IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,210

DISTRICT COURT CASE NO.: 90-00982

CIRCUIT COURT CASE NO.: 89-36270

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

Appellant,

vs.

PATRICIA ESCHARTE, a minor, by and
through her parents and natural
guardians, NORMA ESCHARTE and
PEDRO ESCHARTE, etc.,

Appellees.

_____/

Appeal from the District Court of Appeal
of Florida, Third District

Amicus Curiae Brief of the Florida Hospital Association, the Florida Medical Association and the American Medical Association

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INTRODUCTION

This Brief is filed on behalf of the FLORIDA MEDICAL ASSOCIATION, the FLORIDA HOSPITAL ASSOCIATION and the AMERICAN MEDICAL ASSOCIATION, which have been granted Amicus Curiae status by this Court.

STATEMENT OF THE CASE AND FACTS

The FLORIDA MEDICAL ASSOCIATION (FMA), the FLORIDA HOSPITAL ASSOCIATION (FHA), and the AMERICAN MEDICAL ASSOCIATION (AMA) herein adopt the Statement of the Case and Facts set forth in the Brief of Appellant, UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE.

SUMMARY OF ARGUMENT

For most of the last two decades this country has been experiencing what many have termed a medical malpractice insurance crisis. The crisis has varied in intensity, depending upon the time frame as well as with the locale. Florida has not escaped the crisis, as Florida physicians have seen their medical malpractice insurance premiums skyrocket.

Various states have enacted a variety of measures in an effort to stem the increase in malpractice premiums. Among the few measures which have proven effective is the enactment of a cap on non-economic damages. Just such a cap has been enacted by the Florida Legislature. This cap only applies to non-economic damages in medical malpractice actions, and only applies when one or both parties have offered or demanded arbitration.

The trial court has declared the applicable statutes to be unconstitutional. The Third District Court of Appeal affirmed the trial court ruling based upon the Third District's determination that the applicable statutory scheme denied the claimants access to the Courts pursuant to Article I, Section 21 of the Florida Constitution. That ruling is erroneous, as the statutes do not deny access to the courts. Nor does this series of statutes deny the claimants equal protection or otherwise impinge upon any other constitutional right. Rather, these statutes represent a rational response to a real problem, and offer benefits which are commensurate with the limitations that they

impose. The rulings by the trial court and the Third District Court of Appeal should therefore be reversed, and these statutes should be declared constitutional.

THE TRIAL COURT ERRED IN DECLARING THAT SECTION 766.207 AND SECTION 766.209, ARE UNCONSTITUTIONAL, AND THE THIRD DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT THOSE STATUTES DENIED CLAIMANTS ACCESS TO THE COURTS PURSUANT TO ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION

The trial court ruled that Sections 766.207 and 766.209 are unconstitutional, based upon several different grounds. The Third District Court of Appeal affirmed that ruling, but only upon the finding that these statutes violate the "access to the Courts" provisions found in Article I, Section 21 of the Florida Constitution. Under the circumstances, the Court did not consider "all the asserted arguments" which had been raised by the claimants in support of their original constitutional challenge. Nevertheless, because this Court may choose to examine the balance of the constitutional arguments which have been raised by the claimants should this Court disagree with the decision of the District Court of Appeal, Amicus Curiae will address those additional constitutional arguments as well as the so-called "equal access" argument which was adopted by the Third District.

MEDICAL MALPRACTICE: THE PROBLEM

Medical malpractice is not a new problem, nor is the filing of medical malpractice lawsuits a recent development. The first recorded case of medical malpractice in English Common Law was noted in 1329. By 1518, malpractice litigation was common enough for the Charter of the College of Physicians of London to include

disciplinary provisions for malpractice. In the United States, physicians were held legally responsible for negligently causing injuries as early as 1794.

Since that time, there have been periodic sharp increases in the amount of malpractice litigation. The first notable increase occurred in the 15 years prior to the Civil War. Increases also occurred at the beginning of the 20th Century, and again in the years prior to World War II.[1] A 1941 study in the Journal of the American Medical Association reflected that 1296 malpractice cases had been filed between 1900 and 1940, with more than 500 between 1930 and 1940. Beginning in the late 1960's, both the number of malpractice claims and the size of jury awards began to rise at an unprecedented rate.

The causes of the increase in claims are many. Undoubtedly, it was caused in part by the increase in medical services being provided, which resulted from the introduction of medicare in 1965 and the concurrent growth of private health insurance. The increasing complexity of medical procedures has also increased the risk of serious injury.[2]

Nevertheless, the increase in claims cannot be attributed to these factors alone, as all types of tort liability claims have been similarly affected, not just medical malpractice claims.

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[1] Plager, S. Jay and Sundwall, David N., Department of Health and Human Services Report of the Task Force on Medical Liability and Malpractice, pg 3, August 1987.

[2] Id. at 3-4.

Rather, some of the change is more readily attributable to an overall increase in litigiousness.

The effect of the increase in claim frequency and severity was quickly felt by physicians. By 1974, physicians in several states began to experience severe problems in obtaining malpractice insurance. Notwithstanding substantial premium increases, a number of insurers left the market entirely, and some health care providers were simply unable to secure liability insurance at any price. These factors led to what many have labeled as a "crisis" in malpractice insurance.

While numerous states enacted a variety of laws seeking to curb the spiralling costs of malpractice insurance, these measures were largely unsuccessful. Thus, after a brief lull between 1975 and 1978, the number of claims and the cost of malpractice insurance again began to rise dramatically. The average premium costs for all physicians increased by 81% between 1982 and 1985.[3] While the average amount spent per physician on medical liability insurance was $5,800 in 1982, by 1985 the cost had risen to $10,500.[4]

The cost of malpractice insurance as a percentage of the average gross income of physicians increased from 3.1% in 1982 to 4.6% in 1985. As a percentage of average total expenses, the average cost of malpractice insurance increased from 7% in 1982 to

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[3] Id. at 4-5.

[4] Id. at 13.

9% in 1984. During that same time frame, malpractice insurance expense increased at a greater rate than did any other expense, including medical and office supplies or payroll.

Studies have found considerable variation in malpractice insurance costs from state to state, and even for regions within the same state. Florida is among those states with the highest average medical malpractice insurance premiums, as are Illinois, Michigan, New York, and the District of Columbia.

The high premium cost to Florida physicians was demonstrated in a 1986 study by the American Medical Association, which was entitled the "Socioeconomic Monitoring System." The average premium for obstetricians-gynecologists in Florida for 1985 was $92,830, exclusive of Dade and Broward Counties. The figure for Dade and Broward Counties was $185,460. On the other hand, Arkansas obstetricians and gynecologists incurred premium expenses of $18,950, whereas the average obstetrician in North Carolina paid $15,290.[5]

Even general practitioners performing minor surgery in Florida paid much more than their counterparts in Arkansas and North Carolina. The average general practitioner in this category in Florida -- not practicing in Dade and Broward Counties -- incurred insurance premium expenses of $16,700. Similar physicians practicing in Dade and Broward Counties could expect to pay

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[5] Plager, S. Jay and Sundwall, David N., Department of Health and Human Services Report of the Task Force on Medical Liability and Malpractice, pg 14, August 1987.

$33,224. General practitioners who perform minor surgery in Arkansas generally pay a $3,700 premium, whereas such physicians practicing in North Carolina would only pay $3,000. Remarkably, in some specialties, such as obstetrics, the average premium cost increased by 113%.[6]

The conditions in Florida which prompted enactment of the Medical Malpractice Reform Act were reviewed in detail by the Medical Malpractice Case Study on Florida which was prepared by the United States General Accounting Office in December of 1986. This study presented important data regarding medical malpractice claims in the State of Florida between 1980 and 1986.

The cost of medical malpractice insurance in the State of Florida rose in all specialties during this time frame. The most minimal increase was experienced by doctors who perform ophthalmology/surgery outside of Dade and Broward Counties. Those physicians were subject to an increase in malpractice rates of only 129%. At the other end of the spectrum, physicians practicing obstetrics and gynecology in Dade and Broward Counties experienced a staggering increase in their insurance premiums of 456%.[7]

Changes in the frequency of claims against physicians varied depending upon the specialty and the period reviewed during the 1980 through 1986 time frame. From 1980 through 1984, the

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[6] Id. at 14.

[7] United States General Accounting Office Report to Congressional Requesters, Medical Malpractice Case Study on Florida, pg 18, December 1986.

frequency of radiology based claims increased nearly 137%, while neurosurgery experienced an 84% increase. Claims for plastic surgery, obstetrics/gynecology, psychiatry and anesthesiology actually decreased in frequency between 1980 and 1984. Virtually all other medical specialties reported an increase in claim frequency, ranging from a high of 84% for internal medicine and neurosurgery to a low of 6% for orthopedic surgery.[8]

The average claim paid for physicians in Florida also increased between 1980 and 1984. The average claim paid in 1980 was $80,556. In 1984, the average claim paid was $140,594, an increase of 75%. During this same time frame, the average cost of investigating and defending claims against physicians increased 57%.[9]

Physicians were not the only Florida health care providers who fell victim to the medical malpractice crisis. Hospitals were also hit with a substantial increase in malpractice insurance costs. Between 1983 and 1985, the cost of medical malpractice insurance for hospitals increased by 63%. The average frequency of claims per 100 occupied hospital beds increased 14% between 1980 and 1984.[10]

The increasing insurance costs caused physicians in a number of areas to modify their practices. In a survey which was

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[8] Id. at page 20.

[9] Id. at page 22.

[10] Id. at page 24, 27.

conducted in 1985 for the American College of Obstetricians and Gynecologists, 35% of the respondents reported that they had modified their practices in some way because of increased professional liability risks. These changes ranged from a reduction in the number of deliveries performed and decreased high-risk obstetrical care to the discontinuation of obstetrical practice altogether.[11]

In Florida and the Great Lakes region, a higher proportion of physicians reported altering their practices than in other parts of the nation. Nationwide, 23% of those respondents surveyed reported reducing their high-risk obstetrical practices and 22% had dropped obstetrical care completely. A 1984 survey by the American Academy of Family Physicians found that 21% of the respondents reported that they had restricted their obstetrics practices. This is believed to have resulted at least in part from the insurers' reclassification of family practitioners who provide obstetric care from a low premium category to the higher premium category which is assigned to obstetrician-gynecologists.[12]

Health care providers are not the only people who feel that something must be done to control the medical malpractice crisis. Nor are health care providers the only individuals who believe that at least part of the fault for this crisis lies with the civil

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[11] Plager, S. Jay and Sundwall, David N., Department of Health and Human Services Report of the Task Force on Medical Liability and Malpractice, pg 5, August 1987.

[12] Id. at page 5.

justice system. A poll of 2,130 Americans conducted in March of 1987 by Lewis Harris & Associates, Inc. revealed that nearly all those sampled desired some change in the civil justice system, including decreasing the cost of lawsuits, prompt hearing of cases and a reduction in excessive damage awards.[13]

The United States General Accounting Office surveyed various groups in Florida regarding their expectations as to medical malpractice insurance problems in the future. The Florida Medical Association, The Florida Hospital Association, The Florida Defense Lawyers Association, and the Florida Department of Insurance expressed the belief that the availability of excess liability insurance would become a major problem for physicians within the next five years. The availability of tail coverage was also expected to be a major problem in the next five years by The Florida Medical Association, The Florida Hospital Association, and The Florida Defense Lawyers Association. These same groups expressed concern over the availability of tail coverage for hospitals, which was expected to become a major problem.

The Insurance Department was of the opinion that tail coverage would only remain available where a hospital remained with its original insurer. Where an insured changes insurers, tail coverage is generally unobtainable. Further, insurers themselves were expected to encounter difficultly in finding sources of

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[13] Id. at page 6.

reinsurance.[14]

In the GAO study, the FMA, FHA, and FDLA expressed the opinion that malpractice awards and settlements were excessive in relation to the actual economic costs arising from malpractice - related injuries, that the amounts which were being paid for pain and suffering were excessive, and that there were too many malpractice awards and settlements exceeding $1,000,000. The report quoted an official from the Physicians Protective Trust Fund, who noted that awards for pain and suffering in the State of Florida average 53% of the total award, whereas the national average is 17%.[15]

The Florida Medical Association, The Florida Hospital Association, The Academy of Florida Trial Lawyers and The Florida Defense Lawyers Association all expressed the belief that the length of time which is required to resolve claims is both a current and a future problem. An official of The Academy of Trial Lawyers was quoted as commenting that Florida's 1985 Medical Malpractice Act "makes great efforts to find ways to encourage the parties to come together early in the history of the claim and seek a resolution of that claim before it becomes an expensive lawsuit."[16]

The cost of litigating medical malpractice actions was also

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[14] United States General Accounting Office Report to Congressional Requesters, Medical Malpractice Case Study on Florida, page 29-30, December 1986.

[15] Id. at page 32.

[16] Id. at pages 32-33.

perceived as a current and future problem. The Florida Hospital Association, The Florida Medical Association, and The Academy of Florida Trial Lawyers perceived major current and future problems regarding the expense of defense and plaintiff's costs, as well as excessive legal expenses and attorneys fees.[17]

MEDICAL MALPRACTICE: THE SOLUTION

During the mid-1970's, all but one state enacted changes in various state tort laws which were aimed at reducing claim frequency, claim severity, and the time and expense of resolving claims. Among the statutory changes or efforts were measures which: 1) shortened statutes of limitations; 2) limited damage awards; 3) reduced the number of court trials by the use of pretrial screening panels; 4) created alternatives to jury trials, such as arbitration; 5) took into account compensation from sources other than the defendant (collateral sources); 6) restricted contingent fees; or 7) provided for the periodic payment of malpractice awards. The movement to modify state tort law has continued to date.

Studies have been conducted in order to evaluate the effects of those tort law changes which were enacted in the mid-1970's. In a 1982 Rand Corporation study, Patricia Danzon analyzed claims which had been filed and closed in the period 1975 through 1978. She found mixed results from those tort law changes which had been enacted in response to the 1975 malpractice insurance availability

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[17] Id. at pages 33-34.

problem.[18] The only changes which were found to have had any measurable impact were those statuted which had limited awards and which had provided a mandatory offset for collateral benefits. The measures significantly slowed the growth in claim severity in the states which had enacted such changes.[19]

In 1986, Danzon updated the 1982 Rand study and reported on the nationwide claims experience from 1975 through 1984.[20] Danzon found that a reduction in the statute of limitations for adults to one year reduced claim frequency by 8% and the frequency of paid claims by 6% to 7%. Collateral offsets reduced claim frequency by 14%. The use of pretrial screening panels was found to have no effect on claim frequency, and there was actually an increase in claim frequency in those states which had mandated arbitration panels.

Tort changes which limited all or part of the malpractice plaintiff's award reduced claim severity by 23%. Collateral source offsets were found to have reduced claim severity by between 11% and 18%. Those states which had enacted binding voluntary arbitration had experienced a 20% decrease in claim severity. However, screening panels were not found to consistently reduce

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[18] Danzon, Patricia M. and L.A. Lillard, The Resolution of Medical Malpractice Claims: Research Results and Policy Implications, The Rand Corporation, R-2793-ICJ, 1982.

[19] However, the enacted changes did not explain the lull in claim frequency between 1975 and 1978.

2 Danzon, P., The Frequency and Severity of Medical Malpractice Claims: New Evidence, Vol. 49:NO2 Law and Contemporary Problems 57 (Spring 1986).

claim severity.

California was among the first states to enact a statutory limitation upon those non-economic damages which would be recoverable in medical malpractice actions. In 1975, California enacted comprehensive medical malpractice legislation which included a $250,000 limit on awards for non-economic damages. This limitation was determined to be constitutional by the California Supreme Court in **FEIN V. PERMANENTE MEDICAL GROUP**, 695 P.2d 665 (Cal. 1985). The United States Supreme Court has refused on multiple occasions to review cases challenging the constitutionality of the cap.

While the cap on damages and other legislative reforms have not completely halted the increase in medical malpractice insurance premiums in California, the impact is obvious when the increase in insurance premiums in California is contrasted with the increase in premiums in Florida during the same time frame. For example, physicians engaged in general practice and performing some minor surgery between 1980 and 1986 experienced an increase in medical malpractice premiums of 173% in California and 199% in Florida. During the same time frame, California physicians practicing internal medicine experienced an increase in premiums of 61%, while their Florida counterparts experienced an increase of 199%. In general surgery, the premiums for California physicians increased by 88% between 1980 and 1986 whereas those for Florida physicians

increased by 256%.[21]

While these figures are certainly dramatic, the disparity is reflected most obviously when one compares premiums for physicians specializing in obstetrics and gynecology between 1980 and 1986. In California, these physicians experienced an increase in premiums of 140%. Physicians practicing in the same specialty in Florida during the same time frame experienced an increase in premiums of 395%. What makes the difference in these premiums even more notable is the fact that the figures which were utilized for Florida were not based on rates that were applicable to the entire state; Dade and Broward Counties were excluded. Yet Dade and Broward Counties have experienced a much higher percentage increase in medical malpractice insurance rates than any other areas of the state. In fact, as was noted earlier, the rates in Dade and Broward Counties for any given specialty are typically twice as high as the rates for that same specialty in virtually any other area of the state. [22]

In addition to experiencing higher percentage rates of increase, as of January 1, 1986, Florida physicians were also subject to higher malpractice insurance rates than physicians in

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[21] United States General Accounting Office Report to Congressional Requesters, Medical Malpractice Case Study on California, page 12, December 1986; United States General Accounting Office Report to Congressional Requesters, Medical Malpractice Case Study on Florida, pate 18, December 1986.

[22] This finding was set forth by the Academic Task Force for review of the insurance and torts' system in its final report, at paragraph 10 of its findings.

California. The differences range from several hundred dollars for coverage for general practice physicians to tens of thousands of dollars. For example, neurosurgeons in Florida, pay $75,367 for coverage, where neurosurgeons in California pay $37,984.[23]

While the measures which were enacted in California -- including the cap on non-economic damages in medical malpractice cases -- have had a demonstrable effect on insurance premium rates, the cap has **not** resulted in an inequitable reduction in recoveries by injured plaintiffs. In other words, contrary to the fears which had been expressed by opponents of this measure, the enactment of the cap in California has not prevented an actual increase in the average claim which is paid by physicians. For example, between 1980 and 1984, there was an 87% increase in the average paid claim for physicians in California. The increase in the State of Florida for the same time frame was 75%. Thus, while insurers, physicians and patients in California are experiencing the benefits of the reduction in premiums which has resulted from the cap on non-economic damages, injured patients are still experiencing an increase in the average amount of recoveries against physicians.[24]

THE FLORIDA SOLUTION

On August 17, 1987 the Academic Task Force for Review of the Insurance and Torts Systems presented its preliminary fact-finding report on medical malpractice. The major findings of the Academic

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[23] Id. at page 13 (Cal.), page 18, (Fla.).

[24] Id. at page 15 (Cal.); Id. at page 22 (Fla.).

Task Force possess such relevance to the issues before this Court that they must be set forth in their entirety.

> 1. Affordability. The cost of medical malpractice liability insurance has increased dramatically during the last eight years with the largest share of this increase during the past two years. The extent of the problem of affordability varies greatly among medical specialties and between South Florida physicians and those in the remainder of the state.
>
> 2. Availability. At the current time, the availability of liability insurance for physicians does not pose a serious problem in Florida.
>
> 3. Cause of Price Increases. The primary cause of increased malpractice premiums has been the substantial increase in loss payments to claimants.
>
> 4. Profitability. During the period of 1977 through 1985, medical malpractice insurers have been slightly more profitable than the property-liability insurance industry as a whole. For the same time period, the profitability of the property-liability insurance industry was slightly less than that of American industrial and financial corporations. The profitability of insurance companies varies dramatically from year to year.
>
> 5. Market Structure. The medical malpractice market in Florida is highly concentrated, but so far this market concentration does not appear to have contributed to the problem of affordability of liability insurance.
>
> 6. Impact of Underwriting Cycle. The rate of price increases during the period 1983 through 1987 was disproportionately dramatic because of the insurance underwriting cycle. Over the course of an entire underwriting cycle, however, it is the increase in paid claims which causes higher premiums.
>
> 7. Risk Classes. The practice of dividing Florida physicians into risk classes by

specialty, and into two different geographic areas, for rating and pricing purposes contributes to current affordability problems for high-risk specialty practitioners, particularly those in South Florida.

8. Frequency of Claims Payments. The frequency of claims payments in Florida has increased 4.6% per year since 1975, but only 1.8% when adjusted for the increase in population.

9. Amounts of Claims Payments. The average cost of paid claims was increased at a compound rate of 14.8% per year since 1975. The increase in the size of loss payments is a substantially more important factor in the overall increase in paid claims than is the increasing frequency of paid claims.

10. Geographic Variations and Claims Payments. The frequency of paid claims per capita is twice as great in Dade and Broward Counties as in the rest of the state. The severity of claims also is greater in South Florida than in the remainder of the state, but the difference is not nearly so dramatic.

11. Variations among Medical Specialties. There are considerable variations both in frequency and severity of paid claims among medical specialties. Obstetrics and Gynecology account for 13.6% of all paid claims while specialties such as endocrinology, psychiatry and thoracic surgery each account for less than 2% of all paid claims. The largest average claims payments (1986) are in pediatrics, neurosurgery and thoracic surgery, with the average claim payment for pediatrics exceeding $350,000.

12. Multiple Claims. Nearly one half of the amount of paid claims during the period 1975-1986 was accounted for by physicians with two or more paid claims. Physicians with two or more paid claims during this eleven year period are not necessarily "bad doctors."

13. Changes in the Law. During the past 30 years, there has been a national trend toward expanded legal liability for medical malpractice. The research conducted for this

report does not reveal any major pro-plaintiff development in medical liability rules of law in Florida during the past two decades, but overall changes in the environment of the legal system appear to benefit plaintiffs.

14. Attorney's Fees and Other Litigation Costs. Attorney's fees and other litigation costs represent approximately 40% of the total incurred costs of insurance carriers, with claimants receiving 43.1% of the total incurred costs. The total amount of attorney's fees is divided approximately equally between plaintiff's attorneys and defense attorneys. During the past eleven years, the average legal costs of defending a malpractice claim has increased at an annual compound rate of 17%.

15. Possible Explanations for Increased Claims Frequency. Increased claims frequency probability results both from a greater number of injuries occurring as a result of medical maloccurrences and from a much greater likelihood that injured plaintiffs will file claims. Any increase in the aggregate number of medical injuries in Florida likely results from the greater number of contacts between physicians and patients as the number of Florida residents and physicians both increase and does not imply any increase in the frequency of medical maloccurrences per physician.

16. Professional Regulation and Medical Care. The Department of Professional Regulation disciplines a relatively low percentage of physicians with multiple paid claims.

The Task Force's report identifying the problems in the field of medical malpractice and analyzing their potential causes was followed shortly thereafter by the Task Force's Medical Malpractice Recommendations Report, issued November 5, 1987.

Among the various recommendations considered by the Task Force was a cap on the recovery of non-economic damages. The Task Force

recommended adoption of the "Prompt Resolution of Meritorious Medical Negligence Claims Plan," which would include the following provisions.

> a. Claims against physicians and denials of such claims must be preceded by reasonable investigation and accompanied by an expert's written opinion;
>
> b. Incentives should be provided for claimants and health care providers to submit claims to a binding arbitration proceeding to determine the amount of economic damages, non-economic benefits not to exceed $250,000 and reasonable attorney's fees.
>
> c. If the defendant refuses to submit the claim to arbitration, the plaintiff should maintain all existing rights to a jury trial.
>
> d. If the plaintiff refuses to submit a claim to arbitration, plaintiff's non-economic damages at trial should be limited to $350,000.

The Task Force specifically recommended that the legislature forego any plan which would have eliminated recovery of all non-economic damages, and also recommended rejection of a plan which would have limited recovery of non-economic damages to $100,000 in all tort cases, including claims for medical negligence.

The Task Force acknowledged that its proposed cap on non-economic damages is different from the absolute cap that was held to be unconstitutional in **SMITH V. DEPARTMENT OF INSURANCE**, 507 So.2d 1080 (Fla. 1987). First, the Task Force asserted that the conditional limitation would only apply to medical malpractice claims, where a special need had been established by specific research findings. Secondly, the limitation would be part of a

balanced plan to facilitate the resolution of meritorious claims, thereby providing commensurate benefits in exchange for the reduced economic remedy. The $250,000 conditional limitation which was proposed by the Task Force would apply only with the consent of both parties. The $350,000 limitation on non-economic damages would apply only if the plaintiff had refused an opportunity to receive expedited payments of limited damages without having to prove fault.

The recommendations of the Task Force were incorporated into law by the Florida legislature effective February 8, 1988. Specifically, §766.207(7)(b) provides "non-economic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50% reduction in his capacity to enjoy life would warrant an award of not more than $125,000 in non-economic damages." This limitation was imposed within the context of §766.207, which provides a procedure for voluntary binding arbitration of medical negligence claims.

If the parties fail to offer or to accept voluntary binding arbitration, the provisions of §766.209 apply. Section 4(a) provides that if the claimant rejects the defendant's offer to enter voluntary binding arbitration, "the damages awardable at trial shall be limited to net economic damages, plus non-economic damages not to exceed $350,000 per incident." The legislature expressly found that such conditional limits on non-economic

damages would be "warranted by the claimant's refusal to accept arbitration, and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured because of medical negligence." Contrary to the conclusions of the trial court in this case and the decision of the Third District Court of Appeal, the conditional limitations which were afforded by Sections 766.207 and 766.209, Florida Statutes, are constitutional.

This Court's most recent analysis of limitations upon damages was enunciated in **SMITH V. DEPARTMENT OF INSURANCE**, 507 So.2d 1080 (Fla. 1987). In **SMITH**, this Court addressed the constitutionality of a statute which had placed a $450,000 limitation on damages for non-economic losses, which were defined as those damages which are designed "to compensate for pain and suffering, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other non-pecuniary damages." The cap was found to be contrary to Article I, §21 of the Florida Constitution, which provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."

In analyzing the constitutionality of the cap, the **SMITH** Court relied upon the standard which had been enunciated in **KLUGER V. WHITE**, 281 So.2d 1 (Fla. 1973). Specifically, the Court stated that restrictions upon the maximum amount of recoverable non-economic damages are not permissible unless this type of legislation provides a reasonable alternative remedy or

commensurate benefit or there is a legislative showing of an overpowering public necessity for the abolition of the right to recover damages, and no alternative method for meeting that public necessity. The **SMITH** Court found that the $450,000 cap failed to satisfy either of these exceptions. Contrary to the finding by the Third District Court of Appeal in this matter, it is respectfully submitted that the subject legislation meets both of the KLUGER exceptions.

First, the arbitration provisions of the Comprehensive Act provides a reasonable alternative remedy or commensurate benefit. The arbitration scheme which is contemplated by §766.207 provides for the prompt resolution of claims. At the same time that a claimant files his notice of intent to initiate litigation, he may accompany it with a request for arbitration of damages. Similarly, after the defendant has been served with a notice, he also has the right to request arbitration.

The defendant who is served with a request for arbitration along with a notice of intent can either agree to the arbitration immediately or, at the latest, upon the expiration of the presuit screening period. Thus, while a plaintiff may not reach the damage phase of his claim through the regular litigation process until after one to three years of active litigation, the plaintiff who agrees to arbitration may proceed with the damage phase of his case in as little as 90 days. The resultant reduction in the time and effort which is necessary to resolve a claim is thus also accompanied by a commensurate reduction in the costs of

litigation.[25]

The limitation which the Court considered in **SMITH** afforded no such commensurate benefit. The cap was not accompanied by arbitration proceedings which would have enabled a party to recover its damages without having to establish liability, or without having to go through the time and expense which would ordinarily be involved in proceeding through the normal litigation processes. Thus, the earlier statute effectively took something away from prospective plaintiffs, i.e., the right to receive an award of non-economic damages in excess of $450,000, while offering nothing in exchange. The same cannot be said of §766.207, Florida Statutes. While something is being taken away, a commensurate benefit is also being offered.

Contrary to the apparent findings by the Third District Court of Appeal, it does appear as though the legislature was able to discern an overpowering public necessity for the abolition of the right to recover unlimited non-economic damages, with no alternative method of meeting that public necessity. The Third District's opinion refers briefly to the Academic Task Force findings, in noting the "functional unavailability of insurance for some physicians...." However, whereas the Third District

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[25] While the Third District notes in its opinion that the "statutory scheme does provide certain benefits to claimants," the Court did not even discuss the fact that utilization of the arbitration procedure may potentially allow a Plaintiff to proceed with the damage phase of his case much more quickly than does the traditional tort system.

thereafter concluded that this "functional unavailability did not rise to the level of a danger of inability to obtain medical care," this finding by the Court of Appeal appears to flatly contradict the Academic Task Force findings which were incorporated by the legislature. Among other things, as was noted earlier, studies that were reviewed by the Academic Task Force specifically found that tale coverage had virtually become unavailable for Hospitals that did not wish to remain with the same insurance carrier.

The need for medical malpractice reforms is set forth in detail in the report of the Academic Task Force. The particular statistics which are applicable to the State of Florida have also been set forth in detail earlier in this brief and while the Third District apparently concluded that there was no realistic suggestion that a limitation on the recovery of non-economic damages would have any meaningful impact upon the discerned crisis in the provision of medical care in this state, the findings that were related above also flatly contradict the conclusions of the Court of Appeal in that regard. As was noted early, both the Rand study and the experience in California suggest that non-economic damages can in fact have a meaningful impact upon what had previously been an unchecked increase in medical malpractice insurance premiums in that state. As has also been discussed, limitations on the recovery of non-economic damages are among the few measures which have had positive results in other jurisdictions.

Once again, these legislative provisions may be contrasted

with those which were reviewed by this Court in **SMITH**. The cap which the **SMITH** Court declared unconstitutional was not directed solely toward medical malpractice claims. Rather, the $450,000 cap on non-economic damages applied to all tort actions, across the board. Thus, while that cap would have had an impact upon those areas of tort litigation such as medical malpractice where there was a crisis situation, the cap also applied to other areas of tort litigation where no such crisis had been demonstrated. In other words, litigation arising out of a slip and fall in a restaurant would have been subject to the same $450,000 cap as medical malpractice actions. And while there certainly is a need for the cap with respect to medical malpractice actions, there could not conceivably have been a showing of overwhelming public necessity for a cap on non-economic damages in the average slip and fall action. By limiting the cap in this instance to medical malpractice actions, the legislature has responded to a specific need.

This Court has previously acknowledged the existence of a medical malpractice crisis. This Court has also acknowledged that some measures are necessary to curb the problem and has specifically found that one such measure -- the enactment of a medical malpractice statute of repose -- was a necessary limiting measure.

In **CARR V. BROWARD COUNTY**, 541 So.2d 92 (Fla. 1989) this Court found that the Fourth District Court of Appeal had properly applied the **KLUGER** principles in determining the existence of an overriding

public necessity, justifying the legislature's enactment of §95.11(4)(b), the statute of repose. Accordingly, the Court found that the statute had been constitutionally enacted.

In its analysis, the Fourth District Court of Appeal quoted from the legislative preamble of the Medical Malpractice Reform Act of 1975, which included the enactment of the medical malpractice statute of repose.

> 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, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> 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, ...
>
> **CARR V. BROWARD COUNTY**, 505 So.2d 568, 575 (Fla. 4th DCA 1987).

Unfortunately, notwithstanding the enactment of the statute of repose, many of the same problems which were noted by the legislature in 1975 still remained in 1987, when the cap was enacted.

The preamble to Chapter 88-1, which enacted the provisions of §766.207 found as follows:

> 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 damages 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 non-economic losses which may be awarded in certain civil actions, recognizing such non-economic losses should be fairly compensated and that the interests of the injured parties should 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 tort feasor 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 finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which could 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, ...

Just as this Court agreed with the legislature that there was a public necessity in 1975 for the enactment of reforms, including a statute of repose, the Court must undoubtedly agree with the legislature that a need for further measures existed in 1988, including the cap on non-economic damages.

It is important to keep in mind that these statutory changes have not in any way impinged upon an injured person's right to recover purely economic damages, such as past and future medical expenses, lost wages, or the loss of earning capacity. It is only those elements of damages which cannot be established through hard evidence (and which are not necessary to an individual's continued survival) which have been limited.

It is equally important to recognize that the legislature has simply limited the recovery of non-economic damages in certain instances; this category of damages has not been totally eliminated. Nor is the existing limitation unreasonably low.

This Court has upheld a statute which created a discovery privilege based upon the Court's determination that the legislature had properly found that the potential detriment which might be caused by the discovery privilege was outweighed by the potential for health care cost containment. **HOLLY V. AULD**, 450 So.2d 217 (Fla. 1984). That statute, Section 768.40(4), Florida Statutes, bars discovery of the proceedings and records of medical review committees in any civil action.

In examining the constitutionality of the statute, the **HOLLY**

Court observed that section 768.40(4) was motivated by the legislature's desire to control the escalating cost of health care in this State. The legislature had determined that it was appropriate to encourage a degree of self-regulation by the medical profession through peer review and evaluation. However, the legislature also recognized that meaningful peer review would not be possible without a limited guarantee of confidentiality for the information and opinions which might be elicited from physicians with regard to the competence of their colleagues.

The Holly Court acknowledged that the discovery privilege which was created by the statute would impinge upon the right of some civil litigants to discover information which might be critical to a particular case. The Court nevertheless noted that it was the province of the legislature (rather than the courts) to determine whether the potential detriment which might be caused by the statute was outweighed by the perceived benefits.

The same statute was more recently considered by this Court in **FELDMAN V. GLUCROFT**, 522 So.2d 798 (Fla. 1988). In **FELDMAN**, the Court had to consider whether §768.40(4) totally abolished any potential defamation claim arising from proceedings before a medical review committee and, if so, whether the statute was constitutional.

The Court concluded that the statute did not totally abolish the cause of action for defamation; rather, it simply added a restrictive element to the cause of action. Accordingly, the Court determined that it need not examine the constitutionality of the

statute.

In his concurring opinion, Judge Grimes agreed with the majority position, despite the fact that the statute had the practical effect of barring defamation actions against medical review committees. Judge Grimes indicated that he questioned the applicability of the "access to the courts" provision of the Florida Constitution, Article 1, §21, as no cause of action was technically being abolished. At most, the statute confers an absolute privilege against liability for certain persons under certain circumstances. Nevertheless, even if the statute could be construed as abolishing a potential cause of action for defamation under certain circumstances, Judge Grimes was of the opinion that the statute could be sustained under **KLUGER V. WHITE**, 281 So.2d 1 (Fla. 1973), given the legislative determination of overwhelming public necessity. Here, the District Court's opinion is predicated solely upon and "access to the Courts" analysis. Yet here, as in **FELDMAN**, there has been no abolition of an existing cause of action. To the contrary, the statute simply restricts one aspect of a claimant's potential damage claim. Therefore, if Section 768.40(4) withstood constitutional muster in **FELDMAN**, the less restrictive statutes in question must certainly be deemed constitutional. The overwhelming public necessity which was discerned by Judge Grimes in 1988 provides ample justification for both the enactment of this legislative plan and a later finding of constitutionality by this Court.

Using a similar analysis, this Court has also upheld

constitutional challenges to the Florida Automobile Reparations Reform Act (the "no fault" insurance law), Section 627.730, et. seq., Florida Statutes (1979). See **CHAPMAN V. DILLION**, 415 So.2d 12 (Fla. 1982). The plaintiff in **CHAPMAN** had challenged the constitutionality of §627.737, asserting that it denied access to the courts, due process, and equal protection. The plaintiff had not been allowed to maintain his suit for pain and suffering as he had not met the threshold requirements of the Statute, to the extent that his injuries were not permanent.

The limitation which was imposed by the no fault statute is similar in some respects to the restrictions which are created by §766.207, i.e., the plaintiff is allowed to recover his demonstrated economic damages; the only limitation is placed upon claims for non-economic damages.

In rejecting the challenge to the constitutionality of the §627.737, the Court in **CHAPMAN** reaffirmed its earlier holding in **LASKY V. STATE FARM INSURANCE COMPANY**, 296 So.2d 9 (Fla. 1974).

> Regardless of the actual amount of recovery, an injured person will receive prompt payment for his major and salient economic losses even where he himself is at fault. Thus, the provisions of §627.737 still provide a reasonable alternative to the traditional action in tort and therefore do not violate the right of access to courts guaranteed by Article 1, §21 of Florida Constitution. 415 So.2d at 17.

The Court also rejected the other constitutional challenges to the statute which were based upon due process and equal protection arguments.

In its opinion, the Third District rejected comparisons to **CHAPMAN** and **LASKY.** Simply put, the Third District did not believe that the statutes which are under review provided the same "benefits" which are provided by the Workers' Compensation Statutes and the Automobile No-Fault Laws. In that regard, it would appear that the Third District has neglected to consider many of the salutory benefits of this comprehensive statutory scheme. In fact, as was noted earlier, the Third District did not even address the fact that a claimant in a medical malpractice matter who agrees to arbitration or who otherwise settles his case during the mandatory pre-suit screening period can look forward to much more prompt payment of necessary medical benefits than a claimant who is relegated to the traditional torts system. In failing to consider that possibility, the Third District also clearly failed to comprehend the possibility that this statutory scheme can in fact benefit individual claimants as opposed to the public at large. It is therefore respectfully submitted that the Third District's determination that §766.207 and §766.209, Florida Statutes violate Article I, Section 21 of the Florida Constitution should be reversed, and that this Court should otherwise rule that both statutes are in fact constitutional.

As was noted earlier, in addition to finding that the subject statutes were unconstitutional because they denied a claimants' right of access to the courts, the trial court in this matter also found that the subject statutes violated the Plaintiffs' right to equal protection. In the event that this Court agrees that the

Third District's constitutional analysis must fail, then it would be appropriate to consider the balance of the trial court's findings, so that there is no remaining question as to the constitutionality of both statutes.

The test to be applied in determining whether a statute denies a party equal protection was set forth by this Court in **PINILLOS V. CEDARS OF LEBANON HOSPITAL, CORP.**, 403 So.2d 365 (Fla. 1981).

> Since no suspect class or fundamental right expressly or impliedly protected by the constitution is implicated by §768.50, we find that the rational basis test rather than the strict scrutiny test should be employed in evaluating the statute against the plaintiffs' equal protection challenge. The rational basis test requires that a statute bear a reasonable relationship to a legitimate state interest, and the burden is on the challenger to prove that a statute does not rest on any reasonable basis or that it is arbitrary. **IN RE: ESTATE OF GREENBERG**, 390 So.2d 40 (Fla. 1980) 403 So.2d at 367.

The issue before the Court was whether §768.50, Florida Statutes, violated the equal protection clauses of the Florida and federal Constitutions. This statute required that judgments in medical malpractice actions be reduced by collateral source payments. The plaintiffs argued that the distinction which the statute draws between medical practitioners and other members of the public was arbitrary and unreasonable.

The state interests which the legislature sought to protect in enacting §768.50 and the balance of the Medical Malpractice Reform Act were set forth in the preamble to the statute. The legislature had determined that there was a professional liability

insurance crisis in Florida, as premiums were rising at an exorbitant rate, insurance companies were withdrawing from the market, and premium costs were being passed on to the consuming public through higher costs for health care services.

The legislature also observed that as a result of the insurance crisis, physicians were downgrading their specialties to obtain relief from oppressive insurance rates, and that the number of available physicians in Florida was decreasing. The Supreme Court concluded that the classification which was created by §768.50 bore a reasonable relationship to a legitimate state interest; i.e., protecting the public health by ensuring the availability of adequate medical care for the citizens of this state.

The concerns which were expressed by the legislature when it enacted §768.50 are virtually identical to those which were noted by the legislature in enacting §766.207. Thus, just as §768.50 bore a reasonable relationship to a legitimate state interest which had been expressed by the legislature, §766.207 also bears a reasonable relationship to an existing state interest.

In declaring that §766.207 violated Plaintiffs' rights to equal protection, the trial court concluded that the statute created two classifications of medical malpractice victims, those with insignificant injuries, who are compensated in full, and those with serious injuries who are deprived of full compensation. The court concluded that this classification was entirely arbitrary and contrary to the fundamental notion of equal justice under the law.

As will be explained, the court erred in reaching this conclusion.

This Court rejected attacks on the constitutionality of another medical malpractice statute in **FLORIDA PATIENTS COMPENSATION FUND V. VON STETINA**, 474 So.2d 783 (Fla. 1985). In **VON STETINA**, the Court considered an attack on Sections 768.51 and 768.54, Florida Statutes, which determined the method of payment of judgments against the Florida Patients Compensation Fund. The Fourth District Court of Appeal had declared these statutes unconstitutional. **FLORIDA MEDICAL CENTER, INC. V. VON STETINA**, 436 So.2d 1022 (Fla. 4th DCA 1983).

The Fourth District Court had quoted a trial order with approval. In that order, the trial court found that the plaintiffs' rights to equal protection were violated in that the statute created two classifications of medical malpractice victims - those with insignificant injuries who would be compensated in full, and those with substantial and life-threatening injuries, who would not be fully compensated. In reviewing the District Court's decision, this Court found that the legislation at issue did not implicate a fundamental right or suspect classification. The Court concluded that as long as the legislation was rationally related to a legitimate state interest, the Court could not substitute its judgment for that of the legislature with respect to the need for -- or wisdom of -- a legislative enactment.

In finding the statutes constitutional, the Court stated "we conclude that the legislature could reasonably find that the increase in costs of medical malpractice insurance posed a threat

to the continued availability and adequacy of health care services, and that the public health could be protected by the enactment of the subject measures which were designed to reform the medical malpractice insurance system." 474 So.2d at 789.

Just as this Court rejected the trial court's conclusion that the statutes which were reviewed in **VON STETINA** improperly created two classifications of medical malpractice victims - those with significant injuries who are compensated in full and those with substantial and life-threatening injuries who are not -- this Court should reject the trial court's identical conclusion in this instance. The instant litigation in no way impinges upon the rights of an injured person with substantial and life-threatening injuries to recover all of those funds which are necessary to provide for that individual's care and treatment, or to fulfill their other economic needs.

The only limitation which is imposed by Section 766.207 is a limitation upon the amount of non-economic damages which may be recovered. It does not necessarily follow that the amount of non-economic damages which a person is entitled to recover increases with the severity of the physical injury that has been sustained. An individual's entitlement to non-economic damages for pain and suffering and like elements is more closely correlated with the success of the individual in accepting that injury and adapting to it than it is to the severity of the injury.

The statute does not arbitrarily create two different classes; nor does it draw an entirely arbitrary line between recovery and

non-recovery. To the extent that the statute does impose limitations, those limitations are rationally related to a legitimate state interest. As such, the statute should not be found to violate the equal protection clause of the state or federal constitutions.

Similar caps have been found constitutional in other states. The Supreme Court of California found that a $250,000 cap on non-economic damages in medical malpractice cases was constitutional in its decision of **FEIN V. PERMANENTE MEDICAL GROUP**, 695 P.2d 665 (Cal. 1985). That cap was challenged in part based upon a due process argument, i.e., the provision limited the potential recovery for medical malpractice claimants without providing an adequate quid pro quo.

The Court in **FEIN** indicated that a quid pro quo was not required, so long as the statutory cap was rationally related to a legitimate state interest. The Court noted that the legislature had specifically found that the rising cost of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving some injured patients with the prospect of uncollectible judgments.

The **FEIN** Court observed that while the legislature had imposed a limitation upon awards of non-economic damages, no such limitation had been placed upon economic damages.

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

The Court further observed that the conditions which led to the development of the concept of damages awarded for pain and suffering no longer exist.

> Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. [citations omitted.] They become increasingly anomalous as emphasis shifts in a mechanized society from adhoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization. [citations omitted.] 695 P.2d at 681, footnote 16, quoting Justice Traynor in **SEFFERT V. LOS ANGELES TRANSIT LINES** (1961) 56 Cal.2d 498, 511, 15 Cal.Rep. 161, 364 P.2d 337.

The same reasoning applies regardless of whether such non-economic damages are awarded pursuant to California law or Florida law. [26]

Maryland has enacted a statute which requires that a trial judge in a personal injury action reduce any jury verdict for any non-economic damages that exceed $350,000. Md. Cts. & Jud. Proc.

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[26] It should also be noted that California's experience since enactment of its cap has been most positive, and otherwise gives credence to the findings of the Academic Task Force, i.e., that a cap on non-economic damages is one of the few measures which has proven to be successful in lowering what had previously been out-of-control premium rates for physicians and hospitals.

Code Ann. §11-108(b). Non-economic damages are defined in the statute to include pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other non-pecuniary injury. This statute has recently been found constitutional by the Court of Special Appeals of Maryland. **EDMONDS V. MURPHY**, 83 Md. App. 133, 573 A.2d 853 (Md. 1990).

In finding that the Maryland statute does not violate a plaintiff's right to equal protection, the Court in **EDMONDS** agreed with a federal court of appeals that "a limitation on a common law measure of recovery does not violate a fundamental right or create a suspect classification," quoting **BOYD V. BULALA**, 877 F.2d 1191 (4th Cir. 1989). The court consequently determined that a rational basis test should be applied.

The **EDMONDS** court thereafter explained that Maryland's cap on damages had been enacted as a result of a recommendation which was made by the Governor's Task Force to Study Liability Insurance. This group had been established to develop recommendations to help ensure the availability of adequate liability insurance coverage at an affordable cost.

The cap on non-economic damages was specifically recommended as a means of helping to maintain awards within realistic limits, thus reducing the exposure of defendants to unlimited damages for pain and suffering. Arguably, this would then lead to more settlements, and also enable insurance carriers to set more accurate rates as the size of judgments became more predictable. The cap was perceived as a reasonable method for helping to reduce

incidents of unrealistically high jury awards which would simultaneously protect rights of injured parties to recover the full amount of economic losses, including all lost wages and medical expenses.

Based upon the legislative history, the Maryland Special Court of Appeals had little difficulty concluding that the classification which was created by the statute, i.e., "plaintiffs who have been awarded non-economic damages greater than $350,000 and those who have been awarded non-economic damages less than $350,000" bore a fair and substantial relation to the object of the legislation, which was to increase the availability and affordability of liability insurance. The court accordingly held the statute to be constitutional in all respects.

Some states have gone even further than California and Florida, and have imposed statutory caps not only upon the amount of non-economic damages which may be recovered in a medical malpractice action, but also upon the recovery of economic damages as well. For example, Virginia has enacted legislation which provides that the total amount recoverable for any injury as a result of malpractice shall not exceed $750,000. This limitation was enacted as a result of a study which was performed by the General Assembly of Virginia, which found that the increase in medical malpractice claims was directly affecting the premium cost for and the availability of medical malpractice insurance. The General Assembly further found that without such insurance, health care providers could not be expected to continue providing medical

care for the Commonwealth's citizens.

This limitation was held to be constitutional under both the Federal and Virginia constitutions in **ETHERIDGE V. MEDICAL CENTER HOSPITALS**, 237 VA. 87, 376 S.E.2d 525 (VA. 1989). The Court found that the plaintiff had not been denied reasonable notice and a meaningful opportunity to be heard. In addition to concluding that the plaintiff had not been denied procedural due process, the **ETHERIDGE** Court also found that the plaintiff had not been denied substantive due process. In reaching this conclusion, the Court noted that there is no fundamental right to a particular remedy or a full recovery in tort.

In summary, the majority of courts, both Federal and State, which have examined the constitutionality of caps on the recovery of non-economic damages, particularly with respect to medical malpractice claims, have found those statutes to be constitutional. Those courts have found that this type of legislation provides a reasonable means of accomplishing an important goal, to afford easily accessible and reasonable medical treatment to its citizens. As has been demonstrated by the experience in the state of Florida, this type of measure does in fact work. §766.207 and §766.209 should be found to be constitutional.

CONCLUSION

The argument against a cap on non-economic damages must necessarily be based upon constitutionally protected rights. Nevertheless, however impressive these arguments may be and however well they may be expressed in terms of constitutional verbiage, one

simple fact rings true -- there is no constitutionally guaranteed right to the undoubtedly arbitrary amount of money that any given jury may award on any given day solely for the pain and suffering of any particular plaintiff. Any attorney who has tried more than a few cases to a jury must readily concede that these awards can vary dramatically from day to day and from jury to jury. Yet numerous panels of scholars have concluded that it is this very type of award which has perverted the system, and which has otherwise contributed demonstrably to the current insurance crisis and, ultimately, to the attendant crisis in health care which has developed in this state.

Stripped of their constitutional veneer, it is clear that the arguments which have been advanced in opposition to a cap on non-economic damages are principally emotional, i.e., we should not invade the province of the jury to award whatever the jury deems appropriate to compensate someone who has been injured for their pain and suffering. It is equally clear, however, that there is no fundamental, constitutional obligation to allow a jury the unfettered right to award virtually any amount of non-economic damages which it may deem appropriate in any particular case. To the contrary, the State of Florida clearly has the paramount right to protect its citizens and to fashion a means of relief for both its injured citizens and its beleaguered physicians and hospitals. So long as the state has done so through a reasonable means, its efforts to redress this discerned crisis in health care should not be disturbed. This Court should hold that §766.207 and §766.209

are in fact constitutional.

Respectfully submitted

By: _____
for ROBERT M. KLEIN, ESQUIRE 230022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mailed this 16th day of August, 1991, to: JOEL D. EATON, ESQUIRE, Podhurst, Orseck, Josefsberg, 25 West Flagler Street, Suite 800, Miami, FL 33130; GROSSMAN & ROTH, P.A., Grand Bay Plaza, Penthouse One, 2665 South Bayshore Drive, Miami, FL 33133; STEVEN E. STARK, ESQUIRE, Fowler, White, Burnett, Courthouse Center, 11th Floor, 175 N.W. First Avenue, Miami, FL 33128-1817; Louis F. Hubener, Asst. Attorney General, Department of Legal Affairs, The Capitol - Suite 1502, Tallahassee, FL 32399-1050; and JAMES E. TRIBBLE, ESQUIRE, Blackwell & Walker, P.A., 2400 AmeriFirst Building, One S.E. Third Avenue, Miami, FL 33131.

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