IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 50-2024-CA-001426-XXXA-MB

CHERYL L. BRIESEMEISTER,

Plaintiff,

vs.

G.L. HOMES OF FLORIDA CORPORATION,
A Florida Profit Corporation, and BOCA RATON
ASSOCIATES VIII, LLLP, a Florida
Limited Partnership,

Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

THIS CAUSE comes before the court upon the Plaintiff's Motion to Strike Defendants, G.L. HOMES OF FLORIDA CORPORATION's and BOCA RATON ASSOCIATES VIII, LLLP's, Affirmative Defenses. The Motion was heard on June 6, 2024. Andrew Harris, Esq. presented the argument on behalf of the Plaintiff; and John Chiocca, Esq. presented the argument on behalf of the Defendants.

I. Factual Background:

This is a trip and fall incident which occurred on March 11, 2023, wherein it is alleged Plaintiff sustained injuries. HB 837 (and specifically Section 768.81(6), Florida Statutes and Section 768.0427, Florida Statutes) (hereinafter, collectively referred to as "the HB 837 Amendments"), were enacted and became effective thirteen days later on March 24, 2023. Plaintiff filed her lawsuit after March 24, 2023.

II. Issues Presented:

Plaintiff seeks to strike two of Defendants' Affirmative Defenses, which Plaintiff asserts cannot be applied to the facts of this case, to wit:

Affirmative Defense #2 which states:

> The Plaintiff was more than 50 percent at fault for the subject incident and any consequential injuries sustained. Accordingly, pursuant to § 768.81, Florida Statutes, as amended by HB 837/SB 236 (2023) ("Florida's Tort Reform" law), Plaintiff may not recover any damages from the Defendants.

Affirmative Defense #13, which states:

> Plaintiff's claimed medical expenses are not reasonable. Plaintiff is only permitted to claim and recover those expenses appropriate and recoverable under Florida's Tort Reform law and section 768.0427, Florida Statutes.

At the outset, for clarity's sake, it is important to note what is **not** at issue. This is not a question of whether the HB 837 Amendments apply to cases filed by March 24, 2023 or thereafter. Indeed, the HB 837 Amendments specifically state that the legislation shall apply to causes of action filed after March 24, 2023.

Instead, the question presented to this Court is whether the HB 837 Amendments can apply to the facts of this case, when the Plaintiff's cause of action **accrued by** March 24, 2023, **but the lawsuit was filed after March 24, 2023**.

This Court applies the well-settled two-part test that governs a court's consideration of whether a statute can apply to a cause of action that accrued by the statute's enactment. For the reasons set forth herein, this Court finds that the HB 837 Amendments cannot be applied to the facts of this case. Thus, these two affirmative defenses are hereby stricken for failing to state valid legal defenses.

III. Analysis:

A. Is this a Prospective or Retroactive Application

The first question is whether application of the HB 837 Amendments to this case is prospective or retroactive. During the hearing of this matter, Defendants argued that the HB 837 Amendments are, by their own terms, prospective in nature.

It is true that the HB 837 Amendments state, "Note.—B. Section 30, ch. 2023-15, "except as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act. [March 24, 2023]." However, Defendants seek to apply the statutes retroactively to Plaintiff's cause of action which accrued **before** HB 837's enactment. This Court finds that Defendants' application of the HB 837 Amendments to this cause of action is a retroactive application.

B. Can the HB 837 Amendments Be Retroactively Applied To This Case That Accrued By March 24, 2023, But Was Filed On a Later Date?

Having determined that the Defendants' attempted application of the HB 837 Amendments is retroactive, the question is then whether the HB 837 Amendments **can be** applied retroactively to Plaintiff's claims which accrued by HB 837's enactment.

The Florida Supreme Court has mandated a two-part test to determine whether a statute can be applied retroactively. First, a court must determine whether the legislature intended for the statute to apply retroactively. Second, if the legislature expresses a clear intention to apply the statute retroactively, a court must then determine whether it would be unconstitutional to apply the statute that way. *E.g.*, *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 130 (Fla. 2011); *Menendez v. Progressive Express Ins. Co., Inc*., 35 So. 3d 873, 877 (Fla. 2010).

As the Fourth District has additionally explained, *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418, 425 (Fla. 4th DCA 2014) (all emphases added):

> Even in the absence of legislative indication that a statute should apply retroactively, **procedural and remedial statutes** "should be applied to pending cases in order to fully effectuate the legislation's intended

> purpose." Arrow Air, Inc. v. Walsh, 645 So.2d 422, 424 (Fla.1994) (citation omitted). The general rule against retroactive application of statutes does not apply to procedural or remedial changes. See Smiley, 966 So.2d at 334 (citing City of Lakeland v. Catinella, 129 So.2d 133, 136 (Fla.1961)); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55, 61 (Fla.1995) ("The general rule is that a **substantive statute** will not operate retrospectively absent clear legislative intent to the contrary, but that **a procedural or remedial statute** is to operate retrospectively.

As the Florida Supreme Court noted in *Menendez*, "even where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Id*. "The statute must pass both parts of this test to be applied retroactively." *Fitchner v. LifeSouth Cmty. Blood Ctrs.*, 88 So. 3d 269, 279 (Fla. 1st DCA 2012); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 280 (1994) (noting a statute has retroactive effect, thereby causing due process concerns, when it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new penalties with respect to transactions already completed).

Turning to the facts of this case, the parties agree that the Legislature intended for the HB 837 Amendments to be retroactive – the Plaintiff filed her lawsuit after March 24, 2023. However, the retroactive application in this case would be unconstitutional, and as such, the second prong of the two-part test cannot be satisfied. That is because the HB 837 Amendments in this case would impair Plaintiff's vested cause of action which accrued on March 11, 2023 prior to the enactment of HB 837.

The United States Supreme Court has clearly held that a cause of action is "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Similarly, the Florida Supreme Court has explained that "[o]nce the defense of the statute of limitations has accrued, it

is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest." *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994); *see also R.A.M. of South Fla., Inc. v. WCI Communities, Inc.,* 869 So. 2d 1210, 1220 (Fla. 2d DCA 2004) ("[O]nce a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right.").

Article I, section 2 of the Florida Constitution guarantees to all persons the right to acquire, possess, and protect property. Section 9 of the same article provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Florida Courts will not apply a statute retroactively if it "impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995); *see also McCord v. Smith*, 43 So. 2d 704, 708–09 (Fla. 1949) (noting that a retroactive provision of legislation is invalid where it adversely affects or destroys vested rights).

C. <u>Application of Section 768.81(6) to this Case:</u>

Taking Defendants' affirmative defenses one by one, we turn to whether Section 768.81(6) can apply to this case where the alleged negligent incident happened by March 24, 2023. With this statutory change, the Legislature modified Florida's comparative fault scheme so that if a plaintiff is more than 50% at fault for causing his or her injuries, that plaintiff is barred from recovery.[1] This provision is clearly a substantive change that would impede the plaintiffs vested rights if applied to this case. It effectively bars a plaintiff's case even where the defendant is 49.99% at fault, a substantial change in the substantive law.

[1] Section 768.81(6) now provides, in pertinent part: "(6) **Greater percentage of fault**.--In a negligence action to which this section applies, any party found to be greater than 50 percent at fault for his or her own harm may not recover any damages." (emphasis in statute).

The Defendants claim that the Florida Supreme Court in *Hoffman v. Jones*, 280 So. 2d 431 (Fla 1973) held that a change to Florida's apportionment of fault scheme is a "procedural" change that can apply to claims that have already accrued. Of course, this Court would be bound by the precedent of this decision if the Supreme Court had reached this holding. However, the Supreme Court did **not** address the question presented here, whether a legislative change to Florida's allocation scheme, that can result in a plaintiff having no recovery, can be retroactively applied to a cause of action that accrued.

In *Hoffman v. Jones*, the Supreme Court, in its judicial role to assess Florida's **common law**, modified Florida law to change it from a contributory negligence system that completely barred a plaintiff's claims where a plaintiff's own negligence contributed to his or her loss, to a system of comparative fault, where if a plaintiff's own negligence contributed to his or her loss, a plaintiff's recovery would be reduced by the percentage of his or her own negligence.

The Defendants cite *Hoffman v. Jones* for the proposition that a change of the comparative fault scheme is "procedural" in nature. That is not an accurate assessment of that opinion. At the time of that opinion, the Florida Supreme Court acknowledged that there were thousands of pending cases that would be affected by this change. 280 So. 2d at 440. The Court, referencing how trial courts would resolve problems at the trial level with the new holding, stated that trial judges "are granted broad discretion in adopting **such procedure** as may accomplish the objectives and purposes expressed in this opinion." *Id*. (emphasis added).

This is not a statement that the **judicial** change to comparative fault is "procedural." In fact, that sentence is the single use of the word "procedure" in the entire Opinion. There is no discussion anywhere in the Opinion that an analysis on retroactivity and due process concerns was considered, let alone addressed. There also was no discussion as to whether the Court's

common law change of comparative fault was procedural or substantive in nature; **and there was no discussion as to whether the parties even raised the due process or constitutional concerns**.

Since the Supreme Court was not considering a **statutory** change, the decision could not have been precedent on the question presented in this case. As the Supreme Court has explained, *Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020):

> Any statement of law in a judicial opinion that is not a holding is dictum. State v. Yule, 905 So. 2d 251, 259 n.10 (Fla. 2d DCA 2005) (Canady, J., specially concurring) (quoting Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 1065 (2005)). "A holding consists of 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." Id

There is no statement of law in *Hoffman v. Jones* on the question presented here, and thus no holding that could be precedent now. *Hoffman v. Jones* is not precedent where, as here, a statutory change to comparative negligence is in play because a court's "power to bind is limited to the issue that is before [it]." See Bryan A. Garner et. al, The Law of Judicial Precedent § 6, at 89 & n. 31 (quoting United States v. Rubin, 609 F. 2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J. concurring)).

Furthermore, the Defendants overlook that the Supreme Court's decision to have its **common-law** change to Florida law is consistent with the general approach the Court takes to its **judicial decisions** that alter Florida law. This is known as the "pipeline" doctrine. Under this doctrine, an appellate court must generally apply the law prevailing at the time of the decision, assuming an argument was properly preserved in the lower court. *E.g., Clay v. Prudential Ins. Co.*, 670 So. 2d 1153, 1154-55 (Fla. 4th DCA 1996); *and see North Broward v. Kalitan*, 174 So. 3d 403, 412 (Fla. 4th DCA 2015) (explaining that Florida's "pipeline rule" "requires that

disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision, rather than the law in effect at the time the judgment appealed was rendered.") (citation omitted), *affirmed by* 219 So. 3d 49 (Fla. 2017); *and see State Farm v. Stylianoudakis*, 946 So. 2d 647, 649 (Fla. 4th DCA 2007):

> An appellate court generally is required to apply the law in effect at the time of its decision. See Fla. Patient's Comp. Fund v. Von Stetina, 474 So.2d 783 (Fla.1985); Lowe v. Price, 437 So.2d 142, 144 (Fla.1983); Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla.1978). In general, "a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to have prospective effect only." Brackenridge v. Ametek, Inc., 517 So.2d 667, 668-69 (Fla.1987).

In *Clay v. Prudential*, for example, the Fourth District explained that the Supreme Court in *Hoffman v. Jones* had applied this doctrine regarding its judicial change to Florida's common law. *See Clay*, 670 So. 2d at 155. How the Florida Supreme Court handles its judicial changes to Florida law has no bearing on how the judicial branch examines a statutory change to Florida law.

Finally, because there is no indication that the defendant in *Hoffman v. Jones* argued that taking away an immunity defense would impair its vested rights, this is yet another reason the decision cannot be precedent on the question presented here, where the Plaintiff has raised and preserved the argument that the statutory application of a complete immunity defense will impair her vested rights. *See*, *e.g.*,*:*

- *McKean v. Warburton*, 919 So. 2d 341, 346 (Fla. 2006) ("no decision is authority on any question not raised and considered");
- *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are

not to be considered as having been so decided as to constitute precedents." (citation omitted));

- Bryan A. Garner et al., The Law of Judicial Precedent § 23, at 229 (2016) ("[A] court won't normally accept as binding precedent a point that was passed by in silence, either because the litigants never brought it up or because the court found no need to discuss it.").
- *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1227 (Fla. 2004) (explaining that statements from previous Supreme Court cases are nonbinding unless the Court "consider[ed] and expressly address[ed] the precise issue currently before us");

Thus, while the Defendants argue that *Hoffman v. Jones* stands for the proposition that a change in comparative fault law is procedural in nature and not a substantive change, that case cannot be fairly read as precedent that the current **statutory change** to comparative fault is "procedural" as opposed to being "substantive."

The Defendants do not cite any precedent that a statutory change that creates a complete immunity from suit can apply to a cause of action that accrued by the time of the statutory change. In their response to Plaintiff's Motion, the Defendants cited *Kenz v. Miami-Dade County*, 116 So. 3d 461 (Fla. 3d DCA 2013) for the proposition that a change in the transitory substance statute -- which changed the law from not requiring a plaintiff to prove a defendant's notice of the substance, to requiring a plaintiff to prove a defendant's notice of the substance -- was procedural rather than substantive in nature. The Third District held that retroactive application of this amendment was procedural and thus not a violation of the plaintiff's due process rights.

There are two flaws in the Defendants' reliance on this Third District decision. First, this Court is bound to follow the precedent of the Fourth District where it has addressed the same question of law and is in conflict with decisions of other district courts of appeal. The Fourth District specifically rejected the Third District's *Kenz* decision the following year. *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418, 424-26 (Fla. 4th DCA 2014). In *McGruder*, the Fourth District held that the amendment to the transitory substance statute was **substantive**, as it impeded the plaintiff's cause of action and imposed new burdens, and therefore, retroactive application of the amendment would violate the plaintiff's constitutional rights. *Id.* at 425-26 (""[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights." . . . "[Section 768.0755] adds a new element to the claim, creating a new legal obligation and attaching new legal consequences to events that took place before the statute's enactment; therefore, the plaintiff's substantive rights are affected."). *See also Glaze v. Worley*, 157 So. 3d 552, 555–56 (Fla. 1st DCA 2015) (agreeing with the Fourth District's analysis in *McGruder*, and disagreeing with the Third District's analysis in *Kenz*).

Reliance on the statutory change to Florida law in suits involving transitory substances is also misplaced. In enacting section 768.0755, Florida Statutes, the Legislature did not create a complete immunity defense that would eliminate a litigant's right to access to the courts and right to jury trial. Plaintiffs in these transitory substance cases were still able to prevail in these cases, with a business establishment having actual and constructive notice. Moreover, in enacting the statute, the Legislature expressly stated that, "This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises." § 768.0755(2).

In comparison, under Florida's modified fault scheme, a jury's findings will eliminate a plaintiff's cause of action. In the case at hand, Section 768.81(6) unquestionably impedes Plaintiff's cause of action by creating a new threshold for her to gain access to the courthouse steps – and may result in her having the courthouse closed to her. On March 11, 2023, when this fall and alleged negligence happened, Plaintiff could pursue a fall cause of action even if she was over 50% at fault. Thirteen days after her fall, and after her cause of action became a vested right, Plaintiff would now have a new burden if this statute is retroactively applied to her case. The new statute could literally abolish Plaintiff's claim if applied to this case.

At the hearing on this matter, the Defendants cited *Brown & Brown, Inc. v. Gelsomino*, 262 So. 3d 755 (Fla. 4th DCA 2018). In that case, the Fourth District held that an amendment to the joint and several liability aspect of Section 768.81 was procedural, rather than substantive; and therefore, retroactive application to a case that accrued before its enactment was permissible.

That case is readily distinguishable from the current statutory amendment to Section 768.81(6). Importantly, the legislative change in *Brown & Brown* did not prevent a plaintiff from recovery of his or her damages depending on the fact-finder's allocation of fault. Instead, the statutory change meant that a defendant's liability was **limited to** its allocation of fault, rather than expanded to also include the fault of others as well. As the Fourth District explained, "the application of joint and several liability [in the 2011 statutory amendment] "does not affect the amount of damages but rather **how those damages are apportioned among the potentially liable parties**." 262 So. 3d at 760 (emphasis added). In other words, the plaintiff was able to recover damages from all liable parties but limited to a tortfeasor's own allocation of fault and no greater than that.

Here though, the Legislature has done far more than amend Florida's joint and several liability statute to reallocate any liability to a party's own fault. Instead, if the fact finder concludes that the Plaintiff is 50.1% or more at fault, then the Plaintiff recovers nothing at all. A defendant held liable for 49.9% of the Plaintiff's damages owes nothing to the Plaintiff. The statutory change in Section 768.81(6), unlike in *Brown,* "does [] affect the amount of damages" 262 So. 3d at 760. It will operate to deny a plaintiff the recovery of any compensation at all.

Thus, Section 768.81(6) appears to affect a substantive change. The Plaintiff's cause of action accrued thirteen days before HB 837's enactment. The Plaintiff already had a vested right in her cause of action, and application of the new comparative fault law would substantially impair her vested rights, create new obligations, and impose new penalties. As such, this Court cannot apply Section 768.81(6) to the facts of this case.

D. <u>Application of Section 768.0427 to this Case:</u>

Section 768.0427 likewise does not govern claims that accrued by March 24, 2023, like the instant case. The statute impacts far more than provisions related to process and procedure. Subsection (4) changes the "damages that may be recovered by a claimant in a personal injury or wrongful death action for the reasonable and necessary cost or value of medical care." The Legislature then specifically makes clear that not only are a party's medical damages limited to what is admissible in subsection (2), but the damages may not exceed what is set forth in (4)(a), (b), and (c). By impacting the medical damages that cannot just be admitted into evidence, but recovered from the fact-finder, this statute has substantive elements such that it cannot govern this case that accrued on March 11, 2023.

Indeed, these statutory provisions affect the damages a plaintiff may recover for medical care rendered through March 24, 2023, with preexisting decisions made on where to obtain medical care, and any contractual arrangements for that medical care. Applying the statute to

claims that accrued by March 24, 2023 would impair a plaintiff's vested rights in seeking medical care and seeking to recover medical damages from alleged tortfeasors arising from that medical care obtained by March 24, 2023.

Moreover, subsection (3) of the statute would likewise impede Plaintiff's vested rights that accrued by March 24, 2023. This subsection not only requires a plaintiff to disclose a broad category of information, but states these disclosures are "a condition precedent to asserting any claim for medical expenses for treatment rendered under a letter of protection." § 768.0427(3). By imposing these conditions precedent on a party's ability to recover medical damages, the statute clearly has another substantive component. This is especially so for medical care obtained by March 24, 2023, and attorney-client communications by March 24, 2023, communications that were absolutely privileged before HB 837 took effect. But regardless of when the medical care is obtained and if or when there are attorney-client privileged communications, the Plaintiff's cause of action accrued thirteen days before this statute took effect. The change to Florida law cannot govern this case.

Conditions precedent are substantive requirements. *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991); *VanBibber v. Hartford Accident & Indemn. Ins. Co.,* 429 So. 2d 880 (Fla. 1983); accord *Weaver v. Myers*, 229 So. 3d 1118, 1151- 52 (Fla. 2017) (Canady, J., dissenting). The last of those conditions precedent is disclosure of attorney-client communications previously protected by the attorney-client privilege under section 90.502, Florida Statutes. *Worley v. Cent. Fla. Young Men's Christian Ass'n*, 228 So. 3d 18, 20, 24-25 (Fla. 2017). The idea that this portion of the legislation does not impact a plaintiff's vested right to keep communications with counsel confidential is unfounded. Indeed, if a plaintiff had attorney-client communications with an attorney up through March 24, 2023, reasonably believing those were cherished, privileged

communications, that same plaintiff is now required to reveal those communications to recover any medical damages. This clearly creates new legal obligations and imposes new legal consequences and penalties on a plaintiff.

Consider, too, the provisions in subsection (3) regarding Letters of Protection. Injured plaintiffs may have signed written contractual agreements through March 24, 2023, (or at later dates where the alleged negligence happened by March 24, 2023), and were reasonably entitled to rely on those contractual agreements to obtain the necessary medical care. Attorneys may have referred their clients to treating physicians in reliance that these referrals – to physicians they presumably believed would provide the best medical care for their clients – would not be subsequently utilized to limit, if not, eliminate, a plaintiff's ability to recover any medical damages. The Legislature has imposed new legal penalties, consequences that may eliminate a plaintiff's right to recover medical damages, for lawsuits filed after March 24, 2023.

This Court, of course, is not bound to follow any other circuit court decisions. However, one Fifteenth Circuit judge addressed this issue at length, when the Court denied a defendant's motion to compel disclosures in section 768.0427 for a case that accrued by March 24, 2023. Judge Cheeseman concluded that this statute has substantive elements. The Court explained that:

> In the present case, Defendants maintain §768.0427(3), Fla. Stat., does not affect Plaintiff's substantive rights, but merely provides for additional disclosures in her personal injury claim. This contention is belied by the express language of subsection (3), which mandates various disclosures "*as a condition precedent* to asserting any claim for medical expenses for treatment rendered under a letter of protection." Id. (emphasis added by Court). The statute clearly contemplates certain disclosures in the context of a personal injury claim, the absence of which precludes a plaintiff's ability to institute such a claim. Stated differently, Plaintiff's failure to make said disclosures forecloses her right to collect medical expenses provided under a letter of protection. A statute will not operate retroactively if it impairs a vested right or creates new obligations. See *Pembroke*, 137 So. 3d at 425 (quoting *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) ("[T]his

> Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties"). Retroactive application of §768.0427(3), Fla. Stat., would directly impact Plaintiff's rights and obligations in her personal injury claim. Accordingly, the Court declines to retroactively apply §768.0427(3), Fla. Stat., which was enacted after the filing of the above-styled case. Defendant's motion to compel is, therefore, denied.

See Spray v. Hathaway-Ryan & Prog. Sel. Ins. Co., 50-2022-CA-005002-XXXX-MB (Fla. 15th Cir. July 28, 2023), at page 3, denying the defendant's motion to compel, and explaining that the defendant's reliance on the Third District's *Kenz* decision was misplaced in light of the Fourth District's *McGruder* decision.[2] This Court agrees with this reasoning.

Based on the foregoing, Section 768.0427 cannot apply to this case, as the substantive changes to the law impede Plaintiff's rights which vested on March 11, 2023, thirteen days before this statute took effect.

E. <u>This Court Answers The Questions Presented Now, Rather Than Later In This Case.</u>

Finally, the Defendants have suggested this Court can allow these affirmative defenses to be plead now, as these are issues that would only apply at a later trial. Essentially, the Defendants invite this Court to defer addressing the questions presented. In this Court's Order in another case examining the applicability of HB 837 to causes of action that **accrued and were filed by** March 24, 2023, this Court explained that the Legislature always has the authority to have any of its Orders only govern prospective events. Thus, this Court explained it was not

[2] This Court is aware that some Plaintiffs have also raised the argument that if any portions of HB 837 were deemed procedural, only the Florida Supreme Court would have the constitutional authority to implement these procedures. The Plaintiff did not raise this argument in this case, and so this Court does not address it. In any event, as explained above, this Court agrees with the Plaintiff's position these two affirmative defenses address substantive changes to Florida law that cannot govern the Plaintiff's cause of action that accrued by March 24, 2023.

necessary to answer whether the HB 837 changes were substantive or procedural changes in **that case**:

> 11. Thus, while the Defendant contends that both of these statutory provisions are procedural, this Court exercises judicial restraint and declines to reach those issues in this case filed by March 24, 2023. *See, e.g., In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006) ("[W]e have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on non-constitutional grounds."); *PDK Labs., Inc. v. United States Drug Enf't Admin*., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("The cardinal principle of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more – counsels us to go no further.").

See Vandoli v. Williams & State Farm Mut. Auto. Ins. Co., Case No. 2023-CA- 001887-XXXX-MB (Fla. 15th Cir. Nov. 8, 2023), at page 5, ¶ 11.

Here though, where the Plaintiff's cause of action accrued by March 24, 2023, but was filed at a later date, it is necessary to decide more. The question of whether a complete immunity defense now available in Section 768.81(6) may apply to this case is of utmost importance to the parties, even before a trial. The parties' ability to conduct a fruitful mediation in this case may be influenced by this affirmative defense. Discovery may be served in the case to the Plaintiff if this affirmative defense is applicable, regarding those conditions precedent. Additionally, the parties' selection of expert witnesses during discovery may be influenced by the applicability of this affirmative defense

The changes to Section 768.0427 are even more so directly applicable before a trial. As discussed above, there are a series of conditions precedent a plaintiff must present in order to seek medical damages.

Thus, the questions presented are ripe for this Court's consideration now at this stage of this case. It is necessary to address and answer the questions presented, now.

This Court having heard argument of counsel, and being otherwise advised in the premises, it is **ORDERED AND ADJUDGED** as follows:

Plaintiff's Motion is **GRANTED**. Defendants' Affirmative Defenses #2 (Section 768.81(6) and #13 (Section 768.0427) are hereby stricken with prejudice as any further amendment would be futile.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida.

502024CA001426XXXAMB 06/25/2024
Scott Kerner
Circuit Judge

Copies Furnished:

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