No. 105741
consolidated with
No. 105745

IN THE SUPREME COURT OF ILLINOIS

ABIGAILE LEBRON, a minor, by THE NORTHERN TRUST COMPANY, as Guardian of the Estate of ABIGAILE LEBRON, a minor; and FRANCES LEBRON, Her Mother and Next Friend; and FRANCES LEBRON, Individually,

Plaintiffs-Appellees,

v.

GOTTLIEB MEMORIAL HOSPITAL, a corporation, ROBERTO LEVI-'ANCONA, M.D. and FLORENCE MARTINOZ, R.N., *et al.,*

Defendants-Appellants.

Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division.

No. 06 L 12109

The Honorable Diane J. Larsen, Judge Presiding.

THE CHICAGO BAR ASSOCIATION AND ILLINOIS STATE BAR ASSOCIATION'S AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

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POINTS AND AUTHORITIES

POINTS AND AUTHORITIES (cont'd)

POINTS AND AUTHORITIES (cont'd)

INTRODUCTION

"[T]he legislative department is everywhere extending this fear of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST, NO. 48 (James Madison).

Legislative encroachment on the judiciary is a tradition as old as our nation itself. As early as Hayburn's Case, 2 Dall. 409 (1792), only five years after the drafting of the Constitution, the United States Supreme Court was experiencing first-hand the draw into James Madison's described legislative "vortex." Congress had authorized pensions for Revolutionary War veterans. Id. at 409. The statute provided that circuit courts were to review pension applications and determine amounts due, but the Secretary of War had the discretion either to follow or reject the courts' findings. Id. Although the Supreme Court did not strike down the statute, it invoked the importance of judicial independence in harshly criticizing this early federal law:

> It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department . . . to be obliged at, contrary either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, we hope to never experience again.

Id. at 410 (Wilson & Blair, JJ.). Eleven years later, in Marbury v. Madison, 1 Cranch 137, 177 (1803) the Court helped lessen those "excited feelings" felt by the judges in Hayburn's Case by making it clear that the judiciary will not be bullied by other governmental branches, instead serving as the final arbiter in determining whether another branch's actions are constitutional.

In the State of Illinois, our Constitution embodies the spirit of these cases: "The legislative, executive and judicial branches are separate – no branch shall exercise powers properly belonging to the other." ILL. CONST. ART. II, § 1. The Separation-of-Powers

Clause reminds the governmental branches that they "are defined, and limited: and that those limits may not be mistaken or forgotten, the constitution is written." Marbury, 1 Cranch at 176.

As in Marbury, this Court has taken the role of referee to "ensure that the whole power of two or more branches of government shall not reside in the same hands." Best v. Taylor Mach. Works, 179 Ill.2d 367, 410, 689 N.E.2d. 1057 (1997), quoting People v. Walker, 119 Ill.2d 465, 473, 519 N.E.2d. 890 (1988). This Court has not hesitated to prevent encroachment by either the executive or legislative branch on inherent judicial functions, as "each of the three branches of government retains its own sphere of authority..." Allegis Realty Investors v. Novak, 223 Ill.2d 318, 334, 860 N.E.2d 246 (2006). Here, the doctrine of remittitur, the unique process of lowering a tortfeasors level of culpability and subsequent liability, is an inherent judicial function that has been encroached by the General Assembly in enacting 735 ILCS 5/2-1706.5 of the Illinois Code of Civil Procedure.

Amici in this brief are not addressing the merits of the legislation that is before this Court. Both the Illinois State Bar Association and the Chicago Bar Association have many members who hold differing opinions on the merits of this type of legislation. But even though we may differ on the need for and the effect of legislatively imposed caps on damage awards in certain types of litigation, our profession has an obligation to speak up where it witnesses the General Assembly encroaching on judicial powers in violation of the Separation-of-Powers Clause of the Illinois Constitution. Just as this Court must vigilantly guard against legislative attempts to compromise the courts, it is our

professional duty to weigh in on the side of the judiciary when the legislature crosses the line. Here, Amici believe that line has been crossed and offers its view as to why.

I. THIS COURT HAS FOUND THAT CAPS ON NON-ECONOMIC DAMAGES AMOUNT TO A LEGISLATIVE REMITTITUR THAT ENCROACH ON AN INHERENT POWER OF THE JUDICIARY.

Section 2-1706.5 of the Illinois Code states that in any medical malpractice action or wrongful death action based on medical malpractice, there will be a limitation on noneconomic damages: $1,000,000 in cases of award against a hospital and its personnel or affiliates, and $500,000 in cases of award against a physician, health care professional and a physician's business, personnel, or corporate entity. 735 ILCS 5/2-1706.5 (2005). This legislative cap on damages applies to all cases related to medical malpractice, without exception, irrespective of the unique features of a given case.

This Court has previously considered statutory caps on noneconomic damages, and declared such legislation unconstitutional. In Best v. Taylor Mach. Works, 179 Ill.2d 367, 416 (1997), this Court held that 735 ILCS 5/2-1115.1, which mandated a $500,000 limit on compensatory damages for noneconomic damages, violated the Illinois Separation-of-Powers Clause. Section 2-1115.1 impermissibly "invade[d] the power of the judiciary to limit excessive awards of damages," by "taking a jury's finding of fact and altering it to conform to a predetermined formula." Id. at 415. This Court struck down section 2-1115.1 as an encroachment on the doctrine of remittitur, a "fundamental judicial prerogative." Id. at 413-14. In this case, Section 2-1706.5 is functionally equivalent to the unconstitutional section 2-1115.1 in Best, and removes the careful case-by-case analysis undertaken by judges in applying remittitur by substituting a set quantity for compensation.

The power to grant or to deny remittitur is a purely judicial function, and the General Assembly may not remove its application by legislation. The doctrine has been present in America's earliest cases. See Blunt v. Little, 3 F. Cas. 760, 762 (Story, Circuit Justice 1822) ("But if it should appear that the jury have committed a gross error... or have given damages excessive in relation to the person in injury, it is as much the duty of this court to interfere, to prevent the wrong..."). This Court stated in Best that "[f]or over a century [in Illinois], it has been the traditional and inherent power of the judicial branch of government to apply the doctrine of remittitur, in appropriate and limited circumstances, to correct excessive jury verdicts." Best, 179 Ill.2d at 411. Remittitur also serves as an integral part of Illinois jurisprudence, and its application by the courts "promote[s] both the administration of justice and the conclusion of litigation." Id. at 412, citing Carter v. Kirk, 256 Ill. App. 3d 938, 628 N.E.2d 318 (1993). Courts applying remittitur carefully examine the evidence in a particular case, thereby rendering the trial judge, and not the General Assembly, in the best position to prevent excessive verdicts without impairing plaintiffs' ability to receive full compensation for their injuries.

Prior to the enactment of section 2-1115.1 in Best, and section 2-1706.5 here, the application of judicial remittitur had always been "considered on a case-by-case basis." Best, 179 Ill.2d at 413. Before applying remittitur, judges carefully ascertained "the evidence and circumstances supporting verdicts... before the jury's assessment of damages [was] reduced." Id. Cases of remittitur decided by this Court, such as Richardson v. Chapman, 175 Ill.2d 98 676 N.E.2d. 621 (1997), reiterate this careful analysis of trial facts. In Richardson, the plaintiffs were injured when their car was hit by a truck, rendering one of the plaintiffs quadriplegic. Id. at 101. The trial testimony

included an expert witness economist, who gave a range of dollar amounts for the plaintiff's future medical damages. Id. at 105-06. When the jury returned a damages amount $1.5 million above the high range given by the expert witness, the defendants appealed to this Court for a remittitur of damages. Id. at 106. This Court considered many factors specific to the plaintiff, including age, education, work experience, severity of injuries, and future rehabilitation, and ultimately remitted the jury's finding by $1 million. Id. at 113. The careful analysis in Richardson serves as an example of the importance of applying remittitur on a case-by-case basis.

Careful analysis was also present when this Court refused to apply remittitur. In Holston v. Sisters of the Third Order of St. Francis, 165 Ill.2d 150, 153, 650 N.E.2d. 985 (1995), the plaintiff brought a wrongful death action against the defendant hospital owners. The patient underwent gastric bypass surgery, and doctors negligently inserted a catheter into her jugular vein, which eventually slid out of position and caused her death. Id. at 154-55. After listening to various medical witnesses and experts, the jury returned a $ 7.3 million verdict. Id. at 153. The defendant in Holston argued that the verdict was excessive as a matter of law, but this Court disagreed. Id. at 177. After considering various expert testimonies heard at trial, including that of a surgeon, a cardiologist, an anesthesiologist, and an expert in gastric bypass surgery, this Court held that the award was not the result of passion or prejudice. Id. at 177-78. Holston is another example of the fact that remittitur represents a legal conclusion, that is only reached by a court after a careful case-by-case analysis.

In Best, this Court held that a cap on non-economic damages has none of the careful analysis present in the Richardson and Holston decisions, but rather is akin to a

"legislative remittitur" on cases irrespective of their unique factors. Best, 179 Ill.2d at 413-14. This Court noted that "unlike the traditional remittitur power of the judiciary," a legislative cap on damages "disregards the jury's careful deliberative process in determining damages that were fairly compensated to plaintiffs who have proven their cause of action." Id. Rather, the legislative cap "is mandatory and operates wholly apart from the specific circumstances of a particular plaintiff's non-economic injuries." Id. at 414. The General Assembly simply cannot take the unique nuances of trial evidence into account by creating a one-size-fits-all legislative cap.

II. DEFENDANTS' EFFORTS TO DISTINGUISH BEST FROM THE CIRCUMSTANCES OF THIS LEGISLATION ARE NOT PERSUASIVE.

Defendants have asserted that cases subsequent to Best, such as Unzicker v. Kraft Food Ingredients Corp., 203 Ill.2d 64, 783 N.E.2d 1024 (2002), and Burger v. Lutheran Gen. Hosp., 198 Ill.2d 21, 759 N.E.2d 533 (2001) have substantially narrowed the Best ruling. (Appellant Br., p. 26.) These cases, however, explicitly reaffirm Best and distinguish its precepts from their non-related facts. In Unzicker, the General Assembly modified the common law rule of joint and several liability by enacting 735 ILCS 5/2-1117. Id. at 69. Pursuant to section 2-1117, any tortfeasor, whose percentage of fault for a plaintiff's injuries is found to be less than 25% of the total fault attributable to the plaintiff, is only severally liable for the plaintiff's nonmedical damages. Id. The defendant in Unzicker was found liable by the jury for only 1% of the plaintiff's nonmedical damages, and was thus severally liable. Id. Upon the plaintiff's challenge of section 2-1117 as violating separation-of-powers (among other challenges), this Court held that such law was constitutional. Id. at 93-94.

This Court in Unzicker explicitly reaffirmed the Best decision, and noted that section 2-1117 is distinguishable from the unconstitutional legislative cap in Best. While Best held that a legislative cap on damages "invaded the judiciary's prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law," section 2-1117 "merely determines when a defendant can be liable for the full amount of a jury's verdict and when a defendant is liable only in an amount equal to his or her percentage of fault." Id. at 93-94. The key distinguishing feature is that in Unzicker, the defendants' damages were only being reduced to the exact percentage of fault that the jury had found. There simply was no "undue burden" on the inherent judicial function of assessing liability based on fault. This is different from Best, and also the present case, where section 2-1706.5 seeks to lower the liability of defendants to a level potentially below that which the judiciary would assess based on an assessment of specific trial evidence and testimony.

Furthermore, this Court's decision in Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981), illustrates why Unzicker did not break new ground, as Defendants have suggested. In Alvis, this Court adopted a form of pure comparative negligence prior to any statute in the Illinois Code. Id. at 28. It was argued by the Illinois Defense Council in Alvis that the legislature was in a better position to enact such a common law modification, as judicial adoption of comparative fault would be in "piecemeal approach" and leave many "ancillary questions." Id. at 22. This Court in Alvis adopted comparative negligence because it assumed that "the legislature's inaction in this area is attributable to its feeling that it is more appropriate... for the judiciary to act." Id. Such hesitating language by this Court illustrates that comparative fault issues, like that of

Unzicker, are areas of cooperation between the General Assembly and Illinois Courts, and not an inherent judicial function. See Alvis, 85 Ill.2d at 34 (Underwood, J. Dissenting) ("I would... leave the question of change and its nature to the General Assembly in a situation was complex as this); see also Reuter v. Korb, 248 Ill. App. 3d 142, 164, 616 N.E.2d 1363 (2d. Dist. 1993) (upholding 735 ILCS 5/2-1116, which modified the pure comparative fault standard established Alvis). There is no encroachment where the judiciary has welcomed the legislature's involvement.

Defendants also incorrectly cite to Burger as well. In Burger, this Court upheld a disclosure of information law against a separation-of-powers challenge. Burger, 198 Ill.2d at 50. Public Act 91-525 allowed for "limited intrahospital exchange of information" subject to exceptions, and for the limited purpose of patient welfare, risk management, defense of claims, or other public policy objectives. Id. at 44. This Court upheld the Act, and distinguished it from a disclosure law also considered in Kunkel, which was struck down. The statute invalidated in Kunkel, section 2-1003, "mandated that all plaintiffs filing personal injury claims waive their physician-patient privilege and disclose all medical records to any defendant party, irrespective of the relevance of those medical records to the plaintiff's lawsuit." Burger, 198 Ill.2d at 34. Burger is distinguishable from Best, not because of the "nature and scope" of legislative policy, as Defendants suggest, but rather because there was no undue burden imposed on an inherent judicial function. The Court noted that the law in Best (like the Act challenged in this proceeding) was part of the Code of Civil Procedure, while Public Act 91-525 was part of the Hospital Licensing Act, which has traditionally been part of the regulatory prerogative of the General Assembly. Burger, 198 Ill.2d at 40. Also, Public Act 91-525

had various protections to ensure confidentiality and judicial control, which preserved "the judiciary's inherent authority to regulate discovery." Id. at 39. Contrary to Defendants' assertion, this Court has never wavered from the Best ruling, and should apply it now to invalidate the remarkably similar section 2-1706.5 legislative cap on damages.

III. MERITS OF LEGISLATION ARE IRRELEVANT IF LEGISLATIVE ENCROACHMENT OF AN INHERENT JUDICIAL POWER IS PRESENT.

A. The Nature and Scope of the Legislation Is Not a Relevant Analysis in a Separation of Powers Challenge.

Defendants have argued that section 2-1706.5 is sufficiently narrow in its "nature and scope" that it should not be considered unconstitutional. (Appellant Br., p. 31.) This Court has never adopted such a "nature and scope" standard in evaluating legislation under the Separation-of-Powers Clause. See Admin. Office of Ill. Courts v. State and Mun. Teamsters, Chauffeurs and Helpers Union, Local, 167 Ill.2d 180, 192, 657 N.E.2d 972 (1995) ("The separation of powers doctrine forbids one branch of government to exercise powers properly belonging to another branch"). Furthermore, Defendants, by citing to the "nature" of section 2-1706.5, are indirectly attempting to inject the merits of the legislation into the present constitutional evaluation. Such a motive is made clear by Defendants' recurring citation to policy justifications in its separation-of-powers analysis. (See, e.g., Appellant Br., pp. 41-46). The merits of legislation are more suited for Uniformity Clause or Equal Protection Clause challenges, but are not appropriate for ascertaining whether the legislature has encroached on inherent judicial functions. See People v. Warren, 173 Ill.2d 348, 355, 370-71, 671 N.E.2d 700, 705, 711 (1996) (after noting that the wisdom of a statute governing interference with child visitation rights is a

concern for the legislature and not the courts, the Supreme Court struck down the statute as an undue infringement on inherent judicial powers).

The General Assembly will always attempt to justify encroaching laws by citing to legislative purpose, or as Defendants refer to, the "nature" of the statute. These policy arguments are not novel, and have been discarded by courts as early as the above-mentioned Hayburn's Case, where the United States Supreme Court stated:

> "[W]e never can find ourselves in a more painful situation, than to be obliged to object to the execution of any [act of Congress], more especially, to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is."

Hayburn's Case, 2 Dall. at 409 (Iredell, J.). The motives of the General Assembly are irrelevant to the question of whether the courts of Illinois have been encroached upon. Even the purest of motives cannot trump a legislative encroachment on an inherent judicial function.

This Court in Best explicitly rejected similar policy arguments by reiterating that "the legislature is not required to convince this court of the correctness of its judgment that the civil justice system needs reform...[The Court's] task is limited to determining whether the challenged legislation is constitutional, not whether it is wise." Best, 179 Ill.2d at 390. Furthermore, the Separation-of-Powers Clause itself codifies the fundamental policy of "preserving an independent judicial department" from shifting political tides. Kunkel v. Walton, 179 Ill.2d 519, 529, 689 N.E.2d 1047 (1998).

The correct standard (that protects this fundamental policy) was enunciated in Best: the legislature "is prohibited from enacting laws that unduly infringe upon the inherent powers of judges." Best, 179 Ill.2d at 411. While Defendants might construe

the word "unduly" to allow some legislative intrusion, the Best holding could not have rejected this more plainly. This Court clearly stated in Best that a legislative cap, by its very essence of "operat[ing] wholly apart from the specific circumstances of a particular plaintiff's noneconomic injuries," unduly interferes with an inherent judicial function. Id. at 414.

B. This Court Must Guard Against Encroachment on Inherent Judicial Functions.

This Court has assiduously resisted legislative encroachments on inherent judicial authority. In Murneigh v. Gainer, 177 Ill.2d 287, 300, 685 N.E.2d 1357 (1997), this Court held that a statute which mandated blood sample collection from convicted sex offenders unconstitutionally assigned non-judicial tasks to courts, and its contempt provision "is not consistent with the exercise of the court's traditional and inherent power of contempt." Similarly, in People v. Jackson, 69 Ill.2d 252, 260, 371 N.E.2d 602 (1977), this Court struck down a legislative attempt to mandate voir dire examination of prospective jurors to determine their qualifications. Such a trial-tampering statute was "a legislative infringement upon the powers of the judiciary." Id. In Bernier v. Burris, 113 Ill.2d 219, 234, 497 N.E.2d 763 (1984), a statute that created a three-member panel to review medical malpractice liability, with only one judge on the panel, unconstitutionally shared decision-making authority between the judge and nonjudicial panel members. There are numerous other examples of this Court protecting inherent judicial functions from encroachment, and Amici only list a fraction of those cases here. See People v. Johnson, 26 Ill.2d 268, 274, 186 N.E.2d 346 (1962) (holding that statute which compelled court clerks to enter judgment on specified case assessments violated separation-of-powers); see also Agran v. Checker Taxi Co., 412 Ill. 145, 150, 105 N.E.2d

713 (1952) (striking down statute providing that no ex parte action can be dismissed for want of prosecution until after five days' notice to attorneys).

Defendants can only rely on a quote from Burger v. Lutheran Gen. Hosp., 198 Ill.2d 21, 33 (2001), where this Court stated that "where matters of judicial procedure are at issue... the legislature may enact laws that complement the authority of the judiciary or that have only a peripheral effect on court administration." (Appellant Br., p. 32.) Defendants then link such language to their proposition that the General Assembly has the authority to determine whether a statute that restricts a remedy is "reasonably necessary to promote the general welfare." (Appellant Br., pp. 32-33.) Defendants' logic, if followed, equates the Separation-of-Powers Clause analysis to the rational basis standards of the Uniformity Clause or Equal Protection Clause. This assertion is not only without support, but also dangerously allows the General Assembly to shrink the walls of judicial autonomy by merely offering a rational pretext. Maintaining the separation of the powers of equal branches of government presents a constitutional issue, not a legislative one.

IV. THE LEGAL PROFESSION MUST GUARD AGAINST ENCROACHMENT OF THE JUDICIARY'S INDEPENDENCE.

Our profession has a continuing duty to bring to the attention of this Court any attempts by the General Assembly to eliminate or restrict judicial powers. Judicial independence, while always being tested by legislative bodies, has come under increased attack. Recent challenges, for example, include the passing of the REAL ID Act in 2005. The Act stripped district courts of jurisdiction to review removal orders and habeas challenges to removal orders under pre-existing law. Padilla v. Gonzales, 470 F.3d 1209, 1212 (7th Cir. 2006). As then Majority Leader of the House Tom DeLay unabashedly

remarked after its passage, "[w]e set up the courts. We can unset the courts." Enwonwu v. Chertoff, 376 F.Supp.2d 42, 79 (D. Mass. 2005). Similarly, in Boumediene v. Bush, 128 S.Ct. 2229 (2008), the Supreme Court held that the Military Commissions Act (MCA) was unconstitutional to the extent it denied federal courts of jurisdiction to hear habeas corpus actions by aliens detained as enemy combatants at Guantanamo Bay. Everywhere, the realm of judicial authority is shrinking at the hands of the legislature.

Legislative encroachment is also occurring in Illinois' sister states. The highly politicized Florida case of Bush v. Schiavo, 885 So.2d 321 (2004), and its ruling, are relevant here. Id. at 328. In Schiavo, the trial court made certain factual findings, after careful scrutiny of medical evidence, that the patient, Terri Schiavo, was in a persistent vegetative state, with no hope of even partial recovery. Id. at 325. Because of this finding, the trial court authorized the termination of life-prolonging procedures. Id. The Florida Legislature then enacted a law granting the Governor the authority to "issue a one-time stay to prevent the withholding of nutrition and hydration from a patient" if certain elements were met, all of which were present in Schiavo. Id. at 328. Pursuant to this authority, the Governor issued an executive order staying the withholding of nutrition for Ms. Schiavo. Id.

The Florida Supreme Court held that this law was unconstitutional as a violation of separation-of-powers. Schiavo, 885 So.2d at 337. The court noted that the power of the judiciary is not merely to rule on cases, but to decide them upon a careful analysis. Id. at 330. Delicate decisions like the adjudication of incompetent individuals, "some of the most difficult facing society," are particularly suited for the courts, with carefully prescribed rules and procedures. Id. at 332. The Florida Legislature had invaded the

authority of the courts by allowing the Governor to interfere with the final judicial determination of incompetence. Id. The ruling in Schiavo is analogous here, because the application of remittitur is a delicate decision, with procedural safeguards, much like adjudication of incompetent individuals. While the Florida legislature might have had proper motives in crafting such legislation, the statute crossed a constitutional line, and dared to shrink the authority of the Florida Supreme Court. This Court should take heed of these cases, and restore the proper balance of government in the State of Illinois by striking down section 2-1706.5 as unconstitutional.

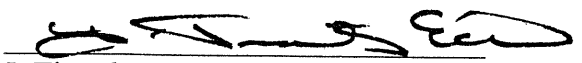
V. CONCLUSION

This Court must not look the other way when the General Assembly's action uproots an inherent judicial function. The courts' authority to grant or deny remittitur is such a function. Remittitur is a legal conclusion, reached by a judge after careful case-by-case analysis. Amici recognize that the Separation-of-Powers Clause is not absolutely unyielding, and some legislative initiatives which have overlapped with judicial rulemaking have been permitted where they are complementary. But to remove from the courts the power to correct excessive verdicts on a case-by-case basis would be to eliminate the essential judicial duty of ensuring that verdicts are just, and allow a jury decision to be subject to the legislative whim of politicians.

WHEREFORE, for the above-stated reasons, Amici request that this Court affirm the judgment below.

DATED: Aug 20, 2008

Respectfully submitted,



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