IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

DEBORAH DEFRANKO, Individually, and DEBORAH DEFRANKO & MYRON SIEGEL, As Husband and Wife,

Plaintiffs,

v.

TAYLOR POOLE, M.D., and POOLE & VILLANI, M.D., P.A.,

Defendants.
_____/

CIVIL DIVISION
CASE NO.: 16-16511 CA 15

ORDER DENYING DEFENDANTS' MOTION TO ENTER/AMEND JUDGMENT IN ACCORDANCE WITH SECTIONS 766.207 & 766.209, FLORIDA STATUTES

This Cause came before the Court on the above motion, and the Court, having reviewed the motion and response, considered the arguments of counsel, and being otherwise fully advised in the premises, hereby finds as follows:

FACTS & PROCEDURAL HISTORY

On February 27, 2018, the jury determined that the Plaintiffs were collectively entitled to $500,000 in noneconomic damages. However, because the record reflects that on June 24, 2016, the Plaintiffs' rejected the Defendants' offer to voluntarily arbitrate this case; the Defendants immediately moved to amend this judgment so that it conforms with the limits placed on damages by sections 766.207(7)(k) and 766.209(4)(a), Florida Statutes. These laws provide that when a plaintiff succeeds at trial but had previously rejected a defendant's offer to voluntarily arbitrate the claim(s), the plaintiff's noneconomic damages are capped at $350,000. The Defendants, in other words, seek to reduce the jury verdict by $150,000, and the Plaintiffs oppose this motion on the basis that the cap violates the equal protection clause of Florida's Constitution. FLA. CONST. art. 1, § 2; see N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49 (Fla. 2017) (finding the personal injury statutory caps of section 766.118 for noneconomic damages in medical malpractice cases unconstitutional); Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014) (same holding for section 766.118's statutory caps on noneconomic damages for wrongful death claims). For the reasons stated below, this Court agrees with the Plaintiffs. Accordingly, the Defendants' motion is *DENIED*, and even if these statutes were constitutional, the Plaintiffs' damages could only be reduced to $400,000.

DISCUSSION

Sections 766.207(7)(k) and 766.209(4)(a) state, in pertinent part, that:

> Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that damages shall be awarded as provided by general law, including the Wrongful Death Act, subject to the following limitations: [. . .]
>
> Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s.766.106. A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s.766.209(3). A claimant who rejects a defendant's offer to arbitrate shall be subject to the provisions of s.766.209(4). [. . .]
>
> If the claimant rejects a defendant's offer to enter voluntary binding arbitration: (a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident.

These laws have also withstood prior constitutional challenge. Alvarez v. Lifemark Hosps. of Florida, Inc., 208 So. 3d 221 (Fla. 3d DCA 2016) (per curiam affirmance citing Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993)); Parham v. Florida Health Scis. Ctr., Inc., 35 So. 3d 920 (Fla. 2d DCA 2010) (following Echarte).[1]

Echarte

In Echarte, the University of Miami [University] treated the Echartes' minor child for a brain tumor, but due to alleged negligence, their daughter's "right hand and forearm had to be amputated in order to save her life." 618 So. 2d at 190. Upon receiving notice from the Echartes about their intent to file a malpractice action, the University requested that the claim be submitted to an arbitration panel pursuant to section 766.207. Id. The Echartes responded by seeking a declaratory judgment on sections 766.207 and 766.209's constitutionality. Id. The trial court found the statutes to violate "the Echartes' constitutional right of access to the courts, right to trial by jury, equal protection guarantees, and procedural and substantive due process rights; violated the single subject requirement; constituted a taking without compensation; and involved an improper delegation of authority." Id. at 191. The Third DCA affirmed "but limited its discussion to the right of access to the courts." Id.

[1] In Parham, the Second District Court of Appeal [DCA] cited Echarte and reaffirmed sections 766.207 and 209's constitutionality as to the right of access to court. Since the instant plaintiffs are challenging these laws on equal protection grounds, this pre-McCall and Katilan ruling is inapplicable.

On appeal, the Florida Supreme Court reversed, and although it also limited its discussion to the right to access the courts, it abruptly dismissed the other constitutional concerns about these statutes. See id.

> Similarly, we limit our discussion to the validity of the statutes under the right of access to the courts. However, we have also considered the other constitutional claims and hold that the statutes do not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the single subject requirement, the taking clause, or the non-delegation doctrine.

Specifically, the Court concluded that the statutory scheme was commensurate to the workers' compensation laws by relying on the legislatively adopted recommendations of a 1988 taskforce. Id. at 194-95. Central to the Court's reasoning, though, was the taskforce's description of a "current medical malpractice insurance crisis" preventing some physicians from affording malpractice insurance due to the dramatic rise in premiums. Id. at 197. With "no alternative method" available to abate this crisis, it constituted "an 'overwhelming public necessity,'" and therefore, sections 766.207 and 209 did not violate the Echartes' right of access to the courts. Id.

Doctrinal Developments

While it is well-established that the Florida Supreme Court "does not intentionally overrule itself sub silentio," Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002), the Court's equal protection holding in Echarte is essentially a summary disposition as there is no analysis. Case law states that such decisions are binding upon lower courts *unless* doctrinal developments since the ruling indicate that the superior court would rule differently now. See Mandel v. Bradley, 432 U.S. 173, 176 (1977); Hicks v. Miranda, 422 U.S. 332, 344 (1975); Kitchen v. Herbert, 755 F.3d 1193, 1205-06 (10th Cir. 2014). In addition, the Florida Supreme Court has held that "'[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.'" Kalitan, 219 So. 3d at 59 (citing McCall, 134 So. 3d at 913 (quoting Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48, (1924))). Here, not only was Echarte's holding primarily based upon the existence of a medical malpractice insurance emergency, the Florida Supreme Court's subsequent rulings in the McCall and Kalitan cases qualify as doctrinal developments that suggest the Court would rule differently on the equal protection concerns surrounding sections 766.207 and 209.

McCall

In McCall, Michelle McCall died after giving birth at a United States Air Force clinic, and her estate later sued the United States under the Federal Tort Claims Act for wrongful death. 134

So. 3d at 897-99 (plurality opinion). The trial court found the United States liable and determined that her estate was entitled to a total of $2 million in noneconomic damages. Id. at 899. However, pursuant to section 766.118(2), Florida Statutes, the court limited these damages to $1 million, and it denied the petitioners' motion challenging the constitutionality of this statutory cap under the Florida and federal constitutions. Id. On appeal, the Eleventh Circuit Court of Appeal affirmed the district court's rulings, but it also certified the question of whether the statute violates the equal protection clause of the Florida Constitution to the Florida Supreme Court. Id. The Court answered the certified question in the affirmative. Id. at 901.

Specifically, the Court first found that the federal district court applied section 766.118 in an unconstitutional manner by citing its holding in St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961, 971-72 (Fla. 2000) where it was determined that statutory caps must be applied "to each claimant individually," not the aggregate total of damages, to survive equal protection scrutiny. Id. In McCall, the parents were awarded $750,000 each, and the surviving son $500,000; thus, the cap should have been separately applied to each award. Id. at 902. The Court, however, proceeded to strike down the damage cap itself because equal protection requires that similarly situated persons be treated alike. See id. at 901. Accordingly, "[u]nless a suspected class or fundamental right" is involved, "a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed." Id. The Court found the cap to violate this test because it unduly burdens the most egregiously injured, especially when multiple survivors are involved. These limits, in other words, made said individuals less likely to be fully compensated for their losses while more fully compensating a minorly injured person. Id. The Court found this result to "not only [be] arbitrary, but irrational, and . . . [offensive to] 'the fundamental notion of equal justice under the law.'" Id. at 903.

In reaching this decision, the Court found that "Echarte is inapposite" because it was only "an access to court challenge," whereas McCall involves equal protection. Id. at 904. It also buttressed the notion of Echarte's inapplicability by noting that in Phillipe, the Court addressed an equal protection challenge to sections 766.207 and 209 and "expressly stated that 'Echarte does not control our decision.'" Id. In addition, the McCall Court emphasized Echarte's finding that sections 766.207 and 209's arbitration provisions provide "commensurate benefits in exchange for the cap, such as saving the expense of attorney fees and expert witnesses," whereas "under section 766.118, survivors receive absolutely no benefit whatsoever from the cap on noneconomic

damages." Id. Echarte and Phillipe, in other words, "involved a very different statutory scheme, based upon economic damage awards in the arbitration context." Id. at 905.

Nonetheless, as noted above, Echarte was fundamentally premised upon the existence of a "medical malpractice crisis," and thus, the McCall Court's analysis—and ultimate rejection—of this matter implicitly impacted Echarte's precedential value. In McCall, the Court noted that the Legislature justified enacting section 766.118 because "'Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude.'" Id. at 906 (internal citation omitted). Specifically, increasing insurance premiums "resulted in physicians leaving Florida, retiring early from the practice of medicine, or refusing to perform high-risk procedures, thereby limiting the availability of health care." Id. Like Echarte, the Legislature "relied heavily on a report prepared [in 2003] by the Governor's Select Task Force on Healthcare Professional Liability Insurance [Taskforce], which stated that 'actual and potential jury awards of noneconomic damages (such as pain and suffering) are a key factor (perhaps the most important factor) behind the unavailability and un-affordability of medical malpractice insurance in Florida.'" Id. (internal citation omitted).

However, upon scrutinizing these findings, the Court concluded that "the existence of a medical malpractice crisis [is] not fully supported by available data." Id. Other government reports, for instance, showed "Florida's physician supply per 100,000 people" grew between 1991 and 2001, thus contradicting the 2003 Taskforce's findings. Id. Similarly, one study showed that over a period of fourteen years, "only 7.5 percent" of cases that "resulted in payments of $1 million or more" "involved a jury trial verdict." Id. at 907. Furthermore, the Taskforce used "extremely equivocal language [such as "could" and "may"] and speculation when describing the existence of a crisis." Id. Its report also noted that insurance premium costs are cyclical in their nature. Id. at 907-08. Finally, the Court noted that doubts were raised about the purported crisis' magnitude during the relevant legislative floor debates. Id. at 908-09. The Court therefore held that the Legislature's finding "of a bona fide medical malpractice crisis, threatening the access of Floridians to health care, is dubious and questionable at the very best." Id. at 909.

Nevertheless, the Court stated that even if such crisis existed, section 766.118 would still violate equal protection because there is no "rational relationship between a cap on noneconomic damages and alleviation of the purported crisis." Id. Reports, for instance, showed that between 1991 and 2002, states with damage caps experienced higher insurance premium increases than those without caps. Id. at 910. Also, while the noneconomic damage cap "limits the amount of

money that insurance companies must pay injured victims of medical malpractice, [nothing requires] insurance companies to use the acquired savings to lower malpractice insurance premiums for physicians." Id. The Court further noted that between 2003 and 2012, medical malpractice filings in Florida decreased significantly, and insurance company profits rose. Id. at 913-14. More importantly, the Court held that "even if a 'crisis' existed when [a law] was enacted, a crisis is not a permanent condition. Conditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation." Id. at 913 (citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1924) ("A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.")). Accordingly, any insurance crisis that might have existed has since subsided, and thus, there is no rational basis to continue applying section 766.118's cap on noneconomic damages in wrongful death claims. Id.

Kalitan

It is noted that some of the above analysis did not technically command a majority of the Court, but the differences between McCall's plurality and concurring opinions are not only minor, they appear to have been mooted by N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49 (Fla. 2017).[2] In Kalitan, Susan Kalitan sued North Broward Hospital after carpal tunnel surgery complications left her severely injured. Id. at 50. Kalitan succeeded at trial, but her noneconomic damages were capped pursuant to sections 766.118(2)-(3). Id. at 50-51. On appeal, Kalitan challenged the cap's constitutionality, and while noting that McCall only addressed section 766.118's noneconomic wrongful death damages, the Fourth DCA found its equal protection analysis applicable to section 766.118's noneconomic damage limits in personal injury medical malpractice claims. Id. at 51-52. The court thus declared the cap unconstitutional, and the Florida Supreme Court affirmed pursuant to the rationale of McCall's plurality opinion, i.e. the caps "arbitrarily reduce damage awards for plaintiffs who suffer the most drastic injuries." Id. at 51-52, 59.

[2] While Justice Pariente agreed with the result, she issued a separate concurrence in McCall because she disagreed "with the plurality's application of the rational basis test." More specifically, she thought the Court must "afford deference to . . . legislative findings in the absence of a showing that the findings were 'clearly erroneous'" at the time they were made, which, in her view, was not established. Nevertheless, she agreed there was no evidence of an ongoing medical malpractice insurance crisis that would justify the continued application of the statutory caps. Id. at 916-922 (Pariente, J., concurring in result).

The Instant Case

In reaching its decision, the Kalitan Court cited then-Chief Justice Barkett's dissent in Echarte, where she concluded, in pertinent part, that sections 766.207 and 209 violated equal protection. Id. at 58. The Court also stated in a footnote that the dissent's "discussion of the equal protection issue regarding the statute's creation of two classifications of medical malpractice victims [was] insightful under the facts at issue." Id. at 58, n.4. That dissent's reasoning, however, permeates the McCall and Kalitan Court majorities because the then-chief justice "fail[ed] to see how singling out the most seriously injured medical malpractice victims for less than full recovery bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry." Echarte, 618 So.2d at 198 (Barkett, C.J., dissenting). It is thus unclear how Echarte remains binding precedent on the issue of equal protection. Echarte, after all, was fundamentally premised upon the existence of a medical malpractice insurance crisis, which in McCall and Kalitan, the Florida Supreme Court found had subsided. As noted above, the McCall and Kalitan Courts reached this conclusion by rejecting the Legislature's 2003 finding that a crisis existed. The Court is therefore unlikely to again accept the Legislature's 1988 findings on this issue as it did in Echarte.

Additionally, although the McCall Court noted that plaintiffs benefit from sections 766.207 and 209 because through arbitration, cases can be resolved faster and without attorney fees, expert witness costs, etc.; there is no formal or functional difference between these statutes and section 766.118. Each law, more specifically, discriminates between classes of medical malpractice cases, and since the Legislature has not adjusted sections 766.207 and 209's caps to account for inflation, any benefit plaintiffs receive from these sections has diminished over time. See Bureau of Labor Statistics Consumer Price Index, CPI Inflation Calculator: January 1988 to January 2018, https://www.bls.gov/data/inflation_ calculator.htm (indicating that $350,000 in 1988 equates to nearly $750,000 in 2018). Sections 766.207 and 209's limits are also arguably harsher than section 766.118's because the latter contains higher caps for more egregious injuries; the former only authorizes $250,000 if a plaintiff accepts a defendant's offer to arbitrate, and $350,000 if a plaintiff wins at trial yet rejected said offer. Cf. § 766.118(2)(a)-(c) with §§ 766.207(7)(b); 766.209(4).

Moreover, any benefit a plaintiff derives from sections 766.207 and 209 is dwarfed by that bestowed upon a defendant: the ability to "unilaterally limit the claimant's noneconomic damages . . . whether the claimant accepts arbitration, . . . or goes to trial." Echarte, 618 So. 2d at 200 (Shaw,

J., dissenting). These statutes thus epitomize "the classic case of 'heads I win, tails you lose,'" id.; and if the McCall and Kalitan Courts held that merely capping the recovery of the most egregiously injured was arbitrary, irrational, and fundamentally offensive to the notion of equal justice; then laws that vest a defendant with the power to limit a plaintiff's recovery are equally, if not more, arbitrary, irrational, and offensive. Defendants, after all, are the potentially/actually negligent party and thus inherently incentivized to use this power, especially in cases involving large liability. The more devastatingly injured plaintiff is then left with no recourse.[3]

CONCLUSION

Accordingly, it is hereby **ADJUDGED** that sections 766.207(7)(k) and 766.209(4)(a), Florida Statutes are unconstitutional as they violate the Florida Constitution's guarantee of equal protection under the law. See FLA. CONST. art. 1, § 2. Therefore,

1) The Defendants' Motion to Enter/Amend Judgment is **DENIED**.

2) Alternatively, even if sections 766.207 and 209 were constitutional, this Court could only reduce the Plaintiffs' collective damages to $400,000. The $500,000 jury verdict at issue consisted of a $450,000 award for Deborah Defranko, and $50,000 for her husband, Myron Siegel. This latter amount would not be affected by the Defendants' motion because statutory damage caps must be applied "to each claimant individually," not the aggregate total of damages. See Phillipe, 769 So. 2d at 971-72.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 06/28/18.

JOSE M RODRIGUEZ
CIRCUIT COURT JUDGE

[3] This reasoning also raises inherent questions about the validity of Echarte's holdings on the rights of access to court and trial by jury. For instance, it is unclear how these statutes provide plaintiffs with a "reasonable alternative remedy or commensurate benefit." Commensurate, after all, means proportionate, and without an insurance crisis, there is no "overpowering public necessity" that warrants abolishing access to courts. Further, court access is closely linked to the right to a jury trial, which the Florida Supreme Court has held cannot be impaired in proceedings that are similar to those that existed when Florida adopted its constitution. See Smith v. Dep't of Ins., 507 So. 2d 1080, 1088 (Fla. 1987) (finding a statute similar to 766.207 and 209 to infringe the rights of access to courts and jury trials); In re 1978 Chevrolet Van, 493 So. 2d 433, 434-35 (Fla. 1986); Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 113-14 (1848). Given that many common law actions like negligence involved jury trials to determine noneconomic and other compensatory damages, sections 766.207 and 209 arguably violate this right.

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION NUMBER 12

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Judge's Initials JMR

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Rodriguez' staff.

CC: ALL PARTIES AND COUNSEL OF RECORD