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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 REPLY BRIEF

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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.

The Florida Legislature enacted the statutory caps on non-economic damages in medical malpractice cases only after the Academic Task Force concluded a comprehensive review of the possible alternatives for resolving the medical malpractice insurance crisis. The Legislature considered numerous alternatives and recognized that between 1975 and 1988 virtually every other alternative was reviewed and enacted without much success. Accordingly, the Legislature enacted the statutes at issue here which contain what the Legislature considered to be the only remaining alternative, a contingent cap on non-economic damages. In his Answer Brief, Branchesi disagrees with the remedy adopted by the Legislature and suggests "alternatives" which he believes will more effectively resolve the problems of health care availability and affordability in Florida. Branchesi is simply asking this Court to second guess the Legislature which has the exclusive power to enact legislation regulating the public health and welfare.

Branchesi's argument concerning alternative remedies is clearly more appropriately a legislative function and not a judicial function. Unlike the Legislature, courts do not have the resources to weigh and evaluate various alternatives and to enact legislation to meet the needs of the public. It is precisely this 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.

Chapter 88-1, Laws of Florida is the Legislature's solution to the medical malpractice crisis. Whether this is the best solution, or whether it will work, is not or this Court to determine as long as the statutes fall within constitutional parameters. See: Smith v. Department of Insurance, 507 So.2d 1080, 1095 (Fla. 1987).

Branchesi incorrectly asserts that only the most seriously injured victims of medical malpractice are affected by the caps imposed by the statutes at issue here. The subject statutory caps affect all medical malpractice victims, including the less seriously injured ones. Situations exist where an individual may have minimal economic losses and extensive non-economic (pain and suffering) losses and other situations exist where an individual has extensive economic losses and minimal non-economic losses. In both scenarios, the statutory caps on the benefits (i.e., prompt and inexpensive resolution of the claims) available under the statutory scheme apply.

Branchesi's position that Smith v. Department of Insurance, supra, is controlling to the question at issue here is misplaced. The issue in Smith was the constitutionality of an absolute $450,000.00 cap on non-economic damages that applied to all tort

actions. The Task Force specifically acknowledged that its proposed cap on non-economic damages is different from the absolute cap that was held to be unconstitutional in Smith. For example, the Task Force stated that the constitutional limitation would only apply to medical malpractice claims where a special need had been established by specific research findings. In addition, the limitation would be a part of a balanced plan to facilitate the resolution of meritorious claims, thereby providing commensurate benefits in exchange for the reduced economic remedy. The $250,000 conditional limitation proposed by the Task Force applies only with the consent of both parties. 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.

The limitation which the court considered in Smith offered no commensurate benefit. Therefore, unlike the cap at issue in Smith, the subject legislation meets the two part test set forth in Kluger v. White, 281 So.2d 1 (Fla. 1973). The Florida Supreme Court has already acknowledged the existence of a medical malpractice crisis and recognized that some measures are necessary to curb the problem. See: Carr v. Broward County, 541 So.2d 92 (Fla. 1989). In enacting the legislation at issue in this case, the Legislature has responded to a need for further measures

necessary to curb the medical malpractice crisis, including a contingent cap on non-economic damages. This legislation does not impinge upon an injured person's rights to recover purely economic damages, such as past and future medical expenses, lost wages, and loss of earning capacity. Rather, it is only those elements of damages which cannot be established through hard evidence and which are not necessary to a claimant's survival which have been limited.

Contrary to Branchesi's suggestion at Page 30 of his Brief that the Task Force did not give serious consideration to other possible alternatives, a review of the Task Force findings demonstrates that the Task Force seriously considered the alternative solutions for the crisis. In fact, the legislation contains the alternatives suggested by Branchesi: title regulation and discipline of health care providers; title regulation of medical malpractice insurers; and damage caps that affects all malpractice victims, including the less seriously injured.

Branchesi contends that the Hospital's quote from the Task Force's "Discussion Draft" that "only non-economic damages would reduce malpractice claims appreciably" is misleading. While the Task Force makes this statement in the context of other possible

civil justice reforms, the statement must be viewed in light of the following introductory statement to the draft report:

> [I]t is useful to subdivide proposals to reform the civil justice system into three discrete groups of proposals:
>
> (1) Limited tort reforms, that is, changes in specific tort doctrines;
>
> (2) Process reforms, consisting of changes in the dispute resolution process (usually designed to reduce costs and the delay in the system); and
>
> (3) Comprehensive alternatives to the tort system. . . .
>
> Before proceeding to an overview of alternatives in each of these major areas, two caveats are in order. First, **proposals in one area, such as strengthened professional regulation of the medical profession, should be seen as potentially complementary to recommendations in other areas, such as reform of the civil justice system. Far too often in the debate over medical malpractice reform, proposals in one of the three areas have been viewed as mutually exclusive alternatives. Because the Preliminary Fact-Finding Report on Medical Malpractice established that Florida's medical liability problems are complex problems with multiple causes, workable solutions must consist of a package of recommendations drawing upon more than one approach to reform. . . .** (Emphasis supplied).

Academic Task Force's Medical Malpractice Reform Alternatives (October 2, 1987), (A. 3, p. 2). The medical profession has been heavily regulated for years and this has not alleviated the malpractice crisis. The foregoing demonstrates that the Task Force

considered and rejected Branchesi's proposal that stricter regulation of the medical profession alone would alleviate the medical malpractice insurance crisis. The Legislature determined that "the magnitude of this compelling social problem demanded immediate and dramatic legislative action". Chapter 88-1, Laws of Florida.

This Court has recognized the Legislature's ability to modify or abolish causes of action when the Legislature provides specific findings supporting its action. In Carr v. Broward County, supra, the Florida Supreme Court relied on the legislative findings that the medical malpractice crisis exists and that a statute of repose was necessary to uphold the statute against an access to court's challenge. The Court did not second guess the Legislature as to whether other alternatives, including tighter regulation, could resolve the malpractice crisis as is urged by Branchesi in this case.

Branchesi's argument that a defendant will invoke the arbitration provision "only when the defendant's conduct was so obviously negligent that it would be indefensible in a court of law" is misplaced. In light of the inherent uncertainty of the litigation process, a defendant that determines that there is a "50/50" chance of liability may decide not to risk contesting liability because of potential problematic exposure and may chose

arbitration and certainty in exposure. Such a decision would clearly benefit claimants who may not ultimately prevail in a trial in such a case. Branchesi's argument clearly ignores the uncertainties, costs and delays in the court system that the legislation at issue was designed to address.

Branchesi incorrectly asserts that the letter of Professor Gifford, the Associate Director of the Task Force, which contains the statement "if there is an alternative method [to the damage cap] of meeting the public necessity, exhaustive consideration of the possibilities did not find it" expresses only the opinion of the writer and cannot be deemed to speak for the Task Force. Professor Gifford's letter specifically states that it was expressing the "thinking of the drafters of the proposal" and sharing the Academic Task Force "staff's own constitutional analysis". See: Associate Director of Academic Task Force correspondence to House Insurance Committee, dated January 12, 1988 (A. 5).

Branchesi erroneously argues that the statutes at issue provide no real benefits to an injured claimant. In the Initial Brief, the Hospital set forth the commensurate benefits afforded to a claimant under the statutes at issue as a trade-off for the cap on non-economic damages. (Hospital's Initial Brief, pp. 8-9). The Third District in University of Miami v. Echarte, 585

So.2d 293 (Fla. 3d DCA 1991), recognized that the statute did provide benefits to claimants. However, without analyzing the value of these benefits, the Third District Court of Appeal erroneously concluded that these benefits were not sufficient.

Contrary to Branchesi's argument, the statute at issue is similar to the workers' compensation law. Like the workers' compensation law, which was deemed constitutional against a denial of access to court's challenge, the subject statute replaces a costly, uncertain and time-consuming tort remedy with a less expensive, more certain and less time-consuming administrative procedure. The claimant under the arbitration provisions of the Medical Malpractice Act, like the claimant in a workers' compensation case, does not have to prove fault in order to recover medical expenses, lost income, attorneys' fees, costs and interest. Further, the claimant under the statutes at issue here is entitled to recover substantial amounts of general damages in direct proportion to their loss of ability to enjoy life.

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

Branchesi's reliance on Smith in support of its argument that the damage caps at issue in this case violates the right to a jury trial is misplaced. This argument ignores the court's statement in Smith that damage caps are "permissible if the statute complies

with the two prong test set forth in Kluger v. White." In Smith, the court stated that the access to court provisions "must be read in conjunction" with the constitutional jury trial provisions. 507 So.2d at 1088-1089. According to Smith, if the damage cap fails to satisfy the Kluger test, then a jury verdict would be "arbitrarily capped" and plaintiff would not be receiving the benefit of a jury trial. Id. If, however, the damage cap satisfies the Kluger test, under Smith, the damage cap is permissible.

Further, Branchesi's attempt to distinguish Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974), is without merit. In Lasky, the court held that if the Legislature complies with the two-prong test in Kluger, it could completely abolish a cause of action triable by a jury without violating the right to a jury trial. Branchesi tries to distinguish Lasky on the grounds that the statutes at issue in this case do not completely abolish the right to recover non-economic damages. However, the issue is not whether the Legislature completely abolished non-economic damages but rather whether the Kluger test is satisfied. Under the rationale set forth in Smith, if the Kluger test is satisfied, a cap on non-economic damages is permissible and the right to jury trial is not violated.

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

Branchesi argues that that statute discriminates significantly against wrongful death medical malpractice claimants, as opposed to all other medical malpractice claimants. However, the issue of whether the term "claimant" contained in the statute refers solely to the personal representative or to each individual beneficiary in a wrongful death action was not raised by the plaintiff below. In fact, there has been no judicial interpretation of the statutes with respect to this issue. Accordingly, Branchesi's argument on this point is not only premature but also purely speculative at this juncture.

Branchesi argues that in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), this Court only held that the 1982 version of Florida Statute 768.854 is constitutional and that the Supreme Court did not consider the 1981 version which the Fourth District declared unconstitutional. This argument is entirely misplaced. As stated by this court in Von Stetina:

> We specifically uphold the constitutionality of Sections 768.54(2)(b), 768.54(3)(e) and 768.51, Florida Statutes (1981). Id. at 789.

Furthermore, contrary to Branchesi's interpretation 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. In any event, the cap at issue here affects all claimants, even those less seriously injured. In Von Stetina, this Court essentially stated that since the statutes did not modify the dollar amounts of medical malpractice judgments, those statutes could be upheld as constitutional without analyzing whether the statute satisfied the two-prong test set forth in Kluger. As noted by this court in Smith, damage caps are "permissible" if the Kluger test is met.

Finally, Branchesi relies on Lasky v. State Farm Ins. Co., 297 So.2d 9 (Fla. 1974) in support of their argument that damage caps violate the equal protection clause because only the most seriously injured are affected. Branchesi's argument, however, ignores the following language contained in Lasky:

> 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. . . .

Id. at 17. It is clear that the statutes at issue in this case create a classification that is reasonably and rationally related to a legitimate legislative goal. Accordingly, the 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.

Initially, contrary to Branchesi's argument at Page 50, in Smith, the Court never indicated that damage caps, by their nature, are wholly "arbitrary" lines drawn between recovery and non-recovery. Instead, this Court in Smith clearly stated that damage caps are "permissible" if they comply with the two part test set forth in Kluger. Branchesi relies on Lucas v. U.S., 657 S.W.2d 687 (Tex. 1988), in support of their argument that the classification drawn by the statutes at issue here does not bear any reasonable relationship to the stated objections of the legislation. However, the Texas cap on non-economic damages at issue in Lucas is clearly distinguishable from the statutes at issue in this case.

For example, the Texas statute did not provide any commensurate benefits as provided by the Florida statute. In addition, 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. Therefore, 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.

Here however, the Task Force specifically determined that caps would reduce medical 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 the $250,000 cap on non-economic damages. See: Academic Task Force for Review on the Insurance and Tort Systems, Final Recommendations, March 1, 1988. (A. 6, p. 89, fn. 52).

With respect to the remaining points on appeal, Appellant relies on the arguments presented in its Initial Brief.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the trial court erred in declaring Sections 766.207 and 766.209, Florida Statutes (1989) unconstitutional. Accordingly, the judgment entered below 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 12th day of August, 1992.

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ST. LUCIE COUNTY COURTHOUSE

CASE NO: 90-964 CA 11

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