Third District Court of Appeal
State of Florida

Opinion filed December 18, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1809
Lower Tribunal No. 16-16511

Taylor Poole, M.D., et al.,
Appellants,

vs.

Deborah DeFranko, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Jose M. Rodriguez, Judge.

Hicks, Porter, Ebenfeld & Stein, P.A., and Dinah Stein and Mark Hicks; Law Office of John D. Kelner, and John D. Kelner (Davie); Burt E. Redlus, P.A., and Burt E. Redlus, for appellants.

Forman Law Offices, P.A., and Theodore S. Forman (Delray Beach); Burlington & Rockenbach, P.A., and Philip M. Burlington and Adam Richardson (West Palm Beach), for appellees.

Holland & Knight, LLP, and Mark K. Delegal (Tallahassee); William W. Large (Tallahassee), for Florida Justice Reform Institute as amicus curiae.

Boyd & Jenerette, P.A., and Kansas R. Gooden (Jacksonville); Saalfield Shad Law Firm, and Travase L. Erickson (Jacksonville), for Florida Defense Lawyers Association as amicus curiae.

Grossman Roth Yaffa Cohen, P.A., and Rachel W. Furst, for Florida Justice Association as amicus curiae.

Before EMAS, C.J., and SALTER and GORDO, JJ.

SALTER, J.

Dr. Taylor Poole and the medical practice of Poole & Villani, M.D., P.A. (collectively, "Dr. Poole"), appeal a final judgment entered following a jury verdict in favor of Deborah DeFranko and her husband, Myron Siegel, in a medical malpractice lawsuit. After the entry of the verdict, Dr. Poole moved the trial court to enter a final judgment in conformance with sections 766.207 and 766.209, Florida Statutes (2018), reducing the damages awarded for noneconomic damages to the maximum amounts allowed by those provisions.

The trial court denied Dr. Poole's motion, ruling 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," citing article I, section 2 of the Florida Constitution. We reverse and remand for the entry of an amended final judgment reducing the jury's award to Ms. DeFranko from $450,000.00 to $350,000.00. We affirm the verdict and separate judgment awarding $50,000.00 to Mr. Siegel.

"The constitutionality of a statute is a pure question of law . . . subject to de novo review." Bean v. Univ. of Miami, 252 So. 3d 810, 815 (Fla. 3d DCA 2018) (quoting City of Ft. Lauderdale v. Dhar, 185 So. 3d 1232, 1234 (Fla. 2016)). Additionally, as set forth in Lewis v. Leon County, 73 So. 3d 151, 153-54 (Fla. 2011):

> Although our review is de novo, statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome. "[S]hould any doubt exist that an act is in violation . . . of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law."

(citations omitted) (quoting Franklin v. State, 887 So. 2d 1063, 1073 (Fla. 2004)).

The Florida Supreme Court upheld the constitutionality of sections 766.207 and 766.209 in University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993). In 2016, this Court recognized Echarte as controlling precedent in Alvarez v. Lifemark Hospitals of Florida, Inc., 208 So. 3d 221 (Fla. 3d DCA 2016), a citation affirmance.

The trial court found, and Ms. DeFranko and one of the three amici curiae[1] who have briefed the issue, invite us to agree, that Echarte (a) did not rule on the

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[1] The Florida Justice Association filed a brief supporting Ms. DeFranko and seeking affirmance, while The Florida Justice Reform Institute and The Florida Defense Lawyers Association each filed an amicus brief in support of Dr. Poole and urging reversal of the order declaring sections 766.207(7)(k) and 766.209(4)(a) unconstitutional. We appreciate the additional sources of legal authority and argument provided by the three amicus briefs.

equal protection issue raised in the present case, and (b) has been overtaken by later, more persuasive and current decisions of the Florida Supreme Court in the intervening 26 years. We disagree.

The more recent cases relied upon by Ms. DeFranko are the plurality opinion in Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014), and the majority opinion in North Broward Hospital District v. Kalitan, 219 So. 3d 49 (Fla. 2017). In each of these cases, the Florida Supreme Court addressed the cap on noneconomic damages in sections 766.118(2) and (3) rather than the two statutory provisions declared unconstitutional in the present case. Ms. DeFranko contends that the holdings of McCall and Kalitan apply to this case, including the assessment in McCall that "the Legislature's determination that 'the increase in medical malpractice liability insurance rates is forcing physicians to practice medicine without professional liability insurance, to leave Florida, to not perform high-risk procedures, or to retire early from the practice of medicine' is unsupported." McCall, 134 So. 3d at 909.

The plurality opinion then determined that:

> Even if these conclusions by the Legislature are assumed to be true, and Florida was facing a dangerous risk of physician shortage due to malpractice premiums, we conclude that section 766.118 still violates Florida's Equal Protection Clause because the available evidence fails to establish a rational relationship between a cap on non-economic damages and alleviation of the purported crisis.

Id.

McCall addressed section 766.118 as it pertained to noneconomic damages in wrongful death cases. Three years later, the Florida Supreme Court addressed in Kalitan the noneconomic damages cap in that statute as it pertained to personal injury medical malpractice cases. The Court held that "the statutory caps in section 766.118 unreasonably and arbitrarily limit recovery of those most grievously injured by medical negligence," 219 So. 3d at 58, and that the caps in section 766.118 "violate the Equal Protection Clause of the Florida Constitution," id. at 59.

The statutes presently under review, however, are within a voluntary arbitration remedy that was not considered by the Florida Supreme Court or subject to the holdings in McCall or Kalitan. In light of (1) Echarte and our adherence to that decision in our own rejection of a constitutional challenge to sections 766.207 and 766.209 in Alvarez, and (2) our standard of review and policy of restraint concerning constitutional questions, we reverse in part and remand the order and final judgment below.

More specifically, we reverse the trial court's determination that sections 766.207(7)(k) and 766.209(4)(a) violate the Equal Protection Clause of the Florida Constitution, we remand for the reduction of the jury verdict and judgment in favor of Deborah DeFranko to $350,000.00 in conformance with those statutory provisions, and we affirm the jury verdict and judgment insofar as it awards Myron

Siegel the separate sum of $50,000.00 (see St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000)).

Reversed in part, affirmed in part, and remanded with instructions.