OA 1-3087

IN THE SUPREME COURT OF FLORIDA

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

Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF INSURANCE, et al.,

Appellees.

CASE NO. 69,551

ANSWER BRIEF OF APPELLEES, THE FLORIDA RAILROAD ASSOCIATION AND FLORIDA POWER AND LIGHT COMPANY

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

This Brief addresses the compliance of the Insurance and Tort Reform Act of 1986, Chapter 86-160, Laws of Florida, with the single subject requirement of the Florida Constitution, which all Appellants have challenged, and the constitutionality of the tort reform provisions challenged by Appellants, Robert P. Smith, Jr., and the Academy of Florida Trial Lawyers ("AFTL"). This Brief does not discuss the validity of the insurance regulatory sections.[1]

These Appellees adopt the Statement of the Case in the Initial Brief of Appellants, American Insurance Association, et al. Our Statement of the Facts follows.

The 1986 Legislature enacted Chapter 86-160, Laws of Florida, in response to the insurance availability and affordability crisis (Ch. 86-160, "whereas" clause nos. 2, 3, 7). The crisis was highly publicized in the print and broadcast media (Exhibits 21 and 22 of these Appellees).

The Legislature found that current tort law significantly contributed to the insurance crisis (Ch. 86-160, "whereas" clause no. 11). The Legislature specifically recognized the need to provide a rational basis for awarding noneconomic damages in civil actions, the need to ensure that injured persons recover reasonable damages, and the need to encourage the settlement of

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[1]The following references are used in this Brief:

TR	Transcript of the trial proceedings
R	Record on Appeal

civil actions before trial (Ch. 86-160 §2; "whereas" clause no. 10).

The trial court heard five days of testimony, received thousands of pages of documentary evidence and, in a logical and well-reasoned order, found ample support in the evidence for the Legislature's findings and its policy decision to address these problems by enacting Chapter 86-160.

With respect to the tort reform provisions of the Act, one of the principal expert witnesses was Professor George L. Priest. Professor Priest holds the John M. Olin Chair of Law and Economics at Yale University and is the director of the Program in Civil Liability, a research unit of the Yale Law School faculty which conducts studies of the effects of tort law and of the reform of tort law (TR 1091-92). Professor Priest testified the liability insurance crisis is a very serious social problem and the Legislature had a reasonable basis for determining there was an overwhelming public necessity for enacting tort reforms (TR 1148, 1161). He testified the cause of this crisis is the expansion of modern tort law (TR. 1135). The short-term solution to this crisis is to change the law in ways which will impact on the insurance market (TR. 1149).

Professor Priest testified the enactment of the reforms in Sections 50 through 60 of Chapter 86-160 was not only a rational response to the insurance crisis but was the only practical alternative available to the Legislature (TR 1159-61). These reforms will help solve the crisis by creating a more coherent

insurance system, reducing the uncertainty in predicting damages, promoting settlement, and increasing the availability and affordability of insurance (TR 1150-57, 1162). These reforms will benefit society in general and the class of potential plaintiffs in particular by making it more likely that defendants against whom judgments are entered will have insurance (TR 1157, 1162).[2] Professor Priest testified the most vital reforms are Section 59 limiting noneconomic damages, Section 60 modifying joint and several liability, Section 52 limiting punitive damages, and Section 55 concerning the collateral source rule (TR. 1156).

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[2]Professor Priest has been engaged for many years in empirical studies on the effects of tort law on questions of litigation, settlement, and the insurance market (TR 1093, 1158). He can "predict quite confidently" that capping noneconomic damages will contribute to reducing the rate of litigation and increasing the rate of settlement (TR 1158).

SUMMARY OF ARGUMENT

The Legislature enacted Chapter 86-160 in response to far-reaching problems in the insurance and civil law areas. The Act contains a variety of topics dealing with insurance, insurance rate regulation, tort reform, and substantive changes in the handling of civil actions. The trial court correctly ruled these areas are logically connected and any meaningful solution requires treatment of both civil law and insurance regulation. Chapter 86-160 deals with a "single subject" as required by the Florida Constitution.

The tort reform sections are likewise constitutional, as the trial court held. Section 59 allows an injured party to recover all economic damages and up to $450,000 for noneconomic damages. The evidence established a reasonable basis for the Legislature's decision to cap noneconomic damages.

Section 60 modifies joint and several liability by providing where damages exceed $25,000, judgment shall be entered on the basis of the defendant's percentage of fault and not on the basis of joint and several liability. However, if a defendant is more at fault than plaintiff, then judgment with respect to economic damages will be entered against that defendant on the basis of joint and several liability. Thus the plaintiff who is not at fault will still be able to recover economic damages from defendants who are at fault. There is a rational basis for the Legislature's policy decision to more equitably determine liability by allocating damages according to fault.

Neither Section 59 nor Section 60 abolishes any cause of

action. Both sections are reasonably related to tort reform, apply evenly to all persons similarly situated, and comply with constitutional requirements concerning access to courts and equal protection.

The remaining tort reform provisions, Sections 51, 52, 53, 54, 56, 57, and 58, deal with the substantive rights of tort claimants to recover damages. The Legislature acted within its domain by enacting these Sections.

These Appellees take no position on the validity of the insurance regulatory sections. However, should this Court invalidate any insurance provision, such invalidity does not affect the tort reform sections which are severable and valid.

This Court should uphold the constitutionality of Chapter 86-160 and affirm the Final Judgment.

ARGUMENT

I. CHAPTER 86-160 DEALS WITH A "SINGLE SUBJECT."

Chapter 86-160, Laws of Florida, deals with insurance and civil actions. Its provisions are logically connected and deal with a "single subject" as required by the Florida Constitution.

A. The "Single Subject" Requirement.

Article III, Section 6 of the Florida Constitution requires that "Every Law shall embrace but one subject and matter properly connected therewith. . . ."

In applying this constitutional mandate, the Supreme Court of Florida has long given wide latitude to the Legislature. Laws are presumed constitutional and are invalidated only in "clear cases free from every reasonable doubt." State v. Reedy Creek Improvement District, 216 So.2d 202, 206 (Fla. 1968). To overcome the presumption in favor of constitutionality, the challenger bears the heavy burden of proving the invalidity beyond a reasonable doubt. Dept. of Business Regulation v. Smith, 471 So.2d 138, 142 (Fla. 1st DCA 1985). If fairly possible, a statute should be construed to avoid not only an unconstitutional interpretation but also one which casts grave doubts upon the statute's validity. State v. Canova, 94 So.2d 181, 184-85 (Fla. 1957).

This Court has defined "subject" as follows:

> The term "subject of an act" within this provision means the matter which forms the groundwork of the act and it may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection.

Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla. 1969). The test for determining whether an act deals with a "single subject" is:

> In determining if matters are properly connected with the subject, the test is whether such provisions are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subject.

Canova, supra at 184.[3]

Applying this test, this Court has twice ruled that insurance and tort reform have a natural and logical connection. In the analagous case of State v. Lee, 356 So.2d 276 (Fla. 1978), the issue was the constitutionality of the Insurance and Tort Reform Act of 1977, Chapter 77-468, Laws of Florida. This Act dealt comprehensively with tort claims and particularly with the problem of the substantial increase in automobile insurance rates and related insurance problems. It was contended the Act contained at least two separate subjects, insurance and tort reform, in addition to other matters which were not properly connected to either subject.

Chapter 77-468 contained 45 sections. The wide variety of tort reform measures included provisions eliminating pain and suffering damages unless the no-fault threshold was met; changing

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[3]The cases cited at pages 19-23 in the Brief of American Insurance Asociation, et al., construe Article XI, Section 3 of the Florida Constitution regarding constitutional change by initiative. Those cases are not applicable because this Court has ruled the "single-subject" restriction for statutory changes by the Legislature (Article III, Section 6) is broader than the "single-subject" limitation for constitutional change by initiative. Fine v. Firestone, 448 So.2d 984, 988-89 (Fla. 1984).

the "collateral source" rule in motor vehicle accident suits; limiting an automobile insurer's liability for punitive damages; requiring the joinder of derivative claims in certain actions; and requiring remittitur and additur in motor vehicle or wrongful death actions. The extensive insurance reforms included provisions changing several aspects of insurance certification, reporting, regulation, and rate-making; freezing certain rates for seven months; revising uninsured motorist's coverage and personal injury protection coverage; providing for examinations by the Department of Insurance; and imposing penalties and creating a civil cause of action for fraudulent claims. Other types of reform measures included sections amending the Administrative Procedure Act, Wrongful Death Act, and the Financial Responsibility Law; changing the responsibilities of various state agencies; and revising the civil and criminal law concerning fraudulent insurance claims.

This Court characterized Chapter 77-468 as a "broad and comprehensive legislative enactment" and stated that widely divergent rights and requirements could properly be included in statutes covering a single subject. Id. at 282-83. With Justices Sundberg and England dissenting, this Court ruled Chapter 77-468 covered a single subject because tort law and automobile insurance are logically connected:

> ...Chapter 77-468 is an attempt by the legislature to deal comprehensively with tort claims and particularly with the problem of a substantial increase in automobile insurance rates and related insurance problems. Sections 38-41 of Chapter 77-468 concern certain aspects of tort litigation, but these sections relate primarily to tort litigation arising from automobile negligence. Given the profound effect of tort litiga-

> tion on all phases of the automobile insurance industry, we cannot say that tort law and automobile insurance have no logical connection.

Id. at 282 (emphasis added).

Three years after Lee, this Court again upheld the constitutionality of legislation containing extensive tort and insurance reform measures. Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) At issue was Chapter 76-260 which the Legislature enacted in an attempt to resolve the crisis in Florida's tort law and liability insurance system relating to medical malpractice. The tort reform measures included provisions on expert medical testimony; establishing risk management procedures and medical incident committees to evaluate claims; certain tort restrictions if a patient accepted compensation proposed by the medical incident committee; alternative methods for payment of damage awards; and for collateral sources of indemnity, attorneys' fees, itemized verdicts, and additurs and remittiturs. The insurance regulatory measures included provisions prohibiting express or reduced premium charges or increases in the premium during the policy term; prohibiting interlocking ownership and management of insurance companies; establishing a policyholder's "bill of rights"; prohibiting unfair trade practices, unfair discrimination in the classification of life insurance rates, false advertisements, and unfair claim settlement practices; and prohibiting insurance transactions through credit card facilities and certain arrangements with funeral directors.

This Court, with Justices Sundberg and England again

dissenting, ruled this broad legislation dealt with "one subject." The Court held:

> ...While Chapter 76-260 covers a broad range of statutory provisions dealing with medical malpractice and insurance, these provisions do relate to tort litigation and insurance reform, which have a natural or logical connection.

Id. at 1124 (emphasis added). This Court reiterated its previous holding that the subject of an act may be as broad as the Legislature chooses if the matters included therein have a natural or logical connection. Id.[4]

B. Chapter 86-160 Deals with a "Single Subject."

Like the legislation upheld in Lee and Chenoweth, Chapter 86-160 complies with the "single subject" requirement of the Florida Constitution. Its provisions are logically connected, germane to the subject of insurance and civil actions, and necessary to promote the purpose of the legislation.

The Legislature made specific findings on the need to deal comprehensively with insurance and civil litigation reform:

> 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...

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[4]This Court also upheld comprehensive insurance legislation in United States Fidelity and Guaranty Co. v. Department of Insurance, 453 So.2d 1355 (Fla. 1984). At issue was Chapter 80-236 which contained provisions relating to Workers' Compensation, insurance exchanges, and excessive profits realized by motor vehicle insurers. (See title to Ch. 80-236.) The Court ruled this legislation dealt with "the general subject of insurance. Thus the law does not embrace more than one subject." Id. at 1362-63.

> 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...
>
> 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 the current tort system has significantly contributed to the insurance availability and affordability crisis, and...
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> WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action,...

These legislative findings and declarations are presumed correct and are to be honored by the courts unless they are clearly erroneous, arbitrary or wholly unwarranted. Moore v. Thompson, 126 So.2d 543, 549 (Fla. 1960). Plaintiffs introduced no such evidence in this case.

Chapter 86-160 contains five major areas which deal comprehensively with the subject of insurance and civil actions. The five categories are: (1) insurance reforms; (2) tort reforms; (3) roll-backs of commercial liability insurance premiums and freezes in liability insurance rates; (4) creation of a task force to study tort and insurance law; and (5) modifications of the financial responsibility requirements applicable to physicians. (R 1391-93).

The trial court correctly found each of the sections of Chapter 86-160 has a natural and logical relationship to "insurance and civil actions" (R 1396-97). Because of the profound effect of tort litigation on the insurance industry

and the need to achieve a meaningful solution to the insurance crisis, the Legislature properly dealt with insurance and civil actions as a single subject.

The reference in Section 50 to contract actions does not violate the "single subject" requirement. As Professor George Priest testified, tort actions frequently grow out of contractual relationships (TR 1149). Insurance covers products liability, breach of warranty, professional malpractice, contractual indemnity and similar contractual claims (Id.). By stating that Chapter 86-160 applies whether suit is in tort or contract, the Legislature made sure that the limitations in the Act will apply regardless of whether the plaintiff brings suit in tort or contract.

Appellants have not met their burden of proving that Chapter 86-160 is invalid beyond a reasonable doubt and have failed to overcome the presumption of constitutionality. Chapter 86-160 complies with the "single subject" requirement of Article III, Section 6 of the Florida Constitution.

II. SECTIONS 59 AND 60 COMPLY WITH THE CONSTITUTIONAL REQUIREMENTS CONCERNING ACCESS TO COURTS AND EQUAL PROTECTION.

Section 59 permits recovery for noneconomic losses up to $450,000. It allows recovery for all economic damages.

Section 60 modifies the common law doctrine of joint and several liability in cases[5] where damages equal or exceed $25,000. Any contributory fault chargeable to the claimant

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[5]Section 60 does not apply to pollution cases or cases based on intentional torts.

diminishes proportionately the amount awarded for an injury attributable to the claimant's contributory fault, but does not bar recovery. Judgment is entered on the basis of each party's percentage of fault and not on the basis of joint and several liability; provided however, judgment is entered with respect to economic damages on the basis of joint and several liability against any party who is more at fault than the claimant.

The trial court correctly ruled that both Section 59 and Section 60 comply with the constitutional requirements concerning access to courts and equal protection.[6]

A. Compliance with the Constitutional Requirement Concerning Access to Courts.

Article I, Section 21 of the Florida Constitution provides for access to courts. The Florida courts have recognized this provision applies only to statutes which completely abolish causes of action. Sasso v. Ram Property Management, 431 So.2d 204, 209 (Fla. 1st DCA 1983), aff'd., 452 So.2d 932 (Fla. 1984), appeal dismissed, 469 U.S. 1030 (1984). This Court has upheld statutes which limit a right of action to some extent. Id.[7]

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[6]Other states have enacted statutes limiting noneconomic damages, punitive damages, and joint and several liability. See Appendix A.

[7]See e.g., Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981) (upholding collateral source rule in medical malpractice cases); Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981) (statute requiring reimbursement of insurer for PIP benefits where insured recovers from a negligent third party does not deny access to courts); Chapman v. Dillon, 415 So.2d 12 (Fla. 1982) (threshold limits of no-fault statute do not deny access to courts).

Appellants, Robert P. Smith, Jr., and the Academy of Florida Trial Lawyers[8] argue in their Brief (pages 37-41) about the lack of an "overpowering public necessity"[9] and lack of an "alternative remedy." However, these factors are relevant only when reviewing a statute which completely abolishes a right of action, in which case the statute is constitutional if the Legislature provides a reasonable alternative remedy or demonstrates an overpowering public necessity for abolishing such right. Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). There is no requirement that either of these elements be met when the Legislature has limited, but not completely abolished, a cause of action. Jetton v. Jacksonville Electric Authority, 399 So.2d 396, 398 (Fla. 1st DCA 1981) (opinion by J. Robert P. Smith, Jr.), review denied, 411 So.2d 383 (Fla. 1981).[10]

Neither Section 59 nor Section 60 abolishes any cause of action. Section 59 permits tort victims to recover all economic

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[8] The Florida Railroad Association, Florida Power & Light Company, and the American Insurance Association questioned the standing of Robert P. Smith, Jr. and the AFTL (R 752-55; 784-85). Neither Smith nor the AFTL have alleged, nor can they allege, any facts showing that they have been injured.

[9] Professor Priest testified there was an overwhelming public necessity for enacting tort reform (R 1148, 1161).

[10] The cases relied upon by Appellants Smith and AFTL are not applicable. Both Chapman v. Dillon, supra note 7, and Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), involved statutes which completely abolished a tort victim's recovery of intangible damages unless certain thresholds were met. Those cases did not involve a cap or limitation on the amount of damages. Also cited is Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 873 (Fla. 1985), in which this Court upheld a statute limiting a health care provider's liability to $100,000. This case did not involve the issue of right of access to courts.

damages and all intangible noneconomic damages up to $450,000. Section 60, when applicable, only affects those from whom the plaintiff may ultimately recover in certain cases. Society always faces the risk of being injured by an insolvent defendant.

The Florida courts have ruled statutes imposing a dollar cap on damages do not deny access to courts. In Jetton, supra, the First District Court of Appeal upheld a statute limiting governmental tort liability to $50,000 per individual and $100,000 per incident. In a 3-0 decision authored by Judge Robert P. Smith, Jr., the court ruled:

> ...[W]e narrowly construe the instances in which constitutional violations will arise. The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action.

Id. at 398. Because the victim's "cause of action has only been limited by the imposition of a dollar cap on the available recovery", the court held the statute did not infringe on plaintiff's access to the courts. Id.[11] To rule otherwise would "commit Florida constitutionally to an ever-expanding tort

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[11]See also White v. Hillsborough County Hospital Authority, 448 So.2d 2, 3 (Fla. 2d DCA 1983), cause dismissed, 443 So.2d 981 (1983), upholding a statute which, in effect, capped the total amount of economic and noneconomic damages recoverable by tort victims injured by the negligence of state employees. The court ruled that the statute did not abolish the right of an injured party to seek redress.

liability system." Id. at 399.[12]

With respect to Section 60, the pitfalls of joint and several liability have been recognized in Florida and other states. A Florida court has held these problems must be answered by the Legislature or the Supreme Court of Florida. Walt Disney World Co. v. Wood, 489 So.2d 61 (Fla. 4th DCA 1986), appeal docketed, No. 68647 (Fla. _____). Twenty-six other states have modified or abolished joint and several liability.[13]

Section 60, dealing with joint and several liability, does not abolish any cause of action that a plaintiff may have had. Section 60, when applicable, only affects those from whom the plaintiff may ultimately recover.

Sections 59 and 60 comply with the constitutional requirement regarding access to courts and should be upheld.

B. Compliance with Equal Protection.[14]

Both the Florida and federal courts have applied a two-level

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[12]Appellants Smith and the AFTL suggest that the authority of Jetton has been undermined by the Supreme Court's decision in Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981). That contention is baseless. The Supreme Court upheld the cap in Cauley. It did not disapprove the District Court of Appeal's decision in Jetton. In footnote 12 of Cauley, the Supreme Court merely found it unnecessary to consider the reasoning of Jetton because an alternative ground for decision was available.

[13]These states are: Alaska, Arizona, California, Colorado, Connecticut, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming. See Appendix "A."

[14]In the Final Judgment on the issue of equal protection, the trial court incorporated verbatim portions of the Trial Brief filed by these Appellees, which is set forth in this Brief.

analysis in determining whether a statute violates the equal protection clauses of both the United States and Florida Constitutions. U.S. Const. Amend. XIV; Fla. Const. Art. I, §2. The "strict scrutiny" test is employed when a fundamental right or a suspect classification is involved. Suspect classes include race, alienage, and national origin. Fundamental rights include privacy, voting, travel, and association.[15]

The "rational basis" test is applied in all other cases. This test requires that the statute bear a reasonable relationship to a legitimate state interest. Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365, 367 (Fla. 1981). This test is highly deferential to the Legislature because it places the burden on the challenger to show there is no rational basis for the statute. Sasso, supra at 217. Thus, as long as some potential objective for the statute is rationally related to a legitimate state interest, the statute will be upheld even if the primary reason for the statute fails the test. Id.[16]

The Florida courts have consistently applied the "rational basis" test in analyzing tort reform statutes. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985)

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[15]McLaughlin v. Florida, 379 U.S. 184 (1964); Graham v. Richardson, 403 U.S. 365 (1971); Oyama v. California, 332 U.S. 633 (1948).

[16]Whether the statute will in fact promote its goal is irrelevant. Sasso, supra at 220. The equal protection clause is satisfied if the Legislature "could rationally have decided that [the statute] might assist in fostering [the objective]." Id. (emphasis in original). The court must not sit as "a superlegislature" and must not substitute its judgment with respect to the need for, or wisdom of, a legislative enactment. Florida Patient's Compensation Fund v. Von Stetina, supra at 789.

(a statute limiting a health care provider's liability to $100,000 does not involve a fundamental right or suspect class); Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981) (collateral source rule in automobile cases). In Pinillos, supra, this Court upheld a statute requiring a judgment in a medical malpractice case be reduced by amounts which plaintiff received from collateral sources. The Court relied on the preamble to the act wherein the Legislature found the malpractice insurance crisis threatened both the public health in Florida and the tort liability insurance system for medical malpractice. This Court ruled that the legislation had a reasonable relationship to these legitimate state interests. Id. at 367-68.[17]

In Jetton, supra, the First District Court of Appeal (Judge Robert Smith) upheld the $50,000 recovery limit for those injured by governmental negligence. The court found the Legislature had a rational basis for imposing such limit.

Courts in other states have upheld statutes which are more restrictive than Chapter 86-160. In 1975, the California legislature passed a major medical malpractice reform package which, among other things, limited noneconomic damages in medical malpractice cases to $250,000. Fein v. Permanente Medical Group,

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[17]This Court has also held that restrictions in the "no-fault" automobile statute on the recovery of intangible damages were substantially related to the legislative purposes of lowering jury verdicts and auto insurance premiums, and had the potential of reducing the inequalities in the recovery of intangible damages and eliminating at least some of the inefficiency in the tort system of reparations. Lasky, supra note 10 at 20.

38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), appeal dismissed, _____ U.S. _____, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985). The Supreme Court of California ruled the limitation complied with the equal protection clause. Although the cap would result in lower judgments in some cases, the court emphasized that:

> ...the Legislature placed no limits whatsoever on a plaintiff's right to recover for all of the economic, pecuniary damages - such as medical expenses or lost earnings - resulting from the injury, but instead confined the statutory limitations to the recovery of noneconomic damages, and -even then- permitted up to a $250,000 award for such damages.

Id. at 680 (emphasis in original).

The court also recognized the $250,000 limit falls more heavily on those with the most serious injuries. However, there was a rational basis for this cap:

> Faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for any of their damages - pecuniary as well as nonpecuniary - the Legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages. Although reasonable persons can certainly disagree as to the wisdom of this provision, we cannot say that it is not rationally related to a legitimate state interest.

Id. at 681. (emphasis in original)[18]

The Supreme Court of Indiana has upheld a statute limiting

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[18]The Ninth Circuit Court of Appeals also ruled the California statute was supported by a rational basis. Hoffman v. United States, 767 F.2d 1431 (9th Cir.1985). The Fourth, Fifth, and Eighth Circuits have applied the rational basis test to statutes limiting the recovery of medical malpractice victims because there is no fundamental right of recovery to tort damages. Id. at 1436 (see cases cited therein).

the total recovery for economic and noneconomic damages in medical malpractice cases to $500,000. Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d. 585 (1980). The court recognized the statutory cap imposed a special burden on the badly injured plaintiff but found a rational justification.[19]

As expressed in the "Whereas" clauses of Chapter 86-160, the Legislature found the current tort system has significantly contributed to the insurance availability and affordability crisis which threatens the public in general and tort victims in particular. The Legislature further found noneconomic damages have no monetary value except on a purely arbitrary basis.[20] It also concluded the interests of the injured party in recovering for noneconomic losses "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," (Ch. 86-160, "Whereas" clause 10).

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[19]As noted by the Johnson court, the United States Supreme Court has ruled a dollar limit upon the aggregate liability of licensed private companies and the government due to a single nuclear incident complies with the equal protection clause. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978).

[20]For some time jurists and legal scholars have raised serious questions as to the propriety of awarding damages for pain and suffering in negligence cases. Fein, supra, 695 P.2d at 680-81. The problems cited include the inherent difficulties in placing a monetary value on such losses and the fact that money damages are at best only imperfect compensation for such intangible injuries. Id. at 681. Another problem is the unpredictability of the size of noneconomic damage awards because of the great disparity in the price tag which different juries place on such losses. Id. at 683.

Based on these findings, the Legislature enacted Section 59 which allows an injured party to recover all economic damages and up to $450,000 for noneconomic damages. There is a reasonable basis for the Legislature's conclusion that the cap on noneconomic damages is necessary to ensure that sufficient funds exist to pay substantial judgments to tort victims. Even if this Court questions the wisdom of this policy, it cannot say it is not rationally related to a legitimate state interest.

There is likewise a rational basis for Section 60 modifying joint and several liability. Under the doctrine of joint and several liability, a defendant can be held liable for all of the damages although he is only negligent to a small degree and a joint tortfeasor is negligent to a large degree. This result becomes even more inequitable when the claimant is more negligent than the solvent defendant.[21]

The Legislature's rationale to allocate liability for damages according to fault is the same as this Court's rationale for eliminating contributory negligence as a complete defense and adopting comparative negligence. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). This Court held that: "In the field of tort law, the most equitable result that can ever be reached by the court is the equation of liability with fault." Id. at 438.

The doctrine of joint and several liability is contrary to

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[21]For example, see Walt Disney World Co. v. Wood, 489 So.2d 61 (Fla. 4th DCA 1986), appeal docketed, No. 68647 (Fla.). The doctrine of joint and several liability would require that Walt Disney World, which was 1% negligent, pay 86% of plaintiff's damages even though plaintiff was 14% at fault.

this principle of fairness and contrary to comparative negligence, since it assesses full liability regardless of the degree of fault. This Court began a revision of negligence law in Hoffman - a revision which the Legislature took a step towards completing by enacting Section 60.

Appellants Smith and the AFTL ignore these principles of fairness and claim Sections 59 and 60 discriminate against the handicapped. Sections 59 and 60 apply to all claimants in negligence cases. They do not discriminate against anyone because of physical handicap. A statute which limits or establishes the rights of all persons (whether or not they are physically handicapped) to recover for injuries they may sustain in the future does not deprive persons of any right because they are physically handicapped.

Sections 59 and 60 apply only prospectively. No one, whether physically handicapped now or not, has a right to a particular damage remedy for injuries which may be sustained in the future.

Appellants Smith and the AFTL also argue that Sections 59 and 60 "disproportionately impact ... children and others lacking proof of 'economic' values in their lives." They claim that juries make up for a child's difficulties in proving economic damages by awarding greater noneconomic damages. Sections 59 and 60 in no way change the existing law in proving and recovering economic damages. This argument is based entirely on the premise that Florida juries do not properly follow instructions. Smith and the Academy should not be permitted to

complain that juries will no longer be able to violate the instructions given to them by the court and award noneconomic damages in the place of economic damages which have not been proven.

Further, there is a rational basis for the Legislature's findings that Sections 59 and 60 benefit all tort victims, including young plaintiffs, by increasing the availability of insurance. Even if this Court questions the wisdom of the policy, it cannot say it is not rationally related to a legitimate state interest.

Sections 59 and 60 are reasonably related to tort reform, apply evenly to all persons similarly situated, and comply with the equal protection clauses of the state and federal constitutions.

III. SECTIONS 51-54 AND 56-58 ARE PROPER EXERCISES OF LEGISLATIVE POWER.[22]

The separation of powers provision in Article II, Section 3 of the Florida Constitution generally requires the Legislature and Judiciary to operate in separate spheres. The Legislature regulates substantive rights, i.e., the rights of individuals with respect to their persons and property. In Re: Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972) (concurring op., J. Adkins), order amended, 272 So.2d 513 (Fla. 1973). The Judiciary regulates practice and procedure, which deals with

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[22]The reference to Section 50 in the Brief (p. 50) of Appellant Robert P. Smith, Jr. is apparently erroneous. Appellant Smith's brief does not argue that Section 50 violates Article II, Section 3, nor did he make that argument at trial.

rules governing the administration of an actual case from the time of its initiation until final judgment and execution. Id. at 66.

Sections 51-54 and 56-58 deal primarily with the substantive rights of tort claimants to recover damages. Any procedural aspects of those sections are closely related to the Act's substantive provisions and are necessary to accomplish the substantive changes. The Legislature acted within its domain by enacting these Sections.

Section 51 provides that no claim for punitive damages will be permitted unless there is a reasonable showing of evidence that would provide a reasonable basis for the recovery of such damages.[23] Section 52 limits the award of punitive damages in certain civil actions to three times the amount of compensatory damages. However, a claimant is not limited by this restriction if there is clear and convincing evidence that a greater award is not excessive.

Punitive damages are punishment for a civil wrong and a matter of substantive law.[24] The Legislature retains broad control over the methods and nature of punishment. The Legislature, which has the power to completely abolish the

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[23]At least one state, Colorado, now requires that punitive damages be proved "beyond a reasonable doubt." Col. Rev. Stat. §13-25-127. A number of states do not permit, or severely limit, the recovery of punitive damages. See Appendix A.

[24]Benyard v. Wainwright, 322 So.2d 473, 475, (Fla. 1975) (punishment for a criminal offense is "clearly substantive law").

award of all punitive damages[25], acted within its domain by adopting Sections 51 and 52.

Section 53 involves remittitur and additur, and is substantially similar to the statute which this Court upheld in Adams v. Wright, 403 So.2d 391 (Fla. 1981). This Court ruled that Section 768.043, Florida Statutes (1977), was "a remedial statute designed to protect the substantive rights of litigants in motor-vehicle-related suits." Id. at 394. As such, it constituted a proper exercise of legislative power.

Section 54 gives the court the option of requiring a settlement conference at least 3 weeks before trial. This section is no more than an expression by the Legislature of its desire that cases be settled rather than litigated. It is inconceivable that any person interested in the administration of justice would challenge a statute which "may" encourage a settlement of lawsuits. Section 54 is a proper exercise of legislative authority.

Section 56 requires the jury to itemize its award into economic, noneconomic, and punitive damages. This characterization of damages relates directly to the substantive law imposing limitations on certain types of damages. Section 56 is also similar to Section 768.48, Florida Statutes, which has been held constitutional on other grounds. Chenoweth

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[25]For example, the Supreme Court of Illinois upheld a statute barring punitive damages in medical malpractice actions in Bernier v. Burris, 113 Ill.2d 219, 497 N.E.2d 763 (1986).

v. Kemp, 396 So.2d 1122 (Fla. 1981).[26]

Section 57 provides alternative methods of payment of future economic damages exceeding $250,000. However, lump sum payment is required if necessary to avoid a manifest injustice to any party, if defendant cannot post an adequate bond, if defendant fails to timely make the required periodic payments, or if it appears that the judgment debtor may be insolvent or lack financial responsibility to make the required payments.

This Court has upheld a statute which provides that, in medical malpractice actions, future medical expenses and future lost wages may be paid as they are actually incurred. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985). This Court ruled such a statute "is within the constitutional prerogative of the Legislature." Id.[27]

Section 58 provides for the award of attorneys' fees and costs under certain conditions. The Florida Legislature has enacted over seventy statutes authorizing the courts to award attorneys' fees in specific types of actions. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1148 (Fla. 1985). An award of attorneys' fees in a medical malpractice case "is a

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[26]The Florida courts have implicitly upheld Section 768.48, Florida Statutes, by ruling that, based on this statute, defendants in medical malpractice cases are entitled to itemized verdicts. See, e.g., Barhoush v. Louis, 452 So.2d 1075, 1076 (Fla. 4th DCA 1984), reh'g dismissed, 458 So.2d 271 (1984).

[27]A statute requiring the periodic payment of future damages was held constitutional by the Supreme Court of Illinois. Bernier, supra note 25. The court recognized a litigant does not have a vested interest in the continuation of a particular mode or form of recovery.

matter of substantive law properly under the aegis of the legislature...." Id. at 1149 (emphasis added).

The trial court correctly ruled Sections 51, 52, 53, 54, 56, 57, and 58 define substantive rights. The Legislature acted within its domain in passing these sections and they should be upheld.

IV. THE TORT REFORM PROVISIONS ARE SEVERABLE FROM THE INSURANCE REFORM PROVISIONS.

In the event this Court declares the insurance reform provisions of the Act invalid, such invalidity does not affect the tort reform sections which are severable and valid.

The Florida courts have applied severability principles if the invalid provisions can be separated, if the legislative purpose expressed in the valid parts of the bill can be accomplished independently of the unconstitutional portion, and if the Legislature would have passed the valid provisions without the invalid provisions. Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828, 830 (Fla. 1962). This Court applied this test in State v. Lee, 356 So.2d 276, 283 (Fla. 1978), involving the Insurance and Tort Reform Act of 1977, Chapter 77-468, Laws of Florida, and ruled Chapter 77-468 involved a single subject but invalidated Section 42 establishing the "Good Drivers Incentive Fund" for other reasons. However, this Court held Section 42 was properly severable from the remaining portions of Chapter 77-468.

In the instant case, this Court should apply the standards set forth in Cramp and Lee and uphold the validity of the tort

reform provisions of Chapter 86-160. As set forth in the legislative recitals of the Act, the Legislature intended to accomplish meaningful reform with respect to civil actions and insurance. This purpose will be accomplished even if various insurance regulatory sections are severed.

Chapter 86-160 contains a severability clause (Section 69) whereby the Legislature expressly stated the elimination of any provision would leave intact a valid, workable statute. A severability clause, although not binding, is highly persuasive because the courts have a duty to uphold the validity of statutes to the maximum extent possible. State v. Champe, 373 So.2d 874, 880 (Fla. 1978).[28]

CONCLUSION

Appellants did not meet their burden of showing beyond a reasonable doubt that Chapter 86-160 is invalid. This Court should affirm the Final Judgment upholding the constitutionality of the tort reform provisions in Chapter 86-160 and ruling Chapter 86-160 deals with a single subject as required by the Florida Constitution. If the Court invalidates any insurance regulatory section, then this Court must sever and uphold the remaining tort reform provisions.

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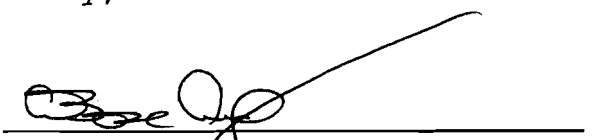
[28]In the House version of CH 86-160 (CS/HB1344), a severability clause was adopted by the Appropriations Committee. An amendment that provided for nonseverability was defeated. The initial Senate version of CH 86-160 (SB465) provided for severability but the full Senate adopted SB465 containing a nonseverability clause. The Conference Committee considered the conflicting provisions and adopted the House version which provided for severability. This version was enacted as Section 69, Chapter 86-160.

DATED this 12th day of January, 1987.



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