IN THE SUPREME COURT OF FLORIDA

In Re:)
)
PETITION TO DETERMINE VALIDITY) No. 71,701
OF INITIATIVE TO AMEND ARTICLE I,)
SECTION 21 OF THE FLORIDA
CONSTITUTION.)
)

SUPPLEMENTAL
BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS
OPPOSING VALIDATION OF THE PROPOSED INITIATIVE AND REFERENDUM

On advisory opinion request by the Attorney General
Sponsored by "Florida Committee for Liability Reform"

ROBERT P. SMITH JR.
DAVID L. POWELL
420 First Florida Bank Building
Post Office Box 6526
Tallahassee, Florida 32314

Attorneys for Academy of Florida
Trial Lawyers

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Why should the Justices read a Supplemental Brief?

The Justices having already conferenced and assigned the case, they will wonder about the need to trouble over another brief two days after argument in an "expedited" proceeding. If informing the Court's judgment is the purpose of briefing - beyond the courtesy of "being heard" - this may well be futile.

It will not be futile if the Court sees that the debacle justifying this submission is characteristic of the advisory opinion process. Systemic dangers in that process, we have said, is one of three good practical reasons [1] in addition to

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[1] The others are (2) the more representative branches of government, the Executive (specifically the Secretary of State and the Attorney General) and Legislative, have been content with mechanical roles in regulating the flow of initiatives; and (3) the price of admission to initiative review has plummeted in consequence of the advisory opinion process; it costs a Sponsor only the effort needed to coax 32,000 signatures from 4,000,000 electors to find out how demanding or permissive the Court's standards will be in regard to the Sponsor's proposal. See our main brief p. 3 fn. 3.

good doctrinal reasons for now articulating a meaningful "strict scrutiny" standard for drafting and judicially reviewing proposed initiatives.

On Monday we were astonished when counsel for the Sponsor alluded in argument to having filed two briefs. We'd been served only one, a reply filed February 15 to our brief filed February 8. Yesterday morning when we inquired, Mr. White gave us a copy of the Sponsor's other brief, filed February 8 and served only on the Attorney General.

On February 4 we had filed and served a notice identifying ourselves and our "interested party." But the Court's order of January 11 did not in terms require that "interested parties" serve each other copies of their briefs due February 8. His confusion over that no doubt accounts for the Sponsor's attorney not sending us or telling us about his brief filed that day. Not knowing about that brief of course deprived us of any chance to reply to it as scheduled on February 15. The Sponsor, to whom we sent a copy of our February 8 brief, had and exercised the privilege of reply by February 15.

The Court needs "strict scrutiny" to protect its own sound judgment in such topsy-turvy proceedings. Amending a Constitution is serious business. No part of that process, certainly not a constitutionally-mandated advisory opinion process for proposed initiatives, ought to be so vulnerable to such vicissitudes as this.

The Court may be disposed to treat the episode as an aberration curable by better logistics next time. We predict

rather that "next time" will simply display a different systemic fault. (Though the order of oral argument "this time" would have been more predictable and more significant to the Court by an announced "strict scrutiny" standard, at least there was no poorly rehearsed mass chorale of argument such as the Court entertained last Summer on the Services Tax.)

The faults are systemic. Sponsor's reply brief filed February 18 asserted for the first time, to our surprise, that the "clear and unambigous language" requirement of Section 101.161 is unconstitutional. The Court's interlocutory order scheduling briefing made no provision for any reply to that. There wasn't time, anyway. Yet that argument plainly troubled at least one Justice at argument. Is that statute now to be under a cloud, with no request by the Court for briefing? Can such a question be decided in an "advisory opinion"?

These things simply wouldn't happen in the ordinary processes of this Court. The Court has recognized that a reliable "filtering" process prevents "precipitous and spasmodic changes in organic law" in Legislature-sponsored referendums. Adams v. Gunter, 238 So.2d 824, 832 (Fla. 1970) (Thornal, J., concurring); Fine v. Firestone, 448 So.2d 984, 988 (Fla. 1984). The Court needs now to recognize its own need for a reliable "filtering" device.

A well-articulated strict scrutiny standard would place a heavy risk of nonpersuasion squarely upon the Sponsor. The Sponsor is the one person present in such a proceeding who had the clear opportunity to make the subject proposal as luminously

compliant with constitutional and statutory standards as the proposal approved in In re: Advisory Opinion to the Attorney General. English -- the Official Language of Florida, ___ So.2d ___, 13 FLW 67 (Feb. 4, 1988).

"Strict scrutiny" for single-subject compliance means this: that no provision in an initiative proposal is "directly connected" with its central purpose unless that provision is demonstrably necessary to complete a central idea that is otherwise incomplete, as by attaching appropriation language to State revenue-raising schemes; [2] or is necessary to implement a central purpose that is otherwise without effect, as by declaring what branch shall implement a stated central purpose that is not self-executing. In re: Advisory Opinion to the Attorney General. English, supra, approving "(b) The Legislature shall have the power to enforce this section by appropriate legislation."

With that elaboration, the Court will have given clear meaning to the "natural and logical unity of purpose" required by the single-subject rule. Evans v. Firestone, 457 So.2d 1351, 1360 (Fla. 1984) (concurring op.). And the dangerous vicissitudes of "precipitous and spasmodic changes" through hasty citizen initiatives, as surely as those of hasty and flaccid advisory opinion processes, will fade from their present significance.

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[2] Carroll v. Firestone, 497 So.2d 1204 (Fla. 1986); Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (Fla. 1978).

The deceptive or ambiguous ballot language.

Attempting to explain why "physical impairment" and "disfigurement" were omitted from the ballot language, and why nevertheless its proposed ballot language "clearly and unambiguously" states the substance and intended effect of the proposal, we understood counsel for the Sponsor to argue that the omission assures that the economic subelements of physical impairment and disfigurement will not be subject to the cap.

The only economic subelements the Sponsored mentioned, ostensibly to be preserved intact by not mentioning "physical impairment" and "disfigurement" as among the "other non-pecuniary losses" capped, are out of pocket expenses ("for surgery on one's disfigured face," someone suggested at argument) and lost earnings or lost earning capacity.

Sponsor's argument unfortunately exemplifies the deception or ambiguity of this ballot language, mirroring the same deception and ambiguity in the text.

Capping or not capping and expressing or not expressing a cap on "physical impairment" and "disfigurement" damages doesn't affect medical or rehabilitation expenses or lost earnings or earning capacity in the slightest. Such expenses and lost earnings or lost earning capacity are classed as "economic damages" - unaffected by anything one does to "noneconomic damages" - by everybody who ever defined "economic damages" specifically or by exclusion from a "noneconomic damages" definition. Compare § 768.80 with § 768.77, Fla. Stat. (1987); compare Sec. 49 (3) of CS for SB 6E passed in recent

special session, defining "Economic damages", with Sec. 49 (7), defining "Noneconomic damages" (p. 86 of enrolled bill filed with Court Feb. 19, 1988); see also Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665, 679 fn. 13 (1985), quoting and discussing Cal. Civ. Code § 3333.2(a).

The Sponsor's reply brief, as we understand it, says that physical impairment and disfigurement amount to nothing more than pain and suffering, inconvenience, mental anguish, loss of capacity to enjoy life, and loss of consortium, to the extent not measurable in medical and other expenses, or in lost earnings or earning capacity. So the reason for not troubling the electors with knowledge that "physical impairment" and "disfigurement" are elements within the cap is that those elements either aren't capped or the electors already know the extent to which they are.

The Sponsor simply assumes its problem away. That physical impairment and disfigurement are not subsumed in and redundant of other "noneconomic" damages, would seem to be proved by the trouble the Florida legislature has gone to, and the California legislature and others as well, in making their lists. Our Standard Jury Instructions do the same. The reason physical impairment and disfigurement are separate subcategories of damages is that - to take obvious cases - a quadruple amputee or brain-damaged child suffers damages so described which are not otherwise expressed in a "noneconomic" litany omitting those elements; and not reflected either in reasonably predictable expenses and lost earning capacity.

The Sponsor's ballot language therefore takes pains not to say what the Sponsor intends the proposal will accomplish if adopted: to cap noneconomic damages that are associated with bodily impairment and disfigurement. Since public understanding of the Sponsor's purpose is the objective, it is significant to us that a highly intelligent and attentive reporter, in Tuesday's story about Monday's argument before the Court, couldn't give a coherent report of the Sponsor's explaination about why "physical impairment" and "disfigurement" were omitted from the damages capped. 3/

The full answer to Justice Overton's single-subject question.

Justice Overton asked how in our opinion the text of an initiative might properly be written as a single-subject to cap noneconomic damages at $100,000 and preserve that purchasing power in future years.

The "strict scrutiny" test for "natural and logical unity of purpose" is that no provision in an initiative proposal is "directly connected" with its central purpose unless that provision is demonstrably necessary to complete a central idea that is otherwise incomplete; or is necessary to implement a central purpose that is otherwise without effect.

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[3] Florida Times-Union, Feb. 23, 1988, p. B-2, col. 6:

> Adams said disfigurement and bodily impairment were not included as noneconomic losses since they caused economic losses, such as lost wages and medical expenses.
>
> Juries could still compensate for noneconomic losses from disfigurement and bodily impairment, even though they were not on the list, Adams said.

Therefore, a single-subject proposal capping noneconomic damages would either place the choice and responsibility wholly in the electorate or place it wholly in the Legislature within parameters set by the electorate, thusly:

Responsibility in the electorate version. The text of the proposal would read:

> Article I, Section 21 of the Constitution is amended by adding the following:
>
> provided, however, that personal injury damages awarded to any person for pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other noneconomic losses shall not exceed $100,000 or its equivalent by changes in the cost of living after this amendment becomes effective; and provided further that the Legislature annually shall implement this provision by general law applicable to causes of action thereafter arising, determining from price indices of the United States Government the effect on such limitation by increase or decrease in the cost of living since the effective date of this amendment.

Responsibility in the Legislature version. The text of the proposal would be:

> Article I, Section 21 of the Constitution is amended by adding the following:
>
> provided, however, that the Legislature shall have power by general law to limit personal injury damages awardable to any person for pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for the enjoyment of life, and other noneconomic losses, to $100,000 or its equivalent at the time of such legislation as affected by increase or decrease in the cost of living since this provision became effective; and provided further, in the event such legislation is enacted, the Legislature then and annually thereafter shall by general law applicable to causes of action thereafter arising determine from price indices of the United States Government the effect on such limitation by increase or decrease in the cost of living since the effective date of this amendment.

Each of these alternatives would survive "strict scrutiny." The first is complete in itself; its immediate effect requires no legislative implementation; its later effect requires implementation, and the electorate requires that annual implementation. The second proposal, whose purpose is not itself to effect radical change but to withdraw (within parameters) constitutional restrictions on deliberative legislative power, Smith v. Department of Insurance, 507 So.2d 35 (Fla. 1977), is complete in another sense. The framework of legislative decision is complete; but it requires legislative decision.

The single-subject integrity of each version is that it wholly encompasses either the electorate's autonomous power or the Legislature's power as enabled by the electorate to fix and dictate adjustments to the cap.

By contrast, the present proposal offers the electorate the hard choice first, in Section One; then Section Two assures the wary elector that the Legislature "may" thereafter undo any error the electors make to the extent raising or lowering the cap may be judicially rationalized as "conform[ing] to changes that occur after the effective date . . . in a consumer price index published by the United States Government."

"Strict scruntiny" prevents this tantalizing of the elector. It prevents that dodging of the choice and places responsibility for the decision wholly in one place or another.

To secure the benefits of this discipline it is not necessary that the Sponsor sacrifice its preference for a

$100,000 cap set by the electors, subject to permissive change within vague or precise limits by the Legislature. All the Sponsor needs to do is list the proposals separately, get the requisite signatures on both, and put both provisions on the ballot. In that event, the electors will know that they must vote on each proposal separately, without the real or imagined comfort of assuming that both proposals rise or fall together. That, after all, is classic log-rolling.

Respectfully submitted,

(Robert P. Smith, Jr.)
David L. Powell
420 First Florida Bank Building
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

Attorneys for Academy of Florida Trial Lawyers.

Certificate of service

I CERTIFY that a copy hereof was mailed this February 24, 1988, to Hon. Robert Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301; to Frederick B. Karl, Esq., 101 North Monroe Street, 950 Monroe-Park Tower, Tallahassee, Florida 32301; and to William H. Adams, III, Esq., 900 Barnett Bank Building, 100 Laura Street, Jacksonville, Florida 32202.

Attorney