IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,210

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

Appellant,

- vs -

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

Appellees.

ON APPEAL FROM

THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

APPELLANT'S REPLY BRIEF

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I. Reply to Eschartes' Argument that the Non-Economic Damage Cap Violates the Constitutional Right of Access to the Courts.

It cannot be questioned that the legislature - through the Academic Task Force - conducted an extensive study of the medical malpractice, tort, and insurance issues. The legislature considered numerous alternatives and recognized that between 1975 and 1988 virtually every other alternative, short of a statutory limitation on damages, was reviewed and enacted without much success. Therefore, the legislature adopted what it considered the only remaining alternative available to it, a statutory cap on non-economic damages.

The Eschartes and the Third District, simply disagree with the legislature's findings and the remedies adopted. The Eschartes discuss alternative remedies that they would prefer and argue that these remedies are better than the remedies adopted by the Legislature. However, this type of argument and analysis is one that is more appropriately a legislative function, not a judicial function. Clearly, courts have neither the resources nor institutional competence to weigh and evaluate multiple points of view and promulgate legislation to meet societal needs. It is this simple distinction between the legislative and judicial branches that requires great deference to legislative findings and results in a presumption in favor of the constitutionality of legislative enactments. Contrary to the Eschartes' suggestion, we are not asking this Court to abrogate its integral role in upholding the Constitution -- we are merely asking that this Court exercise its authority in a manner

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consistent with a recognition of the appropriate interplay of our tri-party system of government and in recognition of the legislature's exclusive power to regulate in the areas of public health, safety and welfare. The Eschartes, in essence, invite this Court to second-guess the Florida Legislature and determine appropriate state policy to meet a crisis that clearly affects the availability and affordability of health care in Florida. This Court should refuse that invitation.

In support of their position, the Eschartes rely on the voters' rejection of Amendment 10 and suggest that the legislature was not properly representing the electorate in enacting the statutes at issue. This argument is entirely inconsistent with principles of judicial construction and the realities of our political system. It is axiomatic that Courts do not consider public opinion in determining the constitutionality of legislative enactments. Further, it is axiomatic that Courts do not police legislatures to make sure they act in accordance with public opinion. Rather, the voters express their wishes through the election of representatives. Nevertheless, if public opinion were an appropriate consideration, then the statutes at issue should be declared constitutional because the subject legislation was passed in a much publicized special legislative session devoted solely to the issue of medical malpractice and there has been no public uproar to repeal this legislation. This reality is not inconsistent with the voters rejection of Amendment 10 because the cap at issue in this case

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differs from Amendment 10, which involved an absolute $100,000 cap on non-economic damages in all tort actions.[1]

The Eschartes' reliance on Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) is misplaced. The issue in Smith was the constitutionality of an absolute $450,000 cap on non-economic damages that applied to all tort actions, as opposed to a contingent cap in this case which limits non-economic damages in medical malpractice cases only. Additionally, the Eschartes erroneously suggest that the legislative findings supporting the statutes in this case were specifically rejected by the Smith court. However, the Task Force, which conducted the studies supporting the legislative findings at issue in this case, was created after Smith - so the Smith court could not have rejected the legislative findings in this case. Further, the Smith court never addressed the legislative findings that supported the $450,000.00 cap.

The Smith court did, however, hold that damage caps are "permissible" if the statute complies with the Kluger v. White test. Smith, 507 So.2d at 1088. The statute at issue complies with both prongs of the Kluger test.

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[1] In fact, the task force provided a "negative recommendation" regarding the proposed constitutional amendment, which it found was too low a figure and which had none of the benefits to claimants and the public inherent in the proposals ultimately enacted. We can only speculate what the election outcome would have been if the proposed "cap" had been higher -- but it is certainly possible, if not probable, that it was the amount of the cap, not the cap in principle, combined with the trial bars extensive media campaign that swayed public opinion. If a higher limit was proposed and failed, then perhaps the Eschartes might have a better argument. As it happened, however, the issue is totally irrelevant.

Contrary to the Eschartes' contention at 27-28, the Task Force "seriously" considered the Eschartes' three alternative solutions for the crisis - and the legislation includes all three: tighter regulation and discipline of health care providers; tighter regulation of medical malpractice insurers; and a damage cap that affects all malpractice victims, including the less seriously injured.[2]

The Eschartes' contention that the Task Force's statement that "only a cap on non-economic damages would reduce medical malpractice paid claims appreciably,[3] means something other than what it was asserted for is erroneous. Although the Task Force was referring to other civil justice reforms when it stated that "of these alternatives" only a cap would reduce paid claims, this statement must be read in conjunction with the Task Force's statement in the same report, several pages earlier, that a comprehensive plan including civil justice reforms and tighter regulations is necessary to address the complex problems under-

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[2] Although the Eschartes suggest the cap has no effect on the "less seriously" injured person, the statute clearly applies to limit all persons' recovery, including those who have damages less than $250,000.00, based upon a determination of the percentage of plaintiff's lost capacity to enjoy life. Further, it is incongruous to suggest that the legislature might have acted constitutionally by doing away with less seriously injured person's claim since the entire substance of the problem is the difficulty in determining the amount of non-economic damages in the initial instance. There may often be situations in which persons with minimal economic losses might have great pain and suffering and other situations and with persons with extensive economic losses may have less non-economic losses. The cap effects all situations, yet still provides reasonable alternative methods that promptly pay economic losses, reduce litigation costs, and promptly resolve matters.

[3] Medical Malpractice Reform Alternatives, October 2, 1987, Appendix 2 at page 5.

lying the malpractice crisis and that these areas should not be seen as "mutually exclusive alternatives". Medical Malpractice Reform Alternatives, October 2, 1987, Appendix 2 at page 2.[4] Of course, the medical profession has been heavily regulated for years and the malpractice crisis persists. High risk specialties are still subject to excessive and multiple awards, the crisis that has been ongoing for years continues unabated, and the spiraling costs of litigation and the delay inherent in the system has gotten progressively worse. The Task Force considered and rejected the Eschartes' proposal that regulating health care providers alone would suffice. Indeed, the legislature determined that "the magnitude of this compelling social problem demand[ed] immediate and dramatic legislative action"[5] and the suggestion that the primary purpose of the statute was to further regulate physicians is simply untrue.

Courts have consistently affirmed the legislature's ability to modify or abolish causes of action when a legislature provides specific findings supporting its action. Indeed, in Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987), aff'd, 541 So.2d 92 (Fla. 1989), the Fourth District and Florida Supreme Court relied on the legislative findings that a medical malprac-

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[4] The Eschartes' erroneously suggest that Professor Gifford was not speaking for the Task Force when he stated that "if there is an alternative method [to the damage cap] of meeting the public necessity, our exhaustive consideration of possibilities did not find it." As Professor Gifford, the Associate Director of the Task Force, stated in his letter, he was discussing the "thinking of the drafters of the proposal" and providing "the staff's own constitutional analysis."

[5] Chapter 88-1, Laws of Florida (Special "E" Session) (Amended and Re-Enacted Ch. 88-277, Laws of Florida).

tice crisis exists and that a statute of repose was necessary to uphold the statute against an access to courts challenge. The courts in Carr did not second-guess the legislature as to whether other alternatives, including tighter regulation, could solve the malpractice crisis, as the Eschartes urge this Court to do in this case. This Court also did not find, as both the Eschartes and the Third District suggest that the legislature found an overpowering public necessity for a passage of a statute of repose that completely abolished a cause of action after a set period of time. Rather, this Court accepted the legislature's express finding that an insurance crisis existed and held that finding sufficient to support a comprehensive legislative solution that included repose provisions.

The Eschartes' assumption that the defendant will invoke the arbitration provisions "only when the defendant's conduct was so obviously negligent that it would be indefensible in a court of law" is equally incorrect. Because of the inherent uncertainty in the litigation process, a defendant that determines there is a "50-50" chance of liability may decide not to risk contesting liability because of the potential for unlimited exposure and may choose arbitration and certainty in exposure. This, of course, may also benefit claimants who may not ultimately prevail in a trial in these "50-50" cases. To suggest that all defendants who request arbitration would absolutely have been found liable at trial or to suggest that all potentially high verdict cases result in actual verdicts ignores the uncertainties, costs, and

delays in the court system the legislation was intended to address.

Further, the statute provides an alternative remedy and a commensurate benefit, thereby satisfying Kluger's second prong. The Eschartes erroneously argue that the statutes at issue provide no alternative remedy whatsoever for the plaintiff to recover the damages which are lost by the cap on damages. The Third District recognized that the statute did provide benefits to claimants, it simply determined that in its own view this was not enough. However, to be reasonable, the alternative remedy does not have to compensate the plaintiff for all of the pain and suffering damages he/she may have recovered under traditional tort law.

Contrary to the Eschartes' skewed argument, the statute at issue is similar to the Worker's Compensation laws because it replaces an uncertain, costly and time-consuming tort remedy with a more streamed-line administrative procedure whereby the plaintiff recovers medical expenses, lost income, and other benefits, including attorney's fees, costs and interests, without having to prove fault. Further, the plaintiffs are entitled to recover substantial amounts of general damages in direct proportion to their lost ability to enjoy life - and, as discussed above, the cap allows for more general damages than the constitutionally tested Worker's Compensation statutes.[6]

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[6] Indeed, in Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983), this Court upheld the Worker's Compensation statutes despite the fact that the plaintiff college student received only $1,200.00 in pain and suffering damages for loss of vision in one eye that resulted in 24% disability. The Supreme

Indeed, the workmen compensation laws require similar if not more extensive preconditions to recovery because the claimant must still prove that the injury was work related and often has to continue to litigate these issues and those of damages through the appellate system.

II. Reply to the Eschartes' Argument that the Statutes Violate the Right to Jury Trial.

The Eschartes argue that Smith makes it clear that damage caps of this type violate the right to a jury trial. This skewed interpretation ignores the Smith court's statement that damage caps are "permissible" if the statute complies with the Kluger test. Further, the Smith court held the access to court provisions "must be read in conjunction" with the constitutional jury trial provisions. Smith at 1088-1089. If the damage cap fails to satisfy the Kluger test, then, according to Smith, a jury verdict would be "arbitrarily capped" so that the plaintiff would not be receiving the benefit of a jury trial. Smith at 1088-1089. If, however, the statute satisfies Kluger, then pursuant to Smith the damage cap is "permissible."

The Eschartes also erroneously argue that the Supreme Court's decision in Lasky v. State Farm Insurance Co., 296 So.2d

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Court recognized that the student could have received more for his vision impairment under traditional tort law. However, the Court reasoned that the immediate recovery of economic damages without delay and uncertainty of litigation is a reasonable alternative remedy. Assuming that the Eschartes' hypothetical blind girl at 12 suffered a 24% disability, the girl would receive $60,000.00 in pain and suffering damages under the cap at issue - which is 50 times more than the student received in Mahoney. Clearly, pursuant to Mahoney, the alternative remedy in the statute at issue is sufficient and reasonable.

9 (Fla. 1974) is "inapposite." Lasky held that if the legislature complies with the Kluger test, it could completely abolish a cause of action triable by a jury but not violate the right to a jury trial. The Eschartes' attempt to distinguish Lasky on grounds that the statutes in this case do not completely abolish the right to recover non-economic damages is flawed. The issue is not whether the legislature completely abolished non-economic damages or partially abolished these damages. Rather, the issue is whether the Kluger test is satisfied. If so, pursuant to Smith, a cap on non-economic damages (a partial abolition of those damages) is "permissible" and pursuant to Lasky the right to a jury trial is not violated.

III. Reply to the Eschartes' Argument that The Statute Violates Article X, § 6(a) of the Florida Constitution.

By relying on Article X, § 6 of Florida's Constitution to declare the damage cap unconstitutional, the Trial Court has effectively vacated 33 years of Florida Supreme Court jurisprudence regarding a legislature's ability to abolish or limit a cause of action. If Article X, § 6 applies, the legislature could never abolish a cause of action unless it provides "compensation" to each potential claimant. However, Kluger and Smith allow the legislature to completely abolish a cause of action without providing any alternative remedy or benefit. If the Eschartes and the Trial Court are correct, the legislature will no longer have the ability to respond to societal problems as the legislature did when it abolished causes of action for alienation of affection, criminal conversion,

seduction and breach of contract to marry, and the legislature and the courts will have to revisit Rotwein v. Gersten, 36 So.2d 419 (Fla. 1948) the Workers Compensation Act and all others statutes/cases in which causes of action were abolished or limited. Perhaps this is why the Eschartes did not cite any cases in which a court relied on constitutional "taking" clauses in determining whether a legislature can abolish or limit a cause of action.[7]

IV. Reply to the Eschartes' Argument that the Statutes Violate the Single Subject Requirement of Florida's Constitution.

Pursuant to Smith and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), which control this issue regardless of the Eschartes' suggestion that the Supreme Court "struggled" with these decisions, a legislative act can be as broad as the legislature chooses as long as the matters included in the act have a natural, logical connection. If the sub-sections promote the purpose of the legislation, a statute does not violate the single-subject requirement. In this case, the legislature concluded that a comprehensive plan that includes tort reform and

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[7] Regardless, the statutes at issue provide a commensurate benefit as discussed above and, therefore, compensate for any "taking" that occurs - and this compensation is better than under the constitutionally tested Workers Compensation Act for the same pain and suffering e.g., a blind person with a 24% disability. Additionally, the Eschartes did not have a property right in an action for non-economic damages. Clausell v. Hobart Corp., 515 So.2d 1275 (Fla. 1987). Indeed, the Eschartes were allegedly injured after the statute became effective so they had no expectation of recovering damages precluded by the statute at issue. If the Eschartes are entitled to compensation for this alleged "taking," then 42 years worth of broken hearts will demand compensation for the state's "taking" of their right to sue for breach of contract to marry.

increased regulation of the medical profession is necessary to deal with the multiple causes of the malpractice crisis. The Eschartes' contention that these two broad categories of matters are entirely separate and not related is puzzling because the Eschartes argue earlier that increased regulation is an alternative to Tort Reform for solving the malpractice crisis. Clearly, notwithstanding the Eschartes about-face on this matter, both areas are logically connected to the same goal - to alleviate the medical malpractice crisis and increase the availability and affordability of medical care in Florida.

V. Reply to the Eschartes' Argument that the Statutes Violate the Equal Protection Clause of Florida and United States Constitution.

As the University initially argued, the Trial Court's reliance on the Fourth District's opinion in Florida Patients Compensation Fund v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983) to hold that the statutes at issue violate the equal protection clause is misplaced because the Supreme Court reversed the Fourth District. 474 So.2d 783 (Fla. 1985). The Eschartes' contention that the University "badly misread" the Supreme Court's opinion in Von Stetina is erroneous at best. The Eschartes contend that this Court only held that the 1982 version of Florida Statute 768.54 is constitutional and that the Supreme Court did not consider the 1981 version which the Fourth District declared unconstitutional - and therefore this Court's reversal was on other grounds. This is definitely not the case. As this Court stated:

> We specifically uphold the constitutionality of sections 768.54(2)(b), 768.54(3)(e), and 768.51, Florida Statutes (1981).

Id. at 789. The suggestion that this is merely a typographical error is insupportable.

Additionally, contrary to the Eschartes' reading of the case, this Court did not suggest in Von Stetina that statutory caps on non-economic damages are impermissible because they only affect the most seriously injured medical malpractice victims - and if it did, this cap affects all plaintiffs, even the less seriously injured. The Eschartes erroneously rely on one sentence in which this Court said that the statutes in Von Stetina did "not modif[y] the dollar amount of medical malpractice judgments that can be rendered." The Von Stetina decision simply implied that since the statutes in that case did not modify the dollar amounts of medical malpractice judgments, those statutes could be upheld as constitutional without analyzing whether the statutes satisfy the Kluger test. Regardless, as this Court stated two years later in Smith, damage caps are "permissible" if the Kluger test is met.

The Eschartes also rely on Lasky for the proposition that damage caps violate the equal protection clause because the most seriously injured are affected. The Eschartes' selective quoting of the Lasky decision ignores the Lasky court's statement that:

> ...situations can be perceived in which severe pain might be uncompensated, and other situations in which suit could still be brought for extremely minor, intangible damages. But perfection is not required in classification; 'problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical,

> it may be, and unscientific.' . . . Some inequality in result is not enough to vitiate on due process grounds a legislative classification grounded in reason. . . .

296 So.2d at 17. Here the legislature's actions were reasonable and rational and even if not fully supported by scientific or empirical data, because such data is simply not available, they are still constitutional.

VI. Reply to the Eschartes' Argument that the Statutes Violate the Substantive and Procedural Due Process Guarantees of the Florida Constitution and the United States Constitution.

Contrary to the Eschartes' argument at 42, the Smith decision never stated or suggested in any way whatsoever that damage caps "by their nature ... are wholly 'arbitrary' lines drawn between recovery and non-recovery." Rather, this Court in Smith stated that damage caps are "permissible" - but are unconstitutional "if" arbitrarily created, i.e., if the cap does not comply with the Kluger test.

Further, the Eschartes' reliance on Lucas v. U.S., 757 SW.2d 687 (Tex. 1988) is misplaced. The Fifth Circuit previously held in the same case that the Texas cap on non-economic damages did not violate federal equal protection guarantees. Thereafter, the Fifth Circuit certified a question to the Texas Supreme Court asking whether the statute complies with the Texas Constitution's access to court provisions. The Texas Supreme Court held that the cap violated Texas' access to court provisions. However, the Texas Supreme Court's opinion in Lucas is clearly distinguishable for critical reasons the Eschartes ignore. The Texas statute did not provide any commensurate benefits as provided by the Florida

statute. More importantly, the Texas cap was enacted in 1977 after the Texas commission that studied the malpractice crisis could not conclude that the caps would decrease malpractice insurance rates. Accordingly, the Texas Supreme Court reasoned that it was "unreasonable and arbitrary to limit the recovery in a speculative experiment to determine whether liability insurance rates would decrease." Id. at 691.

However, Florida's Task Force, which studied the malpractice crisis ten years after the Texas commission, determined that caps would have a beneficial effect on malpractice premiums. The Task Force relied on studies not available to the Texas Commission that demonstrated the savings that would result from the caps, including a 1986 study by the General Accounting Office which reported that malpractice insurance rates increased less in California than in New York and Florida between 1980 and 1986. The Attorney General's Tort Policy Working Group concluded that this difference was due to California's strong tort reform measures, including a $250,000 cap on non-economic damages.[8]

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[8] Academic Task Force for Review of the Insurance and Tort Systems, Final Recommendations, March 1, 1988, Defendant's Appendix 5, page 89, fn. 52. Additionally, the Eschartes' poor reading of the Task Force report led to their erroneous conclusion that the Task Force "guesstimated" that the caps "might" result in a reduction in loss payments. In the passage the Eschartes rely on, which they reproduce at 21, the Task Force was not discussing whether there would be a reduction in loss payments. Rather, the Task Force was simply comparing the effects of caps on medical malpractice claims with the effect of caps on other liability lines. Of course, it is difficult to prove exactly how much of a reduction would result because this depends on factors that the Task Force cannot adequately gauge, including whether defendants will utilize this procedure. Accordingly, the legislature reserved the right to review the effect of this legislation and revise it in the future if the desired results are not achieved. Then, perhaps, the legislature may be forced to adopt an absolute cap the carrot without a stick - to ensure the availability and affordability of medical care for Florida's citizens.

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VII. Reply to the Eschartes' Argument That the Statutes Violate Article II, § 3, of the Florida Constitution.

Contrary to the Eschartes' argument at 49, the statutes at issue do not give the defendant "the unilateral power to dictate the manner or means by which, and the extent to which, plaintiff may enforce this substantive right." Rather, the statute allows the parties to agree to arbitration. If the plaintiff or defendant does not want arbitration, the party can refuse the request and proceed with a trial. Accordingly, the legislation does not affect an unconstitutional usurpation of judicial power.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Trial Court erred in declaring Sections 766.207 and 766.209, Fla. Stat. (1988 Supp.) unconstitutional.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of November, 1991, to: **Joel S. Perwin, Esq.** and **Joel D. Eaton, Esq.**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 W. Flagler Street, Suite 800, Miami, Florida 33130 and **Neal Roth, Esq.**, Grossman & Roth, P.A., Grand Bay Plaza, Penthouse One, 2665 South Bayshore Drive, Miami, Florida 33133; **Debra Snow, Esq. or Robert Klein, Esq.**, Stephens, Lynn, Klein & McNicholas, One Datran Center, Suite 1800, 9100 South Dadeland Blvd., Miami, Florida 33156; **Jim Tribble, Esq.**, Blackwell & Walker, et al., 2400 AmeriFirst Building, One Southeast Third Avenue, 24th Floor Miami, Florida 33131; **Bob Gibbins, Esq.**, 500 West 13th Street, P.O. Box 1452, Austin, Texas 78767; **Cheryl S. Flax-Davidson, Esq.**, 1050 31st Street, N.W., Washington, D.C. 20007 and **Roy D. Wasson, Esq.**, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130.

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