IN THE SUPREME COURT OF FLORIDA

Case No.: SC11-1148

ESTATE OF MICHELLE EVETTE MCCALL, BY AND THROUGH CO-PERSONAL REPRESENTATIVES EDWARD M. MCCALL, II, MARGARITA F. MCCALL, AND JASON WALLEY,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

AMICUS BRIEF OF HCA HEALTH SERVICES OF FLORIDA, INC.

On Certified Questions From The
United States Court Of Appeals For The Eleventh Circuit
Case No. 09-16375-J

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STATEMENT OF INTEREST OF AMICUS CURIAE

HCA Health Services of Florida, Inc. ("HCA") owns 15 healthcare facilities in Florida and, as one of Florida's largest healthcare providers, HCA has a vested interest in the proper construction and application of Florida's laws governing the provision of healthcare services.

SUMMARY OF ARGUMENT

Among the questions certified by the Eleventh Circuit is whether the statutory cap on noneconomic damages violates Florida's constitutional right of access to courts. *McCall v. United States*, No. 09-16375 (11th Cir. May 27, 2011) (slip at 18). Beginning with this Court's seminal decision in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), this Court has held that, to satisfy the access to courts provision, the Legislature must satisfy a strict standard should it choose to abolish any common law remedy **or** statutory remedy in existence when Florida's 1968 Constitution was adopted.

HCA respectfully submits that this Court should recede from *Kluger* to the extent it prohibits the Legislature from abolishing statutory remedies in effect at the time of the adoption of the Florida Constitution of 1968. Prior to *Kluger*, there was no authority under Florida law for imposing such a restriction on the Legislature, regardless of when the remedy was first enacted. Indeed, pre-*Kluger* authority runs contrary to such a result.

Moreover, a review of how other jurisdictions have addressed challenges to damages caps under their respective access to courts provisions further informs the limited reach this Court should accord to Florida's constitutional access to courts provision.

ARGUMENT

I. The History Of The Access To Courts Provision Does Not Support Its Application To Limit Statutory Remedies.

HCA respectfully submits that this Court should recede from that portion of its decision in *Kluger* that prohibits the Legislature from abolishing statutory remedies in effect at the time of the adoption of the Florida Constitution of 1968. Nothing in the 1968 Constitution—or in Florida jurisprudence prior to 1968—supports the *Kluger* Court's interpretation of the access to courts provision as a limitation on legislative authority to abolish or modify statutory remedies. To the contrary, the express provisions of the 1968 Constitution and prior Florida law would lead to the opposite result.

In *Kluger*, a state statute abolished the common law right to sue and recover for property damage to a vehicle, unless the damages exceeded $550. 281 So. 2d at 2. Though the court in *Kluger* conceded that it had "never before specifically spoken to the issue," it held in a 4 to 3 decision that, where redress for a particular injury has been provided by statutory law predating the adoption of the 1968 Constitution, the Legislature is "without power" to abolish that right to redress

unless it provides a reasonable alternative, or it demonstrates an overpowering public necessity for the abolishment and shows that no alternative method short of abolishment is available. *Id.* at 3-4.

Even apart from the fact that the elimination of a *statutory* remedy was not at issue in *Kluger*, the Court's holding in this regard is not supported by Florida law or history. Most authorities trace the substance of Florida's "access to courts" provision to the Magna Carta. *See Henderson v. Crosby*, 883 So. 2d 847, 851-52 (Fla. 1st DCA 2004) (citing authorities). That Magna Carta provision provides: "To no one will we sell, to no one will we refuse or delay, right or justice." *See id.* at 851.

The wording and historical context of the Magna Carta provision demonstrate that its purpose was to protect due process and ensure that justice was not for sale. *See id.* At that time, the courts were still "considered a political arm of the Crown." Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1288 (1995). This access to courts provision of the Magna Carta acted "as a guarantee of freedom of the judiciary from corrupt influence and improper meddling" and "to restore the integrity of the courts by curtailing the selling of writs." *Id.* at 1286, 1288. There is no historical basis to assert that this provision was intended to limit a legislative body's authority to change statutory law.

Nor does Florida case law prior to the adoption of the 1968 Constitution support *Kluger*'s limitation on the Legislature's ability to modify remedies it created. Prior to *Kluger*, no Florida court ever applied the "access to courts" provision to restrict the legislature's authority to change statutory remedies. The provision has primarily been applied to the courts themselves. *See Nelson v. Lindsey*, 10 So.2d 131, 133 (Fla. 1942) (holding that the access to courts provision does "not contemplate that the exercise of a purely legislative power . . . shall be subject to judicial review," except where contrary to the constitution).

In *Haddock v. Florida Motor Lines Corp.*, 9 So. 2d 98, 99-100 (Fla. 1942), this Court interpreted the "access to courts" provision of the 1885 Constitution to be an obligation of the courts to enforce remedies chosen by the Legislature. *See also McDuffie v. McDuffie*, 19 So. 2d 511, 513 (Fla. 1944) (when "every element of a right of action" is admitted, "Section 4 of the Declaration of Rights [now Art. I, § 21, Fla. Const.] contemplates that . . . the courts of the State shall be open for remedy without sale, denial, or delay"); *Shotkin v. Cohen*, 163 So. 2d 330, 332 (Fla. 3d DCA 1964) (recognizing "constitutional mandate that the courts be open to all persons," but prohibiting attorney from representing himself due to misconduct).

In *Rainey v. Rainey*, 38 So. 2d 60, 60-61 (Fla. 1948), this Court relied on the access to courts provision in striking down an unreasonable fee awarded by a

Chancellor to a special master. *See also Reddish v. Forlines*, 207 So. 2d 703, 708 (Fla. 1st DCA 1968) (recognizing that "judicial restraint should be practiced in the exercise of the court's inherent power to dismiss actions for want of prosecution, to the end that persons may not be wrongfully deprived of their constitutional right to a remedy by due course of law").

This Court in *Waller v. First Sav. & Trust Co.*, 138 So. 780, 784 (Fla. 1931), relied on the access to courts provision to invalidate a provision of English common law which provided that an action against a tortfeasor died when the tortfeasor died. *See also Gates v. Foley*, 247 So. 2d 40, 44 (Fla. 1971) (citing, among other things, 1968 access to courts provision in overturning common law rule prohibiting a wife from suing for the loss of consortium of her husband); *Cooper v. Tampa Electric Co.*, 17 So. 2d 785, 787 (Fla. 1944) (relying on access to courts provision for authority to entertain common law action for discriminatory or unreasonable electric rates, where the legislature had failed to act).

None of the above decisions applied Florida's access to courts provision as a limitation on the Legislature's ability to modify or abolish the statutory remedies it created. Nor do those decisions support the application of the access to courts provision in such a manner.

It remains to note that there is nothing in the express wording of the 1968 Constitution or its adoption that supports *Kluger*'s interpretation of the access to

courts provision as freezing statutory remedies in effect at the time the constitution was adopted, or that the Legislature "is without power" to repeal or modify statutory remedies.

To the contrary, the Florida Constitution expressly provides that "[a]ll laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed." Art. XII, § 6(a), Fla. Const. Clearly this acknowledges and contemplates the Legislature's authority to repeal and modify existing statutory remedies. To hold otherwise invades the prerogative of the Legislature to make the laws (and to repeal them), and violates separation of powers.

II. The Authorities Cited By *Kluger* Do Not Support Its Interpretation Of The Access To Courts Provision As A Limitation On The Legislature's Authority To Limit Statutory Remedies.

In *Kluger*, this Court held:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown

281 So. 2d at 4.

In reaching its holding that the Florida Constitution's access to courts provision applies not only to common law remedies, but also to statutory remedies existing when the 1968 Constitution was adopted, the Court cited only one authority: Corpus Juris Secundum.[1]

Specifically, the pertinent section of the CJS as quoted by the Court in 1973 is as follows:

> [I]n a jurisdiction wherein the constitutional guaranty applies to the legislature as well as to the judiciary, . . . it has been held that the guaranty precludes the repeal of a statute allowing a remedy where the statute was in force at the time of the adoption of the Constitution. Furthermore, . . . the guaranty also prevents, in some jurisdictions, the total abolition of a common-law remedy.

Kluger, 281 So. 2d at 4 (quoting 16A C.J.S. *Constitutional Law* § 710, 1218-19 (1956)). No authority from Florida—or any other jurisdiction—was cited for this Court's holding that statutory remedies in existence in 1968 were "constitutionalized" by the adoption of the access to courts provision.

Nor does any such authority exist today. The current version of CJS contains much the same language as the version quoted by and relied on by the *Kluger*

[1] The Court cited to *Spafford v. Brevard County*, 110 So. 451 (Fla. 1926), for the proposition that the Declaration of Rights of the Constitution of the State of Florida applies to State government and to the Legislature. *Kluger*, 281 So. 2d at 4. *Spafford* dealt with procedures related to eminent domain that impaired the judicial function. It has no application to the ultimate question addressed by *Kluger*.

court. *See* 16D C.J.S. *Constitutional Law* § 2154 (2011).[2] A significant difference, however, is the citations on which the CJS now relies. The CJS now cites only two decisions for its statement regarding the constitutionalization of statutory remedies in existence at the time a state's constitution was adopted: *Kluger* and a later case out of Connecticut, *Gentile v. Altermatt*, 363 A.2d 1 (Conn. 1975). That is, the primary authority for this proposition in the CJS is now *Kluger* itself, and a case decided after *Kluger*.

Gentile—like *Kluger*—involved a common law right, not a statutory right in existence when Connecticut adopted its constitution in 1818. 636 A.2d at 12. As a result, the discussion of statutory rights was also unnecessary for that court's decision. Nonetheless, the Connecticut high court later clarified that their access to courts provision is **not** applicable to all statutory remedies in existence at the time the constitution was adopted: "Not all statutory rights that existed before 1818 are automatically incorporated into article first, § 10. Rather, only statutory *common*

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[2] The current CJS provision states as follows:

> [I]n a jurisdiction wherein the constitutional guaranty applies to the legislature as well as to the judiciary, it has been held that the guaranty precludes the repeal of a statute allowing a remedy where the statute was in force at the time of the adoption of the constitution,[44] or unless it can show an overpowering public necessity for the abolition of such rights, and that no alternative method of meeting such public necessity can be shown.[45]

Footnote 44 is a citation to *Kluger* and *Gentile v. Altermatt*, 363 A.2d 1 (Conn. 1975). Footnote 45 is a citation to *Kluger*.

law rights are so enshrined. Statutory common law rights are rights that were not created as a matter of legislative discretion by the pre-1818 statutes themselves, but rather were already part of the common law and were merely codified by or reflected in those statutes." *Moore v. Ganim*, 660 A.2d 742, 751 n.30 (Conn. 1995) (internal quotation and citation omitted).

In Florida, "[a]n action for wrongful death was not authorized at common law, and is a creation of the legislature." *White v. Clayton*, 323 So. 2d 573, 575 (Fla. 1975). Thus, even under the law of Connecticut—the only other jurisdiction cited by CJS that purports to constitutionalize statutory causes remedies in existence at the time the state constitution was adopted—a wrongful death cause of action would not be incorporated into the access to courts provision.

Moreover, a strict application of *Kluger* to the access to courts challenge in this case runs contrary to the vast majority of jurisdictions dealing with similar challenges pursuant to their respective access to courts provisions. For example, see:

1. *Wachocki v. Bernalillo County Sheriff's Dep't*, 228 P.3d 504 (N.M. App. 2009).

In rejecting a challenge to the damages cap in the New Mexico Tort Claims Act, the court held that the access to courts provision "did not create a right to unlimited recovery against the government." *Id.* at 516. The court further held that

"nothing within New Mexico's constitutional provision itself purports to control the scope or substance of remedies afforded." *Id.* (quotation omitted).

2. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

The court here rejected the access to courts challenge to the statutory cap on noneconomic damages in certain tort actions, holding that, "[w]hile the statute prevents some plaintiffs from obtaining the same dollar figures they may have received prior to the effective date of the statute, it neither forecloses their ability to pursue a claim at all nor completely obliterates the entire jury award." *Id.* at 433.

3. *Judd v. Drezga*, 103 P.3d 135 (Utah 2004).

In addressing the access to courts challenge to the cap on noneconomic damages in medical malpractice actions, the court held that it must determine "whether the damage cap represents a reasonable, nonarbitrary method of reducing increasing health care costs and other dangers that the legislature views as clear social or economic evils." *Id.* at 139. In performing that analysis, the court "recognize[d] an obligation of deference to legislative judgments." *Id.* After reviewing the conflicting evidence presented by each side, the court held that, "[w]hen an issue is fairly debatable, we cannot say that the legislature overstepped its constitutional bounds when it determined that there was a crisis needing a remedy." *Id.* at 140. The court concluded that "[t]he legislature's determination

that it needed to respond to the perceived medical malpractice crisis was logically followed by action designed to control costs." *Id.* at 401.

4. *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 183 (Mich. 2004).

Though not specifically addressing an access to courts challenge, the court held that "[d]amage caps are constitutional in causes of action springing out of the common law because the Legislature has the power under our Constitution to abolish or modify nonvested, common-law rights and remedies." *Id.* at 183 (footnote omitted). The constitutional provision referenced by the court states: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Art. 3, § 7, Mich. Const. This provision is similar to Florida's provision in Article XII, section 6(a).

5. *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43 (Neb. 2003).

In upholding the damages cap in medical malpractice actions, the court rejected the argument that the access to courts provision was violated because the cause of action was in place when the access to courts provision was adopted. *Id.* at 73-74. The court held that, "[a]lthough plaintiffs have a right to pursue recognized causes of action in court, they are not assured that a cause of action will remain immune from legislative or judicial limitation or elimination." *Id.* at 74.

6. *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).

The court here rejected an access to courts challenge to the cap on noneconomic damages in personal injury and wrongful death actions, stating that the right of access is infringed only when there is a "direct impediment[] to court access." *Id.* at 1056 (Fabe, C.J., for an equally divided court). The court specifically rejected the approach taken by *Kluger*. *Id.* at 1057 n.66.

7. *Guzman v. St. Francis Hosp., Inc.*, 623 N.W.2d 776 (Wis. App. 2000), impliedly overruled on other grounds by Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (Wis. 2005).

In rejecting the access to courts challenge to the statutory cap on noneconomic damages, the court held that the access to courts provision confers no legal rights, but merely preserves the right to obtain justice on the basis of the law as it exists. *Id.* at 582-83.

8. *In re Certification of Questions (Knowles)*, 544 N.W.2d 183 (S.D. 1996), superseded by statute on other grounds as stated in *Peterson ex rel. Peterson v. Burns*, 635 N.W.2d 556 (S.D. 2001).

Though the court ultimately invalidated the damages cap on medical malpractice claims on due process grounds, the court rejected the access to courts challenge, holding that the access to courts provision "is not a guarantee that all injured persons will receive full compensation or that remedies once existent will always remain so." *Id.* at 203. Plaintiffs are entitled only to a remedy only "by due course of law." *Id.*

9. *Greist v. Phillips*, 906 P.2d 789 (Or. 1995).

In rejecting a challenge to the statutory cap on noneconomic damages in a wrongful death action, the Oregon Supreme Court held that its access to courts provision is satisfied "as long as the plaintiff is not left without a substantial remedy." *Id.* at 795. The Court concluded that, "[a]lthough that remedy is not precisely of the same extent as that to which plaintiff was entitled before the enactment of [the cap on damages], that remedy is substantial." *Id.*

10. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. 1992).

The *Adams* court upheld the statutory cap on noneconomic damages in a medical malpractice case in the face of an access to courts challenge. *Id.* at 906. In so doing, the court noted that its access to courts provision precludes only procedural barrier to the courts. *Id.* The *Adams* court also expressly rejected this Court's limitation imposed by *Kluger*, stating that such a position "arbitrarily and unnecessarily limit[s] the legitimate lawmaking role of the legislative branch in a manner not intended by our constitution." *Id.*

11. *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992).

The court here held, while the statutory cap on noneconomic damages abrogated the right to recover such damages, "this change in the substantive law is not a restriction upon access to the courts." *Id.* at 114. The court further noted that, even if there were a restriction on access to courts, that provision requires only that

the restriction be reasonable, and the damages cap satisfies that rational basis-type standard. *Id.*

12. *Peters v. Saft*, 597 A.2d 50, 54 (Me. 1991).

In rejecting an access to courts challenge to the cap on damages for injuries for negligent or reckless service of liquor, the court noted that its access to courts provision has been defined to mean only that the "court must be accessible to all persons alike without discrimination, at times and places designated for their sitting, and afford a speedy remedy for every wrong recognized by law as remediable in a court." *Id.* at 54 (quotation omitted).

13. *Robinson v. Charleston Area Medical Center, Inc.*, 414 S.E.2d 877 (W.Va. 1991).

In rejecting the access to courts challenge to the statutory cap on noneconomic damages in a medical malpractice action, the court stated:

> [T]he economic basis underlying a tort action for damages indicates that the right to bring such an action is not a fundamental right in the sense that any limitation on that right requires strict scrutiny under the "certain remedy" provision. Instead, the legislature may reasonably consider clear economic or social conditions in this state in deciding to alter or repeal the common law.

Id. at 884.

14. *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990).

In rejecting an access to courts challenge to the statutory damages cap applicable in a wrongful death action, the court noted that "the open courts provision does not apply to statutory claims." *Id.* at 845.

15. *Wright v. Colleton County School District*, 391 S.E.2d 564 (S.C. 1990).

In rejecting the access to courts challenge to the damages cap imposed by the South Carolina Tort Claims Act, the court held that the access to courts provision "is not a guarantee of full compensation to all injured persons." *Id.* at 570.

16. *Jones v. State Bd. of Medicine*, 555 P.2d 399 (Idaho 1976).

In upholding the cap on damages in medical malpractice actions, the court rejected the argument that the access to courts provision preserved the then existing common law right of action for medical malpractice such that it could only be altered if a substitute remedy is provided. *Id.* at 404-05.

CONCLUSION

HCA Health Services Of Florida, Inc. respectfully submits that this Court should recede from that portion of its decision in *Kluger* that prohibits the Legislature from abolishing statutory remedies in effect at the time of the adoption of the Florida Constitution of 1968.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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