IN THE SUPREME COURT OF FLORIDA

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

Appellant,

vs. CASE NO. 78,210

PATRICIA ECHARTE,
etc., et al.,

Appellees.
_____/

BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

On Appeal from the District Court of Appeal, Third District

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - SUITE 1502
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-9935

Attorneys for Amicus Curiae
State of Florida

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida Constitution

Florida Statutes

Other Authorities Cited

ISSUE ON APPEAL

Whether the medical malpractice arbitration procedures, as set forth in §§766.207 and 766.209, Florida Statutes, deny claimants access to courts under article I, §21, Florida Constitution, because of the limitations imposed on noneconomic damages.

INTEREST OF AMICUS CURIAE, STATE OF FLORIDA

Rarely has a legislature in this country set out to address an acute social problem in as much depth and with as much objectivity as did the Florida Legislature when confronted with the medical malpractice insurance crisis in 1987-1988. The Academic Task Force, created by the Legislature in 1987, was composed of distinguished professionals who would not have served had they been expected simply to endorse preordained conclusions. The effort made to analyze and come to grips with the medical malpractice insurance crisis facing this state was unprecedented. No words can better describe the Academic Task Force and its work than nonpartisan and comprehensive. Its recommendations, including the limitation on noneconomic damages, were enacted into law by Chapter 88-1, Laws of Florida.

The district court of appeal, in ruling the law denied access to courts, did not even attempt to weigh and assess the benefits afforded a claimant under the arbitration procedures. Nor was the court willing to accept legislative

and Task Force findings that a crisis existed and there was no reasonable alternative to a cap on noneconomic damages. In short, the district court disregarded controlling principles of constitutional construction in striking the statutory scheme, giving neither the Act nor the Legislature the benefit of a reasonable doubt.

Given the seriousness of the crisis and the magnitude of the effort to resolve it, a more dispassionate and principled analysis is owed the people of this state. For that reason, the State of Florida submits this brief.

STATEMENT OF THE CASE AND FACTS

The State of Florida, as amicus curiae, adopts the statement of the case and facts set forth by the appellant, the University of Miami, in its brief. The partial statement that follows is an essential predicate to the argument advanced in this brief.

A. THE STATUTORY SCHEME.

When a presuit investigation suggests reasonable grounds for medical negligence, either party may request the other to submit to voluntary binding arbitration of a medical negligence claim under §766.207. If the offer is accepted, the injured party is entitled to net economic damages (past and future medical expenses plus 80% of wage loss and loss of earning capacity) and noneconomic damages up to $250,000. Noneconomic damages are awardable on a percentage basis

according to the percentage loss in the claimant's capacity to enjoy life. The defendant is also liable for interest on accrued damages; attorney's fees and costs up to 15% of the award; and all costs of arbitration and fees of the arbitrators. Each defendant is also jointly and severally liable for all damages assessed.[1]

Under §766.209, if neither party requests or agrees to voluntary binding arbitration, the claim may proceed to trial, there being no applicable limitations. If the defendant refuses an offer to arbitrate, there are no statutory limitations on the amount of damages (including noneconomic damages) the plaintiff may claim. The plaintiff, on proving negligence, is entitled to attorney's fees up to 25% of the award and prejudgment interest. If the plaintiff refuses an offer to arbitrate, he or she is limited to net economic damages and noneconomic damages up to $350,000. Section 766.209(4)(a) states in part:

> The Legislature expressly finds that such conditional limit on noneconomic damages is 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

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[1] Joint and several liability, in the absence of §766.207(7)(d), would otherwise be limited under §768.81(3)(5) and (6) or §766.112 for most health care defendants. Under those provisions, joint and several liability applies only to economic damages. Under §766.207(7)(h), it applies to all damages.

patients who are injured as a result of medical negligence.

* * * *

The trial court found, inter alia, that §§766.207 and 766.209 were in violation of article 1, §21, Florida Constitution (right of access to courts), and article 1 §22, Florida Constitution (right to jury trial). It also found that the statutes violated the equal protection clauses of the state and federal constitutions by creating two classes of claimants, those who were fully compensated and those who were not. The district court of appeal affirmed, considering only the right of access to courts argument. That is the issue addressed in this brief.

B. BACKGROUND.

1. Legislative Findings

The arbitration provisions and the limitation on noneconomic damages were based on comprehensive studies undertaken by the Academic Task Force for Review of the Insurance and Tort Systems, a group established by the Tort and Insurance Reform Act of 1986. See Ch. 86-160, Laws of Florida (1986). Its membership consisted of three university presidents and two businessmen with distinguished public service backgrounds. See Medical Malpractice Recommendations, Report of Academic Task Force for Review of the Insurance and Tort Systems, Nov. 6, 1987, at 8-9. The Task Force hired a professional staff with expertise in insurance and finance,

actuarial science, law, economics and medicine. The Task Force did not include members of special interest groups.[2]

Based on the work of this group, and as well as its own efforts, the Florida Legislature found, inter alia:

> 1. A financial crisis existed in the medical liability insurance industry;
>
> 2. If the crisis is not abated, many medical professionals would be unable to purchase liability insurance, and many injured persons would therefore be unable to recover for either their economic or noneconomic losses;
>
> 3. That, in general, the cost of medical liability insurance was excessive and injurious to the people of Florida;
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> 4. That it should provide a rational basis for determining damages for noneconomic losses, recognizing that such 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 compensation is ultimately borne by all persons;
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> 5. The Academic Task Force had established the existence of a medical malpractice crisis which could be alleviated by adoption of comprehensive reforms;
>
> 6. That the magnitude of the problem demanded immediate and dramatic legislative action.

Preamble to Chapter 88-1, Laws of Florida (1988) (emphasis added).

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[2] The report notes that "[t]he research effort supporting the Task Force findings is believed to be the most comprehensive effort to determine the causes of malpractice problems conducted anywhere in the United States." Report at 8.

With respect to controlling the dramatic increase in insurance premiums, the Legislature specifically found:

> 766.201 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.
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> (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 interests 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.
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> * * * *
>
> (2)(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.

(Emphasis added.)

In summary, the Legislature identified the increase in the amounts of paid claims as the primary cause of increased insurance premiums. To control these costs, and to assure the availability of both medical care and a source of compensation for those injured by negligence, early determination of the merits of claims and early arbitration must be undertaken. The limitation on noneconomic damages facilitates both predictability and early resolution of claims.

2. Report of the Academic Task Force, November 6, 1987[3]

The Report of the Academic Task Force ("Report") recommended the noneconomic damages cap of $250,000 for arbitrated claims and $350,000 where arbitration is refused. (Report 1) This recommendation was supported by a number of significant findings. Among these are:

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[3] See appendix to Appellant's Initial Brief, Tab 3.

1. Increased premiums have resulted in increased health costs. (Report 10)

2. For some physicians premiums were so expensive that liability insurance was functionally unavailable. Id.

3. The primary cause of increased premiums was the substantial increase in loss payments, not excessive insurance company profits. Id.

4. Further, the dramatic increase in the size of amounts of paid claims was the major cause of the increase in total claims payments. Id.

5. The size and increasing frequency of very large claims was a problem. Id. at 11.

6. Attorneys' fees and litigation costs accounted for 40 percent of insurance companies' costs while amounts paid to claimants accounted for 43.1 percent. Id.

7. The damage cap serves to limit the high-end awards that have caused the increase in total paid losses, which, in turn, was the primary cause of dramatic increases in premiums. Id. at 24.

The Report states that early investigation of claims and arbitration will reduce attorneys' fees, litigation costs and delay. Id. at 11, 15-16. The arbitration procedure of §766.207 is voluntary. The $250,000 limitation on noneconomic damages is conditional, applying only where the defendant concedes its willingness to pay plaintiff's full economic losses and reasonable attorneys' fees. Id. at 11, 22. This will realize substantial cost-savings and reduce frivolous claims and defenses. Id.

Where a plaintiff refuses a defendant's offer to arbitrate, as occurred here, the plaintiff may still recover full economic damages but noneconomic damages may not exceed $350,000. The Report states:

The Task Force concludes that a conditional limit on noneconomic damages is warranted after the plaintiff's refusal to accept the Early Offer of Arbitration. First, the conditional limit on noneconomic damages at trial gives the plaintiff greater incentive to accept the defendant's offer to arbitrate. Second, the $350,000 limit on noneconomic damages is an appropriate balance between the interests of all patients who ultimately pay for such losses and the interests of those patients who are injured as a result of medical negligence. The Task Force has found that the increase in paid losses is the primary cause of insurance affordability problems and that high-end awards are a substantial cause of the increase in paid losses. Further, insurers' concerns about the lack of predictability and the amounts of high-end awards have the potential for producing availability problems. On the other hand, this proposal, unlike the Medical Incident Compensation act described below, recognizes that physical and mental pain and suffering are real.

The question is, given the inherent inefficiencies of the current tort system and its inexactitude in distinguishing meritorious claims from non-meritorious claims and full compensation from overcompensation, can society fully compensate every claimant for all the noneconomic damages that the jury might find appropriate in every medical liability case? The Task Force concludes that in the specific area of medical liability the answer is "no", just as the Legislatures of at least thirteen other states, where malpractice insurance premiums are less than in Florida, have reached this conclusion. Unlike most other jurisdictions, however, the Task Force endorses this limitation only as a part of the package that includes carefully balanced proposals for eliminating non-meritorious claims from the system, reducing transaction costs, limiting actual medical negligence through increased regulation of the quality of medical care and providing equitable reductions in

malpractice premiums for those physicians who can demonstrate genuine hardship as a result of high malpractice premiums.

This plan's conditional limitation on noneconomic damages differs from the absolute cap that was held to be unconstitutional in Smith v. Department of Insurance. First, it applies only to medical malpractice claims, where a special need has been established by specific research findings. Second, it is part of a balanced plan to facilitate early resolution of meritorious claims, thereby providing commensurate benefits in exchange for the reduced damage remedy. The $250,000 conditional limitation on noneconomic damages applies only with the consent of both parties. The $350,000 limitation on noneconomic damages applies only if the plaintiff has refused an opportunity to receive expedited payments of limited damages without having to prove fault.

(Emphasis added.)

SUMMARY OF ARGUMENT

The Limitation On Noneconomic Damages Does Not Violate the Right of Access to the Courts.

The Report of the Task Force and the legislative findings clearly establish the emergency to which the Legislature was responding. Because of the malpractice insurance crisis, the Legislature was entitled to limit noneconomic damages even if it did not provide an adequate alternative remedy or commensurate benefit. However, the statutes also meet these alternative criteria because plaintiffs who accept arbitration are entitled to full and expeditious recovery of economic damages; costs and attorneys

fees; arbitration costs and fees; interest on damages; and the benefit of joint and several liability. These benefits have substantial value that the district court did not even attempt to analyze. The limitation applicable where plaintiffs reject arbitration is a reasonable cap that makes judgments more predictable and insurance--and health care--more available. Injured claimants therefore have an adequate remedy if they can recover their economic damages and substantial noneconomic damages.

The decision of the district court of appeal violates well-established principles of constitutional and statutory construction. It fails to accord the statute the benefit of a single doubt, gives little credit to the findings of the Academic Task Force and the Legislature, and attempts to substitute its wisdom for that of the Legislature.

ARGUMENT

I. THE DAMAGES LIMITATIONS OF SECTIONS 766.207 AND 766.209, FLORIDA STATUTES, ARE CONSTITUTIONAL BECAUSE THE LEGISLATURE HAS BOTH PROVIDED AN ADEQUATE ALTERNATIVE REMEDY AND ACTED IN RESPONSE TO AN OVERPOWERING PUBLIC NECESSITY.

The two statutes in question impose caps on noneconomic damages in medical malpractice actions but neither statute abolishes a cause of action. It may yet be an open question as to whether caps of this nature rightly draw into question the access to courts provision of article I, §21, Florida Constitution. See Feldman v. Glucroft, 522 So.2d 798

(Fla. 1988) (Grimes, J., concurring); White v. Hillsborough County Hospital Authority, 448 So.2d 2 (Fla. 2d DCA 1983), citing Kluger v. White, 281 So.2d 1 (Fla. 1983), for the proposition that "where a cause of action is reduced as opposed to being destroyed, it is not essential that the Legislature provide a substitute remedy." Accord, Jetton v. Jacksonville Elec. Authority, 399 So.2d 396, 398 (Fla. 1st DCA 1981), rev. denied, 411 So.2d 383 (Fla. 1981), citing Abdin v. Fischer, 374 So.2d 1379 (Fla. 1979). Nevertheless, since the courts below read Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), and Kluger to the contrary, the analysis presented here will assume that the damage limitations imposed by §766.207 and §766.209 must be consistent with the requirements of article I, §21 as set forth in Smith and Kluger.[4]

The district court of appeal found that the statutes failed to provide a reasonable alternative remedy or commensurate benefits for the limitations imposed. It specifically rejected analogies to Workers' Compensation laws (which permit no recovery for pain and suffering or other

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[4] In Smith, supra, this Court struck down a limitation on noneconomic damages in the amount of $450,000, as violating article I, §21, Florida Constitution. The limitation applied to all tort actions. Relying on Kluger, supra, this Court held that such a restriction was not permissible unless the law 1) provided a reasonable alternative remedy or commensurate benefit, or 2) there was a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity. Smith, supra, at 1088. The decision, however, did not apply this analysis to limitations on punitive damages. Id. at 1092.

noneconomic damages) and to no-fault automobile insurance laws which permit recovery of noneconomic damages only in very limited circumstances. See §627.737(2), Florida Statutes. The court's decision distinguished these remedies chiefly because they permitted a degree of compensation on a strictly no-fault basis and required insurance coverage as a condition of the "benefits" conferred. These benefits constituted an appropriate "quid pro quo" for what was taken (which, in fact, were causes of action). In contrast, the court said, §766.07 and §766.09 do not provide a no-fault basis for recovery and do not require malpractice insurance. The benefits conferred are not commensurate with the potential loss of noneconomic damages due to the caps. Moreover, the court ruled that available health care and more affordable malpractice insurance, which it termed benefits to "society in general," cannot be weighed in this balance.

The court also refused to acknowledge any "overpowering public necessity" for limiting noneconomic damages. The functional unavailability of malpractice insurance for some doctors could not warrant the cap. Moreover, the Legislature had not differentiated between highend awards of economic and noneconomic damages as the cause of insurance coverage problems. Thus it could not be said that the cap on noneconomic damages was justified. The court also faulted the Legislature for failing to expressly find that no less onerous alternative existed to imposition of the caps.

The State submits that the benefits conferred by the arbitration process are significantly greater than the district court of appeal acknowledged and that the limitation on noneconomic damages does not deny a party's access to courts. Furthermore, in analyzing the justification vel non of an overpowering public necessity the district court failed to give appropriate weight to the findings of the Legislature. There can be no doubt that just such a necessity spurred the enactment of this legislation.

A. Alternative Remedy or Commensurate Benefit

The district court, making no distinction between the voluntary cap of §766.207 and the compulsory cap of §766.209, was content to find simply that the "arbitration procedure does not provide a reasonable alternative remedy or commensurate benefit permitting the Legislature to restrict [a] claimant's noneconomic damages." While setting forth some of the benefits provided, the court made no effort whatsoever to assess their value.

The binding arbitration procedure of §766.207 provides a noneconomic damages limitation of $250,000. In exchange for this a claimant receives the following benefits:

1. The claimant does not have to prove negligence. There is no risk of not recovering damages as there would be at trial.

2. All past and future medical expenses plus 80% of wage loss and loss of earning capacity are compensated.[5]

3. Damages for future economic losses are compensated.

4. Interest on the accrued damages is paid.

5. Reasonable attorney's fees and costs up to 15 percent of the award are paid by the defendant.

6. The costs of the arbitration proceeding and the fees of the arbitrators are paid by the defendant.

7. Joint and several liability applies to economic and noneconomic damages for all defendants submitting to arbitration.

The district court dismissed these benefits out of hand with the statement that "the true benefit--the damage cap--inures only to the negligent defendant."

In a litigated malpractice action, however, an injured plaintiff always runs the risk of a zero verdict even if he or she has a seemingly good case. Arbitration eliminates that risk. But even assuming a plaintiff prevails in litigation, he or she will always incur significant costs in doing so (a point the court below conveniently ignored). The plaintiff will typically pay 33% to 45% of the total award for attorney's fees alone, and more for all litigation costs that cannot be assessed against the defendant.[6] Legal proceedings

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[5] The Legislature did not require payment for 100 percent of these losses because damage awards are not subject to taxation. See §766.201(1)(e).

[6] See Rule 4-1.5(4), Rules Regulating the Florida Bar. For that portion of damages that exceeds $1 million, a fee of 30% is allowed, and for that portion exceeding $2 million, 20%. Id.

may delay recovery for years, for which the litigant is not compensated by payment of interest. Given the very real benefits of attorney's fees, costs and interest, even a seriously injured plaintiff will likely retain more through arbitration than litigation. And, the prospect of fully recovering the noneconomic damages awarded is enhanced by joint and several liability.[7]

Should the plaintiff reject arbitration, he or she is limited to a maximum of $350,000 in noneconomic damages.[8] The district court did not find this figure inadequate but simply concluded that the benefits of the two statutes inured only to the negligent defendant. That is demonstrably untrue.

The Worker's Compensation Law and the No-Fault Automobile Insurance Act have withstood constitutional challenges even though they effect a much greater reduction in recoverable damages for serious injuries than do the instant statutes.[9] Worker's Compensation permits no recovery for pain

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[7] The chart in the appendix to this brief demonstrates how much more a plaintiff can expect to retain by arbitrating rather than litigating.

[8] The Legislature correctly observed that such damages can only be valued "on a purely arbitrary basis." Preamble, Chap. 88-1, Laws of Florida.

[9] See, e.g., Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983) (award of $1,200 to college student for loss of sight in one eye upheld against access to courts challenge); Acton v. Fort Lauderdale Hosp., 440 So.2d 1282 (Fla. 1983) (denying recovery for 25% permanent disability where injured worker returned to work at a higher wage did not violate access to courts provision).

and suffering and the no-fault automobile insurance law allows for it only when there is severe physical injury or death. See §627.737, Florida Statutes. Under either law significant pain and suffering and other noneconomic damages will go entirely uncompensated.

The district court distinguished these laws by stating that both require insurance and both eliminate the need to prove fault, thus assuring some measure of recovery. The medical malpractice arbitration procedure, the court found, does not require insurance, retains "causation defenses" and does not provide a no-fault basis for recovery.

The court's analysis is neither incisive nor accurate. First, §766.207 clearly does provide a no-fault basis for recovery once arbitration is agreed upon. The claimant, in the presuit investigation undertaking, need only establish "reasonable grounds" to believe a defendant was negligent and that such negligence caused the injury. See §766.203, Florida Statutes. But this is no greater a hurdle or "defense" than is the requirement under Worker's Compensation that a worker prove his disability is causally related to a job injury or is a bona fide occupational disease.[10] Both laws

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[10] See, e.g., Simon Sez, Inc. v. Ferrer, 567 So.2d 51 (Fla. 1st DCA 1990) (claimant did not satisfy burden of proof to establish that carpal tunnel syndrome was an occupational disease); Hodgen v. Burnup & Sims Engineering, 420 So.2d 885 (Fla. 1982) (no evidence fatal heart attack was due to unusual exertion and it therefore was not compensable as an occupational disease); Dean Jaye Const. v. Johnson By and Through Johnson, 486 So.2d 664 (Fla. 1st DCA 1986), rev.

merely require a claimant to establish the compensable nature of the injury. And given the comparatively unlimited recovery allowed for medical malpractice, it is hardly unreasonable that a claimant should have at least "reasonable grounds" to believe negligence caused his injury.

With respect to the objection that malpractice insurance is not mandatory, this legislation was enacted precisely because the Legislature found that a financial crisis existed in the medical malpractice insurance industry, that if the crisis were not abated many professionals would be unable to purchase liability insurance, and that for some professionals malpractice insurance was already functionally unavailable. See Statement of the Facts, ante at 5-6. The statutes in question were enacted precisely to make insurance more available.

The State submits that it is scarcely reasonable to make malpractice insurance a requirement when it has become functionally unavailable for some physicians and the industry

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denied, 494 So.2d 1150 (1986) (evidence sufficient to show that employee's heart attack causally related to accident of exposure to urethane fumes); City of Lakeland v. Cushman, 445 So.2d 1128 (Fla. 1st DCA 1984) (evidence sufficient to show policeman's heart attack was causally related to prior compensable injury). To be compensable, the disability must be the direct and immediate result of an industrial injury. See Horse Haven v. Willit, 438 So.2d 128 (Fla. 1st DCA 1983) (neurosis); Hing v. Richard Electric Supply Co., Inc. 388 So.2d 13 (Fla. 1st DCA 1980) (hernia); Wadsworth v. Tampa Catholic High School, 565 So.2d 401 (Fla. 1st DCA 1990) (depression); Sunshine Truck Plaza etc. v. Tucker, 395 So.2d 265 (Fla. 1st DCA 1981) (dermatitis).

is in crisis. If this legislation is successful in making malpractice insurance affordable, it might then be appropriate for the Legislature to impose an insurance requirement. Or if in time uninsured physicians are shown to be making improper use of the arbitration procedure, this Court could weigh that fact in assessing whether these laws have achieved their purpose, or whether in practice and effect they tend to foreclose recovery. This hypothetical problem is clearly a due process question that should be assessed after some experience with the law. See Aldana v. Holub, 381 So.2d 231 (Fla. 1980) (because of rigid jurisdictional time frames, Medical Mediation Act operated in practice to deny due process). There is absolutely no evidence that there are unscrupulous, uninsured physicians waiting to manipulate the arbitration procedure. And it is illogical to suppose, much less assume, that physicians will risk a lucrative career by not purchasing liability insurance if they can possibly afford it. In rejecting the analogy to Workers Compensation and no-fault automobile insurance, the district court wrongly indulged a presumption against the statutory scheme rather than in favor of it. The "facts" argued to support this rejection are entirely speculative.

Further on this point, the district court refused to accept as a commensurate benefit the greater availability of a source of recovery--saying that commensurate benefits must inure strictly to the injured patient, not society in general.

We have discussed above the substantial benefits afforded the individual claimant. As to the greater availability of medical care and insurance, however, the State submits the court's analysis is misguided. We seek medical care as individuals and we seek recompense for malpractice as individuals. Claimants can only benefit from more available care and insurance as individuals, not as "society at large."

This Court has acknowledged that under the no-fault law "situations can be perceived in which severe pain might be uncompensated," Lasky v. State Farm Insurance Co., 296 So.2d 9, 17 (Fla. 1974), but has continued to uphold that law because injured parties are assured "recovery of their major and salient economic losses." Chapman v. Dillon, 415 So.2d 12, 17 (Fla. 1982) (emphasis added). Problems of government, the Court noted in Lasky, "may justify, if they do not require, rough accommodations . . . ." 296 So.2d at 17. Here, through arbitration, major and salient economic losses may be recovered as well as substantial noneconomic damages. We note, with respect to the latter, that the Academic Task Force found that noneconomic damages "often are difficult to estimate" and that those making such awards (arbitration panels) should have "more guidance" and "should be limited to reasonable amounts." Report at 11-12, 16. This finding is well supported by extant case law. See, e.g., Fein v. Permanente Medical Group, 695 P.2d 665, 680-681 (Cal. 1985) (noting the "inherent difficulties in placing a monetary value [on pain and

suffering]" and that "money damages are at best only imperfect compensation for such intangible injuries"). The State submits that the Legislature and the Academic Task Force have endeavored to produce far more than a rough accommodation.

The plaintiffs have suggested that in general malpractice defendants will arbitrate only when they are clearly negligent and want to limit their liability for noneconomic damages and they thus conclude, as did the district court, only defendants benefit from the cap. While in a very narrow and literal sense it may be true that only defendants benefit from this limitation, it is also true that plaintiffs benefit from arbitration by not having to relinquish 45% or more of a verdict for attorney's fees and costs, as can happen in litigation. Moreover, many, and perhaps most, cases will be close or unpredictable as to liability. Given the defendant's potential liability under §766.209(3) for attorney's fees, prejudgment interest and full damages if he refuses arbitration, there is a significant incentive to agree to arbitration in almost all cases, a point the district court did not acknowledge. What arbitration provides for the medical profession and insurance provides is not a cap that significantly limits damages but a way to reduce the tremendous costs of litigation, costs which have nearly equalled the amounts paid to claimants (40% vs. 43.1%). See Statement, ante, p. 8.

B. Overpowering Public Necessity and No Less Onerous Alternative.

The district court ruled that the statutes did not meet the alternative test because the legislative findings failed to "demonstrate an overpowering public necessity to cap noneconomic damages of the most seriously injured victims." First, the two precedents cited for support, Overland Constr. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), and Kluger v. White, 281 So.2d 1 (Fla. 1973), do not stand for this proposition. The district court's quotation from Sirmons disingenuously underscores certain language to create emphasis where none was intended; and both cases dealt with entirely different kinds of limitations on actions.

Second, it is by no means true that pain and suffering and other noneconomic damages necessarily are attendant upon the most severe physical injury, as this Court recognized in Lasky, supra, acknowledging the possibility that even where physical injuries are not great, "severe pain might be uncompensated." 296 So.2d at 17. Contrary to Lasky, the decision below addresses this issue in only the most simplistic context. It assumes, contrary to reason, that noneconomic damages are subject to objective determination, that there is some proportional, linear relationship between pain and suffering and monetary damages. But it is precisely because there are no real guideposts for juries to follow in this assessment that the present insurance crisis has arisen. The

Legislature, while preserving full economic damages, has set an outer limit in this area (a limit which, in the arbitration process, is substantially enhanced by payment of attorney's fees and other costs). The district court has effectively ruled, by finding the cap affects only the "most seriously injured" claimants, that there can be no limitation on noneconomic damages. This Court did not even hint at such a lack of authority in its Smith decision. The district court simply disagrees with the policy and wisdom of the Legislature.

The district court also suggested the crisis was insufficient to merit the limitation, citing the legislative finding that insurance was "functionally unavailable for some physicians" as if that was the only conclusion resulting from all the studies and investigation. The Legislature also stated in the preamble to Chapter 88-1 that:

> 1. A financial crisis existed in the medical liability insurance industry;
>
> 2. If the crisis is not abated, many medical professionals would be unable to purchase liability insurance, and many injured persons would therefore be unable to recover for either their economic or noneconomic losses;
>
> 3. That, in general, the cost of medical liability insurance was excessive and injurious to the people of Florida;
>
> 4. That the magnitude of the problem demanded immediate and dramatic legislative action.
>
> (Emphasis added.)

The Legislature also found that it was "imperative" to control the costs of defending malpractice claims "in the interests of the public need for quality medical services." See §766.021(1)(a) and (b), Florida Statutes (ante at p.5). Apparently, under the reasoning of the decision below, the Legislature must refrain from addressing the crisis until the vast majority of physicians are unable to practice and medical care is unavailable to most citizens. The district court clearly believed its policy judgment on when to address the crisis was superior to the Legislature's when it stated, "the functional unavailability of insurance for some physicians does not rise to the level of a danger of inability to obtain care."

The legislative findings here are at least as compelling, and probably more so, than others upheld under the Kluger test. See Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) ("without . . . legislative relief, doctors will be forced to curtail their practices, retire or practice defensive medicine at increased cost to the citizens of Florida . . ."") (emphasis added); Carr v. Broward County, 505 So.2d 568, 575 (Fla. 4th DCA 1987), aff'd 541 So.2d 92 (Fla. 1989) (same); American Liberty Ins. Co. v. West and Conyers, 491 So.2d 573 (Fla. 2d DCA 1986) ("the availability of professional liability insurance for the engineer, architect and contractor is more difficult to obtain if they are exposed to potential liability for an indefinite period of time . . .").

Finally, the court below said although the Academic Task Force clearly found high-end awards to be a substantial cause of the increase in paid losses, it failed to differentiate between economic and noneconomic damage awards. It had thus failed to demonstrate a necessity for restricting noneconomic damages. This analysis defies reason. If high-end awards are the acknowledged problem, why does it matter whether the Legislature restricts economic or noneconomic damages? Is it not more favorable to the claimant to provide him full economic damages as well as costs, interest and attorney's fees so that he suffers no financial losses? How does the Legislature's choice deny access to the courts? The necessity was demonstrated. The Legislature, exercising its constitutional prerogative as the Legislature, chose the remedy more beneficial to the claimant. The district court said no, the choice is not reasonable.

If our state constitution says anything at all on this issue, it is that, to preserve separation of powers, the courts cannot invalidate laws on the grounds of their reasonableness. We turn now to that and related fundamental principles.

C. The Presumption of Constitutionality and the Plaintiff's Burden of Proof.

The Report of the Academic Task Force and the findings of the Legislature demonstrate conclusively that the Legislature acted out of an overpowering public necessity and

that there was no reasonable alternative to a cap on noneconomic damages.[11] The Legislature expressly found that a crisis existed in the medical malpractice insurance industry; that if the crisis were not abated, many medical professionals would be unable to purchase liability insurance and many injured persons would therefore be unable to recover economic or noneconomic losses. Both the Task Force and the Legislature found that the primary cause of increased insurance premiums was the substantial increase in loss payments, not excessive insurance company profits, and the size of the amounts of paid claims was the major cause of the increase. The arbitration procedures were therefore intended and structured to reduce overall litigation costs, to impose a rational balance between the interests of the injured and the interests of the public for the compensation of noneconomic damages, and to restore some predictability to paid losses to ensure the availability of insurance.

In finding the benefits of the statutory scheme are not balanced, that there is no quid pro quo, that at best only society at large benefits, that there was no overpowering public necessity and that there was no demonstrated reason to limit noneconomic damages as opposed to economic damages, the court below, contrary to basic principles of constitutional

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[11] Previous attempts to deal with this ongoing crisis are described in the amici briefs of the Florida Defense Lawyers Association and the Florida Hospital Association.

construction, simply substituted its wisdom and policy views for those of the Legislature.

The principles that control judicial construction are forcefully expressed in Holley v. Adams, 238 So.2d 401 (Fla. 1970):

> First, it is the function of the Court to interpret the law, not to legislate.
>
> Second, courts are not concerned with the mere wisdom of the policy of the legislation. . . .
>
> Third, the courts have no power to strike down an act of the Legislature unless the provisions of the act, or some of them, clearly violate some express or implied inhibition of the Constitution.
>
> Fourth, every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act.
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> * * * * *
>
> The judiciary will not nullify legislative acts merely on grounds of the policy and wisdom of such act, no matter how unwise or unpolitic they might be . . . .

Id. at 404-405 (emphasis added).

To these we add the well-established principles that a statute is presumed constitutional, Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), and that the burden is on the plaintiff to prove beyond a reasonable doubt that the statute conflicts with the constitution. Knight and Wall Co. v. Bryant, 178 So.2d 5 (Fla. 1965), cert. denied, 383 U.S. 958 (1966). Moreover, the courts are bound to give great weight to

legislative determinations of fact. American Liberty Insurance Co., supra, at 575. And "[w]here a factual predicate is necessary to the validity of an enactment, it is to be presumed that the necessary facts were before the legislature." Cilento v. State, 377 So.2d 663 (Fla. 1979).

Contrary to these principles, the district court of appeal found a fatal imbalance of benefits without even attempting to weigh and quantify the very real benefits provided by arbitration. It denied the existence of an overpowering public necessity although the Legislature and Task Force clearly believed and stated the contrary. In attempting to negate the indisputable fact that high-end awards were the main cause of the crisis, the decision even denied the Legislature the power to choose to limit noneconomic damages, rather than economic damages, although that choice clearly favored claimants. How such a choice denies access to courts was left unexplained.

Finally, in ruling that the Legislature did not "expressly" state it had found no reasonable alternative to a cap on noneconomic damages, the decision below denied the Legislature the right to rely on the unambiguous finding of the Academic Task Force stating that "[o]f these alternatives, only a cap on noneconomic damages would reduce malpractice claims appreciably . . . ." See Medical Malpractice Reform Alternatives, October 2, 1987 at 5. That the Legislature expressly relied on the findings of the Academic Task Force

cannot be gainsaid.[12] Applying the controlling principle that every reasonable doubt must be indulged in favor of the legislative act, one cannot help but conclude that this finding was key to the Task Force's recommendation and the Legislature's decision to limit noneconomic damages and that it is entitled to great weight. It not only can be presumed to have been before the Legislature, Cilento, supra, but was in fact before that body. Although the time and effort expended by the nonpartisan Academic Task Force and the Legislature in addressing the crisis were unprecedented nationally, for want of a magic phrase the district court of appeal held their labors for naught.

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[12] The preamble to Ch. 88-1, Laws of Florida, provides in pertinent part:

> 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. . . .

(Emphasis added.)

If this Court should understand one thing above all else, it is that in addressing this crisis neither the Legislature nor the Academic Task Force acted out of partisan purpose or solicitude for special interests. The Academic Task Force brought the most distinguished and disinterested minds to bear on the medical malpractice insurance crisis. The Legislature accepted the Task Force's work product and implemented its recommendations. Given the findings of the Task Force and the Legislature, there is obviously a rational basis for the damages cap.

It is a truism that "of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus." Shands Teaching Hospital and Clinics v. Smith, 497 So.2d 644, 646 (Fla. 1986). If the findings of the Task Force and the Legislature cannot be given credence, and their efforts accepted as responsive and responsible, then it appears the Legislature is powerless to limit even those damages that have value only "on a purely arbitrary basis." See Preamble, Chap. 88-1, Laws of Florida. The largely conclusory reasoning of the opinion below and its refusal to weigh the benefits of arbitration underscore policy differences, not constitutional defects. If critically needed legislation can be invalidated on such grounds, then the courts will have arrogated to themselves the power to substitute their judgment of what is--or is not--appropriate social legislation

for that of the Legislature, much as did the Supreme Court when it decided Lochner v. New York, 198 U.S. 45 (1905), and the many other cases in which it struck down, for want of "substantive due process," social and economic legislation that was not to its taste. That pernicious doctrine, abandoned more than a half century ago, should not be revived under the rubric of "access to courts."

CONCLUSION

The district court of appeal failed to give the statutes in question a presumption of correctness or the benefit of any reasonable doubt. It also failed to accord the findings of fact of the Legislature and Academic Task Force the great weight due them.

Plaintiffs did not meet the heavy burden of proving §766.207 and §766.209, Florida Statutes, unconstitutional. Given the circumstances that led to the adoption of a

noneconomic damages cap, and the alternative remedy and benefits provided, these statutes are clearly constitutional.

The judgment below should be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 140084
Department of Legal Affairs
The Capitol - Suite 1502
Tallahassee, FL 32399-1050
(904) 488-9935

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE STATE OF FLORIDA IN SUPPORT OF APPELLANT** has been furnished by U.S. Mail to **MICHAEL L. 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; and **JIM TRIBBLE, ESQUIRE**, Blackwell & Walker, et al., 2400 Amerifirst Building, One Southeast Third Avenue, 24th Floor, Miami, Florida 33131, this 16th day of August, 1991.

LOUIS F. HUBENER
Assistant Attorney General