IN THE SUPREME COURT OF FLORIDA

Case No. 78,210

On Appeal From The District Court Of Appeal

Third District of Florida

UNIVERSITY OF MIAMI, d/b/a
THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE,
a Florida corporation,

Appellant,

vs.

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

Appellees.

BRIEF OF AMICUS CURIAE PHYSICIANS PROTECTIVE TRUST FUND IN SUPPORT OF APPELLANT

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INTRODUCTION

PHYSICIANS PROTECTIVE TRUST FUND (PPTF) files this amicus curiae brief with leave of the Court and supports the position of the appellant, UNIVERSITY OF MIAMI.

PPTF insures health care providers against medical malpractice claims and, in such capacity, is presently involved in an appeal to the Fourth District Court of Appeal[1] presenting the same legal issue as the one addressed in this case.

STATEMENT OF THE CASE AND FACTS

PPTF, as amicus curiae, adopts the statement of the case and facts as presented in the appellant's brief.

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[1] Perry R. Lloyd III, M.D., v. Gus Branchesi, etc., Case No. 91-01299 (consolidated with Case No. 91-01263).

SUMMARY OF THE ARGUMENT

The challenged arbitration statutes provide a reasonable trade off to an injured plaintiff in exchange for the cap imposed on noneconomic damages. This is all that is constitutionally required under this Court's decisions in the Smith and Lasky cases.

This Court's recent opinion and decision in Martinez v. Scanlan requires reversal of the lower courts in the present case.

The other constitutional challenges asserted by plaintiffs are equally meritless. Each has previously been rejected by one or more decisions of this Court.

ARGUMENT

THE CHALLENGED STATUTES PROVIDE BOTH A REASONABLE ALTERNATIVE AND COMMENSURATE BENEFITS. THE LOWER COURTS' ADJUDICATION OF UNCONSTITUTIONALITY SHOULD BE REVERSED.

A. The challenged statutes were enacted as a matter of overriding public necessity to resolve a financial crisis in the medical liability insurance industry.

The substantive arguments made in this brief can best be understood after a review of the legislative findings supporting the statutes at issue.

The preamble to Chapter 88-1 recited the following findings:

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses, and
>
> WHEREAS, the people of Florida are concerned with the increased cost of litigation and the need for a review of the tort and insurance laws, and
>
> WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced, and
>
> WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily

measured on a monetary basis or reflect ultimate monetary loss, and

WHEREAS, the Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions, recognizing that such noneconomic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than the tortfeasor alone, and

WHEREAS, the Legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the State of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

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 legislative action....

Another finding that bears upon the issues presented here is to be found in Section 56 of the Act, dealing in part with the cap upon noneconomic damages:

(4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:

(a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident. The Legislature expressly

> finds that such conditional limit on non-economic damages is warranted by the claimant's refusal to accept arbitration, and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result of medical negligence.
>
> (Emphasis added.)

Courts are bound to give great weight to legislative determinations of fact such as those quoted above. American Liberty Ins. Co. v. West and Conyers, 491 So.2d 573, 575 (Fla. 2d DCA 1986). Such legislative findings are presumptively correct, State v. Bales, 343 So.2d 9, 11 (Fla. 1977); Smathers v. North St. Lucie Drainage District, 73 So.2d 235, 237 (Fla. 1954), and all reasonable presumptions will be indulged in favor of the constitutionality of a legislative act. Miami Home Milk Producers Assn. v. Milk Control Board, 169 So. 541, 543 (Fla. 1936).

B. Chapter 88-1 Amply Meets the Test Prescribed by this Court in the Smith and Lasky Decisions.

Virtually every legal challenge asserted by plaintiffs in the trial court was also involved in either Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), a case in which this Court construed provisions of the Tort Reform and Insurance Act of 1986, or in Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), a decision upholding the threshold requirement of

the vehicular "no-fault" insurance statute. In tandem, those two decisions have essentially rejected every one of plaintiffs' contentions except the "access to courts" argument, which was accepted by the district court of appeal and consequently warrants extensive discussion here.

The Smith Court invalidated the $450,000 cap on noneconomic damages because it did not meet the criteria earlier specified by the Court in Kluger v. White, 281 So.2d 1 (Fla. 1973). The Court articulated those criteria as follows:

> In Kluger, the legislature attempted to unconstitutionally restrict the right of redress at the bottom of the damages spectrum; here, it attempts to restrict the top of the spectrum. Neither restriction is permissible unless one of the Kluger exceptions is met; i.e., (1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.
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> Appellees urge that Kluger is distinguishable in light of Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), and Chapman v. Dillon, 415 So.2d 12 (Fla. 1982). In Lasky, we upheld a statutory provision which denied recovery for pain and suffering and similar intangible items of damages unless the plaintiff was able to meet a $1,000 medical expense threshold. We did so, however, because the legislature had provided such plaintiffs with an alternative remedy and a commensurate benefit.... Thus, unlike here, the legislation we upheld in Lasky provided a reasonable trade off of the right to sue for the right to recover uncontested benefits under the statutory no-fault insurance scheme and the right not to be sued....

507 So.2d at 1088 (emphasis by the Court).

The present case is like Lasky and unlike Smith. Here, as in Lasky, the legislature has provided a "trade off" that includes an alternative remedy and a commensurate benefit.

The statutes challenged here indisputably provide benefits to an injured plaintiff. By offering to have damages determined by voluntary binding arbitration, a medical malpractice defendant agrees not to contest the issue of negligence as to the care provided. The defendant also agrees to comply with the decision of the arbitration panel; to pay net economic damages and reasonable attorneys' fees; to pay interest on all accrued damages; to pay the fees and costs incurred in the arbitration proceedings; to be jointly and severally liable for all damages assessed; to a procedure for determination of damages in which evidence standards are essentially lower; and to pay a higher interest rate on the arbitration award than the statutory rate on judgments if not paid within 90 days.

These statutory provisions manifestly were intended by the legislature to provide incentives for both plaintiffs and defendants to submit their cases to binding arbitration. Benefits flowing to a plaintiff are provided in exchange for the cap imposed on noneconomic damages. This is a far different situation than that involved in the Smith case, where this Court noted that the limitation on noneconomic damages was an absolute cap and nothing was provided as an alternative remedy or commensurate benefit.

The reasonable trade off provided by the arbitration statutes involved here is similar to the one enacted long ago in

Florida's Worker's Compensation Law, Chapter 17481, Laws of Florida (1935). As the Kluger court noted, the Act

> abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury.

281 So.2d at 4.

This Court has upheld the Worker's Compensation Law against constitutional challenges similar to the ones brought here. Sasso v. RAM Property Management, 452 So.2d 932 (Fla. 1984); Mahoney v. Sears Roebuck & Co., 447 So.2d 1285 (Fla. 1983); Acton v. Fort Lauderdale Hospital, 440 So.2d 1282, 1284 (Fla. 1983). These decisions held that the Worker's Compensation Law was a reasonable alternative to a tort remedy because it provided ample benefits without the delay and uncertainty of litigation.

The statutes involved in the present case are similar to the Worker's Compensation Law. They, like that Law, replace an uncertain, costly and time-consuming tort remedy with a procedure enabling a plaintiff to recover benefits without the burden of having to prove fault.

Because Chapter 88-1 fully complies with the Kluger, Lasky and Smith holdings, this Court should uphold its constitutionality against the challenge asserted by plaintiff.[2]

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[2] A much earlier decision of this Court upheld the complete abolition of a cause of action existing at common law on the basis of overriding public necessity, the other prong of the Kluger-Smith rationale. In Rotwein v. Gersten, 36 So.2d 419 (Fla. 1948), the Court had before it a law abolishing actions

Other Constitutional Challenges[3]

Plaintiffs' other multiple constitutional challenges have previously been rejected by this Court or are otherwise meritless and can be dealt with more summarily.

The contested sections do not deprive a medical malpractice plaintiff of the right to a jury trial.[4] Section 766.209 provides in relevant part:

> (1) A proceeding for voluntary binding arbitration is an alternative to a jury trial and shall not supersede the right of any party to a jury trial.

Plaintiff's equal protection and due process arguments were expressly rejected by this Court in the Lasky case, 296 So.2d at 15-19, and implicitly rejected in the Smith case. The equal protection argument was even more emphatically rejected as applied to the medical malpractice crisis in Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981). In sustaining the power of the legislature to offset medical malpractice judgments by collateral source payments, the Court said:

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for alienation of affections, seduction and related "heart balm" suits. A plaintiff challenged the law as violating three sections of the Declaration of Rights to the Florida Constitution, one of which was the "access to courts" provision. After noting that "the best interests of the people of Florida will be served by the abolition of such remedies," the Court upheld the law.

[3] The district court of appeal declined to pass upon any ground other than the "access to courts" challenge.

[4] In Lasky, this Court rejected the argument that the no-fault act violated the right to trial by jury, saying: "[T]he no-fault act abolishes all right of recovery of specific items of damage in specific circumstances, and, as to those areas, leaves nothing to be tried by a jury." 296 So.2d at 22 (emphasis by the Court).

> The legislature, in the preamble to the Medical Malpractice Reform Act, of which section 768.50 is a part, announced in detail the legitimate state interests involved in its enactment of this provision. The legislature determined that there was a professional liability insurance crisis in Florida. It found that professional liability insurance premiums were rising at a dramatic and exorbitant rate, that insurance companies were withdrawing from this type of insurance market making such insurance unavailable in the private sector, that the costs of medical specialists were extremely high, and that a certain amount of premium costs is passed on to the consuming public through higher costs for health care services. The insurance crisis, the legislature concluded, threatened the public health in Florida in that physicians were becoming increasingly wary of high-risk procedures and, accordingly, were downgrading their specialties to obtain relief from oppressive insurance rates and in that the number of available physicians in Florida was being diminished. The legislature expressed the concern that the tort law liability insurance system for medical malpractice would eventually break down and that the costs would continue to rise above acceptable levels.
>
> The plaintiffs have failed to show that there is no rational basis for the distinction drawn by this statute for health care providers of professional services. We hold that the classification created by section 768.50 bears a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state. (Footnote and citation omitted).

403 So.2d at 367-68.

The judicial rulemaking argument was rejected by this Court in Pinillos, 403 So.2d at 368, in Smith, 507 So.2d at 1092, and in Bonanno, discussed infra.

The single subject argument was rejected by this Court in Smith, the Court summarizing its holding as follows:

> Each of the challenged sections is an integral part of the statutory scheme enacted by the legislature to address one primary goal: the availability of affordable liability insurance. We conclude by approving the words of the trial judge that the legislature was attempting to meet "the single goal of creating a stable market for liability insurance in this state." Civil litigation does have an effect on insurance and there is no reasonable way that we can say that they are not properly connected. We hold chapter 86-160 does not violate the single subject requirement.

507 So.2d at 1087.

Plaintiffs advance one argument that was not made in Lasky or Smith: an impermissible taking of property without due process of law. That theory can perhaps best be rebutted by a discussion of this Court's recent decision in Department of Agriculture and Consumer Services v. Bonanno, 568 So.2d 24 (Fla. 1990).

Ironically, Bonanno itself is a "taking" case. Having earlier held[5] that the State's destruction of healthy citrus plants to combat the spread of citrus canker required compensation to the owners, the Court then upheld the constitutionality of a compensation program enacted by the legislature against the same sort of challenges presented here. The Court's opinion is instructive here in two ways: it buttresses on specific grounds many of the arguments made above in this brief, and it provides an analytical framework for sustaining a legislatively-enacted scheme designed to supplant traditional judicial awards.

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[5] Department of Agriculture & Consumer Services v. Mid-Florida Growers,Inc., 521 So.2d 101 (Fla.), cert. denied, 488 U.S. 870 (1988).

In Bonanno, the Court addressed a 1989 law that provided an alternative remedy for determining the amount of compensation to be awarded owners of citrus plants destroyed under the Canker Program. The law established a table of presumptive values and provided that any owner seeking compensation in excess of those values was limited to an administrative hearing with appellate review by a district court of appeal. The law was even made applicable to pending lawsuits that had not proceeded to final judgment, so as to remove jurisdiction over such actions. Rejecting due process and "access to courts" arguments made by certain owners, the Court said in relevant part:

> [W]e find that the Act serves a public interest in streamlining the process for settlement of compensation claims for destruction of citrus plants under the Canker Program. Further, ... chapter 89-91 merely provides a different procedure to obtain recovery. Therefore, we find that the retroactive application of chapter 89-91 does not violate due process.
>
> We also conclude that chapter 89-91 does not deprive the plaintiffs of access to the courts as guaranteed by article I, section 21, of the Florida Constitution.... In Kluger v. White, 281 So.2d 1 (Fla. 1973), this Court held that the legislature may abolish a common law right of access to the courts if it provides a reasonable alternative to protect the rights of the people to redress for injuries. Chapter 89-91 provides a reasonable alternative.

568 So.2d at 30. The same principles apply with equal force in the present case.

At the time of its decision, the district court of appeal may or may not have had the benefit of this Court's

opinion and decision in Martinez v. Scanlan, 16 F.L.W. S427 (opinion filed June 6, 1991), in which the Court agreed with the trial court that the 1990 revision of the workers' compensation laws violated the single subject rule but rejected other constitutional challenges to the act, including an access to courts argument.[6] On the latter point, the Court said in relevant part:

> This Court previously has rejected claims that workers' compensation laws violate access to courts by failing to provide a reasonable alternative to common-law tort remedies. (Citations omitted.)
>
> Likewise, we reject Scanlan's claim in the instant case. Although chapter 90-201 undoubtedly reduces benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation. It continues to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation. Furthermore, while there are situations where an employee would be eligible for benefits under the pre-1990 workers' compensation law and now, as a result of chapter 90-201, is no longer eligible, that employee is not without a remedy. There still may remain the viable alternative of tort litigation in these instances. As to this attack, the statute passes constitutional muster.

16 F.L.W. at S428 (emphasis added).

The same analysis is equally applicable in the present case. The lower courts held, at least by necessary implication, that a defendant's admission of liability, agreement to pay attorneys' fees and concession of other benefits as provided in

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[6] The Court refused to pass upon due process, equal protection and other arguments as being inappropriate in a declaratory action.

the statute do not constitute a reasonable alternative to a tort remedy. The legislature has determined otherwise, and the reasoning of Scanlan requires reversal of the judgment entered below.

CONCLUSION

The challenged statutes are valid under prior holdings of this Court. The decisions below adjudicating their unconstitutionality should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 11th day of September, 1991, to: Joel D. Eaton, Esq., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, FL 33130-1780; Michael L. Friedman, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, Courthouse Center, Eleventh Floor, 175 Northwest First Avenue, Miami, FL 33128-1817; Neal A. Roth, Esq., Grossman and Roth, Grand Bay Plaza, Penthouse One, 2665 South Bayshore Drive, Miami, FL 33133; Debra J. Snow, Stephens, Lynn, Klein & McNicholas, P.A., Suite 1500, One Datran Center, 9100 South Dadeland Boulevard, Miami, FL 33156; James E. Tribble, Esq., Blackwell & Walker, P.A., 2400 Amerifirst Building, One Southeast Third Avenue, Miami, FL 33131; and Louis F. Hubener, III, Esq., Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, FL 32399-1050.

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