IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2023-015389-CA-01
SECTION: CA08
JUDGE: Robert T. Watson

Terry S. Schwartz et al

Plaintiff(s)

vs.

Brickell Town House Association, Inc.

Defendant(s)

_____/

ORDER GRANTING DEFENDANT'S FIRST AMENDED MOTION IN LIMINE AS TO ISSUE 2: HB 837 MEDICAL EXPENSES

THIS CAUSE came before the Court for a hearing on May 28, 2025, on Defendant BRICKELL TOWN HOUSE ASSOCIATION, INC.'s First Amended Motion in Limine: Issue 2 – HB 837 Medical Expenses, filed on October 30, 2024. The Court having reviewed the Motion, Plaintiffs' Response, the parties proposed Orders, and relevant case law, and having heard argument of counsel, it is **ORDERED AND ADJUDGED** that Defendant's Motion is **GRANTED** for the reasons that follow.

INTRODUCTION

This is a negligence premises liability action arising from a slip and fall injury that occurred on December 18, 2022. Defendant has filed a motion in limine seeking to apply section 768.0427(2), Florida Statutes—enacted on March 24, 2023 as part of the HB 837 tort reform amendments—to this case, which was filed on April 18, 2023.

As explained below, this Court finds that section 768.0427(2) is a procedural statute which may be applied retroactively and finds that the enactment of this procedural statute by the Legislature (and the Governor) does not violate the Florida Supreme Court's exclusive constitutional rulemaking authority, thereby rendering the statute constitutional. Accordingly, the Court will apply the statute in this case.

ANALYSIS

The Court finds that section 768.0427(2) is procedural rather than substantive. The statute merely identifies certain evidence that is admissible to prove medical damages. See § 768.0427(2) (stating: "ADMISSIBLE EVIDENCE OF MEDICAL TREATMENT OR SERVICE EXPENSES.—Evidence offered to prove the amount of damages for past or future medical treatment or services in a personal injury or wrongful death action is admissible as provided in this

subsection.") (emphasis added). The statute does not require a plaintiff (or defendant) to present such evidence, nor does it limit the parties to the evidence listed in the statute, as the statute says that evidence offered to prove past unpaid and future medical expenses is "not limited to" the types of evidence listed in the statute. See § 768.0427(2)(b) and (c). Section 768.0427(2) also does not place caps on the amount of medical damages a plaintiff can recover for past, unpaid medical damages or future medical damages. Accordingly, the Court finds that section 768.0427(2) is merely a procedural statute that governs the admissibility of evidence and does not impair a vested right, create a new obligation, or impose a new penalty. As such, as a general matter, it may be applied retroactively to a cause of action that has already accrued by its effective date.

The next issue presented is whether the Florida Legislature may enact such a procedural law or whether the Florida Supreme Court must approve the evidentiary scheme before it may go into effect.

Initially the Court was inclined to decide that as a procedural law, only the Florida Supreme Court could constitutionally enact provisions such as those found in section 768.0427(2). However, the Court is now persuaded that that conclusion would not be correct.

To begin, the Court is cognizant of our Supreme Court's recent reminder that "statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome. … (1) On its face every act of the Legislature is presumed to be constitutional; (2) every doubt as to its constitutionality must be resolved in its favor; [and] (3) if the act admits of two interpretations, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the latter must be adopted .... And to overcome the presumption of constitutionality, the invalidity must appear beyond reasonable doubt." *Planned Parenthood of Southwest & Central Fla. v. State*, 384 So.3d 67, 76 – 77 (Fla. 2024) (citation modified).

With that high standard in mind, the Court has carefully considered all of the authorities cited by the parties, but ultimately is persuaded by the very thorough and well-reasoned Order of then-Circuit Judge, now Second District Court of Appeal Judge, Anne-Leigh Gaylord Moe, in *Unsworth v. Barsoumian*, No. 20-CA-7575 (Fla. 13th Cir. Ct. May 8, 2024) (attached hereto as Exhibit A).

The bottom line, based on the authorities cited in and reasoning of Judge Gaylord Moe's Order, is this: "Section[s] 768.0427(2) and (3) … are procedural in nature …, both seem procedural in furtherance of both the substantive law of damages and the Legislature's policy judgment. … Section[s] 768.0427 (2) and (3) are not in conflict with the state of the law at the time HB 837 became effective. Because these sections do not clearly conflict with a rule of practice or procedure promulgated by the Florida Supreme Court and appear to be in furtherance of the substantive law and public policy that is within the Legislature's purview, Section[s] 768.0427(2) and (3) are not unconstitutional." Order at 85.

Furthermore, "[t]his finding is supported by the text, context, and history of Article V, section 2(a) and the Supreme Court's precedent over time. That precedent lends itself to the conclusion that there is no violation of Article V, section 2(a) because subsections (2) and (3) of Section 768.0427, Florida Statutes do not conflict with a procedural rule promulgated by the Florida Supreme Court; are a codification of precedent; are procedural or remedial but in furtherance of substantive law and public policy that is within the Legislature's power; and reflect the Legislature's policy judgment

that there is no reason to distinguish between different sources of payment. Even though it still employs the term 'exclusive' in reference to the rule-making power, the modern Supreme Court does not seem to share the 1973-era Court's view that the rule-making power is 'exclusive' in the sense that legislative activity in that space is foreclosed. Moreover, the Statute is consistent with the history in Florida of the Legislature's involvement in rule-making both immediately before and immediately after ratification of Article V, section 2(a)." *Id.* at 89 – 90.

Finally, "[t]his ruling is confined to the temporal reach of Section 768.0427(2) and (3), Florida Statutes and the argument that it would violate Florida's separation of powers to apply those sections, to the extent they are procedural." *Id.* at 90.

Conclusion

Because HB837 is procedural and not substantive and does not require Supreme Court adoption, it is constitutional and operative. Accordingly, evidence of reasonable medical costs consistent with section 768.0427(2) is admissible. Defendant's Motion in Limine is GRANTED.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 9th day of June, 2025.

2023-015389-CA-01 06-09-2025 7:23 PM

2023-015389-CA-01 06-09-2025 7:23 PM
Hon. Robert T. Watson

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

CHRISTOPHER M. UNSWORTH,

Plaintiff,

CASE NO.: 20-CA-7575
DIVISION: E

v.

BRIAN A. BARSOUMIAN,

Defendant.
_____/

ORDER DENYING PLAINTIFF'S MOTION IN LIMINE & GRANTING DEFENDANTS' MOTION IN LIMINE

I. Overview

The personal injury world was rocked in March 2023 when Governor Ron DeSantis signed HB 837. Article III, section 9 of the Florida Constitution assigns to the Legislature the power, if it chooses to exercise it, to set the effective date of new legislation.[1] In the case of HB 837, the Legislature exercised that constitutional power and chose to make HB 837 effective as of the moment the Governor signed the bill. It also included in Section 30 the following language: "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act."

Plaintiff proposes that we treat the Legislature like this was their first rodeo. There is a problem with that idea: we know it isn't true. Temporal reach of new statutes has not been decided by a star chamber that meets secretly, resolves the matter, and no one hears anything

[1] "Each law shall take effect on the sixtieth day after adjournment sine die of the session of the legislature in which enacted or as otherwise provided therein. If the law is passed over the veto of the governor it shall take effect on the sixtieth day after adjournment sine die of the session in which the veto is overridden, on a later date fixed in the law, or on a date fixed by resolution passed by both houses of the legislature." Art. III, § 9, Fla. Const.

more about it. Florida's appellate courts have decided countless cases involving temporal reach. Those courts all issued written opinions. Those opinions explain the decisional process. Critically, there are *decades* of precedent from the Florida Supreme Court on the subject. An important part of that precedent is Love v. State, 286 So. 3d 177 (Fla. 2019), in which Justice Canady explained just five years ago how the judicial branch applies new procedural statutes. That precedent that informs *any reader*—not just those in black robes—how temporal reach will be handled in Florida's state court system. All of those decisions were written down so that they can be read. Part of the American legal tradition is the issuance of written, reasoned opinions. Those decisions aren't written down because judges write to pass the time. They're written because the people of Florida—and the people's representatives—need to make decisions of their own from time to time. Judicial opinions help people understand how to order aspects of their lives affected by the law.

Game theory is a discipline within sociology and behavioral economics that contemplates complex interactions between players making interdependent decisions.[2] Anyone who has been involved in litigation understands the concept. You're on the eve of trial and the other side convinces the judge to deny your motion to continue. Are you more or less likely to settle the case? You convince the judge to strike the other side's experts; have you gained or lost an advantage in negotiations? If you live in Clewiston and need a hearing in Tallahassee but the

[2] See Adam Hayes, Game Theory, Investopedia at https://www.investopedia.com/terms/g/gametheory.asp#:~:text=Game%20theory%20is%20a%20theoretical,actors%20in%20a%20strategic%20setting (last visited May 3, 2024) ("Game theory is a theoretical framework for conceiving social situations among competing players. In some respects, game theory is the science of strategy, or at least the optimal decision-making of independent and competing actors in a strategic setting. Game theory is used in various fields to lay out various situations and predict their most likely outcomes. Businesses may use it, for example, to set prices, decide whether to acquire another firm, and determine how handle a lawsuit. . . . Game theory tries to understand the strategic actions of two or more 'players' in a given situation containing set rules and outcomes. Any time we have a situation with two or more players that involves known payouts or quantifiable consequences, we can use game theory to help determine the most likely outcomes.").

only time available is 4:30pm on a Friday, are you more or less likely to try to work that issue out and save yourself the long drive home Friday night? Call it what you want, but game theory is a reality of interaction between different players in the law.

Is it reasonable to think that legislative strategy is not informed by written opinions? No. The Legislature is undeniably in a position where it must make decisions based on how the judicial branch has interpreted the law in the past. Members of the Legislature are servants of the people who dedicate a portion of their lives and their careers—some of them the better part of both—to crafting legislation and seeing that it is passed and signed into law with the ultimate goal of giving effect to the people's will. Moreover, the very idea that the Legislature would take no interest in how the judicial branch handles legislation in court cases is borderline ridiculous, as if legislation is a Viking funeral pyre pushed out to sea.[3]

Just as we must assume the Legislature understands how to read, we must also assume it understands how to write. The Legislature understands how to say "shall not," "but not," and "only." It said none of those things in Section 30. Assuming, as we must, that our law-making body is a strategic body, mustn't it be intensely frustrating for the Legislature to carefully craft language only to then watch the judicial branch allow itself to be tied into knots, especially if we are allowing lawyers to convince us that *only we are wise enough* to discern what the Legislature meant (but chose not) to say?

It is only reasonable to assume that in crafting Section 30, the Florida Legislature took into account Florida Supreme Court precedent that explains to which cases a new law will apply.

[3] There is another reason to reject Plaintiff's implicit suggestion that we cannot interpret legislation using the assumption that the Legislature has read prior judicial opinions. Even if it is unintentionally so, such an argument implies that the work of appellate courts is meaningless beyond the impact it has on the parties before them: "No one reads those orders. *Que será, será.*" We cannot accept this. The writing of reasoned opinions on which others will rely is part of the judicial branch's duty to endeavor towards "stability, predictability, and rationality," which are "hallmark[s] of the rule of law." Yule, 905 So. 2d at 260.

If the matter is substantive, this branch will look for a clear expression from the Legislature that retroactive application was intended and, if clear expression of intent exists, then consider whether the intended retroactive application would offend constitutional protections. But if the matter is procedural or remedial (or a hybrid of the two), this branch will apply it to pending cases.

There is considerable irony in Plaintiff's argument that the Legislature—the same body that made HB 837 *effective immediately*—somehow clearly expressed an intent that the judicial branch should not apply procedural aspects of the new law to pending cases. Imagine how the conversation would go, if we could sit down and hash it out with the Legislature. "Well, judges, we have concluded that you're allowing juries to be misled. We know there are some parts of HB 837 that may be procedural and you'd ordinarily apply those to pending cases. However, when it comes to misleading juries we want you to make a special exception. Keep *that* going for another 18 months."

HB 837 seems like a case study of sorts. Both sides of the bar have suggested that the Legislature fast-tracked the implementation of the law by making HB 837 effective as of the date the bill was signed. One need not "speak Tallahassee" to appreciate that making an act effective on being signed into law is not the Legislature's way of easing the personal injury world into the ice bath at their leisure. Look once more at Section 30: "Except as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." What is the significance of using "causes of action" instead of the word "cases" and by making the Act applicable to causes of action that were "filed" after the effective date rather than causes of action that "accrued" as of that date? Don't both of those things obviously broaden and speed the applicability of HB 837 rather than narrow it and slow it down? Hasn't the

Legislature made an act only applicable to "cases filed after" a certain date before? Hasn't the Legislature made an act only applicable to causes of action that "accrued after" a certain date before? This isn't a blind exercise. We can just read the temporal reach cases, including the ones Plaintiff cites, to understand what the Legislature did with Section 30.

Go back to this theoretical conversation with the Legislature and add this fact: as best anyone can tell, if the Legislature was trying to tell the judicial branch not to apply procedural aspects to pending cases, then that would have been a first in the history of Florida. That the Legislature would have done so obliquely becomes as fanciful as the idea that the Legislature doesn't read is offensive. No one has articulated a rational explanation why the Legislature would want to slow-walk an effort to fix what it seems to have clearly viewed as a big problem.

Since May of 2023, this Court has repeatedly been asked to apply one part of HB 837—Section 6, which became Section 768.0427, Florida Statutes—and determine if subsections of that statute can be applied to pending cases. Looking at the nature of Section 768.0427(2) and (3), Florida Statutes (the "**Statute**") and considering how the Florida Supreme Court has defined the terms "substantive," "procedural," and "remedial," the Statute is procedural, remedial, or a combination of the two. The reasons for that determination are found in prior orders that are attached, adopted, and incorporated below.

Our Supreme Court invariably directs that procedural statutes should be applied to pending cases if it makes sense to do so, given the posture of the case. For that reason, the Statute is properly applied to pending cases, if the posture of the case permits application of the Statute.

Reading Plaintiff's cases in their entirety is important. When engaged in that effort, it becomes clear that Plaintiff's argument about temporal reach is fatally flawed by a failure to try

and discern in each case what was actually decided by that court, the circumstances before the court, and the rationale that led to that court's judgment. Consequently, Plaintiff repeatedly cites dicta in temporal reach cases as if that dicta is a holding. Surely this was inadvertent but it makes Plaintiff's citation to those cases terribly misleading. Read in their entirety, the same cases Plaintiff cites to *attack* the premise that Florida has an answer key for temporal reach in actuality *support* that premise. This may be evident by comparing Figure 1 to Figure 2, below.

Figure 1. Florida's Answer Key on Temporal Reach.

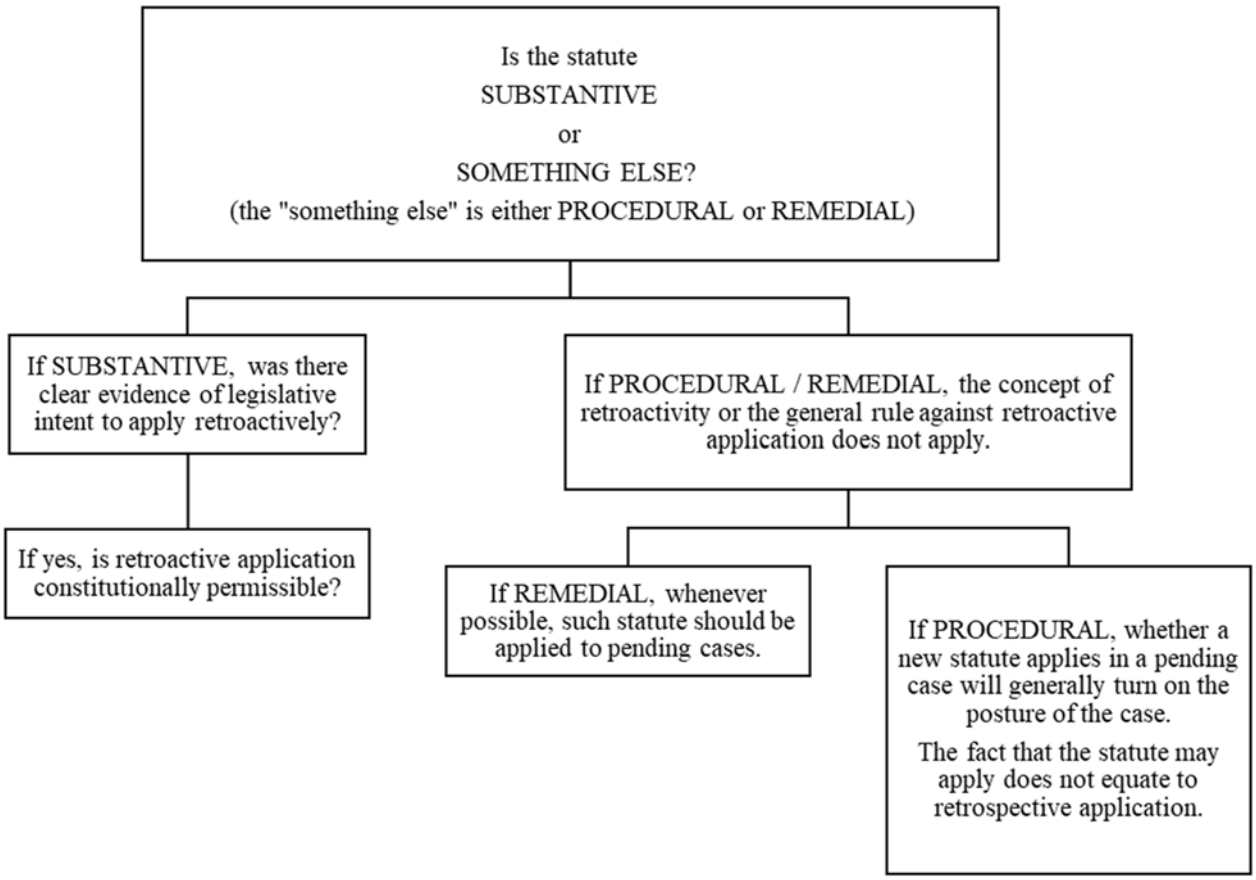

Figure 2. Analysis of Temporal Reach Cases Cited in Plaintiff's Motion.

Case Name	Court	Year	Did the Court Find it to Be Substantive or "Something Else" (Procedural, Remedial, Combination)?	Did the Court Find Legislative Intent to Apply Retroactively?	Did the Court Find a Constitutional Problem with Retroactive Application?	Should it Have Been Applied to a Pending Case?
Love v. State	Florida Supreme Court	2019	Procedural	→	→	Yes
Mungin v. State	Florida Supreme Court	2006	Procedural	→	→	Yes
City of Lakeland v. Cantinella	Florida Supreme Court	1961	Procedural/Remedial	→	→	Yes
Brown & Brown v. Gelsomino	Fourth District	2018	Procedural/Remedial	→	→	Yes
Bionetics v. Kenniasty	Florida Supreme Court	2011	Substantive	No	→	No
Florida Insurance Guaranty Ass'n v. Devon	Florida Supreme Court	2011	Substantive	No	→	No
Mendendez v. Progressive	Florida Supreme Court	2010	Substantive	Yes	Yes	No
Old Port Cove Holdings v. Old Port Cove Condo Ass'n	Florida Supreme Court	2008	Substantive	No	→	No
Smiley v. State	Florida Supreme Court	2007	Substantive	Didn't matter because →	Yes	No
Basel v. McFarland & Sons	Fifth District	2002	Substantive	No	→	No
Metropolitan Dade v. Chase	Florida Supreme Court	1999	Substantive	Yes	No	Yes
State Farm v. LaForet	Florida Supreme Court	1995	Substantive	Yes	Yes	No
Arrow Air v. Walsh	Florida Supreme Court	1994	Substantive	No	→	No
Alamo Rent-a-Car v. Mancusi	Florida Supreme Court	1994	Substantive	Yes	Yes	No
Theodorou v. Burling	Fourth District	1983	Substantive	→	→	No
Fleeman v. Case	Florida Supreme Court	1976	Substantive	No	→	No

Each of the cases depicted above are discussed in detail *infra*, but to understand the nature of the flaw in Plaintiff's argument, one must consider that "[t]he doctrine of stare decisis does not require that we treat every broad statement of principle made in a prior decision as establishing a binding rule." State v. Yule, 905 So. 2d 251, 259 (Fla. 2d DCA 2005) (Canady, J., specially concurring). Flaws can be found in every hypothetical, but to illustrate then-Judge Canady's point in Yule, consider the following.

Two little boys are pushing each other in the car on the way to a basketball game. Their mother says "Boys! Stop that right now. *In our family, we don't push or shove*." The mother keeps driving. As they pull into the gym parking lot she says "Boys, remember that when someone from either team takes a shot, you need to find a boy from the other team and box him out." These boys understand (if not revel in the fact) that boxing out is, as far as they're concerned, the same thing as pushing and shoving. Are their mother's two instructions— "in our family we don't push or shove" and "get in there and box out"—inconsistent? No. Human beings are uniquely created with an ability to discern the nature of things, including instructions. Just as then-Judge Canady noted about *stare decisis*, these two little boys understand that every broad statement of principle their mother makes in one context is not a binding rule that applies in all contexts. An instruction that "we do not push or shove in this family" is an instruction consistent with the nature of that family's values. An instruction that the boys should "crash the boards and box out" is an instruction consistent with the nature of basketball as a competitive sport. The rationale for not pushing or shoving family members does not apply in the context of basketball games. The mother's license to position themselves in athletic competition plainly does not translate to a license to do the same thing when she's handing out bowls of ice cream after dinner.

Florida's temporal reach precedent must be read with the same attention to the nature of things, the context of statements, and the rationale that led to the court's judgment. Just as whether pushing or shoving is okay will depend on whether the boys are in athletic contest or not (and even then, it will depend on the nature of the sport), analysis of temporal reach of new statutes in Florida depends on the nature of matter before the court: is the statute substantive, or is it something else? If it is substantive, there are a few more steps. But if the matter is

"something else" (procedural, remedial, or a hybrid of the two), the Supreme Court has always directed trial courts to apply that new statute to pending cases.

One might assume that *if* (1) a statute is procedural under the temporal reach analysis *then* (2) the statute must violate the separation of powers; however, that assumption is unsupported. Examination of the text, history, and structure of the Florida Constitution and the Florida Supreme Court's precedent reveal that the opposite is true. It is a matter of truth under Florida law that a statute can be procedural for a temporal reach analysis and not violate the separation of powers. We see this, again, in both the Florida Constitution itself—its text, history, and structure—and in the cases interpreting it. The text, history, and structure of the Constitution will be discussed below. With regard to the precedent, there is first a line of cases from the Florida Supreme Court on temporal reach referenced earlier. It consistently directs trial courts to apply new procedural statutes to pending cases. This line of cases begs a question: why in the world would the Florida Supreme Court consistently direct trial courts to apply procedural statutes to pending cases if procedural statutes are always unconstitutional as violations of the Supreme Court's own rule-making authority? Second, there is a line of cases from the Florida Supreme Court that new statutes are cloaked with a presumption of constitutionality. Third, there is a line of cases showing that the Florida Supreme Court routinely works to avoid the very result that Plaintiffs advocate here—invalidation of new statutes as a violation of the Supreme Court's rule-making authority—by adopting those statutes "to the extent that they are procedural." This evident desire to avoid a constitutional showdown may explain the first two lines of cases, and this precedent reflects the constitutional history of Article V, section 2(a).

II. Posture

This cause came before the Court on a Motion in Limine ("**Defendant's Motion**") filed by Defendant Brian A. Barsoumian on November 16, 2023. Plaintiff also filed a Motion to Preclude Application of HB 837 ("**Plaintiff's Motion**") on March 18, 2024. Both motions were heard in a full-day consolidated hearing on April 29, 2024. John S. Mills, Esq., Chair of the Florida Justice Association's HB 837 Appellate Committee represented Plaintiff Christopher Unsworth, along with Keith M. Goan, Esq., Dylan Beitel, Esq. and James Arnold, Jr., Esq. of Morgan & Morgan. Mark Tinker, Esq. of Cole Scott & Kissane represented Defendant, along with Jeffrey M. James, Esq. of Banker Lopez Gassler, P.A.

By agreement of counsel, the hearing on Plaintiff's Motion and Defendant's Motion was consolidated with the same or substantially identical motions filed in four other cases.[4] By agreement of counsel in each of the five cases, Mr. Mills argued for the plaintiff(s) in each case and Mr. Tinker argued for the defendant(s).

At the conclusion of the full-day hearing, in a ruling from the bench Plaintiff's Motion was denied and Defendant's Motion was granted, with an indication that a written order would follow. This order will be entered in each of the other cases.[5]

III. The Act & the Statute

In March of 2023, the Florida Legislature addressed past medical expenses and letters of protection as part of a tort reform bill called HB 837. HB 837 was enacted as Chapter 2023-15, Florida Laws (the "**Act**"). Among other things, the Act included the language that is now

[4] Leizar-Lanman v. Massey, Amazon, & Dasher, 21-CA-1989; Hazen-Stephens v. Tracy & State Farm, 20-CA-10020; Procopis v. Beall's Stores, Inc., 21-CA-5206; and Russell v. U-Haul Storage, LP, 21-CA-8911.

[5] No ruling was given on whether the comparative fault aspects of HB 837 should be applied to Leizar-Lanman v. Massey, Amazon, & Dasher, 21-CA-1989 (or any other case).

Section 768.0427, Florida Statutes (the "**Statute**"). The Statute took effect on March 24, 2023 when Governor DeSantis signed HB 837. Section 6 of HB 837 provides that, in pertinent part, the Statute will read as follows:

> (2) ADMISSIBLE EVIDENCE OF MEDICAL TREATMENT OR SERVICE EXPENSES—Evidence offered to prove the amount of damages for past or future medical treatment or services in a personal injury or wrongful death action is admissible as provided in this subsection.
>
> (a) Evidence offered to prove the amount of damages for past medical treatment or services that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment.
>
> (b) Evidence offered to prove the amount necessary to satisfy unpaid charges for incurred medical treatment or services shall include, but is not limited to, evidence as provided in this paragraph.
>
> 1. If the claimant has health care coverage other than Medicare or Medicaid, evidence of the amount which such health care coverage is obligated to pay the health care provider to satisfy the charges for the claimant's incurred medical treatment or services, plus the claimant's share of medical expenses under the insurance contract or regulation.
>
> 2. If the claimant has health care coverage but obtains treatment under a letter of protection or otherwise does not submit charges for any health care provider's medical treatment or services to health care coverage, evidence of the amount the claimant's health care coverage would pay the health care provider to satisfy the past unpaid medical charges under the insurance contract or regulation, plus the claimant's share of medical expenses under the insurance contract or regulation, had the claimant obtained medical services or treatment pursuant to the health care coverage.
>
> 3. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, evidence of 120 percent of the Medicare reimbursement rate in effect on the date of the claimant's incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

4. If the claimant obtains medical treatment or services under a letter of protection and the health care provider subsequently transfers the right to receive payment under the letter of protection to a third party, evidence of the amount the third party paid or agreed to pay the health care provider in exchange for the right to receive payment pursuant to the letter of protection.

5. Any evidence of reasonable amounts billed to the claimant for medically necessary treatment or medically necessary services provided to the claimant.

(c) Evidence offered to prove the amount of damages for any future medical treatment or services the claimant will receive shall include, but is not limited to, evidence as provided in this paragraph.

1. If the claimant has health care coverage other than Medicare or Medicaid, or is eligible for any such health care coverage, evidence of the amount for which the future charges of health care providers could be satisfied if submitted to such health care coverage, plus the claimant's share of medical expenses under the insurance contract or regulation.
2. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, or is eligible for such health care coverage, evidence of 120 percent of the Medicare reimbursement rate in effect at the time of trial for the medical treatment or services the claimant will receive, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.
3. Any evidence of reasonable future amounts to be billed to the claimant for medically necessary treatment or medically necessary services.

(3) LETTERS OF PROTECTION; REQUIRED DISCLOSURES. -- In a personal injury or wrongful death action, as a condition precedent to asserting any claim for medical expenses for treatment rendered under a letter of protection, the claimant must disclose:

(a) A copy of the letter of protection.

(c) If the health care provider sells the accounts receivable for the claimant's medical expenses to a factoring company or other third party:

> 1. The name of the factoring company or other third party who purchased such accounts.
>
> 2. The dollar amount for which the factoring company or other third party purchased such accounts, including any discount provided below the invoice amount.
>
> (d) Whether the claimant, at the time medical treatment was rendered, had health care coverage and, if so, the identity of such coverage.
>
> (e) Whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral. If the referral is made by the claimant's attorney, disclosure of the referral is permitted, and evidence of such referral is admissible notwithstanding s. 90.502. Moreover, in such situation, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of the bias of a testifying medical provider.

The Act included Section 30, which states that "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." In Section 31, the Act provides that "[t]his act shall take effect upon becoming law."

IV. The Motions

A. Plaintiff's Motion

Plaintiff's Motion seeks a pre-emptive ruling that no part of HB 837 will apply to this case. Plaintiff did not wish to take a position on whether Sections 768.0427(2) and (3) are substantive or procedural. Plaintiff argues that if these subsections are procedural, then it is unconstitutional to apply them because the Legislature's passage of procedural statutes infringes

on the Florida Supreme Court's rule-making authority under Article V, section 2(a) of the Florida Constitution.[6]

B. Defendant's Motion

In Defendant's Motion, Defendant ask this Court to apply certain sections of the Statute to this case. Specifically, Defendant requests:

(a) As to past medical expenses already paid, that Plaintiff be permitted to offer only evidence of the amount actually paid by any payer, pursuant to section 768.0427(2)(a);

(b) As to past medical expenses not yet paid, allow Defendant to offer any evidence specifically permitted by section 768.0427(2)(b), including but not limited to, evidence of 120 percent of the Medicare reimbursement rate in effect on the date the Plaintiff incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, one hundred seventy percent (170%) of the applicable state Medicaid rates and, evidence of the amount any third-party loan services were paid in return for the right to receive payments under any letters of protection;

(c) As to future medical expenses, allow Defendant to offer any evidence specifically permitted by section 768.0427(2)(c); and

(d) For any other relief that the Court deems just and proper.

V. Adoption & Incorporation of Prior Rulings

In some sense, these motions tread well-worn ground. Whether to apply these sections of the Statute is an issue that has been swirling in Florida's circuit courts ever since the Governor

[6] This seems to be a strategic decision to avoid inconsistent positions by the plaintiffs' bar in pre- and post-enactment litigation over application of the Act. This may also explain Plaintiff's counsel's comments that these orders will never be appealed, and that there are no appeals of similar orders pending statewide.

signed the Act into law. Untold hours have been spent hearing this same issue over and over. Many orders have now been entered on the same or closely related issues. Prior to the hearing in this case, counsel were made aware of orders previously entered in this case with encouragement to demonstrate the error in them. Some of these orders are attached, adopted, and incorporated as follows.

Parker v. Superior Siteworks, LLC[7] (the "**Parker Order**") attached, adopted, and incorporated the orders entered in Sapp v. Brooks[8] (the "**Sapp Order**"), Torres-Aponte[9] (the "**Torres-Aponte Order**"), and Grisar v. Brate[10] (the "**Grisar Order**"). In addition to reasons laid out below, Defendant's Motion is granted and Plaintiff's Motion is denied for the same reasons articulated in the Sapp Order, the Torres-Aponte Order, the Grisar Order, the Parker Order and an order entered in Arietta v. A Janitor's Closet, Inc.[11] (the "**Arietta Order**"). The Parker Order, the Sapp Order, the Torres-Aponte Order, the Grisar Order, and the Arietta Order, along with an Order entered in another case that involved past medical expenses but not HB 837, Adams v. Penske[12] (the "**Adams Order**"), are referred to as the "**Prior Rulings**" and the Prior Rulings are attached as **Composite Exhibit A**.

The Sapp Order began the analysis with an effort to discern, structurally, how Florida's judicial branch approaches the temporal reach of new statutes. It concluded that, in Florida, there is an answer key for the analysis of temporal reach, and that analysis in the state court

[7] Parker v. Superior Siteworks, LLC, Case No.: 22-CA-3062 (Fla. 13th Cir.)

[8] Sapp v. Brooks, Case No:. Case No.: 17-CA-5664 (Fla. 13th Cir.).

[9] Torres-Aponte v. Hudnall, Case No.: 20-CA-7146 (Fla. 13th Cir.).

[10] Grisar v. Brate, Case No.: 19-CA-12920 (Fla. 13th Cir.).

[11] Arietta v. A Janitor's Closet, Inc., Case No.: 22-CA-3666 (Fla. 13th Cir.).

[12] Adams v. Penske, Case No.: 18-CA-1399 (Fla. 13th Cir.).

system differs from how federal courts approach the topic. The Sapp Order speculated (but did not rest its conclusion on the idea) that the reasons for Florida's decisional framework relate to our separation of powers, which is more pronounced than the United States Constitution's separation of powers.

The Torres-Aponte Order engaged in a textual analysis of Section 30 of the Act. It concluded that, consistent with the decisional framework and answer key discussed in the Sapp Order, Section 30 was the Legislature's acknowledgement of our branch's temporal reach framework.

The Grisar Order conducted a cursory history of rules regarding practice and procedure in Florida courts and questioned whether perhaps there is a historical explanation for the some of the complexity in this area. The Grisar Order encouraged appellate consideration of these orders, given the potentially massive financial significance to the parties in these cases and the vast number of pending cases in which the question can be expected to arise.

The Parker Order discussed the sequence of the analysis of these questions as between textualism and separation of powers in Florida's Constitution.

The Arietta Order addressed the state of the law prior to HB 837 and concluded that (1) Section 768.0427(2)(a) reflects the Legislature's codification of certain case law and its policy decision that there is no principled reason to distinguish between different sources of payment; (2) Section 768.0427(2)(b)-(c) reflects the Legislature's codification of certain cases about different kinds of evidence regarding reimbursement rates; and (3) Section 768.0427(3)(e) reflects the Legislature's codification of precedent.

VI. Analysis of Temporal Reach

Plaintiff's Motion makes two arguments. First, Plaintiff argues that this Court has gotten it wrong in the Prior Orders' analysis of Florida's temporal reach precedent. Second, Plaintiff argues that the Statute is an unconstitutional exercise of the Florida Supreme Court's rule-making authority and therefore the Statute cannot be applied to this case.

According to Plaintiff, "[t]he overwhelming majority of state and federal trial judges (by a 113-6 margin, just under 95%) known to have ruled on this issue have rejected defense arguments under Florida law to apply all or parts of HB 837 to cases filed by March 24, 2023." See Plaintiff's Amended Motion to Preclude Application of HB837 at p. 3 (doc. 161). Ninety-five percent is a good strong number. It's not hard to understand why Plaintiff harps on this statistic. When ninety-five percent of the people who looked at the same thing saw something different, the other five percent have to think "well, *someone* is missing something—who is it?"

There's no sense in developing a vested interest in being wrong. The plaintiff's bar has been openly encouraged to make their best arguments on this issue, over and over, even though significant thought, time, and effort went into prior rulings.[13] Basic respect for the value lawyers

[13] The Sapp Order was entered after the following occurred. Defense sought application of the Statute almost immediately after the Statute was enacted. Plaintiff almost as quickly moved to sanction the defense for even making the argument. The hearing that was set for a brief period. Fortunately, what was set for a small window of time on one day could be given much more time than scheduled. The hearing on day one bled into a second day. In a fairly significant break from ordinary practice, a ruling was not made from the bench. The Sapp case was set to go to trial in May 2023 and it was the only case left on the trial docket. Because plaintiffs made a meritorious motion to continue the May 2023 trial, a rare window—ten business days—opened to research the issue, think about it, and document the analysis. That ten days yielded the 40-page Sapp Order.

After the Sapp Order was entered, the plaintiff's bar vigorously argued that it was wildly off-base. Having no interest in being wrong and with an appreciation that the frequency with which this issue was likely to arise gave an opportunity to continue testing the correctness of the Sapp Order's premise, further motion practice was encouraged. As much hearing time as could be given was made available.

Torres-Aponte was the next case to be heard. The lengthy hearing in that case resulted in the Torres-Aponte Order, which was also the result of careful consideration of the arguments and cases cited. The pattern repeated itself. The Grisar case came next, along with the Grisar Order. Then there was Parker and the Parker Order.

provide in our legal system makes it worth taking a close look at the cases Plaintiff cites. Do those cases stand for the proposition that, in Florida, the analysis of temporal reach is something other than the answer key discussed in the Prior Orders?

The brief answer is no. But this is not an issue where anyone should rest confidently on brief answers. One must actually read the cases to appreciate that one hundred percent (100%) of the ones Plaintiff cites are in line with the analytical framework in the Prior Orders. What follows *infra* is an examination of each case on temporal reach cited in Plaintiff's brief. Each is run through the answer key discussed in the Prior Orders. But first, it is important to discuss the difference between a holding and dicta when reading cases.

A. Dicta, Holdings, and Rationale.

Before he was on the Florida Supreme Court, Justice Canady sat on the Second District. In State v. Yule, 905 So. 2d 251 (Fla. 2d DCA 2005), then-Judge Canady specially concurred in a per curiam decision.[14] Although the context of then-Judge Canady's special concurrence was his disagreement with the majority's conclusion that certain cases *were* distinguishable (in his view, the cases *were not* distinguishable) his point was that it is essential to determine a prior court's holding and the underpinning rationale. Id. at 259.

Some cases like Adams v. Penkse came along in which the defense initially sought to apply the statute but then withdrew the motion, noting that the law as it existed prior to HB 837 gave them essentially the same right to introduce evidence regarding past medical billing.

Then there was Arietta, which sought application of the statute for a reason similar to Penske, and the plaintiff's counsel in Arietta agreed with the defense argument on the state of the law on this issue pre-HB 837.

[14] The per curiam opinion reversed the trial court's decision to suppress certain evidence obtained during a warrantless probationary search. Yule, 905 So. 2d at 252. Then-Judge Canady wrote his special concurrence to highlight his disagreement with the rationale by which the majority reached, even though he agreed with the majority's outcome. Id. at 256. At the risk of oversimplifying the issues, he disagreed with the majority's conclusion that the outcome of the Yule case did not depend on whether certain Florida Supreme Court decisions had been superseded by a decision by the United States Supreme Court. Id.

Then-Judge Canady noted that "[t]he doctrine of *stare decisis* . . . does not require that we treat every broad statement of principle made in a prior decision as establishing a binding rule. Courts often deliver statements of legal principle that are not material to the determination of the issues actually presented and decided." Id. at 259. "We unquestionably should avoid the tendency of latching on to each and every statement of legal principle in judicial opinions and treating them as binding holdings." Id. at 260. His point was that it is "critical to the legitimacy of judicial decision making" to avoid both unduly restrictive and unduly expansive readings of holdings in cases. Id. at 260. He went on to cite a law review article about dicta, as follows:

> Legal and judicial culture play a critical role in checking abuses of the judge's countermajoritarian power. Central to that culture is the notion that any judicial decision must be justified by the giving of reasons.... For the judiciary, giving reasons justifies the exercise of governmental authority.
> ...
>
> Viewed from this perspective, the reasons a court gives for a decision constitute a critical part of the decision itself.
> ....
>
> [J]udicial accountability and legitimacy derive from judicial rationality, which in turn will be found in the rationales offered by courts to justify their decisions. To discard the rationale of an earlier decision without the kind of compelling reasons that justify any departure from precedent does more than merely reinterpret a past case. It delegitimizes that case, and in the process, delegitimizes the decision in the case before the court.

Id. at 260 (citing Michael C. Dorf, Dicta and Article III, 142 U. Pa. L.Rev. 1997, 2029, 2040 (1994)). "In sum, a commitment to the rule of law and a proper understanding of the source of legitimate authority in our constitutional order will result in a holding/dictum distinction that turns on rationales, not just facts and outcomes." Id.

Then-Judge Canady quoted a definition of the word "holding." Relevant to the analysis *infra*, that definition is this: "A holding consists of those proposition along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta." Id. at 260 n.10 (quoting Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953 (2005)).

Below, this definition of "holding" will be applied in an analysis of every case cited by Plaintiff. This analysis will show that every case Plaintiff cites follows the answer key that the judicial branch has shown the Legislature about how it interprets the temporal reach of statutes. The Legislature legislates against that background.

The answer key is this:

There is a core assumption that the Legislature makes law for the future. A substantive law made for the future will apply to cases filed after the effective date. There are constitutional reasons why this is so, and why the judicial branch must exercise caution about applying a substantive statute retroactively. It is only when the Legislature articulates a clear intent that a substantive provision should apply retroactively that the judicial branch will even consider doing it. And the judicial branch will decline to apply a substantive statute retroactively if retroactive application offends the Constitution.

The future is more immediately upon us when the new law is procedural or remedial in nature. When a new law of that type takes effect, the Florida Supreme Court has directed trial courts to apply it to pending cases if it makes sense to do so given the posture of the case.

B. There is No Substitute for Actually Reading the Cases.

Taking the temporal reach cases cited in Plaintiff's brief in more or less the order in which they were presented, first up is Fleeman v. Case, 342 So. 2d 815 (Fla. 1976). Fleeman involved the constitutionality of Section 711.231, Florida Statutes (1975). Id. at 816. The statute was enacted to address the inflationary practice of inserting into condo lease agreements rental escalation clauses that tied to commodity or consumer price indexes. Id. The "Legislature apparently regarded [this] as a practice inimical to the health of this State's economy because of its inflationary nature," so the Legislature enacted Section 711.231, which "prohibit[ed] the inclusion or enforcement of escalation clauses in leases" and "declared [them] void for public policy." Id. at 817. When trial courts applied Section 711.231 retroactively, the lessors—deprived of the ability to escalate the rent to which they were entitled under the terms of the pre-existing lease—appealed. Id. The lessors argued that application of the statute impaired the lessors' rights under the pre-existing lease agreements because the lessors no longer had the rights they bargained for at the time the lease was negotiated. Id. Compare this to the answer key. Was the statute substantive or something else? It was substantive: had the lessors known they could not escalate the rent as provided in the agreement, the lessors would not have made the deal. Because the statute was substantive, the Court moved to the next question, which was whether the Legislature expressed a clear intent for the statute to be applied retroactively. Because there was no such clear intent, the analysis ended. Fleeman is therefore consistent with the answer key.

Plaintiff next cites Theodorou v. Burling, 438 So. 2d 400 (4th DCA 1983), a case in which the Fourth District heard an appeal from an order disallowing attorneys' fees. Id. at 401. At issue in that medical malpractice action was whether the addition of new defendants in an

amended complaint related back to the original filing of the action. Id. When Burling originally filed the complaint, the appellees (Dr. Theodorou and Radiology Associates) were not named. Id. Nine months later, on November 16, 1980, Dr. Theodorou and Radiology Associates were added as defendants in an amended complaint. Id. Between the filing of the original complaint and the amendment that added Dr. Theodorou and Radiology Associates, Section 768.56 took effect, providing for the award of attorneys' fees in favor of a prevailing party in medical malpractice cases. Id. Ultimately, Dr. Theodorou and Radiology Associates were the prevailing parties and they sought the benefit of Section 768.56. Id. Plaintiff's brief concedes that the law in Theodorou was substantive. Consistent with the answer key for substantive statutes, the next question the Fourth District asked was whether there was clear evidence that the Legislature intended for retroactive application. Id. The outcome of that case turned on the fact that the answer to that question was "no"—Section 768.56(2) explicitly provided that it "*shall not apply* to any action filed before July 1, 1980." Id. (emphasis added). Now let's evaluate Theodorou against the answer key. Was the statute substantive or something else? According to Plaintiff, it was substantive. Had the Legislature expressed a clear intent to apply the statute retroactively? No. For that reason, the statute was not applied retroactively. Theodorou squarely lines up with the answer key.

In Brown & Brown, Inc. v. Gelsomino, 262 So. 3d 755 (4th DCA 2018), the Fourth District heard a personal injury appeal involving injuries sustained in 2002. Id. 756-57. Gelsomino was injured in the Bahamas while working for his brother's company, T&T Contracting. Id. at 757. T&T Services was an entity that had been incorporated in the Bahamas to do the work that T&T Contracting had been hired to perform. Id. Gelsomino and his brother sought an insurance policy for T&T Services but the policy mistakenly named T&T Contracting

(the Florida company) instead of T&T Services (the Bahamian corporation). Id. Brown & Brown was the insurance broker. Id. When Gelsomino was injured in the Bahamas and the insurance company denied coverage, he filed a negligence claim against Brown & Brown and the insurance company. Id. The insurance company settled out and the case went to trial in 2014 against Brown & Brown. Id. In the years between the 2002 accident and the 2014 trial, the Legislature had passed "several laws narrowing and eventually eliminating the doctrine of joint and several liability" and the question was which version of Section 768.81 applied—"the statute passed and effective in 2002, 2006, or 2011?" Id. at 757. After a jury trial, the jury apportioned fault as follows:

35% to Brown & Brown
5% to Gelsomino
25% to Gelsomino's brother
10% to T&T Services
10% to T&T Contracting

Id. Gelsomino filed a motion for entry of judgment, seeking the entire amount of the award from Brown & Brown, less the 5% of fault that the jury awarded against Gelsomino personally. Id. Under the version of the statute in effect in 2002, Gelsomino was entitled to seek 95% of his damages from Brown & Brown. Id. The problem was that later amendments to the statute, if they applied to the case, substantially narrowed Brown & Brown's liability for the fault of others. Id. The trial court applied joint and several liability as it had existed under the version of the statute in effect in 2002, and the effect of this was that Gelsomino had a judgment against Brown & Brown for 95% of Gelsomino's damages, even though the jury had apportioned to Brown & Brown only 35% of the fault. Id.

On appeal the Fourth District determined that when the Legislature passed the 2011 version of the Statute, it "made the abolition of joint and several liability retroactive" and

therefore "the trial court erred in applying joint and several liability" after it had been abolished. Id. Although Plaintiff is correct that the Fourth District in Brown & Brown spoke forcefully about the fact that "[i]t is totally within the domain of the legislature to pass laws and exercise its discretion to make laws prospective or retroactive as it sees fit" and that courts "are obligated to follow the law as formulated by the legislature unless it infringes on vested rights as protected by the United States or Florida Constitution," to understand what the Fourth District was (and was not) saying, you have to keep reading. What immediately follows that language in Brown & Brown is this: "[t]he retroactive application of the law did not violate any vested rights in this case." Id. at 761. The statement that retroactive application of the law did not violate any vested rights reflects that the Fourth District *first* determined that the statute was not substantive. This matches what came earlier in the opinion, when the Fourth District said that the means of apportioning fault is *not like the substantive right to damages*. Id. at 760 ("It is important to note that the application of joint and several liability does not affect the amount of damages, but rather how those damages are apportioned among the potentially liable parties. This type of right is *different* than a party's entitlement to damages, which *is* substantive.") (emphasis added). In the Fourth District's view, the allocation of fault was not a matter of substantive law; it was "something else." Because the nature of the law was not substantive and instead was "something else," the 2011 amendment to the law should have been applied to the pending case. Id. The trial judge's refusal to apply the 2011 amendment was reversible error.

Now run Brown & Brown through the answer key. Was the change in the law substantive or something else? It was not substantive. Therefore, it should have been applied to a pending case. Because the trial court *got it wrong* by refusing to apply the new non-substantive statute to the pending case (exactly what Plaintiff urges this Court to do here), the trial court *was*

reversed with directions to "enforce the bar to joint and several liability as required by operative law." Id. at 761. One might argue that it this is a surprising time for the plaintiff's bar to remind everyone about Brown & Brown; in any event, Brown & Brown is entirely consistent with the answer key.

Next up, Mungin v. State, 932 So. 3d 986 (Fla. 2006). In Mungin, the Florida Supreme Court considered whether an October 1, 2001 change to Rule 3.851 of the Florida Rules of Criminal Procedure applied in a first-degree murder conviction following an offense committed on September 16, 1990. Id. at 991-92. In a footnote in that decision, the Florida Supreme Court noted that "[f]or all death case postconviction motions filed after October 1, 2002, Florida Rule of Criminal Procedure 3.851 requires an evidentiary hearing 'on claims listed by the defendant as requiring a factual determination'" but "prior to the 2001 amendments to rule 3.851, Rule 3.850(d) applied to the summary denials of postconvinction motions in both death and nondeath cases." Id. at 995 n.8. "Because Mungin's motion for postconviction relief was filed in 1998, the summary denial standard set forth in rule 3.850(d) applie[d]." Id. Mungin involved a procedural rule. No one argued that making Rule 3.851 of the Florida Rules of Criminal Procedure was not within the Florida Supreme Court's rule-making authority[15] and since making the rule was within the Florida Supreme Court's constitutional wheelhouse, the Florida Supreme Court decided the temporal reach issue. In this case, was the rule substantive or something else? It was something else—a clear rule of procedure. Did it make sense to apply the new rule change to the pending case? It made sense to apply the version of the rule in effect at the time the decision was made. Mungin, then, also lines up with the answer key.

[15] Maybe the name "Florida Rules of Criminal Procedure" had something to do with it.

In Menendez v. Progressive Express Ins. Co., Inc., 35 So. 3d 873 (Fla. 2010), the Florida Supreme Court considered whether a statutory presuit provision could be applied retroactively to an insured's claim, when the Legislature had clearly indicated that retroactive application was intended. Id. at 877. The Supreme Court concluded that the answer was "no" because the statute was substantive. Id. Was the statute substantive or something else? It was substantive. Did the Legislature intend for retroactive application? Yes. Was there a constitutional reason not to apply the statute retroactively, even though the Legislature intended for retroactive application? Yes. Menendez is consistent with the answer key.

In State Farm v. Laforet, 658 So. 2d 55 (Fla. 1995), the Florida Supreme Court considered "[w]hether newly-created Section 627.727(10), Florida Statutes, which alters the damages available in a bad faith action brought under Section 624.155, is a remedial statute that has retroactive application." Id. at 56. The statute was "a penalty to insurance companies for bad faith conduct in failing to settle uninsured motorist claims" and the chapter law under which section 626.727(1) was enacted "provide[d] that it [was] to apply retroactively to 1982" and referred to the statute as "remedial rather than substantive." Id. at 57. On the basis that the statute was a penalty in substance regardless of what the Legislature called it, and because "this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties," the Florida Supreme Court held that Section 627.727(10) was a substantive change in the law (even though the Legislature called it remedial), the new statute could not be applied retroactively. Id. The Court disapproved of "two district courts [that] have applied [Section 626.727(10)] retroactively without reaching the constitutionality of such a retroactive application." Id. at 60-62. So was it substantive or something else? Substantive. Did the Legislature evidence a clear intent for retroactive application? Yes. Was

there a constitutional reason not to apply the statute retroactively? Yes. The Statute could not be applied retroactively because of the *ex post facto* problem. Laforet was, then, decided consistent with the answer key.

In Bionetics Corp. v. Kenniasty, 69 So. 3d 943 (Fla. 2011), the Florida Supreme Court considered whether an amendment to Section 57.105, Florida Statutes that took effect on July 1, 2002 applied to lawsuits commenced prior to the effective date. Id. at 944. The particular amendment at issue added a safe harbor provision that required the party seeking sanctions to serve a copy of the motion for sanctions on the party against whom sanctions would be sought, giving the non-movant an opportunity to consider whether to withdraw the challenged paper, claim, defense, contention, allegation, or denial. Id. It is important to look at the facts of Bionetics case. Bionetics sued Deitz and Moore in 1999. Id. The allegation was that Deitz and Moore had purchased some equipment from the Defense Reutilization and Management Office, and Bionetics owned an interest in the equipment. Id. at 945. Bionetics obtained an order requiring Dietz and Moore to sequester the equipment. Id. Dietz and Moore sought relief from the sequestration, which the trial court denied. Id. Later, the trial court ordered that the Sherriff move the equipment to a Bionetics' facility for storage. Id. At trial, Deitz and Moore prevailed as the legal owners of the equipment and the trial order vacated the order of sequestration only to find that, when they inspected the equipment at the Bionetics facility, it was disassembled, scattered on the facility's floor, and "in a seriously degraded condition in a non-secure area with 'a leaking roof, no air conditioning units, . . . lack of ventilation, and extreme filth and dust.'" Id. Litigation then ensued that began in 2001 with a four-count complaint by Deitz and Moore, represented by Kenniasty, against Bionetics and by the end of 2002 Bionetics had managed to get Deitz and Moore's complaint dismissed four times. Id. at 945-46. In 2003, Bionetics moved

for sanctions under Section 57.105 and although the trial court took the motion under advisement until the conclusion of the bench trial, the motion for sanctions was later granted when the trial court gave Bionetics an involuntary dismissal at the end of the case. Id. at 946. The trial court found that Bionetics was entitled to fees for certain of the claims. Id. Then, a successor judge found that Bionetics was entitled to a fee award of $72,000 and a costs award of $6,051.56. Id. After a judgment was entered in Bionetics' favor based on the award of fees and costs under Section 57.105, the appellate court held that the award was error because Bionetics failed to comply with the safe harbor provision, disagreeing with Bionetics' assertion that the amendment to add the safe harbor provision was a substantive change in the law and therefore should not be applied to a pending case. Id.

On review, the Florida Supreme Court noted that "[o]ne relevant inquiry when analyzing a change in statutory law is whether the amendment constitutes a substantive change or a procedural or remedial change in the law." Id. at 947-48. It recognized that "a statutory right to attorney's fees constitutes a substantive right" and then it concluded that "the safe harbor provision contained in section 57.105(4) is substantive in nature." Id. at 948. After concluding that the change was substantive in nature, it then turned to consider the prospective or retroactive application of it. Id. It looked first for evidence of the Legislature's intent to apply the statute retroactively. Id. at 948-49. Finding "no evidence of a legislative intent to rebut the presumption against retroactivity," the Court "conclude[d] that the safe harbor provision applies prospectively." Id. at 949. Bionetics, then, follows the answer key.

Next is Florida Insurance Guaranty Association v. Devon Neighborhood Association, Inc., 67 So. 3d 187 (Fla. 2011), in which the Florida Supreme Court considered the statutory framework that defines the obligations of the Florida Insurance Guaranty Association ("**FIGA**").

Id. at 189. Amendments to the statute were effective July 1, 2005. Id. at 192. FIGA argued that the amendments could not be applied retroactively to claims made under a 2004 insurance policy but the trial court disagreed. Id. at 192-93. On appeal, the Fourth District disagreed and held that the 2005 amendments applied to the 2004 insurance policy. Id. When the case arrived at the Supreme Court, the Supreme Court looked at the nature of the statute and concluded that it was "clearly substantive" and therefore "the presumption against retroactive application" applied. Id. at 195. The Court then looked for "clear evidence of legislative intent" to rebut the presumption against retroactive application. Id. Examining the text of the amendment itself, the Court noted that it was "silent as to its forward or backward reach" and "no 'clearly expressed legislative intent' to apply section 627.7015, as amended in 2005, retroactively." Id. at 196. This is consistent with answer key.

Continuing with Plaintiff's cases, in Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association One, Inc., 986 So. 2d 1279 (Fla. 2008), the Florida Supreme Court considered (1) whether Section 689.225, Florida Statutes retroactively abrogated "the infamous rule against perpetuities" and (2) whether the rule against perpetuities applied to rights of first refusal. Id. at 1280. Justice Cantero defined the rule against perpetuities "with deceptive simplicity" as "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Id. at 1282 (quoting Iglehart v. Phillips, 383 So. 2d 610, 614 (Fla. 1980)). Although the opinion does not seem to address the substantive/procedural distinction explicitly, the Court explained that the purpose of the rule against perpetuities was "to prevent the perpetual entailment of estates and give them over to free and unhampered conveyance," which may have been so obviously substantive that no one argued otherwise. Id.; see also DeLisle v. Crane Co., 258 So. 3d 1219, 1224 (Fla. 2018) (a substantive

matter "defines, creates, or regulates rights—'those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property, and reputation.'"). Before concluding that Section 689.225 did not retroactively abolish the common law rule against perpetuities, the Court "conclude[d] that the plain language of section 689.225 does not evince an intent that the statute apply retroactively." Id. at 1284. This, too, is consistent with the answer key.

In Smiley v. State, 966 So. 2d 330 (Fla. 2007), the Florida Supreme Court considered whether Section 776.013, Florida Statutes (2005) applied to cases pending at the time the statute became effective. Id. at 332. Smiley was charged with a first degree premeditated murder that occurred on November 6, 2004. Id. The victim was an occupant of a cab that Smiley was driving, and Smiley claimed that the shooting was in self-defense. Id. On October 1, 2005, Section 776.013 took effect and established a "no duty to retreat" rule in a broader context than had previously existed. Id. at 335. Smiley moved the trial court to permit two special jury instructions based on the new statute and the trial court granted the motion, finding that the statute was remedial and should be applied retroactively. Id. at 332. The case went to the Fourth District on an emergency petition for writ of certiorari filed by the State, and the Fourth District agreed with the State that the new statute did not apply to conduct committed before the statute's effective date of October 1, 2005. Id. The Florida Supreme Court approved the Fourth District's decision, holding that the statute was substantive in nature because it significantly changed the affirmative defenses available to Smiley. Id. The Supreme Court noted that ordinarily it would then look for clear evidence of legislative intent to apply the statute retroactively, but said "we do not address the first inquiry of legislative intent as to whether the presumption against retroactive application is rebutted here" because there was a "clear constitutional prohibition

against retroactive application of section 776.013" in Article X, section 9 of the Florida Constitution since "retroactive application of section 776.013 would directly affect the ability to successfully prosecute Smiley under section 782.01." Id. at 336 and 337 n.5. This analysis in Smiley is consistent with the answer key.

In Arrow Air, Inc. v. Walsh, 645 So. 2d 445 (Fla. 1994), the Florida Supreme Court considered whether the private sector Whistle-Blower's Act, which became effective on June 7, 1991, imposed liability for a termination that occurred before its effective date. Id. at 423. Walsh filed a complaint against his former employer, Arrow Air, for wrongful discharge. Id. He alleged that he was fired on May 15, 1989 in retaliation for delaying a flight and reporting safety violations in connection with that flight. Id. Walsh sued in Florida under a New York labor law. Id. When the Florida trial court dismissed the cause of action because the action was governed by Florida law and Florida law did not recognize a cause of action for retaliatory discharge, Walsh appealed and the Third District initially affirmed. Id. However, during the pendency of Walsh's appeal, Florida's private sector Whistle-Blower's Act took effect and, after taking briefing on the applicability of the new law, the Third District vacated its decision and reversed the trial court's dismissal of the complaint. Id. at 424. When the case reached the Florida Supreme Court, it reversed the Third District on the basis that the statute created a new cause of action, "thereby directly affect[ing] substantive rights and liabilities." Id. at 424. Referring to the "presumption against retroactive application of a law that affects substantive rights, liabilities, or duties" as a "default rule," the Florida Supreme Court quashed the Third District's decision "because we find no clear evidence of legislative intent to rebut the presumption against such retractive application." Id. at 425. In sum, this case answered the first question—is it substantive or something else?—with "substantive" but the statute was not applied to the

pending case because the answer to the second question—is there clear evidence of legislative intent to apply the statute retroactively?—was "no." This, too, is in accord with the answer key.

In Alamo Rent-a-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994), the Florida Supreme Court considered, among other things, whether Section 768.73(1)(a), which capped punitive damages at three times the amount of compensatory damages, applied to a case in which the plaintiff alleged and proved misconduct in a commercial transaction. Id. The statute at issue was enacted in 1986 and specifically stated that it "applie[d] only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date." Id. at 1358. When first enacted, the statute did not cover misconduct in commercial transactions, and misconduct in commercial transactions was added into the ambit of the statute in 1987, becoming effective October 1, 1987. Id. The commercial transaction between Mancusi and Alamo that gave rise to the case occurred in September 1986. Id. The case was filed on October 2, 1987, one day after the amendment took effect. Id.

The Florida Supreme Court began its analysis with an examination whether the statute was substantive or something else. Id. ("To determine whether the amendment applies to the instant cause of action, we must examine whether the amendment is one of substantive or procedural law."). It found section 768.73(1)(a) to be a substantive rather than procedural statute because "[p]unitive damages are assessed not as compensation to an injured party but as punishment against the wrongdoer" and "[t]he establishment or elimination of such a claim is clearly a substantive, rather than procedural decision of the legislature because such a decision does, in fact grant or eliminate a right or entitlement." Id. Was the statute substantive or something else? It was substantive. Did the Legislature evidence a clear intent to apply the statute retroactively? Yes, the Legislature directed that the statute should take effect on October

1, 1987 and then should apply "only to causes of action arising after July 1, 1986." Was there an *ex post facto* type problem? Evidently yes, because the Court refused to apply the statute. Although the reasoning of this 1994 decision is less detailed some of the Court's subsequent decisions in this area, the reasoning provided comports with the answer key. And keeping in mind then-Judge Canady's framework for evaluating a holding, the vagueness of the Mancusi opinion does not undermine the support it provides for the answer key as applied to the case at bar.

In Love v. State, 286 So. 3d 177 (Fla. 2019), the Supreme Court considered whether section 776.032(4), Florida Statutes (2017), which altered the burden of proof at pretrial immunity hearings, applied to pending cases involving criminal conduct alleged to have been committed prior to the effective date of the statute. Id. at 179. The bill provided that "[t]his act shall take effect upon becoming a law" and the statute carried an effective date of June 9, 2017. 2017 Fla. Sess. Law Serv. Ch. 2017-72; Fla. Stat. § 776.032.

The defendant, Love, was charged with attempted second-degree murder following an altercation on November 26, 2015 at a nightclub. Id. at 181. At the end of the altercation, Love shot the victim as he was about to hit her daughter. Id. When the State charged Love, she moved for immunity arguing that the newly enacted amendment in section 776.032(4) applied to her. Id. The State argued that section 776.032(4) did not have retroactive application and even if it did, application to pending cases was violative of article X, section 9 of Florida's Constitution and violated Florida's separation of powers. Id. Citing Landgraf, the trial court first looked to whether there was a clear expression of legislative intent regarding retroactivity. Id. Finding no such expression of intent, the trial court next looked to whether the statute was procedural/remedial or substantive. Id. Because burden of proof standards are normally

considered procedural, the trial court applied the presumption that procedural/remedial statutes are applied to pending cases. Id. At that juncture, the trial court determined that (1) because section 776.032(4) created no substantive rights and merely changed the procedure by which a defendant enforces the statutory right to immunity, the statute was procedural; (2) the statute was not violative of article X, section 9 of Florida's Constitution; but (3) the statute infringed upon the court's rulemaking powers and therefore violated the separation of powers. Id. at 181-82. On that basis, the trial court held the defendant to a preponderance of the evidence burden of proof for the immunity hearing, following a prior Florida Supreme Court decision, Bretherick v. State, 170 So. 3d 766 (Fla. 2015).[16] Id. The trial court determined that the defendant did not meet the Bretherick burden of proof and was no entitled to immunity. Id. at 182.

Love petitioned the Third District for a writ of prohibition. Id. The Third District denied the petition, but rejected the trial court's conclusions about the statute. Id. Recognizing that its decision conflicted with a decision from the Second District, the Third District certified conflict on the question whether section 776.032(4) applied to cases that were pending at the time the statute took effect. Id.

The Florida Supreme Court began by recognizing the sometimes-blurry line between substantive and procedural law. Id. at 183 ("At the outset, we recognize that sometimes '[t]he distinction between substantive and procedural law is neither simple nor certain.'") (citing Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 53 (Fla. 2000)). It also acknowledged that "some of this Court's general pronouncements regarding the retroactivity of procedural law have been

[16] In enacting section 776.032(4), Fla. Stat., the Legislature responded to the rule laid down by the Bretherick majority by, in essence, adopting the Bretherick dissent but with a "clear and convincing' burden as opposed to the "beyond a reasonable doubt" burden. The Bretherick dissent was authored by Justice Canady, who also authored Love.

less than precise. Indeed, we acknowledge having been unclear about what it means to give retroactive application to procedural law." Id. at 184.

It thereafter concluded that "properly understood, the caselaw compels the conclusions that section 776.032(4) is procedural, applies to all immunity hearings on or after the statute's effective date, and does not implicate article X, section 9." Id. It also explained why Smiley did not control, pointed to State v. Garcia's explanation of the concepts of procedural and substantive law in the criminal context, and recognized that in civil cases a statute is considered "substantive" if it "created a new substantive right or interfered with vested rights." Id. at 185. Because the substantive right to assert immunity was established in 2005, section 776.032(4) did not create a new substantive right and instead "merely altered the 'method of conducting litigation involving' that right," the statute was not substantive. Id. at 186. Moreover, the burden of proof in other contexts had been considered procedural in nature and the Supreme Court had repeatedly referred to Stand Your Ground immunity determinations as matters of procedure. Id.

After analyzing the statute as procedural, the Court turned to the issue of retroactivity and clarified that, "properly understood, whether a new statute applies in a pending case will generally turn on the posture of the case, not the date of the events giving rise to the case." Id. at 186-87. Importantly, "if the new procedure does apply, that is not in and of itself a retrospective application of the statute." Id. at 187 (citing Landgraf, 511 U.S. at 269-70) ("Landgraf generally explained the concept of a retrospective statute: 'A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.'"). Because section 776.032(4) "in no way 'attaches new legal

consequences to events completed before its enactment,'" the statute was not truly retrospective even if applied to a pending case. Id. (citing Landgraf, 511 U.S. at 275) ("procedural matters generally—but not always—do not 'rais[e] concerns about retroactivity'" because there are diminished reliance interests in matters of procedure and rules of procedure "regulate secondary rather than primary conduct").

The Love court then went on to clarify that its holding "does not mean that a new procedure applies in all pending cases. Rather, the 'commonsense' application of a new procedure generally 'depends on the posture of the particular case.'" Id. at 187. For example, a new rule that governed the filing of complaints would not apply in a case where the complaint had already been filed. Id. at 188 (quoting Landgraf, 511 U.S. at 275 n.29). Similarly, a new rule of evidence would not require an appellate remand for a new trial. Id. It cited its prior ruling in Lee v. State, 174 So. 589, 591 (1937), where it dismissed as untimely an appeal brought outside the period established in a statute that took effect after the alleged date of the crime but before a judgment of conviction was entered, even though the statute was "plainly intended to have a prospective operation only," because the statute was procedural in nature. Id. In Lee, "prospective operation" meant that the new statutory time limit applied to writs of error rendered after the statute became effective. Id. at 188. And its decision in Pearlstein v. King, 610 So. 2d 445, 445-46 (Fla. 1992), concluded that a new rule giving a 120-day time limit to serve a defendant after initial filing of the complaint should have "prospective application" because it was a rule of procedure, but that "prospective application" meant that the rule applied to complaints filed before the effective date of the rule, but the 120 days ran from the effective date of the rule rather than the date of filing. Id. Was it substantive or something else? It was

something else—procedural. Should the statute have been applied to pending cases? Yes. The failure to apply the procedural statute to the pending case was error. Love tracks the answer key.

In City of Lakeland v. Cantinella, 129 So. 2d 133 (Fla. 1961), the Florida Supreme Court considered a dispute between two workmen's compensation carriers. Id. at 134. The dispute had been initially adjudicated by a deputy with the Industrial Commission, who took jurisdiction pursuant to Section 440.20(8). Id. at 135. On review, the Court concluded that the deputy was wrong in his conclusion that Section 440.20(8) applied to the proceeding. Id. However, it then considered one of the carriers' arguments that jurisdiction was properly assumed under a different statute that had taken effect on July 1, 1959, which was (1) after the second of the two accidents that were the subject of the worker's underlying claim, but (2) before the two carriers began to dispute which of them was required to pay the claim. Id. at 136. The Court determined that the applicable statute was the one when the controversy arose, and the controversy between the two carriers was found to have arisen on July 23, 1959. Id. The Court characterized the subject statute as either remedial or procedural, in that the underlying right of one carrier to have the second carrier assume or share in the obligations to the worker already existed prior to the effective date and was able to be enforced in judicial proceedings. Id. Because the statute was "more related to a remedial or procedural statute" in that it "empowered the Industrial Commission to assume jurisdiction to adjudicate such controversies" it was best considered remedial statute since it did not create rights, take away rights, and only "operate[d] in furtherance of the remedy or confirmation of rights already existing." Id. Because it was remedial it did not "come with the legal conception of a retrospective law." Id. This case, too, fits within the answer key. Was it substantive or something else? It was "something else." Because it made sense given the posture of the case to apply the statute to the case, it was

applied. Moreover, applying the statute to the pending case could not even be called a retrospective application.

In Basel v. McFarland & Sons, Inc., 815 So. 2d 687 (5th DCA 2002), the Fifth District considered whether a statutory change to the joint and severability statute should apply to a pending case. Id. The Fifth District concluded that the change in the law was substantive and there was no explicit indication from the Legislature that the law was intended to apply retroactively. Id. Because the statute was substantive and there was no clear expression of legislative intent to apply the statute retroactively, the Fifth District determined that the statute should be only applied prospectively and was inapplicable to the case. Id. at 696. Basel fits the answer key.

In Metropolitan Dade County v. Chase Federal Housing Corp., 737 So. 2d 494 (Fla. 1999), the Florida Supreme Court considered whether certain provisions in the Dry Cleaning Contamination Cleanup Act applied retroactively. Id. at 496. The defendants owned shopping centers that had leased space to dry cleaning facilities that had, unknown to the defendants, contaminated the property with dry cleaning solvents. Id. After the defendant landowners expended hundreds of thousands of dollars to remove the contamination caused by their tenants, the County sued the landowners based on a theory of strict liability under Chapter 24 of the Dade County Code. Id. at 497. The defendants moved for summary judgment, claiming immunity based on a provision in the Dry Cleaning Contamination Cleanup Act. Id. Dade County did not dispute that the defendants became eligible for conditional immunity under the Act, nor did the County contest that the Act was intended to address and remedy contamination that occurred after the Act was passed; the issue was whether the Act retrospectively barred the County's cause of action. Id. at 499. The Supreme Court found that the County had "in effect, conceded

that the Act may be retroactively applied" and the question was merely "the extent of the statute's retroactive reach." Id. Ultimately, the Court examined the nature of the Act and recognized that it abolished a cause of action that the County would otherwise have had against the defendants, representing a substantive change. Id. at 505 (recognizing that "after the defendants became immunized under the Act, the County no longer had the power to bring an action under the provisions of its County Code to recover the costs it expended in cleaning the dry cleaning contamination or to compel the defendants to clean the contamination," recognizing the interplay between a county and the State and the Court's duty "to enforce the constitutional limitations placed on the powers of political subdivisions," and emphasizing "that a different result might well be reached if these immunity provisions were applied to abrogate the cause of action of a private plaintiff rather than a government entity's cause of action."). The Court noted that "[g]enerally, due process considerations prevent the State from retroactively abolishing vested rights," but those constitutional issues did not apply to the County because of the structure of Florida's government under the Florida Constitution. Id. at 504. Thus, Metropolitan Dade also fits within the answer key. The statute was substantive. That it was intended to be applied retroactively was a conceded issue. There were no constitutional issues with retroactivity because of the unique attributes of the County.

There is one more interesting thing about Metropolitan Dade: the Florida Supreme Court *explicitly rejected* the argument that Plaintiffs have made in this case "that the inclusion of an effective date rebuts any interpretation in favor of retroactivity." Id. at 502 ("We reject an interpretation of Hassen that leads to the unbending principle that the inclusion of an effective date in a statute will always supersede the clearly expressed legislative intent that the statute be applied retroactively.").

Consider the logic in the Metropolitan Dade court's refusal to consider the inclusion of an effective date to be an "unbending principle" that rebuts any interpretation in favor of retroactively. Sometimes the inclusion of an effective date will suggest that the Legislature intended that the law take effect at some future point because the Legislature wants everyone to have time to order their lives and plan for the change. Sometimes, the Legislature's choice of an effective date and inclusion in the Act will suggest the opposite.

The point of this exercise is to demonstrate, using Plaintiff's own cases, the truth of the temporal reach answer key. That answer key has been used by Florida courts for decades. Whether or not the cases say the quiet part out loud, the threshold question is whether the statute is substantive or not. How can we tell this? By reading the cases.

Unwaveringly, when the statute is found to be substantive, the cases all ask whether there is evidence of the Legislature's clear intent to apply the statute retroactively. When the statute is substantive and there is no clear expression of such an intent, the cases apply the statute only prospectively. When the statute is substantive and there is a clear expression of retroactive intent, the cases evaluate whether the statute to pending cases would offend constitutional rights. The cases are equally consistent when the statute is found to be something other than substantive (procedural, remedial, or a hybrid of the two): the statute should be applied to pending cases if it makes sense to do so, given the posture of the case.

C. Dicta is Not the Holding.

Having looked at each case above, it is easier to discern what is a holding and what is dicta in each of them. Take some of Plaintiff's most forceful arguments based on temporal reach

case law, actually look at the cases themselves, and consider Yule's definition of holding. Plaintiff's arguments go the way of a new perm on a rainy day.[17]

Plaintiff says that "Florida appellate courts have long recognized that they must follow a legislative direction with only one potential exception—if the direction is to apply the law to pending actions, courts will not enforce it if that would violate a party's vested constitutional rights." Plaintiff's Brief at p. 3. Plaintiff cites for this proposition Fleeman, Theodorou, and Brown & Brown. We can definitively say that neither Fleeman nor Theodorou held that courts must follow legislative direction for procedural or remedial statutes, because, having read Fleeman and Theodorou, we know that the courts found those two statutes to be substantive. What was actually decided in those cases? That laws the courts found to be substantive in those cases did not have a clear indication of legislative intent for retroactive application. How could *that* constitute a holding that trial courts should look for the Legislature's intent about a procedural or remedial statute? It can't. The same problem arises in Plaintiff's quotation from Fleeman on p. 7 and the quote from Theodorou on p. 8 of Plaintiff's brief.

Similar issues arise with Plaintiff's quotes from Brown & Brown. As discussed earlier, that case involved a procedural statute that was applied to a pending case. It's true that the Fourth District pointed to the fact that the Legislature provided that the act should be applied retroactively, but this case cannot be cited for the proposition that the answer key is *overridden by* the Legislature's direction on a non-substantive statute. That couldn't be the holding, *because that was not the situation before the Fourth District*. As Plaintiff's counsel acknowledged at the hearing, we do not read appellate decisions with the assumption that the court intended to decide issues not before the court. The Fourth District had what it found to be a procedural statute and

[17] See Elle Wins!, Legally Blonde, at https://www.youtube.com/watch?v=GSu7BGbyJqc (explaining the first cardinal rule of perm maintenance) (last visited May 7, 2024).

the Legislature's expressed intent was *completely consistent with* the answer key. Plaintiff urges a reading of Brown & Brown that would transform dicta into a holding contrary to that court's judgment.

The same problem is found in Plaintiff's characterization of Basel on p. 20 of Plaintiff's brief. Plaintiff cites Basel as support for the idea that the answer key is merely a set of presumptions of legislative intent "that apply when there is no contrary direction in the new law." An initial problem is that Basel does not say this. Secondarily, the problem is that when Basel said "[i]n the absence of clear legislative intent, a law effecting substantive rights is presumed to apply prospectively while procedural or remedial statutes are presumed to operate retrospectively," was that the court's holding? No. What's the tip-off? Basel examined a substantive change in the law, not a procedural one. Isn't there something deeply wrong with the idea that Plaintiff invites this Court to assume that a 2002 decision about a statute the Fifth Circuit found to be substantive trumps a 2019 decision about a statute the Florida Supreme Court found to be procedural?

Once again, the same issue exists with Plaintiff's discussion of Metropolitan Dade on p. 20 of Plaintiff's brief. Plaintiff says that this court has "conflated these presumptions of legislative intent with an implied constitutional restriction on legislative authority that is untethered to any actual constitutional text and is directly contrary to the Supreme Court's directions that a presumption about the application of a new statute 'is only a default rule of statutory construction . . . to determine legislative intent' and that this 'presumption is rebutted by clear evidence of legislative intent.'" Plaintiff's Brief at p. 20 (quoting Metropolitan Dade, 737 So. 2d at 500). Good gracious. This is the kind of statement best reserved for those situations in which one has read the cases. Metropolitan Dade found the statute at issue to be

substantive. Perhaps someone could ring up a law professor and ask whether a 1999 decision about a substantive statute could overrule the Supreme Court's decision about a procedural statute twenty years later in Love. Not only is Love the later-decided case, but also (1) it actually took up a procedural statute, (2) the fact that the statute was procedural was the basis for the decision, and (3) the procedural nature of the statute led to the judgment. See Yule, 905 So. 2d at 269 n.10 (Justice Canady providing a definition of "holding" as "those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment."). Moreover, the Florida Constitution says what it says. Compare art. III, § 1 ("The legislative power of the state shall be bested in the legislature of the State of Florida") with art. V, § 1, Fla. Const. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts, and county courts.") and art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts") and art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

In summary, while continued argument has been and will continue to be encouraged on this issue, Plaintiff's Motion did not raise arguments that merit a reversal of course. Part of the reason for this is that Plaintiff has failed to attend to maybe the most basic principle in reading law: you have to read the law. It is not enough to just poke around in Westlaw for a few sentences here and there that sound good and, viewed in isolation, support your arguments. Surely the most favorable interpretation of Plaintiff's Motion is that this was the nature of the error. (The alternative, of course, is worse.) Plaintiff's Motion made arguments based on flawed premises and did all of the following: (1) quoted dicta as if were the holding, (2) suggested that

dicta in one case overruled the holding in another, and (3) cited to cases that support rather than undermine the reasoning contained in the Prior Orders.

VII. Analysis of Constitutionality

According to Plaintiff, if the Statute is procedural then it cannot be applied to pending cases because that would violate the separation of powers in the Florida Constitution. Plaintiff believes that any procedural aspects of HB 837 are an arrogation of the Florida Supreme Court's rule-making authority and this Court should refuse to apply them for that reason.

It would have been helpful, of course, if Plaintiff had cited some case law to support the argument. That Plaintiff choose to proceed on an argument that the Statute is unconstitutional without any meaningful legal citation and analysis is ironic. Certainly, it suggests that Plaintiff lacks an appreciation for the seriousness of that ask. Plaintiff wants a member of the judicial branch to invalidate an action of the Florida Legislature signed into law by the Governor of Florida on the basis that that the Legislature lacked the authority under the Florida Constitution to pass the statute and, in doing so, violated the separation of powers. It's as if there would be no separation of powers problem with a judge invalidating an act of the Legislature on a whim, and without authority under the law! Yet a party's failure to provide legal support for an argument does not fully absolve a court of its responsibility to analyze it.

When deciding whether someone else's toes were stepped on, there is usually a clue in how the owner of the toes reacts. Here, Article V, Section 2 of the Florida Constitution says that "[t]he supreme court shall adopt rules for the practice and procedure in all courts . . ." Art. V, § 2, Fla. Const. Before concluding that this amendment to Florida's Constitution necessarily means that it is unconstitutional for the Legislature to enact a law that judicial branch later construes as procedural, it is helpful to examine how the Florida Supreme Court has approached

this issue over time, in addition to considering the text of the provisions at issue as well as the history and tradition surrounding those provisions.

The text, history, and structure of the Florida Constitution—along with decades of precedent—all suggest that a statute can have aspects that are found to be procedural yet not intrude on the Florida Supreme Court's constitutional authority to make procedural rules. How could this be? There is more ground in this area than can be covered in a state trial court's order, but consider the words of one scholar: "The answer to the question, 'What is procedure?' depends upon the answer to another question, 'Why do you want to know?'" Ernest Means, The Power to Regulate Practice & Procedure in Florida Courts, 32 Fla. L. Rev. 442, 468 n.168 (1980) (quoting Green, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence, 26 A.B.A.J. 482, 485 (1940)).

A. Passing on Constitutionality is a Grave and Delicate Duty.

Not that a judge's duty can ever be lightly undertaken, but the gravity of the judicial role is intensified when a court is called upon to judge the constitutionality of a statute. Writing for the majority in Citizens United, the Chief Justice of the United States Supreme Court explained the seriousness with which the judicial branch is obligated to approach the task to pass on the constitutionality of an act of the legislative branch. Citizens United v. Fed. Elec. Com'n, 558 U.S. 310, 373 (2010). As he said—and as Justice Oliver Wendell Holmes said eighty-three years before him, adjudicating the constitutionality of a statute is "the gravest and most delicate duty" the branch can be called upon to perform. Id. (citing Blodgett v. Holden, 275 U.S. 142, 147 (1927) (Holmes, J., concurring)). In these cases, "[b]ecause the stakes are so high," the judicial branch tends to refrain from addressing constitutional questions "except when necessary to rule

on the particular claim" pending before the court. Id. And, ultimately, "[i]f it is not necessary to decide more, it is necessary not to decide more." Id. In Florida, the approach is no different.[18]

B. Method of Analyzing Constitutional Issues.

No one seems to have found a case in which the Florida Supreme Court explains how it can be true that rule-making for practice and procedure in the courts is its function and yet lower courts are to apply new procedural statutes to pending cases, even before the Supreme Court has addressed the statute's constitutionality.[19] Acknowledging the vacuum that seems to exist does not mean that there is no precedent that guides the inquiry, though. In the absence of precedent directly on point, on an issue like this one we look to the Florida Supreme Court's precedent laying out the method of analyzing constitutional questions.

As a matter of first principles, Florida Supreme Court precedent consistently and clearly guides lower courts to avoid declaring acts of the Legislature unconstitutional. If ever this was in question, a conclusive majority of the Florida Supreme Court drove it home in Planned Parenthood of Southwest & Central Fla. v. State, 2024 WL 1363525, at *5 (Fla. Apr. 1, 2024). The Court noted that "[w]e have long recognized that 'statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome.'" Id. at *5. The Court continued, "[i]ndeed, nearly a century ago, we said '(1) On its face every act of the Legislature is presumed to be constitutional; (2) every doubt as to its

[18] Indeed, perhaps this "cardinal principle of restraint," Miami Dade College v. Allen, 271 So. 3d 1194, 1198 (Fla. 3d Dist. 2019), has something to do with what could otherwise appear to be an incongruence between (1) the fact that rule-making for practice and procedure in the courts belongs to the Florida Supreme Court under Florida's Constitution and (2) the Florida Supreme Court's consistent direction to lower courts that new procedural statutes should be applied to pending cases, if it makes sense to do so, pending the Supreme Court's review.

[19] Nor has anyone provided a case in which the Florida Supreme Court has engaged in an analysis of the provisions of the Florida Constitution at issue here using the type of text, context, and historical evidence of its adoption that are used to analyze constitutional meaning. Planned Parenthood of Southwest & Central Fla. v. State, 2024 WL 1363525, at *5 (Fla. Apr. 1, 2024).

constitutionality must be resolved in its favor; [and] (3) if the act admits of two interpretations, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the later must be adopted . . . .'" Id. (quoting Gray v. Cent. Fla. Lumber Co., 104 Fla. 446 (1932); citing Savage v. Bd. of Pub. Instruction for Hillsborough Cty., 133 So. 341, 344 (1931); Chatlos v. Overstreet, 120 So. 2d 1, 2 (Fla. 1960); In Re: Caldwell's Estate, 347 So. 1, 3 (Fla. 1971); Franklin v. State, 887 So. 1063, 1073 (Fla. 2004); Florigrown, LLC, 317 So. 3d at 1111; Statler v. State, 349 So. 3d 873, 884 (Fla. 2022)). "[T]o overcome the presumption of constitutionality, 'the invalidity must appear beyond reasonable doubt.'" Id. (citing Franklin, 887 So. 2d at 1073 (quoting State ex rel. Flink v. Canova, 94 So. 2d 181, 184 (Fla. 1957)) and Waybright v. Duval Cnty., 196 So. 430, 432 (1940) ("[W]e will . . . determine if, beyond a reasonable doubt, violence was done [to] any provisions of the organic law in the passage of the challenged act, and in doing so will not deal with the merits of the measure, that being the exclusive concern of the Legislature.")). Recognizing that the Florida Supreme Court precedent at issue [In re T.W., 551 So. 2d 1186 (Fla. 1989)] had "failed to acknowledge the longstanding principle that statutes are presumed to be constitutional," the Court receded from its own precedent recognizing that the failure to apply the presumption of constitutionality was "clearly erroneous." Id. at *15.

Second, Supreme Court precent guides the analysis of constitutional meaning. The approach to interpreting the constitution should "reflect[] a commitment to the supremacy-of-text principle" and recognize that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Planned Parenthood of Sw. Fla. & Cent. Fla., 2024 WL 1363525 at *6 (quoting Coates v. R.J. Reynolds Tobacco Co., 365 So. 3d 353, 354 (Fla. 2023)). "The goal of this approach is to ascertain the original, public meaning of a

constitutional provision—in other words, the meaning understood by its ratifiers at the time of its adoption." Id. (citing City of Tallahassee v. Fla. Police Benevolent Ass'n, Inc., 375 So. 3d 178, 183 (Fla. 2023)). This effort to discern original public meaning calls for consideration of the text, contextual clues, dictionaries, canons of construction, and historical sources, including evidence of public discussion. Id.

C. The Text.

In Plaintiff's view, the constitutional impediment to the Legislature's power to enact the Statute is the Supreme Court's rule-making power in Article V, section 2(a) of the Florida Constitution. The text of the Florida Constitution itself is, of course, the chief navigational instrument in a constitutional analysis. In analyzing whether Section 768.0427 (2) and (3), Florida Statutes represents an unconstitutional infringement upon the Florida Supreme Court's rule-making authority, we should start with what the Constitution itself provides. Both precedent and common sense support the use of dictionaries as a tool to discern the public meaning of words. Planned Parenthood of Sw. Fla. & Cent. Fla., 2024 WL 1363525 at *6.

Article V, section 2(a) of Florida's Constitution provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts." Art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts"). In a legal context today, the word "practice" means in "[t]he procedural methods and rules used in a court of law," "[a] customary action or procedure," "[t]he act or process of knowledge through performance," and "[t]he frequent exercise of a skill for purposes of perfecting technique or performance." Practice, Black's Law Dictionary 1419 (11th ed. 2019). However, since Article V, section 2(a) was added by amendment in the 1970s, to the extent that an era-appropriate dictionary is available it is preferred. In the 1970s, "practice" was defined as:

> Repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage. Application of science to the wants of men. The exercise of any profession.
>
> The form or mode of proceeding in courts of justice for the enforcement of rights or the redress of wrongs, as distinguished from the substantive law which gives the right or denounces the wrong. The form, manner, or order of instituting and conducting an action or other judicial proceeding, through the successive stages to its end, in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts. The term applies as well to the conduct of criminal as to civil actions, to proceedings in equity as well as at law, and to the defense as well as the prosecution of any proceeding.

Practice, Black's Law Dictionary 1055 (5th ed. 1979). Meanwhile, the word "procedure" means today "[a] specific method or course of action" or "[t]he judicial rule or manner for carrying on a civil lawsuit or criminal prosecution." Procedure, Black's Law Dictionary 1457. In the 1970s, "procedure" meant "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. That which regulates the formal steps in an action or other judicial proceeding; a form, manner, and order of conducting suits or prosecutions. The judicial process for enforcing rights and duties recognized by substantive law and for justly administering redress for infraction of them." Procedure, Black's Law Dictionary 1083. It also meant the "machinery for carrying on suit including pleading, process, evidence and practice, whether in trial court or appellate court." Id.

Article III, section 1 gives the Legislature "all legislative power." Art. III, § 1, Fla. Const. ("The legislative power of the state shall be bested in the legislature of the State of Florida"). Perhaps we might think we understand this well enough that a definition is not required, but for avoidance of doubt "the power to legislate" today means "[t]he power to make

laws and to alter them; a legislative body's exclusive authority to make, amend, and repeal laws." Legislative Power, Black's Law Dictionary 1083 (11th ed. 2019). In the 1970s, that term meant "[t]he lawmaking powers of a legislative body, whose functions include the power to make, alter, amend and repeal laws. In essence, the legislature has the power to make laws and such power is reposed exclusively in such body though it may delegate rule making and regulatory powers to departments in the executive branch. It may not, however, delegate its law making powers nor is the judicial branch permitted to obtrude into its legislative powers." Legislative Power, Black's Law Dictionary 810-11 (5th ed. 1979).

Article V, section 1 gives the judicial branch "the judicial power." Art. V, § 1, Fla. Const. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts, and county courts."). Again, perhaps we have some confidence about what judicial power means, but "judicial power" is today defined as "[t]he authority vested in courts and judges to hear and decided cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it." Judicial Power, Black's Law Dictionary 1012. In the 1970s, it was defined as:

> The authority exercised by that department of government which is charged with declaration of what law is and its construction. The authority vested in courts and judges, as distinguished from the executive and legislative power. Courts have general powers to decide and pronounce a judgment and carry it into effect between two persons and parties who bring a case before it for decision; and also such specific powers a contempt powers, power to control admission and disbarment of attorneys, power to adopt rules of court, etc.
>
> A power involving exercise of judgment and discretion in determination of questions of right in specific cases affecting interests of person or property, as distinguished from ministerial power involving no discretion. Inherent authority not only to decide, but to make binding orders or judgments. Power to decide

> and pronounce a judgment and carry it into effect between persons and parties who bring a case before court for decision. Power that adjudicates upon and protects the rights and interests of persons or property, and to that end declares, construes and applies the law.

Judicial Power, Black's Law Dictionary 761-62 (5th ed. 1979)(internal citations omitted).

Article II, section 3 provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Since these dispute centers on separation of powers and whether the legislative branch infringed on the Supreme Court's rule-making power, we should examine the meaning of the word "power," which today can mean either "[d]ominance, control, or influence over another" or "[t]he legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or another." Power, Black's Law Dictionary 1414. In the 1970s, "power" meant:

> The right, ability, authority, or faculty of doing something. Authority to do any act which the grantor might himself lawfully perform.
>
> A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.
>
> In a restricted sense a "power" is a liberty or authority reserved by, or limited to, a person to dispose of real or personal property, for his own benefit, or benefit of other, or enabling one person to dispose of interest which is vested in another.

Power, Black's Law Dictionary 1053-54 (5th ed. 1979)(internal citations omitted).

Of course, while some terms may be most completely defined in a legal dictionary the more complete definition is not better evidence of original public meaning than definitions in a

layman's English dictionary. In fact, the extent that the two differ may have significance. For that reason, an era-appropriate dictionary of the English language ought to also be consulted. To that end, "judicial" was defined in the 1970s as "of judges, law courts, or their functions." Judicial, Webster's New Twentieth Century Dictionary 990 (2d ed. 1977). "Legislate" was defined as "to make or enact a law or laws" and "legislative" was defined as "giving or enacting laws," "pertaining to the enacting of laws," and "brought about or enforced by legislation." Legislate, Legislative, Webster's New Twentieth Century Dictionary 1035 (2d ed. 1977). "Power" was defined as the "ability to do; capacity to act; capability of performing or producing," "a specific ability or faculty." Power, Webster's New Twentieth Century Dictionary 1412 (2d ed. 1977).

Considering these definitions, in the era in which Article V, section 2(a) was adopted, the ratifiers likely understood the Legislature to have the right, ability, and authority to enact substantive law and policy and understood the judicial branch as having the right, ability and authority to declare what the law is and to apply that law to judicial proceedings. Rule-making in the judicial branch context likely carried the sense of adopting rules that would govern the form and/or mode of judicial proceedings.

Analysis of the text does not stop with dictionaries, though. The immediate context of the rule-making language is also relevant. The placement of Article V, section 2(a) within the structure of the Florida Constitution has meaning as well. First, its location within the article pertaining to judicial power suggests that the focus of the grant was on the judicial power, not the legislative power. Consider the relation between Article V, section 2(a) and Article II, section (3). Article II, section (3) is the separation of powers and anti-job sharing provision: "[t]he powers of the state government shall be divided into legislative, executive and judicial branches.

No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Read in the context of Article II, section 3 it seems entirely possible that grant of rule-making authority was an acknowledgement, in a sense, that there must be a narrow sliver of concurrent power where the judicial branch works within the "judicial power" lane and the legislative branch works within the "legislative power" lane and the two work side by side in accordance with the "except as expressly provided herein" provision. As further support for this, the provision of Article V, section 2(a) that permits the Legislature to "repeal[] by general law enacted by two-thirds vote of the membership of each house of the legislature" calls into question the idea that Article V, section 2(a) excluded the Legislature from the domain of rule-making. See Art. V, § 2(a).

D. Relevant History & Tradition.

Although "[d]ictionary definitions" and "immediate context" are "informative," they "do not provide a full picture of the text's meaning." Planned Parenthood of Sw. Fla. & Cent. Fla., 2024 WL 1363525 at *7. The history of rule-making in Florida's courts could be described as "an early period marked by legislative supremacy over practice and procedure, with judicial dominance occurring much later by virtue of constitutional grants of rule-making authority to the court," and then an accelerating modern resurgence of legislative supremacy. Means, The Power to Regulate Practice & Procedure in Florida Courts, at 444.

In his law review article titled The Power to Regulate Practice & Procedure in Florida, Ernest Means described three periods of special relevance to understanding the evolution of rule-making—(1) the period prior to July 1, 1957; (2) the period between 1957 and 1972; and (3) 1973 to 1980. Id. at 444-58. However, the shift following the publication of Means' article

creates at least one additional period: the modern era. A fulsome understanding of the first three periods is best gained by reading the article itself, but Means summarized them as follows:

> The period prior to July 1, 1957, was notable for the absence of any specific constitutional delegation of rulemaking authority and was marked by legislative domination of rulemaking practice and procedure in the courts. The middle period was introduced by a 1956 amendment to the Florida Constitution providing that "[t]he practice and procedure in all courts shall be governed rules adopted by the supreme court." Finally, the third period began with the adoption of the present language of article V, the judicial article, which became effective January 1, 1973.

Id. at 444.

As discussed in the Grisar Order, in 1940 the fact that the people had not (yet) given the judicial branch the constitutional power to lay down uniform rules of procedure was the reason the Florida Supreme Court denied the Florida Bar's petition to establish the Florida Rules of Civil Procedure. Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure, 199 So. 57 (Fla. 1940). This decision reflects the dominion over rulemaking exercised by the Legislature early in Florida's history, as Means described. In 1940, the judicial branch had not been given constitutional authority to develop rules and it was presumed that the law-making branch of government had that authority, not the courts. Means explained that:

> Prior to the revision of article V of the Florida Constitution which took effect July 1, 1957, there was no express grant of constitutional authority to regulate practice and procedure in the courts either to the supreme court or to the legislature. In the absence of such a grant, the legislative branch dominated the subject by virtue of the general legislative authority vested in it by all Florida constitutions. Additional support for legislative authority over practice and procedure existed in the provisions, first appearing in the Constitution of 1868, prohibiting the enactment of any special or local act relating to practice and procedure in the courts (and to a number of other subject matters as well) and requiring that this subject matter be dealt with only by general law. If these provisions were not a source of legislative

> authority over court procedures, they could at least be read as recognizing authority that already existed.
>
> Florida constitutions of the period contained other provisions that might have provided some support for the notion of a court-based rulemaking authority—for example, dividing the power of government into executive, legislative, and judicial branches and forbidding one branch to exercise any power properly belonging to one of the others and vesting the judicial power in the supreme court and other named courts. However, the Florida supreme court laid no strong claim to inherent power to control even its own procedures, much less those of the other courts.
>
> A much more important source of judicial rulemaking authority during the period prior to 1957 consisted of recurrent statutory delegations to the court. As early as 1824, long before statehood, it was provided: 'The Court of Appeals shall have power and it shall be its duty to make all necessary rules for the regulation of the practice of the said superior courts, as well as for the said court of appeals, which said rules so made shall be submitted to the legislative council at the session thereof next after the making of such rules, and the rules, if approved of by the said legislative council, shall after such approval have the force, effect and authority of laws.'

Id. at 444-45 (citing Act of Dec. 13, 1824, s. 12, Fla. Terr. Acts (1824), p. 165)). The Legislature's early statutory delegations of rule-making authority "were calculated primarily to solicit the assistance of the court for the initiation of rules of practice and procedure, rather than to vest anything approaching final authority." Id. at 445. "Proposed rules were not to conflict with existing statutory law, and existing rules were subject to amendment or repeal by the legislature. Later statutory delegations tended more and more to place final authority over court procedures in the supreme court." Id. Then, in 1929, the Florida Legislature got out of the rule-making business and "completely abdicated its own authority so far as rules of the supreme court were concerned." Id.

Following the Supreme Court's 1940 decision declining to adopt the Florida Rules of Civil Procedure, the legislative shift towards giving the Supreme Court rule-making authority over the lower courts seems to have been hastened. A Committee for the Adoption of the Federal Rules drafted a legislative act "which, if passed, would fully empower the Florida Supreme Court to promulgate rules governing Florida procedure." See Bruce J. Berman, Peter D. Webster, Historical Development of the Florida Rules of Civil Procedure, 4 Fl. Prac. § 1.010:1 (May 2024). The act was passed during the 1943 legislative session and the draft rules were again brought to the Florida Supreme Court, which again declined to adopt them. Id. "The Court recognized the need for reform of the state's common law procedures, but insisted that the adoption of the Federal Rules was too radical a departure from Florida's traditional procedural regime, that is, one that maintained a bifurcation of actions at law and suits in equity." Id.

In 1945, legislation was passed to take sections of chapter 59 of the Florida Statutes, which related to appellate procedures, and convert them into rules of court that could be "changed, amended, repealed, or superseded" by rules adopted by the Supreme Court. Id. at 446. The year before Florida amended the Constitution to give an initial constitutional authorization to the Supreme Court to promulgate rules of court, the Legislature "completed the statutory delegation of rulemaking power" by amending Section 25.47(1), Florida Statutes to provide that the Supreme Court "shall have the power to prescribe from time to time the rules for practice and procedure in actions at law or suits in equity, and all statutory and extraordinary forms of action, in all courts within the state. A rule shall not abridge, enlarge, or modify the substantive rights of any litigant. When a rule is promulgated and adopted by the supreme court concerning practice and procedure, and it conflicts with the statute, the rule supersedes the statutory provision." Id. (quoting Section 25.47(1), Fla. Stat. (1956)). This made "[t]he authority of the

supreme court" at that point "as complete as it could be made by statute" in that it "extended to all courts, and rules automatically overrode conflicting statutes." Id.

In 1957, Florida amended its Constitution to give the Supreme Court rule-making powers in what was at that time Article V, section 3. See Means, *supra*, at 444. There were material distinctions between the 1957 amendment that created Article V, section 3 and the later amendment that created what is now Article V, Section 2(a). The reasons why the amendment was viewed necessary at that time are not perfectly clear, given the Legislature's exit from the field of rule-making. Id. ("In view of this complete legislative submission to the principle of judicial initiative in the control of practice and procedure, it is difficult to understand the motive for the adoption of the constitutional delegation of the following year. Perhaps the rulemaking provision was casually added to what was a general revision of the judicial article of the constitution."). But in any event, the amendment that created Article V, section 3 was proposed by the Legislature itself in 1955. Id. at 446 ("By House Joint Resolution 810, the 1955 legislature proposed a major revision of article V of the Florida Constitution relating to the judiciary. The proposal was approved by the electorate at the general election of 1956, to take effect July 1, 1967."). The fact that the rule-making amendment to the Constitution was proposed by the Legislature is an important aspect of the analysis, as was the fact that "the very next legislature following the one that proposed the revision of article V was not of the opinion that it had been rendered powerless to legislate concerning practice and procedure." Id. at 447. "The 1957 legislature, meeting just prior to the effective date of the article V revision, added section 25.371 to the Florida Statutes to provide that '[w]hen a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision.'" Id. As Means notes, "[s]uch an enactment would have

been quite meaningless in the face of a grant of exclusive authority to the court" and the Legislature "apparently read the new constitutional grant as vesting about the same degree of authority in the court has had been vested by the earlier statutory delegations." Id. And "[a]lthough the new provision could certainly be read as vesting exclusive authority, the Florida supreme court never so applied it" during that period. Id. (with discussion of various cases in which there was "not a single instance in which the 1957 constitutional delegation was held to have vested exclusive rulemaking authority in the supreme court").

Two Supreme Court opinions during this period show that the court did not consider its rulemaking authority to be exclusive. Id. at 448 (citing Smith v. State, 197 So. 2d 497 (Fla. 1967) and State v. Garcia, 229 So. 2d 236 (Fla. 1969)). In Smith v. State, the Supreme Court "did not express any doubt that the legislature had authority to enact the statute" relating to waiver of a jury trial in a capital case. Id. (citing Smith, 229 So. 2d at 499 (citing Fla. Stat. § 912.01 (1967)). In State v. Garcia, the Supreme Court considered whether a defendant who had pled not guilty to a capital offense could waive a jury trial. Id. (citing Garcia, 229 so. 2d 236 (Fla. 1969)). A statute prohibited the waiver of a jury trial in that instance, but the Supreme Court adopted Rule 1.260, which allowed for such a waiver. Id. The Third District certified a question to the Supreme Court whether, in light of this conflict between the statute and the rule of procedure, a jury trial could be waived by a defendant who pled not guilty to an indictment for a capital offense. Id. The Supreme Court answered yes. Id. It "observed that its rulemaking authority was limited to matters of procedure" and said that "[i]n some instances it is difficult to determine whether a rule relates to a matter that is substantive or a matter that is procedural, but this difficulty does not exist" with the rule under consideration because it "merely prescribes the procedure and method of waiving a jury trial." Id. According to Means, "the same statute that

'largely influenced' the court in [Smith v. State] was now [in State v. Garcia] confidently labelled 'procedural' and therefore superseded by a subsequently promulgated rule of the court." Id.

In 1973, article V of the Florida Constitution was completely revised. Id. at 448. Again, the Legislature proposed the amendment. Id. The revision was approved by the electorate in 1972, taking effect in 1973. Id. The 1973 amendment brought into being the current article V, section 2(a). Id. "Shortly after the new revision became effective, a dramatic conflict of opinion as to the meaning of the new rulemaking provision occurred between the branch of government which had proposed the language of the revision in the first place, and the branch of government which was to have the final word in construing and applying it." Id. at 449. Indeed, in the next legislative session yielded statutes that were "obviously procedural in nature," and the "[p]assage of these measures certainly reflected confidence on the part of the 1973 legislature that the recent revision of the rulemaking provision of article V had not terminated its authority to legislate in the area of court practice and procedure." Id.

In this period, it became clear that the Supreme Court and the Florida Legislature had differing views on the meaning of the amendments to Article V. In 1973, the Court expressly addressed these recent acts of the Legislature, beginning with the Legislature's attempt to directly repeal and rewrite Rule 3.16 of the Florida Appellate Rules, which had been promulgated by the Supreme Court. In re Clarification of Florida Rules of Prac. & Proc., 281 So. 2d 204, 204 (Fla. 1973). Finding that the two-thirds vote of the Legislature made the repeal within the Legislature's power, the Court found the attempted amendment "beyond the powers of the Legislature as the Supreme Court is given exclusive authority to promulgate rules of practice and procedure in the courts." Id. at 204-05. The Court clarified that "under the Constitution, the

Legislature may veto or repeal, but it cannot amend or supersede a rule by an act of the Legislature." Id. at 205.

The Legislature had also amended Section 53.031, Florida Statutes in an "attempt[] to regulate voir dire examination during the trial," but the Court noted that this was "a matter solely within the province of the Supreme Court to regulate by rule." Id. It noted that "[a]t the time the Civil Rules of Procedure were promulgated, there were various statutes in existence relating to procedure. The order adopting the rules . . . provided that all statutes not superseded by the rules or in conflict with the rules shall remain in effect as rules promulgated by the Supreme Court. Id. "The adoption as rules of the Court of all statutes which [had] not been superseded or [might have been] in conflict with the rule [was] primarily a matter of convenience or administrative expediency," the Court explained, because "[s]uch adoption avoids the question of whether a matter lies within the field of substantive law or procedural law." Id. The Court then seemed to amend its rule to conform to the statute. Id.

With regard to a new enactment from the Legislature relating to criminal procedure that "authorize[d] the issuance of a notice to appear for certain crimes and violations," the Court "approve[d] this procedure" and appended to its decision a new Rule 3.125 of the Florida Criminal Procedure Rules, making it clear that "[t]his rule supersedes only that portion of the statute included in the rule and the balance of the statute will remain in effect as part of the substantive law." Id. At the same time, a new statute that had created a domestic relations depository "filled a great need in the judicial system," so the Court amended Rule 1.611 of the Florida Civil Rules of Procedure "for the purpose of including the benefits provided in" the statute. Id. The Court made each of these rule adoptions and amendments effective on the date of the statutes to which they were related. Id.

Means calls this 1973 Supreme Court opinion "extraordinary in several ways." Means, *supra*, at 450. "For one thing, it created new law without acknowledging that it was doing so" and by "failing to mention that it was making a sharp break with the past, the court avoided having to explain the rationale upon which its action was based," according to Means. Id. at 451. In his critique of the 1973 decision, Means described the case as "very unusual," "hardly normal," "aggressive[]," an "expansion of its own lawmaking authority at the expense of the power of a coordinate branch of government, in a proceeding instituted at its own initiative and apparently without participation or input of any kind by anyone outside the court itself," and "irregular." Id. That the 1973 opinion was so unusual was, in Means' view, "further emphasized by the circumstance that the court was holding several statutes to be unconstitutional." Id. Means argued that this 1973 decision had defined its rule-making authority to "the displacement of legislative discretion." Id. at 453. For years, the Court's view of the exclusivity of its rule-making authority continued. Id. at 452-58.

In his 1980 article, Means criticized the Supreme Court's doctrine of exclusiveness in rule-making. Id. at 458. He argued that "[t]he notion that the Florida supreme court's constitutional rulemaking authority is exclusive, in the sense that the legislature is considered as being totally foreclosed from active participation in the regulation of practice and procedure in the courts, should be abandoned." Id. He noted that the Court's doctrine of exclusiveness "was neither warranted by the language of the Florida Constitution nor intended by those who framed and proposed that language." Id. "On the other hand," he argued, "quite apart from any question of constitutional interpretation, the notion should be abandoned as constituting a source of inevitable and widespread confusion and as being inconsistent with democratic principle." Id.

Means argued that "there is no doubt that the framers of the revised article V knew how to vest exclusive authority" because, for example, the framers had given the Supreme Court "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted" in Article V, section 15. Id.

Means conceded that "[i]t is commonplace" "that as to the legislature, a state constitution is to be considered as a limitation of authority and not as a grant." Id. at 459. "In other words, the legislature possesses all authority not denied to it by the constitution expressly or by implication." Id. But, Means argued, "the legislature's authority over practice and procedure in the courts was never challenged prior to 1973, despite the absence of express constitutional authority." He concluded that "[t]he notion that authority to regulate practice and procedure cannot reside simultaneously in the supreme court and the legislature can also be summarily disposed of" because of the history of rule-making that predated Article V, section 2(a). Id. "This authority coexisted in both branches of government throughout the history of the state prior to 1973, including the long period where there was no express constitutional provision, and the brief period of 1957-1972, when there was." Id. Means argued that "[t]he basic grant of rulemaking authority to the supreme court was obviously necessary if the court was to be assigned constitutional responsibility in an area normally within the competence of the legislative branch. This is especially so in view of the Florida court's traditionally conservative view concerning the extent of its inherent rulemaking authority." Id. at 460.

As this order is being prepared in the roughly one-week period between the hearing on the Motions and trial of the first case to which this ruling will apply, time does not permit the kind of exhaustive review of Supreme Court precedent in this area that would document the shift from the 1973-era to the modern Supreme Court's view of its rule-making power, but it seems

likely that the reasons for the shift track Means' critique. Referring to the 1973 decision, Means attacked "[a]ny implied support" for the 1973 decision, which he speculated might have included these ideas: "(1) that absence of an express grant of legislative authority over practice and procedure implies an intent that the legislature shall not have such authority; (2) that the authority to regulate practice and procedure cannot coexist in both the court and the legislature, and an express grant was made to the court; or (3) that application of the maxim *expressio unius est exclusion alterius* to one or the other of the components of the constitutional grant of rulemaking authority implies that the legislature is to be excluded from the regulation of practice and procedure." Id. at 459.

As to the first "implied support" for the 1973 decision, Means noted that in the area of legislative authority, a state constitution is generally viewed "as a limitation of authority and not a grant," in that "the legislature possesses all authority not denied to it by the constitution expressly or by implication." Id. To this point, he observed that "the legislature's authority over practice and procedure in the courts was never challenged prior to 1973, despite the absence of express constitutional authority." Id.

As to the second "implied support" for the 1973 decision, Means argued that "[t]he notion that authority to regulate practice and procedure cannot reside simultaneously in the supreme court and the legislature can also be summarily disposed of. This authority coexisted in both branches of government throughout the history of the state prior to 1973, including the long period when there was no express constitutional provision, and in the brief period of 1957-1972, when there was." Id. at 459-60.

As to the third "implied support" for the 1973 decision, Means pointed out the frequency with which courts "warn that the maxim *expressio unius est exclusion alterius* should only be

used 'in ascertaining the true meaning of a constitutional or statutory provision, and not as a rigid rule of universal application.' Therefore, the maxium should not apply, especially in construing a constitutional provision as impliedly precluding legislative authority, if there is a rational alternative explanation for the inclusion of the provision in question. Not surprisingly, a plausible alternative reason does exist" for Article V, section 2(a) because

> [t]he basic grant of rulemaking authority to the supreme court was obviously necessary if the court was to be assigned constitutional responsibility in an area normally within the competence of the legislative branch. This is especially so in view of the Florida court's traditionally conservative view concerning the extent of its inherent rulemaking authority.
>
> There was also an adequate alternative justification for including the express authority for legislative repeal of rules of practice and procedure. The normal product of the legislative process is a statute or legislative resolution, not a rule of court. During the century and more that the legislature exercised dominant authority in regulating court procedures, it did so by the enactment of statutes. If, during the period of legislative dominance, the legislature desired to retain a degree of control over statutorily delegated judicial rulemaking, it was certainly appropriate to require by statute that court-promulgated rules be subject to amendment or repeal by the legislature. Just as obviously, legislative authority to repeal rules promulgated by the court pursuant to constitutional authority must be expressly granted in the constitution.
>
> Without the aid of the negative implication of the maxim, then, neither of the quoted provisions of article V, section 2(a) can be read as forbidding legislation relating to practice and procedure in the courts.

Id. at 460-61.

After extensive analysis of what led to the Legislature's proposed amendment to Article V, Means concluded that the framers of article V never intended that the Supreme Court's rule-making authority preclude the Legislature from making law that contained procedural aspects.

Id. at 461-65. He posited that the revision was "directed against possible judicial abuse" from the rule-making process, including efforts by the judicial branch to, "under the guise of its rulemaking power," step into the Legislature's constitutional lane of enacting substantive law. Id. at 465-66. Means concluded that the framers' intent behind Article V, section 2(a) in its present form "was to safeguard against judicial, not legislative, abuse." Id. 466. He further concluded "that the legislature—particularly the House of Representatives—was not in any sense attempting to enlarge the rulemaking authority of the court beyond what it had previously been. At the very most the purpose was only to safeguard against judicial abuse by providing for continuing legislative oversight." Id. at 467. Means summarizes that "the history of the adoption of the 1972 amendment militates strongly against the court's claim that its rulemaking authority is exclusive." Id.

E. Precedent.

In this area, the precedent suggests a meaningful shift in the Supreme Court's interpretation of Article V, section (2)(a) over time. Appreciation of the differences between the 1970s/1980s-era precedent and today is helpful.

1. Early Interpretations of Article V, section (2)(a).

At the time of his 1980 article, Means cited the Florida Evidence Code as an example of the "conundrum" that In Re Clarification created with its assertion that the rule-making authority granted under Article V, section (2)(a) was "exclusive." Id. In fact, Means called the Evidence Code "[t]he most notable example of the kind of confusion resulting from the court's holding that its rulemaking power is exclusive" and recited the history:

> Originally developed as a project of the Florida Law Revision Commission, this complete code of evidence was enacted by the

> 1976 legislature, to become effective July 1, 1977. The effective date of the new code was subsequently postponed to July 1, 1979.
>
> On June 28, 1979, just prior to the new Code's finally becoming effective, the supreme court issued an order temporarily adopting, as rules, the provisions of the evidence code as enacted by Chapter 76-237, Laws of Florida, to the extent that they are procedural . . . .' The expressed reason for such blanket adoption was '[t]o avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedure and, therefore, unconstitutional because they have not been adopted by this Court under this rule-making authority. . . . The order concluded: '[W]e request The Florida Bar, the Academy of Florida Trial Lawyers, and other interested parties to file any appropriate suggestions or objections on or before October 1, 1979, directed to specific rules of evidence contained and stating (1) the basis why the challenged rule is procedural rather than substantive, and (2) why the rule is inappropriate in its present form.'
>
> . . .
>
> In view of the obvious difficulty of defining the distinction between substance and procedure, it is little wonder that the response to the court's invitation for suggestions as to the labelling of individual sections of the Code was disappointing. In a 'Clarifying Opinion," issued November 8, 1979, the court reported that the Board of Governors of the Florida Bar, after receiving reports from the Judicial Administration Selection and Tenure Committee, had advised the court that 'The Florida Evidence Code on the whole is a good work product and . . there was no specific recommendations as to suggested changes in, or objections . . . to . . . specific rules, based on content.'

Id. at 470-72. Means warned that "[w]holesale adoption of the provisions of the Code 'to the extent that they are procedural,' whether temporarily or permanently, is only an expedient and really amounts to an abdication of the spirit of the court's obligation under section 2(a) of article V, if not its letter. Whether or not the constitutional grant is exclusive, it certainly assumes that rulemaking will occur by deliberative procedures of some kind on the part of the court and its agencies." Id. at 472. Wholesale adoption "to the extent the Evidence Code is procedural' was,

however, how the Supreme Court elected to handle the matter. In Re Evidence Code, 376 So. 2d 1161, 1162 (Fla. 1979).

As if he were looking into a crystal ball, Means raised the "practical problems" that would occur if the Supreme Court adopted the Evidence Code "to the extent it is procedural" because "such a blanket adoption of statutes as rules of the court fails to inform practitioners of which statutes have been so adopted. Nevertheless, those adopted are supposedly thereafter removed from the power of the legislature to amend." Id. Referring to "[t]he inevitable confusion resulting from the present division between legislative authority and the judicial rulemaking power" as an infection "within the court itself," Means noted that a softening of the Supreme Court's exclusivity assertion had already begun to occur by the date of his article's publication in 1980, observing that "[i]n a series of recent cases, the court has exhibited either confusion or lack of full commitment to its original position concerning the exclusiveness of its authority to regulate practice and procedure." Id.

Means concluded that "confusion is inevitable when mutually exclusive areas of 'legislative authority' are divided by a verbal boundary that cannot be defined with precision. It is doubtful that the confusion could be eliminated by an alteration of the verbal boundary. However, the confusion attending the Florida supreme court's rulemaking authority would substantially disappear immediately upon abandonment of the notion that the authority is exclusive." Id. at 476. "The Florida supreme court's holding that its rulemaking authority is exclusive was on a collision course with democratic principle from the instant it was announced" because "[d]emocratic principle assigns the primary role in the determination of public policy to the legislative branch of Florida government" and "any arrangement that effectively transfers a significant portion of the legislature's power to determine public policy to the supreme court is

contrary to this organizing principle. It's as simple as that." Id. at 476, 478-81 (noting the "substantial evidence" that the 1973-era Florida Supreme Court was "well aware" of how its declaration of its exclusive role in rule-making had created a license for the Supreme Court to expand its role in the determination of policy issues).

2. Modern Interpretation of Article V, section (2)(a).

a. Why Do We Have Separation of Powers, Anyway?

Whether because what Means proposed about the nature of rule-making authority under Article V, section 2(a) is in logical conformity with the separation powers or for some other reason, the modern Supreme Court's rulings often seem to track Means' proposal. This more modern approach seems to be a nod towards the reality that the potential for tyranny that separation of powers was conceived to protect against is unlikely to occur from a legislative act that could be considered procedural. See, e.g., Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 268 (Fla. 1991) ("[C]oncentration of power is prohibited by any tripartite system of constitutional democracy and cannot stand."). Moreover, the modern approach acknowledges that even procedural matters are within the Legislature's mandate to the extent that they are tied with substantive law or public policy.

The framers of the Florida Constitution clearly appreciated the dangers that the founding fathers of the United States had front-of-mind when drafting the United States Constitution. The people are the ultimate sovereign. In America and in Florida, the government was created by our ancestors and they designed the government to be subjugated to us.

The government, while necessary to certain ends, represents a clear and present danger to the people. Power is separated because, just as sure as death and taxes, we know that if we give

someone too much power over us, that person will abuse the power, use it for their own benefit, and become our oppressor.[20]

Having said this, what's really remarkable about Florida is that we looked at the United States Constitution and concluded that its protection against consolidation of power wasn't enough. Florida wanted more.[21] Unlike the United States Constitution, which merely separates the power of government, Florida's Constitution commands that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Florida courts have consistently referred to our state's separation of powers as being "strict." See, e.g., State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000).

Although Florida clearly recognizes that separation of powers is important, when considering the separation of powers analysis in this case it might help to consider *why* the separation of powers is important to America and Florida. The founders of America and the framers of Florida's constitution knew that separation of powers was a check against governmental tyranny. If one branch or one person within a branch could accumulate power, the

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[20] See Benjamin Franklin's Last Great Quote & the Constitution, at https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution#:~:text=%E2%80%9COur%20new%20Constitution%20is%20now,and%20taxes%2C%E2%80%9D%20Franklin%20said ("Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes.")

[21] The Floridian demand that we be further protected against governmental tyranny is remarkable. Consider the history of the United States Constitution. That document—"the longest surviving written constitution in all of history" and the document that Abraham Lincoln called the "apple of gold" in the "frame of silver" created by the Declaration of Independence—did not separate powers enough for Floridians. Larry P. Arnn, The Founder's Key 10, 19 (2013) (citing Abraham Lincoln, Fragment on the Constitution, January 1862). The Declaration of Independence was the throwing off of one government and the Constitution was the building of a new one in its place, id. at 21, and when viewed in reference to one another it seems evident that the separation of powers in the U.S. Constitution is explained by the Declaration. Id. The Declaration's "list of charges against the king" reflect our forefathers' outrage over George III's interference with the operation of the legislative and judicial functions, which even in a monarchy had, over time, been taken away from the King of England. Id. at 24, 32-36. Someone could look at the passage of a mere 57 years between ratification of the United States Constitution and the grant of Florida's statehood and conclude that the framers of Florida's Constitution trusted government even less than America's founding generation.

sovereign was at risk of losing control over the government that is answer to and serve the sovereign's interests. The judicial branch's role in checking the accumulation of power is unlikely to be implicated in those situations where the Legislature passes a bill that is procedural but in furtherance of the substantive law and public policy matters that are properly the domain of the Legislature.

Some of this was addressed by the Florida Supreme Court in Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260 (Fla. 1991), which did not relate to Article V, section 2(a) but took up a separation of powers argument that arose in the context of then-Governor Chiles' direction to all state agencies (which, by legislative definition, included the judicial branch) to reduce their current operating budgets to address a budgetary shortfall. Id. at 265. The petitioners, all children in Florida's foster care system, sought an injunction in state court and asked the trial court to declare the statute unconstitutional. Id. Finding that the "central issue" in the case was "whether the legislature, in passing section 216.221, violated the doctrine of separation of powers by assigning to the executive branch the broad discretionary authority to reapportion the state budget." Id. at 263. Although Chiles did not address a separation of powers issue in the context of Article V, section (2)(a), its language is instructive.

The Chiles Court recognized that "[t]he principles underlying the governmental separation of powers antedate our Florida Constitution and were collectively adopted by the union of states in our federal constitution." Id. at 263. Powers of government are separated out of a "fundamental concern" that "fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty." Id. It cited Montesquieu that: "[t]here would be an end of everything, were the same . . . body . . . to exercise those three powers, that of executing the public resolutions, and of trying the causes of individuals." Id.

(quoting Charles de Montesquieu, L'Espirit des Lois, (Robert M. Hutchins ed., William Benton 1952) (1748)). The Supreme Court interpreted Article II, section 3 of the Florida Constitution to include "two fundamental prohibitions:" first, "that no branch may encroach upon the powers of another" and second, that "no branch may delegate to another branch its constitutionally assigned power." Id. at 264. Of added interest to the case at bar, the Supreme Court held that "[a]ny attempt by the legislature to abdicate its particular constitutional duty is void," even if it would further "policy considerations" to do so. Id. The reason this is of interest here, of course, is the history of the Legislature's attempt to legislatively delegate rule-making to the judicial branch noted above, which does not seem to have implicated those concerns. If the Legislature was able to delegate rule-making to the judicial branch, then this perhaps reflected the view that the delegation was merely confirmatory of the judicial branch's power to regulate practice and procedure that did not conflict with the Legislature's lawmaking ability. Moreover, Chiles stands for the proposition that powers of one branch may be concurrent of powers in another. The Supreme Court in Chiles recognized, after all, that although the Legislature had "the power of the purse," the Court "[did] not state that the Governor and Cabinet have no role to play in the budgetary process," citing for example a statute that provided for limited transfers within budget entities under specific circumstances and the Governor's power to veto appropriations bills or call the Legislature into special session to balance the budget. Id. Ultimately, under the facts of the Chiles case, because "the legislature cannot . . . delegate its policy-making responsibility," the trial court's determination that the statute in question was unconstitutional was upheld. Id.at 268. Because the Constitution included a mandate of "coordinate power-sharing," the Legislature's definition of "state agency" that included the entire judicial branch was also

unconstitutional, since "the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power." Id

b. Job-Sharing vs. Coordinate Work.

When it comes to procedural rule-making, Plaintiff impliedly argues that on its face, Florida's Constitution has an intraconstitutional conflict. The term "intraconstitutional conflict" describes the idea that the Florida Constitution could have two or more provisions in apparent conflict with one another. The intraconstitutional conflict presents itself like this: if (1) Legislature has all legislative power, (2) but the Florida Supreme Court has rule-making authority for procedural rules, and (3) article II, Section 3 establishes a strict separation of powers that prohibits job-sharing between the branches, then (4) the Constitution both requires and prohibits job-sharing.

Although the federal constitution is by design challenging to amend, Florida's process to amend its Constitution is much easier. The relative ease of the amendment process, the lack of any mandatory pre-enactment conflict-check mechanism, and the varying approaches the Florida Supreme Court has taken to the single subject rule each arguably play a role in the existence of intraconstitutional conflicts.

Ask anyone who's ever served on the editorial board of a law review what they think about making revisions to documents that are mostly finalized, then duck. Every revision has the potential to create havoc. You can't just casually change something on page twenty without considering what it means to pages three, seven, and four hundred sixty-eight. The greater the complexity of the document, the more important an established final review process becomes. This is why law reviews employ small armies checking cross-references in footnotes. (If you thought all the fun went into looking for italicized periods, now you know.) Perhaps you're

thinking "what does a law review have to do with anything?" Fair point, and it's probably no less of a big deal to add a new dish to the menu of Chili's. However, unlike the law review and the Florida Constitution, you can bet your bottom dollar that over at Chili's a new burger never sees the light of day without making it through a mandatory, well-defined review process run by a bunch of professionals.

Perhaps this is not what Floridians expect, but the reality seems to be that there is no defined pre-enactment process by which the Florida Supreme Court (or anyone else) confronts the intraconstitutional conflicts that might arise if an amendment makes its way into the Florida Constitution. If such an amendment passes, though, the Florida Supreme Court is called in to make sense of it all. Sometimes, the Court's answer is an unwelcome surprise, as its opinion in In Re Clarification appears to have been. Yet, this is perhaps a problem inherent in readily amending an otherwise-finalized document that matters to more than one stakeholder. One wrestling with the idea that Florida must "pass an amendment to find out what it means" might say this is an argument against piecemeal amendments to a document of such significance.

Before delving into the law on intraconstitutional conflicts, it may be helpful to understand how an intraconstitutional conflict can occur. There are four primary ways that the Florida Constitution can be amended, all described in Article XI. Section 1 provides for proposals by the Florida Legislature. Section 2 provides for proposals by the Constitutional Revision Commission. Section 3 provides for proposals by ballot initiative. Section 4 reserves to the people the power to revise the entire Constitution.

Unless a case is filed in which the issue of intraconstitutional conflicts is raised pre-enactment and reaches the Florida Supreme Court[22] prior to the election, it appears that the Florida voter must:

(1) Possess a comprehensive understanding of the existing Constitution;

(2) Divine the meaning of the Constitutional text; and

(3) Appreciate the potential that some part of the existing Constitution might conflict with a new provision that would be added if an amendment passes. Perhaps a voter might expect that someone else has done this before the voters are asked to vote, but such an expectation seems to be inconsistent with reality.[23]

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[22] For example, in Fine v. Firestone, 448 So. 2d 984 (1984), petitioner sought from the district court a writ of mandamus to the Florida Secretary of State, directing the Secretary of State to remove from the ballot a proposed Constitutional amendment.

Finding that the proposed amendment failed the single-subject requirement because it failed to "identify the articles or sections of the constitution substantially affected" which is "necessary for the public to be able to comprehend the contemplated changes in the constitution and avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal" the Court directed that the amendment must be removed from the ballot. Id. at 989.

Recognizing that "[t]he problem of conflicting provisions resulting from the adoption of an initiative proposal cannot be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict" the Court receded from precedent that held otherwise because "[r]eliance on the application of this principle of constitutional construction in these circumstances would grant to this Court broad discretionary authority in determining the effect of a proposed amendment or revision on the existing Constitution. No official record of legislative history or debate would be available to aid this Court in the construction of an amendment resulting from an initiative proposal" and the Court did not "believe it was the intent of the authors of the initiative-amendment provision, nor the intent of the electorate in adopting it, that the Supreme Court should be placed in the position of redrafting substantial portions of the constitution by judicial construction" because to do so would, in the Court's view, "be a dangerous precedent." Id.

A concurring opinion in Fine detailed some history of Florida's amendment process. Id. at 993 (McDonald, J., concurring). Criticizing the Court's precedent in Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978), the concurrence pointed out that "[i]f an amendment is specific and well-defined in its scope, there is no problem in ascertaining what it supersedes" but a failure to strike from the ballot a proposed amendment that creates an unaddressed intraconstitutional conflict "would create chaos as to which part of that document have or have not been affected and in what manner." Id. at 995.

[23] Although the Florida Supreme Court performs an advisory function to the Attorney General as part of an Article XI, Section 3 process, recent precedent highlights the internal debate on the Court over the appropriate extent to which potential intraconstitutional conflicts ought to be addressed within the context of advisory proceedings. See, e.g., Advisory Op. to the Attorney General Re: Limiting Government Interference With Abortion, 2024 WL

To the extent that Plaintiff has suggested here that Florida's choice to amend its Constitution to give the Florida Supreme Court rule-making authority created an intraconstitutional conflict of sorts, the history of the amendment and Supreme Court precedent reflect a degree of merit in the contention. Amendments to Article V yielded unhappy surprises, as noted by Means. Namely, the Legislature that proposed the amendment was surprised to find that the Supreme Court took on the view that its rule-making power was exclusive. While Plaintiff appears to be correct that such a conflict arose, it seems that over time the Supreme Court has eased away from it. Specifically, the modern Court's precedent reflects a departure from the view that Article V, section 2(a) was a deduction of power from the Legislature.

In Massey v. David, 979 So. 2d 931 (2008), the Supreme Court considered a decision by the First District that held a statute invalid. In that case, a trial court awarded costs for an expert witness as part of a judgment in favor of David. Id. at 934. Massey contended that the statute that permitted the award of expert fees was unconstitutional. Id. The Fourth District held that the section was unconstitutional as a procedural statute that unconstitutionally infringed on the Supreme Court's authority to determine matters of practice and procedure. Id. at 935. The Supreme Court noted that the statute had "been in the status of having been declared

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1363899 (Fla. Apr. 1, 2024)(the ballot summary need not identify the sponsor's view of potential intraconstitutional conflicts because doing so "ignores the limits on the sponsor's own authority" and would be "speculative and unwarranted"). When acting in its adjudicatory (as opposed to advisory) function in the context of an extraordinary writ proceeding, the Court will take up intraconstitutional conflicts as part of a single-subject rule analysis, but to secure that analysis such a proceeding must of course be actually filed. See Fine v. Firestone, 448 So. 2d 984 (Fla. 1984) ("In summary, we find that the extraordinary writ of mandamus is a proper means for resolving the strictly legal issue" involved when considering constitutional conflicts); cf. Advisory Op. to Attorney General Re: Limiting Gov't Interference With Abortion, 2024 WL 1363899, at *9 n.3 (Fla. Apr. 1, 2024) (acknowledging "tension in the case law" regarding ambiguity in the legal effect of a proposed amendment and declining to address potential intraconstitutional conflicts arguably created by a proposed amendment because the unsettled nature of the issue would be speculative on the part of the amendment's sponsor); but see Advisory Op. to Attorney General Re: Limiting Gov't Interference With Abortion, 2024 WL 1363899, at *15 (Fla. Apr. 1, 2024) (Grosshans, J.) (dissenting from advisory opinion that failed to address conflicts within the Florida Constitution that may arise from the adoption of a proposed amendment).

unconstitutional for five years without the issue having come to this Court for approval or rejection after the analysis of the Fourth District." Id. at 936.

Explaining that "[g]enerally, the Legislature is empowered to enact substantive law while this Court has the authority to enact procedural law," the Court framed the question as whether the statute at issue was an impermissible encroachment on the Court's rule-making authority. Id. Although it held that the answer was "yes" as to the particular statute before the Court in Massey, it also recognized that "[o]f course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail." Id. at 937.

The majority in Massey noted that "[i]f a statute is clearly substantive and 'operates in an area of legitimate legislative concern,' this Court would not hold that it constitutes an unconstitutional encroachment on the judicial branch" but "where a statute does *not* convey substantive rights, the procedural aspects of the statute cannot be deemed 'incidental,' and that statute is unconstitutional." Id. Additionally, Massey noted that to the extent that even a substantive statute has procedural aspects, if it "conflicts with or interferes with the procedural mechanisms of the court system, those requirements are unconstitutional." Id.

Application of these principles, Massey noted, meant that a statute that created a condition precedent to maintaining a cause of action against a liability insurer and precluded a noninsured person from filing suit against an insurance company before it secured a judgment against the insured was not a violation of the separation of powers because, although it had "an

impact on the procedural issue of joinder of parties," it "primarily created substantive law," and "regulation and supervision of insurance" was an area of traditional involvement by the Legislature and the statute operated in an area of "legitimate legislative concern." Id. (citing VanBibber v. Hartford Accident & Indem. Ins. Co., 439 So. 2d 880, 883 (Fla. 1983)). In contrast, Massey cited Knealing v. Puleo, 675 So. 2d 593 (Fla. 1996), where the Legislature enacted a statute that altered procedural portions of another statute that the Supreme Court had incorporated into Rule 1.442 of the Florida Rules of Civil Procedure. Id. at 938.

Even if it were the most recent proclamation on this point, and it is not, Massey is distinguishable in important ways from this case. First, it in some sense turned on a point that does not exist with the Statute at bar, in that the statute Massey found to be unconstitutional because it was procedural had "portions" that created procedures that fell "completely to the absolute discretion of the courts" and the majority could not "conclude that a statute establishes or defines a substantive right where it allows courts, by the express terms of the statute, to unilaterally alter those 'rights.'" Id. at 940. Second, the statute in Massey "conflicted with the procedural mechanisms that [had] been clearly established by this Court through our rules of procedure." Id. Indeed, the Legislature expressly acknowledged that aspects of the statute in Massey might be declared as an encroachment on the Florida Supreme Court's authority, and had "declare[d] its intent that any such provision be construed as a request for a rule change." Id. at 942 (citing Ch. 99-225, § 35, Laws of Fla.). Over vigorous dissent, the majority also referred to legislative history that cautioned that the courts might construe that statute to be unconstitutional. Id. In the case at bar, Plaintiff has not shown how the Statute conflicts with any existing rule of civil procedure.

Furthermore, it is the dissent in Massey that seems to more closely align with the modern Court's approach. In the dissent, Justice Cantero (joined by Justice Bell), explained his view that when determining if a statute impermissibly intrudes on the Florida Supreme Court's rule-making authority, the pertinent issue is "whether the statute provides for, or conditions, a substantive right (which is within the Legislature's authority) or whether it merely establishes a procedure for enforcing a right (which is within our authority)" and Justice Cantero concluded that "[t]he fair answer is that it does both." Id. at 943 (Cantero, J., dissenting). Because the statute at issue was necessary to implement substantive law and because it did not conflict with existing rules, the dissent argued that it was constitutional. Id. In the dissent's view, "[t]he placement of a condition on a right in a different statute from the one creating [that right] does not render it procedural" and "[t]he mere presence of procedural aspects in a primarily substantive statute will not render a statute unconstitutional where they are 'minimal' and 'are intended to implement the substantive provisions of the law.'" Id. at 945, 947 (citing multiple examples of cases in which the Court rejected constitutional challenges when procedural provisions were intertwined with substantive rights and where procedural aspects were intended to implement the substantive provisions of the law). The dissent further noted the requirement that "we 'assume that the Legislature intended to enact an effective law.'" Id. at 946 (citing A.B.A. Indus., Inc. v. City of Pinellas Park, 366 So. 2d 761, 763 (Fla. 1979)). Concluding that the statute in Massey was not purely procedural, the dissent distinguished it from those cases where the Supreme Court had found procedural statutes unconstitutional and argued that "[i]t is only where the procedural aspects of a statute conflict with a rule promulgated by this Court that we have found them unconstitutional." Id. at 948-49 (citing Looney v. State, 803 So. 2d 656, 676 (Fla. 2001) as an example of the Court's precedent rejecting a challenge to a statute

governing the admissibility of victim impact evidence "where it did not conflict with an existing rule of procedure"). Because the statute did not conflict with any rules of procedure, Justice Cantero argued that the "minimal procedural aspect" did not render it unconstitutional. Id. at 949. He further argued that the majority had not cited any authority permitting the Court "to override substantive law by procedural rule" and argued that "[j]ust as we must readily assert our authority to adopt court procedure, we must respect the Legislature's constitutional prerogative to enact substantive law." Id. at 950.

In Estate of McCall v. U.S., 134 So. 3d 894 (Fla. 2014), the Florida Supreme Court declined to answer a question certified by the United States Court of Appeals for the Eleventh Circuit about whether a statute impermissibly intruded on the Supreme Court's rule-making authority, since the majority concluded that the statute did not pass constitutional muster on other grounds. Id. at 914 (majority of the Florida Supreme Court concluding that the Legislature was wrong that a medical malpractice crisis existed). In (another) vigorous dissent—this time authored by Justice Polston and joined by Justice Canady—a minority of the Court rejected the idea that the Supreme Court precedent supported the Court's engagement in a *de novo* evaluation of legislative policy findings and, more salient to the case at bar, articulated a rationale that seems to more squarely align with the current Court's majority. See id. at 931 n.13. Justice Polston argued for the rejection of the contention that the cap on noneconomic damages violated the separation of powers. Id. at 937 (Polston, J., dissenting). Because the statutory cap on noneconomic damages "addresse[d] the substantive rights of parties with regard to the recovery of damages," any procedural aspects of the statute were sufficiently tied to substantive law and moreover related to the Legislature's policy role under the Florida Constitution. Id. (citing Smith v. Dep't of Ins., 507 So. 2d 1080, 1092 (Fla. 1987)).

In Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014), the Florida Supreme Court considered whether the Timely Justice Act of 2013, which was meant to reduce delays in capital cases, was *inter alia* an unconstitutional infringement upon the Court's rule-making function. Id. at 536. Petitioners alleged that section 922.052, Florida Statutes, infringed on the Supreme Court's rule-making powers by creating a time requirement for issuance of a warrant of execution. Id. at 538. Distinguishing that statute from another that it had declared unconstitutional in a different case in which "statutory modifications directly and substantially altered the procedural rules adopted by this Court," the Court determined that section 922.052 "merely addresse[d] matters relating to the issuance of a warrant of execution." Id. at 539. Because the statute addressed "an executive function" (issuance of the warrant for execution) and did "not directly change, alter, or abolish any procedural rules of this Court," there was no violation of the separation of powers. Id. Moreover, the statute did not restrict or regulate the procedural mechanisms of the judicial process because it did not alter the timelines of capital proceedings or establish deadlines. Id. Finally, the Court recognized that the Legislature could exercise its legislative powers to direct the Clerk of Court to certify to the Governor when a capital defendant has completed requisite postconviction proceedings even though the judicial branch is "charged with the constitutional responsibility to oversee and direct the Clerk." Id. at 541. In this way, Abdool highlights the difference between impermissible job-sharing (a consolidation of power in a single branch) and permissible coordinate work (two branches exercise their own discrete constitutional powers in a manner that is in some sense side-by-side).

The shift from the 1973-era view of the Court's rule-making authority towards the modern view is perhaps most visible in the Supreme Court's adoption of the Daubert standard. In Delisle v. Crane Co., 258 So. 3d 1219 (Fla. 2018), the Court nodded to its tendency to adopt

rules of evidence "to the extent they are procedural" "to avoid the issue of whether the Evidence Code is substantive in nature and therefor within the province of the Legislature or procedural in nature and therefore within the province of this Court." Id. at 1224. That decision, rendered in October of 2018, recognized that until 2000, the "working arrangement between the Legislature and the Florida Supreme Court remained intact" but in In re Amendments to the Florida Evidence Code, 782 So. 2d 339 (Fla. 2000) the Supreme Court "for the first time declined to adopt, to the extent they were procedural, amendments to section 90.903, Florida Statutes (1997)" and determined that the revised statute was an unconstitutional infringement on a defendant's right to confront witnesses. Id. Although since that time "we have only rarely declined to adopt a statutory revision to the Evidence Code" the Court rejected the Legislature's effort to adopt Daubert and cease the application of Frye to expert testimony because the amendment was "written . . . to overrule this Court's decision" in another case. Id. at 1225. The majority examined the statutory provision of the Evidence Code at issue, section 90.602, Florida Statutes, determined that it was "not substantive," and then recognized that "consideration of the constitutionality of the amendment does not end with our determination that the provision was procedural. For this Court to determine that the amendment is unconstitutional, it must also conflict with a rule of this Court." Id. at 1229. The Court then pronounced that "[a] procedural rule of this Court may be pronounced in case law," and "[w]hile the Legislature purports to have pronounced public policy in overturning Marsh[v. Valyou, 911 So. 2d 543 (Fla. 2007)]," the rule in Marsh "was a procedural rule of this Court that the Legislature could not repeal by simple majority." Id. After reaffirming that the Frye standard was the appropriate test in Florida's courts, not Daubert, the Supreme Court noted that Frye was "inapplicable to the vast majority of cases because it applies only when experts render an opinion that is based upon new or novel

scientific techniques," and because the case at bar involved medical causation testimony that was not new or novel or subject to a Frye analysis, the trial judge correctly declined to apply Frye. Id. at 1230. In dissent, Justice Canady—joined by Justices Polston and Lawson—argued that the majority lacked jurisdiction to decide DeLisle and furthermore took up an issue that was not raised below. Id. at 1236-37.

Less than six months after DeLisle was decided, and after the composition of the Florida Supreme Court was changed by the retirement of three of its long-time members (including the author of DeLisle), the Florida Supreme Court adopted the Daubert standard "in accordance with this Court's exclusive rule-making authority" "to the extent it is procedural." In re Amendments to the Florida Evidence Code, 278 So. 3d 551, 554 (Fla. 2019). Justice Lawson's concurring opinion recognized the Court's constitutional authority to make rules, which seems to suggest that it was his view that the Daubert amendment was procedural (carrying perhaps added significance here) and "note[d] that this Court routinely adopts evidence rules 'to the extent that they are procedural'—without deciding whether they are procedural." Id. "This practical approach makes sense because it conforms our rules of evidence to the Code and avoids the uncertainty that would otherwise be created by years of litigation over the substantive/procedural issue. So long as the Legislature has adopted the provision, which was done here, no separation of powers concerns can flow from our decision to simply adopt the provision to the extent that it is procedural and thereby avoid the uncertainty and attendant costs that we would impose on parties by continued litigation of the issue." Id. at 556-57.

Justice Lawson's analysis is consistent with the idea that the modern Supreme Court has shown reluctance to invalidate procedural statutes that might reflect in some manner the types of policy judgments that belong to the Legislature. Id. (referring repeatedly to Florida's separation

of powers in art. II, § 3 as "strict" but finding that the challenged statute was "not unconstitutional on its face as violative of separation of powers principles."); Citizens for Strong Schools, Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127, 137-42 (Fla. 2019) (citing Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996))(rejecting invitation "to not only intrude into the Legislature's appropriation's power . . . but also to inject itself into education policy making and oversight."); Id. at 143 (Canady, J., concurring) ("The manifest goal of the Petitioners . . is to put the educational funding and educational policy firmly under the control of the judiciary" yet "[t]here is no reason to believe that the judiciary is competent to make these complex and difficult policy choices. And there is every reason to believe that arrogating such policy choices to the judiciary would do great violence to the separation of powers established in our Constitution" because the "capaciously vague terms" in the Constitutional amendment at issue "cannot be understood to have wrought a revolution in the separation of powers."); see also id. at 145 ("Here this Court properly turns aside the quest of the Petitioners and the dissenters for 'the assumption of a continuing judicial review of substantive political judgments entrusted expressly to' a coordinate branch of government. This result is required by the fundamental structure of our constitutional system and the very nature of judicial power.").

To the extent that the cases can be synthesized, they generally lend themselves to the following conclusions. Despite an initially-strict construction of Article V, Section 2(a) from the 1973-era Court, the modern Court seems to have increasingly shared Means' view about that text. Specifically, the precedent suggests a view that the rule-making amendment was a grant of power to the Supreme Court but not necessarily a corresponding deduction of power from the Legislature; for that reason, Article V, section 2(a) does not prohibit the legislative branch from

making procedural statutes in furtherance of substantive law or public policy. See also, Chiles, 589 So. 2d at 267 (discussing the possibility of coordinate effort between branches notwithstanding Florida's strict separation of powers). The status seems to be that the Florida Supreme Court makes rules for practice and procedure in the courts and the Legislature continues to pass substantive law. While the Legislature may not pass a "purely procedural" law, the Legislature did not lose its authority to pass statutes that could rationally be classified as procedural so long as the procedural aspects of the law are secondary or adjacent to substantive law and public policy. The state of the precedent leaves open the possibility that a statue could be invalidated under Article V, section 2(a) if it were purely procedural and untethered to any matter of substantive law or expression of public policy, but the likelihood of this is diminished for the reasons Means noted: it is hard to envision the Legislature taking interest in a matter of practice and procedure in the courts if that matter had nothing to do with substantive law or the public policy of the State of Florida.

The process of rule-making as between the Florida Rules of Civil Procedure and the Florida Evidence Code is consistent with Justice Canady's observation, while he was on the Second District, about the distinction between procedural rules that exist in isolation as opposed to procedural statutes that are intertwined with substantive law. Cartwright v. Florida, 870 So. 2d 152, 156-62 & nn. 3-4 (Fla. 2d DCA 2004)(Canady, J.). In Cartwright, the petitioner appealed an order civilly committing him for treatment as a sexually violent predator under the Jimmy Ryce Act. Id. at 154. Among other things, Cartwright argued that provisions of the Act that permitted admission of hearsay evidence was unconstitutional as a violation of separation of powers. Id. at 154-55. Recognizing that Cartwright's separation of powers argument was a "complex issue," seemingly without endorsing the State's view that the challenged provision was

purely substantive then-Judge Canady "conclude[d] that the challenged statutory provision should be upheld because it is 'intimately related to' and 'intertwined with' the substantive provisions of the Ryce Act." Id. at 157. All of this seems consistent with the fact that Florida's separation of powers assigns all legislative power to the Legislature. Legislative power is a policy-making function.

Where does all of this leave Section 768.0427(2) and (3)? Although these two sections are procedural in nature for the reasons discussed in the Prior Orders, both seem procedural in furtherance of both the substantive law of damages and the Legislature's policy judgment. Evidently the Legislature is concerned that the conduct of jury trials in personal injury cases has resulted in jury verdicts that are not the product of a fair presentation of evidence on a component of the negligence cause of action that is substantive law: that the proper measure of a plaintiff's damages includes the *reasonable* value of past medical expenses. The Adams Order demonstrates the potential for massive discrepancies between the billed amount of past medical expenses and the amount a provider who treated under a letter of protection may routinely accept as payment in full. The scenarios presented in the Adams Order and the Grisar Order could very well be the kinds of things that animated the Legislature's policy choices and motivated these enactments. For the reasons articulated in the Arrietta Order, Section 768.0427 (2) and (3) are not in conflict with the state of the law at the time HB 837 became effective. Because these sections do not clearly conflict with a rule of practice or procedure promulgated by the Florida Supreme Court and appear to be in furtherance of the substantive law and public policy that is within the Legislature's purview, Section 768.0427(2) and (3) are not unconstitutional.

It should also be noted that the Supreme Court has, in promulgating the Rules of Civil Procedure, been clear that procedural rules "shall be construed to secure the *just*, speedy, and

inexpensive determination of every action." Rule 1.010, Fla. R. Civ. P. (emphasis added). The authors' comments to that rule recognize that "procedural law is not an end in itself; it is only the means to an end and that end is the proper administration of the substantive law." Id. at cmt. Ultimately, "[p]rocedural law fulfills its purpose if the substantive law is thereby administered in a 'just speedy, and inexpensive manner.'" Id. Where the Legislature enacts a law with procedural aspects that are clearly intended to administer the substantive law in a "just" manner, this may be an additional worthy consideration in the analysis.

F. A Matter for Future Briefing: Constitutionality of a Statute Ordinarily is Challenged by Way of a Declaratory Judgment Action in Circuit Court.

As a final note, there is reason to question whether a case like this one is the vehicle the Florida Supreme Court intends for the constitutionality of a statute to be addressed. See West Flagler Associates, Ltd., et al. v. DeSantis, No. SC2023-1333 (Mar. 21, 2024) (Sasso, J.) (rejecting a challenge to the substantive constitutionality of a law by way of a petition for writ of *quo warranto*); Chiles v. Phelps, 714 So. 2d 453, 457 (Fla. 1998) ("We have stated that under ordinary circumstances, the constitutionality of a statute should be challenged by way of a declaratory judgment action in circuit court."); Chiles v. Children A, B, C, D, E, and F, 589 So. 2d at 263 ("This Court has held that to 'entertain a declaratory action regarding a statute's validity there must be a bona fide need for such a declaration based on present, ascertainable facts or the court lacks jurisdiction to render declaratory relief.'"); Abdool v. Bondi, 141 So. 3d 529, 537 (Fla. 2014)("Ordinarily, the constitutionality of a legislative act should be challenged by filing an action for declaratory judgment in circuit court."). West Flagler was before the Court on a petition for writ of *quo warranto* and the thrust of that decision was that *quo warranto* "is not, and has never been, the proper vehicle to obtain a declaration as to the substantive

constitutionality of an enacted law." Id. In isolation, an argument could be made that perhaps the Court was narrowly focused on the impropriety of the *quo warranto* vehicle, as opposed to stating an exclusive means by which a statute's constitutionality may be challenged. But Chiles says otherwise. Chiles makes clear that while "under ordinary circumstances, the constitutionality of a statute should be challenged by way of a declaratory judgment action in circuit court," the Court will also take jurisdiction in an original proceeding "where the functions of government would be adversely affected absent an immediate determination by this Court." 714 So. 2d 453; see also Planned Parenthood of Southwest & Central Fla. v. State, 2024 WL 1363525, at *5 (Fla. Apr. 1, 2024)(recognizing that cases involving the review of the constitutionality of a statute and the interpretation of a provision of the Florida Constitution call on the Florida Supreme Court to conduct a *de novo* review).

Plaintiff has not chosen the means by which our highest court has directed that challenges like this one should occur. What is the natural consequence of not following the Court's direction on how to raise constitutional challenges? Here we are, over a year after the Statute was passed. Not only are the trial courts still left to work through these issues without the benefit of an appellate ruling, but also there is no end in sight. If this case is the vehicle in which the Florida Supreme Court first addresses the constitutionality of the Statute, it will take many years before it winds itself to Tallahassee.

The Statute was passed fourteen months ago. The Sapp Order was entered a year ago, less than two months after the Statute took effect. Sapp involved a case with the same Plaintiff's firm. This case was pending in the same division as Sapp at the time that decision was made. Now, perhaps no one talks about these things. Perhaps Mr. Unsworth's counsel was unaware that this Court and other judges in the State have applied the procedural aspects of the Statute to

pending cases that early. But in any event, since the Sapp Order this Court has made the same decision again and again. Exhibit A reflects some (not all) of the orders entered on this issue, but note how many of those orders involved the same law firm.[24] If Plaintiff wished to challenge the constitutionality of applying the Statute to his case, he could have filed a declaratory judgment action on the day the Statute took effect, at the time the Sapp Order was entered, at the time the Torres-Aponte Order was issued, when the Grisar Order was issued, when Defendant filed the Defense Motion in this case, when the Defense Motion was set for hearing, or really any other point up until now. A declaratory judgment, presumably, would have required no discovery at all and would have moved quickly to the Second District. If the Second District declared the Statute to be invalid, the Florida Supreme Court would have mandatory jurisdiction. The Florida Supreme Court has discretionary jurisdiction if the Second District expressly declares the Statute valid. Think about how much more efficient it would have been in the administration of justice if someone had done this, instead of continually proceeding as these cases have to date. It's natural to wonder why plaintiffs in all of these cases haven't sought the swiftest possible resolution of this issue by the Florida Supreme Court.

What our highest court has told us about how statutes should be challenged makes sense in light of the Court's direction that procedural statutes should be presumed constitutional and applied to pending cases. If challenges to the constitutionality of a statute proceed as directed in Chiles and West Flagler, will that be a vehicle that moves faster through the lower courts on its way to the Florida Supreme Court? With any understanding about case management and the ordinary flow of litigation, how could the answer to that question possibly be no? It may seem that this aspect of the analysis should have come sooner, but this matter is raised at the end

[24] The same decision has been made in cases that do not involve Plaintiff's law firm, but Plaintiff's law firm appears to have more cases of this type in this division than any other law firm.

because it was not a basis on which the Court decided this case. The reason for this is that neither party raised or had the opportunity to brief the issue, leaving this as a question better addressed in another case should one arise.

VIII. Conclusion

The Florida Supreme Court has written an answer key for lower courts to employ in determining temporal reach direction. There's a nice thing about an answer key: once you've seen it, you have a sense of how your paper is likely to be graded. Plaintiff's Motion largely urges this Court to recede from the Prior Rulings because 95% of other judges have gone a different way. Examination of every temporal reach case Plaintiff cites, though, merely underscores the existence of the answer key and the consistency with which the Supreme Court has directed lower courts to apply new procedural or remedial statutes to pending cases. To abandon precedent—including 100% of the temporal reach cases cited in Plaintiff's Motion—defies logic. 95% is perfectly respectable, but why not shoot for 100%?

It would have been helpful if Plaintiff's second argument about the constitutionality of Section 768.0427(2) and (3) had been supported by a single case. Certainly, Plaintiff's failure to cite case law on the constitutionality point leaves open the possibility that the Court's own research, which by necessity was conducted in a brief window of time, is incomplete. However, the limited analysis that could be performed by the Court supports a finding that the Statute is not unconstitutional as a violation of Article V, section 2(a) of the Florida Constitution. This finding is supported by the text, context, and history of Article V, section 2(a) and the Supreme Court's precedent over time. That precedent lends itself to the conclusion that there is no violation of Article V, section 2(a) because subsections (2) and (3) of Section 768.0427, Florida Statutes do not conflict with a procedural rule promulgated by the Florida Supreme Court; are a

codification of precedent; are procedural or remedial but in furtherance of substantive law and public policy that is within the Legislature's power; and reflect the Legislature's policy judgment that there is no reason to distinguish between different sources of payment. Even though it still employs the term "exclusive" in reference to the rule-making power, the modern Supreme Court does not seem to share the 1973-era Court's view that the rule-making power is "exclusive" in the sense that legislative activity in that space is foreclosed. Moreover, the Statute is consistent with the history in Florida of the Legislature's involvement in rule-making both immediately before and immediately after ratification of Article V, section 2(a).

This ruling is confined to the temporal reach of Section 768.0427(2) and (3), Florida Statutes and the argument that it would violate Florida's separation of powers to apply those sections, to the extent they are procedural. Plaintiff requested a pre-emptive ruling as to all other aspects of HB 837, but nothing here should be construed as extending any further than explicitly addressed.

Accordingly, it is now

ORDERED and **ADJUDGED** that:

1. Defendant's Motion is **GRANTED**;
2. Plaintiff's Motion is **DENIED**;
3. Section 768.0427(2) and (3), Florida Statutes is **NOT UNCONSTITUTIONAL** under Florida's separation of powers under Article V, section 2(a) of the Florida Constitution;
4. Within five days of the date of this Order, Defense counsel is **DIRECTED** to propose an order in each of the other cases set for hearing on April 29, 2024. The proposed order for each case should attach and incorporate this Order; and

5. Within ten (10) days of the date of this Order, Defense counsel is **DIRECTED** to order the complete transcript of the April 29, 2024 hearing and file that transcript under a Notice of Filing in each case heard in that consolidated proceeding. If this Order is appealed, a copy of the April 29, 2024 hearing transcript must be included in the complete record on appeal.

DONE and **ORDERED** in Chambers in Tampa, Hillsborough County, Florida on this 7th day of May, 2024.

Electronically Conformed 5/8/2024
Anne-Leigh Gaylord Moe

ANNE-LEIGH GAYLORD MOE
Circuit Court Judge

Electronic copies provided through JAWS

Composite
Exhibit A
Filed Under Separate Docket Entry