IN THE FLORIDA SUPREME COURT

CASE NO.: 79,941

HCA HEALTH SERVICES OF FLORIDA, INC., etc., et al.,

Appellant(s),

v.

GUS BRANCHESI, as Personal Representative, etc.,

Appellee(s).

ON APPEAL FROM

THE FOURTH DISTRICT COURT OF APPEAL

APPELLANT'S INITIAL BRIEF

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PREFACE

This is an appeal from the Fourth District Court of Appeal's decision that Florida Statutes Sections 766.207 and 766.209 are unconstitutional under the Florida and United States Constitution. The Plaintiff/ Appellee, GUS BRANCHESI, as Personal Representative of the Estate of ADRIA BRANCHESI, Deceased, will be referred to as "Branchesi". The Defendant/Appellant, HCA HEALTH SERVICES OF FLORIDA, INC., d/b/a HCA MEDICAL CENTER OF PORT ST. LUCIE, will be referred to as the "Hospital". Citations to the Record on Appeal will be referred by letter "R" with appropriate page numbers. The Appendix accompanying this Brief will be referred by appropriate section and page number.

STATEMENT OF THE CASE AND FACTS

On August 15, 1989, Adria Branchesi was admitted to the Appellant Hospital where she died of a pulmonary embolus the following day. (R. 2) On January 26, 1990, the Appellee Branchesi mailed the Hospital a Notice of Intent to Initiate Litigation for Medical Malpractice. (R. 2) The Hospital responded by offering to admit liability and by agreeing to submit to binding voluntary arbitration pursuant to Sections 766.106(3)(b) and 766.207, Florida Statutes. (R. 6-7)

Branchesi neither accepted nor rejected the Hospital's offer but instead filed a complaint for declaratory relief requesting a judicial determination of the constitutionality of Sections 766.207 and 766.209, Florida Statutes (1989). (R. 1-9) Both Branchesi and the Hospital moved the trial court for summary judgment on the issue of the constitutionality of said statutory sections. (R.

26-30; 31-34) Branchesi's Motion for Summary Judgment asserted the unconstitutionality of Sections 766.207 and 766.209 on the grounds that:

(1) the statutes deprived Branchesi of his constitutional right of access to the courts;

(2) the statutes deprived Branchesi of his constitutional right to trial by jury;

(3) the statutes deprived Branchesi of his constitutional right to equal protection under the law;

(4) the statutes deprived Branchesi of his constitutional right to procedural due process;

(5) the statutes deprived Branchesi of his constitutional right to substantive due process;

(6) the statutes constitute an impermissible taking of property without due process of law;

(7) the statutes invade judicial rule-making authority; and

(8) the statutes were enacted in violation of the single subject legislation rule.

The Hospital moved for summary judgment asserting the constitutionality of Sections 766.207 and 766.209, Florida Statutes (1989), and countering the constitutional challenges raised by Branchesi. (R. 31-34)

The trial court granted Branchesi's Motion for Summary Judgment and in a final declaratory judgment, the trial court held

that Florida Statute Sections 766.207 and 766.209 are unconstitutional under the Florida and United States Constitutions in accordance with the arguments presented by the Plaintiff. (R. 496-97, 498-99). On appeal, the Fourth District affirmed the trial court's ruling that the statute violates Florida Constitutions' access to courts and right to jury trial provisions based on the reasoning set forth in the Third District's opinion in University of Miami v. Echarte, 585 So.2d (Fla 3d 1991). (A. 1) The Third District's opinion in Echarte is presently pending before the Supreme Court, Case No. 78,120. The Third District in Echarte held that these statutes unconstitutionally denied the right of access to the courts. The Court in Echarte expressly declined to consider the other constitutional challenges raised by the Appellant in that case.

Sections 766.207 and 766.209 were enacted by the Florida Legislature to protect the public from the medical malpractice crisis, which affects the availability and affordability of medical care in Florida. Prior to the enactment of these statutes, through the Tort and Insurance Reform Act of 1986, the Legislature established the Academic Task Force for Review of the Insurance and Tort Systems to analyze the medical malpractice crisis and recommend solutions. See Chapter 86-160, Laws of Florida. After conducting an extensive study of the malpractice

crisis, the Task Force recommended a comprehensive program to address the problems underlying the medical malpractice crisis. (See "Preliminary Fact Finding Report on Medical Malpractice" released by the Task Force on August 14, 1987 and "Medical Malpractice Recommendations" released by the Task Force on November 6, 1987 and Final Recommendations dated March 1, 1988 attached hereto as A. 2, A. 4 and A. 6.)

SUMMARY OF THE ARGUMENT

Sections 766.207 and 766.209, Florida Statutes (1989), do not violate the Florida Constitution's access to court's provision because these statutory sections satisfy the two-prong test set forth in Kluger v. White, 281 So.2d 1 (Fla. 1973). These statutes were enacted by the Legislature based on its finding of an overriding public necessity and that there was no alternative means available to address the problem. The statutory sections also provide both an alternative remedy and a commensurate benefit in lieu of a traditional recovery in tort.

The statutes at issue do not violate Florida's constitutional right to jury trial. The statutory provisions are voluntary and provide adequate alternative benefits to both plaintiffs and defendants in exchange for jury trial. The statutes provide the right of either party to obtain a jury trial and imposes a contingent cap on non-economic damages only where the plaintiff refuses the alternative remedy of arbitration.

The instant statutes do not violate the constitutional right to equal protection under the law. The contingent cap on non-economic damages apply in a similar manner to all medical malpractice claimants. In addition, the statutes bear a reasonable relationship to the legitimate state interest of protecting the public health by assuring the availability of

adequate and reasonably priced medical care for the citizens of Florida.

The statutes at issue do not violate procedural or substantive due process. The statutes bear a reasonable relationship to the permissible legislative objective of assuring adequate and reasonable medical care for the citizens of Florida.

The effect of the statutes does not constitute an unconstitutional taking of private property without due process of law. Florida does not recognize that a plaintiff has a vested property interest in a cause of action. In addition, there is no constitutional taking under the state's eminent domain powers.

The statutes do not violate the separation of powers provision of the Florida Constitution. The procedural provisions contained in the statutes are necessary for the proper implementation of the substantive provisions of the statutes and, therefore, do not constitute an invasion of the judicial rule making authority.

Finally, the legislative act of which the statutes at issue form a part of do not violate the single subject requirement of Florida's Constitution. The provisions of the act satisfy the "common sense test" because the provisions "are fairly and naturally germane to the subject of the act," and as the matters contained in the act "have a natural or logical connection."

ARGUMENT

I. SECTIONS 766.207 and 766.209, FLORIDA STATUTES (1989), DO NOT VIOLATE ARTICLE I SECTION 21 OF THE FLORIDA CONSTITUTION - THE RIGHT OF ACCESS TO COURTS.

Article I, Section 21 of the Florida Constitution provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The seminal case applicable to this issue is Kluger v. White, 281 So.2d 1 (Fla. 1973). In Kluger, the Florida Supreme Court held that a legislative enactment which abolishes a pre-existing common law right does not violate the right of access to the courts where (1) it provides a reasonable alternative remedy or commensurate benefit, **or** (2) where the Legislature can show an overpowering public necessity for the abolishment of the right and there is no alternative method of meeting such public necessity. See also, Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987). The Statutes at issue satisfy the two-prong test set forth in Kluger and are, therefore, constitutional.

A. The Statutes Provide a Reasonable Alternative Remedy and Commensurate Benefit for a Medical Negligence Claimant

In enacting these statutes, the Legislature furnished medical negligence claimants with a remedy not previously available and one which provides a prompt, certain and preferable alternative to

expensive, uncertain and time-consuming trial litigation. Sections 766.207 and 766.209, Florida Statutes, were designed to reduce delay, provide for prompt payment of claims, and reduce the amount of attorneys' fees and costs, which must be paid by both the claimant and the defendant. The benefits, for both the claimant and the defendant, under the arbitration scheme are:

(1) When the defendant makes an offer to have damages determined by voluntary binding arbitration, he agrees not to contest the issue of negligence with respect to the care provided.

(2) The defendant agrees to be bound by and comply with the decision of the arbitration panel.

(3) The defendant is obligated to pay the claimant's reasonable attorneys' fees and costs in the arbitration. Section 766.207(f), Florida Statutes (1989).

(4) The defendant is obligated to pay the costs of the arbitration proceeding and the fees of all arbitrators. Section 766.207(7)(g).

(5) The defendant is required to pay interest on all accrued damages. Section 766.207(7)(e), Florida Statutes (1989).

(6) The defendant(s) who submit to the arbitration proceeding is held jointly and severally liable for all damages assessed (thus precluding applicability of Section 768.81, Florida Statutes, which abrogated the joint and several liability doctrine for non-economic damages and for economic damages under certain circumstances.) Section 768.207(7)(h), Florida Statutes (1989).

(7) The defendant must pay an arbitration award within twenty (20) days after the determination of damages by the arbitration panel. Section 766.211(1), Florida Statutes (1989).

(8) The defendant must pay the amount awarded in the arbitration proceeding within twenty (20) days of the determination of damages by the arbitration panel, or, commencing ninety (90) days after the damage award is rendered, the award begins to accrue interest at the rate of eighteen percent (18%) per year (rather than at the twelve percent [12%] per year rate which normally accrues to judgments at trial). Section 766.211, Florida Statutes (1989).

(9) The arbitration award is only subject to a limited administrative type appeal pursuant to Section 120.68. In addition, an appeal does not serve to stay the arbitration award and neither the arbitration panel nor a circuit court judge can stay the award pending appeal. This abolishes the defendant's right to supersede a judgment by posting adequate and sufficient bond at twelve percent (12%) interest and by its very terms forces an appeal proceeding to be completed more expeditiously. The Appellate Court can only stay the payments of an arbitration award if "manifest and justices" is shown. So an arbitration award would rarely be stayed. Furthermore, even if such stay is granted, interest will continue to run at the rate of eighteen percent (18%) rather than the twelve percent (12%) rate of interest which normally accrues to judgments on appeal. Section 766.212, Florida Statutes (1989).

The foregoing demonstrates that unlike the statute at issue in Smith, which placed an absolute $450,000 cap on the non-economic damages a tort victim could recover, the Legislature established an alternative remedy and commensurate benefit in Sections 766.207 and 766.209. As stated by the Academic Task Force:

> The plan's constitutional limitation on non-economic damages differs from the absolute cap that was held to be unconstitutional in Smith v. Department of Insurance. First, it applies only to medical malpractice claims, where a special need has been established by specific research findings. Second, it is part of a balanced plan to facilitate early resolution of meritorious claims, thereby providing commensurate benefits in exchange for the reduced damage remedy. The $250,000 conditional limitation on non-economic damages applies only with consent of both parties and the $350,000 limitation on non-economic damages applies only if the plaintiff has refused an opportunity to receive expedited payments of limited damages without having to prove fault.

(Appendix 4, p. 27).

The cap on non-economic damages in the statutes at issue in this case is not absolute but rather contingent on one of the parties requesting the arbitration procedure. If a defendant rejects a claimant's offer for voluntary binding arbitration, the action proceeds to trial without any damage limitation. If plaintiff prevails, they can recover pre-judgment interest and attorneys' fees up to twenty-five percent (25%) of the award

reduced to present value. Accordingly, unlike the statute at issue in Smith, which provided no quid pro whatsoever, the statutes at issue in this case viewed, provides advantages for both plaintiffs and defendants.

The alternative remedy and commensurate benefit established by the statutes at issue here are comparable to those provided by the Worker's Compensation Law which has been upheld as constitutional against claims of denial of access to the courts. In Kluger, the Florida Supreme Court noted that:

> Worker's compensation 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.

The Florida Supreme Court again addressed and upheld the Worker's Compensation Law against the challenge that the 1979 Legislature's replacement of permanent partial disability benefits, with the enactment of a permanent impairment and wage loss benefit system, denied injured workers the constitutional right to access to the courts in Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983). In upholding the law's constitutionality, the Court stated:

> The Worker's Compensation Law remains a reasonable alternative to tort litigation. The change from lump save payments for permanent partial disability to a system offering such payments only for permanent impairments and wage loss benefits for other types of partial disability may disadvantage some workers, such as Mr. Acton. On the other hand, the new system offers greater benefits to injured workers who still suffer a wage loss after reaching maximum medical recovery. The Worker's Compensation Law continues to afford substantial advantages to injured workers, including full medical care and wage loss payments for total or partial disability without their having to endure the delay and uncertainty of tort litigation. Subsections 440.15(3)(a) and (b) do not violate the access to the court's provision of the Florida Constitution as interpreted in Kluger v. White.

440 So.2d at 1284.

The Acton case was relied upon by the Florida Supreme Court in Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983), where an injured Sears employee suffered an eighty percent (80%) loss of vision to an eye and received only $1,200 in impairment benefits. The injured employee argued that the Worker's Compensation Statute unconstitutionally deprived him of access to the courts for redress of his injury. In disagreeing with the injured employee, the Court stated:

> In Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983), we held that subsections 440.15(3)(a) and (b), Florida Statutes (1981), do not violate constitutional guarantees of access to the courts and equal protection. [The injured employee] Mahoney

> might well have received more compensation for the loss of his eye prior to the legislative amendments to the Worker's Compensation Law in 1979. Mahoney, however, received fully paid medical care and wage loss benefits during his recovery from his on-the-job accident without having to suffer the delay and uncertainty of seeking a recovery in tort from his employer or a third party. Worker's Compensation, therefore, still stands as a reasonable litigation alternative. The $1,200 award for loss of sight in one eye may appear inadequate and unfair, but it does not render the Statute unconstitutional.

440 So.2d at 1285-86.

The Florida Supreme Court again upheld the constitutionality of the Florida Worker's Compensation Law against a denial of access to the courts challenge in Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984). In that case, a landscape gardener, who had lied about his true age in obtaining employment with Ram Property Management, was injured while on the job. Since his injury resulted in a permanent impairment and since he was unable to find alternate employment, the injured employee filed a complaint for permanent total disability and wage loss benefits under the Worker's Compensation Law. Due to the fact that the Worker's Compensation Law cut off wage loss benefits at age sixty-five (65), and the injured employee was seventy-eight (78) at the time of the injury, the Deputy Commissioner found the employee ineligible for wage loss benefits and also denied permanent total disability payments. In upholding the Worker's Compensation Law against the

injured employee's constitutional challenge, the Florida Supreme Court stated:

> Sasso [the injured employee] urges that the Worker's Compensation Law, which abolishes the right to sue one's employer and substitutes the right to receive benefits under the compensation scheme, has denied him access to the courts without providing a substitute. In Kluger v. White, 281 So.2d 1, 4 (Fla. 1973), this Court held that "the Legislature is without power to abolish [a right to redress for a particular injury provided by statute before the adoption of the Declaration of the Rights of the Florida Constitution] without providing a reasonable alternative." Sasso argues that because he no longer may sue his employer for lost wages, and because of his age, he has been denied any "reasonable alternative" to his right to sue, in violation of Article I, Section 21, of the Florida Constitution.
>
> However, **we find that Sasso has been provided with a reasonable alternative. His medical expenses were covered by worker's compensation benefits, and he received temporary total disability benefits during his convalescence. Permanent total disability benefits were available to him if he had qualified and any future medical expenses related to his injury are also covered. Sasso thus has received some of the compensation which a tort suit might have provided had he been forced to pay his own expenses and subsequently seek redress in court. Such partial remedy does not constitute an abolition of rights without reasonable alternative as contemplated in Kluger v. White.** (Emphasis supplied)

452 So.2d at 934.

The Florida Supreme Court recently addressed, once again, the constitutionality of the Worker's Compensation Law against a

violation of access to the court's challenge in Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). In Martinez, the Court stated:

> This Court previously has rejected claims that worker's compensation laws violate access to courts by failing to provide a reasonable alternative to common law tort remedies.
>
> . . .
>
> Likewise, we reject Scanlan's claim in the instant case. Although Chapter 90-201 undoubtedly reduces benefits to eligible workers, the Worker's 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 Worker's 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.

Id. at 1171-72.

Similarly, this Court has consistently upheld Florida's no-fault automobile insurance statutes against a right of access to court's challenge. In Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974), this Court found that the Legislature had established a reasonable alternative to tort recovery for pain and suffering damages by requiring motor vehicle owners to maintain

insurance. This insurance would provide recovery to injured parties for their economic losses even if they were at fault; speedy payment by the insured's insurer of medical cost and lost wages and immunity from suit/loss of right of action proceeds for pain and suffering unless permanent injury was established or certain threshold medical expense requirements were met.

The constitutionality of later amendments to the "no-fault" insurance statutes were upheld by this Court in Chapman v. Dillon, 415 So.2d 12 (Fla. 1982). The Court noted that the "no-fault" statute, while lowering personal injury protection benefits and increasing the amount of permitted optional deductibles, still assured injured parties prompt recovery of their major and salient economic losses. The Court stated:

> Although the percentage of recovery of medical expenses has been reduced to 80% and the percentage of recovery of lost income has been reduced to 60% or 80%, the absolute limits of PIP coverage have been increased from $5,000 to $10,000. Regardless of the actual amount of recovery, an injured person will receive prompt payment for his major and salient economic losses even where he himself is at fault. Thus, the provisions of Section 627.737 still provide a reasonable alternative to the traditional action in tort and therefore do not violate the right of access to courts guaranteed by Article I, Section 21 of the Florida Constitution.

Id. at 17.

The statutory sections being challenged here are constitutional for the same reasons the Florida Supreme Court has found the Workers' Compensation Law and Automobile "No-Fault" Insurance statutes constitutional in the foregoing cases. By permitting a medical malpractice claimant to recover medical expenses, lost income, attorneys' fees, costs and interest without having to go through the uncertain and costly mechanism of proving defendant's fault at trial, the claimant has been provided a reasonable alternative to the tort remedy in satisfaction of the first prong of the Kluger test.

In the Echarte case, the Third District erroneously concluded that the arbitration procedure set forth in the subject statutory sections did not constitute a reasonable alternative remedy or commensurate benefit to claimants. The Third District reasoned that the malpractice statutes at issue do not create a no-fault basis for recovery similar to the workers' compensation statute and No-Fault Automobile Insurance Statutes. This conclusion is erroneous because said statutes apply only if the defendant admits negligence. A plaintiff can proceed to court, without any limitation on non-economic damages, if the defendant does not admit negligence.

Furthermore, the Third District incorrectly reasoned that the statutes at issue were distinguishable from the workers'

compensation statutes and no-fault automobile insurance statutes because the statutes at issue do not require physicians to purchase malpractice insurance. This reasoning fails to take into account that physicians, prior to the enactment of the subject statutory sections, were already required to purchase malpractice insurance or maintain resources with which to maintain the financial ability to satisfy judgments against them. Section 458.320, Florida Statutes (1987).

As set forth above, there are numerous benefits which inure to the medical malpractice claimant. These benefits include the replacement of an uncertain, costly and time-consuming trial mechanism with an administrative system that is streamlined so as to permit the prompt proof and payment of damages; the avoidance of litigation delays; and a reduction in the costs incurred in the recovery of the damages sustained. The Third District's conclusory finding that only the negligent defendant benefits from the establishment of the non-economic damages cap is thus inaccurate.

B. Overpowering Public Necessity and no Alternative Means

Through the Tort and Insurance Reform Act of 1986, the Florida Legislature established the Academic Task Force for Review of the Insurance and Tort Systems. Chapter 86-160, Laws of Florida. The Academic Task Force was not composed of members of special interest groups but rather consisted of the presidents of three of Florida's

major universities and two businessmen of distinguished public service backgrounds who were selected to serve on the Task Force by the university presidents. In order to conduct their investigation of the insurance and tort systems, the Task Force hired a professional staff with expertise in insurance and finance, actuarial science, law, economics and medicine. (See A. 4, Academic Task Force for Review of the Insurance and Tort Systems, Medical Malpractice Recommendations at pp. 8-9 (November 6, 1987).

Florida's Governor, in February 1988, called the Legislature into a special session for the purpose of addressing the medical malpractice crisis existing in Florida. The Legislature responded by enacting Chapter 88-1, Florida Statutes, the preamble of which states as follows:

> 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 non-economic 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 non-economic losses which may be awarded in certain civil actions, recognizing that such non-economic 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 by 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[.]

Chapter 88-1, Laws of Florida (Special "E" Session).

The Legislature codified, as Section 766.201, Florida Statutes (Supp. 1988), the following:

Legislative findings and intent.-

(1) The Legislature makes the following findings:

(a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.

(b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.

(c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interest of the public need for quality medical services.

(d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorneys' fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.

> (e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.
>
> (2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified.
>
> . . . .
>
> (b) Arbitration shall provide:
>
> 1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorneys' fees, litigation costs, and delay.
>
> 2. A conditional limitation on non-economic damages where the defendant concedes willingness to pay economic damages and reasonable attorneys' fees.
>
> 3. Limitation on the non-economic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

It is evident from a reading of the preamble to Chapter 88-1 and Section 766.201, Florida Statutes (Supp. 1988), that the

Legislature determined that the Academic Task Force had demonstrated the existence of a medical malpractice crisis in the State of Florida that could be alleviated only through the immediate adoption of dramatic, legislatively-enacted reforms.

The foregoing demonstrates that the Legislature determined that the primary cause of the medical malpractice crisis are the high-end damage awards and the substantial litigation costs associated with medical malpractice cases. Therefore, the comprehensive legislative remedy enacted by the Legislature includes a contingent cap on non-economic damages to reduce the high-end awards and a streamlined arbitration procedure to reduce the costs of litigation if the defendant admits liability.

The critical issue in this case concerns the relationship between the Legislature and the judiciary and the proper role of the court in determining whether a legislative act is constitutional. This Court has indicated that the courts should give great deference to judicial findings when reviewing legislative enactments. For example, in State v. Bales, 343 So.2d 9, 11 (Fla. 1977), this Court pronounced that:

> "[A]ny legislative enactment carries a strong presumption of constitutionality, including a rebuttable presumption of the existence of necessary factual support in its provisions. . . . If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. . . . Questions as to wisdom,

> need or appropriateness are for the Legislature. (Citations omitted).

In reviewing the constitutionality of the statutes at issue here, this Court must heed the foregoing pronouncements.

Similarly, in Holley v. Adams, 238 So.2d 401 (Fla. 1970), this Court stated:

> First, it is the function of the Court to interpret the law, not to legislate. Second, courts are not concerned with the mere wisdom of the policy of the legislation. . . . Third, the Courts have no power to strike down an act of the Legislature unless the provisions of the act, or some of them, clearly violate some express or implied inhibition of the Constitution. Fourth, every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act.
>
> * * *
>
> The judiciary will not nullify the legislative acts merely on grounds of the policy and wisdom of such act, no matter how unwise or unpolitic they might be. . . . .

Id. at 404-405.

In Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987), affirmed, 541 So.2d 92 (Fla. 1989), the Fourth District Court of Appeal found that the seven-year statute of repose in medical malpractice cases, as embodied in Section 95.11(4)(b), Florida Statutes (1975), was constitutional and that the Legislature had adequately established the overriding public necessity for said

statute in the preamble to Chapter 75-9, Laws of Florida, the Medical Malpractice Reform Act of 1975. The language contained in that preamble was quoted by the court in its opinion, as follows:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defense medicine at increased cost to the citizens of Florida; and
>
> WHEREAS, the problem has reached crisis proportion in Florida, NOW, THEREFORE, . . .

505 So.2d at 575. On appeal to the Florida Supreme Court, this Court affirmed the Fourth District's opinion and held:

> We find that the Fourth District Court recognized the principles of Kluger and properly applied them in determining that the Legislature had found an overriding public necessity in its enactment of Section 95.11(4)(b). Accordingly, we hold that the subject statute was constitutionally enacted and bars the Carrs' medical malpractice action under the circumstances of this cause.

541 So.2d at 95.

In Holly v. Auld, 457 So.2d 217 (Fla. 1984), this Court upheld the constitutionality of Section 768.40(4), Florida Statutes (1981), which provided medical peer review committees with a

privilege against discovery of hospitals' committee proceedings in civil actions and stated:

> There are . . . substantial legislative policy reasons to restrict discovery of hospitals' committee proceedings and it is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court. . . .
>
> Subsection (4) of what is now Section 768.40 was enacted as Chapter 73-50, Laws of Florida. The preamble and language of that enactment readily reveal the Legislature's intent and its policy reasons. In an effort to control the escalating cost of health care in the state, the Legislature deemed it wise to encourage a degree of self-regulation by the medical profession through peer review and evaluation. The Legislature also recognized that meaningful peer review would not be possible without a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues.
>
> . . . .
>
> Inevitably, such a discovery privilege will impinge upon the rights of some civil litigants to discovery of information which might be helpful, or even essential, to their causes. We must assume that the Legislature balanced this potential detriment against the potential for health care cost containment offered by effective self-policing by the medical community and found the latter to be of greater weight. It is precisely this sort of policy judgment which is exclusively the province of the Legislature rather than the courts.

450 So.2d at 219-20. (Citations and footnotes omitted).

The Third District's opinion in Echarte conflicts with the foregoing principles of judicial construction. The Third District simply concludes that "a careful review of the legislative findings does not demonstrate the requisite overpowering public necessity for restricting damages." 585 So.2d at 300. In rejecting the legislative findings concerning the overpowering public necessity, the Third District failed to afford these statutes a presumption of constitutionality including a presumption of the existence of necessary factual support as required by Bales.

The case of Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1972), relied on by the Third District in Echarte is entirely distinguishable from this case. In Overland, the Florida Supreme Court held that Section 95.11(3)(c), Florida Statutes (1975), which required that an action "founded on the design, planning, or construction of an improvement to real property" had to be brought within twelve (12) years after the completion of the improvement which produced the injury, was unconstitutional in that it was violative of the right of access to the courts. The Florida Supreme Court explained that in enacting the subject statute, the Legislature had failed to demonstrate an overpowering public necessity for the provision and the absence of a less onerous alternative. 369 So.2d at 574.

In this case, however, the Legislature has clearly pronounced the "overriding public necessity" for Sections 766.207 and 766.209 in the preamble and the findings sections of Chapter 88-1. Moreover, in response to Overland, the Legislature enacted Section 95.11, Florida Statutes (1985). This statute is nearly identical to the statute of repose at issue in Overland, however, it specifically sets forth the overriding public necessity perceived by the Legislature in the preamble. The constitutionality of this statute was upheld against an access to the courts challenge in American Liberty Ins. Co. v. West and Conyers, Architects and Engineers, 491 So.2d 573 (Fla. 2d DCA 1986), based on the following reasoning:

> The Legislature has the last word on declarations of public policy. . . . The courts are bound to give great weight to legislative determinations of fact. . . . It is not unusual for a subsequent legislative determination of the legality of purpose to be served by an undertaking to be deemed sufficient to overcome a prior judicial decision to the contrary. . . . In enacting the preamble to the new Section 95.11(3)(c), we believe the Legislature has met the requirements of Overland Construction Co., thereby sustaining the validity of the statute.

Id. at 575.

The Third District incorrectly maintains that Carr, supra, is distinguishable because the statute at issue in that case, the Medical Malpractice Reform Act of 1975, merely shortened the time

for claimants to bring suit for recovery of their damages. The focus should be on the legislative findings set forth in enacting the statute, which findings are similar to those asserted by the Legislature with regard to the statute at issue, i.e., skyrocketing costs of medical malpractice insurance resulting in increased medical care costs. While the Medical Malpractice Reform Act of 1975 totally eliminated the right to pursue causes of action, the act at issue here merely limits non-economic damages recoverable. Clearly, the instant act is a less severe response to the medical malpractice crisis than that which was constitutionally upheld in Carr.

In Carr, this Court held that the Fourth District properly applied the Kluger test and stated:

> We agree with the district court that Section 95.11(4)(b) [the medical malpractice statute of repose] was properly grounded on an announced public necessity and no less stringent measure would obviate the problems the Legislature sought to address, and thus the statute does not violate the access-to-courts provision.

541 So.2d at 95. As in Carr, the Legislature specifically expressed the public necessity for the statutes at issue in this case.

The Legislature has also demonstrated that, based on the Academic Task Force's study of the medical malpractice crisis in Florida, there existed no alternative means to alleviate the

problem than that of adopting the comprehensive legislative scheme that it devised. The absolute indispensability of the contingent cap on non-economic damages as a component of the legislative reform is substantiated by a communication between the Associate Director of the Task Force and a member of the House Insurance Committee wherein it is stated that:

> The research staff considered any number of possible solutions to the problem of dramatically increased loss payments, and we concluded that any approach not containing a cap on non-economic damages wold not ameliorate escalating premium costs. **If there is an alternative method of meeting the public necessity, our exhaustive consideration of possibilities did not find it.** (Emphasis supplied).

(A. 5)

Furthermore, it should be noted that the Academic Task Force's October 2, 1987 draft of recommended medical malpractice reform alternatives stated, in relevant part, that:

> **only a cap on non-economic damages** would reduce medical malpractice paid claims appreciably. . . . (Emphasis supplied).

(A. 3, p. 5)

Although the Third District recognized that the Legislature determined that damage caps would be effective in decreasing damage awards, the court concluded "it is unclear how effective a damage cap would be in alleviating the cost of loss payments, paid claims, and liability insurance premiums." 585 So.2d at 301. In so

holding, the court in Echarte improperly questioned the wisdom of this legislation contrary to the following language set forth in this court's opinion in Holley v. Adams, 230 So.2d 401 (Fla. 1970):

> The judiciary will not nullify the legislative acts merely on grounds of the policy and wisdom of such act, no matter how unwise or unpolitic they might be. . . .

Id. at 405.

In Carr and American Liberty, this court upheld the statutes of repose due to the presumption in favor of constitutionality that requires the court to give deference to legislative findings of public necessity. The legislative finding of overpowering public necessity in this case meets the second prong of the Kluger test and, therefore, the Fourth District erroneously relied on the reasoning of the Third District's decision in Echarte which improperly rejected these legislative determinations.

II. SECTIONS 766.207 AND 766.209, FLORIDA STATUTES (1989) DO NOT VIOLATE THE RIGHT TO JURY TRIAL.

In Lasky v. State Farm Insurance Company, 206 So.2d 9 (Fla. 1974), this Court addressed the issue of whether the abrogation of an existing cause of action, triable by a jury, violated the constitutional right to a jury trial. That case involved a number of constitutional challenges to the 1972 Florida Automobile Reparations Reform Act, otherwise known as the "no-fault"

automobile insurance law, which, in part, limited damages recoverable in a tort action for personal injury by denying recovery for pain and suffering, mental anguish and inconvenience where the injured party's medical expenses did not meet a $1,000 threshold amount. In determining that said provision of the "no-fault" automobile insurance law did not violate the right to trial by jury, the court reasoned:

> [T]he no-fault act abolishes all right of recovery of specific items of damages in specific circumstances, and as to those areas, leaves nothing to be tried by a jury.

296 So.2d at 22. As long as the Legislature satisfies the test set forth in Kluger, it may enact a statute completely abolishing a cause of action triable by a jury without violating the right to jury trial.

The statutes at issue here do not violate the right of a medical malpractice claimant to a jury trial. If neither party to the action requests arbitration, the right to a jury trial as to all damages remains intact. Only if both parties request arbitration or if the defending party requests the arbitration procedure and the claimant refuses arbitration, the right to recover non-economic damages in excess of specified amounts is abolished and there is nothing left to be tried by a jury. Under the reasoning expounded in Lasky, the abolishment of all rights to recover specific items of damage, i.e., those in excess of

specified damage cap amounts, does not constitute a violation of the right to trial by jury.

In Smith v. Department of Insurance, 507 So.2d 1080, 1088 (Fla. 1987), the Florida Supreme Court stated that the "trial by jury" provision of the Florida Constitution must be read in conjunction with the "access to courts" provision when analyzing whether the Legislature's placement of a cap on non-economic damages is constitutional. The court noted:

> Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for e.g., $1,000,000, has not received a constitutional redress of injuries if the Legislature statutorily, and **arbitrarily**, caps the recovery at $450,000. Nor, we add because the jury verdict is being **arbitrarily** capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. . . .
>
> Here . . . the Legislature has provided nothing in the way of an alternative remedy or commensurate benefit and one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim. We cannot embrace such nebulous reasoning when a constitutional right is involved. (Emphasis supplied).

507 So.2d at 1088-89.

Smith involved an absolute and arbitrary cap on damages without an alternative remedy, commensurate benefit, or overriding public necessity for that limitation. Nevertheless, this Court

recognized in Smith that damage caps are permissible if the statute complies with the test set forth in Kluger.

The statutory sections in the instant case are neither absolute nor arbitrary. In addition, the statutory scheme provides an alternative remedy and commensurate benefit. (See discussion under Point I, subsection A of this brief.) These statutes were enacted pursuant to a legislative finding that there was an overpowering public necessity for this contingent cap and no other alternative would meet this public need. The statutes at issue satisfy both prongs of the Kluger test and, therefore, do not violate the constitutional right to trial by jury.

III. SECTIONS 766.207 AND 766.209, FLORIDA STATUTES (1989), DO NOT DENY THE RIGHT TO EQUAL PROTECTION UNDER THE LAW.

The statutes at issue do not contain unequal and arbitrary classifications which are not rationally related to legislative goals and, therefore, do not deny equal protection. Rather, the legislative classification herein is rationally related to the Legislature's goal of assuring the availability and affordability of medical care to Florida citizens by reducing the size of claims and reducing the costs and delays associated with litigation through the promotion of arbitration of claims.

The Florida Supreme Court, in Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 821 (Fla.

1983), noted that under the equal protection clauses of the Florida and Federal Constitutions, "governmental acts that classify persons arbitrarily may be invalid if they result in treating similar people in a dissimilar manner." Medical malpractice claimants are not treated in a dissimilar manner under the non-economic damages cap scheme set up by the subject statutes. The caps apply equally to all claimants. This fact is not changed by the possibility that certain claimants may have non-economic damages that, if litigated in the traditional tort system, would exceed the amount of the applicable cap, while other claimants may have non-economic damages that, if litigated in the traditional tort system, would fall below the amounts of the caps. Claimants are equally subjected to the contingent cap on non-economic damages.

The Florida Supreme Court, in Pinillos v. Cedars at Lebanon Hospital Corporation, 403 So.2d 365 (Fla. 1981), held that in evaluating whether a statute violates the equal protection clauses of the Florida and Federal Constitutions, the following test should be applied:

> [When] no suspect class or fundamental right expressly or impliedly protected by the constitution is implicated . . . we find that the rational basis test rather than the strict scrutiny test should be employed in evaluating [the] statute against . . . [an] equal protection challenge. The rational basis test requires that a statute bear a reasonable

> relationship to a legitimate state interest, and the burden is on the challenger to prove that a statute does not rest on any reasonable basis or that it is arbitrary. (Citation omitted).

403 So.2d at 367.

In Pinillos, the Florida Supreme Court found that Section 768.50, Florida Statutes (1979), requiring judgments rendered in medical malpractice actions to be reduced by amounts received by plaintiffs from collateral sources, bore a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for Florida citizens. 403 So.2d at 368. The Court reasoned, as follows:

> 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 cost is passed on to the consuming public through higher costs for health care services. This 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.

403 So.2d at 367-68.

In enacting Sections 766.207 and 766.209, Florida Statutes, the Legislature set forth virtually the same reasons it had expressed in the preamble to the enactment of Section 768.50, i.e., protecting the public health by ensuring the availability of adequate and reasonably priced medical care for the citizens of Florida. Upon application of the rationale set forth in the foregoing cases to the statutes at issue in this case, it is clear that Sections 766.207 and 766.209 create a classification that is rationally related to a legitimate legislative goal. Accordingly, these statutes do not violate the equal protection clauses of the State or Federal Constitutions.

IV. SECTIONS 766.207 AND 766.209, FLORIDA STATUTES, DO NOT VIOLATE THE RIGHT TO PROCEDURAL OR SUBSTANTIVE DUE PROCESS.

In Belk-James, Inc. v. Nuzum, 358 So.2d 174, 175, 177 (Fla. 1978), the Florida Supreme Court discussed the due process requirements of the United States and Florida Constitutions and held that:

> The proper standard by which we must evaluate the Legislature's exercise of the police power in the area of economic regulation is whether

> the means utilized bear a rational or reasonable relationship to a legitimate state objective.

. . . .

> [W]e begin with a presumption that acts of the Legislature are constitutional, and that all reasonable doubts are to be resolved in favor of their validity.

In Lasky v. State Farm Insurance Co., 296 So.2d 9. 15 (Fla. 1974), the Florida Supreme Court stated:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. It therefore becomes necessary for us to examine the objectives of the Legislature in enacting [the] statute in order to determine whether the provisions of the act bear a reasonable relation to them. (Footnote omitted).

The court in Lasky upheld the constitutionality of the No-Fault Insurance Act, which established threshold limitations for recovery of intangible damages, based on its finding that the Act bore a reasonable relationship to permissible legislative objectives. The court determined that the legislative goals of reduction of delays, reduction of auto insurance premiums and the assurance that persons injured in automobile accidents would receive some economic aid for medical expenses and lost wages were permissible legislative objectives. While noting that the No-Fault Act would allow

recovery of intangible damages in cases where substantial economic damages are present, the court recognized that:

> Admittedly, 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 (citations omitted).

Lasky demonstrates that mathematical certainty is not required. Therefore, pursuant to the foregoing rationale, although the statute at issue in this case may preclude recovery for severe pain and suffering in some cases, the statute does not violate the Constitution because it bears a direct and reasonable relationship to permissible legislative objectives.

As has been previously discussed in this brief, the Legislature specifically set forth, in the preamble to the Medical Malpractice Reform Act, those reasons which justified the enactment of Sections 766.207 and 766.209. The Legislature determined that a cap on non-economic damages was essential in order to reduce medical malpractice claims, to decrease delays in the payment of claims, to increase certainty in the recovery of damages, to reduce the amount of attorneys' fees, to improve the availability of

medical malpractice insurance coverage for physicians and to assure adequate and reasonable medical care for the citizens of Florida. Furthermore, the $250,000/$350,000 cap was not arbitrarily established but rather was arrived at after the Academic Task Force conducted studies which took into account different cap amounts and evaluated the estimated savings attainable were those different cap amounts adopted. See The Academic Task Force for the Review of Insurance and Tort Systems, Final Recommendations, March 1, 1988, Appendix 6 at p. 64.

The foregoing demonstrates that Sections 766.207 and 766.209 bear a direct and reasonable relationship to permissible legislative objectives which are similar in substance to the permissible legislative goals identified in Lasky. Therefore, these statutes do not violate the right to procedural or substantive due process.

V. SECTIONS 766.207 AND 766.209, FLORIDA STATUTES, DO NOT VIOLATE ARTICLE X, SECTION 6 OF FLORIDA'S CONSTITUTION.

Under Kluger and Smith, the Legislature may completely abolish a cause of action without providing an alternative remedy or commensurate benefit where the legislation is founded on a legislative determination of overpowering public necessity and that there are no alternative solutions. If Article X, Section 6 were held to apply to the statutes at issue, the Legislature could

never abolish a cause of action unless it provides compensation to each claimant. In any event, as discussed above, the statutes at issue provide a commensurate benefit and, therefore, compensates for any "taking" that occurs.

Moreover, the subject statutes do not constitute an impermissible taking of property without due process of law since Florida law recognizes that a plaintiff has no vested property interest in a cause of action. Clausell v. Hobart Corporation, 515 So.2d 1275 (Fla. 1987). Medical malpractice claimants cannot be deemed to have suffered a deprivation of a property right where no judgment has been obtained and where there is no assurance that any amount will be proven and recovered in the event of trial.

VI. SECTIONS 766.207 AND 766.290, FLORIDA STATUTES (1989), DO NOT VIOLATE THE SEPARATION OF POWERS PROVISION OF ARTICLE II, SECTION 3, OF THE FLORIDA CONSTITUTION.

Article II, Section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers pertaining to either of the other branches unless expressly provided herein.

When the Legislature enacted Sections 766.207 and 766.209, it was addressing the substantive rights of claimants in medical malpractice cases to recover damages. While there are clearly

certain procedural aspects set forth in the statutory sections, these procedural aspects are necessary for the successful implementation of the substantive provisions of the statutes. In Smith v. Department of Insurance, 507 So.2d 1080, 1092 (Fla. 1987), the Florida Supreme Court held that the separation of powers doctrine was not violated in sections of the Tort Reform and Insurance Act of 1986 which contained procedural provisions which were directly related to the substantive statutory scheme.

Likewise, the procedural aspects contained in the statutes at issue are directly related to the substantive provisions of the statutory scheme. Therefore, pursuant to Smith, these provisions do not violate the separation of powers clause of the Florida Constitution.

VII. SECTIONS 766.207 AND 766.209, FLORIDA STATUTES (1989), DO NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT SET FORTH IN ARTICLE III, SECTION 6, OF THE FLORIDA CONSTITUTION.

Article III, Section 6 of the Florida Constitution provides:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. . . .

In Smith v. Department of Insurance, 507 So.2d 1080, 1087 (Fla. 1987), the Florida Supreme Court stated:

> The test to determine whether legislation meets the single-subject requirement is based on common sense. It requires examining the act to determine if the provisions "are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subject."

In Chenoweth v. Kemp, 396 So.2d 1122, 1124 (Fla. 1981), the Florida Supreme Court noted:

> We have long held that the subject of an act "may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection." . . . While Chapter 76-260 covers a broad range of statutory provisions dealing with medical malpractice and insurance, these provisions do relate to tort legislation and insurance reform, which have a natural or logical connection.

The legislative act at issue in the instant case is similar to that in Chenoweth in that it covers a broad range of statutory provisions all of which have a natural or logical connection in that they deal with medical malpractice and with matters affecting the affordability of liability insurance in the medical malpractice field. Accordingly, Sections 766.207 and 766.209 do not violate the single subject requirement set forth in Article III, Section 6 of the Florida Constitution.

CONCLUSION

For the above-stated reasons, Appellant respectfully submits that Sections 766.207 and 766.209, Florida Statutes (1989) are constitutional. Therefore, the Fourth District Court of Appeals' decision to the contrary should be reversed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to all counsel on the attached list, this 29th day of June, 1992.

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