IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,210

UNIVERSITY OF MIAMI, d/b/a
THE UNIVERSITY OF MIAMI
SCHOOL OF MEDICINE, etc.,

Appellant,

vs.

PATRICIA ECHARTE, a minor, by
and through her parents and
natural guardians, NORMA
ECHARTE and PEDRO ECHARTE,
and NORMA ECHARTE and PEDRO
ECHARTE, individually,

Appellees.

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, THIRD DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from a decision of the Third District Court of Appeal determining the unconstitutionality of §§766.207 & 766.209, Fla. Stat. (1989), which statutes, inter alia, placed caps on non-economic damages in medical malpractice cases at the option of defendants. The trial court declared that the statutes violated seven constitutional provisions: access to courts; trial by jury; equal protection; substantive due process; procedural due process; single subject requirement; and taking without payment of just compensation. On appeal, the Third District affirmed, reaching only the access to courts argument.

The Academy of Florida Trial Lawyers ("Academy") supports the position of the Appellees in all respects, but writes only on one issue, in an effort to spotlight a suggested principle of statutory review which will, if enunciated by this Court, give guidance to the legislature in its efforts toward the passage of sustainable laws, and will aid the lower courts in future cases.

The Academy disagrees with one fundamental aspect of the Appellant's Statement of the Case and of the Facts, and disagrees with an underlying theme throughout the Appellant's Brief based thereon. The area of disagreement concerns Appellant's insistence that the legislature has determined that there is no available alternative to the cap on damages under the subject statutory scheme. In light of that disagreement, the Academy offers this version of that matter, pursuant to Fla. R. App. P. 9.210(c).

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In the Appellant's effort to satisfy the showing required for a finding of constitutionality of the subject statutes under the applicable authorities--that there were no alternative legislative solutions available--Appellant has read into the legislative record one very important finding which simply is not there. On page 7 of its Initial Brief, for example, Appellant states as follows:

> [T]he legislature determined that a comprehensive solution, which includes a cap on non-economic damages and a contingent arbitration procedure, is required.

(Id.)(emphasis added).

Appellant's assertion of a legislative finding of no available alternative continues throughout its Brief, in such unqualified language as this: "The legislature determined that there was no alternative to the contingent cap on non-economic damages." (Initial Brief at 11)(emphasis added). On the next page, Appellant refers to "the Florida Legislature's findings . . . that there are no alternative solutions [other than the statutes under review]." (Initial Brief at 12)(emphasis added). See also id. at 14, where Appellant refers to "the Florida Legislature's determination . . . that only a damage cap can effectively address this crisis"; accord., e.g., id. at 18: "the legislature expressed the public necessity for the statutes at issue . . . ." (emphasis added).

In truth, there were no such legislative findings expressed in the record. As held by the Third District in the decision under review: "The legislature did not expressly find that no alternative method existed . . . ." University of Miami v.

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Echarte, No. 90-982, LEXIS 5495, at 14 (Fla. 3d DCA 1991). (emphasis added). Furthermore, there was not so much as a finding by the Academic Task Force to that effect which was generally adopted by the legislature.

The sources cited for Appellant's assertions concerning the legislature's findings do not refer to materials prepared by or adopted by the legislature. On page seven of its Initial Brief, Appellant refers to a letter from Professor Gifford to Mr. Robert Henderson of the House Insurance Committee, which states in pertinent part: "If there is an alternative method of meeting the public necessity, our exhaustive consideration of possibilities did not find it." Assuming for the sake of discussion[1] that the letter is properly before this Court, the letter contains not the findings of the legislature, nor even those of the Academic Task Force, but the opinion of its author.

Appellant asserts in various places throughout its Initial Brief that the Academic Task Force made a finding of no alternative means which rises to the level of a finding on the issue by the legislature. For instance, on page nineteen of its Brief, the Appellant argues that "the Third District erroneously rejected the Task Force's findings that there was no alternative method of meeting the public necessity." (emphasis added). The Academy disagrees that the record supports a determination that there were such findings by the Task Force, but, more importantly, disagrees

[1]The Academy notes that Appellees objected to judicial notice being taken of the subject letter.

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that such findings--if made--were adopted by the legislature itself.

First, the Task Force's statement concerning alternatives discusses five specific alternatives being explored, and then concludes: "Of these alternatives, only a cap on non-economic damages would reduce malpractice paid claims appreciably . . . ." See Echarte, supra, slip op. at 14 (emphasis added). Thus, the Task Force itself did not conclude that the cap was the only available alternative from any source, merely the only available alternative from the five therein enumerated.

In any event, the legislature did not adopt the Task Force's findings regarding alternatives, whatever would have been the effect of those findings if it had adopted them. Ch. 88-1, Laws of Florida, reflects in pertinent part that "the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice," but there is no expression of the legislative adoption of those findings[2]. (emphasis added).

In other respects, the Academy accepts the version of the Statement of the Case and of the Facts set forth by the Appellees, being the parties whose position the Academy supports herein.

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[2]The Academy will examine the above language of the legislature in more detail in the argument section.

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SUMMARY OF THE ARGUMENT

The decision of the Third District must be affirmed because, in addition to all of the other grounds upon which the trial court based its judgment, the statutes in question unconstitutionally deny to the Plaintiff/Appellee her right of access to the courts. There are two well-defined circumstances in which the legislature may abrogate such a constitutional right, but such exceptions are not present in the case at bar.

First, there has been no express legislative showing of both overpowering public necessity for the damages cap, and the absence of any less onerous alternative. Such findings cannot be presumed from the mere enactment of a statute, in light of the public policy interests in protecting individual rights, and the ease with which the legislature can (and does) express such findings where they are actually made. The Academy agrees with the Third District that not even the reports of the Academic Task Force support a conclusion that that body found no available alternative. However, even if such a finding on the part of the Task Force was assumedly made, such finding would not render the subject statutes constitutional, for the finding was not incorporated by the legislature.

On the alternative remedy/commensurate benefit element, the Academy adopts the approaches of the Third District and of the Appellees that there is no real remedy or benefit to the Plaintiff from the scheme, but only benefit to the Defendant in the lowered exposure to damages from its fault. The Academy simply adds the

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following: In a nutshell the Appellant argues that the cap on damages inures to the benefit of Plaintiffs in that it makes it more likely that negligent doctors and hospitals will admit liability. Such an argument falls under its own weight when taken to its logical extreme that: the lower the damages, the more likely the admission of liability, and, hence, the greater the benefit to the plaintiff. Therefore, under such analysis, a damages cap of ten or twenty thousand dollars is more supportable as against constitutional attack that would be the present cap. Such is not the law and should not be.

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ARGUMENT

THE CAP ON NON-ECONOMIC DAMAGES UNCONSTITUTIONALLY DEPRIVED PLAINTIFF OF HER RIGHT OF ACCESS TO THE COURTS, IN THAT THE LEGISLATURE NEITHER FOUND THE ABSENCE OF ALTERNATIVE METHODS NOR PROVIDED ANY REASONABLE ALTERNATIVE REMEDY OR SOME COMMENSURATE BENEFIT

Article I, §21, Fla. Const. precludes the legislature under most circumstances from abolishing common law rights of recovery, providing as follows: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." This Court, starting with Kluger v. White, 281 So. 2d 1 (Fla. 1973), has established two exceptions to that "access-to-courts" provision, at least one of which must be present in order for legislation impairing such rights to withstand constitutional scrutiny. Those exceptions are laws "(1) providing a reasonable alternative remedy or commensurate benefit, or (2) [laws passed upon a] legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity." Smith v. Dept. of Insurance, 507 So. 2d 1080 at 1088 (Fla. 1987)(emphasis in original). Neither exception is present in the case at bar.

The Academy will address the second exception first, and concentrate on the aspect of that exception which requires that the legislature establish that no alternative method exists of meeting the public necessity. This is not to say that the Academy agrees that a showing of overpowering public necessity has been made, but

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the Academy will adopt the grounds and authorities set forth in the Third District's decision and will defer to the Appellee to argue that aspect of the case.

In overview of this "no alternative" aspect of the second Kluger exception, it is the position of the Academy that a simple test exists by which the courts should review legislation under "access-to-courts" analysis, which test also will provide clear guidance for the legislature to use in its enactment of laws which otherwise would be constitutionally defective. That test is this: if there is no available alternative which would meet the public's needs without impinging on individuals' constitutional rights, the legislature must say so expressly and unequivocally or the statute cannot be upheld as against an access-to-courts attack.

Such an express legislative finding was not made in connection with the subject statutes, as noted by the Third District: "The legislature did not expressly find that no alternative method existed . . . ." University of Miami v. Echarte, No. 90-982, LEXIS 5495, at 14 (Fla. 3d DCA 1991).

The closest thing to a finding from the legislature on the subject of the suitability of its enactment falls far short of a finding of no available alternative, as follows:

> WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and
>
> WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic

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legislative action . . . .

Chapter 88-1, Laws of Florida (Special "E" Session) (amended and re-enacted Ch. 88-277, Laws of Florida).

Such generalizations of legislative intent as quoted above fall far short of findings as to the necessity for the specific sections under review here, especially in light of the fact that the majority of the fifty-two sections of Ch. 88-277 (all of which combined seemingly make up the referenced "immediate and dramatic legislative action") deal with matters other than damage caps, such as with the prevention of malpractice, discipline, and procedures. There is no legislative finding of the necessity of <u>any</u> of those enactments, much less as to the constitutionally defective ones.

In order for there to have been a finding of no alternative expressed in the above-quoted Preamble to the subject legislation, additional language would be required. For example, the following may have sufficed:

> WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated [<u>only</u>] by the adoption of [<u>the following</u>] comprehensive legislatively enacted reforms . . . .

(bracketing and underlining added for illustration).

There is no reason why the legislature cannot adhere to such a standard of express findings, as it has utilized in the past, such as with Ch. 90-401, Preamble, 1990 Laws of Florida, which states: "The legislature finds that the reforms contained in this

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act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system . . . ." (emphasis added). The Academy submits that the legislature's proven ability to make such an express finding evidences its lack of a finding in connection with other laws.

Appellant implicitly recognizes the insufficiency of the express language of the legislature itself to set forth the needed finding of no available alternative, where it urges that "the Third District erroneously rejected the Task Force's findings that there was no alternative method of meeting the public necessity." (Initial Brief at 19)(emphasis added). While Appellant goes on to quote from the Task Force's language and a disputed letter to the House Insurance Committee, Appellant's insistence that the Florida legislature itself made a finding of no alternative methods is belied by the absence from Appellant's Brief of quoted legislative language.

The Academy disagrees that the record supports a determination that there were any findings by the Task Force of no alternative methods. The Task Force's partially-quoted statement concerning alternatives discusses five specific alternatives being explored, and then concludes: "Of these alternatives, only a cap on non-economic damages would reduce malpractice paid claims appreciably . . . ." (emphasis added). Thus, the Task Force itself did not conclude that the cap was the only available alternative from any source, merely the only available alternative of the five therein enumerated. The Third District expressly considered and rejected

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the Task Force's statement as meeting the requirement of an express finding, holding as follows: "That qualified finding does not satisfy the Kluger test." University of Miami v. Echarte, supra, at 14.

However, more importantly, the Academy submits that such any such finding on the part of the Task Force alone--if any had been made--would be insufficient to meet the "access-to-courts" test applicable to the present case, for there was no adoption of the Task Force's findings on that subject by the legislature. It should not be sufficient that there was some evidence before the legislature which, if it had been accepted, would support a finding of no alternative.

The issue should not be framed so as to allow a party seeking to uphold a suspect statute to have a presumption that such a finding was made, for the burden should be on the proponent of a statute which impairs an existing right to establish that "the legislature has shown an overpowering public necessity for this prohibitory provision, and an absence of less onerous alternatives." See Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979)(emphasis added). Were statutes to be supportable on simply the hypothetical theories of what the legislature might have found in light of the available evidence, then preservation of important constitutional rights would never be possible where the legislature remained silent on its findings. Those rights are too dear to be presumed-away, and the requirement of a clear expression of findings in support of those rights'

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impairment is no great burden to impose.

Very briefly on the first Kluger prong of an alternative remedy or commensurate benefit, the Academy adopts and incorporates the discussion and authorities set forth in the Third District's opinion, as well as those in Appellees' Brief. Additionally, the Academy submits that there is no quid pro quo to a plaintiff from a statute which permits a defendant to choose to admit liability, for defendants always have had the ability to admit or contest liability as they see fit. Likewise, there is no benefit conferred by a statute which permits the parties to a lawsuit to voluntarily agree to arbitration, for litigants have long had that power to submit their disputes to arbitration. Neither of those asserted benefits are "conferred" by the statutes in question, because the statute does not mandate that they occur but leaves the decision solely in the hand of the defendant.

The argument is made from those in Defendant's camp that the benefit conferred by the statute is the increased likelihood of an admission of liability because of the damages cap. The fallacy of that argument becomes apparent when one considers that a still lower cap would make such an admission of liability even more likely. A damages cap of $2,500 might make a liability admission ten times more likely than would a cap of $250,000. However, even if an admission of liability were a virtual certainty in a given case (such as where all damages were capped at ten or twenty thousand dollars, for example), no one could contend seriously that the degree of benefit to a plaintiff was directly and inversely

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proportionate to the amount of damages recoverable. It will be a strange, strange world when "logic" tells us that the lower the cap on damages, the greater the benefit conferred on a plaintiff. There has been no showing of any alternative remedy or commensurate benefit from the subject statute, for there is no such benefit. The judgment below is correct and should be affirmed.

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CONCLUSION

WHEREFORE, Appellants having failed to demonstrate that the legislature either 1) found overpowering public necessity and the absence of any available alternative to impairing Plaintiff's right to access to the courts, or 2) that the statutory scheme provided an alternative remedy or reasonably commensurate benefit in the place of the abolition of Plaintiff's rights, the Third District correctly determined that the statutes in question were unconstitutional and the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by mail, upon Michael L. Friedman, Esq. and Steven E. Stark, Esq., FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., 11th Floor Courthouse Center, 175 N.W. 1st Avenue, Miami, FL 33128-1835; Joel D. Eaton, Esq., PODHURST, ORSECK, JOSEFSBURG, EATON, MEADOW, OLIN & PERWIN, P.A., Suite 800 City National Bank Building, 25 West Flagler Street, Miami, FL 33130; Neal Roth, Esq., GROSSMAN & ROTH, P.A., Grand Bay Plaza, PH-1, 2665 South Bayshore Drive, Miami, FL 33133; Debra Snow, Esq., STEPHENS, LYNN, KLEIN & McNICHOLAS, One Datran Center, Suite 1800, 9100 South Dadeland Boulevard, Miami, FL 33156; Jim Tribble, Esq., BLACKWELL & WALKER, P.A., 2400 Amerifirst Building, One Southeast Third Avenue, Miami, FL 33131; and Louis Hubener, Esq., OFFICE OF THE ATTORNEY GENERAL, Department of Legal Affairs, Suite 1502 The Capitol, Tallahassee, FL 32399-1050; Julian Clarkson, Esq., HOLLAND & KNIGHT, Post Office Drawer 810, Tallahassee, FL 32302; David W. Spicer, Esq., BOBO, SPICER, CITOLI & FULFORD, NCNB Tower, Suite 910, 1555 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401-2363; Jeffrey White, Esq., Association of Trial Lawyers of America, 1050 31st Street NW, Washington, DC 20007 on this, the 29th day of October, 1991.

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