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IN THE SUPREME COURT OF FLORIDA

CASE NOS. 79,941 and 79,942

HCA HEALTH SERVICES OF FLORIDA, INC. and PERRY R. LLOYD, III,

Appellants,

vs.

GUS BRANCHESI, as Personal Representative of the Estate of Adria Branchesi, deceased,

Appellee.
_____/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

**CONSOLIDATED ANSWER BRIEF OF APPELLEE BRANCHESI TO THE SEPARATE BRIEFS OF APPELLANTS HCA AND LLOYD**

COLSON, HICKS, EIDSON, COLSON & MATTHEWS
200 South Biscayne Boulevard, 47th Floor
Miami, Florida 33131
-and-
PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: Joel S. Perwin
Joel D. Eaton

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## I
## STATEMENT OF THE CASE AND FACTS

Both appellants have accurately summarized the procedural history of this case. We should note that, with one important exception, all of the constitutional arguments have already been briefed in *University of Miami v. Echarte,* Case No. 78,210, which was argued on May 8 before six Justices of this Court (Justice Kogan having recused himself). The one exception, however, is important: *Echarte* is a personal-injury case, and the instant case is a wrongful-death case. That difference gives rise to one additional and important argument for the plaintiffs--that the statutes at issue violate equal protection because they cap non-economic damages at either $350,000.00 or $250,000.00 for *each claimant* in a personal-injury case, while limiting the *single claimant* in a wrongful-death case--the personal representative, who may be representing several survivors as well as the estate--to a *total* of $350,000.00 or $250,000.00. We will develop this point in discussing the equal-protection argument later in the brief. The point here is that even if the Court should reject all of the plaintiffs' arguments for unconstitutionality in *Echarte*, there is one additional argument to be addressed here.

## II
## ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DECLARING THAT §§ 766.207 AND 766.209, FLA. STAT. (1991), ARE UNCONSTITUTIONAL, AND THAT THE PLAINTIFF IS ENTITLED TO A JURY TRIAL OF HIS MEDICAL MALPRACTICE CLAIM, AT WHICH HE MAY RECOVER THE TOTAL AMOUNT OF THE SURVIVORS' AND ESTATE'S ACTUAL DAMAGES.

## III
## SUMMARY OF THE ARGUMENT

As a preliminary matter, we note that the trial court's order contains only the summary ruling that the plaintiff's motion for summary judgment was granted, and that "[i]n

accordance with the arguments presented by the plaintiff, this Court declares that §§ 766.207 and 766.209, Fla. Stat. (1989), are unconstitutional under the Florida and United States Constitutions" (R. 496-97). Thus, the trial court did not specify the basis for its ruling, other than to invoke both the Florida and federal constitutions; and as both defendants have acknowledged, the plaintiff advanced below a number of different arguments, under both constitutions--all of which are available as a basis for affirming the trial court's ruling, under the familiar "right for the wrong reason" rule. *See Landis v. Allstate Insurance Co.*, 546 So.2d 1051 (Fla. 1989). In order to prevail here, therefore, the defendants must rebut *all* of the asserted bases of the trial court's rulings; if any one of them is correct, the statutes are unconstitutional, and the plaintiff's declaratory judgment must be affirmed.

First and most obvious, as the district courts held here and in *University of Miami v. Echarte,* 585 So.2d 293 (Fla. 3d DCA), *review granted,* Case No. 78,210 (Fla. 1991), the statutes plainly violate the Florida constitutional guarantee of access to the courts, because they delegate to defendants the unilateral right to drastically slash the damages to which a plaintiff has been entitled under the common law, whether or not the plaintiff accepts a defendant's demand for arbitration. The so-called "alternative" of arbitration is therefore illusory, because the plaintiff's damages are even more constricted if he chooses that alternative than if he does not. In essence, therefore, the statute is nothing more than a cap on damages at the defendant's discretion, and from that perspective, under a clear line of Supreme Court decisions, it violates the right of access to courts.

Second, the statutes also violate the Florida constitutional guarantee of trial by jury, by recognizing and preserving a plaintiff's common-law right to the full measure of his damages if the defendant chooses to litigate the case, while delegating to the defendant the unilateral choice of denying the plaintiff his pre-existing right of trial by jury by demanding arbitration. Third, the statutes violate the Florida and federal due process prohibitions



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

against taking property without just compensation, because they recognize the plaintiff's full measure of damages after his cause of action has arisen, while delegating to the defendant the power to take away that well-recognized property right. Fourth, the statutes violate the federal and Florida guarantees of equal protection, because they discriminate against wrongful-death claimants in medical-malpractice cases, and because they discriminate against those medical-malpractice plaintiffs who suffer the most damages.

Fifth, the statutes violate the federal and Florida guarantees of substantive and procedural due process, because they draw arbitrary and indefensible lines which have no reasonable relationship to any governmental objectives, and deny access to the courts. Sixth, the enacting legislation violated the Florida constitutional requirement of a single subject, because it embraced both tort reform and health-care regulation, which do not bear a necessary relationship to each other. And seventh, the statutes violate the Florida Constitution's separation of powers, both because they regulate procedure, and because they delegate unbridled discretion to medical-malpractice defendants.

At the risk of stating the obvious, we remind the Court that every one of these arguments is a *constitutional* argument. The defendants have repeatedly entreated this Court to defer to the legislature's judgment on the wisdom of this legislation, and to the academic recommendations upon which it was based, and thus to ignore the purposeful constraints placed upon legislative authority by the far-higher authority of the Constitutions of the State of Florida and the United States of America. Those constraints exist to protect otherwise-powerless individuals like Adria Branchesi and her survivors against (in the late Justice Terrell's words) "the tyranny of the majority."[1/] In our tripartite system of government, that

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[1/] Address entitled "The Judiciary and Democracy," given by Justice Glenn Terrell in St. Augustine, Florida (circa 1942), *quoted in In Re Inquiry Concerning a Judge,* 357 So.2d 172, 181 (Fla. 1978) (C.J. Overton, concurring).



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is the Court's most important job, and it does not sit as a "superlegislature" when it fulfills that constitutional role.[2/] This Court has not shirked from that task in the past; and the Court recently emphasized its propriety in *Smith v. Department of Insurance*, 507 So.2d 1080, 1089 (Fla. 1987), where it declared unconstitutional the legislature's first attempt at enacting damage "caps," observing in the process that constitutional rights cannot be subordinated to "legislative grace" or "majoritarian whim," and that "[t]here are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system."

Moreover, we cannot resist underscoring the irony that the defendants have invoked majoritarian principles in this particular case. After this Court declared arbitrary damage "caps" unconstitutional in *Smith* (and after the damage "caps" in issue here were enacted), the medical industry mounted a multi-million dollar "Amendment 10" campaign to overrule *Smith,* and to write damage "caps" into the Florida Constitution. The Court will remember that the amendment was soundly defeated by an overwhelming majority of the people of the State of Florida. While the proposed amendment was not identical to the statutes in issue here, the substance and thrust of the two were clearly the same, and it would therefore appear that the "legislative majority" which enacted the statutes in issue here was simply that, a *legislative* majority (swayed perhaps by powerful special interest groups)--not a representative majority of the electorate which ultimately endorsed the Court's decision in *Smith*. If any deference is to be given to any majority here, we respectfully submit that such deference is owed to the people rather than the legislature. We turn to the specific provisions of the state and federal constitutions which the legislature violated when it enacted §§766.207 and 766.209, Fla. Stat. (1991).

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[2/] *See generally Getzen v. Sumter County*, 89 Fla. 45, 103 So. 104 (1925); *State ex rel. Lawson v. Woodruff*, 134 Fla. 437, 184 So. 81 (1938).



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

## IV
## ARGUMENT

THE TRIAL COURT DID NOT ERR IN DECLARING THAT §§766.207 AND 766.209, FLA. STAT. (1991), ARE UNCONSTITUTIONAL.

*A. The Violation of Article 1 §21 of the Florida Constitution.*

*1. The Legal Background.* Stripped of the hyperbole and the various makeweights with which §§766.207 and 766.209 have been defended here, the obvious purpose and effect of the statutes is quite simple. The statutes do not purport to limit *any* of a medical malpractice victim's rights if a defendant contests liability in a court of law and loses; they operate only when a negligent defendant is willing to concede liability (after that liability has been demonstrated to him in the statutory "pre-suit investigation" process leading to the "notice of intent letter" in which the plaintiff is required to prove a *prima facie* case of negligence to the defendant--*see* §766.203, Fla. Stat.) by, in the euphemistic phrase adopted by most defendants, "requesting arbitration." When that occurs, a plaintiff's damages are immediately "capped."

If the plaintiff accepts the defendant's demand for arbitration, §766.207 limits the plaintiff's damages to 80% of his lost income and loss of earning capacity, and to a maximum of $250,000.00 for his non-economic damages, calculated as a percentage of the plaintiff's lost capacity for the enjoyment of life.[3/] If the plaintiff declines the defendant's demand for arbitration, opting instead to exercise his constitutional right to a jury trial on the issues of liability and damages, the plaintiff's economic damages are limited to 80% of his lost income and loss of earning capacity, and his non-economic damages are limited to $350,000.00.

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[3/] For example, as §766.207(7)(b) puts it, "a finding that the claimant's injuries resulted in a 50-percent reduction in his capacity to enjoy life would warrant an award of not more than $125,000 non-economic damages."



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

In short, the statutes in issue here impose damage "caps" upon a medical malpractice victim simply to encourage a negligent defendant to admit the negligent conduct proven in the plaintiff's "pre-suit investigation" and "notice of intent letter." They are, at bottom, merely a financial reward for admitting liability and arbitrating damages, and they are really no more complicated than that. The question is therefore this: can the legislature permissibly "cap" a medical malpractice victim's recovery of his actual damages simply to encourage negligent defendants to admit liability without a trial. In our judgment, as two trial courts and two district courts have held, to "cap" a medical malpractice victim's recovery in that fashion and for that reason violates Article I, §21 of the Florida Constitution, which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

The seminal decision construing this provision is, of course, *Kluger v. White*, 281 So.2d 1 (Fla. 1973), in which this Court struck down a statutory threshold of $550.00 in property damages as a prerequisite to tort actions arising from automobile accidents. The constitutional right of access to the courts, the Court held, applies to all causes of action recognized prior to the adoption of the 1968 Florida Constitution. To permit the legislative abolition of such a right, Article I, §21 requires that the plaintiff be provided with a reasonable alternative or a commensurate benefit, or that the legislature demonstrate both an overpowering public necessity for abolition of the right and the absence of a less onerous alternative:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such a right has become a part of the common law of the State pursuant to Fla. Stat. § 2.-01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

281 So.2d at 4. Because the statute at issue in *Kluger* provided no alternative means of redress for those suffering less than $550.00 in property damage, and reflected no overpowering public necessity for the abolition, it was declared unconstitutional.

Fourteen years later, in *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987)--a decision which we believe to be controlling of the nearly identical question at issue here--this Court applied the *Kluger* test to overturn a statutory $450,000.00 cap on damages for non-economic losses in personal injury cases. At the outset, it held that a tort victim's right to recover the full amount of both his economic and non-economic damages was fully protected by Article I, §21. The Court then reiterated the *Kluger* test, and explained why the "caps" at issue in *Smith* were constitutionally impermissible, as follows:

> . . . . There is no relevant distinction between the issue in *Kluger* and the issue here. In *Kluger*, the legislature attempted to unconstitutionally restrict the right of redress at the bottom of the damages spectrum; here, it attempts to restrict the top of the spectrum. Neither restriction is permissible unless one of the *Kluger* exceptions is met; i.e., (1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of overpowering public necessity for the abolishment of the right *and* no alternative method of meeting such public necessity.
>
> . . . .
>
> . . . . Here, the benefits of a $450,000 cap on non-economic damages run in only one direction because the potential plaintiffs and defendants stand on different footing. For example, a medical patient or the client of a lawyer obtains no compensatory benefit from a cap placed on non-economic damages because of the unlikeliness of negligence by a patient or client.
>
> Appellees also argue, and the trial court below agreed, that the



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> legislature has not totally abolished a cause of action, it has only placed a cap on damages which may be recovered, and, therefore, has not denied the right to access the courts. This reasoning focuses on the title to article I, section 21, "Access to courts," and overlooks the contents which must be read in conjunction with section 22, "Trial by jury." Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1. None of these caps, under the reasoning of appellees, would "totally" abolish the right of access to the courts. . . . [I]f it were permissible to restrict the constitutional right by legislative action, without meeting the conditions set forth in *Kluger*, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, as Mr. Smith puts it, "majoritarian whim." There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system.
>
> [The dissent] appears to believe that the legislature's major purpose in capping non-economic damages was to assure available and affordable insurance coverage for all citizens and that this furnishes a rational basis for the cap. This reasoning fails to recognize that we are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so. Rationality only becomes relevant if the legislature provides an alternative remedy or abrogates or restricts the right based on a showing of overpowering public necessity and that no alternative method of meeting that necessity exists. Here, however, the legislature has provided nothing in the way of an alternative remedy or commensurate benefit and one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim. We cannot embrace such nebulous reasoning when a constitutional right is involved.

507 So.2d at 1088-89. The *Smith* holding was reiterated in *In Re Advisory Opinion to the*



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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*Attorney General, Limitation of Non-Economic Damages in Civil Actions*, 520 So.2d 284 (Fla. 1988). *Smith* is obviously the candle by which the egg must be inspected here. We will examine each of the alternative aspects of the egg in turn.[4]

2. *The Absence of an Alternative Remedy or Commensurate Benefit.* Before applying *Smith* to the case at hand, it might be useful to explore those decisions in which a legislative scheme has been upheld in the face of an access-to-courts challenge, because the scheme provided "a reasonable alternative remedy or commensurate benefit." As this Court made clear in the passage quoted above, such an alternative remedy or benefit will be considered constitutionally acceptable only if it inures to the specific benefit of the individual or class of individuals who are deprived of a pre-existing right of access to the courts; some general benefit to society will not suffice. Thus in *Smith*, it was insufficient that the statute might "assure available and affordable insurance coverage for all citizens," because "one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort *victim*." In short, only an alternative remedy or commensurate benefit to the victim himself is sufficient to justify the abolition or curtailment of a pre-existing right.[5]

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[4] In preface, we remind the Court of its historical commitment to the principle of *stare decisis*--a principle which would seem to be especially compelling here, since the meaning of the *Constitution* should not be subject to easy change by changeable majorities, and especially since an overwhelming majority of the electorate effectively ratified *Smith's* interpretation of Article I, §21 when it rejected "Amendment 10." *See Old Plantation Corp. v. Maule Industries, Inc.*, 68 So.2d 180 (Fla. 1953); *In re Seaton's Estate*, 154 Fla. 446, 18 So.2d 20 (1944). In the U.S. Supreme Court's recent and much-anticipated abortion decision, the majority opinion of Justices O'Connor, Kennedy and Souter speaks eloquently of this principle, recognizing that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of Southeastern Pennslyvania v. Casey,* 60 U.S.L.W. 4795, 4801 (U.S. June 29, 1992).

[5] *See generally Wright v. Central DuPage Hospital Association*, 63 Ill.2d 313, 347 N.E.2d 736, 80 A.L.R.3d 566 (1976); *Lucas v. United States*, 757 S.W.2d 687, 690-91 (Tex. 1988) ("[T]he legislature has failed to provide Lucas any adequate substitute to obtain redress for his



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

For example, in *Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974), upon which the defendants inappropriately rely, this Court upheld those portions of the no-fault automobile insurance statute which had not been invalidated in *Kluger*--specifically, the requirement of $1,000.00 in medical expenses as a threshold for recovery of such intangible damages as pain and suffering. In doing so, the Court repeatedly emphasized the specific and substantial benefits provided as a *quid pro quo* to those who were denied a pre-existing right of action by virtue of the new statute: (1) the new statute required all automobile owners to maintain no-fault insurance coverage, thus increasing the injured party's chances of recovering his economic losses, and provided for no tort immunity in the absence of such coverage;[9] (2) the new statute assured an accident victim of some recovery even if himself at fault; (3) the new statute not only limited a claimant's potential recovery if below the no-fault threshold, but likewise limited that claimant's potential exposure in actions below the threshold brought against him by others; and (4) the new statute relieved a potential claimant of any obligation to prove fault in cases below the threshold. Thus, the *Lasky* Court concluded that while "[t]he property provisions considered in *Kluger* did not allow any reasonable alternative to the traditional tort action . . . the provisions of [the statute at issue] do provide a reasonable alternative to the traditional action in tort, and therefore do not violate the right of access to the courts . . . ." 296 So.2d at 15.

In *Smith*, this Court took pains to point out that the *Lasky* decision could only have

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injuries. . . . [W]e reject any argument that the statute may be supported by alleged benefits to society generally").

[9] In *Kluger*, this Court had noted that the outcome might have been different "[h]ad the Legislature chosen to require that appellant be insured against property damage loss . . . . A reasonable alternative to an action in tort would have been provided and the issue would have been whether or not the requirement of insurance for all motorists was reasonable." 281 So.2d at 5.



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

been justified by the substantial compensating benefits provided by the no-fault law:

> In *Lasky*, we upheld a statutory . . . $1,000 medical expense threshold . . . because the legislature had provided such plaintiffs with an alternative remedy and a commensurate benefit. First, the vehicular no-fault insurance statute required that all motor vehicle owners obtain insurance or other security to provide injured persons with minimum benefits. This was essentially a contractual arrangement; if the defendant vehicle owner failed to purchase the required insurance, the defendant's immunity was nullified and the plaintiff retained the right to sue below the threshold. Second, under the no-fault insurance statute, any given vehicle owner was as likely to be sued as to sue and giving up the right to sue was compensated for by obtaining the right not to be sued. Thus, unlike here, the legislation we upheld in *Lasky* provided a reasonable trade off of the right to sue for the right to recover uncontested benefits under the statutory no-fault insurance scheme *and* the right not to be sued.

507 So.2d at 1088.

For similar reasons, the Florida courts have upheld the workers' compensation laws, which provide substantial new benefits to workers in exchange for the pre-existing common law rights abolished. As the decisions upon which the defendants also inappropriately rely make clear, the workers' compensation laws survive Article I, §21 only because of those new and commensurate benefits, among them: (1) immediate payment of medical expenses and lost wages without the delays of litigation; (2) certainty of recovery as opposed to doubt; (3) recovery without a showing of fault; (4) immunity from fellow-servant or comparative negligence defenses; (5) presumptions of sufficient notice, and of the absence of willful wrongdoing; (6) the recovery of lost wages even after maximum medical recovery; and, of course, (7) a requirement that insurance coverage be maintained. As the Court put the point in *Kluger*: "Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

against abolition of the right to redress for an injury." 281 So.2d at 4.

As a third example of a constitutionally sufficient *quid pro quo*, this Court has upheld the Florida Patient's Compensation Fund Act, because it did not abolish a claimant's right of recovery above $100,000.00, but merely created an alternative source for that recovery: "The scheme that makes the Fund party to a medical malpractice action and responsible for portions of awards in excess of $100,000 does not substantially violate or change any of the plaintiff's vested rights." *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 788-89 (Fla. 1985). Indeed, the Court found that the new statutory scheme "in fact is designed in part, to ensure that sufficient funds exist to pay substantial judgments to medical malpractice victims." 474 So.2d at 788. Thus, there are a variety of cases in which the deprivation of a pre-existing right of access to the courts has been justified by provision for an alternative remedy or substantial commensurate benefits.

The question which remains is whether the statutes in issue here, which undeniably impose various damage "caps" at the discretion of a negligent defendant willing to admit liability--elsewhere provide an alternative remedy or a commensurate benefit. We emphasize again that the issue is whether the statutes provide an alternative remedy or benefit to victims affected by the "caps"--not to society as a whole. Thus, we can dispense at the outset with the so-called "finding" of §766.209(4)(a) that the $350,000.00 cap imposed when a plaintiff rejects a demand for arbitration "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 as a result of medical negligence." As the *Smith* Court itself observed, that type of "rational relationship" finding is constitutionally irrelevant where Article I, §21 is concerned. The question is not whether the statutes impermissibly sacrifice medical malpractice victims for some greater good. The question is whether the statutes sacrifice the pre-existing constitutional rights of prospective *plaintiffs*, because it denies *them*



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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an alternative remedy and a commensurate benefit.

Similarly, the alternative "finding" of §766.209(4)(a)--that the $350,000.00 cap in the event a trial is demanded "is warranted by the claimant's refusal to accept arbitration"--can only be characterized as a cruel legislative joke. The statutes give a plaintiff a *lower* recovery if he accepts arbitration than if he rejects it, and then finds it "warranted" to punish him for accepting the higher option which the legislature has provided! And that option is not simply $100,000.00 higher for intangible damages. The $250,000.00 "cap" in the event of arbitration must be pro-rated *down* according to the plaintiff's lost "capacity to enjoy life." *See* § 766.207(7)(b). For example, if the arbitrators find a 10% loss, the plaintiff's maximum intangible damages are $25,000.00.

As an additional example, if the arbitrators find that a ten-year-old girl who has been blinded by the defendant's indisputable negligence--the perfect case for the defendant to cut his losses by demanding arbitration--has suffered no more than a 50% disability, then her maximum intangible award, for a lifetime of blindness and pain and suffering, is $125,000.00. In any case in which the intangible damages are at all significant, the two statutes give a plaintiff no choice at all, and the victim would have to be crazy to accept arbitration. Moreover, the fact that a plaintiff has an alternative between two "caps" is hardly an alternative remedy for the amount of damages above the "caps" of which he is deprived. And, of course, punishment for "refusal to accept arbitration" hardly qualifies as an alternative remedy or a commensurate benefit.

The defendants' protestations to the contrary notwithstanding, the statutes in issue here simply do not provide an alternative remedy for the damages lopped off by the "caps." The statutes give the defendant a unilateral right to dictate the maximum amount of the plaintiff's recovery for intangible damages, and for lost income and loss of earning capacity, simply by conceding liability and demanding arbitration. The plaintiff has no say in the



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

matter--no capacity to counter the defendant's unilateral imposition of a "cap" upon his damages. Once the defendant demands arbitration, one way or another, the damages are "capped"--and the statutes provide no alternative remedy whatsoever for the plaintiff to recover the damages which are lost by that unilateral act. The absence of an alternative remedy in the statutes in issue here is simply not debatable.

Neither do the statutes provide plaintiffs any benefit *commensurate* to the damages which they take away. In the workers' compensation cases, such benefits are manifest. The plaintiff gets an immediate no-fault remedy of medical expenses and lost wages--not just on the one occasion of his injury, but throughout his entire working life; freedom from such defenses as contributory fault; a mandatory requirement that the employer purchase the necessary insurance coverage; and a streamlined administrative mechanism which contrasts significantly with the delays and uncertainties of litigation. The statutes in issue here provide a medical malpractice victim with no such benefits. Although defendants have characterized the statutory scheme as a "no-fault remedy," that characterization is indefensible. The statutes provide no recovery whatsoever for medical injuries sustained during the course of *non*-negligent treatment (as the workers' compensation laws do). Instead, the statutes authorize recovery only when the defendant is *negligent*. And under §§766.203-.206, the plaintiff is required to engage in an elaborate presuit investigation of his claims, and to make a *prima facie* showing of malpractice through the provision of a written expert report corroborating "reasonable grounds to initiate medical negligence litigation"--§ 766.203(2)--as a condition precedent to his claim.

In other words, to obtain the only even arguable "benefit" of the new statutes--a pre-suit admission of liability--the plaintiff must prove liability before suit is filed. This is hardly a *commensurate* benefit for the damages abolished by the "caps"; it simply shifts what would have been the plaintiff's burden *at* trial to a period *before* trial. Indeed, the statutes add an



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

additional detriment to this "shift" in timing, in the form of sanctions under §766.206 if the plaintiff's report fails to satisfy a threshold requirement of reasonableness. And after all of this, the plaintiff ends up exactly where he would have been without the statutes--that is, subject to a defendant's unilateral option to concede liability (which, of course, a defendant has always enjoyed)--except that the plaintiff's damages are now significantly reduced if the defendant chooses that option in the guise of "requesting arbitration" rather than admitting liability in an answer to a complaint.[7]

Moreover, the defendant's option of arbitration offers the plaintiff no administrative benefits comparable to the workers' compensation scheme. There are certainly no streamlined administrative procedures. To the contrary, as we have noted, the plaintiff is required to undertake an elaborate "pre-suit investigation" in order to prove negligence through an expert with a "notice of intent letter," and then must submit to arbitration on the questions of causation and damages--a process which is little less cumbersome, lengthy or uncertain than the civil trial which the scheme is purportedly designed to replace. In effect, one finder-of-fact has simply been substituted for another. And there are no guaranteed benefits during the pendency of the arbitration. There are no presumptions relative to

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[7] In order to be comparable to such a one-sided arrangement, the workers' compensation statutes would have to have required proof of employer negligence, and would have to have given the employer unilateral discretion to decide which job-related injuries would be subject to the administrative remedy. The employer would choose that remedy when clearly at fault, but would withhold compensation benefits if it had a meritorious defense. All of the benefits would run to the employer -- none to the employee. Clearly, the workers' compensation statutes have withstood constitutional scrutiny precisely because they are *not* one-sided, but confer commensurate benefits to both sides. *See University of Miami v. Matthews*, 97 So.2d 111, 114 (Fla. 1959) (workers compensation statute is "a two-way street"); *Grice v. Suwanee Lumber Mfg. Co.*, 113 So.2d 742, 745-46 (Fla. 1st DCA 1959) (statute "intended to benefit the employee and employer alike"); 2 A. Larson, *The Law of Workman's Compensation* ¶65.10 (1986) ("quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance").



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

causation, no waiver of causation defenses. To the contrary, the plaintiff retains the burden of proving those damages which were caused by the defendant's negligence.

Thus, the supposed benefits of the defendant's concession of liability are entirely illusory, and hardly satisfy the requirement of a *commensurate* benefit to plaintiffs. The defendant always had the option to admit liability when a preliminary investigation of the matter (which the statutes now require the plaintiff to make) demonstrated the strength of the plaintiff's claim. The new statutes do nothing more than reward the defendant for exercising that option, by slashing the plaintiff's potential damages, while providing the plaintiff no commensurate benefit for that loss whatsoever. As in *Smith*, "the benefits of [the] cap on non-economic damages run in only one direction because the potential plaintiffs and defendants stand on different footing." 507 So.2d at 1088.

Nor can it be argued that the overall statutory scheme provides a commensurate benefit by giving the plaintiff a right to demand arbitration of the defendant. The reason is that arbitration at the plaintiff's instance results in the same "cap" on damages as a defendant-instigated arbitration. A plaintiff whose damages are well above the cut-off therefore has no incentive whatsoever to demand arbitration, unless he does so only with the hope that the defendant will refuse arbitration, in which case, in addition to the full amount of his damages, §766.209(3)(a) will give the plaintiff a right to some attorneys' fees if he recovers at trial. But the prospect of a fee award if the defendant rejects arbitration is hardly a benefit "commensurate" to the significant damages which a *seriously* injured plaintiff will lose if the defendant accepts the demand. And although §766.207(7)(f) also allows the plaintiff some fees if the defendant agrees to arbitration, such an award is obviously far less than the damages which a *seriously* injured plaintiff will be forced to give up. Thus, while the analysis might be different if the statute provided some substantial offsetting benefit (for example, three times the total amount of actual damages, tangible and intangible) if the



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

defendant rejected arbitration and lost, the instant statutes are entirely one-sided. They give the defendant an overwhelming benefit for demanding arbitration, while providing the *seriously* injured plaintiff no significant countervailing benefit if he demands arbitration.[8/]

Finally, it cannot be said that the statutes benefit plaintiffs by assuring them insurance coverage for even those portions of their damages not prohibited by the "caps." The defendants argue that the avowed "purpose" of the "caps" is to help relieve a so-called liability insurance "crisis," by lowering premiums and thus assuring the availability of liability coverage (although, as we shall demonstrate in a moment, the projected savings are both miniscule and speculative). Although any resulting benefit to *society* is not relevant in the present context, it might be argued that the statutes provide benefits specifically to potential plaintiffs, by increasing the chance that they will have insurance coverage for the damages permitted below the "caps." Indeed, in the handful of statutory schemes which have survived Article I, § 21 scrutiny, provision has invariably been made for the availability of insurance coverage, to guarantee recovery as a commensurate benefit.[9/]

However, and notwithstanding that the avowed "purpose" of the statutory scheme in

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[8/] We have emphasized the word "seriously" here to distinguish the instant case (and others like it) from the less serious cases in which the intangible damages lopped off by the "caps" might be made up by the various "benefits" conferred upon plaintiffs, like the provision for attorney's fees. Certainly, there will be *some* cases in which a less-seriously injured plaintiff may receive a "commensurate benefit" for the damages abolished by the "caps." But the fact that some less-seriously injured plaintifs may receive a commensurate benefit simply cannot validate the statutory scheme for the many plaintiffs, like Gus Branchesi and those he represents, whose intangible damages are so large that the crumbs thrown to them elsewhere by the statutes can never amount to benefits *commensurate* with what they have lost.

[9/] *See Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974) (the statute which the court upheld removed no-fault immunity in the absence of insurance coverage); *Kluger v. White*, 281 So.2d 1, 5 (Fla. 1973) (outcome might be different "[h]ad the Legislature chosen to require that appellant be insured"). *See also Smith v. Department of Insurance*, 507 So.2d 1080, 1088 (Fla. 1987) (distinguishing *Lasky* because the statute there "required that all motor vehicle owners obtain insurance").



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

issue here is to spread the damages of malpractice victims to society at large through the mechanisms of the insurance industry (*see* § 766.209(4)(a)), the instant statutory scheme does *not* require potential defendants to purchase insurance coverage to effect that statutory purpose.[10/] In other words, the statutory scheme allows potential medical malpractice defendants to practice medicine *without* insurance, and then to "cap" a plaintiff's damages by electing arbitration, whether they are capable of paying the ultimate award or not. And, of course, when an *uninsured* defendant demands arbitration, the savings obtained by the "caps" elected by the defendant are *not* passed on to anyone through any mechanism at all; they are simply withheld from the plaintiff and left in the defendant's pocket. Whatever the legitimacy of the avowed "purpose" of the statutory scheme, and whatever potential resiliency to an Article I, § 21 challenge might have been gained by a requirement of mandatory insurance, it ought to be perfectly clear that the scheme in issue--which affirmatively

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[10/] The only "financial responsibility" requirements we have been able to find are contained in §458.320, Fla. Stat. (1989), which pre-existed the statutes in issue here, and which require *physicians*, as a condition of licensure, to maintain either an insurance policy, a letter of credit, or an escrow account, in amounts of $100,000/$300,000, or if the physician has hospital staff privileges, in amounts of $250,000/$750,000. Of course, neither the letter of credit nor the escrow account will have any effect on liability insurance premiums, nor will they spread victims' damages to society at large through the mechanisms of the insurance industry. Moreover, these requirements need *not* be met. The statute permits physicians to "go bare" if they like, subject only to "discipline" if they are unable to pay a judgment creditor (up to $100,000 or $250,000) "on a schedule determined by the Board to be reasonable and within the financial capability of the physician." Moreover once again, this statute applies only to physicians in private practice. It does not apply to physicians employed by governmental agencies -- and there are no financial responsibility requirements imposed upon any other type of health care provider, like the defendant in the instant suit.

The defendants also purport to find in §766.207 an "obligation to pay" on the part of a defendant, whenever arbitration is demanded. If a *real* obligation appears in the statute (and we are not convinced that it does), that obligation is certainly no substitute for mandatory insurance coverage. It also provides no commensurate benefit whatsoever, because the defendant would have exactly the same legal "obligation to pay" any judgment entered against him in a civil malpractice action.



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

authorizes "caps" but fails entirely to require any insurance coverage to effect the "purpose" of such caps--cannot survive scrutiny under Article I, § 21.

In light of the foregoing, it should be obvious that the two statutes are weighted entirely in the negligent defendant's favor. They require an innocent, seriously injured victim of the defendant's malpractice to make a pre-suit showing of negligence, and then give the negligent defendant a unilateral right to slash the plaintiff's damages by simply conceding his negligence before suit is filed, whether he has purchased insurance coverage or not. If the plaintiff declines to "arbitrate," his damages are "capped" at trial. If he accepts, his damages are slashed even more drastically, in return for a concession of liability which he neither needs nor wants, and attorneys' fees. In contrast, if the plaintiff demands arbitration, he is subject to the same "caps." The only cost to the defendant is an award of fees if the plaintiff prevails at trial--crumbs which any defendant would eagerly toss to a seriously injured victim in return for the savings in damages. The worst case for the negligent defendant is an unqualified victory. The best case for the seriously injured plaintiff is an unqualified disaster. Most respectfully, at least where seriously injured victims or wrongful-death survivors are concerned, no legitimate argument can be made that the rights sacrificed by this Rube Goldberg invention are balanced by an alternative remedy or a commensurate benefit--which brings us to the defendant's alternative argument.

*3. The Absence of an Overpowering Public Necessity and the Existence of Reasonable Alternatives.* The defendants contend alternatively that, even if the statutes in issue here provide no alternative remedy or commensurate benefit, they are nevertheless supported by an overpowering public necessity and the absence of any less onerous alternative. To support that argument--and because Ch. 88-277, which amended and reenacted Ch. 88-1 to cure numerous defects, contains no legislative findings to support the particular statutes in issue here--the defendants rely upon an earlier set of legislative findings



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(305) 358-2800

contained in the "Whereas" clauses and §§1 and 48 of Ch. 88-1, by which the statutes were initially enacted. Section 48 of Ch. 88-1 is codified at §766.201 Fla. Stat. (1991). These findings, according to the defendants, clearly demonstrate an overpowering public necessity for enactment of the statutes in issue here. In point of fact, however, the legislative findings demonstrate no necessity whatsoever for the imposition of damage "caps" only upon the recoveries of the *most seriously* injured victims of medical malpractice at the option of a negligent defendant who is willing to admit his culpability, which is the point in issue here, and they deserve a far more careful scrutiny than the defendants have been willing to give them.[11/]

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[11/] One of the legislature's "findings" deserves no scrutiny at all -- the finding that damage "caps" "provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning . . . ." §766.201(2)(b)(3). We take it to be self-evident that the administrative convenience of insurance companies can never amount to an *overriding public necessity* for the abolition of an injured victim's legal rights.

Another of the legislature's "findings" can simply be ignored, because it is wrong as a matter of law. The "finding" to which we refer is the legislature's purported justification for "capping" "wage loss and loss of earning capacity" at 80% when the defendant is willing to admit its culpability: "The recovery of 100 percent of economic losses constitutes over-compensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages." This "finding" is wrong because Florida juries are not instructed to award *gross* earnings lost in the past; they are instructed to award actual losses of income suffered prior to suit, which in most cases would be net income after taxes. *See* Fla. Std. Jury Instn. (Civ.) 6.2d. In addition, calculation of a plaintiff's future impairment of earning capacity does not even involve considerations of gross income and net income -- because it is thoroughly settled that the measure of this element of damages is loss of *capacity* to earn, not loss of future earnings. *See, e. g., Mullis v. City of Miami*, 60 So.2d 174 (Fla. 1952); *Florida Greyhound Lines, Inc. v. Jones*, 60 So.2d 396 (Fla. 1952); *Allstate Insurance Co. v. Shilling*, 374 So.2d 611 (Fla. 4th DCA 1979); *Atlantic Coast Line Railroad Co. v. Ganey*, 125 So.2d 576 (Fla. 3rd DCA 1960). In any event, whatever justification this "finding" might have provided for a substantive requirement that all economic damages be measured as net after taxes, it certainly does not demonstrate any "overpowering public necessity" for allowing malpractice victims to recover 100% of their economic damages unless a negligent defendant selects them for an 80% cap on those damages by admitting its culpability.

Of course, the legislative "findings" have their genesis in the findings of the Academic Task Force, from which they were borrowed and upon which the defendants heavily rely--and an examination of those reports will prove revealing. It is true that the Task Force (and the legislature) found that "[t]he 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" (§766.201(1)(b))--but that proves absolutely nothing pertinent to the issue presented here, because the *underlying cause* of the increases in the amounts of paid claims is *not* identified in this "finding." According to the Task Force, the *primary* cause of the high cost of medical malpractice insurance premiums was not excessive damage awards, but *too much malpractice*, too little regulation, and too little discipline of repeatedly negligent health care providers (R. 477-78--also in Appellant HCA's appendix, Tab 4, at 12-13).[12/]

Indeed, in a finding that should give this Court serious pause when confronting the defendants' claim that damage "caps" were a *reasonable* response to the perceived crisis, the Task Force found as a fact that *nearly half* of all the dollars paid on malpractice claims in Florida over the 12-year period from 1975 to 1986 were paid by a *very* tiny group of Florida's physicians--the *4%* who had experienced *multiple* malpractice claims (R. 469--also in HCA's appendix, tab 2, pp. 142-46). The Task Force therefore concluded that, "[o]bviously, a reduction in the occurrence of medical injuries is the most desirable manner in which to

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[12/] This conclusion was but an echo of the Task Force's preliminary finding that the "increase in loss payments" was caused by increased frequency of claims and increased severity of injuries, and that no data existed from which the Task Force could conclude that any victim had received an "excessive" award under current legal rules (HCA's appendix, tab 2, p. 49). This was also the conclusion reached in the "Reporters' Study, Enterprise Responsibility for Personal Injury" (1991), prepared for the American Law Institute--in which the reporters generally validated the conclusion of supporters of the tort system that "the true cause of soaring rates of malpractice litigation and liability insurance is the large amount of medical malpractice that occurs." *Id.* at Vol. I, pp. 295-99.



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

reduce the costs of the medical malpractice systems" (HCA's appendix, tab 4, p. 13). To that end (and this is an exceedingly important point which the defendants would just as soon this Court overlook), *most* of the 52 sections of Ch. 88-277 are directed to regulation, discipline, and prevention of malpractice at the threshold--not to the so-called "tort reform" provisions sprinkled throughout the Act. And because nearly all of the *general* findings upon which the defendants rely are directed to *numerous* sections of the Act, including the dozens of sections designed to reduce the incidents of malpractice, they simply cannot be relied upon as providing particularized support for the two quite isolated sections of the Act in issue here.

To the extent that the legislative findings purport to address the two specific statutes in issue here, they simply do not demonstrate any "overpowering public necessity" for the imposition of damage "caps" upon only the most seriously injured victims of medical malpractice at the sole election of negligent defendants who are willing to admit their culpability. In point of fact, the Task Force was quite specific in its conclusion that straightforward damage "caps," by themselves, are regressive and undesirable; that they would unfairly penalize only the most seriously injured tort victims; and that they would be unconstitutional--and it therefore squarely recommended *against* them (R. 472-73, 480-81, 483-84, 488-89--also in HCA's appendix, tab 3, pp. 17-18; tab 4, pp. 1, 35-36; tab 6, pp. 1, 58-60, 63-65).[13] The specific "caps" in issue here were recommended nonetheless, according

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[13] This was also the conclusion reached in the "Reporters' Study, Enterprise Responsibility for Personal Injury" (1991), prepared for the American Law Institute -- in which the reporters concluded that damage "caps" have "far more vices than virtues"; that they are "inherently discriminatory" because "the full cost of a reform policy aimed at reducing tort liability premiums for everyone is borne by the more severely disabled victims, especially the youngest, who can be expected to live the longest with their disability"; that "caps" are "inequitable" because a quadriplegic will recover the same award as a victim who has lost merely a finger or a toe; and because "the entire burden of containing malpractice costs is imposed on a handful of the most catastrophically injured victims, a legal policy that should



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

to the Task Force, not to achieve any particularly significant savings in ultimate loss payments, but *primarily* as an incentive to encourage negligent defendants to admit liability and arbitrate damages, thereby resulting in earlier resolution of meritorious claims at less litigation expense to insurers than would have been incurred in defending civil lawsuits--and that is essentialy the thrust of the legislative findings upon which the defendants rely (R. 476-79, 484--also in HCA's appendix, tab 4, pp. 11-12, 21, 27; tab 6, p. 59).

The insignificance of the projected savings from this "prompt resolution" plan, as well as the fact that the projection itself was based on largely inadequate data, is also revealed by the Task Force itself:

> The Task Force has not previously published estimates on the projected effects of caps in Florida, because adequate and reliable information is not available as to the distribution of economic and non-economic losses in past paid claims data. However, the data published in previous fact-finding reports will support a reasonable inference that a statutory cap on non-economic damages would probably have a more substantial effect upon medical malpractice claims than upon other liability lines.
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> . . . .
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> . . . [T]he Task Force has attempted to estimate the *relative magnitude* of the effect (impact) of a cap on other liability lines as compared with the medical malpractice line. Caution must be exercised in the interpretation of these results, for several reasons. First, the estimates are based upon hypothetical assumptions (rather than empirical data) as to distribution of economic and non-economic losses in past paid claims data. Second, the estimates are based upon a retrospective analysis,

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be entirely unappealing from the point of view of both corrective justice and efficient insurance." *Id.* at Vol. II, pp. 218-21. According to the reporters, "[a] fairer, more sensible policy would incorporate a *floor* or threshold on pain and suffering damages: this would remove from the tort system the bulk of the less significant pain and suffering claims . . . that now tend to be overcompensated because it costs the insurer more to defend than to pay them." *Id.* at Vol. II, pp. 220-21.



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> to measure how several levels of caps might have affected past loss payments. There is no way of knowing how future loss payments would be changed by conditions that have changed since the closed claims data were reported.
>
> With these limitations in mind, the Task Force made a retrospective analysis of how past loss payments (1981-85) for medical malpractice claims and other liability lines in Florida might have been affected if caps on non-economic damages at assumed levels of $250,000 or $350,000 would have been applicable. With a $250,000 cap on non-economic damages, loss payments would have been reduced by about 11 percent for medical claims but only 2 percent for other liability lines, assuming a 1 to 1 ratio of non-economic losses and economic losses. With a $350,000 cap on non-economic damages, the corresponding figures would be approximately 7 percent for medical claims and only 1.6 for other liability lines. The numbers change, but the relative magnitude remains about the same, if it is assumed that the ratio of non-economic losses to economic losses would be 1 to 2. The estimated reduction in loss payments would then be approximately 4.2 percent for medical and only 1 percent for other liability lines, with a $250,000 cap; or it would be approximately 2.4 percent for medical and only 0.7 percent for other lines, with a cap of $350,000. . . .
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> . . . For reasons explained above, these figures are offered only for what they say about relative magnitude. They should not be misinterpreted as vouching for the amount of savings that might be realized from caps on non-economic damages.

(R. 486-88--also in HCA's appendix, tab 6, pp. 61-63).

In other words, the Task Force has simply "guesstimated," based upon hypothetical assumptions and data which it itself cautions against taking too seriously, that the "prompt resolution" plan which includes the draconian "caps" at issue here *might* result in mere single-digit percentage reductions in loss payments. This "guesstimate" also assumed that the "caps" would apply in all cases; but since the statutes in issue here provide "caps" only in cases where the arbitration alternative is elected, the projected savings must be substantially less.



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

In addition, of course, the projections were made upon past loss experience during a time when there was too much malpractice, too little regulation, and too little discipline of repeatedly negligent health care providers, and the projection therefore needs a further reduction for the savings to flow from the tightened regulation and discipline effected by the numerous additional statutes contained in Ch. 88-277.

In short, the findings of the Task Force itself demonstrate that, at best, the "caps" imposed by the statutes in issue here might shave a few percentage points from liability insurance premiums--and no more. The findings of the Task Force also squarely refute the defendants' unjustified attempt to turn the legislature's otherwise unexplained finding of "functional unavailability" into a finding that, without the draconian "caps" authorized by the statutes in issue here, malpractice insurance will be totally unavailable. The Task Force said no such thing. In fact, the Task Force expressly found that "medical malpractice insurance has always been available from some source"; "that there is no genuine unavailability problem"; that malpractice insurance "represent[s] an expensive, but affordable 'cost of doing business' item for many physicians"; and that the otherwise available insurance coverage might be "functionally unavailable" to only a few, like "young practitioners in high risk specialties serving in less affluent medically underserved regions" (HCA's appendix, tab 2, pp. 37, 40, 239-40).[14/]

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[14/] This was also the conclusion reached in the "Reporters' Study, Enterprise Responsibility for Personal Injury" (1991), prepared for the American Law Institute -- in which the reporters concluded that malpractice insurance premiums have not risen appreciably faster than health care costs as a whole; that insurance premiums are not much more than 1% of the nation's total health care bill; that premiums are stable and insurance is available; and that the average doctor's malpractice premiums are around $15,000.00 per year, an amount characterized as a "relatively bearable component of the overall expenses of medical practice, the bulk of which are soon recovered from the health care insurance programs paid for by patient premiums." *Id.* at Vol. I, pp. 285-89. Of course, just as the Task Force did, the reporters noted that premiums are considerably higher for a few high risk specialties, like obstetrics. The high premiums for obstetricians provide no support for the draconian "caps"



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

This, in our judgment, is a far cry from the non-existent "finding" claimed by the defendants here--that, absent damage "caps" there will be no malpractice insurance available to physicians in this state--and the bottom line here therefore remains this: at best, the "caps" imposed by the statutes in issue here might shave a few percentage points from liability insurance premiums--and no more. To demonstrate an "*overpowering* public necessity," however, the necessity must be a *compelling* one. *See Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979). We take it to be self-evident that shaving a few percentage points from liability insurance premiums is hardly a *compelling* justification for depriving only the most seriously injured victims of medical malpractice, and no one else, of a full recovery.

Only one real justification for the "caps" therefore remains in the Task Force's and the legislature's findings--the finding that the "caps" at issue here are deemed desirable to provide incentives to negligent defendants to admit their liability (but only, of course, after their liability has been proven to them by a plaintiff's "pre-suit investigation" and "notice of intent letter"), and to arbitrate damages rather than defend a lawsuit (on the off-chance that the incentives, if successful, *might* result in single-digit percentage savings in insurance premiums). In our judgment, this assertion does not even arguably satisfy the *Kluger* and *Smith* tests. Before a plaintiff's cause of action for intangible damages can be abolished, in whole or part, the legislature must demonstrate considerably more than the desirability of providing incentives to negligent defendants to admit liability to the plaintiff and arbitrate damages (rather than to admit liability to a court and try damages to a jury) in order to reduce litigation costs; instead, the legislature must demonstrate a compelling public

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in issue here, however -- because, for $5,000.00 per year paid to the Florida Birth-Related Neurological Injury Compensation Plan (which was established by other provisions of the Act in issue here) an obstetrician escapes tort accountability altogether, and the statutes in issue here will therefore never come into play for this type of medical injury. *See* §766.301-316, Fla. Stat. (1991).

necessity for *abolishing the cause of action* itself. *See Overland Construction Co. v. Sirmons*, *supra* at 572 (proponents must show an overpowering public necessity not for some change, but "for abolishing [the] cause of action" at issue). Most respectfully, that requirement is simply not satisfied by a demonstration that damage "caps" are nifty incentives to force negligent defendants to admit liability, in the speculative hope that replacing a few civil trials with arbitration panels might result in single-digit percentage savings in insurance premiums.

It is also worth emphasizing here that the legislative findings upon which the defendants rely here are essentially the same considerations which motivated the tort reform legislation overturned in *Smith* (quoted at 507 So.2d at 1084, n. 2). If those findings were insufficient to support the damage "caps" at issue in *Smith*, and no party contended to the contrary, then the nearly identical findings relied upon by the defendants here should be insufficient to demonstrate the necessary overpowering public necessity for abolition of a portion of the plaintiffs' cause of action. We should also note that, *after* enactment of the statutes in issue here, a statewide referendum was held in November, 1988, on "Amendent 10"--a proposal designed to overrule this Court's reading of Article I, §21 in *Smith*, and impose a constitutional "cap" on personal injury damages. The proposal was, as the Court will remember, rejected in a landslide. Surely, if the electorate itself perceived no necessity whatsoever for amending the constitution to add damage "caps," the Court should be extremely chary of concluding that an overpowering public necessity existed for imposition of the damage "caps" which the legislature provided as incentives to negligent defendants in the statutes in issue here.

In any event, even if the Court were to conclude that the legislature's findings demonstrate the requisite overpowering public necessity, that would not be enough to sustain the constitutionality of the statutes. The alternative test of *Kluger* and *Smith* has *two* conjunctive requirements, and the legislature must *also* demonstrate the unavailability of *any*



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

less onerous alternative than outright abolition of the cause of action. As the district court correctly observed in *Echarte*,[15] there is no "finding" to this effect in either the legislative enactments or the Task Force reports. In its brief (p. 30), defendant HCA has purported to find such a conclusion articulated in the "Discussion Draft" of the Task Force, in the following half-quoted (and slightly misquoted) phrase: "only a cap on non-economic damages would reduce medical malpractice paid claims appreciably." The sentence *actually* reads, "*Of these alternatives*, only a cap on non-economic damages would reduce malpractice paid claims appreciably, . . ." (HCA's appendix, tab 3, p. 5--emphasis supplied). The "alternatives" which immediately precede the sentence are: "[the cap], a requirement that the plaintiff prove 'gross negligence' in at least some situations, more specific jury instructions on damages, further limitations on or elimination of punitive damage awards, and expansion of the collateral source offset." (*Id.*). Of *those* limited alternatives, of course, only a cap on non-economic damages would reduce malpractice paid claims appreciably, so the half-sentence upon which defendant HCA relies means something entirely different than the proposition for which it has been advanced--that *no* reasonable alternatives exist to the imposition of the damage "caps" effected by the statutes in issue here.

The *only* place in which such a conclusion appears in writing is in the letter included at tab 5 of HCA's appendix, which a member of the Task Force's research staff wrote to a member of the House of Representatives. The letter merely expresses the writer's opinion, and does not purport to speak for the Task Force itself, or for the legislature--neither of which articulated the necessary conclusion that no reasonable alternative existed to the draconian "caps" at issue here. Defendant HCA is therefore left with the mere suggestion that such a conclusion is inferable from the passage of the legislation itself. As the district

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[15] *University of Miami v. Echarte,* 585 So.2d 293, 301 (Fla. 3d DCA 1991), *review granted,* Case No. 78,210.



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

court correctly observed in *Echarte*, however, 585 So.2d at 301, this is insufficient--because it would render Article I, §21 an empty shell. It is also mere wishful thinking, because there are several reasonable alternatives which come readily to mind, each of which could arguably accomplish the same speculative, single-digit percentage savings in liability insurance premiums projected by the Task Force.

First and most obvious is the alternative method provided by the numerous remaining provisions of Ch. 88-277 itself--tighter regulation and discipline of repeatedly negligent health care providers to reduce the incidents of medical malpractice. Surely, since that was the *primary* purpose of Ch. 88-277 in any event, that alternative could have been given some time to work before determining whether abolition of the plaintiffs' cause of action was absolutely necessary. The legislature might also have taken some counsel from the *Lasky* decision, and effected its hoped-for single-digit percentage savings in insurance premiums by abolishing the causes of action of a small percentage of the *least* seriously injured victims of medical malpractice, rather than denying recovery only to the most needy and deserving of those victims. The legislature might also have reduced the recoveries of *all* medical malpractice victims in the small amounts necessary to effect the projected savings, rather than sacrificing the rights of only the most seriously injured victims. Tighter regulation of medical malpractice insurers and mandatory insurance schemes might also have provided reasonable alternatives. There is no indication in the Task Force reports that any of these perfectly sensible (and much more reasonable) approaches to the problem were given any serious consideration by the Task Force, much less that such alternatives were found to be *unavailable.*

More to the point, as we have taken some pains to point out, the "caps" in issue here really amount to little more than financial incentives to negligent defendants to admit liability--before suit, rather than in an Answer to a Complaint--in an effort to reduce the cost



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

of litigation. They are, in other words, a carrot rather than a stick. But where a carrot will do, a stick will ordinarily do as well--and a stick was clearly in order here, because the carrot dangled in front of defendants by the statutes in issue here functions doubly as an axe to plaintiffs' legal rights. A stick, on the other hand, would provide incentives to negligent defendants to admit liability, without causing plaintiffs any deprivation at all. And, in determining whether a carrot or a stick is appropriate, it is relevant, we think, that victims are innocent and negligent defendants are negligent. Carrots are appropriate for innocents, not for wrongdoers; wrongdoers deserve sticks, not rewards.

The stick we have in mind could have taken many forms. For example, instead of financially *rewarding* negligent defendants for admitting liability, the legislature could have created financial *penalties* for negligent defendants who refuse to admit liability and arbitrate the plaintiff's damages, and who thereafter suffer an adverse verdict on liability at trial. Some of those penalties are already tacked on to the edges of the Rube Goldberg invention represented by the statutes in issue here, and their use could have been broadened considerably without sacrificing plaintiffs' rights. We will not belabor the matter. We point out simply that a stick is a perfectly reasonable alternative to the carrot provided by the statutes in issue here; that a stick could have been utilized to accomplish essentially all that the carrot was designed to accomplish; and that the availability of such an alternative renders indefensible the defendant's contention that the damage "cap" incentives provided to negligent defendants by the statutes in issue here, at the considerable expense of seriously injured victims of medical malpractice, avoids the rigorous requirements of Article I, §21 of the Florida Constitution.[16] For all of the foregoing reasons, we respectfully submit that

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[16] Although *Smith* obviously controls the question here, we should point out that this Court is not alone in its rigorous interpretation of Article I, §21. In those states whose constitutions recognize the right of access to the courts, statutory caps on damages like those

neither the trial court nor the district court erred in declaring the statutes in issue here violative of Article I, §21 of the Florida Constitution.

*B. The Violation of Article I, §22 of the Florida Constitution.*

In *Smith v. Department of Insurance,* 507 So.2d 1080, 1089 (Fla. 1987), this Court declared the cap on damages unconstitutional not only for violating the claimant's right of access to the courts, but also because it deprived the claimants of their constitutional right of trial by jury: "[B]ecause the jury verdict is being arbitrarly capped . . . the plaintiff [is not] receiving the constitutional benefit of a jury trial as we have heretofore understood that right." Likewise here, because a defendant's demand for arbitration automatically deprives the plaintiff of a pre-existing measure of damages, whether the plaintiff accepts arbitration or not, the *Smith* holding is dispositive. Nevertheless, both defendants argue that this conclusion is erroneous for two reasons: (1) the legislature may "abolish . . . *all* right of recovery of specific items of damage" without violating the constitutional right to trial by jury, according to *Lasky v. State Farm Insurance Co.*, 296 So.2d 9, 22 (Fla. 1974); and (2) this Court did not mean what it said in *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987), when it observed that damage "caps" violate the right to trial by jury. We disagree with both of these contentions.

First, *Lasky* is simply inapposite here. The statutes in issue here do not "abolish. . . *all* right of recovery of specific items of damage." In fact, they authorize recovery of 100%

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in issue here have uniformly been struck down. *See, e.g., Wheat v. United States*, 860 F.2d 1256 (5th Cir. 1988); *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986); *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186 (1986), *cert. denied*, 481 U.S. 1029, 107 S. Ct. 1954, 19 L. Ed. 2d 527 (1987); *Gentile v. Altermatt*, 169 Conn. 267, 363 A.2d 1 (1975), *appeal dismissed*, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976); *Kansas Malpractice Victim Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985). *See also Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986); *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991).

of a plaintiff's lost income and loss of earning capacity and 100% of a plaintiff's intangible damages if the defendant simply opts to contest liability. Damages for lost income and loss of earning capacity are "capped" at 80% only if the defendant opts to admit liability. A plaintiff who has suffered intangible damages in amounts less than the "caps" may recover 100% of those damages even if the defendant admits liability. And a plaintiff who has suffered intangible damages in excess of the statutory amounts has his recovery "capped" in an arbitrary amount which bears no relationship to the actual extent of those damages. In other words, the right to a jury award of actual damages is denied only in part, and only to some (and of those, to some more than others), and then only in the limited circumstance where the defendant opts to admit liability. The statutes therefore do not even arguably purport to "abolish . . . *all* right of recovery of specific items of damage." They simply allow medical defendants to elect between contesting liability or admitting liability, and they reward election of the latter by imposing "caps" upon items of damage otherwise determinable and awardable by a jury.

The relevant decision is therefore not *Lasky*; it is *Smith*. And in *Smith*, we think this Court made it crystal clear that damage "caps" of this type violate Article I, §22:

> Appellees also argue . . . that the legislature has not totally abolished a cause of action, it has only placed a cap on damages which may be recovered and, therefore, has not denied the right to access the courts. This reasoning focuses on the title to article I, section 21, "Access to courts," and overlooks the contents which must be read in conjunction with section 22, "Trial by jury." Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e. g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. *Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.*
> . . .



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

507 So.2d at 1088-89 (emphasis supplied). We will leave it to the Court to determine whether this announcement is addressed *only* to Article I, §21, or whether it is addressed to Article I, §22.[17]

Although we find no ambiguity in this pronouncement, the defendants insist that there is, so we should briefly address the point as if *Smith* did not exist. We therefore remind the Court that Florida's constitutional guaranty of trial by jury reflects the "most basic and fundamental of all our rights," which "dates back to the Magna Carta, and is recognized as one of the greatest bulwarks of human liberties," and "has become a part of the birth right of every free person." *Broward County v. La Rosa*, 484 So.2d 1374, 1378 (Fla. 4th DCA 1986), *approved*, 505 So.2d 422 (Fla. 1987). Indeed, the strength of the commitment is reflected in the language of Article I, §22 itself: "The right of trial by jury shall be secure to all and remain inviolate." Such a constitutional right "is not to be narrowly construed," *In Re Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433, 435 (Fla. 1986), but "must be maintained inviolate," *Olin's, Inc. v. Avis Rental Car System of Florida*, 131 So.2d 20, 22 (Fla. 3rd DCA 1961), and if the issue is at all a close one, the court should recognize the right to jury trial. *Hollywood, Inc. v. City of Hollywood*, 321 So.2d 65 (Fla. 1975).

With these principles in mind, we ask the Court to examine the statutes in issue here a little more closely than the defendants would like. Apparently, the legislature was well aware that the right to a jury trial prohibits the state from *requiring* arbitration, and that a statute authorizing arbitration can therefore withstand constitutional scrutiny only if the

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[17] A substantial number of other jurisdictions have agreed with *Smith's* conclusion that damage "caps" violate the constitutional right to trial by jury. *See, e. g., Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988); *Arneson v. Olson*, 270 N.W.2d 125 (N. Dak. 1978); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Ops.3d 164, 355 N.E.2d 903 (Ohio P.C. 1976).



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

parties have the mutual option to reject it.[18] In an apparent effort to avoid this settled stricture, the legislature therefore pretended to frame the statutes in issue here as providing arbitration merely as an *alternative* procedure. Indeed, this illusion is made explicit in §766.209(1), which declares that "[a] proceeding for voluntary binding arbitration is an alternative to jury trial and shall not supercede the right of any party to a jury trial."

The problem with this pretention, however, is that it contains no mutual option to reject arbitration without consequences. Instead, the options are staggered, and a true rejection of arbitration, without significant consequences, can only occur if the plaintiff first rejects arbitration and the defendant also rejects arbitration. However, if the plaintiff initially rejects arbitration, and the defendant then asks for arbitration, significant consequences immediately attach. If the plaintiff then agrees to arbitration, his damages are "capped"--at 80% of his lost income and loss of earning capacity, and at $250,000.00 of his intangible damages. If the plaintiff continues to insist upon his constitutional right to a jury trial, his damages are still "capped"--at 80% of his lost income and loss of earning capacity, and at $350,000.00 of his intangible damages. In short, if the defendant wants to arbitrate, the plaintiff is deprived of a meaningful opportunity to reject this so-called "alternative" procedure in favor of his constitutional right to a jury trial; indeed, he will be *punished* for doing so by deprivation of a portion of his potential recovery.

The so-called "alternative" provided by the statute is therefore not an "alternative" to the plaintiff at all; it is an "alternative" only to the defendant, and an "alternative" which carries a significant punishment for any plaintiff who dares to reject the defendant's choice

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[18] *See, e.g., Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241, 82 S. Ct. 1318, 8 L. Ed.2d 462 (1962) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed.2d 1409 (1960) (same); *G & N Construction Co. v. Kirpatovsky*, 181 So.2d 664 (Fla. 3rd DCA 1966) (same).



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

of alternatives. Incidentally, that the statutory scheme is entirely lacking in mutuality and is essentially punitive is made explicit only a few subparagraphs after the illusory "alternative" is recognized--in §766.209(4)(a), which declares that if the plaintiff rejects arbitration, a $350,000.00 cap on his non-economic damages is "warranted by the claimant's refusal to accept arbitration . . . ." In short, the statutes explicitly recognize the plaintiff's right to a jury trial and his correlative right to reject arbitration--but they then *punish* him for exercising that constitutional right, by depriving him of a portion of the damages which would have been available to him if he had not been forced to reject arbitration in the first place.

In our judgment, there is no substantial difference between an unconditional requirement for mandatory arbitration in violation of a constitutional right, and economic *punishment* for exercising that constitutional right, and both are impermissible for the same reasons. It should also be clear that, if a person can be *punished* for exercising a constitutional right, then he does not possess that constitutional right. Surely, a constitutional right to jury trial which would allow this type of economic punishment for its exercise would be no right at all, and Article I, §22 simply cannot be be pared back in that fashion at the whim of the legislature. Most respectfully, the so-called "alternative" by which the defendants seek to distinguish *Smith* from the scheme in issue here is simply a punitive wolf dressed in sheep's clothing; it amounts to damage "caps" at the unilateral election of the defendant; and it therefore offers no basis for distinction from *Smith*. *Smith* is clearly controlling here, and the trial court correctly concluded that the statutes in issue here violate Article I, §22 of the Florida Constitution.

### *C. The Violation of Article X, §6(a) of the Florida Constitution.*

The statutes in issue here recognize a plaintiff's cause of action for the full extent of



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

the pre-existing damages allowed at common law, but delegate to the defendant the unilateral right to deprive the plaintiff of a portion of the damages to which he was entitled at the time his cause of action arose. Thus, we are not speaking here of a statute which simply abolishes a cause of action, or a specific measure of damages, before the cause of action arises. We are speaking of a statute which permits the surrender of a portion of the plaintiff's damages, *after* that cause of action has arisen. In this particular context, the statutes in issue here clearly constitute the unlawful taking of proper without just compensation.

The plain language of Article X, §6(a) prevents the taking of "*private* property" without full compensation, not merely "real property"--and it is settled beyond any argument whatsoever that the constitutional protection provided by this clause is afforded to *all* property rights, real *and* personal: "It has long been settled in this jurisdiction . . . that the prohibition against the taking of private property 'without just compensation' . . . is not limited to the taking of property under the right of eminent domain." *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959) (declaring unconstitutional "caps" on compensation for the taking of individual citrus trees).[19] Second, the plaintiffs clearly do have "property rights" in a recovery of the full amount of their intangible damages, because it is thoroughly settled that a cause of action in tort for damages creates a "property right" in the injured person.

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[19] In addition, *see Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla.), *cert. denied*, 488 U.S. 870, 109 S. Ct. 180, 102 L.Ed.2d 149 (1988) (citrus trees in nursery pots); *Alford v. Finch*, 155 So.2d 790 (Fla. 1963) (personal property right to hunt game on one's real property); *State ex rel. Davis v. City of Stuart*, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307 (1929) (money appropriated in the guise of taxation); *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 5 So. 833 (1889) (money appropriated by confiscatory tariff regulations); *Morton v. Zuckerman-Vernon Corp.*, 290 So.2d 141 (Fla. 3rd DCA), *cert. denied*, 297 So.2d 32 (Fla. 1974) (interest payments owing upon note); *Mullis v. Division of Administration*, 390 So.2d 473 (Fla. 5th DCA 1980) (leasehold interest); *Flatt v. City of Brooksville*, 368 So.2d 631 (Fla. 2nd DCA 1979) (personal property); *Kirkpatrick v. City of Jacksonville*, 312 So.2d 487 (Fla. 1st DCA 1975) (personal property).



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

*See, e. g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed.2d 265 (1982); *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982).[20]

Indeed, the statutes in issue here recognize that medical malpractice victims have property rights, both in their causes of action and in the full amount of their intangible damages, because they initially authorize recovery of the full measure of a medical malpractice victim's damages in all cases, and then simply delegate to negligent defendants the right to avoid paying some of those damages in whatever cases they select by exercising their option to admit rather than contest liability.[21]

To be more specific, a plaintiff who has suffered intangible damages in an amount less than the "caps" is entitled to recover 100% of those damages, whether the defendant chooses to admit liability or not. In addition, a plaintiff who has suffered intangible damages

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[20] *See State, Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981); *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987), *cert. denied*, 485 U.S. 1000, 108 S. Ct. 1459, 99 L. Ed.2d 690 (1988); *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (1975); *City of Winter Haven v. Allen*, 541 So.2d 128 (Fla. 2nd DCA), *review denied*, 548 So.2d 662 (Fla. 1989); *Griffin v. City of Quincy*, 410 So.2d 170 (Fla. 1st DCA 1982), *review denied*, 434 So.2d 887 (Fla. 1983).

The more difficult questions presented in most of these decisions -- whether, when, and to what extent such a "property right" can be retroactively abolished by the legislature within the constraints of the "due process" clause -- are simply not implicated by the issue presently under discussion, which involves only the reach of Article X, §6(a). The only aspect of these decisions which is relevant to the subject presently under discussion is the recognition that a cause of action in tort for damages is a "property right."

[21] In the argument which follows, we will focus upon the optional "caps" imposed upon intangible damages. We remind the Court here, however, that the statutes contain an additional wrinkle concerning damages for lost income and loss of earning capacity. The statutes recognize an initial property interest in the recovery of 100% of those damages, until the point at which the defendant exercises his option. If the defendant chooses to contest liability, the plaintiff may recover the full 100% of both of those items of damage. If the defendant chooses to admit liability, 20% of those damages are automatically lopped off. The analysis in the text applies to the uncompensated "taking" represented by this aspect of the statutory scheme as well.

in an amount which exceeds the "caps" is also entitled to recover 100% of those damages if the defendant chooses to submit the issue of his liability to a jury. The *only* circumstance in which these pre-existing and statutorily-recognized property rights are curtailed is when a defendant takes advantage of the singular *option* granted him by the statutes to admit liability and demand arbitration when the plaintiff's property rights exceed the "caps." That statutory option is neither an abolition of a cause of action nor a declaration that the plaintiff has no property rights in the full measure of his damages, however; it is simply a grant of unilateral authority to medical malpractice defendants to pay less than full compensation to their victims if they choose to admit, rather than to contest, liability. And that, we believe, amounts to precisely the type of "taking" prohibited by Article X, §6(a).

The point can best be made with a simple, parallel hypothetical. Assume that, instead of imposing "caps" on the amounts which a negligent defendant had to *pay* his victim, the statutes required the defendant to pay the victim the full measure of compensation needed to redress his intangible damages, and then required the plaintiff to pay over to the state all sums recovered above $250,000.00 or $350,000.00 (depending upon whether the plaintiff had accepted or rejected a defendant's demand to arbitrate). The statutes might then require the state to place these monies into the general revenue fund for the public benefit, or even to return the monies collected to the defendant (or its insurer) for the public benefit of reducing liability insurance rates and increasing the availability of medical care. If that is what the statutes had required, we believe this Court would not have hesitated for an instant to declare such a scheme violative of Article X, §6(a)--because it is precisely that type of uncompensated appropriation of private property which Article X, §6(a) is designed to prevent.

The statutes presently before the Court are different in form from our hypothetical, of course. In substance, however, they do exactly the same thing--and the difference



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

amounts to little more than a bookkeeping entry. Instead of the state taking the plaintiff's property and placing it in the general revenue fund or returning it to the defendant (or its insurer) for the public benefit, the statutes in issue simply delegate authority to the defendant to keep the money in the first instance, eliminating the transactions in between. And if our hypothetical statutes would violate Article X, §6(a), then the statutes in issue here--which amount to little more than a shell game in which exactly the same thing is accomplished, by delegating to the defendant the option to appropriate the plaintiff's property rights without compensation simply by admitting liability--must be held violative of Article X, §6(a) as well. *See Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622, 625 (Fla. 1990) (substance controls over form in a "takings" case, and a "taking" by indirection is simply a "thinly veiled" "taking" by direction).[22]

As against all of this, defendant Lloyd (brief at 12-13) asserts that the plaintiff's theory on this point "can perhaps best be rebutted by a discussion of this Court's recent decision in Department of Agriculture and Consumer Services v. Bonanno, 568 So.2d 24 (Fla. 1990)," in which, "[h]aving earlier held [*see Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.,* 521 So.2d 101 (Fla.), *cert. denied,* 488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988)] that the State's destruction of healthy citrus plants to combat the spread of citrus canker required compensation to the owners, the Court then upheld the constitutionality of a compensation program enacted by the legislature against the same sort of challenges presented here." We agree entirely with Dr. Lloyd's

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[22] In addition, *see Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed.2d 788 (1976) (where a state is prohibited by the constitution from doing a particular act, the state may not statutorily delegate authority to a citizen to do that particular act); *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla.) (same), *aff'd sub nom. Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, 428 U.S. 901, 96 S. Ct. 3202, 49 L. Ed.2d 1205 (1976).



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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characterization of the *Bonanno* decision, which thoroughly supports our position. The Court recognized in *Bonanno*, as it had held earlier, that the state *is* required to compensate owners for the loss of their trees, and then upheld the specific *methodology* by which the legislature chose to provide such compensation.

As Dr. Lloyd points out (brief at 12-13), the statute in *Bonanno* "established a table of presumptive values and provided that any order seeking compensation in excess of those values was limited to an administrative hearing with appellate review by a district court of appeal." In other words, the statute gave the tree owner a specified amount of compensation for the loss of his trees, and then gave him an administrative remedy by which he could establish that the trees had a higher value. In the instant case, in contrast, the statutes give the plaintiffs *no method* by which they can recoup, in *any way*, the amount of damages which are taken away by the statute. As we have emphasized repeatedly, these statutes provide that if the defendant demands arbitration, the plaintiff's pre-existing damages are lost forever--and there is no mechanism, judicial or administrative, by which the plaintiff can ever get that property, or any alternative measure of that property. It is simply gone forever. As *Bonanno* itself holds, that is an unconstitutional taking unless some measure of compensation is provided.

The plaintiffs' property rights are also protected from confiscation without just compensation by the Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed.2d 358 (1980); *Joint Ventures, Inc. v. Department of Transportation, supra*. The foregoing analysis also applies to this federal constitutional provision--and for the same reasons that the statutes in issue here violate Article X, §6(a), they violate the federal constitution as well. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra* (Florida statute which authorizes clerk of court to retain



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

interest on all funds deposited into the registry of the court is an unconstitutional "taking" without just compensation, violative of the Fifth and Fourteenth Amendments).

### *D. The Violation of the Equal Protection Clauses of the Florida and United States Constitutions.*

The "test" to be applied here would appear to the be the "rational relationship" test, which this Court has recently stated as follows:[23]

> It is well settled under Federal and Florida law that all similarly situated persons are equal before the law. [Citations omitted]. Moreover, without exception, all statutory classifications that treat one person or group differently than others must appear to be based at a minimum on a rational distinction having a just and reasonable relation to a legitimate state objective. [Citations omitted].
>
> *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So.2d 249, 251 (Fla. 1987). Equal protection analysis requires that classifications be neither too narrow nor too broad to achieve the desired end. Such underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test quoted above.

*Shriners Hospital for Crippled Children v. Zrillic*, 563 So.2d 64, 69-70 (Fla. 1990). Included within these general requirements is, of course, the obvious additional limitation that "a statutory classification cannot be wholly arbitrary." *Vildibill v. Johnson*, 492 So.2d 1047, 1050 (Fla. 1986).[24]

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[23] A decent argument can be made that an intermediate-level "heightened scrutiny" test should apply to the particular issue presented here. Our alternative argument under the "heightened scrutiny" test can be found in the lengthy memorandum of law which we filed in the trial court, and that more strenuous test is therefore available to the Court should it be so inclined.

[24] In light of this standard, which tests the relationship between the statute's ends and its means, it is not enough for the defendants to say that the statutes pursue important objectives. Even apart from the defendants' failure to recognize that the overall aims of the



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

We acknowledge at the outset that the statutes in issue may not be argued to deny equal protection because they discriminate between medical malpractice victims, on the one hand, and victims of various other types of tortious conduct, on the other. This type of more broadly inclusive classification, as invidious as it is, has been held permissible. *See, e. g., Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783 (Fla. 1985); *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So.2d 365 (Fla. 1981); *Woods v. Holy Cross Hospital*, 591 F.2d 1164 (5th Cir. 1979). And because these decisions address only that type of classification, the defendants' reliance upon them (and similar decisions) here is misplaced. The statutes in issue here create several indefensible distinctions; and HCA's startling declaration (brief at 35)--that "[t]he caps apply equally to all claimants"--is manifestly false.

In the instant case, which is a wrongful-death case, the most obvious infirmity is the distinction which the statutes make between personal-injury plaintiffs, on the one hand, and wrongful-death plaintiffs on the other. It is obvious from even a cursory review of the statutes that its drafters never even thought about its application in wrongful-death cases. Section 766.207(7)(b), which discusses the damages awardable in arbitration, calls for calculation "on a percentage basis with respect to capacity to enjoy life," and contains no analogous provision for wrongful-death cases. Nevertheless, § 766.207(7)(b) makes clear that the "claimant" is limited to $250,000.00 per incident; and similarly, § 766.209(4), dealing with the failure to accept arbitration, says that the "claimant" is limited in such cases to $350,000.00 per incident.

In a personal-injury case, of course, the "claimant" is the injured plaintiff. But as the

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statute are not the specific aims of the cap, *see* discussion *supra*--that is, even assuming *arguendo* that the specific legislation in question pursued legitimate governmental objectives--the means chosen must be rationally related to those objectives. Neither defendant has even addressed that issue.



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Court is aware, under § 768.20, Fla. Stat. (1991), the wrongful-death "claimant" is "the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estates . . . ." Thus, as the defendants conceded below (Tr. 41-42), even if the personal representative may be bringing claims on behalf of several beneficiaries, his *total* damages are limited to either $350,000.00, if the plaintiff declines arbitration, or $250,000.00 (pro-rated down) if the plaintiff accepts arbitration. In contrast, in a personal-injury action, each individual injured person is entitled to those separate caps. As written, the statutes thus appear to discriminate significantly against wrongful-death medical-malpractice claimants, as opposed to all other kinds of medical-malpractice claimants. There is certainly no legislative justification for such a distinction, and in the particular context of wrongful-death cases, the statutes are clearly unconstitutional.

Moreover, in all types of medical-malpractice cases, the statutes create invidious distinctions. They discriminate between medical malpractice victims and against a very small number of them. They create a class which is narrowed in two successive steps (the first by the legislature, the second by admittedly negligent defendants) to a very small class, in which only the most deserving plaintiffs are deprived for the benefit of the least deserving defendants. First, the statutes themselves discriminate solely against those victims of medical malpractice who suffer the greatest injuries, and who therefore suffer the greatest intangible damages. It might have been another matter if the legislature had asked *all* medical malpractice plaintiffs to contribute to a supposed greater good. But these statutes ask no sacrifice of those medical malpractice victims who suffer non-economic damages valued at $350,000.00 or less. Such plaintiffs may reject arbitration, and proceed to trial for the full amount of their intangible damages. Only those who have suffered greater losses are subject to the statutory "caps." Worse still, because the extent of the deprivation increases as the losses increase, the *most* seriously injured victims are the most seriously deprived by the



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

statutory "caps."

Second, the class defined by the statutes themselves is only a potential class, subject to further definition--not by the legislature, but by a delegation of the legislature's lawmaking authority to medical defendants. The delegation occurs in the statutory option granted to medical defendants charged with negligence to select from their victims those who will be included in the class and those who will be excluded from the class.[25] When a defendant charged with negligence chooses to contest the charge in a court of law, the plaintiff is excluded from the class. When a defendant charged with negligence chooses to admit the charge rather than contest it, the plaintiff is then included in the class affected by the "caps."

And because an admission of liability will rarely occur unless the defendant's conduct was so obviously negligent that it would be indefensible in a court of law, the class which is ultimately created by this two-step process includes only the most deserving plaintiffs who have been victimized by the least deserving defendants. Worse still, the "cap" which is imposed when a victim demands his right to a jury trial after the admittedly negligent defendant has selected him for inclusion in the class is not imposed for any purpose actually related to the public good. According to the plain language of §766.209(4)(a), the "cap" is deemed "warranted by the claimant's refusal to accept arbitration . . . ," and it is therefore simply a punishment for the plaintiff's exercise of his constitutional right to a jury trial.

In short, the classification created by the statutes in issue here applies only to the most egregiously injured victims of negligent conduct which is itself so egregious as to be indefensible in a court of law, at the delegated election of the admittedly negligent defendant and as a punishment for exercising a constitutional right. The statutes affect *only* those

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[25] This delegation of the legislature's lawmaking authority to the unbridled discretion of an individual is itself constitutionally impermissible, as we will explain in the final subsection of our argument (at pages 58-60, *infra*).



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

persons--and no one else. It is almost as if, to shave a few percentage points off liability insurance premiums, the legislature had imposed damage "caps" on all left-handed or red-haired malpractice victims--but not quite. The statutes in issue here are worse; they allow the most obviously negligent defendants to single out the most seriously injured victims of their malpractice for special deprivation--and the greater the losses, the harsher the punishment. In our judgment, this classification is so obviously and invidiously upside-down as to be arbitrary and irrational in the extreme--and unless the equal protection clauses of the state and federal constitutions are to be declared essentially meaningless, the statutes in issue here simply must be declared constitutionally impermissible.

In a number of decisions, the courts of Florida have recognized the necessity that a statute penalize least those who suffer most. For example, in upholding against an equal protection challenge the automobile no-fault statute in *Lasky v. State Farm Insurance Co.*, 296 So.2d 9, 19 (Fla. 1974), this Court emphasized that the statute modified the rights of those with the least injuries, while preserving the rights of those with the most injuries:

> It is not arbitrary to differentiate between persons permanently injured and those who will recover from their injuries insofar as allowing only the former group to recover (under this particular threshold) for pain and suffering. Rather, this is a reasonable classification allowing those most likely to incur substantial and prolonged pain to recover damages to recompense them, while not granting such right of recovery to those substantially less likely to incur any prolonged pain. This threshold enables one who has lost an arm or leg, or lost the use of his hands, or who has sustained a permanent and excruciating soft tissue injury to recover some compensation for the substantial injury sustained if it be permanent in nature. At the same time, it does not (by itself) allow recovery for pain and suffering where a transient injury, such as a sprained wrist leaving no permanency, is sustained. By providing for recovery for pain, suffering and inconvenience in a category of cases involving a substantial likelihood of long-term suffering while not authorizing it in a category far less likely to give rise to substantial suffering, the Legislature has not been arbitrary or unreasonable.



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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Similarly, in *Chapman v. Dillon*, 415 So.2d 12 (Fla. 1982), in upholding the no-fault statute as amended, this Court quoted these passages from *Lasky* in emphasizing that the amendments continued to reflect a legislative determination to preserve the rights of those most injured.

The reverse side of the coin is represented by *Florida Medical Center, Inc. v. Von Stetina*, 436 So.2d 1022, 1027 (Fla. 4th DCA 1983), *rev'd on other grounds*, 474 So.2d 783 (Fla. 1985), in which the district court declared a temporal "cap" on the collection of medical malpractice judgments violative of equal protection guarantees, on the ground that "it is impossible that singling out the most seriously injured medical malpractice victims (rather than imposing the same burden equally upon all medical malpractice victims) bears any reasonable relationship to the announced purpose of alleviating the 'medical malpractice insurance crisis.'" The statute at issue in the Fourth District's decision was §768.54, Fla. Stat. (1981), which contained the temporal "caps" which the district court declared unconstitutional. On appeal in the district court, the defendant argued that a later, 1982 version of the statute, in which the legislature had eliminated the temporal "caps" by amendment, should be applied. The district court rejected this argument; applied the version of the statute in existence at the time of the plaintiff's injury; and declared it unconstitutional on the grounds set forth above. In this Court, the defendant argued once again that the *amended* version of the statute, which contained no "caps," applied. Unlike the district court, which had rejected this contention, this Court accepted the contention--and it then upheld the *amended* version of the statute as constitutional. *See Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783 (Fla. 1985).[26] In view of *Lasky* and

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[26] Actually, the Court misspoke itself when -- after holding that §768.54(3)(e)3, Fla. Stat. (*1982*), applied on appeal, rather than the 1981 version of the statute which the district court had declared unconstitutional -- it concluded its discussion of the point by "uphold[ing] the

*Chapman*, it seems unlikely that this Court would have disapproved the district court's holding if the legislature had not already cured the constitutional defect itself.

Indeed, this Court twice declared in *Smith v. Department of Insurance*, 507 So.2d 1080, 1088 (Fla. 1987), that the legislature had "arbitrarily" capped plaintiffs' damages in the statute in issue there--and if the "caps" in *Smith* were "arbitrary," then the "caps" imposed by the earlier version of the statute at issue in *Von Stetina*, as well as the statutes in issue here, must be "arbitrary" as well. And, of course, an "arbitrary" classification is, by definition, violative of the equal protection clauses of the state and federal constitutions.[27] It is for that reason--and principally because it is simply irrational to single out only the most seriously injured victims of medical malpractice to contribute to the solution of a perceived "crisis," with the extent of the deprivation increasing as the extent of the injury increases--that several jurisdictions have declared similar damage "caps" arbitrary, irrational and violative of equal protection guarantees.[28]

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constitutionality of sections . . . 768.54(3)(e)3 . . . Florida Statutes (1981)." 474 So.2d at 789. It is perfectly *obvious* from the lengthy discussion which precedes the Court's slip of the pen that the Court simply misspoke itself in conclusion -- and that it actually declared §768.54(3)(e)3, Fla. Stat. (*1982*), constitutional, and not the earlier version of the statute which it declared inapplicable to the case.

[27] *See Vildibill v. Johnson*, 492 So.2d 1047, 1050 (Fla. 1986) (statute "which denies recovery to the parents of an adult decedent yet allows recovery when the adult decedent leaves no survivors" creates "a classification that is purely arbitrary and totally unrelated to any state interest"); *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (Fla. 1989) (statute which denies workers compensation death benefits to non-resident aliens from Mexico, but not to non-resident aliens from Canada, was so arbitrary that it could not pass a rational basis test).

[28] *Wright v. Central DuPage Hospital Association*, 63 Ill.2d 313, 347 N.E.2d 736 (1976); *Arneson v. Olson*, 270 N.W.2d 125 (N. Dak. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Richardson v. Carnegie Library Restaurant, Inc.*, 107 N.M. 688, 763 P.2d 1153, 78 A.L.R.4th 513 (1988); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989); *Brannigan v. Usitalo*, ___ N.H. ___, 587 A.2d 1232 (1991); *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986). *Cf. Gallegos v. Phipps*, 779 P.2d 856 (Colo. 1989) (en banc) (statute

Although the peculiar, upside-down classification drawn by the statutes in issue here--which hurts only the most deserving plaintiffs for the benefit of the least deserving defendants, and which is triggered at the election of the least deserving defendants as a punishment upon victims who demand their constitutional right to a jury trial--is so obviously arbitrary and irrational that we need not examine whether the statutes serve a legitimate governmental objective, we should also note that the statutes in issue bear no reasonable relationship to such an objective. For example, assuming *arguendo* that it is a legitimate governmental objective to impose "caps" to achieve some broader societal benefit like lower liability insurance rates, to be effected through the risk-spreading mechanisms of the insurance industry, the fact of the matter is that the statutes do not require health care providers to purchase any liability insurance coverage in any amounts. As a result, the "caps" in the statutes can be triggered by uninsured defendants as well as insured defendants, and the putative benefit to society upon which the statutes purportedly rest will never accrue; the benefit will be conferred solely upon the uninsured defendant, at the considerable expense of the admittedly negligent defendant's victim, and no one else.

Most respectfully, it simply cannot be a legitimate governmental objective to deprive a seriously injured medical malpractice victim of his damages for the sole purpose of relieving an uninsured and admittedly negligent defendant from the obligation to pay them. In short, whatever rationality there might be in a statutory scheme which couples arbitrary

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imposing a higher duty of care on landowners towards persons on premises for own purposes than towards paying customers totally irrational); *Baptist Hospital of Southeast Texas v. Baker*, 672 S.W.2d 296 (Tex. Ct. App. 1984), *writ ref'd n.r.e.*, 714 S.W.2d 310 (Tex. 1986). In contrast, the decisions which have upheld damage "caps" against equal protection attacks involved straightforward "caps" like the caps at issue in *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987). They did not involve the more peculiar classification at issue here--which applies only to the most egregiously injured victims of negligent conduct which is itself so egregious as to be indefensible in a court of law, at the selection of the negligent defendant and as a punishment for exercising a constitutional right to jury trial.

"caps" to a requirement to purchase insurance, the statutory classifications in issue here--which contain no mandatory mechanism to ensure that their basic purpose is ever served--surely cannot qualify as rationally related to a legitimate governmental objective. For all of the foregoing reasons, the statutes in issue here create a terribly underinclusive, totally arbitrary, and completely irrational classification which is impermissible under the equal protection clauses of the state and federal constitutions.

### *E. The Violation of the Substantive and Procedural Due Process Guarantees of the Florida Constitution and the United States Constitution.*

The test for determining a substantive due process challenge is essentially the same as the test governing an equal protection challenge: "The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." *Lasky v. State Farm Insurance Co.*, 296 So.2d 9, 15 (Fla. 1974). Although the memorandum of law which we filed below contains a rather extensive analysis of the statutes under the due process clauses, because the tests governing the due process clauses and the equal protection clauses are essentially the same, we are content to rest our response here on essentially the same grounds contained in our argument concerning the equal protection clauses--and primarily upon the ground that, as we have demonstrated, the classifications in issue here are entirely arbitrary and wholly irrational.

As noted previously, in *Smith v. Department of Insurance*, 507 So.2d 1080, 1088 (Fla. 1987), this Court twice observed that damage "caps," by their nature, are wholly "arbitrary" lines drawn between recovery and non-recovery. And the statutes in issue here, as we have also demonstrated, are not merely "caps." Instead, the "caps" which they impose apply only to the most egregiously injured victims of negligent conduct which is itself so egregious as



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

to be indefensible in a court of law, and the "cap" which is most likely to apply in any given case (since it is the higher of the two "caps" provided by the statutes) is explicitly defined as a punishment for exercising a constitutional right to trial by jury. Most respectfully, if simple "caps" are by their nature wholly "arbitrary," then the Rube Goldberg mechanism by which "caps" are imposed by the statutes in issue here (at the unilateral option of negligent defendants) are much worse than merely "arbitrary." Given this Court's observations in *Smith* concerning the *per se* arbitrariness of simple damage "caps," we do not believe there can be any serious doubt that the due process clauses of the two constitutions are violated by the statutes in issue here.

In any event, even if some wholly arbitrary line-drawing were permissible in an effort to meet legitimate governmental objectives, we do not believe that the arbitrary lines drawn by the statutes in issue here bear any reasonable relationship to the stated objectives of the legislation. Our point has been nicely made by the Texas Supreme Court as follows:

> In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. . . . [W]e hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.
>
> Even the Keeton Commission [Texas Medical Professional Liability Study Commission] could not conclude that there was any correlation between a damage cap and the stated legislative purpose of improved health care, stating that adequate data was lacking. . . . One independent study has concluded that there is no relationship between a damage cap and increases in insurance rates [thereby reducing available health care], given that less than .6% of all claims brought are for over $100,000. Sumner, *The Dollars and Sense of Hospital Malpractice Insurance*, 9 (Aft Books 1979).



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

*Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).[29]

If the statutes in issue here were something more than a mere speculative experiment, this sensible observation might be inapplicable to them. The statutes in issue here *are* a speculative experiment based upon inadequate data, however; as we have previously demonstrated, the Task Force simply "guesstimated," based upon hypothetical assumptions and data which it itself cautioned against taking too seriously, that the draconian "caps" at issue here *might* result in mere single-digit percentage reductions in loss payments. That speculation, in our judgment, is an awfully slender reed upon which to deny plaintiffs recovery of their actual damages, merely because a defendant's negligent conduct was so obviously indefensible in a court of law that it should admit liability for its malpractice. Surely, the due process clauses require more.

There are additional irrationalities in the statutes in issue here which cannot survive the due process clauses. Even if the "caps" in issue here resulted in the single-digit savings hypothesized by the Task Force, the fact remains that the legislature did not tie the "caps" to any mechanism which would even arguably ensure that the savings would actually be effected. The legislature did not roll back or even purport to regulate liability insurance premiums as a *quid pro quo* for the damages forgiven. The legislature did not even require that health care providers secure liability insurance as a *quid pro quo* for any of the damages either allowed or denied to plaintiffs. And the suggestion that "caps" on the highest medical malpractice damage awards will result in one penny's savings, because the insurers will *voluntarily* reduce their rates, is worse than mere speculation, because it runs counter to all

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[29] *Accord*, *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991); *Wright v. Central DuPage Hospital*, 63 Ill.2d 313, 347 N.E.2d 736 (Ill. 1976); *Detar Hospital v. Estrada*, 694 S.W.2d 359 (Tex. Ct. App. 1985). *See Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989).



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

of the available evidence. All of the evidence suggests that the statutes in issue here will have one effect and one effect only--to save the insurance companies money, with no benefit whatsoever to their insureds. *See* pp. 66-73 of appendix to the plaintiff's trial memorandum, which begins at R. 50. Their sole effect will be to take money from those innocent victims of medical malpractice who are hurt the most by the most negligent defendants, and put it in the treasuries of insurance companies (or in the pockets of uninsured defendants).

Most respectfully, constitutional rights cannot give way to legislative hopes. The damage caps in issue here, which are imposed only for the benefit of admittedly negligent defendants for a reason which is entirely speculative, are entirely arbitrary and wholly irrational, and therefore cannot survive even minimal due process scrutiny. *See Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765, 771 (1991), in which the Ohio Supreme Court recently declared Ohio's medical malpractice damage caps violative of Ohio's due process clause, with the following emphatic observation: "[I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." A similar conclusion would seem to be especially compelling here--where, under Florida's statutory scheme, the class of "those most severely injured by medical malpractice" is further narrowed and limited only to those most deserving victims of the least deserving defendants, those whose malpractice has been so egregious that they have no choice but to admit their liability, and at the election of those least deserving defendants alone.

The statutes at issue also violate procedural due process. As the United States Supreme Court held in *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 28 L. Ed.2d 113 (1971), "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *See Aldana v. Holub*, 381 So.2d 231 (Fla. 1980). As



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

we have noted, the statutes in issue here provide no substitute mechanism by which medical malpractice victims can secure the full extent of their damages, in the face of a unilateral demand for arbitration by an admittedly negligent defendant. Nor can the defendants possibly show a "countervailing state interest of overriding significance" which would justify the deprivation; to the contrary, as we have just demonstrated, the deprivation rests solely upon a speculative assumption that liability insurance companies might *voluntarily* reduce liability insurance premiums in single-digit percentages. For all of these reasons, the trial court did not err in declaring the statutes violative of the substantive and procedural due process guarantees of both the Florida Constitution and the United States Constitution.

*F. The Violation of Article III, §6 of the Florida Constitution.*

Chapter 88-277 contained 52 sections, which may be generally grouped as follows: (1) creation of a Division of Medical Quality Assurance of the Department of Professional Regulation, and various subsidiary boards, and review of hospital and physicians' budgets, programs and performance; (2) regulation of physicians' assistants, chiropractic and podiatric medicine, nursing, and dentistry; (3) amendment of certain of the pre-existing non-disclosure provisions relative to the internal risk management programs of health care providers; (4) requirement of reports to the legislature by the Department of Professional Regulation; (5) prescription of new procedures governing health care licensure; (6) new record-keeping requirements regarding the dispensing of drugs; (7) new procedures for the pre-suit investigation of medical malpractice claims; (8) the provisions discussed above, concerning arbitration of medical negligence claims; (9) establishment of a compensation plan, in lieu of tort litigation, regarding birth-related neurological injuries; (10) prescription of a new standard of care applicable in emergencies; (11) sanctions against the refusal to provide emergency room treatment; (12) abolition of joint and several liability in actions against teaching hospitals; and (13) prescription of procedures governing medical review committees,



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

and their immunity from liability. We have described the various provisions of the Act in great generality. The title of the Act alone, written in single-spaced print so small as to be almost unreadable, occupies more than two full pages--and it contains nearly 150 semicolons, and one period. For the convenience of the Court, we have included a copy of the title of the Act at the end of this brief--and we think even a quick glance at it will convince the Court that the Act includes a staggering variety of disparate subjects.

As a general proposition, a statute embraces only one subject if all of its parts are necessary incidents of a single unified goal: "[A] statutory provision challenged on single-subject grounds must be a necessary incident to the statute it is a part of, making effective or promoting the object or purpose of the legislation." *Pilot Equipment Co. v. Miller*, 470 So.2d 40, 42 (Fla. 1st DCA 1985), *citing Smith v. Chase*, 91 Fla. 1044, 109 So. 94 (1926). The statute may not permissibly embrace an object or purpose which is separate from that of the remainder, *State ex rel. Landis v. Thompson*, 120 Fla. 860, 163 So. 270 (1935), but must be logically connected in all of its parts. *Board of Public Instruction v. Doran*, 224 So.2d 693, 699 (Fla. 1969). And it is not enough that there be some tangential connection between the statutory provisions in question, so that they "facilitate to a slight degree" the overall purpose of the statute; to the contrary, there must be "a natural, logical, or intrinsic connection" between all provisions. *Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 1351, 131 So. 178, 179 (1930). *Accord, Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991).

In *Chenoweth v. Kemp*, 396 So.2d 1122 (Fla. 1981), and *Smith v. Department of Insurance*, 507 So.2d 1080, 1084-87 (Fla. 1987), this Court struggled with the question of whether a statute embracing both insurance reform and tort reform could survive constitutional scrutiny. *See also State v. Lee*, 356 So.2d 276 (Fla. 1978). Despite the general relationship between liability insurance and tort reform, the Court had great difficulty with the constitutional question, but upheld the statutes at issue. It did so in *Smith*, however, only



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

over a forceful dissent by Justice Ehrlich (joined by two other Justices), who contended that the Court's resolution of the issue "succumbed to nebulous reasoning," "[p]erpetuating an error in legal thinking under the guise of stare decisis [which] serves no one well and only undermines the integrity and credibility of the Court." 507 So.2d at 1096.

Justice Ehrlich concluded that the tort reform legislation in *Smith* "clearly violates the single subject requirement of our constitution"--a "basic infirmity [which] renders the entire act unconstitutional." *Id.* Quoting extensively from prior decisions of this Court, emphasizing the historical importance of the constitutional provision in question, and accepting *arguendo* the majority's conclusion that the major goal of the statute was affordable liability insurance, he insisted that tort reform and insurance reform are two separate subjects, even though both parts of the statute might have an effect upon the other. *Id.* at 1097-98. As he put it: "These [various] sections may very well be designed to bring about a single laudable goal or achieve a desirable objective, but article III, section 6 of Florida's Constitution, does not mandate single goals or objectives in legislation, but does mandate that each bill contain a single subject. [The Act] fails this constitutional test." *Id.* at 1098.

In the instant case, it is unnecessary to debate Justice Ehrlich's position, or the likelihood of its acceptance by a different Court than the Court which decided *Smith*.[30]

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[30] In this connection, we should note that Justice Shaw and Justice Kogan recently retreated from the broad implications of the Court's resolution of the "single subject" challenge in *Smith*, and from their joinder in that resolution in *Smith* -- in *Burch v. State*, 558 So.2d 1 (Fla. 1990). In *Burch*, Justice Ehrlich maintained the views he expressed in his dissent in *Smith*, but voted to uphold the Act in issue because "[t]he facts in this case are substantially different." *Id.* at 4. Further erosion of the relatively relaxed approach to the "single subject requirement" represented by *Smith* is reflected in the Court's more recent decisions in *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991), and *Alachua County, Florida v. Florida Petroleum Marketers Ass'n*, 16 FLW S657 (Fla. Oct. 10, 1991). The best that can be said from all these recent divisions is that the present scope of the "single subject requirement" is unsettled, but that the pendulum may be swinging back toward the rigorous enforcement



LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

The reason is that Chapter 88-277 embraces a number of subjects in addition to those falling within the general categories of tort reform and insurance reform, and therefore embraces provisions which pursue different objectives. To be more specific, many of the statutory provisions concern tighter regulation of the health care industry and the delivery of medical services, provisions which are unrelated to the remaining provisions prescribing new procedures for the judicial resolution of medical malpractice claims. In our judgment, these two broad categories must be considered entirely separate matters, because they represent inherently conflicting approaches to reducing the social costs of medical malpractice. One attempts to reduce the number of incidents of malpractice by regulating repeat offenders out of the industry; the other takes the social costs of malpractice out of the recoveries of malpractice victims. A legislator who would prefer the first approach, but not the second, cannot vote on the Act in that manner, however; to obtain the first, he must accept the second--which is precisely what the "single subject requirement" is designed to prevent.

Of course, both approaches may have some general relationship to the other (just as a statute requiring Florida motorists to wear their seat belts may have some general relationship with tort reform, since it would theoretically reduce the *occasions* for malpractice by health care providers). But in no sense can it be said that each subject has "a natural, logical, or intrinsic connection" to the other. *Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 1351, 131 So. 178, 179 (1930). Provisions regarding the regulation and delivery of health care services are not "a necessary incident" of provisions constituting tort reform, and only tangentially have the effect of "making effective or promoting the object or purpose" of the tort reform provisions. *Pilot Equipment Co. v. Miller*, 470 So.2d 40, 42 (Fla. 1st DCA 1985). In no sense can it be concluded that either subject is inherent in the

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which the provision deserves.

other, and thus the legislation embraces more than one subject. *See Bunnell v. State*, 453 So.2d 808 (Fla. 1984); *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991). The Act is thus violative of Article III, § 6 of the Florida Constitution.

### *H. The Violation of Article II, §3 and Article III, §1 of the Florida Constitution.*

The Florida Constitution draws strict distinctions between legislative and judicial functions. The legislature is empowered to create, define, and regulate substantive rights; only the judiciary may prescribe methods for the enforcement of those substantive rights.[31] There is no dispute about that here, of course; the only dispute is whether the statutes in issue here are to be classified as substantive or procedural. In our judgment, because they narrowly regulate the steps by which the plaintiffs may enforce their substantive rights, they are essentially procedural. They are procedural because they do not simply limit plaintiffs' substantive rights to recovery of their actual damages. Instead, they delegate to defendants the unilateral power to dictate the manner and means by which, and the extent to which, plaintiffs may enforce substantive rights otherwise granted by the statutes.

At its discretion, simply by deciding to contest liability, a defendant can require a plaintiff to pursue his substantive rights through the judicial process (where he may recover the *full* measure of his damages). At its discretion, simply by deciding to concede liability, a defendant may require a plaintiff to elect between pursuing his substantive rights through the judicial process, or pursuing his substantive rights through arbitration (with its own, different rules of procedure)--and thereby limit the plaintiff's damages to less than the full

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[31] *See In Re Florida Rules of Criminal Procedure*, 272 So.2d 65 (Fla. 1972), *amended*, 272 So.2d 513 (Fla. 1973); *Markert v. Johnston*, 367 So.2d 1003 (Fla. 1979); *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977); *Carter v. Sparkman*, 335 So.2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041, 97 S. Ct. 740, 50 L. Ed.2d 753 (1977); *Sydney v. Auburndale Construction Corp.*, 96 Fla. 688, 119 So. 128 (1928).

measure otherwise granted by the statutes. The defendant's election between contesting liability and admitting liability (which is already squarely regulated by a rule of civil procedure--Rule 1.140, Fla. R. Civ. P.) also puts a plaintiff to a potential choice between two quite different statutory "caps" in the two different types of proceedings, complicating the plaintiff's selection of the steps by which he should enforce his substantive rights even further.

In short, the statutes in issue here place the determination of which procedure will be utilized to enforce substantive rights first at the option of the defendant, and then at the forced option of the plaintiff (with "caps" to boot). Most respectfully, because the enforcement of substantive rights otherwise recognized by the legislature is a uniquely judicial function, the legislature simply has no power to delegate to litigants the selection of which steps a party can utilize to enforce his substantive rights. *See* cases cited in footnote 31, *supra*. *Cf. Martinello v. B & P USA, Inc.* 566 So.2d 761 (Fla. 1990) (procedurally impermissible to allow a defendant to select the theory under which the plaintiff's case is tried by unilaterally stipulating to be governed by a theory which the plaintiff does not desire to pursue).

Secondly, the legislature most certainly has no authority to delegate to negligent defendants the right to determine the amount of damages which any given plaintiff can recover, as it clearly attempted to do in the statutes at issue here. *See Cassady v. Consolidated Naval Stores Co.*, 119 So.2d 35 (Fla. 1960) (legislature's lawmaking authority may not be delegated to the unbridled discretion of an individual or group of individuals). *See generally, D'Alemberte v. Anderson*, 349 So.2d 164 (Fla. 1977); *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla. 1976); *Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla. 1968). For both of these reasons, the statutes in issue here violate Article II, §3 and Article III, §1 of the Florida Constitution.



LAW OFFICES. PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

## V
## CONCLUSION

It is respectfully submitted that the district court did not err in declaring §§766.207 and 766.209, Fla. Stat. (1991), unconstitutional. Its decision should be affirmed--either for the reason expressed in the decision or for one or more of the additional reasons advanced in the trial and district courts.

## VI
## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of July, 1992, to: ROBERT M. KLEIN, ESQ., Stephens, Lynn, Klein & McNicholas, P.A., One Datran Center, Suite 1500, 9100 S. Dadeland Boulevard, Miami, Florida 33156; PATTI A. HABER, ESQ., Bobo, Spicer, Ciotoli, Fulford, Bucchino, P.A., Esperante - 6th Floor, 222 Lakeview Avenue, West Palm Beach, Florida 33401; JULIAN CLARKSON, ESQ., Holland & Knight, P.A., P.O. Drawer 810, Tallahassee, Florida 32302; and to JANIS BRUSTARES KEYSER, ESQ., Gay, Ramsey & Lewis, P.A., P.O. Box 4117, West Palm Beach, Florida 33402.

Respectfully submitted,

COLSON, HICKS, EIDSON, COLSON & MATTHEWS
200 South Biscayne Boulevard, 47th Floor
Miami, Florida 33131
-and-
PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130

By: _____
JOEL S. PERWIN

By: _____
JOEL D. EATON

# MEDICAL INCIDENTS

## Chapter 88-277

Committee Substitute for Committee Substitute for House Bill No. 819

AN ACT relating to medical incidents; amending s. 20.30, F.S.; providing for a director of the Division of Medical Quality Assurance of the Department of Professional Regulation; amending s. 395.0115, F.S.; providing for disciplinary proceedings against hospitals; amending s. 396.041, F.S.; providing for quarterly medical incident reports by licensed health care facilities under the internal risk management program; providing for confidentiality thereof; providing that the report to the Legislature by the Department of Professional Regulation on classifications of adverse incidents include incidents in health maintenance organizations; amending s. 395.509, F.S., relating to review of hospital budgets, to provide for approval of assessments to fund the Florida Birth-Related Neurological Injury Compensation Plan; reenacting and amending s. 455.225, F.S., relating to professional disciplinary proceedings; providing for proceedings for the summary suspension or the restriction of a license of a health care practitioner; providing civil immunity and prohibition from discharge to persons reporting with respect to incompetence, impairment, or unprofessional conduct of specified health care providers; providing penalties; reenacting and amending s. 455.241, F.S.; providing for reports in lieu of certain psychiatric patient records; providing for transfer of records; providing for assertion of psychiatrist-patient privilege; authorizing the Department of Professional Regulation to obtain certain patient records pursuant to subpoena under certain circumstances; limiting public access to records; providing maximum copying charges; reenacting s. 455.313, F.S.; providing for an investigative process for licensure by