IN THE
SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
ATTORNEY GENERAL RE:
THE MEDICAL LIABILITY CLAIMANT'S
COMPENSATION AMENDMENT

CASE NO.: SC04-310

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INITIAL BRIEF IN OPPOSITION TO THE MEDICAL LIABILITY CLAIMANT'S AMENDMENT

FILED IN RESPONSE TO THE COURT'S ORDER ISSUED MARCH 11, 2004
ON BEHALF OF THE TRIAL LAWYERS SECTION OF THE FLORIDA BAR

JACOBS & ASSOCIATES, P.A.

ARTHUR I. JACOBS, ESQUIRE
Fla. Bar No. 108249
LISA G. SATCHER, ESQUIRE
Fla. Bar No. 0195758
961687 Gateway Blvd., Suite 201-I
Fernandina Beach, FL 32024
(904) 261-3693 (telephone)
(904) 261-7879 (facsimile)

Counsel for the Opponents,

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF AUTHORITIES

Florida Constitutional provisions

Florida Statutes

Florida Rules of Professional Conduct

Florida Case Law

Federal Statutes

STATEMENT OF INTEREST

The Trial Lawyers section of The Florida Bar is composed of both plaintiff and defense lawyers. Their principle purpose is to promote integrity in the judicial system and the rights of Floridians pursuing justice. They promote, as well, professionalism amongst the Trial Bar in Florida. The Trial Lawyers section has a unique perspective from which to analyze the Medical Liability Claimant's Amendment. The Trial Lawyers section has been extremely vigilant in protecting the constitutional rights of Floridians and continues to promote these rights by the filing of this brief in opposition to the proposed Medical Liability Claimant's Amendment.

This filing was approved by the Executive Committee of the Board of Governors of The Florida Bar on March 30, 2004 consistent with applicable standing board policies, and further premised on the declaration that this appearance is by the Trial Lawyer's Section of The Florida Bar, wholly supported by the separate resources of that voluntary organization - not in the name of The Florida Bar - and does not otherwise implicate the membership fees paid by every Florida Bar licensee.

STATEMENT OF THE CASE AND FACTS

In accordance with Article IV, section 10 of the Florida Constitution and section 16.061 of the Florida Statutes, the Attorney General petitioned this Court for an advisory opinion as to the validity of a proposed amendment to the Florida Constitution which seeks to limit the amount of attorney's fees that may be collected under a contingency fee agreement in a claim of medical liability. The questions proposed to the Court are whether the initiative complies with the mandates of Article XI, section 3 of the Florida Constitution and whether the proposed title and summary of the amendment complies with section 101.161 of Florida Statutes.

The full text of the proposed amendment states:

Section 1.

> Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

Section 2.

> This Amendment shall take effect on the day following approval by the voters.

The ballot title for the proposed amendment is "The Medical Liability Claimant's Compensation Amendment." The ballot summary for the proposed amendment states:

> Proposes to amend the State Constitution to provide that an injured claimant who enters into a contingency fee agreement with an attorney in a claim for medical liability is entitled to no less than 70% of the first $250,000.00 in all damages received by the claimant, and 90% of damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This amendment is intended to be self-executing.

Pursuant to this Court's order of March 11, 2004, the Trial Lawyers section of the Florida Bar (hereinafter, "Opponents") submits this brief in opposition to the above quoted proposed amendment.

SUMMARY OF ARGUMENT

The opponents respectfully request this Court to strike the Medical Liability Claimant's Compensation Amendment, (hereinafter, the "proposed amendment" or "initiative") for failure to meet both the constitutional and statutory requirements of Florida Law. To begin, the proposed amendment violates the single-subject and direct connection mandates of Article XI, section 3 in that it fails to deal with a "logical and natural oneness of purpose," and it "affects separate functions of government and the constitution." The proposed amendment, although purporting to guarantee a "Claimant's right to *fair* compensation" is in reality a misnomer in that it actually seeks to limit collectible contingent fees and prevent patients from suing physicians. The proposed amendment clearly would hinder a person's constitutional right to access the courts as many people and attorneys cannot readily afford to litigate a medical malpractice claim. The proposed amendment would also violate one's right to equal protection of the laws as the initiative may only require a cap on contingency fee contracts between plaintiff's attorneys and clients, not defense attorneys and clients who are physicians or employed in the medical profession. Lastly, the proposed amendment would violate the freedom to contract as this initiative seeks to impose a limit on how one may contract for legal services.

The proposed amendment would also violate Florida Statutes section 101.161 in that the language of the initiative is both vague and ambiguous by virtue of the repeated use of different undefined terms such as "claimant" versus "injured claimant;" "medical liability claim;" the use of the word "receive"and the phrase "is entitled to receive;" the legal term of art "exclusive of reasonable and customary costs;" and finally the varying language used to dictate the cap; i.e., "of the first $250,000.00 in all damages received by the claimant. . . whether received by judgment, settlement, or *otherwise*, ..." as compared to the second cap of "90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants."

Lastly, the Amendment is clearly misleading and fails to inform voters of important collateral impacts such as the arguably uneven playing field between a victim of medical malpractice and physicians who can pay an attorney's fees without a cap. More importantly, however, is the undisclosed collateral impact on barring a victims access to courts due to a victims inability to pay and an attorney's inability to represent a victim in a malpractice case for minimal fees.

ARGUMENT

STANDARD OF REVIEW

When reviewing a proposed amendment to the constitution originating by initiative, the Court's responsibility is limited to two legal issues: "(1) whether the proposed amendment meets the single-subject requirements of Article XI, section 3 of the Florida Constitution; and (2) whether the proposed amendment's title and summary are 'printed in clear and unambiguous language,' as provided in section 101.161(1), Florida Statutes." Advisory Opinion to the Attorney General re: Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 565 (Fla. 1998). The duty of the Court is to "uphold the proposal unless it can be shown to be 'clearly and conclusively defective.'" Advisory Opinion to the Attorney General re: Tax Limitation, 673 So. 2d 864, 867 (Fla. 1996)(quoting Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 339 (Fla. 1978). The Court does not, however, review the merits of the proposed amendment. Advisory Opinion to the Attorney General re: Amendment to Bar Govt. From Treating People Differently Based on Race, 778 So. 2d 888, 891 (Fla. 2000).

I. Single Subject Requirement

THE PROPOSED AMENDMENT VIOLATES THE SINGLE

SUBJECT REQUIREMENT BECAUSE IT SUBSTANTIALLY AFFECTS MULTIPLE FUNCTIONS OF GOVERNMENT, MULTIPLE SECTIONS OF THE CONSTITUTION AND LACKS ANY LOGICAL ONENESS OF PURPOSE.

Article XI, section 3 of the Florida Constitution provides that proposed amendments based on citizen initiative petitions "shall embrace but one subject and matter directly connected therewith." A primary purpose behind this "rule of restraint," is to "prevent a single constitutional amendment from substantially altering or performing the functions of multiple aspects of the government." Advisory Opinion to the Attorney General re: Florida's Amendment to Reduce Class Size, 816 So. 2d 580, 583 (Fla. 2002). Article XI, section 3 "protects against multiple 'precipitous' and 'cataclysmic' changes in the state constitution by limiting to a single subject what may be included in one amendment proposal." Id. This law also ensures that the "electorate understand the specific changes in the existing constitution" by the proposed amendment. Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984).

A. The proposed amendment would change more than one government function.

Several tests have been articulated to determine whether a proposed amendment violates the mandates of Article XI, section 3. In Evans v. Firestone, this Court stated "where a proposed amendment changes more than one government function, it is clearly multi-subject." 457 So. 2d 1351, 1354 (Fla. 1984). The Evans case concerned

a proposed amendment that would have capped damages in proportion to a defendant's fault, required courts to summarily resolve lawsuits when no material facts were present in order to avoid unnecessary costs and limit non-economic damages to a maximum of $100,000. Finding that the proposed amendment violated the single subject requirement, the Court first focused on the function of the proposed amendment and its potential effects on the legislative and judicial branches. 457 So. 2d 1351, 1354. In regards to the legislative branch, the court explained that a limitation on a defendant's liability is substantive in nature and thus legislative in nature. In regards to the judicial branch, the court stated that the summary judgment mandate is procedural in nature and a judicial function. Because the initiative would have performed both legislative and judicial actions, it failed to meet "the functional test for the single-subject limitation the people have incorporated in Article XI, section 3 of the Florida Constitution." Id.

The Evans Court also invalidated the proposed amendment based on its failure to be directly connected with its various features, finding that while one section concerned a cap on damages, the summary judgment directive in no way limited the concept of liability or damages. 457 So. 2d at 1354.

1. Potential Effects on the Judicial Branch

The proposed amendment, like the initiative in Evans, would substantially impact

all branches of government. The most drastic impact would be felt by the judiciary who, due to the self-executing clause of the proposed amendment, would be forced to immediately interpret and essentially make law while deciding the meaning of the various ambiguous and vague terms of this initiative. For example, the initiative, which does not contain a set of definitions, uses the term "receive" three times in one sentence, with potentially numerous meanings which could reasonably be attributed to each, to wit: does the term "receive" mean when the check is sent from a law firm to the client, which would mean after the attorney collects his or her fee and *reasonable and customary costs?* Or does "receive" mean when a judgment is entered by a court or jury or when a settlement agreement or release is signed? The initiative also uses the phrase "claimant," leading one to ask is this the same claimant that is referred to in the ballot summary; i.e., an injured claimant? Does a "claimant" include an estate or spouse as would be the case in a wrongful death suit? Each of these issues would require lawmaking, a legislative function.

Another obvious affect of this amendment on the judicial branch may very well be its usurping of the exclusive authority of this Court to provide rules of practice and procedure. Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). For example, this initiative seeks to limit an attorney's ability to recover fees in medical liability cases. However, the Florida Rules of Professional Conduct already addresses the issue of attorney's

fees and the factors to be considered in determining their propriety. See Fla. Rules of Professional Conduct 4-1.5. For example, Rule 4-1.5 (f) provides that the attorney and client must place their agreement in writing, detailing what percentage the attorney may recover at various stages of litigation and detailing what costs must be borne by the client "before or after the contingent fee is calculated."

2. Potential Effect on the Legislative Branch of Government

In regards to the effects on the legislative branch, the initiative would provide a new absolute entitlement to damages in medical liability cases. This new entitlement would apparently trump any contracts limiting a "claimant" to another percentage of damages and trump any liens that may be present. Once again, the proposed amendment would be performing the legislative function of policy-making-- declaring a new entitlement.

3. Potential Effect on the Executive Branch

Finally, the executive branch would certainly feel the effects of the initiative when attempting to recoup its liens, whether they be tax liens or Medicare liens as required by federal law. See Fla. Stat. § 409.910 (legislation implementing mandate required by 42 U.S.C. §1396). The proposed initiative would drastically impact the relations between the state and federal government in this situation because, for example, if "claimants" are to receive all seventy percent of damages up to $250,000

and ninety percent of all damages over $250,000, the state would be in a position to stand in line behind the federal government (otherwise violating federal mandates requiring recoupment of these expenditures) and otherwise fight it out with other lienholders attempting to satisfy their liens with the remaining thirty percent of damages *received.* The implications under this one scenario are too numerous to imagine.

B. The proposed initiative substantially impacts other provisions of the Florida Constitution.

Another test articulated by this Court when determining whether an initiative violates the single subject provision of Article XI, section 3 is whether and how the initiative impacts other provisions of the constitution. In re: Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994). The affected provisions must be identified so that voters can "comprehend the contemplated changes in the constitution and to avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal." Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984).

1. The proposed amendment conflicts with the Article I, section 21 guarantee of access to courts.

Article I, section 21 of the Florida Constitution provides that "courts shall be open to every person for redress of any injury, and justice shall be administered

without sale, denial or delay." This Court has previously found that the constitutional right to access to the courts is violated if a law provides a "procedural hurdle" which is "significantly difficult" to surmount. Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001). The proposed amendment would certainly conflict with this guarantee as its effect would be to prevent, or at the very least inhibit, a plaintiff's ability to hire counsel in medical liability cases.

2. The proposed amendment conflicts with the right to equal protection of the laws as provided in Article I, section 2.

Another guarantee that conflicts with the proposed initiative is one's right to equal protection of the laws as found in Article I, section 2. "In order for a statutory classification not to deny equal protection, it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed . . . there must be a logical connection between the classification involved and the stated purpose to be achieved by the [law]. . . . ." Fla. Real Estate Comm. v. McGregor, 336 So. 2d 1156, 1159 (Fla. 1976). In McGregor, the Court found unconstitutional a law that required a corporation to hire licensed real estate brokers to sell real property. The corporation and its representatives, unique in the few types of properties it purchased and sold, was unable to hire licensed brokers because the realty was difficult to reach (generally in rural areas) and very inexpensive, thus

drastically limiting any commission. Under the statutory scheme, the corporation, who was otherwise entitled to hold and sell property, could not unless it hired a licensed broker. The Court held that, in the absence of a compelling public purpose to be served by the law, as it applied to the appellee, was unconstitutional. Id. at 1160.

An individual claimant's right to equal protection of the laws would be substantially affected by the proposed amendment in that plaintiffs would be financially limited in their ability to hire competent counsel in medical liability cases, while defendants in medical liability cases would be free to pay as much as they wish for defense counsel. This is inherently unfair and clearly places plaintiffs in a detrimental situation. There can be no "just and reasonable" or logical purpose behind shackling a plaintiff's ability to be adequately represented by counsel, while the defendant or its insurer has an unfettered ability to hire whomever he or she chooses.

3. The proposed amendment conflicts with Article I, section 10's prohibition against laws that impair contracts.

Finally, the proposed amendment conflicts with the right to contract as provided under Article I, section 10 of the Florida Constitution. This Article provides that "[n]o . . .law impairing the obligation of contracts shall be passed." Art. I, § 10 Fla. Const. "Virtually no degree of contract impairment is tolerated in Florida." Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, 779 (Fla. 1979). However,

the Court in Pomponio further provided that in order to determine how much

> impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the State purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Pomponio, 378 So. 2d 774, 780. In order to better understand the term impairment, the Court describes "to impair" as "to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken." Id. at 781 n. 41 (Citing State ex rel. Women's Benefit Assoc. V. Port of Palm Beach District, 164 So. 851, 856 (Fla 1935).

Under the present facts, the proposed amendment would certainly restrict one's right to contract, whether the contract be with an attorney, a hospital or a local or state government. However, the ability to contract with an attorney appears the most obvious and inequitably affected by the scheme of the amendment. The proponents of the initiative would retain their freedom to contract while a victim of medical malpractice would be left with the choice of foregoing a suit for redress of his or her

injuries due to financial limitations, or contract with an attorney who is perhaps not as knowledgeable or experienced in medical liability cases.

C. The proposed amendment lacks any logical one-ness of purpose.

In evaluating whether an initiative violates the single-subject rule, the courts also look to whether the initiative "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test." Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984)(citing City of Coral Gables v. Gray, 19 So. 2d 318 (Fla. 1944). This unity and natural relation requirement helps guard against "logrolling," "a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." Advisory Opinion to the Attorney General re: Save Our Everglades Trust Fund, 636 So. 2d 1336, 1339 (Fla. 1994).

Unfortunately, because of the latent ambiguities and vagueness present in the proposed amendment, this test is almost impossible to administer. First, the ballot summary states that the cap on fees received would be limited to contingency fee agreements between attorney's and injured claimants. However, the actual language of the amendment never mentions attorneys, nor does it mention "injured" claimants. The effect of this ambiguity has far reaching implications as, for example, one voter may interpret and agree with this law as applicable to a settlement between an estate and

a public health institution where a contingency fee was involved, but disagree with the implications between an attorney representing a person who has been injured by a faulty heart valve. Clearly, impermissible logrolling may occur.

The Medical Liability Claimant's Compensation Amendment clearly violates the single subject rule because it not only changes more than one government function, its effects would certainly prove to bring about numerous precipitous and cataclysmic changes. As such, the proposed amendment should be removed on this basis.

II. The proposed amendment is facially vague and ambiguous.

> THE MEDICAL LIABILITY CLAIMANT'S COMPENSATION AMENDMENT VIOLATES FLORIDA STATUTE SECTION 101.161 BECAUSE IT IS AMBIGUOUS, VAGUE, MISLEADING AND FAILS TO INFORM VOTERS OF IMPORTANT COLLATERAL IMPACTS THE AMENDMENT WOULD HAVE ON RIGHTS.

Florida Statute section 101.161(1)(2003) provides that "[w]henever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates . . . ." The purpose behind this requirement is to "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." Advisory Opinion to the Attorney General re:

Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998). The requirements of Florida Statute section 101.161 (1) also mandate that the "ballot title and summary . . . state in clear and unambiguous language the chief purpose of the measure." Id. It is the Court's responsibility to determine whether the language as written misleads the public. Id.

In Advisory Opinion to the Attorney General re: Amendment to Bar Govt. From Treating People Differently Based on Race, 778 So. 2d 888 (Fla. 2000), this Court struck down a proposed amendment due to, among other things, discrepancies between language used in the ballot title and text; i.e., the term "people" as opposed to the subsequently used term "persons." The Court explained that to the voter, "it is unclear . . .whether the difference in terms was intentional . . ." Id.

In the present case, the ballot summary uses the term "injured claimant" while only using the term "claimant" in the text of the proposed amendment. The summary of the initiative also alludes to a "contingency fee contract with an attorney" yet never mentions the word attorney when describing a "claim involving a contingency fee." Whether these discrepancies were intentional to mislead voters to believe the amendment would apply to lawyers is unknown.

Furthermore, while voters are presumed to have a certain amount of common sense and knowledge, the average voter may not be acquainted with various legal terms

of art. This Court has struck down proposed amendments that used similar legal terms such as: "bona fide qualification based on sex" as used in the law at issue in Advisory Opinion to the Attorney General re: Amendment to Bar Government from Treating People Differently Based on Race, 778 So. 2d 888, 899 (Fla. 2000); "common law nuisance" and "increases in tax rates" as used in proposed summaries of ballots at issue in Advisory Opinion to the Attorney General re: People's Property Rights Amendments Providing Compensation for Restricting Real Property, 699 So. 2d 1304, 1309 (Fla. 1997)

In the present case, the proposed amendment contains the legal phrase "reasonable and customary costs," which are excluded from the damages that a claimant is entitled to receive. It is reasonable to believe that voters, like those confronted with the phrases "bona fide qualification based on sex," "common law nuisance" and "increase in tax rates," could have varying interpretations of what is a reasonable and customary cost.

Finally, the proposed amendment is so poorly drafted that voters cannot begin to conceive of the ramifications of this initiative. The language of the amendment is so blatantly vague and ambiguous that basic questions cannot be answered such as:

! Who is the claimant? Is there a difference between the injured claimant in the ballot summary and claimant as used in the amendment? Would the amendment apply

to survivors and estates of an injured party or would it be limited to the injured claimant as the ballot summary implies?

! What is a medical liability claim? Does it encompass all medical malpractice and negligence claims? Does it apply to medical products liability, or products liability cases in general? Will the amendment apply to workers' compensation cases, which, after all, deal with injuries that may require a "medical liability claim?"

! What does the phrase "received by the claimant" mean? At what point does this amendment become operative? It appears as though the amendment may operate upon receipt of damages, however, the term "received" is used three-times in one sentence with arguably separate meaning given to each.

! What is meant by "entitled to receive?" Does this phrase assume a strict liability standard or a finding of liability or fault? Would this apply to issues of comparable fault?

! What is meant by "exclusive of reasonable and customary costs?" What standard would govern what costs are reasonable and customary?

! The amendment applies to damages "whether received by judgment, settlement or otherwise." What does "otherwise" entail?

! What is the purpose behind the differing language between the 70% "of the first $250,000.00 in all damages received by the claimant" as compared to the 90% "of

all damages in excess of $250,000.00?" Does this mean that for claims totaling in excess of $250,000.00, a claimant receives 90% thereof? Or does the 70% standard apply to the first $250,000.00 and the 90% standard applies to the rest of the damages received?

These obvious discrepancies in terminology could certainly lead voters to question the ultimate effect of the amendment. Additionally, the differences in terminology between the ballot summary and the actual text concern items with significant legal relevance of which the proponents of this initiative cannot expect ordinary voters to understand.

These glaring examples of this initiative's violation of Florida Statute 101.161 by failing to inform voters of these collateral effects should alone be enough to strike the proposed amendment. As stated by Justice Kogan in his concurring opinion in In re: Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1024 (Fla. 1994), the Constitution requires "that all such civil rights initiatives must be narrowly framed, must not involve undisclosed collateral effects, and must not have the potential to disrupt other aspects of Florida law . . . ."

Conclusion

The Medical Liability Claimant's Compensation Amendment violates both

Article XI, section 3 mandates as well as section 101.161 of the Florida Statutes. The initiative's inherent vagueness and ambiguity is fatal. The proposed amendment would severely impact all three branches of government, with the judiciary taking the greatest hit as soon as the amendment was implemented. Furthermore, while the functions of the branches would be impacted, the relationship between the local and state levels of government as well as the state and federal government dynamic would be impacted financially at the very least.

The present proposed amendment fails to address the "myriad of laws, rules and regulations that may be affected" by the implementation of this amendment. In re: Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1024 (Fla. 1994). Once again, due to the vague and ambiguous nature of the entire initiative, the voters will be misled into believing that the law only addresses certain contracts with "attorneys" while in reality it affects any contingency fee contract. Finally, the collateral impact the initiative would have on other guaranteed rights such as access to courts, the right to contract and equal protection of the laws are not addressed and will not in any way benefit the voting public.

Based on the foregoing, the opponents respectfully request this Honorable Court grant oral argument and ultimately strike the Medical Liability Claimant's Compensation Amendment.

Respectfully Submitted by:

JACOBS & ASSOCIATES, P.A.

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ARTHUR I. JACOBS, ESQUIRE
Fla. Bar No. 108249
LISA G. SATCHER, ESQUIRE
Fla. Bar No. 0195758
961687 Gateway Blvd., Suite 201-I
Fernandina Beach, FL 32034
(904) 261-3693 (telephone)
(904) 261-7879 (facsimile)

Counsel for the Opponents,
Trial Lawyers Section of the Florida Bar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to Charles J. Crist, Attorney General, Office of the Attorney General, State of Florida, The Capitol PL01, Tallahassee, Florida 32399-1050 by U.S. mail ( ), Facsimile ( ), Hand Delivery ( ), this __ day of March 2004.

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Arthur I. Jacobs, Esquire

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style used in this brief is 14-point Times New Roman and spaced in accordance with Fla. R. App. P. r. 9.210(a)(2).

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Arthur I. Jacobs, Esquire