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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FL

Case Number: SC15-1858
LT Case Numbers: 4D11-4806, 4D11-4833, 4D11-4834

NORTH BROWARD HOSPITAL
DISTRICT, et al.

Petitioners,

v.

SUSAN KALITAN

Respondent.
_________________________________/

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AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT SUSAN KALITAN

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Association ("FJA"), formerly Academy of Florida Trial Lawyers, is an association of approximately 4,000 members committed to preserving the rights of access to courts and trial by jury in the state of Florida, and to protecting the citizens of Florida from civil wrongs. The statutory cap on noneconomic damages at issue in this case directly impacts those rights and FJA's mission.

FJA has regularly and actively appeared before this and other Florida courts as amicus curiae on issues of public and statewide importance. FJA appeared as amicus in this Court's case of *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014), the application of which is a key issue here.

In this case, FJA appears in support of the position of Respondent, Susan Kalitan.

SUMMARY OF THE ARGUMENT

This Court has already held in *Estate of McCall v. United States,* 134 So.3d 894 (Fla. 2014), that the cap on noneconomic damages in Florida Statutes section 766.118 violates equal protection. Contrary to the Petitioners' argument, the principles agreed upon by a majority of the Justices of this Court in *McCall* are controlling precedent, and compel the same holding in this case.

Unlike the wrongful death claim at issue in *McCall*, this case involves a personal injury claim and rights which existed at common law. Therefore this case allows this Court to address other important constitutional rights violated by the cap: access to courts and the right to trial by jury. Again, the principles agreed by the majority of this Court in *McCall*, along with longstanding Florida law regarding the rights of access to courts and trial by jury, compel a finding that the cap violates the constitution.

Because access to courts is a fundamental right, this case allows this Court an additional opportunity which Justice Pariente's concurrence found did not exist in *McCall* - to critically review the Legislature's findings justifying the cap.

ARGUMENT

I. *MCCALL* IS BINDING PRECEDENT AND APPLIES TO THIS CASE

This Court has already held that the damages cap at issue in this case is unconstitutional. *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014).

A. *MCCALL* IS BINDING PRECEDENT AS TO ANY PART OF THE OPINION JOINED BY AT LEAST FOUR JUSTICES

Petitioners argue that this Court's *McCall* case has no precedential effect because it was a split decision. See, e.g., Initial Brief P. 19-23 ("McCall created no binding precedent outside the case"). This is completely incorrect. In Florida, an opinion or part of an opinion joined by at least four justices, whether it is labeled a majority or concurrence or otherwise, is precedent. *Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980). "[T]he Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed." Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L.Rev. 1151, 1175, notes 85 (1994) ("Kogan"). Even an opinion that "concurs in part and dissents in part" will provide the fourth vote to create binding precedent on areas of agreement; "a careful reading of the different opinions may be needed to ascertain the actual precedent of the case." Kogan at 1176, n. 89.

The Petitioners argue that Justice Pariente's opinion, joined by two other justices, is merely a "concurring in result" opinion, and contends that this indicates

only agreement with the ultimate decision but not the opinion. See Initial Brief, P. 21. In support of this contention, Petitioners cite *Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So.2d 832 (Fla.2007). The *Floridians* case, written by Justice Pariente, actually referred to an opinion "concurring in result only." 967 So.2d at 834. However, Justice Pariente's opinion in *McCall* is not labeled as concurring "in result only," but as "concurs in result with an opinion." The word "only" does not appear. [1]

Furthermore, because *McCall* was before this Court on a certified question from the 11th Circuit Court of Appeals, once this Court accepted the case it had to issue an "opinion" that was "determinative" of the cause. Fla. Const. Article V, § 3(b)(6); Fla. R. App. P. 9.150(b). The purpose of certified question jurisdiction is to enable the federal court to obtain "controlling precedent" on unsettled issues of state law. *See Allen v. Carman's Estate*, 486 F.2d 490 (5th Cir. 1973) (noting that in a decision pursuant to the "remarkable Florida certification procedure," "what [the

[1] Even if Justice Pariente had concurred "in result only," this Court has held that a case involving a plurality opinion in which three justices agree and a separate concurrence by two others "in result only" remains precedent on the matters appearing in both opinions on which at least four justices agree. *See Santos v. State*, 629 So.2d 838, 840 (Fla.1994).

Florida Supreme Court] ha[s] said is the law of the Medes and Persians which binds Floridians and Erie-bound Federal Judges").[2]

B. THE AGREEMENT OF FIVE JUSTICES IN *MCCALL*

Fortunately, it does not take much effort to determine which parts of the *McCall* opinion were agreed by at least four justices and are binding precedent. Justice Pariente's opinion, in which two additional justices of this Court concurred, stated that she agreed with "much of" the plurality opinion, and was very specific in identifying the parts of the plurality with which she disagreed. 134 So.3d at 916.

Justice Pariente made clear that her disagreement was limited to the issue of whether this Court had authority to "engage in the type of expansive review of the Legislature's factual and policy findings that the plurality engages in when undertaking a constitutional rational basis analysis." 134 So.3d at 921. She explained: "Specifically, my primary disagreement is with the decision not to afford deference to the legislative findings in the absence of a showing that the findings were 'clearly erroneous.'" 134 So.3d at 916. Justice Pariente did not disagree with the substance of the plurality's research or its analysis of the alleged medical malpractice crisis ("the plurality capably demonstrates that the Legislature's conclusions as to the existence of a medical malpractice crisis may be questionable").

[2] Two other districts have applied *McCall* as binding precedent without limitation. *Shoemaker v. Sliger*, 141 So.3d 1225 (Fla. 5th DCA 2014); *City of Miami v. Haigley*, 143 So.3d 1025 (Fla. 3d DCA 2014).

Importantly, while Justice Pariente refused to reweigh whether a medical malpractice crisis ever existed, she clearly agreed that "[t]here is no evidence of a continuing medical malpractice crisis." 134 So.3d at 921. To the extent there was ever any legitimate state interest in enacting the caps, five justices of this Court have held that interest (the alleged crisis) no longer exists.

Justice Pariente also specifically agreed that caps were not rationally related to any alleged medical malpractice crisis or the alleged state interest in reducing malpractice premiums for doctors. 134 So.3d at 916. Both Justice Lewis' and Justice Pariente's opinions emphasize that section 766.118 does not mandate that the savings from the caps are actually passed on from the insurance companies to the medical providers. 134 So.3d at 911-12; 919-20.

C. *MCCALL* IS NOT LIMITED TO MULTIPLE CLAIMANT CASES

Petitioners claim that *McCall* is limited to cases involving multiple claimants, and selectively emphasize parts of the plurality and concurring opinion relating to multiple claimant cases. Certainly, one of this Court's holdings was that applying a single cap regardless of the number of claimants violated equal protection because plaintiffs in multiple claimant cases were treated differently than plaintiffs in single claimant cases. However, Justice Pariente did not specify any disagreement with the numerous portions of the plurality opinion discussing the fact that in addition to discriminating against multiple survivors by making them share a single

cap, the caps discriminate against the severely injured because they will not recover the full measure of their damages while the less injured will be fully compensated. See, e.g., 134 So.2d at 902-03.

Furthermore, and more fundamentally, five justices held both that there is no legitimate state interest because any medical malpractice crisis that existed has now been resolved, and that the caps were not rationally related to achieving the stated legislative purposes because the statute did not ensure that savings would be passed on to the doctors instead of kept as profits for the insurance companies. That holding of this Court, by five justices, applies equally to single or multiple claimant cases, and equally to wrongful death or personal injury cases.

The disparate treatment of a single severely injured claimant as compared to a claimant whose damages are within the cap is no less important and no less arbitrary than the disparate treatment of multiple claimants. In *McCall*, the unconstitutional effect was a $1 million reduction in the total damages awards to three survivors. In this case, the cap would have a mathematically much greater impact, reducing Ms. Kalitan's jury award by close to $2 million.

As *McCall* emphasized, the impact of the caps becomes greater as the severity of the injury increases. A claimant whose noneconomic damages, as determined by a jury, just exceed the cap suffers a proportionately lower impact from the cap than a claimant whose injuries are more severe. Unlike multiple claimant wrongful death

cases in which the only variable impacting recovery is the number of claimants, the disparity in economic impact of the caps in single claimant personal injury cases is as varied and as arbitrary as the infinite range of severity of injuries among claimants in Florida. An arbitrary reduction in damages awarded to an injured person is no more valid than an arbitrary reduction in the amount recovered by a survivor.

II. THE DAMAGES CAP VIOLATES THE RIGHT TO ACCESS TO COURTS

Article I, Section 21 of the Florida Constitution establishes the fundamental right of access to courts, ensuring that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Fla. Const. Art. I, Section 21. Because this right is "specifically mentioned in Florida's constitution," it "deserves[] more protection than those rights found only by implication." *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001).

A statute that infringes on access to courts is valid only if it passes the stringent analysis set forth in *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973). In *Kluger*, this Court held that the legislature cannot abridge pre-existing common law rights of redress of injuries without providing a reasonable alternative remedy, or establishing both "an overpowering public necessity" and that "no alternative method of meeting such public necessity can be shown." 281 So.2d at 4. The "*Kluger* test" is the functional equivalent of the "strict-scrutiny" test used in substantive due process and equal protection cases involving fundamental rights or suspect classes. *Mitchell v.*

Moore, 786 So.2d 521, 528 (Fla. 2001) ("there is no relevant difference between the 'compelling governmental interest/strict scrutiny' test and the 'no alternative method of correcting the problem/overpowering public necessity' test set forth in *Kluger*"). Accordingly, the *Kluger* test establishes an exceedingly high hurdle for the proponent of the statute. *See* Richard Fallon, The Supreme Court, 1996 Term Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 79 (1997) (explaining, in the context of strict scrutiny, that "'strict in theory' will routinely prove 'fatal in fact'").

The right to redress for a medical negligence injury is a common law right that existed at the time of the 1968 Declaration of Rights and is therefore protected by access to courts. See *Atlanta Oculoplastic Surgery v. Nestlehutt*, 691 S.E.2d 218, 221-222 (Ga. 2019)(discussing at length the common law history of medical negligence claims). The Petitioners appear to admit that the statute does not provide an alternative means of redress. See Initial Brief, P. 33. Petitioners then acknowledge but ignore the stringent *Kluger* test, and argue only that the cap meets the rational basis test. See Initial Brief, P. 33, 36, 37. This Court rejected this argument in *Smith v. Department of Insurance*, 507 So.2d 1080, 1089 (Fla.1987)("[the dissent] appears to believe that the legislature's major purpose in capping noneconomic 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.") (e.s.). This Court has since reaffirmed, in the case heavily relied upon by Petitioners, that "the law is clear that the Legislature cannot restrict damages by either enacting a minimum damage amount or a monetary damage cap without meeting the *Kluger* test." See *University of Miami v. Echarte*, 618 So.2d 189, 194 (Fla. 1993).

Applying the correct test, this Court has already rejected a cap on noneconomic damages for personal injuries as violating access to courts. In *Smith,* this Court addressed a $450,000 statutory cap on the same type of noneconomic damages limited by the cap in this case. This Court first confirmed:

> It is uncontroverted that there currently exists a right to sue on and recover noneconomic damages of any amount and that this right existed at the time the current Florida Constitution was adopted. The right to redress of any injury does not draw any distinction between economic and noneconomic damages nor does article I, section 21 contain any language which would support the proposition that the right is limited, or may be limited, to suits above or below any given figure.

507 So.2d at 1087.

The *Smith* Court expressly rejected the argument that placing a cap on noneconomic damages does not totally abolish a cause of action and therefore does not offend the right of access to courts:

> 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.

507 So.2d at 1088-89.

Smith establishes that a cap on noneconomic damages violates access to courts unless the defense proves there was no alternative means to address an overpowering public necessity. In *McCall*, this Court has already engaged in the required analysis as to the cap statute at issue in this case. Five justices agreed that the alleged public necessity, if it ever existed, no longer exists. This nonexistent necessity by definition cannot qualify as "overpowering." Five justices also agreed that that the cap does not remedy this alleged public necessity because there is no mechanism for the savings to be passed to doctors in the form of reduced insurance premiums. 134 So.3d at 909-12, 919-20. Given the holding by five justices in *McCall* that the cap is not rationally related to the stated goal, it necessarily follows that the cap is not the only means of achieving that goal.

<u>This Court has the Duty to Independently Analyze Legislative Findings.</u>

Petitioners' argument focuses again on the *Echarte* case and requires this Court to blindly accept the Legislature's findings. However, ten years after *Echarte*

this Court made clear that courts "must conduct their own inquiry." *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 627-28 (Fla. 2003). Findings made by the legislature "are always subject to judicial inquiry." *North Florida*, 866 So.2d at 627-28. "[L]egislative statements of policy and fact do not obviate the need for judicial scrutiny." *Id.* This Court must undertake an independent analysis to determine whether the Legislature presented a sufficient case that an overpowering public necessity exists and that no alternative means to meet that necessity was available. *Kluger*, 281 So.2d at 5.

Importantly, while Justice Pariente's concurrence in *McCall* questions the scope of this review in the rational basis analysis applicable in that case, her concurrence expressly explains that there is no such limitation in a strict scrutiny/fundamental right analysis. 134 So.3d at 921. Justice Pariente's disagreement with this aspect of the plurality is expressly based on the fact that *McCall* involved a very narrow rational basis test. 134 So.3d at 916, 921. Therefore, a majority of this Court agreed that the clearly erroneous standard does not apply, and the independent inquiry explained in *North Florida* does apply, to a case involving a fundamental right. 134 So.3d at 921. Because access to courts is a fundamental right, this Court should undertake an independent review of the legislative findings, such as Justice Lewis' plurality did in *McCall*. It is important that while Justice Pariente's concurring opinion in *McCall* questioned the proper

scope of review in that case, those Justices expressed approval of the plurality's "excellent scholarship regarding the flaws in the Legislature's conclusions as to the existence of a medical malpractice crisis." 134 So.3d at 921-922.

In the preamble to Section 766.118, the Legislature stated its "findings" in support of the cap. The Legislature found that Florida was "in the midst of a medical malpractice insurance crisis of unprecedented magnitude," which "threatens the quality and availability of health care for all Florida citizens." It then identified three "overwhelming public necessit[ies]" underlying the law: making high-quality health care available to citizens; ensuring that physicians continue to practice in Florida; and ensuring the availability of affordable professional liability insurance for physicians. Based on these recitals, the Legislature concluded that "a limitation of noneconomic damages in medical malpractice actions" was justified. Ch. 2003-416, § 1, Laws of Fla., at 4035.

There is no overpowering public necessity.

As Justice Lewis' opinion in *McCall* outlines, authoritative federal and state government reports and the Legislature's own debate on the law contradict the conclusory "crisis" language in support of section 766.118. *McCall*, 134 So.3d at 905-909. Importantly, the evidence contradicts the claims that access to health care had been compromised and that doctors were leaving the state. During the decade preceding the enactment of the caps, the number of doctors practicing in Florida had

in fact steadily increased. See U.S. General Accounting Office, No. GAO-04-124, Physician Workforce: Physician Supply Increased in Metropolitan and Nonmetropolitan Areas but Geographic Disparities Persisted (Oct. 2003), at 23, available at http://www.gao.gov/products/GAO-04-124 (finding that, from 1991 to 2001, Florida's physician supply per 100,000 residents grew 11% in metropolitan areas and 19% in nonmetropolitan areas). As the plurality noted in *McCall,* the testimony before the legislature in the Senate Floor Debate on the bill established that applications to the Florida medical schools had consistently risen year over year, there was no increase in emergency room closings as a result of medical malpractice claims, and the number of doctors licensed to practice in Florida had actually increased. *McCall*, 134 So.3d at 908. The United States General Accounting Office reported that "[r]eports of physician departures in Florida were anecdotal, not extensive, and in some cases we determined them to be inaccurate." See U.S. General Accounting Office, No. GA0-03-836, Medical Malpractice: Implications of Rising Premiums on Access to Health Care, (Aug. 2003) at 17-18, available at http://www.gao.gov/new.items/d03836.pdf, quoted in *McCall*, 134 So.3d at 909. The spectre of runaway noneconomic damages awards was likewise belied by the evidence. *McCall*, 134 So.3d at 907.

In addition, damages caps have been proven ineffective to reduce insurance costs. Over a ten year period between 1991 and 2002, the median medical

malpractice insurance premiums paid by physicians in high risk specialties rose by 48.2% percent in states that had damages caps, but only 35.9% in states without caps. *McCall*, 134 So.3d at 910. This means the premium increases in states with caps were over 30% higher. Only 2 of the 19 states with caps experienced static or declining medical malpractice premium rates following the imposition of caps. 134 So.3d at 910. From the cap enactment in 2003 until 2010, a sample of insurers providing medical malpractice coverage in Florida demonstrated "an increase in their net income of more than 4300 percent." *McCall*, 134 So.3d at 914. As of 2013, after ten years of the caps, the Florida Office of Insurance Regulation concluded that Florida was either the highest or the second highest state for premiums in most scenarios. Florida Office of Insurance Regulation 2013 Annual Report at 57-58, available at http://www.floir.com/siteDocuments/MedicalMalReport10012013.pdf

As a majority of the justices of this Court identified in *McCall*, one critical "missing link" is that the statute imposes the cap but does not require a reduction in premium for the cost savings. 134 So.3d at 911-12; 919-20. Another state supreme court, addressing a similar situation, explained that "[i]nsurance companies who benefit from tort reform but are not required to implement post-tort reform rates decreasing the cost of medical malpractice insurance to physicians" will "happily pay less out in tort-reform states while continuing to collect higher premiums from doctors and encouraging the public to blame the victim or attorney for bringing

frivolous lawsuits." *Zeier v. Zimmer, Inc.*, 152 P. 3d 861, 869-70 (Okla. 2006). "It is difficult to conceive of the necessity of a health care policy that expressly relies on discrimination against the small number of unfortunate individuals who suffer the most debilitating, painful, lifelong disabilities as a result of medical negligence." *Klotz v. St. Anthony's Medical Center*, 311 SW 3d 752, 782 (Mo. 2010) (Teitelman, J., concurring).

There are alternative means of meeting any "public necessity."

Even if the Legislature had established an overpowering public necessity for instituting caps on noneconomic damages in medical malpractice cases, it did not (and cannot) establish the second prong of *Kluger*, that no alternative means exist to meet such a necessity. The Legislature has broad powers and an array of options to keep medical malpractice premiums affordable and, thereby, make Florida more financially attractive to physicians. The Governor's Select Task Force Report, on which the Legislature's findings were based, itself recognized that other measures were available to the Legislature. See Task Force Report, P. 218-220, available at http://floridahealthinfo.hsc.usf.edu/GovTaskForceInsReform.pdf

Premiums can be regulated. See *Smith*, 507 So.2d at 1093 (upholding law that required excess profits from insurance premiums be returned to policyholders who comply with risk management guidelines). Tax incentives or grants can be offered as an alternative to premium increases. See generally *Rosenshein v. Florida Dep't of*

Children & Families, 971 So.2d 837, 841 n.3 (Fla. 3d DCA 2007) (describing use of tax and economic policies by the federal and state governments to encourage or discourage certain behaviors). Here, the Legislature did nothing to directly regulate insurance and insurance premiums. See, e.g., *Nationwide Mut. Ins. Co. v. Williams,* 188 So.2d 368, 369 (Fla. 1st DCA 1966). The existence of viable alternatives means that section 766.118 fails the *Kluger* test.

III. THE DAMAGES CAP VIOLATES THE RIGHT TO TRIAL BY JURY

While the right to trial by jury is merely "preserved" in the United States Constitution, the Florida Constitution guarantees that "[t]he right of trial by jury shall be secure to all and remain inviolate." *Se*e U.S. Const. Amend. VII; Art. I, § 22, Fla. Const. The promise that the right to trial by jury shall "remain inviolate" [] "does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be impaired…the [legislature] has no power to impair, abridge, or in any degree restrict the right of trial by jury." *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 113 (Fla. 1848).

The right to trial by jury is a fundamental right in Florida. *Blair v. State*, 698 So.2d 1210, 1212-13 (Fla.1997); *State v. Page-Martin*, 135 So.3d 491, 492 (Fla. 2d DCA 2014); *Fox v. City of Pompano Beach*, 984 So. 2d 664, 668 (Fla. 4th DCA 2008). Any questions regarding the right to a jury trial should be resolved in favor of allowing the right to trial by jury. *Hollywood, Inc. v. City of Hollywood*, 321 So.2d

65, 71 (Fla.1975); *Hansard Constr. Corp. v. Rite Aid of Fla., Inc.*, 783 So.2d 307, 308 (Fla. 4th DCA 2001). *See also Hornblower v. Cobb*, 932 So.2d 402, 407 (Fla. 2d DCA 2006) (emphasizing "the constitutional sanctity afforded to trial by jury"). Caselaw addressing the right to trial by jury in other jurisdictions with less protection are of no value.

Florida law has long held that determining the amount of compensatory damages is "peculiarly" a jury function. *See Miller v. James*, 187 So. 2d 901, 902 (Fla. 2d DCA 1966). Florida recognizes a right to trial by jury for noneconomic damages. *See Brsant v. Dollar Rent A Car Systems, Inc.*, 869 So.2d 767, 769 (Fla. 4th DCA 2004) (describing as "constitutionally dubious" the legislature's authority to interfere with a jury's determination of unliquidated damages for intangible losses such as pain and suffering). Noneconomic damages are "particularly within the province of the jury" because they "are not capable of being exactly and accurately determined and have no standard whereby damages can be measured." *Daniels v. Weiss*, 385 So. 2d 661, 664 (Fla. 3d DCA 1980). *See also Braddock v. Seaboard Air Line R. Co.*, 80 So.2d 662, 667-68 (Fla. 1955); *St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915)(noneconomic damages are "a question of fact" for the jury).

This Court has already determined that a cap on noneconomic damages violates the right to trial by jury. In *Smith*, this Court stated that the right of access to

the courts "must be read in conjunction with" the right to trial by jury. 507 So.2d at 1088. This Court also held that where "the jury verdict is being arbitrarily capped," the plaintiff is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right." 507 So.2d at 1088-89.

A jury's award is the amount it deems "fair and just in the light of the evidence." *Fla. Std. Jury Instr.(Civ.)* 501(2)(a). Even where an award is excessive, a court is only permitted to reduce the jury's award if it allows the party the option to instead elect a new trial, thus preserving his right to have the matter of damages submitted to a jury. This Court has long held, and recently reaffirmed, that this safeguard ensures that the remittitur procedure does not violate the right to trial by jury. See *Adams v. Wright*, 403 So.2d 391, 395 (Fla.1981); *Waste Management v. Mora*, 940 So.2d 1105 (Fla. 2006). There is no such safeguard in section 766.118.

The cap diminishes a severely injured plaintiff's recovery to a fraction of the jury's award based on an arbitrary $500,000 limit, without regard to his or her actual damages as proven by the evidence. Under *Smith*, this violates the Florida Constitution's guarantee of a trial by jury.

CONCLUSION

This Court should confirm that the cap on noneconomic damages is unconstitutional in personal injury cases and in single claimant cases, in violation of equal protection, access to courts, and the right to trial by jury. This Court should also undertake a critical review of the Legislature's findings underlying the cap, reaffirming the analysis of the plurality in *McCall*.

Respectfully submitted,

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I hereby certify that this Amicus Curiae brief complies with the font requirements of Florida Rule of Civil Procedure 9.210(a)(2), and is formatted using Times New Roman 14-point font.

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