OA 1-30-87

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IN THE SUPREME COURT OF FLORIDA

ROBERT P. SMITH, JR., et al.,

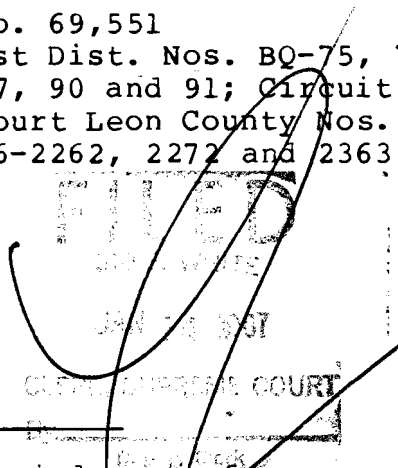
Appellants,

v.

DEPARTMENT OF INSURANCE, et al.

Appellees and
Cross-appellants.

No. 69,551
1st Dist. Nos. BQ-75, 76, 77, 90 and 91; Circuit Court Leon County Nos. 86-2262, 2272 and 2363.



Appeal and cross-appeals from a judgment of the Circuit Court of the Second Judicial Circuit certified for Article V, Section 3(b)(5) review by the District Court of Appeal, First District

BRIEF OF AMICI CURIAE IN SUPPORT
OF DEFENDANTS/APPELLEES

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit membership corporation. Its principal purpose is to sponsor amicus briefs in appellate cases - such as this - which involve significant questions of tort law or related matters.[1/]

The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") is a trade group. Member companies build over ninety-nine percent of all motor vehicles produced in the United States as well as farm, industrial, lawn, and garden tractors; other agricultural equipment; construction and mining machinery; locomotives, railroad rolling stock; and gasoline and diesel engines for various industrial and agricultural uses.[2/] It, too, has a direct and legitimate interest in the subject matter of this case.

1/ The members of PLAC are: American Honda Motor Company, Inc.; American Telephone & Telegraph; Automobile Importers of America, Inc.; Bell Helicopter Textron Inc.; The Budd Company; Clark Equipment Company; FMC Corporation; Fiat Auto U.S.A. and Ferrari, N.A.; The Firestone Tire & Rubber Company; Fruehauf Corporation; Great Dane Trailers Inc.; International Playtex; Motor Vehicle Manufacturers Corporation; Otis Elevator Company; Porsche Cars North America, Inc.; Sturm, Ruger and Company; Subaru of America, Inc.; and Toyota Motor Sales, U.S.A., Inc.

2/ The members are: American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; LTV Aerospace & Defense Company, AM General Division; M.A.N. Truck & Bus Corporation; Navistar International Corporation; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

The legislature of Florida has enacted coherent, carefully thought out reforms of significant aspects of tort doctrine and insurance, a matter which is inter-related with that body of law.[3/] Plaintiff Smith's attack on the validity of those reforms is of immediate and direct concern to amici.

PLAC and MVMA, moreover, can provide the Court with the viewpoint of manufacturers, a group which is effected by tort reform and which is not represented, directly, by any of the other participants.

PREFACE

"Stephany S." will be referred to by name. Robert P. Smith will referred to as "the Plaintiff" or "Mr. Smith". Mr. Smith's brief will be cited as "Pb _____)".

ORAL ARGUMENT

Amici do not request leave to participate.

STATEMENT OF THE CASE AND FACTS

Amici PLAC and MVMA adopt the account of the procedings below and the facts of the case which appear in the briefs submitted on behalf of the Defendants.

3/ Amicus will address only the tort reform aspects of the statute though it will be necessary for us to make occasional references to their relationship to the insurance provisions.

QUESTIONS PRESENTED

Amici adopt the formulation of the issues which appears in the Defendant's briefs.

SUMMARY OF ARGUMENT

> "... the judiciary may not sit as a superlegislature... so long as the legislative measure is rationally related to legitimate state interests, we must not substitute [our] judgment for that of the legislature with respect to the need for, or wisdom of, a legislative enactment...
>
> Florida Patients Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985)

This case offers the Court an opportunity to carry forward the work of American Cyanamid v. Roy, 11 F.L.W. 544 (Fla. Oct. 23, 1986) and Chrysler Corporation v. Wolmer, 11 F.L.W. 605 (Fla. Nov. 26, 1986). Moreover, by affirming the trial court's rulings concerning the tort reform provisions, the Court would recognize the right of a co-equal branch of the government to take reasonable steps to deal with other problems which punitive damage claims and excessive awards present.

I.

THE REFORM PROVISIONS ARE INDEPENDENT AND EACH COULD STAND ALONE EVEN IF THE COURT WERE TO FIND CONSTITUTIONAL FLAWS IN OTHER PROVISIONS OF THE STATUTE

This case involves far more than the validity of the insurance regulatory provisions of the statute. It is important that details of the arguments over premiums, investment practices and the like do not obscure that fact.

More particularly, Plaintiff Smith is wrong when he asserts that the legislature treated the common law as a mere "sub-set" of insurance regulation. (Pb. 36) To begin, that is not what the statute says. While the legislature devoted a great deal of attention to the practical problem of insurance, it also spent time and effort on the tort reform aspects of the matter. Each of the tort reform provisions, in fact, applies whether or not the defendant in the case is insured or the interests of an insurance company are otherwise involved.

Further, each of those provisions has an independent basis which would be sufficient to support it even if the Court were willing to over-ride all of the legislative findings concerning the insurance problems. For example, we will show that the courts and the academic world have recognized that punitive damage claims present serious problems. The conclusion that there should be a reasonable limit on their amount could rest on the need for fairness to defendants just as well as its impact on insurance rates.

The same is true of the limitation on non-economic damages. Indeed, the Plaintiff Smith complains that these claims are necessarily "speculative" (Pb. 28) and the legislature has found that they have no objective equivalent in monetary value.

The "joint and several" reform merely implements a legislative judgment that liability should be somewhat more closely linked to fault than it was under certain aspects of Florida common law as of 1986.

In any event, basic Florida precedent would require affirmance of the trial court rulings on the tort reform provisions even if the legislative intent to address the aspects of tort law were less clear than it is. See, State v. Lee, 356 So.2d 276 (Fla. 1978) in which the Court held that the presumption is in favor of separability; and that the party who seeks to have a statutory provision declared unconstitutional bears the burden of proving that it is inseparable from an other, flawed provision. See also, Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), appeal dismissed, 106 S.Ct. 213, 88 L.Ed. 2d 214 (1985).

II.

THIS CASE IS GOVERNED BY THE "RATIONAL RELATIONSHIP" OR MINIMUM SCRUTINY STANDARD OF REVIEW, THAT WHICH APPLIES TO THE BULK OF SOCIAL AND ECONOMIC LEGISLATION

While the Plaintiff attempts to make use of other provisions of the State Constitution, the heart of his opposition to tort reform lies in the contention that the statute violates due process and equal protection. The direct answer, accordingly, lies in the vast body of precedent which sharply limits review under those constitutional provisions, both state and federal.

A. The "Rational Relationship" Governs Equal Protection Challenges with Rare Exceptions.

The norm is that a statute must be upheld if it bears a reasonable relationship to a permissible legislative goal. Vance v. Bradley, 440 U.S. 93 111 L.Ed. 2d 171 (1979). The rule is

the same under state doctrine. See Acton II v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983) and Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d 365 (Fla. 1981).

The burden is on the litigant who challenges a legislative classification to prove that the facts on which the legislature relied "could not reasonably be conceived to be true by the government decision-maker." Vance v. Bradley, 440 U.S. at 111. Conversely, if the facts are arguably true, that is enough to support the legislative judgment. Vance v. Bradley, 440 U.S. at 112. See also, In Re: Paris Air Crash, 622 F.2d 1315, 1319 (1980) and Florida High School Activities Association, Inc. v. Thomas, 434 So.2d 306, 308 (Fla. 1983) ("the burden is upon the party challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained.")

(i) Strict Scrutiny:

The other recognized standard, that of "strict" review, is more rigorous but it applies only to a few, limited instances. In federal practice, these are primarily matters of race (Strouder v. West Virginia, 100 US 303 (1880)); alienage (Traux v. Reich, 329 US 33 (1915)); and national origin (Hernandez v. Texas, 347 US 475 (1954)). Classifications of that nature are presumed to be invalid. See McGowan v. Maryland, 366 U.S. 420

(1961);[4/]

The "strict scrutiny standard" also applies where legislation violates "fundamental" rights including that of interstate travel (Shapiro v. Thompson, 394 U.S. 618 (1969)); privacy (Griswold v. Connecticut, 318 U.S. 479(1965)); voting in state elections (Dunn v. Blumstein, 405 U.S. 330 (1972)); marriage and procreation (Loving v. Virginia, 388 U.S. 1 (1967); and rights guaranteed by the First Amendment (Police Dept. of Chicago v. Mosely, 408 U.S. 92 (1972)). On the other hand, the Supreme Court has refused to treat many other important matters as "fundamental" i.e., education, San Antonio School Dist. V. Rodriquez, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973); adequate housing, Lindsey v. Normet, 405 U.S. 56 (1972); or receipt of welfare benefits, Dandridge v. Williams, 397 U.S. 471 (1970).

B. The review of most due process challenges is equally limited

The scope of review under federal and state due process doctrine is essentially interchangeable with the "rational relationship" test of equal protection. This is how one respected court has summarized the doctrine:

4/ Also see McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969). Although the cases sometimes contain dicta which would erode the boundaries, the Supreme Court has refused to extend the concept of suspect classes beyond those three. See San Antonio School Dist. v. Rodriquez, 411 U.S. 1., 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973).

> The level of review given the economic and social regulations . . . is quite deferential. In determining whether such regulations violate substantive due process 'courts consistently defer to legislative determinations as to the desirability of particular statutory schemes.' Murphy v. Matheson, 742 F.2d 564, 575 (10th Cir. 1984). Moreover, we are to 'require only that the law bears a reasonable relation to the state's legitimate purpose . . .' (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125, 57 L.Ed.2d 91 (1978).
>
> Ferguson v. Garmon, 643 F.Supp. 335, 342 (D.Kan. 1986)

The Court itself has noted the same logical and precedential consistency:

> "The test applied, when no fundamental rights are at stake, is basically the same under either constitutional provision.
>
> United Yacht Brokers, Inc. v. Gillespie, 377 So.2d 668, 671 (Fla. 1979)

Likewise, it is firmly established in Florida law that where no suspect class or fundamental right is implicated in the action, the rational basis test rather than the strict scrutiny test should be employed. Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d at 367. Strict scrutiny "imposes a heavy burden of justification upon the state and should be applied only to those actions by the state which abridge some fundamental right or affect adversely upon some suspect class of persons." Florida High School Activities Association, Inc. v. Thomas, 434 So.2d at 308.

The significance of that principle is clear and controlling as to much of this case.

If Mr. Smith's attack on the insurance industry were relevant to the tort reform measures, he still would face the fact that he asks an appellate court to override the judgment of legislators as to the significance of statistics which each side admits are incomplete and debatable.

The question, moreover, is how various interests or groups are to share the economic burdens implicit in modern tort and product liability doctrine. That is a political and social issue, not a matter of constitutional law.

See Ferguson v. Garmon, 643 F.Supp. 335 (D.Kan. 1986). There Judge O'Connor expressed his personal agreement with the contention that there is no "malpractice crisis" and that it was unfair to abolish the collateral source rule in malpractice cases while letting it stand in other types of litigation. Nevertheless he went on to say that the decision on those questions were not for him but the legislature and, accordingly, that the statute did not violate due process or equal protection.

III.

THE PLAINTIFF'S ATTEMPT TO QUALIFY FOR "STRICT SCRUTINY" BY MEANS OF THE STATE EQUAL PROTECTION CLAUSE HAS NO SUPPORT IN PRECEDENT OR LOGIC

Mr. Smith tries to avoid the traditional limits on the review of state equal protection and due process cases. This is the purpose of his claim that "Stephany S." is handicapped; that

this individual handicapped person has only a speculative economic loss; and, finally, the assertion that this in turn means that the limitation on "non-economic" losses falls on her with disproportionate and impermissible severity. The effort is ingenious. It also is speculative and wholly unsupported by Florida law.

A. There is no precedent for the proposition that a statute which effects a physically handicapped person necessarily is subject to strict scrutiny.

In Florida Patients Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985) the Supreme Court upheld the validity of provisions which limit, to $100,000, payments by the Patient's Compensation Fund to health care providers. The plaintiff in that case was severely brain damaged, literally handicapped in a way that "Stephany S" may not be. Nonetheless, the Court applied the rational basis test and, at least by inference, rejected an argument much like that which the Plaintiff Smith now offers. These were the Court's words:

> "We find the legislation at issue does not implicate a fundamental right or suspect classification." (p. 789)

Thus broadly applicable legislation which happened to have an adverse impact upon one handicapped person did not constitute impermissible regulation on the basis of a "suspect classification".

The two cases cited in Appellant's brief do not support the Appellant's argument (Pb 48) to the contrary.

In Schreiner v. McKenzie Tank Lines & Risk Management Services, 408 So.2d 711 (Fla. 1st DCA 1982), aff'd, 432 So.2d 567 (Fla. 1983) a truck driver who had suffered epileptic seizures was fired. He sued his employer, relying on the state constitution's equal protection provision. The trial court dismissed the complaint. The Court of Appeal affirmed, holding that the provision is self-executing but, more important, that state action must be involved before there can be any right to relief.[5/] There was no mention of strict scrutiny.

More generally the Court of Appeal indicated (pp. 719-720) that it is doubtful that the existence of a statutory limit on liability or damages would constitute "state action" for this purpose. The Court also cited Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 56 L.Ed. 2d 185 (1978) as an indication that the denial of relief in a law suit would not be state action.

The Supreme Court affirmed, confirming the earlier holding that Article I, Section 2 requires state action, 432 So.2d 567 (Fla. 1983). In the process the Court indicated its approval of the District Court's analysis of the other issues; this included the lower court's discussion of the scope of state action and the

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5/ The pertinent statute did not become effective until after the date of the discharge. Therefore the recovery, if any, had to be based directly upon the constitutional provision.

indications that a generally applicable limitation on damages would not be "state action" sufficient for this purpose.

The Plaintiff's other case contained a discussion of the scope of review under radically different circumstances but it, too, does not support Mr. Smith's conclusions. Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), aff'd, 452 So.2d 932 (Fla. 1984) dealt with a statute which prohibited full recovery on workman's compensation claims by those over the age of 65.[6/] The lengthy opinion stated, in passing, that "greater protections" were extended to certain classes of persons, including the physically handicapped. Id. at 222. The Court did not elaborate on what these greater protections were, nor were they at issue.[7/]

B. This case would neither call for, nor permit, rulings on the constitutional position of "handicapped" persons as a class.

In spite of Von Stetina and Schreiner, the relationship of the state action requirement and the rights of handicapped persons could present complex questions. This case, however, would not justify a ruling on those important matters.

6/ The claimant had lied about his age and the case was complicated by a number of other special considerations which are not relevant to this discussion.

7/ The opinion traced changes in the formulation of the basic standard of review and indicated that the views of the appellate courts have fluctuated from time to time. The ultimate holding, however, was that this statute was subject only to traditional lenient review and that while the limitation on the compensation remedy discriminated against the aged, it was permissible because the discrimination had a rational basis.

(i) The lack of a classic "handicap".

First it is highly debatable whether "Stephany S." is "physically handicapped" in the sense that term is used in Article 1, Section 2. Although she suffered a physical injury the Plaintiff's own presentation (see his Appendix pp. 46-49) suggests that she has recovered to a large degree, and that the damage claim is based, to a significant extent, on the assertion that the accident led to the development of an unpleasant or "overly aggressive" personality. If she were to file suit, the causal connection between an accident and "aggression" would be debatable. Whether that aggression would continue during her adult life and whether it would effect her employment prospects, favorably or unfavorably, would be even more uncertain.

An "aggressive personality" moreover, is a different matter from race or the other characteristics typical of the groups shielded by the equal protection clause. There is no indication that the psychological term refers to a defined class or, if so, that the class has been subject to historical discrimination; still less that the discrimination rests on an easily identified physical characteristic. These, however, are the generally recognized indicia of a "suspect class". Sasso v. Ram, supra. at 221-22.

Indeed there appears to be nothing in the record of the case, or in the Plaintiff's argument, which would distinguish Stephany S. from any other personal injury claimant with some

arguably permanent damage. The effect of a holding that every such person is entitled to the protection of "strict scrutiny" would overrule a large body of precedent concerning the legislature's right to change tort remedies; and "freeze" that important body of law for most practical purposes.

(ii) The absence of discrimination.

The trial court made an equally simple and dispositive point. The statute does not single out the handicapped. Therefore the statutory limits on punitive damages, non-economic damages, etc. does not discriminate against them.

We add that the Plaintiff's argument rests upon the individual circumstances of this case rather than any inherent characteristic of the statute.

Mr. Smith says that "Stephany S." is a young child and, accordingly, that we could only speculate as to the extent to which her allegedly "more aggressive" personality detracts from her future earning capacity. That much, of course, is true.

On the other hand, the emotional hardships unique to a child's case should not be exploited as the pretext for an attack upon an entire tort reform code.

If the organized Plaintiffs' bar had singled out an adult to use in this test case, rather than a child, the situation would be far different. Consider, for example, a 30 year old IBM salesman who became crippled. His economic loss might well be enormous. See City of Tamarac v. Garchar, 398 So.2d 889 (Fla.

4th DCA 1981) where the Court of Appeal affirmed an award of six million dollars under those circumstances. Mr. Garchar would not be affected by the "non-economic" limit in the way Stephanie S. might.

In short, the statute effects different handicapped persons in different ways, just as it would effect different "non-handicapped" persons in different ways depending upon their circumstances.[8/]

IV.

THE GOALS EMBODIED IN THE TORT REFORM SECTIONS OF THE STATUTE ARE LEGITIMATE AND THE MEANS CHOSEN ARE NOT UNREASONABLE

A. If, as we have seen, this is not a case for strict scrutiny, the next step is to apply the rational relationship test.

The findings, as well as the basic text of the statute, show that the legislature set out to make tort law more fair and to see that liability insurance is available at reasonable price and, also, effective as protection for the accident victim and the insured.

The Plaintiff does not question the validity of those goals.

8/ It is also significant that while Mr. Smith concedes that Stephany's damages are speculative, he does not propose that the law be changed to permit an injured child to recover economic losses on a new and more speculative basis. On the contrary, he seems to say that such a change would be madness. (Pb. 28-29, 34) Yet that would be the more logical outcome of his argument.

The only question remaining, therefore, is whether the means chosen fall within the extremely broad area of discretion which the federal and state constitutions grant to a legislative body when it deals with such problems.

B. There is no constitutional ban on the reduction of damages for particular claims or even causes of action.

The most general question is whether any statutory limitation on damages is permissible. The answer is clear. The Constitution does not forbid the creation of new rights, or the abolition of old ones, to attain a permissible legislative object. Silver v. Silver, 280 U.S. 117, 122 (1929). Indeed statutory limits on liability are relatively commonplace and they have been upheld by the courts again and again 9/

More particularly, it is clear there is no "fundamental right" of recovery of tort damages. See, for example, Woods v. Holy Cross Hospital, 591 F.2d 1164, 1174 (5th Cir. 1979); Accord Seone v. Pharmaceuticals, Inc., 660 F.2d 146, 149-150 (5th Cir. 1981).

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) is an excellent example. The case involved the Price-Anderson Act's limit on claims by individuals injured in accidents arising from the operation of a private

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9/ Providence & N.Y.S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 . . . (limitation of vessel owners' liability); Indemnity Ins. Co. of North America v. Pan Amer. Airways, 58 F.Supp. 338 (S.D.N.Y. 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel).

nuclear power plants.[10/] Like the Florida Code, the statute placed a ceiling on the total recovery, regardless of the total injuries suffered. A District Court held that the Act violated due process. The reasoning was that the statute allowed the operation of plants which might produce injuries; and that it did not assure adequate compensation for the victims of every such potential accident. The Supreme Court reversed.[11/] Chief Justice Burger observed that the goal of the statute was legitimate. This, in turn, meant that steps reasonably designed to achieve that purpose were permissible.[12/]

10/ Of this sum the government agreed to indemnify each nuclear reactor owner from potential liability up to $500,000,000, the remaining $60,000,000 being funded by the private insurance industry. Other aspects of this complex and twice-amended statute are beyond the scope of the present discussion.

11/ While the discussion is in terms of due process, the Court expressly notes (at page 93) that the same considerations apply to the equal protection issue.

12/ "The general rationality of the Price-Anderson Act liability limitations-particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy-is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes." (at page 86)

V.

THE LEGISLATURE REASONABLY COULD CONSIDER PUNITIVE DAMAGES AS A MATTER FOR ITS CONCERN AND IT COULD DECIDE THAT A LIMITATION ON THE AMOUNT WOULD BE ONE APPROPRIATE REMEDY

A. In addressing punitive damages, the Florida legislation reflects a concern which courts and academic authorities have expressed again and again in recent years.

While punitive damage claims have a proper role in some cases,[13/] they have been permitted, recently, to intrude into ordinary product liability cases -- where no flagrant misbehavior in fact exists. See Moore v. Remington Arms Co., 427 N.E.2d 608, 616-17 (Ill. App. 1982)("The tide has.. turned: judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded"). The Court itself has recognized the problem. American Cyanamid v. Roy and Chrysler Corporation v. Wolmer, supra. each underscore the vital importance of restraint and call upon the trial courts to exert more meaningful control.

Leading academic commentators have sounded the same alarm: "Punitive damage awards that are unjustified threaten the entire structure of product liability litigation. . . ." Twerski, National Product Liability Legislation: In Search for the Best of All Possible Worlds, 18 Idaho L. Rev. 411, 474 (1982). Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 So.

13/ See, e.g., Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257 (1976).

Cal. L. Rev. 1, 78 (1982)(emphasizing products liability cases, and concluding that "the current expansive judicial attitude toward punitive damages is decidedly misguided"); Cooter, Economic Analysis of Punitive Damages, 56 So. Cal. L. Rev. 79, 98 ("punitive damages should be regarded as an unusual measure, appropriate only for gross, intentional fault"); Owen, Civil Punishment and the Public Good, id. at 103 (agreeing that "an unbridled, expansive application of punitive damages is undesirable on grounds of fairness and efficiency"); Priest, Punitive Damages and Enterprise Liability, 56 So. Cal. L. Rev. 23, 132 (observing "the absence of theoretical justification for punitive damage judgments").[14/]

14/ See also Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 So. Cal. L. Rev. 133 ("Punitive damages are in the air, are on the move. They are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago."); Wheeler, Symposium Discussion, 56 So. Cal. L. Rev. 155, 160 (noting that, in products liability cases, "[t]here were more punitive damages awards in 1980 and 1981 than in the entire prior history of the United States"); Henderson, Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 N.Y.U. L. Rev. 765, 787 (1983)("Awarding punitive damages whenever a manufacturer unreasonably defers implementation of a safety-related product design change would . . . as a practical matter exacerbate a growing problem in product liability law."); Owen, Problems, 49 U. Chi. L. Rev. 1, 59 (1982)("the experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriate assessed, are sometimes unfairly large").

Equally important, scholars have called for statutory reform along the general lines the Florida legislature has chosen. See, W.P. Keeton, Prosser and Keeton on Torts, pp. 13-14 (5th ed. 1984) (noting that certain problems in products liability cases "have stimulated re-examination of the policies and procedures for awarding punitive damages"); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983)(calling for tightening certain specific procedures in punitive damages cases generally);

B. The limit is one logical step toward reform and, therefore, one of the choices open to the legislature.

Just as there is no constitutional bar on reductions of damages in general, there is no due process or equal protection bar to limits on punitive damages.

Indeed, state laws have been upheld which completely deny recovery of punitive damages in wrongful death cases but allow their recovery in other personal injury cases. See, In re Air Crash Disaster Near Chicago, Illinois, 644 F.2d 594 (7th Cir.), cert. den., 454 U.S. 878, 102 S.Ct. 358, 70 L.Ed.2d 187 (1981); In re Paris Air Crash, 622 F.2d 1315 (9th Cir.), cert. den., 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 237 (1980); and Johnson v. International Harvester Company, 487 F.Supp. 1176 (D.N.D. 1980). Also note Freeman v. World Airways, Inc., 596 F.Supp. 841 (D.Ma. 1984), where the court upheld a Massachusetts law that denied punitive damages in personal injury actions but allowed them in wrongful death actions.

C. The legislative changes to punitive damage law are limited and reasonable.

Logic calls for the same result as does precedent.

A limitation on the amount of punitive damages is not the only possible approach to reform, but it is one simple and practical remedy. As a result, that approach was well within the broad discretion of the legislature.

While appellate courts can set forth rigorous standards, there is a tendency for those limits to erode over time.[15/] Moreover, the task of enforcing those standards is repetitive, time consuming and difficult. In contrast, a legislative maximum on punitive damages is essentially self-enforcing. It also gives each side the benefit of some measure of predictability, fostering intelligent compromise.

Further the maximum the Florida legislature has chosen is a generous one. At the same time, it is a limit; and some of the profit is diverted from the lawyer to the public. This should tend to encourage settlements by eliminating the hope for one of the run-away punitive verdicts which make millionaires of claimants and their counsel - when and if the awards survive lengthy appellate review.

15/ The Court, for example, has found it necessary to restate the standard for punitive damages in American Cyanamid v. Roy and Chrysler Corporation v. Wolmer even though it was set in Carroway v. Revell, 116 So.2d 16 (Fla. 1959) a generation ago.

VI.

THE LIMIT ON NON-ECONOMIC DAMAGES ALSO IS PERMISSIBLE UNDER BOTH FEDERAL AND STATE CONSTITUTIONAL LAW

A. Other courts have held that limitations on the amount of pain and suffering and similar non-economic damages are constitutional.

Limitations on non-economic damages have been upheld by several courts.

In Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665 (Cal. 1985), app. dism. 106 S.Ct. 214, 88 L.Ed. 215 (1985), the California Supreme Court upheld a statutory limit of $250,000 on noneconomic damages in medical malpractice cases - a sum significantly lower than that permitted by the Florida Legislature. Rejecting due process and equal protection challenges, the Court focused on the key point:

> "our past cases make clear that the Legislature retains broad control over the measure, as well as the timing, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest."

Id. at 680.

Further, the Court's analysis is similar to that inherent in the finding the Florida legislature made concerning non-economic damages:

> "Thoughtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value of such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers.
>
> Fein 695 P.2d at 680-681

This led to a review of precedent:

> While the general propriety of such damages is, of course, firmly imbedded in our common law jurisprudence . . . no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision.
>
> Id. at 681

The Court concluded that the statutory remedy is permissible. That reasoning is directly applicable to this case.

See also Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (upholding constitutionality of the same $250,000 limit on noneconomic damages subsequent to Fein decision) and Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585, 273 Ind. 374 (1980) (upholding constitutionality of Indiana law limiting recovery against health care providers in malpractice cases to $500,000).

B. The Plaintiff's indignation about a legislative "attack on the jury system" merely evades the point.

The Plaintiff resorts to an obvious strawman when he pretends (Pb. 46) that the legislative finding that non-economic

damages have only an arbitrary monetary value is somehow, an "attack on the jury system".

The Legislature did not criticize jurors; or say that pain and suffering are not important in human terms; or suggest that a Plaintiff is not entitled to reasonable compensation. On the contrary, the statute leaves in place non-economic awards, up to $450,000. This may be less than Mr. Smith or the organized Plaintiff's bar might want, but it is hardly a "token".

Instead the legislators recognized a difficult intellectual problem.

Pain and suffering and other non-economic awards differ fundamentally from other damages which can be established on a relatively "objective" basis.[16/] The connection between the

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16/ Fein, supra. set forth additional academic authority and constitutional reasoning pertinent to the issue. Quoting a dissent by Justice Traynor in another case, "There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. (Morris, Liability for Pain and Suffering, 59 Columb.L.Rev. 476; Plant, Damages for Pain and Suffering, 19 Ohio L.J. 200; Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 Law and Contemporary Problems 219; Zelermyer, Damages for Pain and Suffering, 6 Syracuse L.Rev. 27.) Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged.**[Citations.]** They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization. **[Citations.]** **[¶]** Nonetheless, this state has long recognized pain and suffering as elements of damages in negligence cases [citations]; any change in this regard must await reexamination of the problem by the Legislature."

degree of the suffering and the dollar award is tenuous. Further, this is an area in which juror sympathy - proper or improper - is particularly likely to play a role.

The conclusion is that if the legislators had to cut somewhere, this was one reasonable area to do so.

VII.

THE LIMITATION ON JOINT AND SEVERAL LIABILITY REFLECTS THE LEGISLATURE'S JUDGMENT AS TO FAIRNESS AS WELL AS INSURANCE REGULATORY CONCERNS

Section 60 places limitations upon joint and several liability. As to them, the fundamental question is whether it is fair that a plaintiff be permitted to recover the entire amount of the verdict from a defendant who is only partially responsible.

In Hoffman v. Jones 280 So.2d 431 (Fla. 1973) the Supreme Court joined many other jurisdictions in adopting comparative negligence. The motivating factor was the Court's conviction that fairness requires that a person's liability correspond to his fault and that each person should be responsible for his own actions.

The Supreme Court reviewed that general body of precedent in Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984) and then applied the logic to the seat belt issue. (p. 542) There is no reason why the legislature could not take the same approach to this aspect of tort law.[17/]

17/ It is true that the Court has chosen to leave joint and several liability in place because of a concern for

Footnote Continued

VIII.

THE PUNITIVE DAMAGE PROVISIONS ADDRESS THE SUBSTANCE OF THE REMEDY RATHER THAN THE "MACHINERY OF ENFORCEMENT" AND THEREFORE DO NOT VIOLATE ARTICLE V, SECTION II

Mr. Smith and the Plaintiffs' Bar invoke Article V, Section 2 and dispute the lower Court's findings that the punitive damage provisions are substantive rather than procedural. If the provisions are read carefully, however, it is apparent that their thrust is to deal with the basic right itself rather than the "machinery" by which that right is enforced. Therefore, they satisfy the spirit of the constitutional provision and the applicable body of precedent as well. See, In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972).

A. The Punitive Damage Provisions are explicitly subordinated to other law, making any conflict with the rule-making power hypothetical and improbable.

Before the Court considers the individual provisions, we think it important to note that they are preceded by a directive (Section 50) that "if a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply".

Footnote Continued from Previous Page

plaintiffs. On the other hand, there has never been a suggestion that that is a constitutional rule. The legislature was entitled to come to a different conclusion.

The Court's rule-making power is based in large part on statutory grants of power which precede the current constitution. See Means, The Power to Regulate Practice and Procedure in Florida Courts, 32 Fla.L.Rev. 442 (1980) at p. 444. Logically, Section 50 requires deference to those grants and to the constitutional arrangement which has developed from them.

Moreover it is improbable that the legislature would take care to subordinate the remedial provisions to every other statute and yet intend that they should over-ride the state constitution.

Therefore in the event of an arguable conflict between the tort reform provisions and the Court's rule-making authority, Section 50 would require that the legislature be deemed to have withdrawn from the field and that the statute be subordinated.[18/]

It is conceivable, of course, that a litigant or a lower court might fail to heed Section 50 and thus create a constitutional issue. That possibility, however, is merely hypothetical.

B. An analysis of the individual punitive damage provisions shows that the legislature has not encroached on the powers of the judiciary.

Section 51: As the lower court put it, this defines the conditions the plaintiffs must meet to recover punitive damages.

18/ The text calls for that reading, even if it were not traditional law that statutes should be interpreted in a manner which would avoid unconstitutionality. It follows that there is no constitutional clash, at least as yet.

A claim for punitive damages shall not be permitted unless it has a "reasonable basis". On the other hand, nothing in the key sentences speaks of the means by which that qualitative standard is to be enforced. The matter is left entirely to the courts. The claim only need be supported by the evidence, be it "in the record" or "proffered by the claimant."

The provision also recognizes the claimant's right to amend his complaint to assert a claim "as allowed by Rules of Civil Procedure". This, however, adds nothing new.

The same is true of the declaration of policy that the Rules of Civil Procedure should be "liberally construed" to allow claimants discovery of the evidence necessary to support the claim.

When the elements of §51 are read as a whole, then, the section sets forth the important public policy that the rules of procedure be applied in a manner which will require that punitive damage claims have support in the evidence.

The requirement of a reasonable basis in the evidence, at most, would be a new prerequisite - a substantive requirement for such a claim, like that which the Court singled out in School Board of Broward County v. Price, 362 So.2d 1337 (Fla. 1978) as making a statute substantive and therefore valid.

As to procedure the change, if any, from preexisting law is slight. There is no statement for example that a punitive damage claim may never be included in the original complaint. If there

is evidence in the record or the claimant could make a proffer of evidence - which, presumably, could withstand an immediate challenge - that claim is proper, at least on the basis of a facial analysis of §51.[19/]

Section 52(A) - The provision begins by setting forth the maximum amount for punitive damages - three times the compensatory award, subject to exceptions. This is a straightforward statement as to how much can be recovered. Few statements could be more clearly devoted to the substance of the right rather than to the "machinery" of enforcement.

Similarly the provision also deals with the distribution of the punitive award between the public medical assistance trust fund, the Plaintiff and his or her lawyer. The balance concerns the right of remittur, a matter which the court has ruled to be substantive. See Adams v. Wright, 403 So.2d 391 (Fla. 1981).

There also is a requirement that the plaintiff demonstrate "by clear and convincing evidence" that an award in excess of that statutory limit is not excessive. Once again, the qualitative standard is inseparable from the right;[20/] and the

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19/ We recognize that others may take a different view of the meaning of the provision. This is precisely the sort of statutory interpretation issue which is best dealt with by permitting the case to work its way through the trial and intermediate levels of review. The Court would gain the benefit of empirical data as to what happens in practice and the thinking of judges who must deal with such problems on a day-to-day basis.

20/ There is also a statement that the jury should not be instructed as to the provisions of the statute. The effect

Footnote Continued

choice of the means to enforce that standard is left to the Courts.

Section 53: This deals with remittur and additur, a matter controlled by Adams v. Wright. There the court held the comparable statute to be a "remedial" matter, designed to protect the substantive rights of litigants in motor vehicle suits. The Plaintiff's brief does not make any effort to distinguish that precedent.

Section 54: This says that the court may require a settlement conference at least three weeks before the trial. As Judge Miner observed, there is no requirement that the judge take that step; and therefore no invasion of the judicial preogative. The provision, moreover, reiterates the public policy in favor of settlement. It is entirely appropriate that the legislature be the voice for that view as to an important practical matter.

Section 56: This deals with the practical necessity that the trier of fact say what amounts are to be awarded in various categories such as "economic loss", punitive damages, non-economic loss and the like. The requirement is "substantive" in that it is indispensable if the other provisions -- such as

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> is to prevent any prejudice to either side. The limitation is on the evidence and legal argument which either side can argue, a matter of substance. The Supreme Court, after all, has treated the entire evidence code as substantive; there is no reason why this minor fragment should be treated differently.

limitation on the amount of non-economic loss -- are to be meaningful.

There is no specification as to the procedural means by which that substantive object should be accomplished. Indeed, contrary to the Plaintiff's key assumption, there is no explicit requirement concerning the "form of the verdict". That practical question is left to the courts. The direction is only that there be some form of "itemization".

It also is significant that Plaintiff Smith has not challenged the collateral source provision and that he attacks the limitation of non-economic damages in terms of due process and equal protection but not as a violation of the judicial powers.[21/] If the broad limitations on the amount of certain damage components are not an invasion of the rule-making power, a carefully limited subsidiary requirement that the results those limits helpe to produce be stated expressly also is constitutionally appropriate.

Section 57: This provides for alternative methods of payment of future economic damages in excess of $250,000. Here, again, the Supreme Court already has approved similar measures. See, Florida Patients Compensation Fund, supra, at 789. The thrust, moreover, is largely to provide a means for reduction to

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21/ Each of those provisions has aspects which could be subjected the type of semantic attack upon which he has directed against Section 56.

present value. An adjustment in the amount one party obtains, if his or her claims succeeds, is the very essence of a "substantive" right.

The trial courts and the parties are given a variety of choices as to how to accomplish the objective, of this section making the matter essentially permissive and, therefore, constitutional. Further the court may refuse to grant the order if it concludes that the effect would be unjust.

The bond provisions (3) are, of course, additional substantive protection for the plaintiff.[22/]

It is true there are requirements for the calculation of future damages but they are part of the definition of the rights of each side under this new substantive disposition. This is no more an invasion of the court's power to enforce its judgment than is the remittur and additur statute approved in Adams v. Wright, supra.

Section 58: This gives a party rights in the event that he or she files an offer of judgment which the other side rejects. There is no specification as to the mechanics of the offer, other than the time limit.

Here, again, a new statutory right is created[23/] and the

22/ Query whether Mr. Smith is not estopped to attack them in his role of champion of plaintiffs as a broad class.

23/ The Plaintiff himself in fact refers to it as a new remedy (P.b. 51).

aspects which the Plaintiff attacks as "procedural" are, instead, a necessary part of the definition of that statutory and substantive right.

Like so many others, this part of the statute does not dictate how the courts should accomplish its substantive objectives. Paragraph 2(G) only sets forth a list of suggestions as to factors relevant when the trial judge considers the quality of the litigants actions.

Moreover this legislation does not represent legislative usurpation of the power of the judiciary. On the contrary it creates a significant new power for the judiciary - the right to decide that a particular offer was not made in good faith -- in which case the other side shall not be entitled to the award of costs and attorney's fees.

More generally, the punitive damage provisions and the tort reform sections as a whole do not indicate any intention by the legislature to take control of the trial courts. Time and again, the practical powers which would control the out-come of an individual case are specifically entrusted to the trial judge.

In spirit and in letter the legislation is a conscientious attempt to articulate important public policy judgements while still deferring to the courts in their proper sphere.

C. If, arguendo, a preliminary review of some of the provisions were to suggest that some of them are "procedural", the Court then would face several other questions.

(i) Timeliness and Ripeness for Adjudication:

The first is whether the time has yet come for a constitutional ruling.

We suggest that the Court does not have the information it would need to justify the grave step of holding important legislation unconstitutional.

Our brief review of the text of the provisions may have suggested some questions of interpretation. In addition, there almost certainly will be other questions of interpretation or practical effect which are not yet apparent.

The measures in question, after all, have not been put into effect in any case involving "Stephany S".

Further the rules have not yet been explored at the trial and intermediate appellate level.

(ii) The hypothetical nature of the punitive damage issues as far as this case is concerned.

There also is a question whether Mr. Smith, the organized Plaintiff's Bar for whom he speaks, and even "Stephany S" have a right to ask the Court to deal with the complexities of these provisions in this case.

The Plaintiff would have the Court consider important statutory sections in the abstract and without the benefit of a factual context. An opinion which resulted from that process would be advisory, not a ruling on an actual case or controversy.

Stephanie has not claimed punitive damages. For that matter, she has not even filed a law suit. And if she did, the trial court would be bound to grant judgement against the punitive damage claim on the basis of American Cyanamid v. Roy Chrysler Corporation v. Wolmer, supra.[24/]

It is fundamental law that one who is not subject to a statute cannot challenge it. Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), app. dism., 106 S.Ct. 213, 88 L.Ed. 2d 214 (1985). Also, see the opinion of the then Judge Robert P. Smith in Florida Home Builders Associates vs. Division of Labor, 355 So.2d 1245 (Fla. 1st DCA 1978). Further an opinion on this aspect of the case would be advisory. The judgment would neither grant nor deny damages in an actual law suit. Instead the Court would function as a "third branch" of the legislature, mulling over the nature of the punitive damages measures and their possible effects on society in general. Any ruling for Mr. Smith would constitute the Supreme Court's veto of those sections, based on the theory that it represents unwise social policy or, perhaps, an impermissible

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24/ The injuries which she suffered are unfortunate but they are also a consequence of a fairly routine traffic accident. Counsel for the Trial Lawyers' Association assert that the collision occurred because another driver was unwise enough to make a turn in the face of uncoming traffic. Nothing in those sparse facts suggests that the driver's conduct could rise to the extreme levels necessary for punitive damages. There is no showing of egregious culpability in this case. The man made a mistake, perhaps a stupid one - no more.

"majoritarian" philosophy -- to use the Plaintiff's phrase.[25/] We think it obvious, however, that it would not be consistent with Florida's constitutional law for the judiciary to make such social and political decisions. Indeed the very suggestion ignores the principle of separation of powers upon which the Plaintiff's position supposedly rests.

(iii) The adoption of the reforms as rules of court.

Alternatively, if the question properly is before the Court and the form of the legislation is barred on constitutional grounds, the essentials of those provisions, nevertheless, are consistent with the Court's own concern for the proper regulation and control of punitive damage claims. See Wolmer and Roy, supra. Therefore, it would seem logical for the Court to consider adopting the provisions as rules of court, rather than to nullify useful reforms.

There is ample precedent for that approach. See In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979). Indeed, that is exactly what the Court did in two of the cases upon which the

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25/ One man's "majoritarian politics" is another's democracy. In any event, the whole tenor of the Plaintiff's brief shows that his position is appropriate for a political arena - perhaps the Florida Legislature - but not for decision in this case. How, for example, could the Florida Supreme Court reject "majoritarian politics", as he argues, in this or any other case without ignoring Baker vs. Carr and the most basic provisions of the federal and state constitutions? The Plaintiff's resort to such rhetoric shows the dangers which arise when a court permits litigants to go beyond the bounds of a specific lawsuit.

Plaintiff Smith himself now attempts to rely, Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (1977) and Carter v. Sparkman, 335 So.2d 802 (Fla. 1976).

CONCLUSION

By way of summary, amicus contends that:

1. The tort reform measures are consistent with the insurance regulatory scheme but, nevertheless, separable and capable of standing on their own;

2. They are only subject to limited review under due process and equal protection; and those aspects of the state constitution which involve strict scrutiny do not apply to them.

3. The limitations on punitive damages, non-economic damages and joint and severable liabilities are among the many measures which the Florida Legislature was free to choose in its efforts to deal with important social and political problems.

4. The punitive damages provisions are essentially substantive. Questions as to the constitutionality of their details are premature and hypothetical. The Court can only guess how those detailed provisions will be interpreted and applied in future lawsuits.

5. Section 50 means that the provisions in question are subject to the Supreme Court's rule-making power and, thus, constitutional on their face; and it is too soon to consider

other problems which might arise when individual sections are applied in actual litigation.

6. If arguendo they violate Article V, those provisions nevertheless are consistent with the public policy objectives for which the Court has worked.

Therefore, we urge that the judgment of the trial court be affirmed insofar as it addresses the tort reform provisions of the statute; or, alternatively, if any of the punitive damage sections are held to be impermissibly "procedural" that they be re-enacted as rules of court.

Respectfully submitted,

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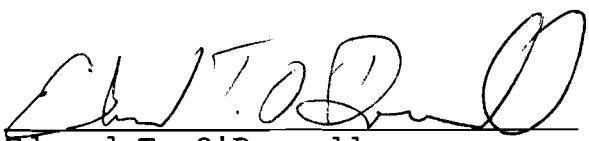
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by commercial courier this 12th day of January, 1987 to: ROBERT P. SMITH, JR., 420 First Florida Bank Building, 215 So. Monroe Street, Tallahassee, Florida 32314 and an additional copy was sent to Mr. Smith by regular U.S. Mail, also on January 12th, 1987. Copies of the foregoing were furnished by regular U.S. Mail this 13th day of January, 1987 to: DAVID A. YON, Department of Insurance, Room 413B, Larson Building, Tallahassee, Floirda 32301 and JAMES W. SLOAN, Office of the Attorney General, The Capitol, Suite 1501, Tallahassee, Florida 32301. Copies will be furnished by regular U.S. Mail this 13th day of January, 1987 to DUBE AUSLEY of Ausley, McMullen, McGehee, Carothers and Proctor, P.O. Box 391, Tallahassee, Florida 32302 and WILLIAM H. ADAMS, III, Mahoney, Adams, Milam, Surface & Grimsley, P.O. Box 4099, Jacksonville, Florida 32201; THOMAS M. ERVIN, JR., ESQ., Robert K. High, Esq., Ervin, Varn, Jacobs, Odom & Kitchen, P.O. Box 1170, Tallahassee, FL 32302; Frederick B. Karl and Thomas J. Maida, Karl, McConnaughhay, Roland, Maida & Beal, P.A., P.O. Drawer 229, Tallahassee, FL 32302; Alan C. Sundberg, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.O. Drawer 190, 410 First Florida Bank Bldg., Tallahassee, FL 32302; Arthur J. England, Jr., Fine, Jacobson, Schwartz, Nash, Block & England, P.A., 2401 Douglas Road, Miami, Florida 33134; Vincent J. Rio, III, Esq., Taylor, Day, Rio & Mercier, 121 W. Forsyth Street,

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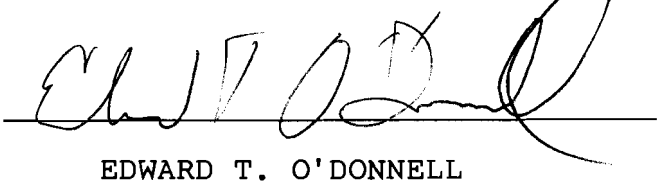

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