IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

ABIGAILE LEBRON, a minor, by THE NORTHER TRUST COMPANY, Guardian of the Estate of ABIGAILE LEBRON, a minor; and FRANCES LEBRON, her Mother and Next Friend; and FRANCES LEBRON, Individually,	)	
Plaintiffs,	)	
v.	)	**Case No. 2006 L 12109**
GOTTLIEB MEMORIAL HOSPITAL, a corporation; ROBERTO LEVI-D'ANCONA, M.D., and FLORENCE MARTINEZ, R.N.,	)	**Hon. Diane Joan Larsen Judge Presiding**
Defendants.	)	
In re consolidated motions challenging the constitutionality of Public Act 94-677	)	

ORDER

This matter comes before the court pursuant to an order entered on March 27, 2007, by the Honorable William D. Maddux, Presiding Judge of the Law Division, Circuit Court of Cook County, designating this case the lead case amongst all cases challenging the constitutionality of Public Act 94-677 ("the Act") and consolidating all related motions before this court. Among the cases in the Law Division of the Circuit Court of Cook County currently raising a challenge to the Act's constitutionality are Alexander v. Nacopoulos, et al., 07 L 2207, and Zago v. Resurrection Medical Center, et al., 07 L 1720. The record reflects that Plaintiffs' counsel in this case have served copies of Plaintiffs' Memorandum of Law in Support of Motion for Partial Judgment on the Pleadings on Count IV ("Plaintiffs' Memo") on defense counsel of record for the Alexander and Zago cases. (See Plaintiffs' Memo at p. 3). After the consolidation order was entered, the court published in the

Chicago Daily Law Bulletin notice of the consolidation order and various status dates, and the court notes that counsel on the related cases have attended the status hearings. The court finds that it has both subject matter and personal jurisdiction and, further, that Plaintiffs' lead counsel has represented to the court that there has been compliance with Illinois Supreme Court Rule 19 with the Office of the Attorney General for the State of Illinois being notified of the constitutional challenge to the Act.

The following motions have been filed in this matter: Plaintiffs' Motion for Partial Judgment on the Pleadings on Count V, Defendants' Gottlieb Memorial Hospital and Florence Martinoz, R.N.'s Cross Motion for Summary Judgment as to Count V, Defendant Roberto Levi-D'Ancona, M.D.'s Motion for Judgment on the Pleadings on his First and Second Affirmative Defenses, Defendant Roberto Levi-D'Ancona, M.D.'s Motion for Judgment on the Pleadings on his Counterclaim for Declaratory Relief, and Defendant Roberto Levi-D'Ancona, M.D.'s Motion for Judicial Notice. The court set various briefing schedules on these motions which were all by agreement of the parties. Further, the court eliminated the page-restriction on the length of all briefs filed. The court received and reviewed courtesy copies of all briefs and materials filed on the motions including volumes labeled "Defendant Roberto Levi-D'Ancona, M.D.'s Appendix of Empirical Sources" and "Index of Exhibits to Defendants' Gottlieb Memorial Hospital and Florence Martinoz, R.N.'s Opposition to Plaintiffs' Motion for Partial Judgment and Counter-Motion for Partial Judgment on the Pleadings on Count V."

On September 17, 2007, the court heard approximately two hours of oral argument on the related motions. After oral argument, the court received a letter dated October 1, 2007 ("the letter") from counsel for Defendants Gottlieb Memorial Hospital and Florence Martinoz, R.N. which contested certain of Plaintiffs' counsel's statements made at the oral argument. Plaintiffs responded with a motion to strike the letter or allow a response to be filed by Plaintiffs. The court allowed Plaintiffs to file a response and indicated that the letter should be filed to be made a part of the record. The court has received both a filed copy of the letter and Plaintiffs' Memorandum in Response to Defendants Gottlieb Hospital's and Martinoz's Post-Argument Letter Arguing About the Status of County Hospitals.

Summary of Plaintiffs' Constitutional Challenges to Public Act 94-677

As set forth with greater specificity in Plaintiffs' Memorandum of Law in Support of Motion for Partial Judgment on the Pleadings on Count V ("Plaintiffs' Memo"), Plaintiffs seek a declaratory judgment that the following statutory provisions are unconstitutional and, thus, null and void:

1. 735 ILCS 5/2-1706.5 (§ 2-1706.5), which caps non-economic damages;
2. 735 ILCS 5/2-1704.5 (§ 2-1704.5), which permits periodic payments;
3. 735 ILCS 5/8-2501 (§ 8-2501), which restricts eligible expert testimony that a plaintiff may proffer;
4. 735 ILCS 5/2-622 (§ 2-622), which requires a certificate of merit to initiate a medical malpractice lawsuit;
5. 735 ILCS 5/8-1901 (§ 8-1901), which establishes an evidentiary rule regulating admissibility of a health care provider's admission of liability; and,
6. Public Act 94-677 as a whole on the ground that the invalid portions of the Act are

inseverable from the remainder of the Act. (See Plaintiffs' Memo at p. 1).

In particular, Plaintiffs claim that the caps on non-economic damages invade exclusive and inherent judicial authority by enacting a legislative remittitur and, thus, violate separation of powers, citing Best v. Taylor Machine Works, 179 Ill. 2d 367 (1997), and amount to an impermissible form of special legislation, citing Best, 179 Ill. 2d at 408, and Wright v. Central DuPage Hospital Association, 63 Ill. 2d 313 (1976). (See Plaintiffs' Memo at pp. 5-20). Plaintiffs further claim that the caps on non-economic damages violate the right to trial by jury, due process, equal protection, and the right to a remedy. (See Plaintiffs' Memo at pp. 21-32). Plaintiffs make the same arguments regarding the periodic payment provision, as well as claiming that the provision constitutes a taking without just compensation in violation of Article I, § 15 of the Illinois Constitution. (See Plaintiffs' Memo at pp. 33-40). Plaintiffs claim that the restrictions on expert witnesses violate the Illinois Constitution's prohibition against special legislation, as well as the due process and equal protection guarantees. (See Plaintiffs' Memo at pp. 40-48). As to the certificate of merit required for medical malpractice claims, Plaintiffs allege the amendments violate separation of powers, due process and equal protection guarantees, and constitute special legislation. (See Plaintiffs' Memo at pp. 48-59). Finally, as to the evidentiary rule contained in § 8-1901, a limitation on the admissibility of certain statements by health care providers, Plaintiffs allege a violation of the Illinois Constitution's prohibition against special legislation and also a violation of due process guarantees. (See Plaintiffs' Memo at pp. 59-62).

Summary of Defendants' Legal Positions Regarding Plaintiffs' Constitutional Challenges to Public Act 94-6 77

As set forth with greater specificity in Defendants' Memoranda, Defendants argue that Wright and Best are distinguishable from the current iteration of legislation and, therefore, do not compel a finding that the amendments are unconstitutional. Instead, Defendants maintain that the contested provisions of Public Act 94-677 are constitutional for, *inter alia*, the following reasons:

1. Section 2-1706.5 of the Act adopts reasonable limits on non-economic damages in malpractice cases, which numerous studies considered by the legislature have demonstrated are effective in reducing insurance premiums. See 735 ILCS 5/2-1706.5.

2. Section 2-1704.5 of the Act expands Illinois' periodic payment provisions, which reduce costs by allowing a judgment debtor to purchase an annuity to pay for future medical expenses, while ensuring a plaintiff has access to medical funds when needed. See 735 ILCS 5/2-1704.5.

3. Section 8-2501 of the Act strengthens the standards for expert witnesses in malpractice cases to ensure that witnesses who testify about the medical standard of care are actually qualified to do so. See 735 ILCS 5/8-2501.

4. Section 2-622 of the Act amends the provision requiring malpractice plaintiffs to submit reports from medical professionals in order to ban anonymous reports, which ensures accountability and discourages frivolous claims. See 735 ILCS 5/2-622.

5. Section 8-1901 of the Act seeks to avoid unnecessary litigation by encouraging health care providers to acknowledge their mistakes promptly and offer fair

settlements. See 735 ILCS 5/8-1901.

(See, e.g., Defendant Roberto Levi-D'Ancona, M.D.'s Opposition to Plaintiffs' Motion for Partial Judgment on the Pleadings ("Defendant Levi-D'Ancona's Memo") at pp. 9-11). A complete discussion of Defendants' argument on each of the contested statutory provisions is contained in Defendants' Memoranda. (See, e.g., Defendant Levi-D'Ancona's Memo at pp. 14-78).

Standard of Decision

The standard of decision on a motion for judgment on the pleadings is whether "the pleadings disclose no genuine issue of material fact and [] the movant is entitled to judgment as a matter of law." Gillen v. State Farm Mut. Auto. Ins. Co., 215 Ill. 2d 381, 385 (2005) (citations omitted). In resolving such a motion, a court may properly "consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record." Gillen, 215 Ill. 2d at 385.

Analysis

The court begins its analysis where the Illinois Supreme Court concluded its own in Best: "[t]he problems addressed in the briefs and in oral arguments in the case at bar represent some of the most critical concerns which confront our society today." Best, 179 Ill. 2d at 471. The court similarly acknowledges and commends the attorneys for all parties on the scholarly and comprehensive briefs and oral arguments submitted in the matter.

For the reasons stated below, the court grants Plaintiffs' motion for judgment on the pleadings on Count V on the grounds that § 2-1706.5, the cap on non-economic damages in medical malpractice claims, violates the Separation of Powers Clause of the Illinois Constitution (Ill. Const. 1970, art. II, § 1), and because of the inseverability provision at § 995 of the Act, invalidates the Act in its entirety. Accordingly, the court denies Defendant's motion for judgment on the pleadings on his first and second affirmative defenses as to plaintiffs' challenge of § 2-1706.5 and denies Defendant's motion for judgment on the pleadings on his counterclaim for declaratory relief to the extent that it seeks judgment declaring that the limitations on non-economic damages in § 2-1706.5 are consistent with the Separation of Powers Clause in the Illinois Constitution.

The court cautions that its decision is narrowly drawn. As a preliminary matter, the court finds that Plaintiffs in the lead case and the Alexander and Zago cases have standing to contest the provision of the Act capping non-economic damages given the catastrophic nature of the injuries pled in the complaints. (See, e.e., Lebron First Amended Complaint at Law and Complaint for Declaratory Judgment, Count V at paras. 23-28). Similar catastrophic injuries were pled in the complaints at issue in Best, and the Illinois Supreme Court found "that plaintiffs have alleged a sufficient and direct interest in the application of the challenged provisions...." Best, 179 Ill. 2d at 383. Moreover, the court finds that the matter as to the provision of the Act capping non-economic damages in medical malpractice actions is ripe for adjudication for all of the reasons articulated by the Court in Best. See Best, 179 Ill. 2d at 382-84. The court does not reach any of the potential standing and ripeness issues as to any of the other challenged provisions because those issues are not necessary to the court's substantive judgment.

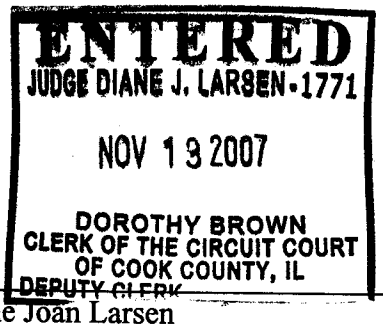
As instructed by the Illinois Supreme Court in Best, the role of this court in considering the constitutionality of the Act "is not to judge the prudence of the General Assembly's decision that reform of the civil justice system is needed." Best, 179 Ill. 2d at 377. The Court in Best emphasized that "we should not and need not balance the advantages and disadvantages of reform." Id. (citations omitted). Thus, the court does not engage in such balancing; rather, the court "must determine the meaning and effect of the Illinois Constitution in light of the challenges made to the legislation in issue." Id. (citation omitted).

While the court is mindful that it "should begin any constitutional analysis with the presumption that the challenged legislation is constitutional [], and it is the plaintiff's burden to clearly establish that the challenged provisions are unconstitutional []" (Id. (citations omitted)), this court must also faithfully adhere to our system of jurisprudence based on *stare decisis.* The Illinois Supreme Court in Best stated that "we hold that the compensatory damages cap of section 2-1115.1 violates the constitutional prohibition against special legislation and also violates the separation of powers clause." Best, 179 Ill. 2d at 416. It is the judgment of this court that the holding of the Illinois Supreme Court – that a compensatory damage cap applicable in all cases violates separation of powers – is no less applicable to the present case simply because the cap at issue applies only in medical malpractice cases. The Supreme Court has determined that a cap on non-economic damages applicable in all cases operates as a legislative remittitur which "disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action." Best, 179 Ill. 2d at 414. In finding that the cap on non-economic damages "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law", the Court expressly noted that "the cap on damages is mandatory and operates wholly apart from the specific

circumstances of a particular plaintiff's noneconomic injuries." Id. There is no principled reason set forth that a cap on non-economic damages applicable only in medical malpractice cases should not be considered a legislative remittitur given the Supreme Court's holding in Best. "[O]nce the Supreme Court has declared the law on any point, we may not refuse to follow it, no matter what our personal views might be, because the supreme court alone has the power to overrule or modify its decisions." Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 733, 780 (1st Dist. 1987).

Because the court has found that Plaintiffs have met their burden of persuasion regarding § 2-1706.5 as violating the Separation of Powers Clause of the Illinois Constitution (which is both the first provision of the Act challenged by Plaintiffs and the first ground on which Plaintiffs challenge the provision), the court declines to issue what would amount to an advisory opinion on all other issues presented by the parties. Moreover, because the Act contains an inseverability provision at § 995, the court invalidates the Act in its entirety, and thus, the court does not reach Plaintiffs' other bases of claimed constitutional defects regarding § 2-1706.5 or any other of the sections of the Act Plaintiffs claim are unconstitutional. Likewise, the court does not reach Defendants' Motion for Partial Summary Judgment or Defendant's Motion for Judicial Notice.

WHEREFORE, the court hereby enters a judgment declaring 735 ILCS 5/2-1706.5, as enacted by Public Act 94-677, unconstitutional in violation of the Separation of Powers Clause of the Illinois Constitution (Ill. Const. 1970, art. II, § 1) and, further, declaring Public Act 94-677 invalid in its entirety in accordance with the Act's inseverability clause at § 995.



Diane Joan Larsen
Judge of the Circuit Court of Cook County

Dated: November 13, 2006