O/A 2-22-88

IN THE SUPREME COURT OF FLORIDA



In Re: )

PETITION TO DETERMINE VALIDITY )
OF INITIATIVE TO AMEND ARTICLE I, )
SECTION 21 OF THE FLORIDA )
CONSTITUTION. )
_____ )

NO. 71,701

# BRIEF OF THE FLORIDA COMMITTEE FOR REFORM ANSWERING BRIEF FILED BY ACADEMY OF FLORIDA TRIAL LAWYERS

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### I. The Ballot Statement Describing the Substance of the Amendment is Not Misleading.

#### A. Physical Impairment and Disfigurement Should Not Be Included in the Definition of Noneconomic Damages.

The Academy argues that the ballot description of the substance of the proposed amendment, tracking the amendment's language, is misleading because physical impairment and disfigurement are omitted from the list of noneconomic damages. They say that, although these items are omitted from the list of noneconomic damages in the proposed amendment, they are in the list of noneconomic damages in the Florida standard jury instructions and Section 768.80, Florida Statutes. They say this inconsistency makes both the proposed amendment and the ballot statement misleading because neither discloses that adoption of the amendment would limit recovery for these important elements of noneconomic damages.

The sponsor's decision not to include physical impairment and disfigurement in the amendment's definition of noneconomic damages was deliberate. Contrary to the assertions of the Academy, if physical impairment and disfigurement were included in the definition of noneconomic damages, the definition would be both confusing and misleading.

The damages that flow from physical impairment and disfigurement include both economic and noneconomic damages. Physical impairment and disfigurement are bodily conditions. They may give rise to a claim for damages, but there is nothing

inherent in either physical impairment or disfigurement to indicate the character of the damages they produce. In themselves, physical impairment and disfigurement are neither economic nor noneconomic in character. To the extent these conditions cause an injured person to incur medical and other expenses or lose actual or prospective income, the person suffers economic loss and is entitled to damages to compensate for it. To the extent these conditions produce pain and suffering, inconvenience, mental anguish, loss of capacity to enjoy life, loss of consortium and other similar nonpecuniary effects, the injured person suffers noneconomic loss and is entitled to claim noneconomic damages.

Because both economic damages and noneconomic damages flow from physical impairment and disfigurement, those conditions are not analogous to the other kinds of loss listed in the amendment's definition. The other listed losses are subjective consequences of injury and may result from various conditions, including physical impairment and disfigurement. There is no way to measure these subjective effects in monetary terms. They are, therefore, properly included in the definition of noneconomic loss.

Physical impairment and disfigurement, on the other hand, may produce either economic or noneconomic loss or both. To the extent they produce economic loss, the effects can be measured in monetary terms, and the conditions should not be included in the list of noneconomic losses. To the extent physical impairment

and disfigurement have nonmonetary effects, those effects are all necessarily included in one or more of the noneconomic losses listed in the definition. Including physical impairment and disfigurement in the list would be confusing because it would result in the same items being counted twice. First, as physical impairment and disfigurement and then again in terms of the listed subjective effects of those conditions.

Under the amendment, the noneconomic effects flowing from these conditions would be counted only once in calculating damages. To the extent physical impairment and disfigurement produce noneconomic losses, they would be included in the $100,000 limitation. To the extent they produce economic loss, the amendment would not limit recovery of damages.

The ballot summary accurately discloses that the legal effect of the amendment is to limit damages recoverable on account of the listed subjective effects of bodily injury. To include physical impairment and disfigurement in the list of noneconomic losses would be misleading because it would imply that all damages that flow from them are noneconomic and would be limited. This was not the sponsor's intention, and it would be inconsistent with the plain language and legal effect of the proposed amendment.

B. Alleged Inconsistency with Jury Instructions and Section 768.80, Florida Statutes.

If the Academy is concerned about the possible inconsistency between the amendment and existing law, the answer is simple.

Constitutional amendments frequently change the law. Indeed, that is almost always their purpose. If the amendment is adopted, it will prevail over other definitions of noneconomic damages, but only in respect to the dollar limitation it provides. To the extent changes to Section 768.80 and the jury instructions are required, the Legislature and the Court are perfectly capable of making them.

C. The Ballot Description is Not Defective For Failing to Advise Voters that the Amendment Would be a Proviso to Article I, Section 21, and Would Alter the Historic Judicial Function Under that Section.

The trial lawyers argue that the ballot statement is misleading because it fails to advise electors that what is proposed would be "a proviso to Article I, Section 21, of the Declaration of Rights changing the historic judicial function embraced in the term 'Access to Courts.'" Academy's Brief at 12.

The failure to state explicitly that the amendment would be a proviso is not a defect. The ballot summary advises voters that the proposed amendment will limit recovery of noneconomic damages to $100,000. It accurately describes the amendment's ultimate legal effect. The necessary implication from the ballot description, which any reasonable person can understand, is that the amendment would place a limit of $100,000 on a pre-existing right to collect a greater amount.

There are two answers to the contention that the amendment would change the historic judicial function of courts under Article I, Section 21. The first is that the amendment would not

change the judicial function in any way.[1] The second is that such a statement smacks of the kind of editorializing this Court has condemned. Evans v. Firestone, 457 So.2d 1351, 1355 (Fla. 1984).

The amendment would not change the role of courts any more than an ordinary statutory amendment redefining a cause of action changes the role of courts. The amendment would clearly perform a legislative, rather than judicial, function. Common law causes of action have been developed by courts over the years through the evolutionary process of adjudication. When courts make law in this way, they are engaging in what is fundamentally a legislative activity but they are doing it through the judicial process. This Court has always recognized that the power of the common law for courts to make law is subject to the superior power of the Legislature to overrule their decisions through legislation. No one doubts that when the Legislature enacts a statute modifying the common law, it is performing a legislative function. When, as the proposed amendment would do, the Constitution is amended to modify a common law right, the amendment likewise performs a legislative function.

The function of courts, on the other hand, is to decide individual cases; that is, to apply applicable statutes or constitutional provisions, in light of the facts developed in a

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[1] There is no need to tell voters that Article I, Section 21, is entitled "Access to Courts." Under Article X, Section 12(h), titles and subtitles are not to be used in construing constitutional provisions.

particular case. Changes in the substantive law that modify the rules governing a cause of action do not change the judicial function in the slightest. That function remains as it was to interpret the substantive law and apply it in the context of particular cases.

The proposed amendment would change the substantive rights of parties who suffer bodily injuries by placing a limit on the amount of noneconomic damages they may recover. Under the amendment, courts would have exactly the same function as they have now under Article I, Section 21; that is, they would decide cases and award such damages as are permissible under the proviso.

D. Considerations that Must be Taken into Account in Construing the Statutory Requirement that a Sponsor Prepare the Ballot Summary.

1. Section 101.161, Florida Statutes, Is an Unconstitutional Burden on the Right of Initiative.

Article XI, Section 3, of the Constitution reserves to the people the right to initiate amendments. The only limitation on that right in the Constitution is the requirement that an amendment "shall embrace but one subject and matter directly connected thereto." Evans v. Firestone, 457 So.2d at 1353. Under Section 3, this power may be,

> invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the

> last preceding election in which presidential electors were chosen.

Article XI, Section 3, Florida Constitution.

The Constitution says what must be done to invoke the power of initiative. It does not suggest that a sponsor may be obligated to prepare a statement for the ballot. Furthermore, once the power of initiative is invoked under Section 3, it becomes mandatory to place the proposed amendment on the ballot. Article XI, Section 5(a) requires that:

> A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election . . . (emphasis added)

We do not deny that in most cases, for practical reasons, a ballot summary is desirable; and, we see no reason why the sponsor should not be asked to prepare a first draft. However, since the constitutional right to initiate amendments is not conditioned on the sponsor's preparation of a summary, the Legislature cannot validly restrict the right of initiative by requiring a sponsor to do the work of state officials at its peril; that is, on pain that, if this Court decides there is a mistake in the summary language, access to the ballot is denied. A sponsor fulfills the only condition imposed by the Constitution when it files its petition with the Secretary of State.

Proper application of constitutional principles requires that the Court either declare Section 101.161 invalid as a burden on the right of initiative or require state officials to make

whatever corrections are required to ensure that the amendment is not denied access to the ballot merely because of a defective summary.

2. A Seventy-Five Word Statement of Substance is Not Intended to be a Prospectus.

Section 101.161(1) limits the number of words that may be included in a ballot description to 75. In this case, the description contains 73 words. The Academy does not say the description in the statements sponsor has submitted is inaccurate. They say only that more information should have been included to give voters a deeper understanding of its real effect. It is obvious, however, that there is not much more room to include the material that the Academy says should be provided. They do not suggest what words should be omitted to make room for the information they would add.

The argument that more affirmative information should be included, in effect that the statement should read as if it were a securities prospectusm, misapprehends the purpose of the ballot description. Under the cases, a ballot description should clearly state the amendment's chief purpose without being misleading. Grose v. Firestone, 422 So.2d 303, 305 (Fla. 1982); Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982); Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981, 987 (Fla. 1981); Hill v. Milander, 72 So.2d 796, 798 (Fla. 1954). "Inclusion of all possible effects, however, is not required on

the ballot summary." Grose v. Firestone at 305; see Smathers v. Smith, 338 So.2d 825 (Fla. 1976).

The Academy argues as if the only information voters will ever have about the effect of the amendment is the information included on the ballot sumary. This is obviously untrue. The statement of the substance is not the end of the political process. It is only as small part of it. Article XI, Section 5(b) requires the entire text of the proposed amendment to be published twice in each county twice. Information, pro and con, about the background of an amendment, the changes it will make in the law, its wisdom, and the impact it may have on society and affected individuals can be supplied through the political process. The Federalist Papers demonstrate that political debate is the most valuable vehicle for educating the citizenry on the issues involved in adopting or amending a constitution.

## II. Sections 1 and 2 Involve the Same Subject or, at the Least, they are Directly Related.

The proposed amendment has only one purpose, to limit recovery of noneconomic damages to $100,000. The limitation is clearly stated in Section 1. Section 2 assures that the limitation will be measured in terms of the purchasing power of the dollar on the effective date. This is achieved by providing that the maximum amount recoverable may be adjusted by general law to conform to changes, after the effective date of the amendment, in a consumer price index published by the United States government. Since consumer price indexes have a habit of

changing from time to time, it would have been impractical to identify a particular index in the amendment. To argue that permitting the Legislature to identify the appropriate index injects a new subject or matters not directly related to the limitation or that Section 2 "mixes" noneconomic and economic issues is, frankly, ridiculous. It is difficult to believe the Academy makes this contention with a straight face.

## III. The Severability Clause Only Injects Matter that is Directly Related to the Main Subject.

The Court has spoken to the propriety of severability clauses and given them its approval. Carroll v. Firestone, 497 So.2d 1204, 1206 (Fla. 1986). The fact that the Constitution now enables sponsors to obtain an advisory opinion on the validity of initiative opinions does not change the requirements of Article XI, Section 3. The severability clause does not inject an additional subject or matter not directly related to the single subject of the proposed amendment. Consequently, there is no reason for the Court to revisit its decision in Carroll v. Firestone.

## IV. The Arguments Made by the Academy are Unworthy.

The Constitution preserves the public's right to initiate amendments subject to the requirement that each amendment embrace but a single subject. It also specifies the procedure a sponsor must follow to place an initiative amendment on the ballot. Thus, the Constitution itself represents a determination of how hard the amending process should be. The Court has an obligation

to protect both the right of initiative and the limitations on it. Despite suggestions to the contrary in the Academy's brief, the Court has no duty and nor has it evidenced an inclination to make the amending process artificially difficult or to exercise prior restraint over proposed amendments of which it disapproves.

Statements in the Academy's Brief such as the statement that it has become "an article of [the Court's] faith" to resist what it considers to be "precipitous and spasmodic changes in the organic law"[2] (The Academy's brief at page 6) implicitly accuses the Court of joining the political arena and acting to ensure that proposals it considers unwise will be kept off the ballot. Such statements coupled with the policy arguments contained in the Academy's brief are unworthy of their authors.

It is odd to observe the philosophical inconsistency between the arguments the Academy is using to keep the proposed amendment off the ballot and their contrary views on efforts of defendants to keep cases from the jury. In both cases, an adversary process refines the issues before the persons who have the decisionmaking responsibility under organic law render their verdict. The Academy seems unwilling to trust voters to decide whether the proposed amendment would be unwise or precipitous. Using

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[2] The amendment at issue here is not one that would make such a change. Before the Court's decision in Smith v. Department of Insurance, 507 So.2d 180 (Fla. 1987), the constitutional validity of a cap on noneconomic damages was considered sufficiently arguable to be enacted by the Legislature.

hypertechnical arguments that would have been embarrassing to even a medieval lawyer, they ask the Court to enter a summary judgment taking the decision from the people.

## CONCLUSION

The Committee for Liability Reform respectfully submits that the arguments submitted on behalf of the Academy of Florida Trial Lawyers should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 15th day of February, 1988, via first class United States mail upon the following: Honorable Robert A. Butterworth, Attorney General, State of Florida Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 and Robert P. Smith, Jr., Esquire and David L. Powell, Esquire, Post Office Box 6526, Tallahassee, Florida 32314.

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