IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,210

UNIVERSITY OF MIAMI,
d/b/a THE UNIVERSITY OF
MIAMI SCHOOL OF MEDICINE,
a Florida corporation,

Appellant,

vs.

PATRICIA ECHARTE, a minor,
by and through her parents
and natural guardians, NORMA
ECHARTE and PEDRO ECHARTE;
NORMA ECHARTE and PEDRO ECHARTE,
individually,

Appellees.
_____/

BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION, INC. IN SUPPORT OF APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

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INTRODUCTORY STATEMENT

This case is before the Court for review of a summary judgment which declared unconstitutional the Prompt Resolution of Meritorious Medical Claims Plan ("Prompt Resolution Plan"), § 766.207 and § 766.209, Fla. Stat. (Supp. 1988), which summary judgment was affirmed by the District Court of Appeal, Third District. Both the circuit court and the district court below held that the contingent cap on noneconomic damages, which is an essential element of the Prompt Resolution Plan, constitutes a denial of access to the courts as guaranteed by Art. 1, § 21, of the Florida Constitution.

The purpose of this amicus brief is to present supplemental argument to that presented in appellant's brief in support of the constitutionality of the Prompt Resolution Plan for claims of medical malpractice. This amicus curiae, Florida Defense Lawyers Association, Inc., will not reiterate legal arguments and authorities advanced by the appellant as to all issues in this case, but rather will restrict its amicus brief to an analysis of why the Prompt Resolution Plan is constitutional under Art. 1, § 21. As to other constitutional issues, the amicus expressly agrees with the legal positions of the appellant and of the amicus curiae, State of Florida.

STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association, Inc. ("FDLA"), agrees with the statement of the case and of the facts set forth in appellant's brief.

SUMMARY OF ARGUMENT

The district court erred by holding that the contingent cap on noneconomic damages, which is an essential element of the Prompt Resolution Plan, constitutes a denial of access to the courts as guaranteed by Art. 1, § 21, of the Florida Constitution.

The plan, considered as a whole, satisfies both of the two alternative criteria for constitutionality established in Kluger v. White, 281 So. 2d 1 (Fla. 1973) and Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987): (1) The plan provides a "commensurate benefit" to medical malpractice claimants in that (a) many cases will be resolved in a more expeditious and less costly manner, (b) defendants will be more likely to accept full responsibility for all economic damages without the necessity of a trial on the merits of plaintiff's complaint, and (c) the plaintiff can recover attorneys fees and prejudgment interest upon a defendant's refusal to accept financial responsibility as provided by the plan; and (2) There is an extremely well-documented legislative showing of an overwhelming public necessity to stabilize the cost of medical malpractice insurance in Florida, and, further, given the many prior legislative attempts to control this problem, it is quite apparent that the Prompt Resolution Plan is the only remaining method of meeting the public necessity.

ARGUMENT

THE CONTINGENT LIMITATION ON NONECONOMIC DAMAGES CONTAINED IN THE PROMPT RESOLUTION PLAN FOR CLAIMS OF MEDICAL MALPRACTICE DOES NOT VIOLATE THE RIGHT OF ACCESS TO THE COURTS UNDER ARTICLE 1, SECTION 21, OF THE FLORIDA CONSTITUTION.

On authority of Kluger v. White, 281 So. 2d 1 (Fla. 1973) and Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), the District Court of Appeal, Third District, held that the contingent limitation on noneconomic damages (which is an essential element of the Prompt Resolution Plan) constituted a denial of access to the courts as guaranteed by Art. 1, § 21, of the Florida Constitution.

Although the amicus concurs that Kluger and Smith are controlling authorities in this case, a proper reading of those cases supports the conclusion that the contingent limitation on noneconomic damages does not violate Art. 1, § 21, of the Florida Constitution. In Kluger, the Florida Supreme Court invalidated a "threshold" of $550 of economic damages, below which an injured plaintiff would have no right to sue. And in Smith, the Court invalidated a mandatory "cap" of $450,000 of noneconomic damages in all personal injury actions. However, in both of these cases this Court acknowledged that the legislature could constitutionally restrict a common law recovery of damages, upon a showing of either 1) a reasonable alternative remedy or commensurate benefit, or 2) an overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

In this case both of the two alternative criteria are satisfied. The existence of 1) "commensurate benefit," and

2) "overwhelming public necessity" and "no alternative method of meeting the public necessity" is amply demonstrated by the plain language of the law itself, an analysis of the antecedent legislative history, and a review of the detailed reports and recommendations of the Academic Task Force that were relied upon by the legislature in the enactment of the law.[1]

The 1988 legislation was not the first attempt by the State of Florida to combat the critical problem of escalating medical malpractice insurance premiums. Indeed, prior to the enactment of the Prompt Resolution Plan in 1988, almost every other plausible alternative was pursued by the legislature, albeit without any meaningful success. For example, in 1975, in response to a major statewide crisis of availability and affordability of medical malpractice insurance, Florida adopted its first major legislation pertaining to this subject, the Florida Medical Malpractice Reform Act of 1975. Ch. 75-9, Laws of Fla. The preamble provided as follows:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and

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[1] It is sufficient for appellant to demonstrate that <u>either</u> of the two criteria are satisfied in order to sustain the constitutionality of the law. But in this instance <u>both</u> of the alternative criteria are present.

WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased costs to the citizens of Florida; and

WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE,

* * * *

The 1975 legislation included provisions creating a joint underwriting association and a patients' compensation fund, and expanding authority for the formation of medical malpractice self-insurance trusts.

The 1975 Act also included substantial tort reforms. Most notably, it established medical malpractice mediation panels, a four year statute of repose for medical negligence actions, a statutory definition of "informed consent," and the elimination of "ad damnum" clauses. Initially, these reforms provided some temporary relief. However, by the beginning of 1988 the Joint Underwriting Association for Medical Malpractice Insurance had become a prohibitively expensive, nominal insurer; the Patient's Compensation Fund no longer offered coverage due to inherent problems which resulted in an insufficient number of participants; and the expanded self-insurance trust market regrettably did not produce the expected savings in the cost of medical malpractice insurance. Moreover, the most significant of the 1975 tort reforms, that being the concept of mediation panels, was declared unconstitutional. Aldana v. Holub, 381 So. 2d 231 (Fla. 1980). So, the legislature continued its search for other viable alternatives.

In 1976 the legislature readdressed the medical malpractice issue, having quickly concluded that the provisions enacted the previous year would be inadequate to effectively control the problem of escalating liability insurance costs for health care professionals. Ch. 76-260, Laws of Fla.:

> WHEREAS, despite the responsive and responsible actions of the 1975 session of the Legislature, professional liability insurance premiums for Florida physicians have continued to rise and, according to the best available projections, will continue to rise at a dramatic rate, and
>
> WHEREAS, insurance companies across America are continuing to withdraw from the medical professional liability insurance market so that such insurance, even at exorbitant rates, is becoming virtually unavailable in the voluntary private sector, and
>
> WHEREAS, the maximum rates for essential medical specialists such as cardio-vascular surgeons, neurosurgeons, orthopedic surgeons, and anesthesiologists range from $8,200 in physician-owned trusts to $24,000 through the JUA, and
>
> WHEREAS, a certain amount of these premium costs are passed on to the consuming public through higher costs for health care services in addition to the heavy and costly burden of "defensive medicine" as physicians are forced to practice with an overabundance of caution to avoid potential litigation, and
>
> WHEREAS, this insurance crisis threatens the quality of health care services in Florida as physicians become increasingly wary of high-risk procedures and are forced to downgrade their specialties to obtain relief from oppressive insurance rates, and
>
> WHEREAS, this crisis also poses a dire threat to the continuing availability of health care in our state as new young physicians decide to practice elsewhere

> because they cannot afford high insurance premiums and as older physicians choose premature retirement in lieu of a continuing diminution of their assets by spiraling insurance rates, and
>
> WHEREAS, our present tort law/liability insurance system for medical malpractice will eventually break down and costs will continue to rise above acceptable levels, fundamental reforms of said tort law/liability insurance system must be undertaken, and
>
> WHEREAS, the continuing crisis proportions of this compelling social problem demand immediate and dramatic legislative action,
>
> NOW THEREFORE,
>
> * * * *

The 1976 reforms included a tighter definition of the standard of care required by a health care provider, a limitation on the doctrine of res ipsa loquitur, a requirement for itemized verdicts, periodic payment of future damages and the reduction of damage awards by the amount of collateral sources. Provisions were also adopted for internal risk management within hospitals, where most major incidents of medical malpractice occur. Nonetheless, in the final analysis these reforms failed to accomplish the desired result, and before long the legislature was again forced to readdress this issue.

In 1980 a new law was enacted to allow prevailing parties to recover attorneys fees in medical malpractice actions. § 768.56, Fla. Stat. (1980 Supp.). It was intended to discourage frivolous lawsuits and to encourage the early resolution of meritorious

claims. However, it soon became apparent that the law was having a contrary effect, and it was repealed. Fla. Laws 85-175, Sec. 43.

Five years later, prompted by several consecutive years of shockingly high increases in premiums for medical malpractice insurance, and the ancillary consequences of increased medical costs for patients and disruptions in the availability of medical care, the legislature promulgated the Comprehensive Medical Malpractice Reform Act of 1985. Ch. 85-175, Laws of Fla.[2] Again the legislature recognized the seriousness of the problem by providing specifically as follows:

> WHEREAS, high-risk physicians in this state sometimes pay disproportionate amounts of their income for malpractice insurance, and
>
> WHEREAS, professional liability insurance premiums for Florida physicians have continued to rise and, according to the best available projections, will continue to rise at a dramatic rate, and
>
> WHEREAS, the maximum rates for essential medical specialists such as obstetricians, cardio-vascular surgeons, neurosurgeons, orthopedic surgeons, and anesthesiologist have become a matter of great public concern, and
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> WHEREAS, these premium costs are passed on to the consuming public through higher costs for health care services in addition to the heavy and costly burden of "defensive medicine' as physicians are forced to practice with an overabundance of caution to avoid potential litigation, and
>
> WHEREAS, this situation threatens the quality of health care services in Florida as physicians become increasingly wary of high-risk procedures an dare forced to downgrade

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[2] See generally, Hawkes, The Second Reformation: Florida's Medical Malpractice Law, 13 Fla. St. U. L. Rev. 747 (1985).

their specialties to obtain relief from oppressive insurance rates, and

WHEREAS, this situation also poses a dire threat to the continuing availability of health care in our state as new young physicians decide to practice elsewhere because they cannot afford high insurance premiums and as older physicians choose premature retirement in lieu of a continuing diminution of their assets by spiraling insurance rates, and

WHEREAS, our present tort law/liability insurance system for medical malpractice will eventually break down and costs will continue to rise above acceptable levels, unless fundamental reforms of said tort law/liability insurance system are undertaken, and

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

WHEREAS, medical injuries can often be prevented through comprehensive risk management programs and monitoring of physician quality, and

WHEREAS, it is in the public interest to encourage health care providers to practice in Florida,

NOW, THEREFORE,

* * * *

Among other provisions, the 1985 Act established restrictions on expert witnesses, limitations on attorneys' contingency fees, increased powers for trial judges to reduce or increase jury awards, new procedural requirements before punitive damages could be requested or imposed, a mandatory pre-suit screening and investigation process applicable to all parties, and mandatory pretrial settlement conferences in all medical malpractice cases.

The 1985 Act also established a system of voluntary binding arbitration for cases where defendants admit liability but dispute the issue of damages. In this instance the prospective defendant's offer to admit liability and arbitrate the issue of damages could be conditioned on the plaintiff's acceptance of a limitation of general damages in the arbitration proceeding. In addition, as an economic inducement to the prompt resolution of meritorious claims the Act created the "offer of judgement, demand for judgment" rule, which imposes penalties on parties who unreasonably refuse good faith offers of settlement prior to trial.

Moreover, the 1985 legislature imposed tough new risk prevention requirements on hospitals, and a landmark system of "triggered" administrative review of physicians who are subject to a disproportionate number of malpractice claims. But here again the newly enacted legislation was inadequate to address the medical malpractice crisis, and the following year the legislature was struggling with the issue once again. In fact by the spring of 1986 the longstanding and worsening medical malpractice problem was exacerbated by a nationwide crisis affecting all lines of commercial liability insurance, and especially medical malpractice insurance. Carriers experienced unprecedented loss ratios; excess insurance became very scarce and for some lines was totally unavailable; premiums reached record levels; and again the legislature was compelled to respond in the public interest.[3]

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[3] See, preamble, Ch. 80-160, Laws of Fla.; see generally, Fort, Florida's Tort Reform: Response to a Persistent Problem, 14 Fla. St. U. L. Rev. 505 (1986).

The Tort Reform and Insurance Act of 1986 implemented a series of innovative measures that directly affected actions for medical malpractice. Ch. 86-160, Laws of Fla. For example, the legislature added a presumptive limitation on punitive damages in an amount equal to three times the amount of general damages, and it provided that a portion of the punitive damages must be paid over to the state. It restricted the application of the doctrine of joint and several liability, and it approved a $450,000 cap on noneconomic damages. The latter provision, however, was declared unconstitutional prior to actual implementation. Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987).

In addition the 1986 Act established the Academic Task Force For Review of Insurance and Tort Systems for the purpose of studying Florida's problems involving affordability and availability of liability insurance. The legislature directed the Task Force to review the impact of the reforms it had enacted in recent years and to make further recommendations regarding the state's tort and insurance systems by March 1, 1988.

Unlike other study commissions that had previously been created in Florida and elsewhere in the country, the Task Force was not composed of representatives of the various special interest groups. Instead the five members of the Task Force consisted of the presidents of three major Florida universities (two of whom happen to be attorneys) and two businessmen with distinguished public service backgrounds who were selected by the three presidents. To supervise its research into Florida's insurance and

tort systems, the Task Force retained Executive Director, Carl S. Hawkins, the retiring dean of the law school at Brigham Young University, and Associate Director Donald G. Gifford, Professor of Law at the University of Florida. In addition Dean Hawkins hired a professional research staff with experts in the fields of law, insurance, actuarial science, economics and medicine. The Task Force staff also had the benefit of the academic resources of Florida's major universities and resource materials provided by House and Senate legislative staff. The Task Force undertook a massive research project to determine the scope and the true causes of the problems in Florida's insurance and tort systems, and to make appropriate recommendations to the legislature. The Task Force conducted numerous public hearings throughout Florida, and the staff consulted extensively with acknowledged experts everywhere in the country. Although the Task Force did not believe it was compelled to recommend "reform" proposals, the research staff did investigate a wide range of alternatives that were either adopted or proposed in other jurisdictions or advocated in law review articles and other academic literature.[4] It is respectfully suggested that in 1988 the research, reports and recommendations of Florida's Academic Task Force constituted the most impartial, thoughtful and deliberative analysis of its type ever performed in this or any other state pertaining to the liability insurance crisis.

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[4] "Final Fact Finding Report on Insurance and Tort Systems," March 1, 1988; "Final Recommendations," March 1, 1988.

Soon after the Task Force and its professional staff commenced its investigation, the medical malpractice problem emerged as the most visible and the most serious area of concern. The preliminary observations of the Task Force confirmed that problems arising from the resolution of claims of medical malpractice were more serious than in most other areas of the tort and liability insurance systems, thereby requiring an appropriate response.

Because of the worsening situation in the area of medical malpractice (including another round of significant rate increases, the demise of the Dade County Trauma Network and the refusal of certain high risk specialists to treat emergency room patients), and given the overriding public interest in the cost and availability of health care, (especially emergency care and obstetrics), Governor Bob Martinez decided that it was necessary to call a special legislative session to readdress the continuing problem of medical malpractice. In this regard the Governor requested that the Task Force provide findings and recommendations in the area of medical malpractice on an accelerated basis in anticipation of the special session.[5]

In response to the governor's request, the Task Force produced two major reports on medical malpractice: Preliminary Fact-Finding Report on Medical Malpractice dated August 14, 1987 and Medical Malpractice Recommendations dated November 6, 1987. Since the

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[5] The events that precipitated the special session in February 1988 are well documented in Tedcastle and Dewar, Medical Malpractice: A New Treatment for an Old Illness, 16 Fla. St. U. L. Rev. 535 (1988).

legislature relied heavily on these reports in formulating the 1988 legislation, it is necessary for the Court to review some of the pertinent findings and recommendations contained therein.

The Task Force found that despite the prior enactments of remedial legislation designed to stabilize the cost of medical liability insurance in Florida, the cost of this coverage continued to rise significantly, both in absolute terms and when compared to physicians' gross revenues. The increase was most dramatic for physicians in South Florida, with obstetricians and gynecologists in Dade and Broward counties experiencing average annual premium increases of 45.7 percent during the previous three years. The Task Force further determined that the substantial rise in the cost of medical liability insurance resulted from a significant increase in the total amount of payments for claims for medical malpractice. Indeed this increase in loss payments was produced by an increase in both the number of claims paid (frequency), and the amount paid for each claim (severity). Liability insurance premiums therefore represented an increasing financial burden to physicians, with the problem being most acute in the high risk specialties that are so necessary for quality health care. Physicians absorbed some of the cost of increased liability insurance premiums, and shifted the remainder to consumers by increasing fees for health services. In fact a survey conducted by the Task Force revealed that the cost of liability insurance was responsible for an estimated 34 percent of all increases in physicians fees in Florida.

The Task Force also concluded that "negative defensive medicine" was contributing to the high cost of health care in this state, and that because of liability concerns an increasing number of physicians were unwilling to treat emergency room or trauma patients.

Lastly, the Task Force considered the relationship between the tort system and rising medical malpractice premiums. It determined, after substantial analysis, that litigation costs and attorneys fees in medical malpractice cases increased substantially from 1975 through 1986 despite the enactment of remedial legislation during this period, and that the increased frequency and severity of claims coupled with the increase in litigation related transaction costs was definitely driving up the cost of medical malpractice insurance in this state[6].

On the basis of the thorough research and the factual findings discussed above, the Task Force forwarded several specific recommendations to the legislature. Among its proposals the Task Force recommended several reforms in the tort system with specific application to claims for medical malpractice. Interestingly,

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[6] Back in 1976 the legislature was dismayed that the cost of medical malpractice insurance for many medical specialties was $8,200 per year. See, preamble, Ch. 76-260, Laws of Fla. However, by 1987 the same cost had risen to $88,838 for anesthesiologists, $130,811 for orthopedic surgeons, $165,320 for obstetricians, and $192,420 for neurosurgeons, in Dade and Broward counties, representing increases in premiums of about 1,000 percent to 2000 percent, or more, depending on specialty, from 1976. As a result, some high risk physicians are paying about one-fourth of their gross income for malpractice insurance. See, "Preliminary Fact Finding Report on Medical Malpractice," Academic Task Force, August 14, 1987.

however, the Task Force specifically recommended against adoption of an outright cap on noneconomic damages, either by statute or constitutional amendment. It concluded that a mandatory cap would unduly restrict the rights of injured plaintiffs and would do nothing to reduce the transaction costs of the civil justice system. Instead the principal reform advanced by the Task Force was the Prompt Resolution of Meritorious Medical Claims Plan, which combined two basic proposals: (1) enhanced requirements for pre-suit investigation, documentation and evaluation of claims by all parties; and (2) financial incentives for parties to fairly and expeditiously settle their disputes through voluntary binding arbitration.

Not unlike the underlying premise of the "offer of judgment, demand for judgment" rule which the Supreme Court found constitutional in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), the Task Force recognized that new incentives had to be built into the system to assure that parties would make every reasonable effort to resolve their differences without the necessity of protracted and costly litigation. Consequently, the Prompt Resolution Plan provided an incentive in the form of a conditional limitation on noneconomic damages. If the defendant agrees, as a result of the mandatory pre-suit claims evaluation process, to accept full responsibility for all economic damages arising from the incident of alleged medical malpractice, and to immediately proceed to arbitration on the singular issue of damages, then upon acceptance of the offer of binding arbitration

by the claimant, the defendant's exposure to an award of noneconomic damages is limited to $250,000. If the claimant refuses the offer of binding arbitration and proceeds instead to trial, the defendant's maximum exposure to liability for noneconomic damages will be limited to $350,000. Conversely, if a defendant refuses a claimant's arbitration offer, (that is if a defendant refuses the claimant's pre-suit offer to accept a $250,000 limitation on non-economic damages in return for the defendant's acceptance of responsibility for the claim and proceeding to arbitration on the issue of damages), then the case would proceed to trial without any damage caps. Moreover, the prevailing plaintiff in this situation would be entitled to prejudgment interest and an award of attorney's fees.

In February 1988 Governor Martinez called a special session to deal with the medical malpractice problem. The legislature dutifully considered the reports and recommendations of the Academic Task Force, and testimony elicited from numerous special interest groups. Thereupon, the legislature enacted Ch. 88-1, Laws of Fla. The legislative findings that necessitated this important legislation are well documented in the Act itself.

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, 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 non-economic 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

WHEREAS, the Legislature believes, that in general, the cost of medical 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 created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the State of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and

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

NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

> Section 1. Legislative findings and intent. -- The Legislature finds that the costs, both in terms of real dollars and access, to the public for quality health care are so high that not all Floridians can be guaranteed an acceptable level of care. The Legislature further finds that the strict regulation of health care practitioners is imperative to maintaining the quality of health care delivered in the state. It is, therefore, the intent of the Legislature to encourage health care practitioners to report possible instances of malpractice by offering them protection from civil suit. It is, further, the intent of the Legislature to facilitate the maintenance of medical practice in Florida by promptly and fairly disciplining health care practitioners whose performance is outside acceptable limits.

With specific reference to the Prompt Resolution Plan and the contingent cap on noneconomic damages, the legislature proceeded to set forth additional findings and intent, which must be given due deference by the court.

Section 48. Legislative findings and intent.--

> (1) The Legislature makes the following findings:
>
> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.
>
> (b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.
>
> (c) The average cost of defending a medical malpractice claim has escalated in the past

decade to the point where it has become imperative to control such cost in the interest of the public need for quality medical services.

(d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.

(e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.

(2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, pre-suit investigation and arbitration. Pre-suit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary, and shall be available except as specified.

(a) Presuit investigation shall include:

1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.

2. Medical corroboration procedures.

(b) Arbitration shall provide:

1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.

2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.

3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

In this case the district court held that the contingent limitation on noneconomic damages in actions for medical malpractice suffered from the same constitutional infirmity as the mandatory limitation on noneconomic damages in all personal injury actions that was stricken down in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987). However, as aptly noted by the Academic Task Force and thereupon by the legislature itself, there are important points of distinction that validate the 1988 Prompt Resolution Plan, notwithstanding the invalidity of the mandatory cap on damages contained in the 1986 Tort Reform and Insurance Act.

(1) Commensurate Benefit.

By its very nature, the imposition of a mandatory cap on damages is devoid of any "commensurate benefit" for injured plaintiffs. Smith v. Department of Insurance, supra. Indeed, in its enactment of the Tort Reform and Insurance Act of 1986, the legislature did not even purport to confer a specific benefit on injured claimants. Instead, the mandatory limitation on non-economic damages was intended to confer a consequential benefit on society in general, through expected reductions in liability insurance costs.

However, the enactment of the Prompt Resolution Plan presents an entirely different situation. Under the contingent cap on

noneconomic damages, the defendant must give something in order to get something. The defendant must accept full responsibility for all economic damages, and agree to pay noneconomic damages up to the limitation amount, before the damage cap becomes applicable in any given case. (Conversely, under the 1986 Tort Reform and Insurance Act, the defendant received the benefit of a damage cap in every case, without having to accept responsibility for even one dollar of economic or noneconomic damages.)

Under the Prompt Resolution Plan the injured claimant must receive something (an early offer from the defendant to pay all economic damages and also all noneconomic damages up to the limitation amount) before he loses something (that being the common law right to seek a recovery for unlimited noneconomic damages).[7] Simply stated, the contingent nature of the damage limitation being considered herein produces the commensurate benefit for injured claimants that was nowhere apparent in Smith.

Nonetheless the Third District held that the contingent limitation on noneconomic damages violates Art. 1 § 21, by failing to provide a reasonable alternative to protect the rights of medical malpractice victims to redress for injuries because:

> [t]he true benefit -- the damage cap -- inures only to the negligent defendant . . . . A benefit to society in general does not satisfy Kluger. The benefits must inure to the medical malpractice victim. Smith.

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[7] This is most analogous to the quid pro quo that enabled Florida's No Fault Insurance Law to withstand a constitutional challenge under Art. 1, § 21, Fla. Const., Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982); Lasky v. State Farm Insurance Co., 296 So. 2d 9 (Fla. 1974).

University of Miami v. Echarte, ___ So. 2d ___, 16 F.L.W. 1539, 1540 (Fla. 3d DCA 1991). However, the above quoted statement, upon which the Third District based its decision, represents an erroneous characterization of both Kluger and Smith.

A medical malpractice claimant is never subject to a limitation on noneconomic damages, unless the defendant first agrees to unconditionally pay all economic damages, and reasonable noneconomic damages up to $250,000, as determined in an expeditious, no-fault arbitration proceeding. Based on actual testimony by medical malpractice victims before House and Senate Committees, and the findings of the Academic Task Force, the legislature properly concluded that the most material benefit that could be conferred on victims of medical malpractice is the implementation of a system that provides meaningful incentives to defendants and their insurers to quickly, fully and fairly evaluate claims of medical negligence, and further to make bona fide, unconditional offers of settlement of all economic damages (and reasonable noneconomic damages) whereby the matter can be quickly resolved, without the claimant having to file suit and suffer the uncertainties of protracted litigation.

The statutory scheme which is now under constitutional attack conferred upon the claimant a direct benefit [an unconditional, pre-suit offer to pay reasonable, no-fault damages] which most likely would not have been proffered, but for the contingent cap on damages. Moreover, the direct benefit to the claimant is further enhanced by the strict limitation on attorney's contingency fees

that applies to any case which is settled through the Prompt Resolution Plan, § 766.109(7)(a), Fla. Stat. (Supp. 1988) and, conversely, through the assured avoidance of an adverse judgment for attorney's fees or court costs in the event that the claimant is not successful at trial. § 768.79, Fla. Stat. (1989); Fla. R. Civ. P. 1.442.

The Prompt Resolution Plan is a "two way street." If the defendant refuses an early offer of settlement tendered by the injured claimant pursuant to the plan, the claimant may recover attorneys fees and prejudgment interest at time of trial. Certainly, the value of attorneys fees and prejudgment interest awarded to a plaintiff in a major medical malpractice action, when computed against the total judgment amount inclusive of noneconomic damages, can often exceed the benefit derived by a defendant from a cap on noneconomic damages in the amount of $250,000 or $350,000.[8]

This amicus curiae believes that in the mind of the legislature, and in the eyes of the law, prejudgment interest and

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[8] There are many medical malpractice cases where the cap of $250,000 or $350,000 would be a veritable "nonlimitation" on noneconomic damages because the nature of the injury sustained by the plaintiff would not warrant an award of that magnitude. Under the Prompt Resolution Plan, the plaintiff in these cases can demand that the defendant in effect accept full responsibility for all damages, both economic and noneconomic, even before suit is filed. If the defendant refuses this offer, the prevailing plaintiff can recover attorneys' fees and pre-judgment interest at the time of trial, remedies which were disallowed under common law. So, to the extent that the plaintiff herein suggests that there are cases where the contingent cap may restrict a common law recovery, under the Prompt Resolution Plan, there are probably a greater number of cases where the opposite is true.

attorneys fees (when the defendant is unwilling to pay economic damages), or, in the alternative, an early offer by the defenadnt to pay the claimant no-fault type damages in lieu of the uncertainties of litigation, both constitute an adequate and commensurate benefit for the potential loss of some (but not all) noneconomic damages.

The FDLA further rejects the District Court's fallacious premise that under Kluger, a commensurate benefit must be conferred on each and every medical malpractice claimant, (rather than medical malpractice claimants as a class), in order to satisfy the requirements of Art. 1, § 21, Fla. Const. Indeed, given such a restrictive standard, there is no way that the Automobile No-Fault Law,[9] or the Workers Compensation Law,[10] would ever withstand a constitutional challenge.

Indeed, when the Court carefully compares the benefits provided to an injured worker with a disputed claim under Ch. 440, Fla. Stat., (the Workers Compensation Law), to the benefits that are conferred on any comparably injured medical malpractice victim, (assuming a presuit offer of settlement under the Prompt Resolution Plan), the only material difference is that the medical malpractice claimant will likely receive a much quicker and a much larger award.

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[9] Sasso v. RAM Property Management, 452 So. 2d 932 (Fla. 1984); Mahoney v. Sears, Roebuck & Co., 440 So. 2d 1285 (Fla. 1983); Acton v. Fort Lauderdale Hospital, 440 So. 2d 1282 (Fla. 1983).

[10] Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982); Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974).

Surely, in many individual cases, workers compensation claimants fare worse under Ch. 440, Fla. Stat. than they could under the tort system. However, the test of constitutionality is not whether every injured worker receives a commensurate benefit under Ch. 440, but whether workers as a class receive sufficient benefit to offset the loss of certain tort remedies due to the implementation of the statute. Likewise, in this case the test of constitutionality is not whether every medical malpractice claimant receives a commensurate benefit, but whether medical malpractice victims as a class benefit from the prompt resolution plan. Clearly, no victim who accepts a presuit offer of settlement pursuant to the plan is ever going to challenge the constitutionality of the statute, nor will any suits be filed by victims who recovered attorney's fees and prejudgment interest because the defendant refused the claimant's presuit demand for compensation for injuries sustained. Indeed, a challenge will only originate from a claimant, such as the plaintiff herein, who rejects a bona fide offer and then complains about the $350,000 limitation on noneconomic damages at trial. However, the test of constitutionality is not based merely on the application of the statutory limitations to the one complaining plaintiff, but rather on the impact of the Prompt Resolution Plan, considered as a whole, on all medical malpractice claimants in Florida.

When considered in light of Kluger and Smith as properly construed, the aggregate benefit that is conferred on all medical malpractice claimants by the Prompt Resolution Plan constitutes a

sufficient quid quo pro to sustain the constitutionality of the contingent limitation on noneconomic damages, without which the plan would be noneffectual. The inherent value of this benefit to injured claimants is fortified by the obvious conclusion that many injured claimants would rather accept early offers of settlement, if tendered, than incur the emotionally unsettling travails of protracted litigation, and the finding of the Academic Task Force that most medical malpractice cases that proceed to a full jury trial are decided in favor of the medical providers and against the injured plaintiffs.[11]

(2) Public Necessity And The Absence Of Any Viable Alternatives.

The Smith case held that the legislature failed to demonstrate an "overwhelming public necessity" for the 1986 enactment of a mandatory $450,000 cap on noneconomic damages in all personal injury cases, let alone the absence of alternative methods of meeting such public necessity. Here again, however, the present case is distinguishable.

Whereas, the enactment of the $450,000 cap on non-economic damages in 1986 was prompted by a philosophical concern about the

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[11] It should be noted that the mandatory cap on damages that was stricken down in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987) provided, in effect, an incentive for defendants to forego early settlement and proceed instead to trial. Conversely, the contingent cap being considered herein has the complete opposite effect. In order to "trigger" the limitation on noneconomic damages, the defendant must tender an early offer of settlement, which provides for payment of all economic damages and a reasonable amount of noneconomic damages. Clearly, a contingent cap provides a benefit for injured claimants that is totally lacking under a mandatory cap on damages.

measurability and rationality of awards of general damages, and the obvious desirability of lower insurance rates, the 1988 Prompt Resolution Plan was prompted by a very serious crisis in the health care delivery system, and a well documented recognition of deficiencies in the tort system as it related to the resolution of medical malpractice claims.

Indeed, when the legislature convened in February 1988 for the special legislative session on medical malpractice it had the benefit of the report of the Academic Task Force, the most exhaustive analysis of its type ever performed on behalf of a state legislature anywhere in the country. (No analogous documentation was available to the legislature in 1986 when it enacted the omnibus $450,000 cap on general damages). The Task Force concluded that the problem of medical malpractice insurance was sufficiently important and sufficiently unique to necessitate the enactment of appropriate remedial measures, such as, most notably, the Prompt Resolution Plan. Quite clearly, the increasingly high cost of medical malpractice insurance was having an adverse and potentially catastrophic impact on the health care delivery system in this state, especially inasmuch as the problem was most acute in the high risk specialties of obstetrics, neurosurgery and thoracic surgery, and in the treatment of emergency room and traumatized patients. Governor Martinez recognized the magnitude and urgency of this problem by calling a special session in February 1988 to enact necessary legislation, as formally recommended by the Task Force. And the legislature confirmed the overwhelming public

necessity, in substantial detail, in the preamble and declarations of legislative intent contained within the act itself.[12]

Likewise, the absence of any viable alternative is documented by the Act, by the findings of the Academic Task Force, and by the legislative history that preceded the enactment of Ch. 88-1, Laws of Fla. From 1975 to 1985, the legislature enacted many different provisions in an attempt to control the medical malpractice problem. Indeed, during this 11 year period, virtually every other conceivable alternative, short of a statutory limitation of damages, was considered and enacted, albeit without much tangible success.

Conversely, there was no comparable history of legislative "trial and error" regarding other aspects of the liability insurance problem, apart from medical malpractice. When the 1986 legislature enacted the mandatory $450,000 cap on non economic damages, the legislature could not demonstrate that it exhausted all other alternative remedies and responses, prior to passage of the damage cap. But here again the opposite is true. Over a period of years the legislature exhausted every other meaningful alternative before enacting the Prompt Resolution Plan. Indeed, in 1986, (the year after the passage of the Comprehensive Medical Malpractice Act of 1985), the legislature took the extraordinary

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[12] These legislative findings are presumed to be correct, Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.23 879 (Fla. 1983). There is a heavy burden on the plaintiff to overcome the presumption of constitutionality. Griffin v. State, 396 So. 2d 152 (Fla. 1981); Peoples Bank of Indian River County v. Dept. of Banking and Finance, 395 So. 2d 521 (Fla. 1981).

step of creating the Academic Task Force, and appropriating $250,000, to ascertain what was wrong with our tort and insurance systems. The Task Force concluded that medical malpractice was the one and only area that required significant tort reform, and inasmuch as all other reforms were previously tried and exhausted, the Prompt Resolution Plan was (by process of elimination) the only remaining legislative option.

In Carr v. Broward County, 541 So. 2d 92 (Fla. 1989) this Court held that the statute of repose in medical malpractice actions did not violate plaintiffs' access to the courts. In doing so, this Court recognized legislative findings that absent a statute of repose, "doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased costs to the citizens of Florida[.]" Carr, 541 So. 2d at 94. Surely, a contingent limitation on noneconomic damages, is much less impedimental to the claimant's right of access to the courts than a statute of repose which disallows any recovery whatsoever after a given date. Moreover, the legislative findings that precipitated the Prompt Resolution Plan clearly indicate that the reforms of earlier years, (such as those recognized and sustained by this Court in Carr) were ineffectual, that the underlying problem recognized by this Court in Carr had indeed grown worse, and that there existed "an overpowering public necessity for the abolishment [or in this instance a reasonable, contingent limitation] of such right, and no alternate method of meeting such public necessity . . . [.]" Kluger, 218 So. 2d at 4.

CONCLUSION

In 1988 the legislature enacted a system of mandates and economic incentives for the early identification and prompt resolution of meritorious claims of medical malpractice. That system, inclusive of the contingent limitation on noneconomic damages which is an essential component thereof, is the last, best hope (short of a constitutional amendment) to deal with the public necessity of controlling liability insurance premiums for health care providers in Florida.

Based on the foregoing argument, the Amicus, Florida Defense Lawyers Association, Inc., respectfully urges the Court to reverse the lower court's order which held that § 766.207 and § 766.209, Fla. Stat. (Supp. 1988) violate Art. 1, § 21, of the Florida Constitution.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION, INC. IN SUPPORT OF APPELLANT** has been furnished by U.S. Mail to **MICHAEL FRIEDMAN, ESQUIRE,** Fowler, White, Burnett, Hurley, Banick & Strickroot, Courthouse Center, 11th Floor, 175 Northwest First Avenue, Miami, Florida 33128-1817; **JOEL D. EATON, ESQUIRE,** Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130; **NEAL ROTH, ESQUIRE,** Grossman & Roth, P.A., Grand Bay Plaza, Penthouse One, 2665 South Bayshore Drive, Miami, Florida 33133; **DEBRA SNOW, ESQUIRE/ROBERT KLEIN, ESQUIRE,** Stephens, Lynn, Klein & McNicholas, One Datran Center, Suite 1800, 9100 South Dadeland Blvd., Miami, Florida 33156; **ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, LOUIS F. HUBENER, ASSISTANT ATTORNEY GENERAL,** Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32399-1050, this 15th day of August, 1991.

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