OA 1-30-87

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IN THE SUPREME COURT

ROBERT P. SMITH, JR., et al,

Appellants,

vs.

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 First District Court of Appeal.

ANSWER BRIEF FOR APPELLEE FLORIDA MEDICAL ASSOCIATION, INC.

WILLIAM H. ADAMS, III
ROBERT J. WINICKI
Mahoney Adams Milam Surface
& Grimsley
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

Attorneys for Appellee,
Florida Medical
Association, Inc.

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PRELIMINARY STATEMENT

Appellee, Florida Medical Association, Inc. ("FMA"), submits this brief to answer (a) the arguments of all the Appellants on the validity of Chapter 86-160 (the "Act") under Article III, Section 6 (single subject) and (b) the arguments in the brief filed by Appellant Robert P. Smith, Jr. (the "Smith Brief") on the validity of Sections 49 - 60 (the "tort reform sections") as against the various constitutional challenges raised in that brief.

References to the record will be denoted (R. at ____) and reference to the trial transcript will be denoted (Tr. Vol. ___ p. ___).

STATEMENT OF THE CASE AND FACTS

FMA does not believe it is necessary to summarize all the testimony received by the trial court or to dispute the numerous controversial assertions of fact made in the Smith brief's statement of facts.[1] The issues involved in this appeal are essentially issues of law. To the extent FMA deems testimony at trial to be pertinent, it will be referred to in the argument section of this brief.

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1 The FMA does not accept these assertions as true but does not deem it necessary to dispute them on a point by point basis. However, certain egregious assertions made by Smith are refuted in the argument section of this brief.

SUMMARY OF ARGUMENT

Chapter 86-160 does not violate the single subject requirement of the Florida Constitution. The Legislature determined that tort and insurance reform constitutes one subject. To the extent that the Act applies to both actions in tort and contract, the Legislature recognized that many actions involving the same set of facts can be sued upon in tort, in contract or both. The testimony of George L. Priest, John M. Olin Professor of Law and Economics at Yale Law School, explains the historical process through which, in certain areas, tort and contract actions have become indistinguishable.

Sections 59 and 60 of the Act do not deprive injured persons of access to courts for redress of injuries nor do they deprive injured persons of equal protection of the laws.

The cap placed on non-economic damages in the Act is fair to everyone in society, including potential tort victims. The proper methodology for evaluating changes in tort law is on an ex ante basis from the standpoint of one who does not know in advance whether he or she will be a tort victim, a tortfeasor or a bystander. A cap on non-economic damages will make insurance more available and reduce the amount paid by society for excessive insurance against accidents. Since non-economic damages are inherently speculative and cannot really compensate for the intangible damages injured persons suffer, the Legislature's decision to place a limit on recovery of such

damages was rational. The Legislature found that a crisis existed in liability insurance availability and that one of its causes was excessive, unpredictable non-economic damages. The Legislature reached its decision to limit such damages after studying numerous documents and hearing testimony from interested persons on all sides of the issues. In light of all the facts, its decision was rational.

The cases decided by this Court make it clear that Article I, Section 21, comes into play only if there is a complete abolition of a common law remedy. Numerous cases have upheld caps on total damages, including economic damages, even when no alternative remedy was provided to the injured person.

Section 60, which modifies the common law doctrine of joint and several liability and replaces it with a comparative fault rule, also benefits everyone on an ex ante basis. This Court has recognized that apportionment according to fault is the most equitable way to distribute losses due to negligence. In Hoffman v. Jones, the Court recognized that, "When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party." The Legislature simply adopted this principle in modifying the doctrine of joint and several liability.

Nor do Sections 59 and 60 deprive injured persons of rights in violation of the equal protection clause. Once again, the

proper methodology of viewing the sections is on an ex ante basis. From this perspective, all of us, both the healthy and the handicapped, are potential tort victims. As such there is no discrimination against any particular class of individuals.

Sections 51, 52, 53, 54, 56, 57 and 58 of the Act do not encroach upon the judicial power to regulate practice and procedure exclusively reserved to the judiciary under Article V of the Florida Constitution. These sections define substantive as opposed to procedural rights. To the limited extent to which they do involve procedural matters, their requirements are discretionary with the courts. As such, there is no encroachment upon the judiciary's power.

In short, the Act represents an attempt by the Legislature to solve a difficult and perplexing problem. While reasonable persons may disagree as to the merits of the tort reforms contained in the Act, there is no doubt that the Legislature carefully considered all of the various alternatives and had a rational basis for enacting them.

ARGUMENT

I. CHAPTER 86-160 DOES NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION

The Final Judgment entered by the circuit court, contains an excellent discussion of the general principles that courts must apply in determining whether legislation violates the single-subject requirement of the Constitution. Final Judgment at 3-12. (R. at 1388-97). It is sufficient to say that (1) in considering whether an act is valid under Article III, Section 6, a court must begin with the presumption that the act is constitutional and must uphold it against a single subject attack unless there is "an apparent, plain, or palpable violation"; (2) the Legislature may make the subject of an act as broad as it chooses as long as the matters included in it have a natural and logical connection to each other; and (3) courts should avoid any interpretation of an act which would render the act invalid or cast doubt on its validity. Final Judgment at 11. (R. at 1396).

Application of these principles makes it clear that Chapter 86-160 contains only one subject and that Appellants' attack on it under Article III, Section 6, has no merit.

Appellants argued in the trial court that Chapter 86-160 is multifarious on a variety of grounds. They seem to concede in this Court that the Legislature did not violate the single-subject requirement by combining insurance and tort reform provisions in the same Act. Indeed, Appellants are

forced to that position by the Legislature's findings, this Court's decisions in State v. Lee, 356 So.2d 598 (Fla. 1978) and Chenoweth v.Kemp, 396 So.2d 1122 (Fla. 1981), and by the expert testimony in the trial court which makes it clear that liability insurance and the tort system are closely interrelated.

Appellants are now reduced to arguing that Chapter 86-160 is invalid because it contains two provisions that are allegedly extraneous to the broad subject of insurance and tort reform. First, they argue that it contains more than one subject because Section 50 makes the tort reforms in Section 51-60 applicable "whether suit is in tort or contract." They contend that this phrase makes Section 51-60 apply to all civil litigation and takes the act far beyond matters related to liability insurance and tort reform. State Farm goes further and says that the Court should find a violation of this section because the provisions of Section 44 relating to retrospective deficit assessment coverage do not really involve "insurance". State Farm says that real insurance always looks forward, not backward and that, because the deficit assessment provision is backward-looking, it is not logically connected to the remainder of the Act.

Neither of these contentions has any merit. Both are good illustrations of the accuracy of the observation by Professor Rudd that " . . . an argument based on the one subject rule is often the argument of a desperate advocate who lacks a

sufficiently sound and persuasive one." Rudd, No Law Shall Embrace More Than One Subject, 42 Minn. L. Rev. 389, represented in IA C. Sands, Sutherland Statutory Construction, 523-28 (1972).

The phrase "whether in contract or tort" is not new to the sections of Florida statutes dealing with tort litigation. Before the enactment of Chapter 86-160, the phrase appeared in various sections of the Medical Malpractice Law. Chapter 768, Part II, Fla. Stat. (1985); see § 768.48 (itemized verdict); § 768.49 (remittitur and additur); § 768.495 (pleading in medical negligence cases; claim for punitive damages), § 768.50 (collateral sources of indemnity), § 768.51 (alternative methods of paying damage awards), Fla. Stat. (1985). These sections were included in the medical malpractice law because the relationship between physicians and their patients is fundamentally contractual. For this reason, malpractice suits against physicians can be brought either in tort or contract. The Legislature intended the provisions of the medical malpractice act to be applied regardless of whether a physician was sued in tort or for breach of contract.

Making the tort reform provisions of Sections 51-60 applicable "whether suit is brought in tort or contract" obviously has the same purpose. As Professor Priest testified:

> Well, much of modern tort law represents a shift to areas of what we call tort from what before in earlier times was an issue of contract law. Obviously in the manufacturing context, formerly recovering the fifties and before, recovering for an injury from a

> product was a branch of warranty law, and it is only in the sixties and since that it is, it has become an area of tort law.
>
> Similarly, in the medical malpractice field, malpractice actions used to be contract. They are, of course, now regarded as tort actions and there are other contract types of actions in cases that deal with liability insurance, indemnity agreements and the like, so that there is a very large overlap now between tort causes of action and contract causes of action such that I teach both torts and contracts at Yale, and there is a, there is, it's really very hard to distinguish a wide range of material in those courses as to whether it should be in one course or another.

(Tr. Vol. VII, p. 1149-1150, Priest Testimony)

> Often the overlap occurs because of the consequence of physical injury, personal injury as a result of some type of activity, so that oftentimes many jurisdictions are regarding as sounding in tort any type of action that, that generates a physical or personal injury even though, even through the underlying duty might have been established by contract?

(Tr. Vol. VII, p. 1217, Priest Testimony).

Professor Priest testified that insurance companies write liability insurance to protect businesses against contract liabilities arising from the various tort-like contract actions described in his testimony. (Tr. Vol. VII, p. 1150, Priest Testimony). This established the logical connection between liability insurance and some kinds of contract actions.

While the draftsmanship of Section 50 may leave something to be desired, it is obvious that the Legislature did not intend Sections 51-60 to apply to all kinds of contract actions. Its purpose was to make them applicable to tort-like

contract actions regardless of whether the underlying duty is based on contract or tort. This purpose is clear from the context. These sections are contained in an act entitled "The Tort Reform and Insurance Act of 1986." There is no indication in the Act or in its legislative history that the Legislature was concerned in any way with ordinary contract cases. The Legislature placed these sections in a new part III of Chapter 768, which is entitled "Negligence." If it had intended these sections to have far-reaching effects on all civil contract actions, they would certainly not have been placed in a chapter on torts.

The applicable cases make it clear that in interpreting statutes courts are required to ignore ridiculous literal constructions and adopt those that carry out the legislative intent as gleaned from the Act as a whole, its legislative history and similar sources. See City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983); Yeste v. Miami Herald Publishing Co., 451 So.2d 491 (Fla. 3d DCA 1984); Mercedes-Benz of North America v. Dept. of Motor Vehicles, 455 So.2d 404 (Fla. 2d DCA 1984); George v. State, 203 So.2d 173 (Fla. 2d DCA 1967). The literal construction on which Appellants' argument is based would produce a ridiculous result.

The Legislature's failure to be specific in drafting Section 50 may create problems of construction that will have to be resolved in future contract cases, but that failure

should not create a violation of the single subject requirement. In this case, the presumption that the Legislature intended a valid act and the rule requiring courts to avoid unconstitutional interpretations act together defeat Appellants' contentions. It would be grossly unreasonable to penalize a drafting mistake in a comprehensive act such as this by killing the Act.

The same principle applies to State Farm's contention that the provision in Section 44 requiring members of the Florida Medical Malpractice Joint Underwriting Association to write deficit assessment is not logically related to liability insurance. Regardless of any other problems Section 44 may create, it clearly does deal with liability insurance coverage. It is germane to the general subject covered by other sections of the Act and is properly within the broad single subject chosen by the Legislature.

II. SECTIONS 59 AND 60 DO NOT DEPRIVE INJURED PERSONS OF ACCESS TO COURTS FOR REDRESS OF INJURIES NOR DO THEY DEPRIVE INJURED PERSONS OF EQUAL PROTECTION OF THE LAWS.

A. The Purpose Served by Sections 59 and 60

Section 59 places a limit of $450,000 on the amount of noneconomic damages an injured person may recover. Section 60, apportions damages among defendants based on their percentage of fault except that, if a defendant's fault equals or exceeds that of the claimant, the plaintiff may recover the entire amount of economic damages against that defendant under the doctrine of joint and several liability.

Evidence received at the trial demonstrates why a limitation on the amount of noneconomic damages is fair to everyone in society, including potential tort victims. Professor Priest explained that the proper way to determine the fairness of rules governing the recovery of damages is ex ante; that is, by looking at what rules a reasonable person would wish to have applied to him before he knows whether he will be injured or not. When viewed in this way, each of us is on both sides of the insurance/tort reform issue. On one hand, we are potential victims of torts. On the other hand, as insured individuals and consumers, we must pay the cost of the insurance that will provide the level of damages we will recover if we are injured. In trying to decide on a coherent legal structure that we would like to have applied to us, whether we are injured or not, we must make tradeoffs between

different levels of tort recovery and the costs we must pay for each level. (See Tr. Vol. VI, p. 1111, Priest Testimony).

Recovery of damages for our economic losses is essential. (See Tr. Vol. VI, p. 1125, Priest Testimony). Economic losses can be reimbursed and eliminated entirely by the payment of money. Noneconomic losses are by definition intangible. They cannot be measured in money or eliminated by a money payment, no matter how great it is. (Tr. Vol. VI, pp. 1124, 1127, Priest Testimony). If we have to choose between recovering damages for our monetary losses and recovering damages for our nonmonetary losses, we would prefer to recover for our monetary losses since a payment of money will shift the monetary loss we have suffered to the defendant. However, recovery of damages for pain and suffering does not shift this loss. We still have it regardless of any payment we may receive. As Professor Ingber of the University of Florida Law School wrote in a recent article published in a symposium on tort law in the California Law Review, "awards for general, non-pecuniary damages cannot provide meaningful compensation for the victim." Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Cal.L.Rev. 772, 783 (1985).

There is no such thing as a free lunch. All of us must pay in one form or another in an amount that corresponds to the level of damages we will be entitled to recover if we are injured. (Tr. Vol. VI, p. 1125, Priest Testimony). In

reality, we all insure each other. As automobile owners and operators, we insure ourselves against liability to others just as other owners insure themselves against liability to us. (Tr. Vol. VI, p. 1126, Priest Testimony). If we are in business, we pay premiums to protect ourselves against liability. But we add the premiums to the cost of the goods and services we sell. Thus, as consumers we all pay for the right to recover damages if we are injured. (Tr. Vol. VI, pp. 1125-6, Priest Testimony). Since the tort system is not voluntary, we are forced to obtain insurance through the tort system for whatever level of recovery it provides. (Tr. Priest 1130).

Insurance provided through the tort system is often referred to as third-party insurance. (Tr. Vol. VI, p. 1121, Priest Testimony). It is much more expensive than first-party insurance, which is the kind we buy when we insure ourselves. For one thing, the administrative costs of third-party insurance are high. (Tr. Vol. VI, p. 1123, Priest Testimony). The tort system is administered in large part through litigation and threats of litigation. The dollars that are paid for liability insurance go, not only to insurance companies and injured persons, but to lawyers representing both plaintiffs and defendants. As a result, only about 40% of each premium dollar ends up in the hands of injured persons. Florida Medical Association Medical Malpractice Policy

Guidebook, FMA Exhibit D, at 142-3. In the case of first party insurance, more than 80% of the premium dollar, approximately twice as much, ends up in the hands of the beneficiary.

While Courts and lawyers support the tort system because they believe it helps the poor, any help it gives them comes at a high price that discriminates against lower income people. (Tr. Vol. VI, p. 1130, Priest Testimony). This is because rich people tend to recover higher damages than poor people -- for one thing, their economic losses tend to be greater. (Tr. Vol. VI, p. 1130, Priest Testimony). A purchaser of first party insurance not only gets more insurance for the dollars he spends, but he can tailor the amount of insurance he buys to fit his own economic needs. This cannot be done when one buys insurance through the tort system and pays premiums in the form of higher prices for goods and services. Since a company that issues liability insurance cannot know whether persons who will be injured by its insureds will be rich or poor, its premiums are based on average recoveries. The premiums are passed on in the price of goods and services that are bought by rich and poor. Since rich and poor alike pay the same average price for the insurance they receive through the tort system, the net effect is that the poor pay relatively higher premiums for the benefits they receive (Tr. Vol. VI, p. 1132, Priest Testimony). Therefore, the poor subsidize the rich.

One inference that may be drawn from this is that the judicial system is not conferring favors on any class of

persons when it provides higher levels of damage recovery than people would voluntarily pay for. One way of determining what an appropriate level of damage recovery might be is to look at the insurance that people buy when they insure themselves. (Tr. Vol. VI, p. 1125, Priest Testimony). This shows the level of recovery they believe is appropriate when they know they are paying the cost. The most striking observation to come from studies of this subject is that while almost everyone has insurance against economic loss, there is no demand for insurance against noneconomic loss; consequently insurance companies do not even offer it on a first party basis. (Tr. Vol. VI, pp. 1122, 1125, Priest Testimony). If people do not voluntarily buy insurance against noneconomic losses when they insure themselves, one may well ask why, when they obtain their insurance at a much higher price involuntarily through the tort system, the law should require them to buy insurance against noneconomic losses. (Tr. Vol. VI, p. 1126, Priest Testimony).

The problems of cost are aggravated by the fact that noneconomic damages are inherently open-ended, subjective, and defy quantification. Since they are subjective, awards for similar injuries can vary greatly from case to case, leading to highly inequitable, lottery-like results. This makes noneconomic damages unpredictable and increases the difficulties insurance companies have in maintaining the narrowly defined risk pools that are required for an efficient

insurance system. (Tr. Vol. VI, pp. 1127-8, 1131-2, Priest Testimony).

Professor Priest testified that in his opinion the limitation in Section 59 on the amount of noneconomic damages will reduce the total exposure of insurance companies, narrow their risk pools and thus make insurance more available. He testified that it will also promote settlements. (Tr. Vol. VII, p. 1152, Priest Testimony).

The record demonstrates that similar arguments support the elimination of joint and several liability. It too will serve to reduce uncertainty, narrow and variance in risk pools, make insurance more available and lower its cost. (Tr. Vol. VII, p. 1153-4, Priest Testimony) Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, FMA Exhibit A, at 63-66).

Professor Priest testified that in his opinion a major cause of the tort crisis is the judicial expansion of tort liability over the last 30 years and the prevalent belief that the fundamental purpose of tort law is to fully compensate victims. The philosophical justification for this belief, which has been referred to as "enterprise liability" is the idea that a defendant, through the insurance mechanism, can spread the plaintiff's loss efficiently. However, the result of applying this idea in the courts has been to destroy the

insurance mechanism by making it impossible for insurance companies to create workable risk pools. Professor Priest's testimony, which is contained in the Appendix, goes into this subject in depth. It also deals extensively with other aspects of the insurance/tort reform controversy.[2]

As the preamble to Chapter 86-160 makes clear, the Legislature accepted these arguments. Appellant Smith naturally disagrees with the Legislature's conclusion. The Smith brief treats this case as an appeal from the Legislature's findings of fact. However, as long as they

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2 The Smith brief ridicules testimony by Professor Priest that tort cases in Florida have been influenced by the "enterprise liability" concept. It argues that whatever influence enterprise liability may have had in other states, no such influence has infected Florida law. Such a contention is incredible.

The enterprise liability concept is the prevailing idea that if any doubt exists about who is at fault in causing an injury in a situation that involves an injured individual and an institutional defendant, it is good public policy to impose liability upon the institution because the injured person will be compensated and the defendant will be able to spread the loss in higher prices among all those who buy its products. This philosophy may not be articulated openly in appellate decisions, but it has certainly been accepted in the law schools and by most sophisticated and well-meaning lawyers. Who can doubt that it has been a strong motivating factor behind the development in the common law liability decisions rendered in this state over the past 35 years? See Sommer, Killing the Golden Goose, 1986 Fla. Bar. J. 9 (1986).

This is not to suggest that the idea of enterprise liability is evil or that it has not been held in good faith. Quite to the contrary. It is only that now we are beginning to see what its consequences have been and why. The issue is not simply a question of cost or of the majoritarian agenda as the

have some basis, findings of fact by the Legislature must be accepted by the courts. The evidence received in the trial court demonstrates that abundant evidence supports the Legislature's determination.

B. Legislative Findings - The Crisis And The Cure

There can be no serious question that Chapter 86-160 represents a reasonable legislative effort to ameliorate the insurance crisis. The dimensions of the crisis, as perceived by the Legislature, are clearly described in the Act's preamble:

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the liability insurance industry, causing a serious lack of availability of many lines of commercial liability insurance, and
>
> WHEREAS, the Legislature finds that professionals, businesses, and governmental entities are faced with dramatic increases in the cost of insurance coverage, and
>
> WHEREAS, the absence of insurance is seriously adverse to many sectors of Florida's economy, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses, and
>
> WHEREAS, the people of Florida are concerned with the increased cost of litigation and the need for a review of the tort and insurance laws, and

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2 cont'd - Smith Brief suggests. The expansion of liability has placed an impossible burden on the insurance system and a dramatic contraction in the availability of the insurance coverage that must exist for the tort system to function. In an effort to insure that helpless people are fully compensated for their losses, the theory of enterprise liability has greatly weakened the mechanism which for a time made compensation widely available.

WHEREAS, the Legislature finds that certain commercial liability insurers are threatening to make insurance coverage less available and less affordable, which will seriously effect many sectors of Florida's economy, and

WHEREAS, the Legislature believes it is necessary to avoid an insurance availability crisis, to maintain economic stability, and to protect the people's rights to affordable insurance coverage in the interim before comprehensive reform measures are fully effective, and

WHEREAS, the Legislature finds that, in general, the cost of liability insurance is excessive and injurious to the people of Florida and must be reduced, and

WHEREAS, The Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and

WHEREAS, the Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions, recognizing that such noneconomic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than by the tortfeasor alone, and

WHEREAS, the Legislature finds that the current tort system has significantly contributed to the insurance availability and affordability crisis, and

WHEREAS, the Legislature finds that tort law and the liability insurance system are interdependent and interrelated, and

WHEREAS, comprehensive insurance regulatory reform and tort reform is necessary to improve the availability and affordability of commercial liability insurance, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action, now, therefore, . . .

In determining how best to solve the crisis, the Legislature deliberated for more than six months. It received volumes of documents, statements and studies from interested parties which indicated that a crisis existed and that tort reforms such as those contained in the act could be expected to alleviate it. Some of the principal documents included: (1) "A Review of Historical Analysis -- Current perspectives of the Doctrine of Joint and Several Liability and A Review of Tort Reform: by the Staff of the Florida Senate Committee on Commerce, FMA Exhibit "E", (2) "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implication of the Current Crisis in Insurance Availability and Affordability: by The Tort Policy Working Group appointed by the Attorney General of the United States, Richard K. Willard, Chairman, FMA Exhibit "A"; (3) "Actuarial Analysis of American Medical Association Tort Reform Proposals" by Allan Kaufman, FMA Exhibit "G"; and (4) Florida Medical Association Medical Malpractice Guidebook edited by Dr. Henry G. Manne, Director of the Law and Economics Center, Emory University and contributed to by distinguished students of medical malpractice issues including Professor Frank A. Sloan of Vanderbilt University, Dr. Barry Anderson of Emory University, Dr. Patricia Danzon of the Duke Center for Health Policy, Dr. Charles Phelps of the University of Rochester and Professor Charles C. Havinghurst of Duke University Law School, FMA Exhibit "D". These materials

and many others, including materials submitted by opponents of tort reform such as the Trial Lawyers who participated vigorously in the process, fully explored the pros and cons of a wide range of possible tort reforms, including caps on noneconomic damages, elimination of joint and several liability and many others. The Legislature acted only after fully considering these materials and hearing testimony from interested persons on all sides of the issue.

In light of the obvious rational basis for the tort reforms in section 59 and 60, Appellant Smith cannot expect to prevail in any attack that would be tested under the rational basis test. Although he gives lip service to his claim that these sections are arbitrary, he does not seriously contend that they lack a rational basis. Instead he is asking the Court to reconsider the facts found by the Legislature and substitute the Court's factual conclusions for those of the Legislature.[3] He contends the Court can do this under its

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3 In an effort to establish that the insurance crisis was created by fictitious losses, the Smith brief focuses on the IBNR portion of the losses included in the annual statements of four of the insurance company plaintiffs. It implies that IBNR losses are somehow illegitimate and that the fact that a large part of the industry's losses were IBNR was concealed from the Legislature. These implications are both false. John Wilson, the witness who discussed IBNR losses, made no effort to say

decision in Kluger v. White, 281 So.2d 1 (1973), which construed Article I, Section 21, of the Florida Constitution. He also argue that Florida should use "strict" or "heightened" scrutiny in testing these sections even though the federal decisions on which he relies hold that such scrutiny is not appropriate in this kind of case. He says that heightened scrutiny is required in Florida because Sections 59 and 60 unfairly impact young persons and persons who are handicapped. We demonstrate below that no basis exists for using any kind of special scrutiny in testing the constitutionality of Sections 59 and 60.

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3 cont'd - that IBNR losses (which are recognized for tax purposes p. 819) were too high or otherwise inaccurate or that no insurance crisis existed, and there is no evidence in the record that they are in any way improper. Wilson's point was that under the regulatory provisions of Chapter 86-160, the Department will now have a tool to determine whether the losses any company reports are justified. (e.g. Tr. Vol. V, pp. 851, 853-4, 913, Vol. VI, p. 987-8, Wilson Testimony).

Mr. Wilson pointed out that the tort reform provisions will make an important contribution toward controlling the IBNR problem. (Tr. Vol. V, pp. 853-4, 859, 906, 911, Wilson Testimony). The record contains no evidence that the Legislature was unaware of the IBNR factor, which, as Wilson's testimony shows, is reported on a special schedule which each company includes in the annual report it files with the Department. In short, the implication in the Smith Brief that discovery of the IBNR factor eliminates the cause of the insurance crisis is a red herring.

C. Access to Courts

Appellant Smith contends that Sections 59 and 60 deny injured plaintiffs access to the courts in violation of Article I, Section 21 of the Florida Constitution.

Smith argues, in effect, that under Kluger, any legislative restriction or limitation on an injured person's remedy in tort pro tanto abolishes his cause of action and thus denies his right of access to the courts unless the restriction is dictated by "an overpowering public necessity" and "no alternative method" of meeting the necessity can be shown.

1. Abolition of Remedies -- The No-Fault Cases

Most of the cases involving Article I, Section 21, concern the Florida Automobile Reparations Reform Act, better known as the No-Fault law. The earliest is Kluger v. White, 281 So.2d 1 (Fla. 1973), in which this Court considered the validity of a provision of the No-Fault law that completely abolished an automobile owner's cause of action for property damages if the amount of his loss did not exceed $550. The Court held that the Legislature may not abolish a prior statutory or common law right of action without either (1) providing a reasonable alternative to protect the rights of the people to redress for injuries, or (2) showing that there is an overpowering public necessity for the abolishment of the right and that no alternative method for meeting the public necessity is

available. It observed that, if the Legislature had chosen to require that appellant (i.e., the plaintiff whose automobile had been damaged) be insured against property damage, the result might have been different. "A reasonable alternative to an action in tort would have been provided, and the issue would have been whether or not the requirement of insurance for all motorists was reasonable." Id. at 5.

In 1974, the year after Kluger, the Court decided Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974), in which it considered the validity of provisions of the No-Fault law that deprived an injured plaintiff of any right to recover damages for pain and suffering and other intangible items unless his medical expenses exceeded a $1,000 threshold or unless he suffered one of several specified types of injury. The Court held that this statutory exemption from liability for intangible damages did not violate Article I, Section 21. It pointed out that the statute created no immunity from tort liability for tangible damages, that the exemption from tort liability for intangible damages applied only to a limited class of cases, and, finally, that, by requiring automobile owners to obtain insurance against personal injuries, the Florida Legislature had given injured persons a right to speedy payment of medical bills and compensation for lost income from their own insurers. In other words, the requirement of a reasonable alternative to liability for noneconomic damages was

satisfied by simply requiring individuals to buy insurance protecting themselves against economic loss due to injury.

This Court discussed at some length the objectives it "presumed" the Legislature had sought to achieve in enacting the No-Fault law. It wrote:

> . . . [T]he legislative objectives involved here included a lessening of the congestion of the court system, a reduction in concomitant delays in court calendars, a reduction of automobile insurance premiums and an assurance that persons injured in vehicular accidents would receive some economic aid in meeting medical expenses and the like, in order not to drive them into dire financial circumstances with the possibility of swelling the public relief roles. Additionally, it is suggested that the Legislature considered recent contentions that the traditional tort system of reparations has led to inequalities of recovery, with minor claims being overpaid and major claims underpaid in terms of their true value, that the tort system of reparation was unduly slow and inefficient and that the preexisting automobile insurance system was unduly costly.

Id. at 16.

The Court held that the structure of the No-Fault law bore a reasonable relationship to achieving these objectives and that, therefore, it was valid. It noted that it had ascribed consequences to the No-Fault law that had yet to be demonstrated and that might turn out to be nonexistent. The court pointed out, however, that what it was actually doing was "presuming" the existence of circumstances supporting the validity of the Legislature's action, in the absence of any evidence to the contrary. "This is the course we must follow . . . Assuming the circumstances to be as described above, the

act before us is reasonably related to a permissible legislative objective, and comports with the requirements of due process of law." Id. at 17.

In Chapman v. Dillon, 415 So.2d 12 (Fla. 1982), the Court considered whether various amendments to the No-Fault law enacted by the Legislature in 1979 rendered the law invalid. The amendments had removed some of the provisions which the Lasky court had relied upon in concluding that the No-Fault law provided a reasonable alternative to tort liability. One change allowed an injured party to collect only part of his medical expenses and lost income. Under the previous version, the law had provided for recovery of all medical expenses and most of an individual's lost income. Another change which diminished the recovery provided under the original act increased the allowable deductibles. The Fifth District Court of Appeal had held the amended law unconstitutional. This Court reversed, holding that, since the changes complained of were reasonable attempts to correct some of the practical problems which the No-Fault law had posed, the principles and reasoning in Lasky still applied. It wrote:

> . . . [W]e do not find anything in Lasky to indicate that the decision was predicated upon a motorist's being insured for the full amount of his medical expenses and lost income. Instead the crux in Lasky was that all owners of motor vehicles were required to purchase insurance which would assure insured parties recovery of their major and salient economic losses.
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> * * *

> Hence, it was the fact that injured parties were assured prompt recovery of their major and salient economic losses, not all of their economic losses, which this court found dispositive in Lasky.
>
> Id. at 17.

Justice Sundberg dissented, contending that the No-Fault law was unconstitutional but only "insofar as it eliminates all causes of action for intangible damages for nonpermanent injuries." (emphasis added) Id. at 19. He contended that the complete elimination of any right of recovery for intangible damages was unconstitutional since that right had been withdrawn without supplying any viable alternative. Thus, even Justice Sundberg impliedly conceded that a mere change in the amount recoverable for noneconomic damages does not violate Article I, Section 21.

In summary, the No-Fault cases hold that if the Legislature reasonably determines that the tort system needs to be modified, it may completely abolish the right to collect intangible damages. While a complete abolition of intangible damages may require the Legislature to provide an alternative remedy, it is clear that very little is needed to satisfy that requirement. The remedy need not be a suit or other claim against the individual who caused the injury. It may be only a claim against an insurance policy that the injured person is compelled to purchase and the insurance provided by that policy may be subject to very substantial deductibles. The No-Fault cases make it clear that Article I, Section 21 is not

applicable to situations in which the Legislature has merely placed a ceiling on the damages a plaintiff may recover.

2. Abolition of Remedies -- Cases Approving Limitations on Total Recovery

Florida courts have consistently upheld caps on the total amount of damages, economic or noneconomic, that a plaintiff may recover even when no alternative remedy is provided.

In Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981), the First District Court of Appeal, in an opinion by Judge Robert P. Smith, Jr., held that limitations of $50,000 per individual and $100,000 per incident for tort claims against the State and its subdivisions were not constitutionally defective because they did not completely abolish an established cause of action. Discussing Kluger and later decisions, the court noted that:

> . . . [N]o substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action. . . . Any rule preventing the legislature from decreasing the remedies of some within the affected class, while increasing the remedies of others, would appear to commit Florida constitutionally to an ever expanding tort liability system. By no means is that a recognized constitutional principle.

Id. at 398-99.

The court noted with approval similar holdings by appellate courts of other states. See Estate of Cargill v. City of Rochester, 406 A.2d 704 (N.H. 1979) ($50,000 statutory limit on

municipal tort liability does not violate the state constitution's right to certain remedy clause); Stanhope v. Brown County, 280 N.W.2d 711 (Wisc. 1979) (similar $25,000 limit validated).

In White v. Hillsborough County Hospital Authority, 448 So.2d 2 (Fla. 2d DCA 1983), the Second District Court of Appeal, following Jetton, held that legislative immunity for state employees from personal tort liability coupled with dollar limitations on tort claims against the state were valid because they merely reduced, but did not destroy, a plaintiff's cause of action. The court held that in such cases it is not essential that the Legislature provide a substitute remedy.

In Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981), this Court considered the constitutionality of Section 768.28(5) which limited to $50,000 the total amount of money damages an injured person could recover against a municipality. The Court stated that the question was whether the cap imposed by that section was valid for proprietary functions for which no sovereign immunity previously existed. 403 So.2d at 384. It upheld the limitation after finding that on July 4, 1776, no common law right existed to recover damages against a municipality for negligence; thus under Kluger v.

White, Article 1, Section 21, was inapplicable.[4]

Despite the Smith Brief's assertion to the contrary, the Cauley court did not disapprove the First District's reasoning in Jetton. In footnote 12, it took note of the Jetton opinion:

> 12. We note that the First District Court of Appeal has recently upheld section 728.68 from constitutional attack in Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981). In addressing the asserted Kluger problem, the court said because section 768.28 merely narrowed the right to sue municipal government rather than abolished it, no constitutional infirmity presented itself. See Abdin v. Fischer, 374 So.2d 1379 (Fla. 1979); McMillan v. Nelson, 147 Fla. 334, 5 So.2d 867 (Fla. 1942).
>
> Our holding that Kluger does not apply because no right existed at common law makes it unnecessary for us to consider the First District's reasoning.

Under the Florida cases, it is clear that the Legislature could probably eliminate any right to recover noneconomic damages.[5] If it can cap total damages, it can certainly cap noneconomic damages. It follows that the $450,000 limitation on noneconomic damages contained in Chapter 86-160 does not violate Article 1, Section 21.

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4 Under this reasoning, the right to recover damages for pain and suffering may not be a common law right protected by Article I, Section 21. The first case to clearly establish a right to recover noneconomic damages was the 1822 English case of Pippin v. Sheppard, 25 Rev. Rep. 746 (Ex. 1822). See O'Connell and Carpenter, Payment For Pain and Suffering Throughout History, Insurance Counsel Journal, July 1983, at 411-12 FMA Exhibit LL.

5 The rationale and holdings of the Florida cases are further supported by an important recent case in California. In Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), appeal dismissed, ___ U.S. ___, 106 S.Ct. 214, 88 L.Ed. 215, (1985),

D. Modification of Joint and Several Liability

Section 60 enacts a comparative fault rule and alters the

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5 cont'd -the California Supreme Court upheld a provision of California's Medical Injury Compensation Reform Act that limited noneconomic damages in medical malpractice cases to $250,000. The court noted that a plaintiff has no vested property right in any particular measure of damages and that the California Legislature has broad authority to modify the scope and nature of recoverable damages. In determining whether the legislative cap was rationally related to legitimate state interests, the court wrote:

> . . . [In] enacting MICRA, the Legislature was acting in a situation in which it had found that the rising cost of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectable judgments.

Id. at 680.

The California Supreme Court pointed out that, in seeking a means of lowering malpractice costs, the California Legislature had placed no limits whatever on a plaintiff's right to recover for all of the economic damages resulting from the injury. Instead, the statutory limitation applied only to the recovery of noneconomic damages. Id. at 680.

With respect to intangible damages, the court wrote:

> 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 on 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.

Id. at 680-81.

common law doctrine of joint and several liability, replacing it with an apportionment of damages according to the percentage of each defendant's fault for (a) noneconomic damages in all cases where damages exceed $25,000 and (b) economic damages only in cases where the defendant's fault is less than that of the claimant. Joint and several liability continues in all cases where the defendant's fault equals or exceeds that of the claimant and where claimant's damages do not exceed $25,000.

To the extent it changes the common law rule, Section 60 apportions damages according to relative fault. This is exactly the same principle this Court followed in deciding Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), in which the Court

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5 cont'd - The court went on to discuss the unpredictability of awards for intangible damages. On this subject it said:

> One of the problems identified in the legislative hearings was the unpredictability of the size of large noneconomic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses. The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates. Furthermore, as one amicus suggests, the Legislature may have felt that the fixed $250,000 limit would promote settlements by eliminating "the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble." Finally, the Legislature simply may have felt that it was fairer to malpractice plaintiffs in general to reduce only the very large noneconomic damage awards, rather than to diminish the more modest recoveries for pain and suffering and the like in the great bulk of cases. Each of these grounds provides a sufficient rationale for the $250,000 limit.

Id. at 683.

replaced the common law absolute defense of contributory negligence with the doctrine of comparative negligence. The Court described its reasons for abandoning the contributory negligence defense as follows:

> The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.
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> . . . .
>
> Perhaps the best argument in favor of the movement from contributory to comparative negligence is that the latter is simply a more equitable system of determining liability and a more socially desirable method of loss distribution. The injustice which occurs when a plaintiff suffers severe injuries as a result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.
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> . . . .
>
> A primary function of a court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can ever be

> reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.

Id. at 436-38.

While Hoffman v. Jones involved a change in common law doctrine by this Court, the Court explicitly noted that such changes could also be made by the Legislature. Id. at 436. By enacting Section 60, the Legislature has adopted the principle of comparative negligence and provided that contributory fault does not bar recovery. Using the same principle, it modified the doctrine of joint and several liability.

Two years after Hoffman v. Jones, the Court decided Licenberg v. Issen, 318 So.2d 386 (Fla. 1975), holding "that when the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of total damages which he has caused the other party. The same rationale eliminates justification for the no contribution principle and dictates that this rule be abolished." Id. at 391. The Court noted that prior to the Legislature's enactment in June, 1975, of the Uniform Contribution Among Tortfeasors Act, it was confronted with "the problem of determining what procedure will most fully effectuate the principle that each party should pay the proportion of the total damages he has caused to the other party, and we considered several alternatives." Id. at 392. One of the alternatives the Court

considered was elimination of joint and several liability. Id. at 392 n.2. However, the Court did not deal with that issue because, by enacting the Uniform Contribution Among Tortfeasors Act, the Legislature had decided to retain joint and several liability.

The arguments in Hoffman v. Jones for eliminating the common law doctrine of contributory negligence apply equally to limiting the common law doctrine of joint and several liability. The horror story of a defendant who is 1% at fault being required to pay the entire verdict because of the insolvency or immunity of other defendants who are 99% at fault is almost as bad as the horror story of the plaintiff who was denied all recovery because he was 1% at fault. For a recent example of just such a case, see Walt Disney World Co. v. Wood, 489 So.2d 61 (Fla. 4th DCA 1986). Allocating damages according to the degree of fault eliminates these problems.

While the issue of access to courts was not raised in either Hoffman v. Jones or Licenberg v. Issen, the Court's decisions in those cases make it clear that alterations in the common law rule of joint and several liability are reasonable and that they do not violate any part of the Constitution.

E. Sections 59 and 60 Do Not Deprive Injured Persons of Rights in Violation of the Equal Protection Clause.

Appellant Smith argues that Sections 59 And 60 deprive young and handicapped people of equal protection of the laws.

He asserts, but does not seriously argue, that limiting noneconomic but not economic damages is arbitrary and therefore cannot survive the rational basis test. His real argument is that handicapped persons are a "suspect" class and that legislation adversely affecting them must be strictly scrutinized. He bases his argument on Article I, Section 2, which provides that "No person shall be deprived of any right because . . . of physical handicap."

The idea of a suspect class is an outgrowth of attempts by the federal courts to protect individuals who are members of classes that traditionally have been treated in a discriminatory way because of prejudice against them. In order to insure that individuals within these classes are not the subject of subtle discrimination, the federal courts developed a rule that classifications based on race, religion and sex are inherently suspect. Legislation adversely affecting individuals because of their race, religion or sex is strictly scrutinized and invalidated unless compelling reasons exist to sustain it. Strict scrutiny almost always results in a holding of invalidity.

The entire basis underlying this nondiscrimination principle and the strict scrutiny that has evolved to enforce it is that <u>because of long-standing prejudice</u> against individuals making up the class, they cannot protect themselves through the political process. Judicial protection is needed

to insure that they will not be the subject of invidious discrimination, open or covert.

Article I, Section 2, of the Florida Constitution, is designed to achieve this end. It puts in the Constitution the rule that the federal courts have developed by judicial decision. It is a recognition that people with physical handicaps are often subjected to discrimination, and it was adopted to prevent such discrimination. It provides that no person shall be deprived of any rights "because" he is handicapped. It thus prevents state and local governments from taking any action that takes from handicapped persons rights they would normally enjoy if it were not for their physical handicaps.

Sections 59 and 60 do not violate this section. They do not deprive anyone of any rights "because" of physical handicap. They are not directed at handicapped persons at all. They do not deprive handicapped persons or anyone else of any rights. They are entirely prospective. They define rights that persons who are injured after the effective date of the Act will have against tortfeasors to recover for their injuries.

These sections apply to <u>all</u> potential tort victims; that is, to everyone in society. When the Act became effective everyone was both a potential tort victim and a potential defendant. No one could or can know in advance which he or she will be. Since they are prospective only these sections affect

everyone equally and govern the rights of anyone who is injured after their enactment. They apply to every individual in society with equal force. They do not apply differentially to any disfavored group that cannot take care of itself in the political process. Since individuals making up the majority are certainly not prejudiced against themselves, there is no logical basis for strict scrutiny. No rights are taken from anyone "because" of a physical handicap. There is simply no violation of either the literal language or the spirit of the constitutional provision.

The trial court was abundantly correct in holding that strict scrutiny should not be used in testing the constitutionality of these sections.

III. SECTIONS 51, 52, 53, 54, 56, 57 AND 58 OF THE TORT REFORM ACT DO NOT ENCROACH UPON THE JUDICIAL POWER TO REGULATE PRACTICE AND PROCEDURE EXCLUSIVELY RESERVED TO THE JUDICIARY UNDER ARTICLE V OF THE FLORIDA CONSTITUTION

The Smith brief argues that the Legislature's enactment of Sections 51, 52, 53, 54, 56, 57 and 58 of the Act is an exercise of the judicial power exclusively reserved to the Supreme Court under Article V of the Florida Constitution.

This Court has recognized that, although courts create substantive rights through the process of common law adjudication, their right to do so is not exclusive and exists only until the Legislature acts. The Legislature has the superior right to make substantive policy decisions. Therefore, when the Legislature enacts a statute defining substantive rights, it prevails over conflicting court decisions. On the other hand, the Court has held that it has exclusive jurisdiction to establish court procedures. A history and critique of the Court's assumption of this exclusive power is contained in Means, The Power to Regulate Practice and Procedure in Florida Courts, 32 U. Fla. L. Rev. 442 (1980).

No hard and fast line distinguishes between substantive and procedural rules. Indeed, it is difficult to conceive of a substantive right that is not in some way affected or defined by the procedure used to enforce it. When, however, the principal effect of a legislative enactment is to create or define substantive rights, it is clear that, even though the

enactment may have procedural aspects, it is not invalid as encroaching on the Supreme Court's exclusive jurisdiction.

Several cases illustrate this principle. In Markert v. Johnson, 367 So.2d 1003 (Fla. 1978), the Court invalidated a former version of Section 627.7262 regulating the stage at which a plaintiff could join an automobile insurer as a co-defendant in a tort case. After the Court decided Markert, the Legislature re-enacted Section 627.7262 in a slightly different form, making it clear that its joinder policy was intended to create a substantive right and that recovering a judgment against the insured was a condition precedent to the injured plaintiffs' right of action against the insured's insurance company. Unlike the original section, which applied only in motor vehicle accident cases, the amended section applied to all policies of liability insurance. In VanBibber v. Hartford Accident & Insurance Co., 439 So.2d 880 (Fla. 1983) this Court construed the amended section as substantive and upheld its validity. The Court wrote:

> Finding that the statute is substantive and that it operates in an area of legitimate legislative concern precludes our finding it unconstitutional. If a statute can be construed as constitutional it should be.

Id. at 883.

A parallel situation can be found in a comparison of Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977) with Florida Wildlife Federation v. State

Department of Environmental Regulation, 390 So.2d 64 (Fla. 1980). In Avila, the Court invalidated a provision of the condominium law authorizing class actions on behalf of condominium unit owners. In Florida Wildlife Federation, the Court upheld a statute giving broad rights of standing to persons desiring to bring environmental actions. In the Florida Wildlife Federation case the Court distinguished Avila on the ground that the environmental statute created a new cause of action. Since it created a substantive right, it was not within the Court's exclusive jurisdiction.

The more recent decisions of this Court have thus recognized that statutory provisions creating limits or defining substantive rights are valid even through they contain procedural elements.

When the Legislature enacted Sections 51 - 60, it was not dealing principally with procedural issues. Its purpose was to restrict and define the substantive rights of tort claimants to recover damages. Although the sections challenged by Appellant Smith contain a few isolated provisions that have procedural aspects, these provisions are integrally related to the Act's substantive provisions and were designed to insure the effectiveness of the substantive changes.

A consideration of the individual sections challenged by Appellant Smith as invading the Court's jurisdiction demonstrates their substantive character.

Section 51 provides that a claim for punitive damages shall not be allowed "Unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." Section 51 thus defines the conditions a plaintiff must meet to recover punitive damages. Since the Legislature has power to determine whether any cause of action exists for punitive damages, it clearly has the power to set the standards by which a claim for punitive damages must be measured.

Section 52 limits the amount of punitive damages available in certain civil actions to three times the amount of compensatory damages awarded by that trier of fact, except when the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances. In addition, Section 52 specifies who shall receive any punitive damages so awarded. The section provides for proportional sharing of punitive damages if the total amount is not collected and for the payment of attorney's fees only from the amount payable to the claimant. Section 52 clearly defines a plaintiff's substantive right to punitive damages. Since the Legislature has the authority to eliminate all punitive damage awards, it has the right to limit an award to three times the amount of actual damages and to decide to whom punitive damages shall be paid. Any procedural provisions of this section are intimately related to the definition of substantive rights it creates.

Section 53 is not really new; it makes the provisions of Sections 768.043 (previously applicable to motor vehicles) and 768.49 (previously applicable to medical malpractice) applicable to all tort and tort-like contract actions. Section 53 prescribes the facts and circumstances which a court must consider in determining whether the amount of damages awarded is within a reasonable range. A court must consider (1) whether the amount awarded is indicative of prejudice, passion or corruption on the part of the trier of fact; (2) whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable; (3) whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture; (4) whether the amount awarded bears a reasonable relationship to the amount of damages proved and the injury suffered; and (5) whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons. By this section, the Legislature defined substantive rights to challenge an award of damages on grounds of inadequacy or excessiveness.

An almost identical statute relating to remittitur and additur in motor vehicle accident cases was upheld by the Court in Adams v. Wright, 403 So.2d 391 (Fla. 1981). The Court held that "Section 768.043, Florida Statutes (1977), is a remedial

statute designed to protect the substantive rights of litigants in motor vehicle related suits." Id. at 394. By enacting Section 53, the Legislature merely codified substantive common law principles governing remittitur and additur. It did not regulate practice and procedure. See id. at 393-94.

Section 54 does deal with practices and procedure. It provides that "the court may require a settlement conference to be held at least 3 weeks before the date set for trial" and "attorneys who will conduct the trial, parties, and persons with authority to settle shall attend the conference held before the court unless excused by the court for a good cause." While this section deals with practice and procedure, the Legislature made it entirely optional with the courts. A court need not hold a settlement conference, unless it chooses to do so. The Legislature did not encroach upon the exclusive authority of this Court by enacting this section.

Section 56 requires itemization of verdicts involving claims of economic, noneconomic and punitive damages. It grants tortfeasors an absolute right to a jury verdict which specifies the amount of each category of damages. By requiring that the trier of fact breakdown the award of damages, the Legislature has imposed a substantive condition precedent to the right of an injured plaintiff to obtain a judgment awarding damages. Since the Legislature has authority to completely eliminate certain types of damages without infringing upon the

practice and procedure of the courts, it has the authority to prescribe conditions precedent to an award of damages.

Section 57 involves alternative methods of paying damage awards. It lists detailed criteria for the payment of damages for future economic losses exceeding $250,000. It provides that the court "shall, at the request of either party, unless the court determines that manifest injustice would result to any party, enter a judgment ordering future economic damages . . . in excess of $250,000 to be paid in whole or in part by periodic payments rather than lump sum payment." As a condition to authorizing periodic payments of future damages, a court must order the defendant to post a bond or security or otherwise to assure payment of damages awarded. In addition, a court must retain jurisdiction so that its processes will be available if the judgment debtor does not timely make the required periodic payments. Finally, the section provides that it does not preclude any other method of payment of awards agreed to by the parties. Section 57, in essence, gives defendants a conditional substantive right to pay judgments exceeding $250,000 in installments as the injured person's loss accrues. Periodic payments have long been a feature of Florida common law, especially in family law. The Florida Legislature has the authority to determine how damage awards should be paid. In Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985), the Court upheld an almost

identical periodic payout mechanism for medical malpractice awards. This section clearly creates a substantive right and does not impermissibly regulate procedure or practice in Florida courts.

Section 58 provides that, if a defendant makes an offer of judgment which is not accepted by a plaintiff and thereafter the plaintiff recovers a judgment in an amount that is at least 25% less than the amount of the offer, the defendant is entitled to reasonable attorney's fees from the date of the offer. This section clearly creates substantive rights. A similar attorney's fee provision relating to medical malpractice cases was upheld by the Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1146-49 (Fla. 1985). In that case, the Court specifically found "that an award of attorney fees to the prevailing party is 'a matter of substantive law properly under the aegis of the legislature,' in accordance with the long-standing American Rule adopted by this Court." Id. at 1149.

It is clear from the foregoing analysis that the sections challenged by Appellant Smith create and define substantive rights and that, by enacting them, the Legislature did not invade this Court's exclusive jurisdiction.

CONCLUSION

The Final Judgment of the trial court should be affirmed.

Respectfully submitted,

MAHONEY ADAMS MILAM SURFACE & GRIMSLEY

By _____
William H. Adams, III
Robert J. Winicki
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

Attorneys for Appellee, Florida Medical Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief and the Appendix have been furnished to the following by U.S. Mail this 10th day of January, 1987.

THOMAS M. ERVIN, JR., ESQUIRE
ROBERT K. HIGH, JR., ESQUIRE
Post Office Drawer 1170
Tallahassee, FL 32302

DAVID A. YON, ESQUIRE
DANIEL Y. SUMNER, ESQUIRE
Office of Legal Services
Florida Department of Insurance
413-B Larson Building
Tallahassee, FL 32301

D. STEPHEN KAHN, ESQUIRE
227 E. Virginia Street
Tallahassee, FL 32301

DONALD WEIDNER, ESQUIRE
Post Office Box 2411
Jacksonville, FL 32203

ALAN C. SUNDBERG, ESQUIRE
Post Office Drawer 190
Tallahassee, FL 32302

DUBOSE AUSLEY, ESQUIRE
Post Office Box 391
Tallahassee, FL 32302

FREDERICK B. KARL, ESQUIRE
Post Office Drawer 229
Tallahassee, FL 32302

VINCENT J. RIO, ESQUIRE
121 W. Forsyth Street
10th Floor
Jacksonville, FL 32202

ARTHUR J. ENGLAND, JR., ESQ.
2401 Douglas Road
Miami, FL 33134

W. DONALD COX, ESQUIRE
Post Office Box 1438
Tampa, FL 33601

JAMES A. DIXON, JR., ESQUIRE
Post Office Box 13767
Tallahassee, FL 32317-3767

HONORABLE JAMES W. SLOAN
Assistant Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, FL 32301-8048

BRUCE CULPEPPER, ESQUIRE
Post Office Box 11300
Tallahassee, FL 32302-3300

A. BROADDUS LIVINGSTON, ESQUIRE
Post Office Box 3239
Tampa, FL 3360

G.W. JACOBS, ESQUIRE
219 South Orange Avenue
Sarasota, FL 33579

FRANCIS X. SEXTON, JR., ESQ.
801 Brickell Ave., Ste. 1100
Miami, FL 33131

DOUGLAS A. MANG, ESQUIRE
Post Office Box 1019
Tallahassee, FL 32302

ROBERT P. SMITH, JR., ESQ.
and THE ACADEMY OF FLORIDA
TRIAL LAWYERS
Post Office Box 6526
Tallahassee, FL 32314

DOMINIC M. CAPARELLO, ESQ.
Post Office Box 1876
Tallahassee, FL 32301

Attorney

2331A