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Florida's medical malpractice tort reform a cognitive analysis of litigious, legislative promulgation and jurisprudence

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FLORIDA'S MEDICAL MALPRACTICE TORT REFORM:
A COGNITIVE ANALYSIS OF LITIGIOUS, LEGISLATIVE
PROMULGATION AND JURISPRUDENCE

by

JOSEPH P. FORMOSO

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
in the College of Health and Public Affairs
and in The Burnett Honors College
at the University of Central Florida
Orlando, Florida

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ABSTRACT

Public opinion in recent years has been seemingly manipulated by superfluous stories, bad press, and negative commentaries regarding the perceived “Medical Malpractice Crisis.” It has initiated a political attack on Florida’s tort system which has resulted in making valid medical malpractice claims even more so difficult for victimized plaintiffs to pursue. After months of diligent research, and with the loyal aid of my university advisors and the dedicated law librarians I’ve had the honor to work with, I have thoroughly analyzed Florida’s past and present medical malpractice tort reforms and governing procedural laws; in addition to arguing, by virtue of this thesis, why these reforms were truly enacted, how traditional tort reforms have egregiously compromised public interests, why Florida’s future—with regard to legislative change—is grim, and how new, innovative tort reforms—such as those established overseas—could genuinely benefit Floridians. The premise of the conclusion reached in this research is partially iterated in a quote by the critically acclaimed “Insurance Law Expert,” Tom Baker:

...the medical malpractice myth. Built on a foundation of urban legend mixed with the occasional true story, supported by selective references to academic studies, and repeated so often that even the mythmakers forget the exaggeration, half truth, and outright misinformation employed in the service of their greater good, the medical malpractice myth has filled doctors, patients, legislators, and voters with the kind of fear that short circuits critical thinking.

—Baker, T. (2005). *The medical malpractice myth*. Chicago: University of Chicago Press.

DEDICATION

For my Father—

A native Sicilian, who at the age of eighteen, with \$65.00 and two suitcases, came to be a successful, respected, hard-working, and honest American entrepreneur who, today, continues to help many of the less fortunate. My Dad always encouraged his children to succeed in academics and to achieve our dreams by receiving a higher education. Albeit, he himself—a quadrilingual graduate of catholic seminary and a vocational expert of machinery and construction—created a prosperous legacy without ever once enrolling into a collegiate University.

Thank you for instilling the value of knowledge in us Dad: it has substantiated my pursuit of happiness and directed my ambitions far more than you may ever know.

*With love and appreciation,
Joe-Peter*

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A special thank you and acknowledgement to my wife, Krista, and my parents, Joe & Eva, for their enduring love and support whilst I completed years of undergraduate studies.

I would also like to acknowledge the following UCF faculty members:

University of Central Professor and practicing attorney, Mark O. Cooper, J.D. for his invaluable lecture and instruction of Ethics and Contract Law—he is a genuine asset to this University and a profound lawyer with integrity. If only I knew more, passionate-about-teaching, professors like him.

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INTRODUCTION

Medical malpractice (short termed MedMal) is one of the most controversial areas of law to which civil jurors are required to decide and render verdicts. Conclusions about how juries perform and the verdicts they render have an unavoidably important implication on the debate for which the merits of the tort system and its reform are based.¹ Modern-day critics of legislative tort reform, The American Medical Association (AMA) for example, hyperbolize the age-old reproach of jury malfeasance or “runaway juries”, if you will.² The AMA was founded in 1847 with a perpetuating mission “*to promote the art and science of medicine and the betterment of public health.*”³ Yet, the AMA’s, perhaps, obscured interest is globally publicized as a herculean advocator for recovery-capped reform; with regard to the *Boggs* medical malpractice verdict, univocally noted verbatim, “*AMA interest: The AMA supports tort reform, specifically the limitation of non-economic damages* [damages for pain, suffering, loss of companionship, consortium, etc.⁴] *in medical malpractice cases.*”⁵ It is not to say runaway juries haven’t or don’t exist—they decidedly have (e.g. *Liebeck v. McDonald's Restaurants*⁶). Unarguably, at times juries have been empowered with wide discretion in reaching their decisions and, to wit, have awarded abhorrent recovery verdicts. However, the actual instances

¹ NIEL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS ix-x (1995)

² See, e.g., NIEL VIDMAR, *supra* note 1, at x.

³ AMA, *Our History*, <http://www.ama-assn.org/ama/pub/about-ama/our-history.shtml> (last visited Nov. 20, 2010); *Id.* at *Our Mission*, <http://www.ama-assn.org/ama/pub/about-ama/our-mission.shtml> (last visited Nov. 20, 2010).

⁴ See, e.g., LINDA L. EDWARDS ET AL., *TORT LAW*, 172 (4TH ED., 2009)

⁵ AMA, *Case Summaries By Topic, Tort Reform, Boggs v. Camden-Clark Memorial Hospital*, 609 S.E.2d 917 (W.Va. 2004), <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/litigation-center/case-summaries-topic/tort-reform.shtml> (last visited Nov. 20, 2010); See *infra* CASE LAW APPENDIX: *Boggs v. Camden-Clark Memorial Hospital* (Published Opinion)

⁶ *Liebeck v. McDonald's Restaurants*, 1995 WL 360309 (N.M. Dist.); See *infra* CASE LAW APPENDIX: *Liebeck v. McDonald's Restaurants* (Judgment)

of undue jury awards upon plaintiffs' are quantifiably nominal; yet those superficial suits have paved a proverbial concord of besmirched conjectures amongst the public. Thus, these select few historical cases have created a societal stigma premised on exaggerated misrepresentations of data and fact. Such claims have no foundation that could have been or should be considered and understood as methodologically or scientifically legitimate.⁷

According to author, Tom Baker, J.D. (Professor of Law and director of the Insurance Law Center at the University of Connecticut School of Law), the "tort crisis" is really an insurance crisis, that is, doctors, hospitals, and insurance companies blame lawyers, judges, and juries for the demand of tort reform. The AMA exclaims that the tort system is out of control and the mass media of television and newspapers etch a false message into the public's mind—a mendacious image, perhaps, of a physician concourse, all attired in white medical garments; crowded together upon the entrance of the state capitals, demanding tort reform—this is, at least, seemingly the general mass-misconception. However, few people truly understand how insurance companies work, that is, how they conduct their fiscal business and capitalism. The truth is, overall an insurance company works something like a bank. The insurance companies' gross income must be within equilibrium of the amount of money spent outward. It would be irrational for one to reason that an increase of the company's income is bound to reflect a large increase of the company's expenditures. The fact is, lawyers, judges, and juries have little or nothing to do with the demand for tort reform.⁸

⁷ NIEL VIDMAR, *supra* note 1

⁸ TOM BAKER, *THE MEDICAL MALPRACTICE MYTH*, 45-67 (2005)

As described in a report by The U.S. Congressional Budget office (CBO), reforming the nation's tort system by enacting legislation to change the common-law rules that state and local courts use in civil cases of injury to people or their property has become an important issue at the federal level. By 2004, most states have already enacted tort reforms which were similar to those being considered by federal lawmakers. In 2004, the CBO reported that a number of case studies have found that state-level tort reforms have decreased the number of lawsuits filed, lowering the value of insurance claims and damage-awards, and increased insurers' profitability when measuring payouts that were relative to premiums.⁹

However, those reported findings, should be interpreted cautiously. Foremost, the data presented was limited, and the findings were not sufficiently consistent to be considered conclusive. Additionally, the more so persuasive studies were confined because they analyzed specific types of torts, such as claims of bodily injury, thus making generalizations difficult in their statistical interpretation. Last, having to distinguish amongst the effects of different types of tort reforms can be very difficult because tort reforms are often enacted in packages within the state level, thus obscuring the conclusions that may be drawn by federal policymakers.¹⁰

The root cause of many states' tort reform, enacted in their respective constitutions and statutes, was based on the presumptions that too many tort claims were being filed and that court awards for punitive damages (intended to punish a defendant for willful and wanton conduct) and noneconomic damages (e.g. and pain and suffering) tended to be excessive. The goal of tort

⁹ U.S. GOV'T CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES vii (2004) [hereinafter *CBO 04 Report*]

¹⁰ *Id.*

reform in the states was to limit the amount that can be awarded for noneconomic damages, as well as those that decrease awards by the amount of payments from third-party sources. The legislatures' intent was to make it less worthwhile to pursue marginal cases and therefore reduce the number of incoming claims overall to address the inefficiencies within the tort system.¹¹

Gratefully, however, legal societies nationwide have dedicated themselves to strengthening and upholding the U.S. civil justice system by protecting the rights of citizens and consumers. In Florida, the Florida Justice Association¹² (FJA) is vigorously challenging reform that is based on prevarications and lobbyists' tainted agendas. The association states their mission as passionately believing that all Floridians will benefit when deserving individuals have a fair chance to seek justice in the state's courts, and that Florida's consumers are made safer when large corporations and industries are held to a high ethical standard and accept fair responsibility for their actions (e.g. healthcare and medical malpractice insurance companies).¹³

FJA works within the legislative, political, and public arenas to ensure that Floridians know and understand the importance of their rights to justice. They make certain that these rights, which are at the very core of what it means to be American, are safeguarded and protected.¹⁴ For example, the FJA explains a viable challenge to the current enactments of the Florida Constitution¹⁵:

¹¹ *Id.*

¹² See *infra* note 19

¹³ Florida Justice Association (FJA), *Who We Are*, <http://www.floridajusticeassociation.org/index.cfm?pg=WhoWeAre> (last visited Nov. 21, 2010)

¹⁴ *Id.*

¹⁵ Florida Justice Association (FJA), *Medical Malpractice*, <http://www.floridajusticeassociation.org/index.cfm?pg=MedMal> (last visited Nov. 21, 2010)

In an order issued on October 30, 2007, Ninth Judicial Circuit Judge John H. Adams, Sr., held that the medical malpractice damages caps that appear in s. 766.118, F.S., are contrary to the plain language of Article I, Section 26, Florida[sic] Constitution, a.k.a. Amendment 3, "Claimant's Right to Fair Compensation". The court held that Article I, Section 26 clearly states that victims may recover certain percentages of "all damages", and this means "all of the damages that a jury could potentially award". The court reasoned that because the Constitution allows claimants to collect "all" damages, the legislative[sic] attempt to "cap" those damages is therefore not permitted.

The foregoing research herein constitutes inquiry and versed exposition advancing a cognitive analysis and evaluation of how Florida's legislative medical malpractice tort reform has affected Floridians, families, society, and the legal-community since the late 20th century and early millennia to present-day; with a discovery emphasis on modern tort law implications upon individuals seeking relief (claimants), insurers, hospitals, doctors, medical practices/associations, et al. (defendants), various legal societies, and Florida State as a whole with topics surrounding: a brief but definitive historic summary of Florida's medical malpractice legislative tort reform¹⁶ and common law jurisprudence (with selective case history and outcomes); Florida's approach to medical malpractice tort reform via massive legislative recourse, namely the Florida's Constitution, Article I, Section 26, also referred to as "Amendment Three"¹⁷, and the constitutionality of the 2003 Medical Malpractice Reform Act¹⁸; representations of Florida's closed claims, past and present, case studies researched from statistical agencies such as: The

¹⁶ See, e.g., CBO 04 Report, *supra* note 7-9

¹⁷ FL Const. art. I § 26, *Claimant's Right to Fair Compensation*

¹⁸ FL STAT. § 395.0197

National Association of Insurance Commissioners (NAIC) and The U.S. General Accounting Office (GAO)¹⁹; adversarial suits pending before the Florida Supreme Court—relative to constitutional challenges on Florida’s current medical malpractice tort reform enactments; an overview of medical malpractice civil procedure (proprietary statutes and state rules) pursuant to reform; insights from the Florida Justice Association²⁰; the implied ramifications and true causations of “Defensive Medicine”²¹; identification of legislative lobbyists’, proponents, and empirical data exposing ulterior fiscal agendas and advocates of progressive civil justice; and, in closing, a conclusion of the proposed remedial change that is necessary to effectuate a proper, plausible reform into new enactments to alleviate the medical malpractice crisis.

The objective of this research is to provide readers with a non-subjective overview of Florida’s tort reform situation, also referred to as “The Medical Malpractice Crisis”, to clearly illustrate empirical data, facts, and arguments on both sides of the current debate, and to assess and understand the legislative changes necessary to facilitate a positive change with the intent to educate and enlighten individuals with regard to the various aspects and considerations that one should place before advocating or voting for a tort reform change or legislative stagnant that is, will, or could subject Florida into acquiring a grievous deficit or, in contrast, a quintessential benefit that could positively affect the rights of its citizens and consumers.

¹⁹See, e.g., FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 21-30 (1993)

²⁰ Florida Justice Association (FJA), <http://www.floridajusticeassociation.org>

²¹ Stephen Langel, *Averting Medical Malpractice Lawsuits: Effective Medicine—Or Inadequate Cure?*, 29:9, Health Affairs, 1565 (2010)

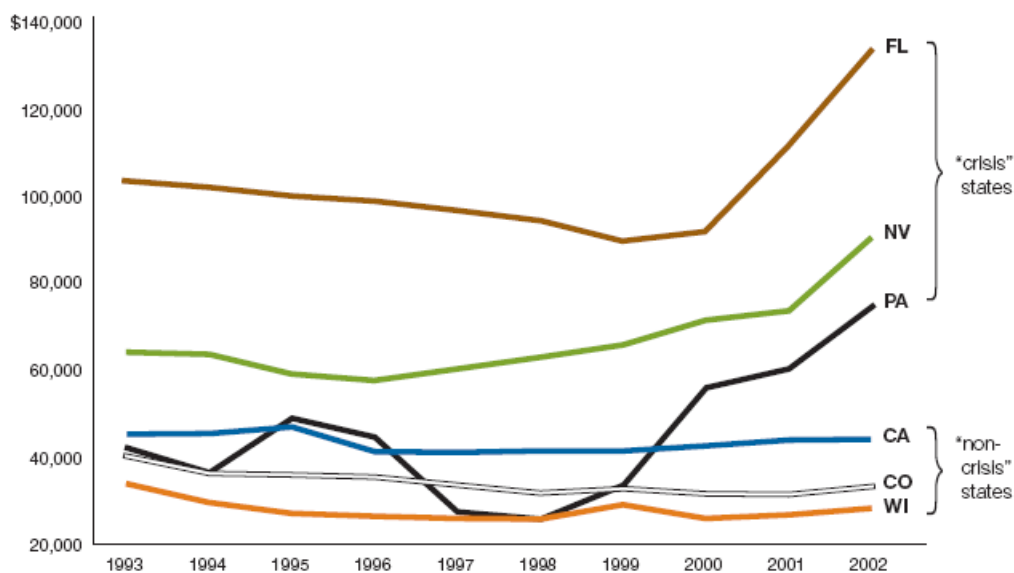
CONCEPTUAL BACKGROUND

The Medical Malpractice Crisis

The “Medical Malpractice Crisis” is a term coined for a period of volatility as it relates to the malpractice insurance market characterized by the well above-average increase in premium rates, corrosion of the financial health of insurance carriers, and contractions in the actual supply of insurance. A multitude of states have become greatly succumbed by the crisis since the late 20th century/early millennia.²²—Florida, largely, being one of the most greatly affected by it. See Figure 1.—reported by the Medical Liability Monitor Annual Rate Survey.²³

Figure 1.

Figure 1. Average liability premiums for OBGYNs in select “crisis” and “non-crisis” states, 1993 to 2002



Source: Weighted average premiums based on author calculations from data reported in the Medical Liability Monitor Annual Rate Survey. All amounts in 2003 dollars.

²² Claudia H. Williams & Michelle M. Mello, J.D., Ph.D., M.Phil., *Medical Malpractice: Impact of the crisis and effect of state tort reforms*, THE SYNTHESIS PROJECT: POLICY BRIEF NO. 10 (MAY 2006)

²³ *Id.*; See *infra* Figure 1.

In 2006, Harvard professor of law and public health, Doctor Michelle M. Mello, J.D., Ph.D., M.Phil., *et. al*, cited the aforementioned research survey documenting the domestic pandemic in their published, legal, policy brief entitled *Medical Malpractice: Impact of the crisis and effect of state tort reforms*.²⁴

Accordingly, indications have been made that premium growth has leveled off, but that premium volatility is a reoccurring obstacle. Dr. Mello documented three major periods of rapidly rising premiums over the last thirty (30) years in her research; each has sparked policy concerns about affordability and accessibility of coverage as well as the overall effectiveness of policy solutions. The brief notes stakeholder group disagreements on whether or not The Medical Malpractice Crisis actually affects access to healthcare, but a wide consensus agrees that Malpractice insurance has become less available and affordable to physicians and governing medical entities. Dr. Mello cites from research:

*State policy-makers have implemented a range of reforms in response to these crises, but their effectiveness is not well understood. This policy brief summarizes the results of research on the impact of these reforms on premium growth, claims, frequency, award size [re: jury verdicts/awards] and physician supply.*²⁵

A rhetorical question phrased in Mello's findings stated, "*How have states responded to malpractice crises?*" She answered:

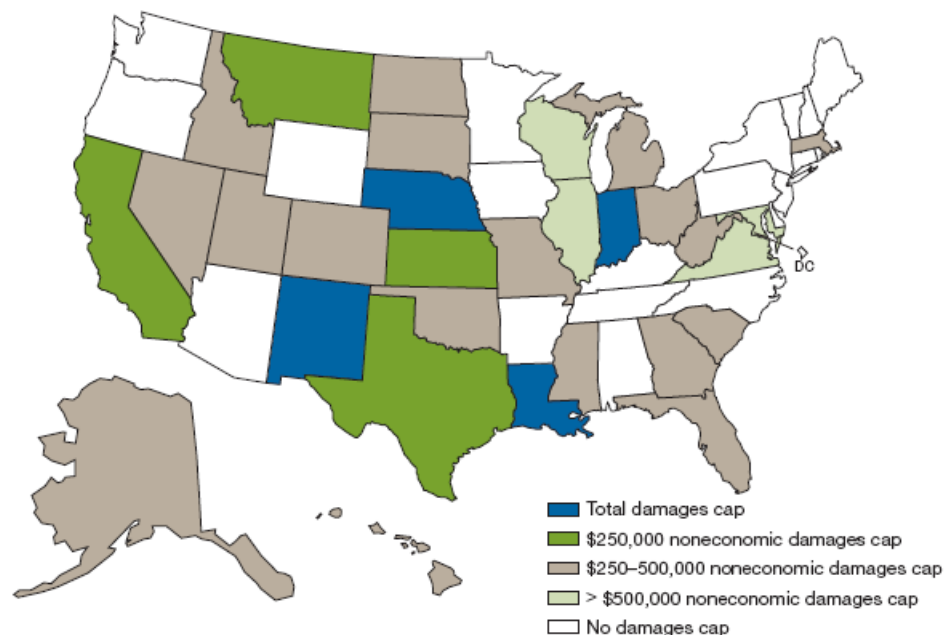
²⁴ *supra* note 22

²⁵ *Id.*

*Many states have adopted tort reforms in response to the 1980s Malpractice Crisis; recently [2006], other states have adopted similar reforms. The goal of these reforms is to reduce costs of malpractice litigation and thus lower premiums. Caps limiting noneconomic damages are among the most common reform, enacted by 26 states (figure 2)[See replication of figure 2 at Figure 2.]. Some states have also imposed tighter regulation of insurance premium rate changes.*²⁶

Figure 2.

Figure 2. Caps on damages by state, April 2006



Source: Mello MM. "Medical malpractice: Impact of the crisis and effect of state tort reforms." Research Synthesis Report, 2006. Maine and Oregon have caps that only apply in cases of wrongful death; Alaska, Florida, Massachusetts and Ohio have caps that increase or can be waived in severe cases.

Figure 2, above, coincides with Florida Statute § 766.118—Determination of noneconomic damages—at subsection (2)(a):

²⁶ *Id.*; See also *infra* Figure 2.

(2) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF PRACTITIONERS.—

(a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence of practitioners, regardless of the number of such practitioner defendants, noneconomic damages shall not exceed \$500,000 per claimant. No practitioner shall be liable for more than \$500,000 in noneconomic damages, regardless of the number of claimants.²⁷

Currently the most common, and heavily criticized, types of tort reforms adopted by the states are as follows: caps on damages, joint-and-several liability reforms, statutes of limitation/statutes of repose, attorney contingency-fee reforms, collateral-source rule reforms, periodic payment reforms, and pretrial screening panels. Caps on damages, seemingly the most widely-used legislative reform tactic, limits the amount of monies a plaintiff can receive as an award in a medical malpractice suit. Joint-and-several liability is defined as liability that may be apportioned either among two or more parties or to only one or a few select members of the group. Thus, each liable party is individually responsible for the entire obligation, but a paying party has rights of contributions and indemnity against nonpaying parties.²⁸ Simply stated, Joint-and-several liability reforms limited liability to a percentage of faults for each defendant.²⁹ Both the statutes of limitation and the statutes of repose limit the amount of time a patient has to file a claim.³⁰ There is a distinct difference between the two, in terms of how they function, however.

²⁷ FL STAT. § 766.118

²⁸ BRYAN A. GARNER, ED., BLACK'S LAW DICTIONARY, (Pocket ed. 1996)

²⁹ Claudia H. Williams et al., *supra* note 22

³⁰ *Id.*

For example, the statute of limitations is enacted in each state to establish a time limit for suing or for prosecuting a crime, based on the date when the claim accrues; the original purpose of this statute is said to require diligent prosecution for known claims, thereby providing finality and predictability in legal affairs and to ensure that claims will be resolved while evidence is reasonably available. The statute of response, however, bars a suit at a fixed number of years after the defendant acts in some way, even if this period ends before the plaintiff suffers any injury.³¹ The attorney contingency-fee reforms limit the amount of fees an attorney may collect from a medical malpractice plaintiff award. The collateral-source rule reforms allows the defendant(s) to deduct payments to the plaintiff from other sources—such as an insurance provider—from the actual amount which is due to a claimant.³² In tort law, the collateral-source rule is simply a doctrine holding that if an injured party receives compensation for their injuries from a source independent of the tortfeasor, such as insurance proceeds (e.g. Medicaid/Medicare/Blue Cross & Blue Shield, etc.), the payment should not be deducted from the damages that the tortfeasor would otherwise have to pay.³³ Periodic payment reforms are types that allow or even require that insurance providers pay out a plaintiff's award over a set period, that is a predetermined of time, rather than in a lump sum—an all at once payment. The last most frequently adopted tort reform employed by the states is known as pretrial screening panels. Prior to trial preset panels are able to review cases early on in a tort suit to weigh their opinion about whether or not a plaintiff has enough merit in their claim to proceed to trial. However, it should be noted that a negatively rendered panel decision will not generally end a

³¹ BRYAN A. GARNER, ED., *supra* note 28

³² Claudia H. Williams et al., *supra* note 22

³³ BRYAN A. GARNER, ED., *supra* note 28

case from proceeding; what it does do, however, is empower defendants to use the panel's opinion as evidence during trial.³⁴

It's concluded The Medical Malpractice Crisis highlights a much deeper problem for our current liability system and instigates a need for a much better tort reform solution. Patients aren't being compensated equitably; medicals errors aren't being deterred as hoped and doctors aren't participating in patient safety initiatives such as adverse-event-reporting³⁵—also known as (AER): A report of an incident where it is believed that a substance may have caused a health problem or detrimental event.³⁶ It is so inefficient, in fact, that only about forty (40) percent of the dollars spent on malpractice insurance actually go to the injured patient. Some of the efforts proposed to develop alternative solutions that could offer equitable awards to injured patients are: schedules of damages, disclosure and “early offer” programs, and administrative compensation systems, or health courts.³⁷

³⁴ Claudia H. Williams et al., *supra* note 22

³⁵ Claudia H. Williams et al., *supra* note 22

³⁶ CYTO-MATRIX, GLOSSARY OF TERMS, <http://www.cyto-matrix.com/glossary.php>, (last visited March 2012)

³⁷ Claudia H. Williams et al., *supra* note 22

The History of Florida's MedMal Tort Reform (Since 1975)

It's noted that the United States has withstood three predominate medical malpractices crises during the 20th century—namely, the crisis of the mid-1970s, the mid-1980s, and the most recent crisis of the late 1990s-early millennia.³⁸ In light of Florida's most recent tort reform discords, this historical reflection begins at the latter most recent major reform period and briefly recaps all major Medical Malpractice Tort Reforms instituted by the Florida Legislature since 1975.

Florida State University College of Law, located at the State's capital—425 W. Jefferson Street, Tallahassee, Florida—released a pro tort reform law review article entitled, *TOWARD A MORE JUST AND PREDICTABLE CIVIL JUSTICE SYSTEM*, back in the winter of 1998. In it, author George N. Meros, Jr., advocates the absolute benefits of legislative reform for Florida. The review addresses why Florida's tort law is "...*A System Out of Balance*," and supports a bill it deems is just—one that, Meros believes, Florida legislators should vote for to ensure equitability in addressing the, then, alleged tort law dilemma.

Meros wrote in part:

II. THE BENEFITS OF TORT REFORM

Tort liability imposes significant costs on society.[10] In 1991, the nation spent \$131.6 billion on tort litigation, representing 2.3% of our gross domestic product.[11] In one recent year alone, state court juries in the seventy-five largest urban areas awarded over \$2.7 billion to plaintiffs.[12] Studies report that citizens pay a "tort tax" of \$1200 per

³⁸ *Id.*

individual, or nearly \$5000 for a family of four.[13] Some have estimated that twenty percent of the cost of a ladder and fifty percent of the cost of a football helmet is attributable to tort liability.[14] The cost of the tort system has risen sharply in the past thirty years[15] and "at a pace far faster than in any other modern, competitive economy." [16]

As tort costs have increased, so too has the unpredictability of liability, to the detriment of American commerce.[17] Product manufacturers have become more risk averse, sacrificing research and innovation for the safe harbor of product uniformity.[18] Socially beneficial products and services have not been developed, or have been withdrawn from the market for fear of tort lawsuits.[19] American competitiveness in the worldwide market has suffered as well.[20] These inequities have increased the unpredictability, and therefore the cost, of the system, deterred commercial innovation, and stifled economic productivity.[21]

Tort liability imposes similar costs in Florida. A recent survey shows that Florida's small businesses—the economic engine of the state—are significantly intimidated by the mere threat of liability.[22] Eighty-five percent of those surveyed believe that liability laws improperly favor those who bring the suit.[23] Sixty percent have real concern about the possibility of a tort suit.[24] The concern is so acute that Florida businesses would rather be subject to a tax audit or OSHA inspection than a liability suit.[25] Similarly, Florida businesses would rather lose their best customer or most valued employee than have to defend a tort lawsuit.[26] Close to 200 businesses indicated that they have

withheld, failed to develop, or refused to market products or services to limit exposure to liability suits.[27] These small businesses consider tort reform as one of the three most important actions the Florida Legislature could take on behalf of business.[28]

Empirical data confirm the benefits of sensible tort reform. A 1994 Stanford University study analyzed the impact of tort liability reforms on economic performance, using data from seventeen industries in states that had enacted tort reform.[29] The study focused on whether reforms had a significant impact on a state's productivity and employment.[30] The findings are notable. They demonstrate that a state's adoption of additional liability-reducing reforms generally enlarges levels of output per worker and employment in a broad range of industries.[31] In contrast, a state's adoption of liability-increasing reforms generally causes lower productivity and employment.[32] The study concludes that liability-decreasing reforms help a state's economy, and liability-increasing reforms hinder a state's economy.[33]

Prudent tort reform will not pose a threat to public safety, as critics suggest, or create tort immunity for wrongdoers.[34] To the contrary, a balanced system will enhance public safety, punish wrongdoers for negligent conduct, and demand personal responsibility.[35]

The present system does little to advance public safety. Florida's citizens are not protected by a system that permits drunk drivers and drug users to collect thousands for their own wrongdoing.[36] They are not protected when the law discourages small businesses and product manufacturers from developing newer, safer products for fear of

lawsuits.[37] All citizens lose when tort liability is based not on fault, but on how much insurance or savings one has.[38]

It is little wonder that studies have found that the expansion in tort liability around the nation has had little impact on consumer safety. A study by Professor George Priest demonstrated that while the number of tort suits and insurance premiums rose sharply in the 1980s, injury rates for consumers and workers, death rates for medical procedures, and aviation accident rates declined no faster than in the 1970s when premium costs and the volume of tort suits were much lower.[39] Stated more directly, Professor Priest found no empirical evidence whatsoever that the explosion in tort liability in the 1970s and '80s made society any safer.[40]

If common sense reforms are enacted, Florida citizens will have a system that requires compensation for wrongful conduct, that refuses to reward drunken drivers and drug users, and that encourages businesses to invent and develop new and safer products and services. It is the fair thing to do.

III. FLORIDA TORT LAW: A SYSTEM OUT OF BALANCE

In the past thirty years, Florida's judiciary has liberalized and expanded tort liability, in part to remedy perceived historical anomalies. In so doing, however, the court retained other legal relics that permit wrongdoers to benefit from their own wrongs and require

*some tortfeasors to pay more than their fair share of a loss. The result is a system that is unpredictable, costly, and often just plain unfair.*³⁹

Meros', questionable, interpretation of Florida's, then, tort law problem was adopted by many like-minded civil liberty proponents at the time, and lobbyists were hard at work to reform Florida's tort laws which virtually provided a sole benefit to their employers.

In 1997, the Florida Legislature proposed a bill that could place limitations on vicarious liability⁴⁰ (Liability that a supervisory party, such as an employer, bears for the actionable conduct of a subordinate or associate, such as an employee, because of the relationship between the two—i.e. The *Doctrine of Respondeat Superior*⁴¹), create a statute of repose for products, limit punitive damages, and establish an alcohol and drug defense. The proposed bill contained a 12-year statute of repose for product liability actions but was not taken up for a floor vote and so was carried over to the agenda for the 1998 legislative session⁴². It was named the Florida Accountability and Individual Responsibility Liability Bill (FAIR)⁴³. As noted by The Florida Bar, “Supporters of the [FAIR] bill noted that the Florida Supreme Court had previously commented favorably on the viability of a statute of repose. n70[Florida Bar Journal citation] Opponents countered that there was not a need for tort reform because the business climate and economy were sound.”⁴⁴. Ultimately, before its 1998 session, both The Senate and The House committees held hearings on the civil litigation environment and the plausible impact it had on

³⁹ George N. Meros, Jr., Toward a More Just and Predictable Civil Justice System, 25 FLA. ST. U.L. REV. 141 (1998)

⁴⁰ *Id.*

⁴¹ BRYAN A. GARNER, ED., *supra* note 32

⁴² Bruce Kuhse, The Florida Bar Journal, 74 FLA. BAR J. 22 (JULY/AUG. 2000)

⁴³ George N. Meros, Jr., *supra* note 39

⁴⁴ Bruce Kuhse, *supra* note 42

the economic development in Florida. Drafted recommendations and proposals for the 1998 session subsequently became known as Senate Bill 874 (SB 874). It included, of course, the 12-year statute of repose for all product liability actions and a "government rules" defense. Later SB 874 was passed by the Florida legislature on April 30, 1998.⁴⁵

When SB 874 was presented to the Florida State Governor Chiles on May 15, 1998, he vetoed it (May 18, 1998). Democratic Governor Chiles was said to have characterized the bill as, *"an economic windfall for business and unfair. n77[Florida Bar Journal citation] He specifically cited news accounts speculating of manufacturing defects in older commercial airliners to illustrate the potential 'unfairness' of the statute of repose provisions."*⁴⁶

It's noted by The Florida Bar that most of Florida's current tort reform laws became effective on October 1, 1999. It was then that a new Republican Governor confidently enacted laws that still dominate Floridians today (the date of this writing). A proposed House Bill known as 775 (HB 775), was passed by the Florida legislature on April 30, 1999. HB 775 is said to have tracked 1998's vetoed Senate Bill 874 and was signed into our existing law by Governor Jeb Bush on May 26, 1999. Sections of HB 775 pertaining to the statute of repose became effective on July 1, 1999. Conveniently, the Florida legislature justified the new law with an explanation that, *"the bill shifts responsibility from one actor to another in certain situations where the legislature has determined responsibility is better assigned..."*⁴⁷

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

It wasn't until 2003 that Florida was subjected to a major reform via Florida's Tort Reform Act. Namely, Senate Bill 2D (CS/SB-2D), *hereinafter* "SB 2D", which became effective September 15, 2003, with regard to caps placed on noneconomic damages in an action for personal injury or wrongful death arising from medical negligence by a medical practitioner (or non-practitioner)⁴⁸. The Florida Senate summarized the legislation of SB 2D, caps on noneconomic damages, as follows:

- *For an injury other than a permanent vegetative state or death, noneconomic damages are capped at \$500,000 from each practitioner defendant and \$750,000 from a nonpractitioner defendant. However, no more than \$1 million and \$1.5 million can be recovered from all practitioner defendants and all nonpractitioner defendants, respectively, regardless of the number of claimants. Alternatively, the \$500,000 cap and \$750,000 cap can be "pierced" to allow an injured patient to recover up to \$1 million and \$1.5 million aggregated from all practitioner defendants and all nonpractitioner defendants, respectively, if the injury qualifies as a catastrophic injury and manifest injustice would occur if the cap was not pierced.*
- *For an injury that is a permanent vegetative state or death, noneconomic damages are capped at \$1 million and \$1.5 million from practitioner defendants and nonpractitioner defendants, respectively, regardless of the number of claimants.*

⁴⁸ *infra* note 49

- *For any type of injury resulting when a practitioner provides emergency services in a hospital or life support services including transportation, provided there is no pre-existing health care patient-practitioner relationship, noneconomic damages are capped at \$150,000 per claimant but cannot exceed \$300,000, regardless of the number of claimants or practitioner defendants. This cap only applies to injuries prior to the patient being stabilized.*
- *For any type of injury resulting when a nonpractitioner provides emergency services in a hospital or prehospital emergency treatment pursuant to statutory obligations, provided there is no pre-existing health care patient-practitioner relationship, noneconomic damages are capped at \$750,000 per claimant from all nonpractitioner defendants but cannot exceed \$1.5 million, regardless of the number of claimants or nonpractitioner defendants.*
- *Allows for setoff against noneconomic damages exceeding the statutory caps, provided a reduction is made first for comparative fault.*
- *Requires reduction of any award for noneconomic damages by any settlement amount received in order to preclude recovery in excess of the statutory cap.*
- *Clarifies that the caps on noneconomic damages applicable in medical negligence trials are applicable to trials that take place following a defendant's refusal to accept a claimant's offer of voluntary binding arbitration.*

- *Caps recovery of noneconomic damages in voluntary binding medical negligence arbitration involving wrongful death.*⁴⁹

Overall, since 1975, the major tort provisions passed and promulgated by The Florida Legislature include eighty (80) Grant Immunities and Protections to Private Entities—with forty (40) of those provisions applying to all private businesses and corporations and with twenty-five (25) applying exclusively to medical providers, eight (8) to nursing homes, and three (3) to HMO and Insurance Companies—the aforesaid does not include broad immunities which have been based at the Federal level.⁵⁰ Below listed is a comprehensive chronological recap outlining Florida’s MedMal Tort Reform since 1975:

1975, Florida passes legislation to drastically reduce the statute of limitations in medical malpractice cases from four (4) years to two (2).⁵¹

1980, The Florida Legislature grants all prevailing parties in medical malpractice litigation costs and attorney fees.⁵²

1985, The Florida Legislature passed the following MedMal tort reforms:

1. *Offer of Judgment and Demand for Settlement:* in civil (MedMal) cases—awarding parties attorney fees and costs if the original offer and demand is was not within twenty-five-percent (25%) of award;

⁴⁹ STATE OF FLORIDA SENATE, 2003-D SPECIAL SESSION: SUMMARY OF LEGISLATION PASSED (2003), <http://archive.flsenate.gov/Publications/2003D/Senate/reports/summaries/pdf/sessum03D.pdf>

⁵⁰ Florida Justice Association (FJA), History of Tort in Florida (2010) (unpublished Executive Summary, on file via FJA proprietary membership database, www.floridajusticeassociation.org, FJA, 218 South Monroe Street, Tallahassee, Florida 32301).[hereinafter *FJA Executive Summary*]

⁵¹ *Id.*

⁵² *Id.*

2. *Structured Settlements*: provisions that future losses which are in excess of \$500,00 may be paid out in a structured settlement⁵³(“...A settlement in which the defendant agrees to pay periodic sums to the plaintiff for a specified time”.⁵⁴);
3. *Study*: a requirement of The Department of Insurance to study the impact of medical malpractice tort restrictions—with a due date of March 1989—however, it was subsequently repealed, without the study ever being done;⁵⁵
4. *Financial Responsibility (FR)*: establishing financial responsibility requirements for hospitals of one-point-five-million-dollars (\$1.5 million) per claim and five-million-dollars (\$5 million) annual aggregate—but for doctors without any staff privileges the FR was set at one-hundred-thousand to three-hundred-thousand-dollars (\$100,000-\$300,000)—for physicians with staff privilege FR was set at two-hundred-fifty-thousand to seventy-five-hundred-thousand-dollars (\$250,000-\$750,000). Furthermore, FR requirements were ordered to be fulfilled by escrow or insurance, however in 1986, a said “loophole” was enacted that allowed physicians to post a sign stating that they do not meet the above FR requirements and “go bare”—meaning they do conduct their practice without any malpractice insurance, an escrow account, or even a letter of credit.⁵⁶
5. *Contributory Fault*: establishes a right of contribution by decreasing proportionately the amount of compensatory damages (i.e. actual damages, “...An amount awarded to

⁵³ *Id.*

⁵⁴ BRYAN A. GARNER, ED., *supra* note 32

⁵⁵ FJA Executive Summary, *supra* note 50

⁵⁶ *Id.*

- a complainant to compensate for a proven injury or loss; damages that repay actual losses”.*⁵⁷) by the contributory fault of the plaintiff.⁵⁸
6. *Mandatory Settlement Conferences*: promulgates that settlement conferences are mandatory in all medical malpractice suits.⁵⁹
 7. *Attorney Fees*: established an attorney fee schedule until rules were established by the Florida Supreme Court (later repealed in 1992). The Florida Supreme Court promulgated a fee schedule and within § 4-1.5(f)(4)(B)(i) of the Rules Regulating The Florida Bar.⁶⁰
 8. *Court Ordered Arbitration*: empowers a trial court to order arbitration if it is requested by either party.⁶¹
 9. *Peer Reviewed*: legislation provides for a peer review confidentiality and immunity provision.⁶²
 10. *Punitive Damages*: no punitive damages (“...*Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; such damages, which are intended to punish...*”⁶³) may be pled in a medical malpractice case until a reasonable showing of evidence is proffered.⁶⁴

⁵⁷ BRYAN A. GARNER, ED., *supra* note 32

⁵⁸ FJA Executive Summary, *supra* note 50

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ BRYAN A. GARNER, ED., *supra* note 32

⁶⁴ FJA Executive Summary, *supra* note 50

11. *Good Faith Certification*: requires a representing attorney to certify that in good faith claims for a medical malpractice suit are being made. Many times this is shown by expert opinion in the [*Pre-Suit Process*] and is considered not to be discoverable.⁶⁵
12. *Expert Witness Testimony*: a requirement that a testifying health care provider/expert-witness have their own training, experience, or knowledge as a result of active practice or instruction within five (5) years before the incident in suit.⁶⁶
13. *Standards of Care*: language redactions to the currently law made to it so that standard of care was changed to “prevailing professional” rather than “accepted” standard of care.⁶⁷

1986, The Florida Legislature passed the following MedMal tort reforms:

1. *Itemized Verdicts*: the law now required verdicts to be itemized by economic to non-economic damages as well as past and future damages.⁶⁸
2. *Remittitur/Additur*: the legislative criteria by which the court must now consider to reduce or increase awards.⁶⁹
3. *Collateral Sources*: a provision that payments made by other sources of medical bills, disability insurance, and so forth will reduce the actual court award.⁷⁰
4. *Periodic Payment*: a court can now order struttred payment of future economic losses in excess of \$250,000. However, the verdict form must be itemized.⁷¹

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

5. *Punitive Damages*: provides that punitive damages will be presumed excessive if over three times compensatory damages. However, the plaintiff must prove by the clear and convincing burden (i.e. “*clear and convincing evidence. Evidence indicating that the thing to be proved is highly probable or reasonably certain; this is a greater burden than preponderance of the evidence, the standard applied in most civil cases, and less than evidence beyond a reasonable doubt, the norm for criminal trials*”).⁷²) that punitive awards over the amount are not considered excessive. The state will be awarded sixty-percent (60%) of all punitive damage awards (later amended in 1992 to thirty-five (35%) and prohibits the plaintiff from setting to avoid state’s share; state’s share repealed effective July 1, 1995 per Chapter 92-85.)⁷³
6. *Cap on Non-economic damages*: provided for a four-hundred-fifty-thousand-dollar (\$450,000) cap on noneconomic damages.⁷⁴
7. *Joint & Several Liability Restrictions*: joint & several liabilities are now heavily restricted, thus proportional liability for economic damages for defendants who are less at fault than the plaintiff was enabled. Any damages over twenty-five-thousand-dollars (\$25,000) the defendant’s liability for noneconomic damages is limited to defendant’s proportional share.⁷⁵
8. *Academic Task Force*: established an academic task force to report on tort and insurance law.⁷⁶

⁷² BRYAN A. GARNER, ED., *supra* note 32

⁷³ FJA Executive Summary, *supra* note 50

⁷⁴ *Id.*

⁷⁵ FJA Executive Summary, *supra* note 50

⁷⁶ *Id.*

1988 and in 1989, The Florida Legislature passed the following MedMal tort reforms:

1. *Presuit Investigation*: a requirement that an expert's opinion must be included when sending out a notice of intent to litigate to all or any potential defendant(s). Laws now require a ninety-day (90-day) Presuit investigation period in addition to new and very strict discovery requirements and guidelines. Both expert doctors and attorneys are subject to court sanctions and discipline if good faith grounds for negligence claim do not exist in the medical malpractice lawsuit.⁷⁷

2. *Binding Arbitration*: according to the FJA executive summary:

*If a defendant offers to arbitrate and the plaintiff refuses, a case can proceed to trial with a \$350,000 cap on non-economic damages. If both parties agree to arbitrate, non-economic damages are capped at \$250,000 (reduced by the percentage of the capacity to enjoy life) and plaintiff is entitled to costs, interest, and attorney fees, which are capped at 15 percent of the award. Additionally, lost wages are capped at 80 percent, and no punitive damages may be awarded. If plaintiff offers to arbitrate and the defendant refuses, the case goes to trial, where the defendant is subject to prejudgment interest and attorney fees, which are capped at 25 percent of the award. (Held constitutional by the Florida Supreme Court (5/14/93).)*⁷⁸

3. *Joint & Several Liabilities: Teaching Hospitals*: The new laws now abolish Joint & Several Liability for teaching hospitals and board of regents.⁷⁹

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

4. *Insurer Reporting*: Insurers are now required to report savings that resulted from reforms.

5. *The Florida Birth-Related Neurological Injury Compensation Plan (NICA)*: documented by the FJA executive summary as providing:

*...compensation without fault for certain birth-related injuries, i.e. brain and spinal cord injuries that render a full-term infant permanently and substantially, mentally and physically impaired. Division of Workers' Compensation judge hears all claims. All medical expenses are paid and parents receive \$100,000, as well as possible attorney fees. Exclusive remedy absent bad faith or willful disregard on the part of the health care provider. Provides for a seven-year statute[sic] of limitations.*⁸⁰

Medical Emergency Care Liability Reform: new laws now grant immunity to healthcare practitioners who administer emergency healthcare. The provisions of which apply now to the Reckless Disregard (“1. *Conscious indifference to the consequences (of an act)*”⁸¹) standard for imposition of liability in medical malpractice cases. The jury is now asked to consider the lack of time to obtain consultation, inability to obtain patient history, time constraints due to other emergencies, and lack of patient/doctor relationship.⁸²

1990, The Florida Legislature limited the circumstances under which confidential settlement agreements can be used to conceal public hazards or information relating thereto

⁸⁰ *Id.*

⁸¹ BRYAN A. GARNER, ED., *supra* note 32

⁸² FJA Executive Summary, *supra* note 50

which may protect the public—termed “*Sunshine in Litigation*”. With regard to wrongful death recovery for adult children, the legislature created an exception for the wrongful death statute thus prohibiting any recovery, whatsoever, on behalf of parents who have lost adult children over the age of twenty-five (25) to medical malpractice and, further, prohibited any recovery on behalf of adult children over the age of twenty-five (25) who have lost their parents due to medical malpractice.⁸³

1992, The Florida Legislature mandated application of the Reckless Disregard standard to EMTs and physicians for negligence caused whilst delivering babies after complications arising as a result of care by midwives; in addition to practice parameters, being, that physicians who willfully comply with practice parameters will be granted an affirmative defense to negligence claims (later repealed), and sovereign immunity privileges to agents of Board of Regents who act on behalf of private hospitals, healthcare providers under contract with a local or state government, and to private practicing physicians who participate in Florida Health Care Corps.⁸⁴

1993, The Florida Statute of Limitations was shortened from seven (7) years to just five (5) in all NICA-type lawsuits.⁸⁵

1996, The Florida Statute of Limitations is tolled for minors—thus, suspending the Statutes of Repose for cases involving fraudulent concealment in order to bar a claim that is filed prior to a child’s eighteenth birthday.⁸⁶

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

1998, an exception for the prohibition against hearsay evidence allows the introduction of former trial or deposition testimony of nonparties even if the parties to the present action never were given an opportunity for cross-examination of said witness.⁸⁷

1999, proved to be a period of major reforms:

1. *Statue of Repose: Barred Actions*: actions that could not have been barred under the prior, existing law, must be brought by July 1st of 2003.⁸⁸
2. *Punitive Damages*: with regard to burden of proof, plaintiffs are now required to prove entitlement to an award of punitive damages by the clear and convincing evidence standard.⁸⁹
3. *Limitations on Punitive Damages*: employers are now immune from punitive liability based on the acts of an employee so long as the employer has not contributed, participated, or approved the conduct or gross negligence which contributed to the injury. Gross negligence is define as, “A *conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages* [i.e. punitive damages].—Also termed *reckless negligence; wanton negligence, willful negligence*”.⁹⁰
4. *Limitations on Punitive Damages: Recovery Caps*: the new law requires that there can only be one punitive damage award for the same act or a single instant injury; otherwise, the court must determine by the clear and convincing evidence standard

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ BRYAN A. GARNER, ED., *supra* note 32

that the prior award(s)—to include any state and federal award(s)—was deficient in punishing said defendant.⁹¹ It's noted further by the Florida Justice Association:

*In such cases, the court may award punitive damages, but there is a set-off for prior awards. Allows the court to “consider” whether or not the defendant has ceased the egregious conduct. Provides that attorney fees are payable based on the final judgment for punitive damages. Provides a tiered cap system for punitive damages: Punitive damages limited to the greater of \$500,000 or three times compensatory damages; If defendant's wrongful conduct was motivated solely by unreasonable financial gain and defendant had actual knowledge of the dangerous nature of the conduct, then punitive damages are limited to the greater of \$2 million or four times compensatory damages; or Where, at the time of injury, the defendant had specific intent to harm the claimant, there is no limit on punitive damages.*⁹²

5. *Joint & Several Liability & Comparative Fault Provisions*: the new law completely rids the application of joint & several liability in cases where the award is less than twenty-five-thousand-dollars (\$25,000). The new provision mandates that a party is required to allege the fault of a non-party (*Fabre* Defendant aka The *Fabre* Doctrine⁹³) to, “*please same affirmatively and identify the nonparty (if known) by motion or in the initial responsive pleading when defense are first presented (absent a*

⁹¹ FJA Executive Summary, *supra* note 50

⁹² *Id.*

⁹³ *See, Fabre v. Marin*, 623 So. 2d 1182; 1993 Fla. LEXIS 1343; 18 Fla. L. Weekly S 453 (August 26, 1993)

showing of good cause.)”⁹⁴ A defendant must prove, by a preponderance of the evidence (“The greater weight of the evidence; the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be”.⁹⁵), the non-party’s fault if fault is to shift and be apportioned to the nonparty named in suit. The 1999 legislation changed laws further to create a tiered cap system for joint and several liability with regard to economic damages. If a defendant’s fault is greater than the plaintiff’s the following new law provisions would then apply:

If defendant’s fault is 0-10 percent, no joint & several liability for economic damages (0-9 percent if plaintiff is faultless); If defendant’s fault is 11-24 percent, \$200,000 cap on economic damages subject to joint & several liability (10-24 percent and \$500,000 if plaintiff is faultless); If defendant’s fault is 25-50 percent, \$500,000 cap on economic damages subject to joint & several liability (\$1 million if plaintiff is faultless); or If defendant’s fault is greater than 50 percent, \$1,000,000 cap on economic damages subject to joint & several liability (\$2 million if plaintiff is faultless). Specifies that joint liability is in addition to several liability for economic and non-economic damages.⁹⁶

2001, limitations to punitive damages in nursing home and assisted living facility cases were enacted, medical malpractice presuit requirements became stricter, attorney’s fees, once

⁹⁴ FJA Executive Summary, *supra* note 50

⁹⁵ BRYAN A. GARNER, ED., *supra* note 32

⁹⁶ FJA Executive Summary, *supra* note 50

again, came under fire, along with various statutory eliminations and new provisions to the statute of limitations.⁹⁷ The Florida Justice Association summarizes the 2001 reform as:

Punitive Damages Limitation in Nursing Home and Assisted Living Facility Cases -- Removes the knowledge requirement regarding an employer who condones, ratifies or consents to the conduct of the employee. Creates a tiered cap system: limits punitive damages to the greater of \$500,000 or three times compensatory damages; if the defendant's wrongful conduct was motivated solely by unreasonable financial gain and defendant had actual knowledge of the dangerous nature of the conduct, punitive damages are limited to the greater of \$2 million or four times compensatory damages; if at the time of injury the defendant had specific intent to harm the claimant, there is no limit on punitive damages. Burden of proof changed to clear and convincing.

Presuit Requirement in Nursing Home and Assisted Living Facility Cases -- Requires a mandatory 75-day presuit notice and investigation process for claims against nursing homes and assisted living facilities for violations of residents' rights and negligence involving personal injury or death.

Mandatory Mediation in Nursing Home and Assisted Living Facility Cases -- Requires mandatory mediation within 30 days of the completion of pre-suit and prior to suit being filed.

Elimination of Attorney Fees in Nursing Home and Assisted Living Facility Cases -- Eliminates attorney fees that must be paid by the nursing home in nursing home and

⁹⁷ *Id.*

assisted living facility cases for claims alleging violations of residents' rights and negligence involving personal injury or death.

Elimination of Negligence Per Se -- To maintain a claim for violations of a resident's rights and negligence involving personal injury or death, the resident, or the personal representative of the estate of the resident, is no longer able to prevail simply by establishing a violation of the resident's rights. To maintain a claim for violations of the resident's rights and negligence involving personal injury or death, the resident or the personal representative of the estate of the resident, must establish that the nursing home or assisted living facility owed a duty to the resident, the nursing home or assisted living facility breached the duty and that the breach caused damages to the resident.

Election of Damages -- When a long-term care facility breaches a duty to a resident and causes the death of the resident, the personal representative of the estate of the resident must elect either recovery of damages for the pain and suffering of the deceased resident from the date of the injury until death or wrongful death damages, which include the recovery for pain and suffering damages of adult children for the death of a parent resident.

Exclusive Remedy in Nursing Home and Assisted Living Facility Cases -- Provides that Chapter 400 is the exclusive remedy for residents to maintain claims for violations of residents' rights and/or negligence involving personal injury or death.

Statute of Limitations Reduction in Nursing Home and Assisted Living Facility Cases --- Drastically reduces the statute of limitations from four to two years. Provides that no

*extension of the statute of limitations by petition for extension is available for medical negligence claims.*⁹⁸

2003, Florida's Tort Reform Act—one of, if not the greatest (to date) tort reform Florida has yet to encounter. The 2003 legislative promulgations are succinctly summarized:

“Code Blue” Immunity -- Extends “Good Samaritan” immunity to health care providers, including hospitals, that provide emergency services. Redefines “reckless disregard” standard of care as conduct that the practitioner knew or should have known created an unreasonable risk of injury. Extends immunity to health care practitioners responding to “code blue” emergency situations for patients other than their own, unless their conduct is willful and wanton and likely to result in injury.

HMOs: Vicarious Liability -- Specifies that a healthcare provider is not deemed an agent or employee of an HMO for purposes of medical malpractice vicarious liability.

Insurers & HMOs Limitation of Liability -- Specifies that an insurer and/or HMO may not be held liable for the negligence of a health care provider in any amount greater than the amount of damages that may be imposed directly against the provider.

College Athletics Contract Practitioners -- Provides sovereign immunity to health care practitioners who contract with state university boards of trustees for medical services to student athletes while acting within the scope of their duties.

⁹⁸ *Id.*

Presuit Screening Panels in Medical Malpractice Cases -- Requires Department of Health (DOH) to study the feasibility of medical review panels as part of the presuit process. Report date: 12/31/03, the report recommended against the use of presuit screening panels.

Expert Witnesses Qualifications -- Provides substantially revised criteria for expert witnesses in medical malpractice cases. Experts must have similar credentials to the medical professionals they testify against. If the defendant is a specialist, the expert must specialize in same or similar specialty and have devoted time within the last three years to clinical practice, consulting, teaching or research in the same or similar specialty. If a general practitioner, the expert must have devoted time within the last five years to clinical practice, consulting, teaching or research in general practice. If another provider, the expert must have devoted time within the last three years to clinical practice, consulting, teaching or research in the same or similar profession.

Mediation Requirement in Medical Malpractice Cases -- Requires in-person mediation within 120 days after a suit is filed if the parties have not agreed to binding arbitration.

Non-Economic Damage Cap for Health Care Practitioners in Medical Malpractice Cases -- Limits non-economic damages for health care practitioners to \$500,000 per claimant, regardless of number of practitioners, and \$500,000 per practitioner, regardless of number of claimants. Provides for a total of \$1 million recoverable non-economic damages from all practitioners, regardless of the number of claimants, if the negligence resulted in a permanent vegetative state or death or caused catastrophic

injury and the court finds that there would be manifest injustice because special circumstances involve particularly severe non-economic harm.

Non-Economic Damages Cap for Nonpractitioners (Health Care Facilities) in Medical Malpractice Cases -- For nonpractitioners, limits damages to \$750,000 per claimant, regardless of number of nonpractitioners, and \$750,000 per nonpractitioner, regardless of number of claimants; provides for a total of \$1.5 million recoverable from all nonpractitioners, regardless of the number of claimants, if the negligence resulted in a permanent vegetative state or death or caused catastrophic injury and the court finds that there would be manifest injustice because special circumstances involve particularly severe non-economic harm.

...Permanent Total Disability Benefits Cut Off -- Cuts off all PTD benefits at age 75 unless the employee is not eligible for Social Security retirement or disability benefits because the injury prevented the employee from working sufficient quarters to be eligible for such benefits.

Permanent Total Disability Supplemental Benefits Reduction and Cut Off -- Reduces supplemental (cost of living) benefits from 5 percent to 3 percent of the compensation rate. Cuts off supplemental benefits entirely at age 62 unless the employee is not eligible for Social Security retirement or disability benefits because the injury prevented the employee from working sufficient quarters to be eligible for such benefits.

Coverage and Benefits for Mental or Nervous Injuries Restricted -- Requires that, for a mental or nervous injury to be compensable, a compensable physical injury must be

*shown by clear and convincing evidence to be the major contributing cause (more than 50 percent responsible) of the mental or nervous injury. Limits duration of temporary benefits for a mental or nervous injury to six months after maximum medical improvement of the physical injury. Limits permanent impairment benefits based on permanent psychiatric impairment to 1 percent impairment.*⁹⁹

2006, new laws eliminate joint and several liability in civil actions so that joint and several liability is abolished with regard to economic damages in negligence suits. Plaintiffs of class action lawsuits are limited to Florida residence only; further, burdens are now placed on plaintiff's to allege and prove actual damages if they are pursuing statutory penalties under Florida Statute Chapter 329, 501, 520 or 521 (applicable to MedMal cases with regard to consumer protection). Additionally, *supersedeas* bonds ("A bond that a court requires from an appellant who wants to delay payment of a judgment until the appeal is over".¹⁰⁰) now have upper limits at fifty-million-dollars (\$50 million) per appellant—regardless of the type of appeal or case being heard, but with exceptions for certified class action lawsuits which are subject to Florida Statute 768.733. The 2006 reform that most greatly affected MedMal suits were the damage caps now placed on behavior health agencies. Now, detoxification programs, addict treatment and public serving facilities have a one-million-dollar (\$1 million) cap on the net economic damages per suit and a two-hundred-thousand-dollar (\$200,000) cap on noneconomic damages in all negligence actions which were or are based on services for the stabilization of a mental health patient or substance abuse user. Behavioral health providers are now required to

⁹⁹ *Id.*

¹⁰⁰ BRYAN A. GARNER, ED., *supra* note 32

obtain and maintain general liability insurance coverage in the amount of one-million-dollars (\$1 million) per claim and three-million-dollars (\$3 million) per incident.¹⁰¹

2010, T.H. Lee Moffitt Cancer Center & Research Institute now has Sovereign immunity (“*A government’s immunity from being sued in its own courts without its consent...*”¹⁰²) granted to its not-for-profit corporations and subsidiaries.¹⁰³

2011, reforms enacted include: sovereign immunity granted to Shands and University of Miami and their related conglomerate entities, new Medicaid caps on noneconomic damages at two-hundred-thousand-dollars to three-hundred-thousand-dollars (\$200,000-\$300,000) for damages suffered by Medicaid patients, and an all new expert witness certification requisite for out-of-state expert witnesses used to substantiate or rebut claims in all MedMal suits; the new law provides for disciplinary procedures if violations to it occur.¹⁰⁴

¹⁰¹ FJA Executive Summary, *supra* note 50

¹⁰² BRYAN A. GARNER, ED., *supra* note 32

¹⁰³ FJA Executive Summary, *supra* note 50

¹⁰⁴ *Id.*

The Common Law Jurisprudence

Albeit, tort reform has always been a national initiative, some of the most notable cases which contributed to the current condition of the State's reform and instigated public hysteria—with regard to the alleged need for drastic legislative tort reforms—are noted herein.

The most widely known case, which comes to mind to every lay person and lawyer alike, in debate of the merits of tort reform, has nothing to do with medical malpractice whatsoever but rather a particular product liability lawsuit: *Liebeck v. McDonald's Restaurants*¹⁰⁵ also termed the McDonald's coffee case is commonly regarded as the star runner for the inception of frivolous lawsuits and “runaway juries.”



¹⁰⁵ *Supra* note 6

Unfortunately, most people are unaware of the facts involved with the 1992 incident. For many, the story is more of a hyperbolized tale of American greed, abuse of the U.S. judicial economy, and the need for immediate tort reform in order to serve the alleged “public interest.”

Seventeen (17) years later, filmmaker, Susan Saladoff, documents the actual events of the case in a new documentary, entitled *Hot Coffee*, in an attempt to dispel the myths surrounding the case. John Schwartz of the New York Times reported June 24, 2011:

ONE day in 1992 Stella Liebeck spilled a cup of McDonald's coffee into her lap. Ever since, people have been fighting over what really happened. Undisputed: Ms. Liebeck sued McDonald's, and in 1994 a jury awarded her nearly \$3 million, \$2.7 million of which was punitive damages. The disputed part is all the rest: Ms. Liebeck and her legal action quickly became a national symbol of frivolous lawsuits, a source of TV punch lines and outrage from the commentariat. The business world used the moment for what became known as tort reform, while others called it a blatant effort to bar the courthouse door. And in it all, Ms. Liebeck's story was largely lost.

...“Everybody knows — or thinks they know — the McDonald's case,” said Susan Saladoff, who put her legal practice aside to direct and produce the film. “But they really don't know it at all. I didn't do this to become a filmmaker. I made this movie because I had something to say that needed to be said, and nobody else was saying it, at least to regular folks, to the public.”

That message may be getting across. Ann Hornaday of The Washington Post, reviewing the film at the Sundance Festival, wrote that it provided “the kind of narrative that sends

*audiences out of the theater thinking in a brand-new way about something they thought they understood”.*¹⁰⁶

The film’s message was echoed in an informative interview of Liebeck’s daughter, Judy Liebeck, and her husband, Charles, conducted by Amy Goodman of Democracy Now!, published, January 25, 2011, entitled *Do You Know the Full Story Behind the Infamous McDonald’s Coffee Case and How Corporations Used it to Promote Tort Reform?*¹⁰⁷ The Facts of the case, when exposed in truth, are surprising to most. Excerpts of the aforesaid interview transcript and corresponding photographs are included:

AMY GOODMAN: An excerpt of the documentary Hot Coffee. It premiered here at Sundance on Monday. It tells the story of Stella Liebeck. She was 79 years old. She made national headlines when she sued McDonald’s after spilling a scalding cup of hot coffee on her lap. The lawsuit had the whole country talking — and many laughing. But what most people don’t know is that Stella suffered third-degree burns on 16 percent of her body. And you also may not know that corporations have spent millions of dollars distorting the story to promote tort reform and alter our country’s justice system. Stella Liebeck passed away in 2004 at the age of 91. We’re joined now by her daughter Judy and her son-in-law Charles Allen. We welcome you both to Democracy Now!

JUDY LIEBECK: Thank you.

CHARLES ALLEN: Thank you.

AMY GOODMAN: Hot Coffee is the name of this documentary, and it’s based on your mother’s case. Judy, tell us what happened. What day was it? And really explain. We heard your mother in this documentary when she was filmed talking about it. Talk about it yourself.

JUDY LIEBECK: Well, whoever I talk to, they don’t have the right story. So I always ask, “What do you think happened?” What really happened was that my nephew was driving

¹⁰⁶ John Schwartz, Documentary Gives Issue Caffeinated Jolt, NEW YORK TIMES (June 24, 2011), http://www.nytimes.com/2011/06/26/arts/television/hbo-to-show-hot-coffee-susan-saladoffs-first-film.html?pagewanted=1&_r=1

¹⁰⁷ Amy Goodman, Do You Know the Full Story Behind the Infamous McDonald’s Coffee Case and How Corporations Used it to Promote Tort Reform?, DEMOCRACY NOW! (January 25, 2011) (interview by Amy Goodman with Judy Liebeck, and Charles Allen), http://www.democracynow.org/2011/1/25/do_you_know_the_full_story

the car, not my mother. They drove into a McDonald's, got coffee and a meal, drove into the parking lot. There were no cup holders in the car, so my mother steadied the cup between her knees and peeled off the lid. The whole cup collapsed. The temperature — McDonald's required that their temperature be held around 187 degrees.

AMY GOODMAN: In a styrofoam cup.

JUDY LIEBECK: In a styrofoam cup. And styrofoam will melt at that temperature. She went to the hospital. We thought, oh, she's in for observation overnight, no problem. But she was in for eight days. She had third-degree burns. She could not — you could not touch that area. She had to have a sheet held up. She —

AMY GOODMAN: The pictures that are shown in the film are gruesome.

JUDY LIEBECK: They're very gruesome...¹⁰⁸

[PHOTOGRAPH OF BURNS RECEIVED BY STELLA LIEBECK]



[PHOTOGRAPH OF BURNS RECEIVED BY STELLA LIEBECK]

¹⁰⁸ *Id.*



[PHOTOGRAPH OF BURNS RECEIVED BY STELLA LIEBECK]



...

AMY GOODMAN: *Let's go to the clip.* [in regard to the documentary *Hot Coffee*]

CRAIG FERGUSON: *Every minute they waste on this frivolous lawsuit, they're not able to waste on other frivolous lawsuits, like, "Ooh, my coffee was too hot!" It's coffee!* [apart of film clip]

MAN ON THE STREET 3: *The woman, she purchased the coffee, and she spilled it on herself. I mean, it wasn't like the McDonald's employee took the coffee, threw it on her. Now, that, in itself, then she would have had a lawsuit.* [apart of film clip]

WOMAN ON THE STREET 2: *It's just people just are greedy and want money, and they'll do anything to get it.* [apart of film clip]

AMY GOODMAN: *Just some of the reaction. Final comments for Judy and Chuck Allen, the final decision?*

CHARLES ALLEN: *In the final decision, 30 days later, we went back into court with McDonald's asking for the judgment to be thrown out because of a runaway jury. The judge said, "You came into court. You showed what you were. And we were incensed by that, essentially." But he did say, "You thought you saw a light at the end of a tunnel. You did not know it was attached to a train." His words. And then he turned to us and said, "I have the authority to reduce this amount of punitive damage to three times compensatory, and I am exercising that." And so, that's what he did. So when we walked out of court, the \$2.7 million had been reduced to three times compensatory, and then that was the end of the case.*

AMY GOODMAN: *And how much, in the end, did you get?*

CHARLES ALLEN: *In the end was the amount, basically. It was an undisclosed amount, but it was in that neighborhood.*

AMY GOODMAN: *Your mother, a strong woman before this cup of coffee?*

JUDY LIEBECK: *Oh, the week before this happened, she dug out a palm tree in Tucson, she painted a ceiling. A very, very, very strong woman.*

AMY GOODMAN: *Afterwards?*

JUDY LIEBECK: *After this happened, she never got to a point where she could — if her little dachshund dug a hole in her stones in the backyard, she couldn't take a rake — and it was very difficult for her to even cover that up. So she never regained the quality of life she had before...*¹⁰⁹

¹⁰⁹ *Id.*

Dr. Charles Baxter was a burn specialist who testified at the *Liebeck* trial. Dr. Baxter offered his opinion stating coffee served at one-hundred-eighty-degrees (180°) was excessive and that it could not be consumed reasonably at that temperature; he further opined that the optimal temperature range to serve coffee should be between one-hundred-fifty-five-degrees (155°) and one-hundred-sixty-degrees (160°).¹¹⁰

Some have rumored McDonald's had, previously and before the *Liebeck* incident, received multiple consumer complaints regarding the temperature of their coffee. The speculation being that McDonald's had intentionally served their coffee at an excessive, non-consumable temperature—purposefully—so that customers wouldn't be as likely to ask for a free coffee refill, then offered, from the fast-food franchise.



¹¹⁰ Jim Dedman, The Stella Liebeck McDonald's Hot Coffee Case FAQ, ABNORMAL USE (January 25, 2011), <http://abnormaluse.com/2011/01/stella-liebeck-mcdonalds-hot-coffee.html>

Saladoff's documentary also highlighted a more recently decided and notorious Medical Malpractice case of *Gourley v. Nebraska Methodist Health System, Inc.* to illustrate the ill effects of statutory caps on damages.¹¹¹ In 1993 Colin Gourley was born with cerebral palsy attributed to medical malpractice; at trial a jury awarded the family five-point-six-million-dollars (\$5.6 million) to pay for Colin's lifelong medical needs.¹¹²

However, the State legislature had already capped the overall damages for medical malpractice recoveries at one-point-seventy-five-million (\$1.75 million). After Colin's medical expensive, legal fees amongst other expenses related to his injury the award did not amount to much of anything and his award was reduced by eighty-percent (80%).¹¹³ Mr. Gourley, Colin's father is starred in the film saying, "What happens then is, he goes on Medicaid, and the taxpayers have to pay".¹¹⁴

Schwartz quotes Saladoff's structured argument that America has a narrowed access to the courts in many ways:

'It's not like corporate interests took our rights from us,' she said. 'We're giving over our constitutional rights to the court system' by voting for tort reform measures and politicians and judges who favor them.

¹¹¹ See, John Schwartz supra note 106 at Page 2 of 2, http://www.nytimes.com/2011/06/26/arts/television/hbo-to-show-hot-coffee-susan-saladoffs-first-film.html?_r=2&pagewanted=2; See also, *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918; 663 N.W.2d 43; 2003 Neb. LEXIS 78 (May 16, 2003)

¹¹² John Schwartz supra note 106 at Page 2 of 2, http://www.nytimes.com/2011/06/26/arts/television/hbo-to-show-hot-coffee-susan-saladoffs-first-film.html?_r=2&pagewanted=2

¹¹³ *Id.*; See also, Amy Goodman, "Hot Coffee" Exposes How Hard Caps on Malpractice Awards Shift Burden to Taxpayers, DEMOCRACY NOW! (January 25, 2011) (interview by Amy Goodman with Lisa Gourley, mother of Colin Gourley & Mike Gourley, father of Colin Gourley), http://www.democracynow.org/2011/1/25/hard_caps_on_malpractice_awards_shift

¹¹⁴ John Schwartz supra note 111

*'We've been convinced through this massive public-relations campaign,' she added. 'We're doing it unwittingly.'*¹¹⁵

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff parents brought a medical malpractice suit against defendants, a corporation, a doctor, the doctor's professional group, and others, seeking damages for injuries sustained by the parents' child because of the alleged negligent care the mother received during her pregnancy. The District Court of Douglas County, Nebraska, entered judgment for the parents and against the doctor and her group. The doctor and the group appealed.

OVERVIEW: The trial court determined that the damages limitation of Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) was unconstitutional because it denied the parents equal protection of the law and a right to a jury trial. On review, the doctor and the group contended the trial court erred in determining that § 44-2825(1) was unconstitutional, the jury verdict was invalid, and the trial court erred in admitting hearsay and irrelevant evidence. Adopting the "any majority" rule, the supreme court found that even though a juror who disagreed on the question of who was liable provided the 10th vote necessary on the damages and apportionment questions, the verdict was valid. Although the trial court erred in allowing the parents' expert to testify as to items in the child's life care plan he was not reasonably certain the child would need in the future, the error was harmless. However, the supreme court held that § 44-2825(1) was not unconstitutional

¹¹⁵ *Id.*

special legislation as there was evidence to justify the enactment of the legislation. Nor did § 44-2825(1) violate the equal protection, separation of powers, or open courts provisions, or the right to a jury trial under the Nebraska Constitution.

*OUTCOME: That portion of the trial court's judgment finding the damages limitation unconstitutional was reversed; the judgment was affirmed in all other respects and the trial court was ordered to enter judgment for the parents in the amount of \$ 1,250,000.*¹¹⁶

Courts have been split on whether or not a cap on medical malpractice damages violates the right to a jury trial, “...other courts have applied language that is generally the same as the Nebraska Constitution and have concluded that a cap on damages does violate a plaintiff's right to a jury trial”.¹¹⁷

¹¹⁶ *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918; 663 N.W.2d 43; 2003 Neb. LEXIS 78 (May 16, 2003); *See infra* CASE LAW APPENDIX: *Gourley v. Nebraska Methodist Health System, Inc.* (Published Opinion)

¹¹⁷ *Id.* § V(4)(e)

LEGAL ARGUMENTS

The Constitutionality of Florida's MedMal Reform

There have been a multitude of cases arguing the constitutionality of Florida's MedMal reform. Caps on damages tend to be the most debated reform policy. A very recent (to the date of this writing) Florida lawsuit currently being litigated is whether or not a one-million-dollar (\$1 million) statutory cap in a particular medical malpractice suit is unconstitutional.¹¹⁸

It's reported the controversy began earlier in 2012 when Atlanta's 11th U.S. Circuit Court of Appeals delivered a verdict in the case of Ms. Michelle McCall. It's said that McCall succumbed to death in back in 2006 after she suffered traumatic childbirth complications at a Florida Air Force Clinic. McCall's estate sued the U.S. government for a total of three-million-dollars (\$3 million). One-million-dollars (\$1 million) designated for the decedents costs and two-million-dollars (\$2 million) for unspecified damages; with this being a wrongful death suit, it was likely loss of consortium amongst other damages were alleged.¹¹⁹

In May of 2012 The Florida Appellate Court declared that a one-million-dollar (\$1 million) cap should exist in the case and the Appellate Court found the statutory provision constitutionally sound but, however, a ruling on its constitutionality should be left up to the Florida's Supreme Court to decide.

¹¹⁸ Johnathan Rosenfeld, Are Caps on Medical Malpractice Lawsuits Unconstitutional? Florida Lawsuit Stirs Intense Controversy, CHILD INJURY LAWS BLOG (March 05, 2012), <http://www.childinjurylaws.com/medical-malpractice/are-caps-on-medical-malpractice-lawsuits-unconstitutional-florida-lawsuit-stirs-intense-controversy/>

¹¹⁹ *Id.*

The Florida Appellate Court’s ruling has initiated what’s being called “...*a flurry legal filings.*”¹²⁰

One side of this legal argument consists of doctors and politicians who argue, “...*uncapped medical malpractice suits increase doctors’ insurance premiums*”. However, on the other side of the argument are attorneys and known organizations such as the American Association of Retired Persons (AARP), who have claimed statutory caps on MedMal damages discourage lawyers from representing plaintiffs in cases where economic damages awards are low.¹²¹

Many can agree that damages awarded in any MedMal case should always, at a minimum, cover medical costs. Medical costs are known to often well exceed one-million-dollars (\$1 million).¹²²

In this aforementioned appellate matter of THE ESTATE OF MICHELLE EVETTE MCCALL, By and Through Co-Personal Representatives Edward M. McCall II, Margarita F. McCall and Jason Walley, EDWARD M. MCCALL, MARGARITA F. MCCALL, JASON WALLEY, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee; Case No. 09-16375; D. C. Docket No. 07-00508-CV-MCR/EMT; *hereinafter* “McCall v. United State of America” or “*McCall*”, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, Appeal from the United State District Court for the Northern District of Florida ordered (excerpts quoted in part):

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

Appeal from the United States District Court

for the Northern District of Florida

(May 27, 2011)

Before EDMONDSON and MARTIN, Circuit Judges, and HODGES, District Judge.*

MARTIN, Circuit Judge:

The central question presented in this appeal is whether Florida's cap on noneconomic medical malpractice damages, Fla. Stat. § 766.118, violates the Florida or United States Constitutions. The Estate of Michelle McCall, Ms. McCall's parents, and the father of Ms. McCall's son (collectively "Plaintiffs") also appeal the District Court's application of that statutory cap. After thorough review and having had the benefit of oral argument, we conclude that the District Court did not err in applying the cap. We also conclude that Florida's statutory cap passes muster under the Equal Protection Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment of the United States Constitution as well as the Takings Clause of Article X, § 6(a) of the Florida Constitution. Because no Florida Supreme Court decisions provide controlling guidance to resolve Plaintiffs' other challenges to this cap on noneconomic medical malpractice damages under that state's Constitution, we grant, in part, Plaintiffs' motion to certify questions to the Florida Supreme Court...

V.

*Because this case raises important questions about the interpretation and application of Florida constitutional law in areas that remain unsettled, we will not decide Plaintiffs' remaining state constitutional claims, but rather will grant Plaintiffs' motion to certify questions relating to those claims to the Florida Supreme Court.⁵ See Fla. Const. art. V, § 3(b)(6); Fla. R. App. P. 9.150 ("On either its own motion or that of a party, . . . a United States court of appeals may certify a question of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida."). "Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary Erie guesses and to offer the state court the opportunity to interpret or change existing law." *Union Planters Bank, N.A. v. New York*, 436 F.3d 1305, 1306 (11th Cir. 2006) (quotation marks omitted). We certify the following questions to the Supreme Court of Florida:*

- (1) Does the statutory cap on noneconomic damages, Fla. Stat. § 766.118, violate the right to equal protection under Article I, Section 2 of the Florida Constitution?*
- (2) Does the statutory cap on noneconomic damages, Fla. Stat. § 766.118, violate the right of access to the courts under Article I, Section 21 of the Florida Constitution?*
- (3) Does the statutory cap on noneconomic damages, Fla. Stat. § 766.118, violate the right to trial by jury under Article I, Section 22 of the Florida Constitution?*

*(4) Does the statutory cap on noneconomic damages, Fla. Stat. § 766.118, violate the separation of powers guaranteed by Article II, Section 3 and Article V, Section 1 of the Florida Constitution?*¹²³

¹²³ Appeal from the United States District Court for the Northern District of Florida, *McCall v. United State of America*, (No. 09-16375; D. C. Docket No. 07-00508-CV-MCR/EMT) (Appellate Order AFFIRMING, in part, and QUESTIONS CERTIFIED), available at <http://www.ca11.uscourts.gov/opinions/ops/200916375cert.pdf>

The Runaway Junior vs. The Conservative Citizen

Who hasn't heard the complaints of runaway juries? The competence of juries to decide lawful disputes, especially MedMal cases, have long been criticized. It's said this current debate has "...centered on the jury's propensities with respect to damage awards...,"¹²⁴ and the overall competence or perceived biases jurors are said to have with respect to decisions on liability and particularly scientific and/or medical testimony rendered at trials. It's noted concisely, "*A basic assertion of jury critics is that juries are regularly led astray by 'junk science' or 'hired gun' experts, or at the least are confused by scientific and medical testimony involving esoteric that are beyond the competence of laypersons.*"¹²⁵

This chapter partially evaluates claims of jury behavior and the verdicts jurors reach in medical malpractice lawsuits. It's been said that "anecdotal evidence" have long since played an important role in the assertions of reckless runaway juries, and that scholars who have actually studied these anecdotes have concluded some are fabricated while the others involve morphed truths and distorted facts of the actual cases.¹²⁶ One example illustrated by Neil Vidmar, author of *Medical Malpractice and the American Jury*, was of the "Philadelphia psychic." Vidmar cites, "*According to the story, a Philadelphia jury awarded a woman almost \$1 million after she claimed that a CXAT scan performed at Temple University Hopsital made her lose her psychic abilities.*" Vidmar notes, "*The story clearly suggests an irresponsible jury at work...*"¹²⁷ and goes on to elucidate about the actual facts—those actual facts being completely different. The

¹²⁴ Niel Vidmar, The Randolph W. Thrower Symposium: Scientific And Technological Evidence: Are Juries Competent To Decide Liability In Tort Cases Involving Scientific/Medical Issues? Some Data From Medical Malpractice, 43 EMORY L.J. 885, (1994)

¹²⁵ *Id.*

¹²⁶ NIEL VIDMAR, *supra* note 1, at 11

¹²⁷ *Id.*, at 11

claims for economic loss in ascertain that the plaintiff could no longer work and make a living as a psychic were genuinely plead; however, what isn't told is the plaintiff also sustained permanent brain damage due to an allergic reaction which was caused by a contrast dye, that the plaintiff claims, was negligently administered to her prior to her CAT scan. Other omissions of this tarradiddle include the instructions given by the presiding judge in the case; who instructed the jury to "...disregard the claim about the loss of psychic abilities and consider only the evidence on brain damage."¹²⁸ Vidmar refutes, that in despite of the true facts of the psychic's lawsuit being publicized back in 1986-87, "...the inaccurate version continues to be repeated."¹²⁹ How right Vidmar was. He cites truthful merits of the story being reporting by Frederic N. Tulsy (1986) *Did Jury's Award Consider Phychic's Loss of 'Powers'?* National L. J., April 14, 1986, at 9; Fred Strasser, *Tort Tales: Old Stories Never Die*, National L. J., Feb. 16, 1987, at 39¹³⁰—in his book, and quotes inaccurate versions being circulated in the 1991 report of former Vice President Quayle's Council on Competitiveness in addition to books published that same year by tort reform advocates Peter Hubler and Walter Olson, and Kip Viscusi (an economist)—not to mention a 1993 article in Newsweek. Moreover, over a decade since Tulsy's and Strasser's publications, the case of the Philadelphia psychic continues to be sensationalized with a very twisted perspective. For example, Nicholas M. Miller of Cleveland State University's Journal of Law and Health writes in a 1997 publication (introduction):

*As the story goes, in 1986, a Philadelphia jury awarded \$ 1 million to a "spiritual advisor" who claimed, in a medical malpractice case, to have lost her [*142] psychic*

¹²⁸ *Id.*, at 11-12

¹²⁹ *Id.*, at 12

¹³⁰ *Id.*, at 280 (See citation 3 & 4 of Chapter 2)

powers as a result of a negligently administered CAT scan. n4 In another case, a jury awarded \$ 98.5 million in punitive damages to the mother of an infant born a spastic quadriplegic because nurses did not quickly enough diagnose complications in the delivery. n5 In yet another case, a jury awarded a man \$ 124,573,750 in punitive damages in addition to \$ 3,047,819 in compensatory damages for the loss of his eye caused by a negligently administered injection.

*We have all heard the stories. Medical malpractice awards are like a recurring dream with a bad theme: the system is out of whack...*¹³¹

Miller goes on to say, “*What is not so clear is who to blame for these seemingly out-of-control awards.*”¹³²

Vidmar segments what is known as unrepresentative verdict data. Accordingly, The National Law Journal produces reports of each year’s largest jury awards and supplies statistics contained in the reports—which are then later cited by various jury system critics and, of course, in testimony before Congress. Back in 1986, for example, The U.S. Department of Justice published a report on tort policy citing, “*...that between 1975 and 1985 the average medical malpractice jury award had increased from \$220,108 to \$1,017,716.*”¹³³

However, even though the statistics are readily accepted, they can be immensely misleading. The Director of Research at the Risk Management Foundation in Cambridge, MA, Russell Localio discovered that no systematic sampling scheme was used to ensure cases were

¹³¹ Nicholas M. Miller, Charitable Donations of Medical Malpractice Punitive Damages, 12 J.L. & HEALTH 141 (1997/1998)

¹³² *Id.*

¹³³ NIEL VIDMAR, *supra* note 1, at 13-14

representative. That is, the data presented, “...relies on court clerks, newspaper clipping services, local verdict reporting services, and attorneys who report on verdicts from trials in which they have been involved or know about.”¹³⁴ One wouldn’t require a Ph.D. in social science to recognize the failures associated with this data composite. For example, the media bolt to report “megaverdicts” but most frequently ignore any case that involves a plaintiff’s lose only a nominal award. Additionally, settlements and bench verdicts have been attributed in statistical figures presenting egregious jury awards.¹³⁵ Not to mention no account for inflation (i.e. awards rendered in 10 years prior don’t exactly equate to present day fair-market medical costs and expenses or the present day standard of living).

It’s said a source of evidence against runaway juries stems more so from systematic studies based on verdict reports and to a much lesser extent on the actual statistics from MedMal insurance company records.¹³⁶ Professor Patricia Danzon conducted a study using an approximately six-thousand (6,000) claims from private insurers in the state of California for incidents alleged in 1974 and 1976. A vast difference in this study was the fact Professor Danzon used information not only on the actual jury verdicts but it also included claims that were settled. Professor Danzon found that only (about) seven-percent (7%) of the cases in her study were ever resolved by a jury verdict. That in all actuality, plaintiff’s only prevailed with odds of one in four (1/4); when they did prevail, their average award was one-hundred-two-thousand-dollars (\$102,000)—contrasted with settlement claims that averaged twenty-six-thousand-dollars (\$26,000). Dazon as quoted by Vidmar:

¹³⁴ *Id.*, at 14

¹³⁵ *Id.*

¹³⁶ *Id.* at 15

*the[sic] cases that are actually litigated to verdict constitute a small, atypical subset, self-selected to that stage of disposition precisely because the outcome was unpredictable to the litigants, the potential award was larger, and the evidence for the plaintiff was weak. Thus we get a vary biased impression of the operation of the malpractice system from observing the minority of more visible cases that are litigated to verdict rather than the great majority of cases that are settle out of court.*¹³⁷

Because data derived from jury verdicts don't, by themselves, provide enough information about the proportion of cases docketed for trial nor do they address the various dimensions by which case can differ (differentiating trial selection processes for example) how might one conclude what actual changes may be occurring in jury behavior or even what the differences are in jury behaviors when a medical malpractice case must be decided?¹³⁸

To Summarize, the partial evidence discussed herein does not absolute whether or not juries are reaching equitable verdicts, but rather, it demonstrates that the statistical evidence presented before congress and sensationalized by our media outlets—with regard to runaway jury awards—do not accurately derive from or consolidate into a scientifically reliable or, often, even an empirical source.

¹³⁷ *Id.* at 17

¹³⁸ *Id.* at 20

The Binding & Procedural Law of Medical Malpractice Lawsuits: A Cognitive Analysis

Over the last twenty-five (25) years, Florida's governing procedural law has been in a constant state of change. It's said multiple statutory changes which have been coupled with various opinions decided by Florida's appellate courts make cognition of the evolving MedMal laws, "...incumbent on the attorney who elects to pursue a medical malpractice case to ensure that the law has been researched and understood. The law has become a virtual mind field for the unwary [lawyer]".¹³⁹

Florida has a multitude of laws that require unique application in medical negligence claims. For example, adult children are precluded from filing claims pursuant to The Wrongful Death Act; when such claims are otherwise allowed in other wrongful death actions¹⁴⁰, there are unique damage caps proprietary to medical negligence cases¹⁴¹, something known as voluntary binding arbitration, unique considerations to Florida's statute of limitations, and considerable alterations to procedural time litigations—known as the medical malpractice presuit process. The Florida Bar quotes, "*These issues [In re the aforementioned laws] make medical malpractice statute of limitations issues complex and confusing. The complexity can serve as a potential trap for those who are unfamiliar with this area of Florida law*";¹⁴² another interesting component of Florida's recent tort reform to be analyzed is The Medical Liability Claimant's Compensation Amendment—also referred to as Amendment III.¹⁴³

¹³⁹ THE FLORIDA BAR, FLORIDA MEDICAL MALPRACTICE HANDBOOK § 1.9 (Madelon Horwich et al. eds., 2nd ed. (2009))

¹⁴⁰ *Id.*, See also FL STAT. § 768.21(8)

¹⁴¹ THE FLORIDA BAR, *supra* note 139; See also FL STAT. § 766.2021

¹⁴² THE FLORIDA BAR, *supra* note 139; See also FL STAT. § 766.207, § 766.106(4), § 766.104(2)

¹⁴³ THE FLORIDA BAR, *supra* note 139 at § 1.11; See also FL Const. art. I § 26, *supra* note 17

Wrongful Death, a cause of action defined by Black's Law Dictionary as "A lawsuit brought on behalf of a decedent's survivors for their damages resulting from a tortuous injury that caused the decedent's death"¹⁴⁴ is limited, with regard to recoverable damages (namely, who is entitled to recover a wrongful death), by section 8 of Florida Statute 768.21. The full context of statute F.S. 768.21, quoted verbatim, is as follows:

FL STAT. § 768.21

Damages.—All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

¹⁴⁴ BRYAN A. GARNER, *ED.*, *supra* note 28

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have

been expected but for the wrongful death, reduced to present money value, may also be recovered:

*1. If the decedent's survivors include a surviving spouse or lineal descendants;
or*

2. If the decedent is not a minor child as defined in s. 768.18(2), there are no lost support and services recoverable under subsection (1), and there is a surviving parent.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(c) Evidence of remarriage of the decedent's spouse is admissible.

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

(8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical negligence as defined by s. 766.106(1).¹⁴⁵

The damage caps which are unique to Florida medical negligence cases are defined in F.S. 766.2021:

¹⁴⁵ FL STAT. § 768.21

FL STAT. § 766.2021

*Limitation on damages against insurers, prepaid limited health service organizations, health maintenance organizations, or prepaid health clinics.—An entity licensed or certified under chapter 624, chapter 636, or chapter 641 shall not be liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract in any amount greater than the amount of damages that may be imposed by law directly upon the health care provider, and any suits against such entity shall be subject to all provisions and requirements of evidence in this chapter and other requirements imposed by law in connection with suits against health care providers for medical negligence.*¹⁴⁶

Voluntary binding arbitration is criticized by some trial lawyers as being hardly “voluntary.” The Florida Statutes establishing voluntary binding arbitration of medical negligence claims are comprehensive and complex to fully understand. The Florida Bar, *hereinafter* “The Bar” regards the MedMal arbitration statutes¹⁴⁷ as, “*most comprehensive*” and “*...the attorney should make specific reference to these statutes in the offer and acceptance. The parties should then follow the procedures contained in these statutes when setting up and conducting the arbitration*”¹⁴⁸ because “*To do otherwise may result in suffering the consequences experienced by the parties in Tallahassee Memorial Regional Medical Center, Inc.*

¹⁴⁶ FL STAT. § 766.2021

¹⁴⁷ FL STAT. § 766.207-766.212

¹⁴⁸ THE FLORIDA BAR, *supra* note 139 at § 3.15

*v. Kinsey [hereinafter “TMRMC, Inc. v. Kinsey”]*¹⁴⁹...in which the parties were denied the protections of these statutes on appeal.”¹⁵⁰ These statutes are so rigid even dubious, in fact, that the consequences for offering, accepting, or declining voluntary binding arbitration is not to be underestimated. The Bar follows this logic in a cautionary notion:

*These are extremely important statutes [In re F.S. § 766.207-766.212]; a thorough understanding of their terms, procedures, and ramifications is essential for medical negligence practitioners. The unknowing, unwitting, or unary are exposed to devastating pitfalls when uninformed decisions are made.*¹⁵¹

As potentially powerful as arbitration can be, for either party (e.g. the limitation of awards or the recovery of attorneys fees and costs), failure to fully comply with the statutory provisions could have nightmarish results. Consequently, the procedural posture, overview, and outcome of *TMRMC, Inc. v. Kinsey* was as follows:

PROCEDURAL POSTURE: Appellants, physician and medical center, sought review from the Circuit Court for Leon County (Florida), which confirmed an arbitration award and held appellants liable for the future damages of appellees, an incompetent by and through his guardian. Appellants argued the court lacked subject matter jurisdiction to confirm the arbitration award and could not hold appellants contingently liable for future damages; appellees cross-appealed.

¹⁴⁹ Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey, 655 So. 2d 1191; 1995 Fla. App. LEXIS 5342;20 Fla. L. Weekly D 1211 (May 18, 1995, Filed); *See infra* CASE LAW APPENDIX: Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey (Published Opinion)

¹⁵⁰ THE FLORIDA BAR, *supra* note 139 at § 3.15

¹⁵¹ *Id.* at § 3.11

OVERVIEW: Appellees, an incompetent by and through his guardian, obtained an arbitration award in a medical malpractice action where liability was admitted by appellants, physician and medical center. Appellees sought court confirmation of the award, and appellants objected on jurisdictional grounds and disputed responsibility as to future damages. Appellees also sought a final judgment and recovery against appellants' liability insurer. On review, the court found that the Florida Arbitration Code provided for confirmation of awards upon application of a party to the arbitration and determined that the motion to confirm the award was properly brought as was jurisdiction. The court then found that the arbitrators' decision to accept additional evidence as to future economic damages was a decision which they alone had the final authority to make . The court then ordered the trial court to enter a judgment in favor of appellees because they were entitled to future damages. The court finally held that appellants' liability insurer could have been joined as a party for the purposes of entering final judgment. Thus, appellant's arguments were overruled and appellee's arguments were sustained.

OUTCOME: The court directed the circuit court to enter judgment for appellees, an incompetent by and through his guardian, regarding future damages and held that the liability insurer of appellants, physician and medical center, could have been joined as a party for the purposes of entering final judgment. The court found that appellants'

*arguments as to jurisdiction and their responsibility for future damages were without merit.*¹⁵²

The Florida legislature created what is known as the medical malpractice presuit process, renumbered in 1998 to the now *F.S.* Chapter 766, in response to the alleged Medical Malpractice Crisis. It was the legislature's agenda to create a process which prior to judicial litigation occurring would "...eliminate meritless claims, resolve valid claims early, and avoid suit."¹⁵³ The presuit process, as currently enacted, requires that prior to filing a MedMal lawsuit a claimant must first mail a certified "Notice of Intent to File Suit", hereinafter "NOI" (Notice of Intent), to each and every prospective defendant. The NOI must contain a verified medical opinion from a medical expert thus attesting that the defendant's care fell below the standard and that resulting negligence has harmed the patient(s). The presuit process is an investigation period that can last up to ninety (90) days unless otherwise agreed by the parties. During presuit, both parties are required to make "good faith" efforts in conducting informal discovery and "reasonable investigations."¹⁵⁴ It's believed the legislative intent was to create a process by which sufficient information could be gathered in time to permit and appropriate evaluation in resolving claims prior to the commencement of judicial litigation. "*To enforce the provisions of the presuit process, the legislature provided sanctions for violations.*"¹⁵⁵ The chronological framing of the MedMal presuit process was succinctly described by Edward J. Carbone:

¹⁵² Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey, *supra* note 148

¹⁵³ THE FLORIDA BAR, *supra* note 139 at § 2.1

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Florida's approach to medical malpractice reform began in 1985 by requiring potential plaintiffs in medical malpractice cases to provide a notice of intent to each prospective defendant, and to certify in any eventual complaint that they had conducted a reasonable investigation resulting in a good faith belief that sufficient grounds existed to support the filing of the action. In 1988, the Legislature added a "presuit investigation" requirement, which included provisions permitting potential parties to conduct "informal discovery" before a complaint was filed. Florida's "presuit" statutory scheme has been modified several times since then, with the most recent revisions coming as part of the comprehensive medical malpractice reform special legislative session in 2003.¹⁵⁶

The MedMal presuit process nearly mirrors "suit" in many ways, there is a discovery process, options to mediate or arbitrate, etc. However, the timelines in the MedMal presuit process are uncustomary compared other types of negligence actions. For example, MedMal presuit requests-to-produce must be rendered to the requesting party within twenty (20) days rather than the typical thirty (30) day time-line associated with other lawsuits—"Failure of a party to comply with the above time limits shall not relieve that party of its obligation under the statute but shall be evidence of failure of that party to comply with the good faith requirements of section 766.106, Florida Statutes."¹⁵⁷ Some denote this as legislative trickery—to confuse, and trip the plaintiff lawyers from filing a successful suit. However, the procedural presuit rules,

¹⁵⁶ Edward J. Carbone, *Presuit Nuts 'n Bolts* (2012) available at http://www.carltonfields.com/files/Publication/bb64a06c-5dca-4799-89e6-6045ed449116/Presentation/PublicationAttachment/21e0fa9a-3485-43e6-a2ce-6463673ce22d/Presuit_Nuts_and_Bolts.pdf

¹⁵⁷ Compare Fla. R. Civ. P. 1.350(b) and Fla. R. Civ. P. 1.650(c)

obviously, apply to both parties; their institution was clearly amalgamated with all other MedMal statutory reforms.

The Medical Liability Claimant's Compensation Amendment—also known as Amendment III—despite its title, was not actually intended to increase the compensation for victims of medical negligence.¹⁵⁸ In November of 2004, voters approved the Amendment 3 ballot, cited as:

FL Const. art. I § 26, Claimant's Right to Fair Compensation

SECTION 26. Claimant's right to fair compensation.—

(a) Article I, Section 26 is created to read “Claimant's right to fair compensation.” In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

*(b) This Amendment shall take effect on the day following approval by the voters.*¹⁵⁹

The tremendous expense in proceeding with most any significant MedMal case can cost a Plaintiff's counsel hundreds of thousands of dollars. The legislative intent was “...rather than increasing the recovery for claimants, the amendment would preclude many victims from being able to obtain representation in valid claims because of the economic realities that would result

¹⁵⁸ THE FLORIDA BAR, *supra* note 139 at § 1.11; *See also* FL Const. art. I § 26, *supra* note 17

¹⁵⁹ FL Const. art. I § 26, *supra* note 17; *See also* THE FLORIDA BAR, *supra* note 139 at § 1.11

*from a strict application of the amendment”*¹⁶⁰ The plaintiff lawyer’s investment would be far greater than the potential remuneration if a successful recovery was even achieved. It was thus conceptualized that the doors to the court house would close for many MedMal victims through the application of this amendment. However, a committee of The Bar studied the adverse impact Amendment III had on individuals seeking representation for their valid MedMal claims. Consequently, The Bar created a process and form for the waiver of the rights provided by Amendment III. The waiver thus allows for victims of medical negligence to receive competent attorney representation on the same terms afforded to victims of negligent motor vehicle operation, premises liability, product liability, etc.¹⁶¹

¹⁶⁰ THE FLORIDA BAR, *supra* note 139 at § 1.11

¹⁶¹ *Id.*; See also Fla. Bar Code Prof. Resp. D. R. 4-1.5 (2012) *In re* THE FLORIDA BAR, *Waiver of The Constitutional Right Provided in Article 1, Section 26, Florida Constitution*

A LAWFUL CONCLUSION

The Future of Florida's MedMal Tort Reform & Purported Innovative Reforms

The future of Florida's MedMal tort reform seems rather grim. The currently instituted "traditional" reforms remain steadfast; although we were told these reforms were promulgated to serve public interest, however, they have yet to prove otherwise. No beneficial outcome has, historically, been seen for the insured or uninsured medical practitioner—with regard to absolute lowered insurance premiums. Patients and healthcare insurance providers continue to see the cost of medical treatment explode as MedMal insurance premiums are deflected by doctors in the form of perpetuating fees; neither have the Floridians victimized by medical negligence been granted a fair, constitutionally sound, jury trial—with the current tort reforms enacted as they are. Only those who have benefited from the current state of our MedMal legislative tort reform seem to be big-business malpractice insurance providers and the recipients of their lobbyism.

In chapter two—conceptual background—The Medical Malpractice Crisis was defined roughly as the inability of health care providers to secure affordable medical malpractice liability insurance; an update to Harvard Law Professor—Dr. Mello's legal policy brief was recently published in April, 2011, outlining the current domestic state of the reforms and what can be expected of them in years to come. Dr. Mello's update concludes these findings:

Insurance premium costs continue to be a financial burden for many health care providers, and may be passed on to patients and health insurers in the form of higher prices. Moreover, the perceived threat of litigation spurs "defensive medicine"—the practice of ordering services primarily to reduce the physician's liability exposure rather

than because they are medically necessary. Defensive medicine contributes to the growth of health care expenditures. There is wide consensus that liability pressure undermines efforts to curb overuse of health services, although there is disagreement about the magnitude of its effect.

*For these reasons, interest in medical malpractice reforms among state and federal policy-makers remains high. In recent months, President Obama authorized the appropriation of \$75 million to fund demonstration projects of innovative liability reforms that advance patient safety. At the same time, courts in several states have struck down the cornerstone of more traditional approaches to liability reform: caps on noneconomic damages. At this point, what are the most promising approaches to liability reform.*¹⁶²

A common question posed is “*Do traditional tort reforms reduce liability costs?*” Dr. Mello addresses the question citing “*Strong evidence exists on the effects of traditional reforms on the number and cost of malpractice claims, liability insurance premiums and the system’s overhead costs.*”¹⁶³ That is, there appears to be a large number of “*...well-designed studies...*”¹⁶⁴ which have evaluated the effects of traditional malpractice reforms—reforms that have been widely instituted by various states over the last thirty (30) years. Dr. Mello notes, “*Although some study*

¹⁶² Michelle M. Mello, J.D., Ph.D., M.Phil. et al., *Medical malpractice—Update*, THE SYNTHESIS PROJECT: UPDATE ISSN 2155-3718 (APRIL 2011)

¹⁶³ *Id.*

¹⁶⁴ *Id.*

findings have been mixed, it is possible to draw fairly strong conclusions based on this research (See Table 1) [herein referred to as Figure 3.]”¹⁶⁵

Figure 3.

Most traditional tort reforms do not reduce liability costs or defensive medicine.

Table 1. Summary of evidence concerning the effects of traditional tort reforms

	Claims frequency	Claims costs	Overhead costs	Malpractice premiums	Defensive medicine
Caps on noneconomic damages	0 (Moderate)	↓↓ (Moderate)	↑ (Low)	↓ (Moderate)	↓ (High)
Pretrial screening panels	0 (High)	0 (High)	↑ (Low)	0 (Moderate)	↓ (Low)
Certificate of merit	0 (Low)	0 (Low)	↑ (Low)	0 (Low)	0 (Low)
Attorney fee limits	0 (High)	0 (High)	↑ (Low)	0 (High)	0 (Low)
Joint-and-several liability reform	0 (Low)	0 (High)	0 (Low)	0 (Moderate)	0 (Moderate)
Collateral-source offsets	0 (Moderate)	0 (High)	0 (Low)	0 (Moderate)	0 (High)
Periodic payment	0 (Low)	0 (Moderate)	0 (Low)	0 (Low)	0 (Low)
Shorter statute of limitations/repose	0 (Moderate)	0 (Moderate)	0 (Low)	↓ (Moderate)	0 (Low)

Notes: Effects are classified as large increase (↑↑), modest increase (↑), no change (0), modest decrease (↓), or large decrease (↓↓). Evidence or certainty levels for these effects are classified as low or theoretical only (low), moderate, or high.

[Figure 3./Table 1. *Summary of evidence concerning the effects of traditional tort reform* as provided within: Michelle M. Mello, J.D., Ph.D., M.Phil., et al., *Medical malpractice—Update*, THE SYNTHESIS PROJECT: UPDATE ISSN 2155-3718 (APRIL 2011)]

¹⁶⁵ *Id.*; See also *infra* Figure 3.

INNOVATIVE TORT REFORMS

There are several tort reform alternatives that have received some attention but have not yet been implemented in the U.S. nor have they been evaluated. They include: the scheduling of noneconomic damages, health courts—most formally known as administrative compensation systems, disclosure-and-offer-programs, and safe harbor for adhering to evidence-based guidelines.¹⁶⁶ Each is defined further herein:

SCHEDULE OF NONECONOMIC DAMAGES: A reform proposal with an established tiering system for the purpose of categorizing injuries and ranking them by their known severity. “A dollar value range for ‘pain and suffering’ awards is assigned to each severity tier. The schedule is used by juries and judges either as an advisory document or as a binding guideline.”¹⁶⁷

ADMINISTRATIVE COMPENSATION SYSTEM AKA “HEALTH COURTS: An alternative process involving specialized MedMal judges with definable decision and damages guidelines, neutral experts, and a compensation standard that is said to be broader than the currently implemented negligence standard.¹⁶⁸

DISCLOSURE-AND-OFFER PROGRAMS: Liability insurers as well as self-insured hospitals are able to provide support to treating doctors by disclosing unanticipated outcomes to patients and are authorized to make compensation offers.¹⁶⁹ “In ‘reimbursement model’ programs, an institution offers to reimburse the patient for out-of-pocket expenses related to the injury and for “loss of time,” up to a preset limit (typically \$30,000).” However, there are some types of

¹⁶⁶ *supra* note 162

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

injuries which are not eligible for such a program.¹⁷⁰ *“In ‘early settlement model’ programs, there are no exclusion criteria or preset limits on compensation; compensation is generally offered only where care was inappropriate, and patients who accept the money waive their right to sue.”*¹⁷¹

SAFE HARBOR FOR ADHERING TO EVIDENCE-BASED GUIDELINES: Enables doctors to use their adherence to accepted, evidence-based clinical practice guidelines as a defense to a malpractice claim.¹⁷²

Reforms that have capped noneconomic damages have, indeed, substantially reduced the average per claim payout. However, they have modestly affected liability insurance premiums.¹⁷³ Dr. Mello cites:

Average awards are reduced by 20 percent to 30 percent, and premiums in states with caps rise 6 percent to 13 percent more slowly than premiums in states without caps. The Congressional Budget Office (CBO) recently determined that implementing a package of five traditional reforms, including a \$250,000 noneconomic damages cap, in all states would reduce the total amount paid for malpractice insurance nationwide by 10 percent.

It’s also notes that, *“Studies examining the effects of caps on the frequency of malpractice claims have returned conflicting findings. The evidence is too equivocal to support a firm conclusion about this effect.”*¹⁷⁴

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

What we have learned from foreign systems and their experience has suggested that administrative compensation systems have much lower cost and actually suppress or quash physician induced defensive medicine, however, at a cost of increasing the frequency of malpractice claims. It's noted that, "*Overhead costs are 10 percent to 20 percent in the Swedish, Danish, and New Zealand medical injury compensation systems, compared with 40 percent in the U.S. tort system.*" ¹⁷⁵ Furthermore, practice of defensive medicine is reported to be less frequent in judicial systems that do not require a victimized patient to prove negligence. ¹⁷⁶

Dr. Mello substantiates the effect of differing reforms stating:

Anecdotal evidence suggests that disclosure-and-offer programs substantially reduce the frequency of claims and lawsuits, claims costs, overhead costs, and malpractice insurance premiums. This evidence comes from reports by program administrators at the University of Michigan Health System, COPIC Insurance, and a Veterans Affairs hospital. It is not clear whether other organizations could replicate these results, or whether the "early settlement model" or the "reimbursement model" achieves better outcomes. No evidence is available about the effect of disclosure-and-offer programs on defensive medicine.

Safe harbor laws have strong theoretical appeal, but there is no evidence concerning their effectiveness. Maine, Florida, Kentucky, Vermont, and Minnesota experimented with demonstration projects of safe harbors in the 1990s. However, little was learned from them because the demonstrations were very narrow in scope, operated for only a few years, and were

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

not evaluated for their effect on malpractice litigation. Maine's program did improve physicians' adherence to practice guidelines [See Figure 4. cited as Table 2.].¹⁷⁷

Figure 4.

Innovative tort reforms have potential to reduce malpractice costs and improve patient safety.

Table 2. Summary of probable effects of innovative tort reforms

	Claims frequency	Claims costs	Overhead costs	Malpractice premiums	Defensive medicine
Schedule of noneconomic damages	0 (Low)	0 (Low) ¹	↓ (Low)	↓ (Low)	↓ (Low)
"Health courts"	↑↑ (Moderate)	0 (Low)	↓↓ (High)	0 (Low)	↓ (Low)
Disclosure-and-offer programs	↓ (Low)	↓ (Low)	↓↓ (Moderate)	↓ (Low)	0 (Low)
Safe harbors	0 (Low)	0 (Low)	↓ (Low)	0 (Low)	↓↓ (Low)

¹ Highly dependent on awards levels specified in schedule.

Notes: Effects are classified as large increase (↑↑), modest increase (↑), no change (0), modest decrease (↓), or large decrease (↓↓). Evidence or certainty levels for these effects are classified as low or theoretical only (low), moderate, or high.

[Figure 4./Table 2. *Summary of probable effects of innovate tort reforms* as provided within: Michelle M. Mello, J.D., Ph.D., M.Phil., et al., *Medical malpractice—Update*, THE SYNTHESIS PROJECT: UPDATE ISSN 2155-3718 (APRIL 2011)]

¹⁷⁷ *Id.*; See also *infra* Figure 4.

The Legislative Proposal: A Means For Justice

In conclusion, as identified by the leading expert of U.S. insurance law, Tom Baker, J.D.—graduate of Harvard University and Director of The Insurance Law Center at the University of Connecticut Law School—the following known key findings were concisely presented, empirically in *The Medical Malpractice Myth* (2005): 1. medical malpractice is considered an epidemic since errors reportedly kill up to one-hundred-thousand (100,000) Americans every year, and one (1) in every one-hundred (100) persons hospitalized become a victim of negligent medical care; 2. insurance costs aren't high—medical malpractice insurance premiums account for less than one-percent (1%) of all total health care spending, and the average doctor paid less than twelve-thousand (\$12,000) annually for MedMal insurance in 2003 (during the greatest of all MedMal tort reforms in Florida); 3. changes in MedMal insurance rates are not related to litigation—“*Medical malpractice insurance premiums rise-and-fall because of the ‘boom-and-bust’ nature of the insurance underwriting cycle*”¹⁷⁸—because the traditional tort system currently in effect has little or hardly anything to do with fluctuations of MedMal insurance premiums; 4. ultimately Florida's current reform has jeopardized patient safety, “*All the research that has been done so far points it the same direction: tort reform does not improve health-care outcomes*”¹⁷⁹—in fact some kinds of tort reforms might actually have a detrimental effect on patient health; 5. physicians aren't “fleeing” as presumed—there are more doctors now, per capita, than ever once before, and the isolated access to health care problems that exist don't have anything to do with MedMal lawsuits; 5. Malpractice lawsuits are, in fact, rare and mostly

¹⁷⁸ American Justice Association (AAJ), Review of *The Medical Malpractice Myth* (U. of Chicago Press, 2005) authored by Tom Baker & Brief Biography of Tom Baker [AKA Thomas Baker] Medical Malpractice News, available at <http://www.atla.org/pressroom/FACTS/health/baker.pdf> (last visited March 2012); *In re supra* note 8, at

¹⁷⁹ *Id.*

meritorious—less than three-percent (3%) of medical negligence victims actually file suit, and the rate of MedMal suits has actually declined over the past 15 years (prior to 2005 & post The Florida Tort Reform Act of 2003).; 6. “Defensive Medicine” is an absolute myth—an exaggerated expense that simply doesn’t quantify—its overall impact on health-care costs are actually nominal—a poor argument to advocate for legislative intervention. It was noted by Washington Monthly, “*Baker’s approach [with regard to the aforementioned findings] is both comprehensive and heavily evidence based, relying on peer-reviewed research and exhaustive studies. There are no polemics here, just a dose of facts and common sense.*”¹⁸⁰ Eloquently written, Tom Baker quotes:

*...the medical malpractice myth. Built on a foundation of urban legend mixed with the occasional true story, supported by selective references to academic studies, and repeated so often that even the mythmakers forget the exaggeration, half truth, and outright misinformation employed in the service of their greater good, the medical malpractice myth has filled doctors, patients, legislators, and voters with the kind of fear that short circuits critical thinking.*¹⁸¹

Overall, politicians and the leaders of special interest groups propagate and use MedMal myths knowingly. It’s highly unlikely the general public will read *The Medical Malpractice Myth* and be shaken out of their strong but erroneous preexisting beliefs.¹⁸² Legislative proposals as a means for justice in reshaping Florida’s current reform are clearly advocated by Baker and, Law Professor, Mary Coombs, J.D. of The University of Miami School of Law. Each

¹⁸⁰ *Id.*

¹⁸¹ *Supra* note 8

¹⁸² *Infra* note 160

comprehensively outlines in their writings proposals that include mandatory disclosures to patients, mandatory disclosure to state agencies, and enterprise liability.¹⁸³ Those proposals are advocated herein with strong emphasis on the innovative reforms cited by Dr. Mello because they are said to hold promise for better aligning the liability system with patient safety improvement goals.¹⁸⁴

With the exception of the noneconomic damages schedule, the innovative tort reforms proposed by Dr. Mello create incentives for doctors to adhere to evidence-based care and genuinely force disclosure when an adverse event occurs. Similar to Florida State's Amendment 7¹⁸⁵ which was designed to provide consumers with transparency when selecting a health care provider and to permit extensive discovery by medical malpractice plaintiffs.¹⁸⁶ Even though Amendment 7 passed in Florida in November of 2004 by more than an eight-one-percent (81%) percent vote and was incorporated into Article X, Section 25 of the Florida Constitution¹⁸⁷, there has been massive litigation against it for non-compliance or "what constitutes adverse-medical events". The other innovative reforms, which have yet to be implemented, but should be evaluated and proposed to curb the current MedMal crisis, are the administrative compensation systems and disclosure-and-offer programs—these innovative tort reforms could build a strong foundation of data that would equip society with discovery and insight as to why medical negligence is continually occurring in the first place.

¹⁸³Mary Coombs, J.D., *The Medical Malpractice Myth (Book Review Essay)*, 27 J. Legal Med. 243 (2006), available at <http://faculty.law.miami.edu/mcoombs/documents/BakerReview.pdf>; *In re supra* note 8

¹⁸⁴Michelle M. Mello, *supra* note 139

¹⁸⁵F.L. CONST. art. X, § 25.

¹⁸⁶See Gary D. Koch et al., *Florida Peer Review After Amendment 7: Challenges and Solutions to a National Trend*, FOLY & LARDNER, LLP (May 5, 2008), available at <http://www.foley.com/florida-peer-review-after-amendment-7-challenges-and-solutions-to-a-national-trend-05-05-2008/>; *In re* N F.L. CONST. art. X, § 25.

¹⁸⁷*Id.*

CASE LAW APPENDIX

Boggs v. Camden-Clark Memorial Hospital

BERNARD BOGGS, AS ADMINISTRATOR OF THE ESTATE OF
HILDA BOGGS, DECEASED, AS PERSONAL REPRESENTATIVE
OF THE STATUTORY BENEFICIARIES OF THE WRONGFUL
DEATH CLAIM HEREIN ASSERTED AND IN HIS OWN RIGHT,
Plaintiff Below, Appellant v. CAMDEN-CLARK MEMORIAL
HOSPITAL CORPORATION, UNITED ANESTHESIA, INC. AND
MANISH I. KOYAWALA, M.D., Defendants Below, Appellees

No. 31757

SUPREME COURT OF APPEALS OF WEST VIRGINIA

216 W. Va. 656; 609 S.E.2d 917; 2004 W. Va. LEXIS 217

November 9, 2004, Submitted

December 8, 2004, Filed

SUBSEQUENT HISTORY: Petition denied by Camden-Clark Mem'l Hosp. Corp. v. Boggs, 553 U.S. 1017, 128 S. Ct. 2080, 170 L. Ed. 2d 815, 2008 U.S. LEXIS 3676 (2008)

Related proceeding at Boggs v. Camden-Clark Mem. Hosp. Corp., 693 S.E.2d 53, 2010 W. Va. LEXIS 20 (W. Va., 2010)

Related proceeding at Camden-Clark Mem. Hosp. Corp. v. St. Paul Fire & Marine Ins. Co., 2010 U.S. Dist. LEXIS 60187 (S.D. W. Va., June 7, 2010)

PRIOR HISTORY: [***1] Appeal from the Circuit Court of Wood County. Civil Action No. 03-C-296. Honorable Robert A. Waters, Judge.

DISPOSITION: REVERSED AND REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant widower sued appellees, a doctor, a corporation, and a hospital, alleging medical malpractice in the death of his wife. The widower also asserted claims for fraud, destruction of records, the tort of outrage, and spoliation of evidence. The Circuit Court of Wood County (West Virginia) granted a motion to dismiss filed by appellees and then denied the widower's motion to amend. The widower appealed.

OVERVIEW: Appellees claimed that the widower failed to comply with W. Va. Code § 55-7B-6(b) (2003) by failing to provide properly executed certificates of merit a full 30 days before filing suit. The appellate court held that W. Va. R. Civ. P. 15 applied to all cases, whether they were malpractice cases or not. The facts of the case satisfied the requirements of Rule 15, establishing that the motion to amend should have been granted. Allowing an amended complaint permitted the presentation of the merits of the case, and there was no "sudden assertion" that prejudiced appellees, who had known of the events giving rise to the suit and had notice of the widower's intent to sue from his first complaint. Finally there was no new "issue" for appellees to "meet" because the amendment simply allowed the widower to correct technical errors he made when filing his second complaint. Also, the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1, et seq., did not apply to the widower's claims for fraud, destruction of records, the tort of outrage, and spoliation of evidence.

OUTCOME: The judgment was reversed and the case was remanded.

CORE TERMS: care provider, certificates of merit, claimant, notices of claim, mediation, screening, amend, medical professional, cause of action, certificate, notice, medical malpractice, applicable standard of care, care services, civil procedure, adverse party, mediator, liability action, leave to amend, written demand, pre-litigation, care facilities, theories of liability, expert's opinion, presentation, malpractice, prejudiced, expiration, settlement, handbook

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Reversible Errors

[HN1] A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend.

Civil Procedure > Joinder of Claims & Remedies > Claims

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN2] See W. Va. Code § 55-7B-6(b) (2003).

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN3] W. Va. Code § 55-7B-6(b) (2003) makes clear that W. Va. R. Civ. P. 15 still applies to all cases, whether they be malpractice cases or not.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

[HN4] See W. Va. R. Civ. P. 15(a).

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

[HN5] A court should not allow a party to use a procedural device to thwart a decision on the merits, at least in those cases where the party would not be prejudiced by an amendment to the pleadings.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

[HN6] The purpose of the words "and leave to amend shall be freely given when justice so requires" in W. Va. R. Civ. P. 15(a) is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under W. Va. R. Civ. P. 15 when: (1) the amendment permits the presentation of the merits of the action, (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment, and (3) the adverse party can be given ample opportunity to meet the issue.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

[HN7] The goal behind W. Va. R. Civ. P. Rule 15, as with all the Rules of Civil Procedure, is to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties.

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN8] By the West Virginia Medical Professional Liability Act's (MPLA), W. Va. Code § 55-7B-1, et seq., own terms, it applies only to medical professional liability actions, and the legislature has provided a definition: "medical professional liability" means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. W. Va. Code § 55-7B-2(i) (2003). Thus the MPLA can only apply to health care services rendered, or that should have been rendered.

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN9] The West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1, et seq., applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous to or related to an alleged act of medical professional liability.

SYLLABUS

1. A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend.' Syl. pt. 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968)." Syl. pt. 5, *Poling v. Belington Bank, Inc.*, 207 W. Va. 145, 529 S.E.2d 856 (1999)

2. "'The purpose of the words "and leave [to amend] shall be freely given when justice so requires" in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the [***2] merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.' Syl. pt. 3, *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50 (1973)." Syl. Pt. 6, *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989).

3. The West Virginia Medical Professional Liability Act, codified at W. Va. Code § 55-7B-1 *et seq.*, applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.

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For Appellee: Richard A. Hayhurst, Esq., Camden-Clark, Memorial Hospital, Parkersburg, West Virginia.

For Appellees: Don R. Sensabaugh, Jr., Esq. [***3] , C. Benjamin Salango, Esq., Flaherty, Sensabaugh & Bonasso, Manish Koyawala, M.D. and United Anesthesia, Inc., Charleston, West Virginia.

For Amicus Curiae for the West Virginia Insurance Commission: Victor A. Mullins, Associate Counsel, West Virginia Insurance Commission, Charleston, West Virginia.

For Amicus Curiae for West Virginia State Medical Association: American Medical Association. West Virginia Hospital Association. West Virginia Health Care Association, West Virginia Orthopaedic Society; The West Virginia Association of Physician Assistants, the West Virginia Chapter of the American Academy of Family Physicians, The Physicians Alliance for Reform, The West Virginia Academy of Ophthalmology, The West Virginia Society of Osteopathic Medicine, Inc., The West Virginia Academy of Otolaryngology-Head and Neck Surgery, Inc., Evan H. Jenkins, Esq., Charleston, West Virginia.

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For Amicus Curiae for Charleston Health Associates, Inc. d/b/a Physicians Alliance of West Virginia: Edward J. George, Esq., Robinson and McElwee PLLC, Charleston, West Virginia.

JUDGES: JUSTICE MCGRAW delivered the Opinion of the Court. CHIEF JUSTICE MAYNARD dissents.

OPINION BY: McGraw

OPINION

[*659] [**920] McGraw, Justice:

I.

FACTS

On September 28, 2001, Hilda Boggs, age 50, slipped on a wet floor while at work and broke her ankle. Her family doctor referred her for treatment at Camden-Clark Memorial Hospital in Parkersburg. Because she had some unrelated health problems, a cardiologist and an endocrinologist evaluated her prior to any surgery for her broken ankle. They recommended spinal, rather than general, anesthesia, and she was scheduled for surgery the next day. Just prior to surgery, anesthesiologist and appellee Dr. Manish Koyawala administered a spinal anesthetic. Ms. Boggs soon stopped breathing and went into cardiac arrest. She died several days later on October 1, 2001.

The appellant, widower Bernard Boggs, alleges that Dr. Koyawala caused Hilda Boggs' death by failing to adhere to the standard of care in anesthetizing her. He has also made claims against [***4] appellees United Anesthesia, Inc. (Dr. Koyawala's anesthesiology group) and Camden-Clark Memorial Hospital on theories of negligent hiring and retention, as well as vicarious

liability. According to the appellant, following the death of Ms. Boggs, several parties engaged in a cover-up, which led Mr. Boggs to assert additional claims for fraud, the destruction of records, the tort of outrage, and the spoliation of evidence. Mr. Boggs maintains that these claims should be considered to be separate and distinct from his medical malpractice claims.

Mr. Boggs has filed three separate, but nearly identical, lawsuits in this case, which we shall call *Boggs I*, *II*, and *III*. It appears from the briefs and argument of counsel that the first suit filed by Mr. Boggs on February 28, 2002, was not prosecuted, and because the summons and complaint were not served within 120 days of filing, the court dismissed the case. Mr. Boggs filed suit again June 29, 2003, and this appeal concerns only this second suit, *Boggs II*. However, for clarity we note that due to the actions of the lower court in dismissing *Boggs II*, Mr. Boggs was forced to file a third suit, *Boggs III*, which counsel [***5] avers is still pending. Even so, the outcome of this appeal is significant to the parties because of changes to the law applying to all claims filed on or after July 1, 2003. ¹ A significant change in the law was the reduction in the amount of non-economic damages a plaintiff could recover, ² which could greatly reduce Mr. Boggs' damages if he were forced to proceed under the new law with his third complaint.

¹ See W. Va. Code § 55-7B-10 (b) (2003).

² See W. Va. Code § 55-7B-8 (2003).

[**921] [**660] In the suit at issue in this appeal, *Boggs II*, counsel for Mr. Boggs served "notices of claim" and "certificates of merit" ³ on all three defendants/appellees via certified mail in May 2003. Appellant claims to have mailed the documents on May 22, and defendants claim to have received them on May 26. Appellant claims that, due to a clerical error, the certificates of merit (or screening certificates) were blank. ⁴ Realizing his mistake, appellant then sent [***6] the corrected certificates to the defendants via Federal Express, a private overnight courier. Defendants received the correct certificates on June 2, 2003, and on June 29, 2003, Mr. Boggs filed the lawsuit that is the subject of this appeal.

³ These terms are contained in W. Va. Code, § 55-7B-6(b) (2003), which we discuss, *infra*.

4 According to the appellant, no party contests the fact that the certificates of merit had been executed prior to the original mailing.

The defendants filed motions to dismiss, alleging that Mr. Boggs failed to provide them with properly executed certificates of merit a full thirty days prior to filing suit. They claimed that the 27-day notice they had between getting the executed certificates and the filing of the second complaint was not sufficient, and that Mr. Boggs' use of Federal Express was not permitted.

Despite the fact that the defendants all had actual notice of the claims against them and that Mr. Boggs' lawsuit contained several [***7] claims, such as fraud, that were independent of any medical malpractice, the lower court found that all the claims were barred by the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq* (the "MPLA"). The court went on to dismiss all of Mr. Boggs' claims against all the defendants, even those claims that were not based on medical malpractice.

On January 30, 2004, Mr. Boggs filed a Motion for Leave to Amend his complaint under Rule 15 of the West Virginia Rules of Civil Procedure. At a hearing on February 5, 2004, the lower court denied this motion to amend. Mr. Boggs now appeals. Because we find that Mr. Boggs should have been permitted to amend his complaint under Rule 15, we conclude that the 2003 changes to the law are inapplicable to this case, and reverse the decision of the lower courts.⁵

5 We specifically do not reach the issue of the MPLA's constitutionality, as such an analysis is not necessary to reach a decision in this case.

II.

STANDARD [***8] OF REVIEW

Because we do not find it necessary to reach the question of the MPLA's constitutionality, our standard of review in this case is abuse of discretion:

[HN1] "A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend." Syllabus Point 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968).

Syl. pt. 5, *Poling v. Belington Bank, Inc.*, 207 W. Va. 145, 529 S.E.2d 856 (1999).

III.

DISCUSSION

We note at the outset that this case, in which a woman being treated for a broken ankle died on the operating table, has never been considered on its merits. Though we reject appellant's request that we consider the constitutionality of the entire MPLA scheme, we agree with his contention that the lower court was wrong to deny him leave to amend his complaint. Our analysis of this [***9] case turns upon the application of Rule 15 of the West Virginia Rules of Civil Procedure; before examining the rule, we first take note of the language of the statute in question.

[**922] [*661] The appellees claim that appellant's failure to comply with the MPLA merits the lower court's dismissal of his claim. The applicable section of the statute reads:

[HN2] (b) At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) The expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; [***10] (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted. The person signing the screening certificate of merit shall have no financial interest in the underlying claim, but may participate as an expert witness in any judicial proceeding. *Nothing in this subsection may be construed to limit the application of rule 15 of the rules of civil procedure.*

W. Va. Code, § 55-7B-6(b) (2003) (emphasis added).⁶ [HN3] The statute makes clear that Rule 15 still applies to all cases, whether they be malpractice cases or not. Rule 15(a) states:

[HN4] (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may [***11] amend the party's pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires*. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

W. Va. R. Civ. Pro. 15(a) (emphasis added). The point of the emphasized language is that [HN5] a court should not allow a party to use a procedural device to thwart a decision on the merits, at least in those cases where the party would not be prejudiced by the amendment.⁷ This Court has explained that:

[HN6] "The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden [***12] assertion [**923] [*662] of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue." Syl. pt. 3, *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50 (1973).

Syl. Pt. 6, *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989); *see also*, Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 334 (2002).

⁶ The 2003 changes to the statute did not materially effect the language of this sub-section in any way relevant to this appeal.

⁷ As explained by the authors of our handbook on West Virginia Civil Procedure:

The purpose of this policy statement is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments. Therefore, motions to amend should always be granted when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet this issue.

Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 334 (2002).

[**13] The facts of this case satisfy the three requirements stated above. Clearly, allowing an amended complaint will "permit the presentation of the merits of the action." As we previously noted, Ms. Boggs died over three years ago and our court system has yet to consider the merits of this claim. There is simply no "sudden assertion" that could prejudice the defendants, who have known of the events giving rise to the suit since they occurred, and had notice of appellant's intent to sue from the filing of his first complaint in February 2002. Finally there is no new "issue" for the defendants to "meet." The amendment would simply allow the appellant to correct the technical errors he made when filing his second complaint.

The lower court took the position that, having dismissed the complaint, it had no authority to later allow an amendment. We disagree. As we have stated previously: [HN7] "The goal behind Rule 15, as with all the Rules of Civil Procedure, is to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties." *Brooks v. Isinghood*, 213 W.Va. 675, 684, 584 S.E.2d 531, 540 (2003) (quoting *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn.2001) [**14] (citations omitted)) (footnote omitted).

Because we find error in not allowing the appellant to amend his complaint, we reverse the lower court on this point. As a result, the changes made to the MPLA as of July 1, 2003, do not apply to appellant's case. ⁸

⁸ We also note with interest that the Legislature has left some flexibility in the process for filing certificates of merit when strict adherence to the 30 day rules would cause manifest injustice. The 2003 version of the MPLA states:

(d) If a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date the health care provider receives the notice of claim.

W. Va. Code, § 55-7B-6(d) (2003). While this statute does not apply directly to the instant case, we note that this exception to the time limits suggests an understanding that "procedural niceties" alone should not extinguish an injured party's right to his or her day in court.

[**15] Although our reversal of the lower court's dismissal makes consideration of the appellant's other arguments unnecessary to decide this case, we feel we must also address the lower court's decision to dismiss *all* of appellant's claims, including the non-medical malpractice claims, because of the delay in serving the certificates of merit. Because such a scenario could reoccur, we address it briefly.

[HN8] By the MPLA's own terms, it applies only to "medical professional liability actions," and the Legislature has provided a definition:

(i) "Medical professional liability" means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.

W. Va. Code § 55-7B-2(i) (2003).⁹ Thus the MPLA can only apply to health care services rendered, or that should have been rendered.

⁹ Changes effective July 1, 2003 moved this language from subsection (d) to subsection (i).

[**16] Fraud, spoliation of evidence, or negligent hiring are no more related to "medical professional liability" or "health care services" than battery, larceny, or libel. There is simply no way to apply the MPLA to such claims. The Legislature has granted special protection to medical professionals, while [**924] [*663] they are acting as such. This protection does not extend to intentional torts or acts outside the scope of "health care services." If for some reason a doctor or nurse intentionally assaulted a patient, stole their possessions, or defamed them, such actions would not require application of the MPLA any more than if the doctor or nurse committed such acts outside of the health care context. Moreover, application of the MPLA to non-medical malpractice claims would be a logistical impossibility. No reputable physician

would sign a certificate of merit for a claim of fraud or larceny or battery; how could such a certificate be helpful or meaningful?

Thus we find that the lower court erred in dismissing the appellant's causes of actions in that they were only contemporaneous or related to the alleged act of medical professional liability. Furthermore, we hold that [HN9] the West Virginia Medical Professional [***17] Liability Act, codified at W. Va. Code § 55-7B-1 *et seq.*, applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.

IV.

CONCLUSION

For the reasons stated, the order of the Circuit Court of Wood County is reversed, and this case is remanded to the circuit court with directions to reinstate appellant's non-medical practice causes of action, to allow the appellant to amend his complaint and to proceed with this case under the law as it existed prior to July 1, 2003.

Reversed and remanded with directions.

DISSENT BY: Maynard

DISSENT

Maynard, Chief Justice, dissenting:

I believe that the circuit court properly dismissed Appellant's complaint for failure to comply with the clear provisions of the 2001 version of W.Va. Code § 55-7B-6. By reversing the circuit court, the majority opinion disregards plain statutory language [***18] and rules in a manner clearly contrary to this Court's recent decision in *State ex rel. Miller v. Hon. Stone*, 216 W.Va. 379, 607 S.E.2d 485, 2004 W. Va. LEXIS 174 (No. 31755, December 2, 2004).

In *Miller*, Petitioner filed her notice of claim on May 9, 2003, and the certificate of merit on June 20, 2003. However, she filed her medical malpractice complaint on June 9, 2003. The circuit

court ruled that Petitioner's complaint could not properly be filed until 30 days after the filing of the certificate of merit, which was July 30, 2003, after the 2003 amendments to the, Medical Professional Liability Act became applicable. Petitioner thereafter sought a writ in this Court to prohibit the enforcement of the circuit court's order. This Court denied the writ after finding that the circuit court's order was correct.

The applicable statutory language in both *Miller* and the instant case provides:

(b) At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim. The notice of claim shall include a statement of the theory or theories of liability upon which [***19] a cause of action may be based, together with a screening certificate of merit. The certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. . . .

* * *

[**925] [*664] (d) If a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date the health care provider receives the notice of claim.

(e) Any health care provider who receives a notice of claim pursuant to the provisions of this section must respond, in writing, [***20] to the claimant within thirty days of receipt of the claim or within thirty days of receipt of the certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) of this section.

(f) Upon receipt of the notice of claim or of the screening certificate, if the claimant is proceeding pursuant to the provisions of subsection (d) of this section, the health care provider is entitled to pre-litigation mediation before a qualified mediator upon written demand to the claimant.

(g) If the health care provider demands mediation pursuant to the provisions of subsection (f) of this section, the mediation shall be concluded within forty-five days of the date of the written demand. The mediation shall otherwise be conducted pursuant to rule 25 of the trial court rules, unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of a complaint or unless the supreme court of appeals promulgates rules governing mediation prior to the filing of a complaint. If mediation is conducted, the claimant may depose the health care provider before mediation or take the testimony of the health care provider during the mediation.

(h) The [***21] failure of a health care provider to timely respond to a notice of claim, in the absence of good cause shown, constitutes a waiver of the right to request pre-litigation mediation. Except as otherwise provided in this subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled from the date of the mailing of a notice of claim to thirty days following receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim would be due, or thirty days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs. If a claimant has sent a notice of claim relating to any injury or death to more than one health care provider, any one of whom has demanded mediation, then the statute of limitations shall be tolled with respect to, and only with respect to, those health care providers to whom the claimant sent a notice of claim to thirty days from the receipt of the claimant of written notice from [***22] the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded.¹

1 The provisions of W.Va. Code § 55-7B-6, as amended in 2003, are substantially the same as those in the 2001 version with the exception of several relatively minor changes.

This Court explained in *Miller*,

A proper reading of W.Va. Code § 55-7B-6(b), indicates that 30 days before a plaintiff files a medical malpractice action, he or she must serve a notice of claim on the defendant. This notice of claim is to include two things - (1) a statement of the theory or theories of liability upon which a cause of action may be based; and (2) a screening certificate of merit. However, under subsection (d), if a claimant has insufficient time to obtain a screening certificate of merit prior to the expiration of the statute of limitations, the claimant shall file a statement of the theory or theories of liability along with a statement [***23] of intent to provide a screening certificate of merit within 60 days of the date the health care provider receives notice of claim.

[**926] [*665] Pursuant to subsection (e), once a claimant files his or her certificate of merit under subsection (d), a health care provider, upon receipt of the certificate, must respond to the claimant, in writing, within 30 days. According to subsection (f), the health care provider is entitled to pre-litigation mediation before a qualified mediator upon written demand to the claimant. Subsection (g) indicates that if the health care provider demands mediation, the mediation shall be conducted within 45 days of the date of the written demand.

Significantly, subsection (h) indicates that the statute of limitations applicable to the medical malpractice action shall be tolled from the date of the mailing of a notice of claim to 30 days following receipt of a response to the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever occurs last. [***24]

Miller, slip op. at 8-9, 2004 W. Va. LEXIS 174 at *14

Upon application of the clear provisions of W.Va. Code § 55-7B-6 (2001), to the facts of the instant case, it is obvious that the circuit court properly dismissed Appellant's complaint.² The facts show that Appellant provided Appellees with a screening certificate of merit on June 2, 2003. Appellant thereafter filed suit on June 27, 2003, less than the 30 days mandated by W.Va. Code § 55-7B-6(f). Thus, Appellees were not provided their 30-day time period in which to demand pre-litigation mediation prior to the filing of Appellant's complaint. Pursuant to W.Va.

Code § 55-7B-6(a) (2001), "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section."

² I agree with the circuit court that "notwithstanding the fact that other theories of recovery are alluded to in the [Appellant's] pleadings, since the giving or failure to give appropriate types and levels of medical care to the plaintiff's decedent is the common gravamen of all theories of relief advanced by the [Appellant]" the entire action falls within the scope of the Medical Professional Liability Act.

[***25] Finally, I note that the result of the dismissal of Appellant's complaint would most likely have been the re-filing of the complaint under the 2003 amendments to the Medical Professional Liability Act, which became applicable on July 1, 2003. Contrary to the assertions in the majority opinion, there would have been no injustice to Appellant. Rather, his causes of action simply would have been governed by an amended version of the Medical Professional Liability Act.

Accordingly, for the reasons set forth above, I dissent.

Gourley v. Nebraska Methodist Health System, Inc

Colin M. Gourley, a minor, by and through Michael J. Gourley, his father, and Lisa A. Gourley, his mother, as next friends and natural guardians, et al., appellees, v. Nebraska Methodist Health System, Inc., a corporation, appellee, and Michelle S. Knolla, M.D., and Obstetricians-Gynecologists, P.C., doing business as the OB/GYN Group, appellants.

No. S-00-679.

SUPREME COURT OF NEBRASKA

265 Neb. 918; 663 N.W.2d 43; 2003 Neb. LEXIS 78

May 16, 2003, Filed

PRIOR HISTORY: [***1] Appeal from the District Court for Douglas County: Michael McGill, Judge.

DISPOSITION: Affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff parents brought a medical malpractice suit against defendants, a corporation, a doctor, the doctor's professional group, and others, seeking damages for injuries sustained by the parents' child because of the alleged negligent care the mother received during her pregnancy. The District Court of Douglas County, Nebraska, entered judgment for the parents and against the doctor and her group. The doctor and the group appealed.

OVERVIEW: The trial court determined that the damages limitation of Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) was unconstitutional because it denied the parents equal protection of the law and a right to a jury trial. On review, the doctor and the group contended the trial court erred in determining that § 44-2825(1) was unconstitutional, the jury verdict was invalid, and the trial court erred in admitting hearsay and irrelevant evidence. Adopting the "any majority" rule, the supreme court found that even though a juror who disagreed on the question of who was liable provided the 10th vote necessary on the damages and apportionment questions, the verdict was valid. Although the trial court erred in allowing the parents' expert to testify as to items in the child's life care plan he was not reasonably certain the child would need in the future, the error was harmless. However, the supreme court held that § 44-2825(1) was not unconstitutional special legislation as there was evidence to justify the enactment of the legislation. Nor did § 44-2825(1) violate the equal protection, separation of powers, or open courts provisions, or the right to a jury trial under the Nebraska Constitution.

OUTCOME: That portion of the trial court's judgment finding the damages limitation unconstitutional was reversed; the judgment was affirmed in all other respects and the trial court was ordered to enter judgment for the parents in the amount of \$ 1,250,000.

CORE TERMS: cap, special legislation, classification, juror, malpractice, equal protection, general surgery, internal medicine, Constitutional Law, care providers, hearsay, substantial difference, reasonably certain, jury trial, malpractice insurance, patient, premium, Liability Act, new trial, noneconomic, legislative act, rational basis test, cross-appeal, common law, public policy, equal protection, economic damages, per curiam, causes of action, heightened

Constitutional Law > Equal Protection > Scope of Protection

Healthcare Law > Actions Against Healthcare Workers > Tort Reform

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN1] Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1998), limits recoverable damages in medical malpractice actions to \$ 1,250,000.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Procedural Considerations > Rulings on Evidence

[HN2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

[HN3] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

[HN4] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.

Civil Procedure > Trials > Jury Trials > Jury Deliberations

[HN5] See Neb. Rev. Stat. § 25-1125 (Reissue 1995).

Governments > Legislation > Interpretation

[HN6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Civil Procedure > Trials > Jury Trials > Jurors > General Overview

Civil Procedure > Trials > Jury Trials > Jury Deliberations

[HN7] Under the "any majority" rule, all jurors are free to deliberate and vote on every issue regardless of their votes on other issues. Plaintiff prevails if the specified number of jurors find in her favor on each element.

Governments > Legislation > Interpretation

[HN8] When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

Civil Procedure > Trials > Jury Trials > Jurors > General Overview

Civil Procedure > Trials > Jury Trials > Jury Deliberations

[HN9] Under the "any majority" rule, a juror who dissents on one issue is allowed to vote on subsequent issues. A juror who disagrees on the question of negligence is still eligible to provide

the vote needed to reach a five-sixths majority on the question of damages. This flexibility reduces the risk of hung juries, as well as all of the associated costs and delays, thus advancing the policy of judicial efficiency underlying Neb. Rev. Stat. § 25-1125 (Reissue 1995) better than the "same juror" rule.

Civil Procedure > Trials > Jury Trials > Jurors > General Overview

Civil Procedure > Trials > Jury Trials > Jury Deliberations

[HN10] The "any majority" rule preserves the principle of full participation in the deliberative process. A juror who dissents on one issue retains the ability to vote on subsequent issues. Thus, the power to vote remains united with the power to debate and the dissenter can deliberate fully and effectively on each issue presented to the jury.

Evidence > Testimony > Experts > General Overview

[HN11] An expert's opinion need not be expressed with reasonable certainty within the expert's field of expertise, but may be expressed with reasonable probability. The expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. When an expert's opinion is mere speculation or conjecture, it is irrelevant. Whether an expert's opinion is too speculative to be admitted is a question for the trial court's discretion.

Evidence > Testimony > Experts > General Overview

[HN12] An expert opinion which is merely speculation or conjecture is inadmissible.

Criminal Law & Procedure > Appeals > Reversible Errors > Evidence

Evidence > Procedural Considerations > Rulings on Evidence

[HN13] Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. In the absence of such an error, the successful party, having sustained

the burden and expense of trial, may keep the benefit of the verdict. In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error. When it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception is not prejudicial error.

Civil Procedure > Appeals > Reviewability > Preservation for Review

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object

Evidence > Procedural Considerations > Rulings on Evidence

[HN14] One may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court.

Civil Procedure > Appeals > Reviewability > Preservation for Review

Evidence > Procedural Considerations > Objections & Offers of Proof > General Overview

[HN15] If a defendant does not offer an objection and does not expressly adopt a codefendant's objection, the matter is not preserved for him or her on appeal.

Evidence > Hearsay > Rule Components > Declarants

Evidence > Hearsay > Rule Components > Statements

[HN16] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay.

Civil Procedure > Appeals > Reviewability > Preservation for Review

Constitutional Law > The Judiciary > Case or Controversy > Constitutional Questions > General Overview

[HN17] When specific constitutional questions are presented, courts will not search for constitutional authority that was not raised and argued by the parties to overthrow a legislative enactment.

Healthcare Law > Actions Against Healthcare Workers > Tort Reform

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN18] The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1998), creates a medical review panel, caps the amount of damages that can be recovered, and creates the Excess Liability Fund. Under the Act, health care providers that do not opt out of the Act's coverage must file proof of financial responsibility with the Director of Insurance and pay surcharges for the excess liability fund. Neb. Rev. Stat. §§ 44-2821, -2824 (Reissue 1998). The Act allows patients to opt out of the Act's coverage. Neb. Rev. Stat. § 44-2821(3) (Reissue 1998).

Healthcare Law > Actions Against Healthcare Workers > Tort Reform

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN19] See Neb. Rev. Stat. § 44-2825 (Reissue 1998).

Constitutional Law > Equal Protection > Scope of Protection

[HN20] See Neb. Const. art. III, § 18.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > Equal Protection > Scope of Protection

[HN21] By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the legislature has a basis in reason and is not purely arbitrary. General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or

class of persons, the privileges or immunities which do not belong to all persons. It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted. Thus, the focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > Equal Protection > Scope of Protection

[HN22] A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > Equal Protection > Scope of Protection

[HN23] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > Equal Protection > Scope of Protection

[HN24] A special legislation analysis is similar to an equal protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts. As a

result, language normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis. But the focus of each test is different. The analysis under a special legislation inquiry focuses on the legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. This is different from an equal protection analysis under which the state interest in legislation is compared to the statutory means selected by the legislature to accomplish that purpose. Under an equal protection analysis, differing levels of scrutiny are applied depending on if the legislation involves a suspect class.

Governments > Legislation > Statutes of Limitations > General Overview

Healthcare Law > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN25] Under Neb. Const. art. V, § 2, only three judges are necessary to determine that an act is constitutional.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

[HN26] Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality. It is commonly held that courts will not reexamine independently the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of the statute. Instead, courts inquire into whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > Equal Protection > Scope of Protection

Governments > State & Territorial Governments > Legislatures

[HN27] All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the legislature. If the legislature had any evidence to justify its reasons for passing the act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified. The court reaches this determination by considering what the legislature could have found at the time the act was passed. It is not the court's place to second-guess the legislature's reasoning behind passing the act. Likewise, it is up to the legislature and not the court to decide whether its legislation continues to meet the purposes for which it was originally enacted. Because the court gives deference to legislative factfinding and presumes statutes to be constitutional, any argument that the record contains evidence that the act was not wise or necessary when it was enacted does not change the analysis.

Constitutional Law > Equal Protection > Scope of Protection

[HN28] See Neb. Const. art. I, § 3.

Constitutional Law > Equal Protection > Scope of Protection

[HN29] The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness

Constitutional Law > Equal Protection > Level of Review

[HN30] Nebraska's Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict accordance must exist between the classification and the statute's purpose. The result the legislature seeks to carry out must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. On the other hand, if a statute involves economic or social legislation not implicating a fundamental right or suspect

class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation. Some legislative classifications, such as those based on gender, are reviewed under an intermediate level of scrutiny.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

[HN31] The right of access to the courts is important, but that right is impaired only by state action that limits or blocks access to the courts.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Equal Protection > Level of Review

[HN32] Access to the courts to pursue redress for injuries is not the type of fundamental right which requires heightened scrutiny.

Constitutional Law > Equal Protection > Level of Review

[HN33] Under the rational basis test, Nebraska's Equal Protection Clause is satisfied as long as there is: (1) a plausible policy reason for the classification; (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker; and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. Thus, when determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Scope of Protection

[HN34] In economics and social welfare, a statute does not violate Nebraska's Equal Protection Clause merely because the classifications made by its laws are imperfect. The fact that other schemes could have been selected does not mean that the scheme chosen is constitutionally infirm. As long as the classification scheme chosen by the legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred. Social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the legislature's actions were irrational.

Constitutional Law > Equal Protection > Level of Review

[HN35] A statute will not offend equal protection if a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

[HN36] See Neb. Const. art. I, § 13.

Governments > State & Territorial Governments > Legislatures

[HN37] The legislature is free to create and abolish rights so long as no vested right is disturbed.

Governments > Courts > Common Law

[HN38] No one has a vested interest in any rule of the common law or a vested right in any particular remedy.

Governments > Courts > Common Law

Governments > State & Territorial Governments > Legislatures

[HN39] In Nebraska, the common law of England was adopted by statute. Neb. Rev. Stat. § 49-101 (Reissue 1998). Thus it exists by legislative enactment and may be repealed.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Public Entity Liability > Immunity > Judicial Immunity

[HN40] Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) does not bar access to the courts or deny a remedy. Instead it redefines the substantive law by limiting the amount of damages a plaintiff can recover. Although plaintiffs have a right to pursue recognized causes of action in court, they are not assured that a cause of action will remain immune from legislative or judicial limitation or elimination.

Governments > Courts > Common Law

Governments > State & Territorial Governments > Legislatures

[HN41] If a common-law right is taken away, nothing need be given in return. Because the legislature can eliminate a common-law cause of action entirely, it can also alter the remedy for a cause of action without providing a replacement remedy, or quid pro quo.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

[HN42] See Neb. Const. art. I, § 6.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

[HN43] The purpose of Neb. Const. art. I, § 6 is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted. The primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. The court, however, applies the law to the facts.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN44] Neb. Rev. Stat. § 44-2825 (Reissue 1998) provides the remedy in a medical malpractice action. The remedy is a question of law, not fact, and is not a matter to be decided by the jury. Instead, the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

[HN45] See Neb. Const. art. I, § 21.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Courts > Common Law

[HN46] Neb. Const. art. I, § 21 applies to vested property rights. A person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. A cause of action and determination of damages are not property.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Healthcare Law > Actions Against Healthcare Workers > Tort Reform

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN47] The damages cap of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1998), does not act as a legislative remittitur or otherwise violate principles of separation of powers. The cap does not ask the legislature to review a specific dispute and determine the amount of damages. Instead, without regard to the facts of a particular case, the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. The legislature may change or abolish a cause of action. Thus, the ability to cap damages in a

cause of action is a proper legislative function. The cap on damages does not violate Neb. Const. art. II, § 1.

Civil Procedure > Appeals > Briefs

[HN48] See Neb. Ct. R. Prac. 9D(f) (rev. 2000).

Civil Procedure > Appeals > Briefs

[HN49] A cross-appeal must be properly designated under Neb. Ct. R. Prac. 9D(f) (rev. 2000) if affirmative relief is to be obtained.

HEADNOTES

1. Rules of Evidence. In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. Judges: Words and Phrases. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. Statutes: Appeal and Error. Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. Constitutional Law: Statutes: Appeal and Error. Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
5. Statutes: Appeal and Error. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

6. Juries. The "any majority" rule applies to Neb. Rev. Stat. § 25-1125 (Reissue 1995); a juror is free to deliberate and vote on each issue presented to the jury, even if the juror has dissented from the majority on a previous issue.
7. Expert Witnesses. An expert's opinion need not be expressed with reasonable certainty within the expert's field of expertise, but may be expressed with reasonable probability.
8. Expert Witnesses. An expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question.
9. Expert Witnesses. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
10. Expert Witnesses. When an expert's opinion is mere speculation or conjecture, it is irrelevant.
11. Trial: Expert Witnesses. Whether an expert's opinion is too speculative to be admitted is a question for the trial court's discretion.
12. New Trial: Appeal and Error. Only an error which is prejudicial to the rights of the unsuccessful party justifies a new trial.
13. Verdicts: Appeal and Error. In the absence of prejudicial error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict.
14. Trial: Evidence: Appeal and Error. In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error.
15. Jury Trials: Evidence: Appeal and Error. When it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception is not prejudicial error.
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17. Trial: Appeal and Error. If a defendant does not offer an objection and does not expressly adopt a codefendant's objection, the matter is not preserved for him or her on appeal.
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19. Rules of Evidence: Hearsay: Proof. Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay.

20. Constitutional Law: Courts: Statutes. When specific constitutional questions are presented, courts will not search for constitutional authority that was not raised and argued by the parties to overthrow a legislative enactment.

21. Constitutional Law: Statutes: Special Legislation. The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.

22. Constitutional Law: Statutes: Special Legislation. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.

23. Constitutional Law: Special Legislation: Public Policy. A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified.

24. Special Legislation. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.

25. Constitutional Law: Special Legislation. Classification for the purpose of legislation is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.

26. Constitutional Law: Statutes: Presumptions. Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.

27. Constitutional Law: Legislature: Presumptions. The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.

28. Statutes: Courts: Legislature: Intent. Courts will not reexamine independently the factual basis on which the Legislature justified a statute, nor will a court independently review the wisdom of the statute.

29. Statutes: Courts: Appeal and Error. An appellate court does not sit as a superlegislature to review the wisdom of legislative acts.

30. Constitutional Law: Statutes: Legislature: Intent. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
31. Special Legislation: Legislature: Public Policy. If the Legislature had any evidence to justify its reasons for passing an act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified.
32. Special Legislation: Legislature: Intent. The determination whether an act of the Legislature is special legislation is reached by considering what the Legislature could have found at the time the act was passed.
33. Statutes: Legislature: Courts. It is up to the Legislature and not a court to decide whether its legislation continues to meet the purposes for which it was originally enacted.
34. Special Legislation: Statutes. The cap on damages in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) does not violate principles prohibiting special legislation.
35. Equal Protection: Statutes: Proof. The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.
36. Equal Protection. The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
37. Equal Protection. In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive.
38. Constitutional Law: Statutes. If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny.
39. Constitutional Law: Statutes: Legislature: Intent. Under the strict scrutiny test, strict accordance must exist between the classification and the statute's purpose. The result the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.
40. Constitutional Law: Statutes: Legislature: Intent. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by

the Legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation.

41. Constitutional Law: Statutes: Appeal and Error. Some legislative classifications, such as those based on gender, are reviewed under an intermediate level of scrutiny.

42. Constitutional Law: Damages. The rational basis test is applied to review the damages cap in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998).

43. Equal Protection. Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

44. Equal Protection. The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.

45. Constitutional Law: Statutes. When determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.

46. Equal Protection: Statutes. In economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

47. Constitutional Law: Statutes. The fact that other legislative classification schemes could have been selected does not mean that the scheme chosen is constitutionally infirm.

48. Constitutional Law: Courts: Legislature: Statutes. As long as the classification scheme chosen by the Legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred.

49. Equal Protection: Courts: Legislature: Intent. Social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational.

50. Equal Protection: Statutes: Damages. The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) satisfies principles of equal protection.

51. Legislature. The Legislature is free to create and abolish rights so long as no vested right is disturbed.

52. Constitutional Law. No one has a vested interest in any rule of the common law or a vested right in any particular remedy.

53. Constitutional Law. If a common-law right is taken away, nothing need be given in return.

54. Constitutional Law: Statutes: Damages. The cap on damages in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) does not violate Neb. Const. art. I, § 13.

55. Constitutional Law: Jury Trials. The purpose of Neb. Const. art. I, § 6, is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted.

56. Actions: Juries. The remedy available in an action is a question of law, not fact, and is not a matter to be decided by the jury.

57. Constitutional Law: Statutes: Damages: Jury Trials. The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not violate the right to a jury trial.

58. Constitutional Law: Statutes: Damages: Property. The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not violate Neb. Const. art. I, § 21.

59. Constitutional Law: Statutes: Damages: Remittitur. The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not act as a legislative remittitur or otherwise violate principles of separation of powers.

60. Rules of the Supreme Court: Appeal and Error. A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9(D)(4) (rev. 2000) if affirmative relief is to be obtained.

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James A. Snowden and Andrew B. Koszewski, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellee Andrew Robertson, M.D.

Thomas J. Shomaker and Mary M. Schott, of Sodoro, Daly & Sodoro, for appellee Nebraska Methodist Health System, Inc.

Charles M. Pallesen, Jr., of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amici curiae Nebraska Medical Association and Greater Nebraska Medical Coalition.

William F. Austin, of Erickson & Sederstrom, P.C., for amici curiae Nebraska Association of Hospitals and Health Systems and Cherry County Hospital.

JUDGES: Hendry, C.J., Wright, Connolly, Gerrard, and McCormack, JJ., and Hannon and Carlson, Judges. Stephan and Miller-Lerman, JJ., not participating. Connolly, J., concurring. Gerrard, J., concurring. Hendry, C.J., concurring in part, and in part dissenting. [***2] McCormack, J., concurring in part, and in part dissenting. Carlson, Judge, concurring in part, and in part dissenting.

OPINION

[**55] [*922] Per Curiam.

[HN1] Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) of the Nebraska Hospital-Medical Liability Act limits recoverable damages in medical malpractice actions to \$ 1,250,000. The district court determined that the damages limitation was unconstitutional because it denied the appellees Colin M. Gourley and his parents, Michael J. Gourley and Lisa A. Gourley, equal protection of the law and a right to a jury trial. The appellants, Michelle S. Knolla, M.D., and Obstetricians-Gynecologists, P.C., doing business as the OB/GYN Group, contend that (1) the district court erred in determining that § 44-2825(1) was unconstitutional, (2) the jury verdict was invalid, and (3) the court erred in admitting hearsay and irrelevant evidence.

I. NATURE OF CASE

The Gourleys brought this medical malpractice action against Nebraska Methodist Health System, Inc., and Nebraska Methodist [*923] Hospital (collectively Methodist Hospital); Knolla; Marvin L. Dietrich, M.D.; Andrew Robertson, M.D.; Pauline R. Sleder, M.D.; OB/GYN Group; and Perinatal Associates, [***3] P.C. The Gourleys sought damages for injuries sustained by Colin because of the alleged negligent care Lisa received during her pregnancy. A jury awarded the Gourleys \$ 5,625,000, and the district court entered judgment for the Gourleys in that amount and against Knolla and the OB/GYN Group.

II. BACKGROUND

During her pregnancy, Lisa received prenatal care from Knolla, an obstetrician and gynecologist employed with the OB/GYN Group. On November 15, 1993, in the 36th week of her pregnancy, Lisa informed Knolla that she noticed less movement from the twin fetuses she was carrying. Knolla assured Lisa that this was common and that everything appeared to be normal. Two days later, Lisa called the OB/GYN Group to again report a lack of fetal movement and was told to come to the office to meet with Dietrich. Dietrich's examination revealed that one of the fetuses suffered from bradycardia, a decrease in the fetus' heart rate, and a lack of amniotic fluid. Dietrich instructed Lisa to proceed to Methodist Hospital for examination by Robertson, who was employed by Perinatal Associates.

[**56] During his examination, Robertson determined that an immediate cesarean section should be performed. Shortly [***4] thereafter, Colin and his twin brother, Connor, were delivered. Colin was born with brain damage and currently suffers from cerebral palsy and significant physical, cognitive, and behavioral difficulties.

The Gourleys filed suit alleging that Knolla and the OB/GYN Group failed to monitor Lisa and Colin while they were under their care. At the close of the Gourleys' case in chief, Methodist Hospital moved for a directed verdict. The court granted the motion and dismissed Methodist Hospital.

The jury found Knolla and the OB/GYN Group to be 60 percent and 40 percent negligent, respectively. The jury awarded the Gourleys \$ 5,625,000. The Gourleys moved for a new trial, arguing that the court erred in granting a directed verdict to Methodist Hospital. The jury found for Dietrich, Robertson, [*924] Sleder, and Perinatal Associates, and the court later dismissed them from the case.

The district court reduced the jury's award and entered judgment for the Gourleys and against Knolla and the OB/GYN Group, jointly and severally, in the amount of \$ 1,250,000. The court found that § 44-2825(1) was constitutional.

The Gourleys filed a second motion for new trial, contending that the cap on damages [***5] imposed by § 44-2825 is unconstitutional because it violates their rights to (1) equal protection; (2) a jury trial; (3) an open court and full remedy; (4) substantive due process; and (5) life, liberty, and the pursuit of happiness. The Gourleys also alleged that the Legislature exceeded its power when imposing the cap and that the cap was unconstitutional special legislation.

Knolla and the OB/GYN Group also moved for a new trial because of 16 alleged errors, among which were that the verdict was not agreed to by five-sixths of the jury as required by Neb. Rev. Stat. § 25-1125 (Reissue 1995) and that the court erred in receiving certain exhibits and testimony into evidence.

The court (1) overruled the Gourleys' motion for new trial on Methodist Hospital's directed verdict and (2) overruled Knolla and the OB/GYN Group's motion for new trial, specifically rejecting their argument that the jury verdict was invalid. Knolla and the OB/GYN Group's other grounds for new trial were also overruled without explanation.

The court reversed its decision and concluded that the cap on damages in § 44-2825(1) violated equal protection under Neb. Const. art. I, § [***6] 3. The court also concluded that § 44-2825(1) violated the Gourleys' right to a jury trial under Neb. Const. art. I, § 6. The court found that § 44-2825(1) was severable from the rest of the act. The court vacated its previous order and entered judgment for the Gourleys and against Knolla and the OB/GYN Group, jointly and severally, in the full amount of \$ 5,625,000. Knolla and the OB/GYN Group appeal.

III. ASSIGNMENTS OF ERROR

Knolla and the OB/GYN Group assign that the district court erred in (1) denying their motion for new trial when the jury returned an invalid verdict; (2) admitting unsupported and hearsay [*925] evidence in the form of a "Life Care Plan for Colin Gourley" by Terry Winkler, M.D.; (3) admitting a book, "What To Expect When You're Expecting," into evidence which contained hearsay, was itself hearsay, and was likely to confuse the jury; (4) overruling their motion for new trial; (5) declaring unconstitutional the damages cap of [**57] the Nebraska Hospital-Medical Liability Act, § 44-2825, and in reversing its order reducing the amount of the judgment to the statutory maximum of \$ 1,250,000; and (6) applying its ruling on the constitutionality of the act retrospectively.

[***7] The Gourleys purported to file a cross-appeal, assigning that the court erred in granting Methodist Hospital's motion for directed verdict.

IV. STANDARD OF REVIEW

[1,2] [HN2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

[3] [HN3] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002). [***8]

[4] [HN4] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

V. ANALYSIS

1. Jury Verdict

Knolla and the OB/GYN Group argue that they are entitled to a new trial because the verdict was not agreed to by five-sixths of the jury as required by § 25-1125.

[*926] Section 25-1125 provides that [HN5] "in all trials in civil actions in any court in this state, a verdict shall be rendered if five-sixths or more of the members of the jury concur therein, and such verdict shall have the same force and effect as though agreed to by all members of the jury" Here, the jury signed and returned two verdict forms. We construe verdict form No. 2 as requiring the jury to determine which defendants were liable and verdict form No. 1 as requiring the jury to decide the amount of damages and how to apportion the defendants' negligence. Although 10 jurors signed both verdict forms, the forms were not signed by the same 10 jurors. This means that a juror who disagreed with the determination of [***9] who was liable provided the 10th vote necessary to decide the amount of damages and how to apportion

the defendants' negligence. Thus, we must decide if a verdict is valid under § 25-1125 if the same five-sixths of the jury fails to agree on each essential issue embodied in that verdict.

[5] [HN6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Newman v. Thomas, supra*. Nothing in the plain language of § 25-1125 indicates whether the same five-sixths of a jury must agree on each essential issue embodied in its verdict. Several jurisdictions, however, have addressed the issue within the context of similar statutory and [**58] constitutional provisions, and we turn to these cases for guidance in construing § 25-1125.

Other jurisdictions have answered the question in one of two ways. See David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 *Jurimetrics J.* 275 (1996). One group has adopted the "same juror" rule. See, e.g., [***10] *Stacy v. Truman Medical Center*, 836 S.W.2d 911 (Mo. 1992); *O'Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d 226, 569 N.E.2d 889 (1991); *Klanseck v. Anderson Sales*, 136 Mich. App. 75, 356 N.W.2d 275 (1984); *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976); *Clark v. Strain et al*, 212 Or. 357, 319 P.2d 940 (1958); *Fleischhacker v. State Farm Mut. Automobile Ins. Co.*, 274 Wis. 215, 79 N.W.2d 817 (1956). Under this rule, the same fractional group of jurors must concur on each issue necessary to support the ultimate verdict. See H. William [*927] Walker, Jr., Comment, *Vote Distribution in Non-Unanimous Jury Verdicts*, 27 Wash. & Lee L. Rev. 360 (1970). If we adopt the same juror rule, the verdict would be invalid because the 10 jurors who determined which defendants were liable were not the same 10 jurors who apportioned the defendants' negligence and determined the amount of damages.

Other courts have rejected the "same juror" rule in favor of the "any majority" rule. See, e.g., *Hendrix v. Docusort, Inc.*, 18 Kan. App. 2d 806, 860 P.2d 62 (1993); [***11] *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989); *Williams v. James*, 113 N.J. 619, 552 A.2d 153 (1989); *Schabe v. Hampton Bays*, 103 A.D.2d 418, 480 N.Y.S.2d 328 (1984); *Juarez v. Superior Court of Los Angeles Cty.*, 31 Cal.3d 759, 647 P.2d 128, 183 Cal.Rptr. 852 (1982); *Tillman v. Thomas*, 99 Idaho 569, 585 P.2d 1280 (1978); *McChristian v. Hooten*, 245 Ark. 1045, 436 S.W.2d 844 (1969); *Ward v. Weekes*, 107 N.J. Super. 351, 258 A.2d 379 (1969). [HN7] Under this rule, all jurors are free to deliberate and vote on every issue "regardless of their votes on other issues. . . . Plaintiff prevails if the specified number of jurors find in her favor on each element." Lombardero, 36 *Jurimetrics J.*, at 298. If we adopt the any majority rule, the verdict would be valid, because at least 10 jurors found for the Gourleys on each element necessary to support a verdict in their favor.

Although there are persuasive arguments for both rules, we conclude that the "any majority" rule better serves the purposes underlying § 25-1125. See *Volquardson v. Hartford Ins. Co.*, 264

Neb. 337, 352, 647 N.W.2d 599, 611 (2002) [***12] [HN8] ("when construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it").

The movement to abolish the unanimous verdict requirement was meant to improve judicial efficiency while preserving fundamental fairness in the jury system. As one court has explained: "Nonunanimous verdicts decrease the number of mistrials and retrials and thus reduce court congestion, delay and the cost of maintaining the judicial system. They also reduce the number of unjust verdicts deriving from juror obstinacy or dishonesty and discourage compromise verdicts." *Schabe v Hampton Bays*, [*928] 103 A.D.2d at 423, 480 N.Y.S.2d at 333. See, also, *Ward v. Weekes*, 107 N.J. Super. 351 *supra*.

Courts have recognized that the "mechanistic" same juror rule does less to improve judicial efficiency than the any majority rule. *Tillman v. Thomas*, *supra*. Under the same juror rule, the same fractional group of jurors must agree on each issue necessary to support the ultimate verdict. For example, in a typical personal [**59] injury case, only the jurors in the five-sixths [***13] majority that agreed that a defendant was negligent could vote on the question of damages. The votes of any jurors who dissented on the negligence question could not be used to reach a five-sixths majority on the damages question. As a result, if the 10 jurors who agreed on the negligence question could not agree on the question of damages, the result would be a hung jury.

But [HN9] under the any majority rule, a juror who dissents on one issue is allowed to vote on subsequent issues. A juror who disagreed on the question of negligence would still be eligible to provide the vote needed to reach a five-sixths majority on the question of damages. This flexibility reduces the risk of hung juries, as well as all of the associated costs and delays, thus advancing the policy of judicial efficiency underlying § 25-1125 better than the same juror rule. See, *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989); *Williams v. James*, 113 N.J. 619, 552 A.2d 153 (1989); *Schabe v Hampton Bays*, 103 A.D.2d 418, 480 N.Y.S.2d 328 (1984); *Juarez v. Superior Court of Los Angeles Cty.*, 31 Cal.3d 759, 647 P.2d 128, 183 Cal.Rptr. 852 (1982). [***14]

Those courts that have adopted the same juror rule have generally conceded that it will lead to less judicial efficiency than the any majority rule. They have argued, however, that two other principles are more important than judicial efficiency, unanimity of the statutorily required minimum number of jurors and consistency in individual juror voting. David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 *Jurimetrics J.* 275 (1996). We are not persuaded by either argument.

Those courts that have relied upon unanimity in adopting the same juror rule see the verdict as a "non-fragmentable totality," representing "one ultimate finding on the basis of several issues." H. William Walker, Jr., Comment, *Vote Distribution in [*929] Non-Unanimous Jury Verdicts*, 27 Wash. & Lee L. Rev. 360, 363-64 (1970). Thus, the verdict cannot be "'the product of mixed thoughts.'" *Clark v. Strain et al*, 212 Or. 357, 364, 319 P.2d 940, 943 (1958) (quoting *The State v. Bybee*, 17 Kan. 462 (1877)). Instead, it must represent the unified thinking of the statutorily required minimum number of jurors.

This reasoning [***15] is misplaced. "The requirement of the same jurors agreeing, which is a necessary characteristic of a unanimous verdict, needs [sic] not remain when there has been a change permitting less than unanimity to be the jury's verdict." *Naumburg v. Wagner*, 81 N.M. 242, 245, 465 P.2d 521, 524 (N.M. App. 1970). We see no reason to "maintain the semblance of unanimity after the requirement of unanimity ceases to exist." *Id.* See, also, *Williams v. James*, 113 N.J. 619 *supra*.

More recent decisions adopting the same juror rule have relied primarily upon the principle of consistency. See, *O'Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d 226, 569 N.E.2d 889 (1991); *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976). These courts contend that inconsistent votes on related issues "indicate that the jurors disagree or do not comprehend." Lombardero, 36 *Jurimetrics J. supra*, at 301. They also question the ability of jurors in the dissenting minority on one issue "to cast aside their opinions and vote on subsequent issues as if they agreed with the majority." *Id.* Courts have been particularly concerned about the ability of a [***16] juror who dissented on the question of who was negligent to fairly participate on the question of how to apportion negligence. See, e.g., *O'Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d at 235, 569 N.E.2d at 897 ("where a juror finds that a [**60] plaintiff has not acted in a causally negligent manner, it is incomprehensible to then suggest that this juror may apportion some degree of fault to the plaintiff and thereby diminish or destroy the injured party's recovery").

We are not persuaded that the concerns over consistency are enough to reject the benefits of the any majority rule. We have more faith in the mental capabilities and ethical integrity of jurors than the courts that have adopted this line of reasoning. We refuse to presume that a juror who dissents on one issue will violate his or her oath and attempt to subvert the deliberations on a subsequent issue, even if the issues are integrally related. [*930] See, *Ward v. Weekes*, 107 N.J. Super. 351, 258 A.2d 379 (1969). In our view, it is more likely that a juror who is outvoted on one issue can "'accept the outcome and continue to deliberate with other jurors honestly and conscientiously to decide the [***17] remaining issues.'" *Juarez v. Superior Court of Los Angeles Cty.*, 31 Cal.3d 759, 768, 647 P.2d 128, 133, 183 Cal.Rptr. 852, 857 (1982) (quoting *Ward v. Weekes*, 107 N.J. Super. 351 *supra*).

Moreover, the same juror rule sacrifices a principle of the jury system that is more fundamental than either unanimity or consistency. That principle is that "all members of a jury . . . partake meaningfully in [the] disposition of the case." *Schabe v Hampton Bays*, 103 A.D.2d 418, 424, 480 N.Y.S.2d 328, 333 (1984). The same juror rule reduces the ability of a juror who dissents on one issue to meaningfully participate in the discussion of the remaining issues. The dissenter remains free to express his or her opinions on the remaining issues, but with the power to persuade divorced from the power to vote, the dissenter's influence is reduced to "a state of practical impotence." *Schabe v Hampton Bays*, 103 A.D.2d at 424, 480 N.Y.S.2d at 333.

By contrast, [HN10] the any majority rule preserves the principle of full participation in the deliberative process. A juror who dissents on one issue retains the ability to vote on subsequent issues. Thus, the power to vote remains [***18] united with the power to debate and the dissenter can deliberate fully and effectively on each issue presented to the jury.

[6] Accordingly, because we believe that it furthers judicial efficiency while protecting fundamental fairness better than the same juror rule, we adopt the any majority rule. A juror is free to deliberate and vote on each issue presented to the jury, even if the juror has dissented from the majority on a previous issue. Even though a juror, who disagreed on the question of who was liable, provided the 10th vote necessary on the damages and apportionment questions, the verdict was valid.

2. Life Care Plan

At trial, the Gourleys called Winkler, a specialist in physical medicine and rehabilitation, to testify about the life care plan that he had developed for Colin. A life care plan is a comprehensive document which includes the items of service, medications, [*931] doctor's visits, and equipment a disabled person will need over the course of his or her life, as well as the costs associated with each of these items. During the direct examination of Winkler, each page of the life care plan was displayed to the jury and received into evidence.

As we understand their [***19] brief, Knolla and the OB/GYN Group make two complaints about Winkler's testimony and the life care plan. First, they claim that the life care plan and some of Winkler's testimony contained opinions that were too uncertain to be relevant. Second, they argue that the life care plan was inadmissible hearsay.

[**61] (a) Relevance

During direct examination, Winkler admitted that for several of the items that he included in Colin's life care plan, he could not state to a reasonable degree of medical certainty that Colin would require that item in the future. He explained that he included these items in the life care plan "to provide information to everybody involved just to help make decisions."

Knolla and the OB/GYN Group argue that the court erred in allowing Winkler to testify about those items for which he was not reasonably certain Colin would need in the future. Similarly, they argue that the life care plan should not have been admitted into evidence because it contained information about these items. We agree, but conclude that the error was harmless.

[7-11] [HN11] An expert's opinion need not be expressed with reasonable certainty within the expert's field of expertise, but may be expressed [***20] with reasonable probability. The expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question. *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992). Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *Franksen v. Crossroads Joint Venture*, 257 Neb. 597, 599 N.W.2d 603 (1999). When an expert's opinion is mere speculation or conjecture, it is irrelevant. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). Whether an expert's opinion is too speculative to be admitted is a question for the trial [*932] court's discretion. See, *id.*; *Anderson by & Through Anderson/Couvillon v. Nebraska Dep't of Social Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998).

Winkler admitted that he included information in the life care plan about items for which he was not reasonably certain Colin would need in the future. The context of his testimony makes clear that he was guessing that Colin might possibly [***21] need these items. [HN12] An expert opinion which is merely speculation or conjecture is inadmissible. Here, the court erred by allowing Winkler to testify about the items for which he admitted that he was not reasonably certain Colin would need in the future. Similarly, information about these items should have been redacted from the life care plan before it was accepted into evidence.

[12-15] That does not, however, end the inquiry. [HN13] Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). In the absence of such an error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict. *Id.* In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error. *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001). When it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom [***22] it was admitted, its reception is not prejudicial error. See *Westgate Rec. Assn. v. Papio-Missouri River NRD*, *supra*.

Here, the record shows that although information about items which Colin was not reasonably certain to need in the future was wrongfully admitted into evidence, the receipt did not affect the result of the trial. Instead, the record shows that the jury knew which items Winkler was not

reasonably certain Colin [*62] would need; that the court instructed the jury to consider only items Colin was reasonably certain to need; and that consistent with the instruction, the jury excluded those items in making its award.

Winkler treated items differently in the life care plan if he was not reasonably certain Colin would need them, and he explained these differences to the jury.

The first part of the life care plan is a 28-page spreadsheet. It provided information about each item that Winkler believed Colin [*933] would need or might need because of his disability. The items are listed in horizontal rows. Spaces appear in each row that allowed Winkler to provide eight types of information about each item as follows: (1) when Colin would need the item, (2) how many years [***23] Colin would need it, (3) how often Colin would need it, (4) the purpose of the item, (5) the likely vendor of the item, (6) a range of per-unit prices for the item, (7) a range of per-year prices for the item, (8) and any additional comments that Winkler believed necessary to explain the item. Winkler testified that if he was reasonably certain that Colin would need an item in the future, he provided an estimate in the space for the range of per-year prices, but that if he was not reasonably certain that Colin would need the item, he left that space blank.

The second portion of the life care plan was designed to demonstrate how much an item would cost over the course of Colin's life. Every item listed in the first portion of the life care plan was also listed in the second. But, as he explained to the jury, Winkler included only an estimate as to how much an item would cost over the course of Colin's life if he was reasonably certain Colin would need the item in the future. If he was not reasonably certain Colin would need the item, he put zero for the cost of the item. At the end of the second section of the life care plan, Winkler provided a total sum of \$ 12,461,500.22 for all [***24] of the items in the life care plan which he was reasonably certain Colin would need.

The jury was aware of exactly which items in the life care plan Winkler was not reasonably certain Colin would need in the future. Moreover, at the end of the trial, the jury was told that it could not consider such information. The court instructed the jury that it could award the "reasonable value of medical, hospital, nursing, therapy, rehabilitation, medical equipment and similar care and supplies reasonably needed by and actually provided to the Plaintiffs and *reasonably certain to be provided in the future.*" (Emphasis supplied.)

It is clear that the jury followed the instruction and excluded from its final award those items which Winkler was not reasonably certain Colin would need. As noted, Winkler estimated the total cost to be \$ 12,461,500.22 over the course of Colin's life for items which he was reasonably certain Colin would need. Later [*934] in the trial, an economist testified that the present value of that amount, depending on which discount factor was used, was a minimum of \$ 5,943,111.

But the jury awarded only \$ 5 million in damages. Thus, the jury did not even award damages for each [***25] of the items Winkler had testified that he was reasonably certain Colin would need, let alone the items for which Winkler was not reasonably certain Colin would need. We conclude that although the court erroneously admitted irrelevant information about items which Winkler was not reasonably certain Colin would require, the error was harmless because it did not unfavorably affect the result of the trial.

(b) Hearsay

At trial, the Gourleys displayed each page of the life care plan to the jury during Winkler's testimony. When his testimony was over, the court received the [**63] life care plan into evidence. As we understand their brief, Knolla and the OB/GYN Group argue that the life care plan was hearsay. They claim that as a result, the Gourleys should not have been allowed to show the life care plan to the jury during Winkler's testimony and that the court should not have received the life care plan into evidence. See *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001) (holding expert's written appraisal inadmissible as hearsay which would unfairly emphasize his trial testimony).

[16] Knolla and the OB/GYN Group, however, failed to preserve a hearsay objection to [***26] the life care plan. [HN14] One may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). The only grounds upon which Knolla and the OB/GYN Group objected to the life care plan were foundation, relevancy, speculation, and conjecture; they did not object to the life care plan because it was hearsay.

[17] We note that one of their codefendants objected because the life care plan was a "narrative memorialization of testimony in a written form of the type that is normally not received." While this might be construed as a hearsay objection, Knolla and the OB/GYN Group did not join the objection. [HN15] If a defendant does not offer an objection and does not expressly adopt a codefendant's objection, the matter is not preserved for him or her on [*935] appeal. See, *Seaside Resorts v. Club Car*, 308 S.C. 47, 416 S.E.2d 655 (S.C. App. 1992); *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161 (Utah 1983); *Thomas v. Bank of Springfield*, 631 S.W.2d 346 (Mo. App. 1982); *Wolfe v. East Texas Seed Co.*, 583 S.W.2d 481 (Tex. Civ. App. 1979). [***27] We will not consider the argument that the life care plan was hearsay.

3. "What to Expect When You're Expecting"

Knolla and the OB/GYN Group assert that the district court erred in receiving into evidence the book entitled "What to Expect When You're Expecting" (hereinafter the book). During the cross-examination of Knolla, the Gourleys marked the book as an exhibit and asked Knolla several

questions about it. The Gourleys then offered the book into evidence. Knolla objected on the grounds that the book was hearsay and that it was irrelevant. In response, the Gourleys' counsel stated that the book was being offered only to show what information the OB/GYN Group would have provided to its patients in 1993. The court overruled the objections and received the book into evidence.[18,19] Initially, Knolla and the OB/GYN Group claim that the book contained inadmissible hearsay statements. [HN16] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Out-of-court statements, if not offered for the purpose of proving [***28] the truth of the facts asserted, are not hearsay. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995). Here, the book was not offered for the truth of its contents, but instead was offered for the limited purpose of showing what information the OB/GYN Group would have provided to its patients in 1993. The book was not hearsay.

Knolla and the OB/GYN Group also argue that the court should have excluded the book under Neb. Rev. Stat. § 27-403 (Reissue 1995) because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of [**64] the issues, or misleading the jury. But, "one may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court." *Benzel v. Keller Indus., Inc.*, 253 Neb. 20, 26, 567 N.W.2d 552, 557 (1997). The only [*936] objections Knolla and the OB/GYN Group made at trial about the book were hearsay and relevance, the first of which is without merit for the reasons set out above and the second of which has not been raised on appeal. We will not consider the § 27-403 argument.

4. Constitutional Issues

Knolla [***29] and the OB/GYN Group argue that the cap in § 44-2825(1) is constitutional. The Gourleys argue that the cap violates principles of (1) special legislation, (2) equal protection, (3) open courts and right to a remedy, (4) right to a jury trial, (5) taking of property, and (6) separation of powers. The Gourleys rely solely on provisions of the state Constitution.

The Gourleys do not argue that the cap violates substantive due process or deprives them of life, liberty, and the pursuit of happiness as listed in their motion for new trial. Other than arguing equal protection, the Gourleys do not argue that Neb. Const. art. I, § 3, applies to their case. The Gourleys also did not argue to the trial court that the cap is unconstitutional as applied, nor do they make that argument on appeal.

[20] [HN17] When specific constitutional questions are presented, courts will not search for constitutional authority that was not raised and argued by the parties to overthrow a legislative enactment. See, e.g., *United States v. Spector*, 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952)

(alternate constitutional ground for overturning statute not considered when appellee did not brief and [***30] argue issue); *Rice v. Rigsby and Davis v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963) (addressing only constitutional issues raised in appellee's brief). Thus, we will consider only the specific constitutional arguments that the Gourleys raise and argue. See *Rice v. Rigsby and Davis v. Rigsby*, 259 N.C. 506 *supra*. Because we are asked to review numerous alternate grounds for finding the cap unconstitutional, we generally address the constitutional issues concerning the Gourleys' contentions.

(a) Statutory Provisions and Background

The Nebraska Hospital-Medical Liability Act was created to address a perceived medical liability crisis. [HN18] The act created a medical review panel, capped the amount of damages that could [*937] be recovered, and created the Excess Liability Fund. Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1998). Under the act, health care providers that do not opt out of the act's coverage must file proof of financial responsibility with the Director of Insurance and pay surcharges for the excess liability fund. §§ 44-2821 and 44-2824. The act allows patients to opt out of the act's coverage. § 44-2821(3). Section 44-2825 provides: [***31]

[HN19]

(1) The total amount recoverable under the Nebraska Hospital-Medical Liability Act from any and all health care providers and the Excess Liability Fund for any occurrence resulting in any injury or death of a patient may not exceed . . . (c) one million two hundred fifty thousand dollars for any occurrence after December 31, 1992.

(2) A health care provider qualified under the act shall not be liable to any patient or his or her representative who is covered by the act for an amount in excess of two hundred thousand dollars for all claims or causes of action arising from any occurrence during the period that the act is effective with reference to such patient.

[**65] (3) Subject to the overall limits from all sources as provided in subsection (1) of this section, any amount due from a judgment or settlement which is in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund pursuant to sections 44-2831 to 44-2833.

(b) Special Legislation

The Gourleys contend that § 44-2825(1) is unconstitutional special legislation because it provides a special privilege to health care professionals while placing a burden on the most [***32] severely injured plaintiffs.

Neb. Const. art. III, § 18, provides:

[HN20] The Legislature shall not pass local or special laws in any of the following cases, that is to say:

....

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . .
. In all other cases where a general law can be made applicable, no special law shall be enacted.

[*938] [21] We described the purpose of the constitutional safeguard against special legislation in *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844-45 (1991), as follows:

[HN21] By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. . . . General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. . . . It is [***33] because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted.

Thus, the focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.

[22] [HN22] A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). This case does not involve a permanently closed class.

[23-25] We have consistently stated that the test for determining the constitutionality of classifications is as follows:

[HN23] "A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose [***34] of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. . . ." "Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes [*939] of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act."

[**66] *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 609, 300 N.W.2d 181, 187 (1980). See, e.g., *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846 *supra*; *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000); *Haman v. Marsh*, 237 Neb. 699 *supra*.

We note that [HN24] a special legislation analysis is similar to an equal protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts. See, generally, *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000) (addressing equal protection and special legislation separately, but deciding [***35] issues for same reasons). As a result, language normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis. *Id.* But the focus of each test is different. The analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. This is different from an equal protection analysis under which the state interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose. Under an equal protection analysis, differing levels of scrutiny are applied depending on if the legislation involves a suspect class. See, e.g., *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995) (discussing special legislation and equal protection separately and applying differing tests); *Lerma v. Keck*, 186 Ariz. 228, 921 P.2d 28 (Ariz. App. 1996) (illustrating difference between equal protection and special legislation); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 5 Va. Law Rep. 1438 (1989) [***36] (upholding damages cap and discussing special legislation and equal protection separately).

This court has upheld the constitutionality of the Nebraska Hospital-Medical Liability Act. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). Discussing equal protection, we first held there was a reasonable basis for the classification. Then, in response to the argument that the medical review panel constituted [*940] a special privilege for the health care provider and imposed an undue burden on the seriously injured patient, we stated:

In this respect it must be remembered the Nebraska procedure is an elective one. Under the election, the act guarantees the claimant an assured fund . . . for the payment of any malpractice claim he [or she] may have. Under the common law remedy [the claimant] had no such guarantee and, as in the case of the plaintiff Prendergast, who has been unable to acquire any malpractice insurance, the likelihood of collecting a substantial judgment could be quite remote.

Additionally, the claimant is assured of a procedure which will provide him access to an impartial medical review panel to determine whether the health care provider [***37] met the applicable standard of care. In return, claimant by his election agrees to the [cap]. . . . The classification rests on reasons of public policy and a substantial difference between medical care

providers and other tort-feasors. Suffice it to say that the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.

. . . Nothing in the act suggests, as defendant infers, that the legislation involved was enacted for the relief of the medical care provider. The enactment was, and so appears to us to be, in the public interest. This is paramount.

Id. at 115, 256 N.W.2d at 669.

The Gourleys argue that *Prendergast* is not precedent because it did not have a [**67] four-judge majority. But, [HN25] under Neb. Const. art. V, § 2, only three judges are necessary to determine that an act is constitutional. Further, even before *Prendergast* was decided, this court recognized the Legislature's concern over the rising cost of malpractice insurance and the substantial difference between medical practitioners and other tort-feasors. When holding that the statute of limitations for malpractice [***38] actions did not constitute special legislation, we stated:

There are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many [*941] professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services.

Taylor v. Karrer, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976), *disapproved on other grounds*, *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998).

After *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), was decided, we relied on it when determining that a different cap on damages was constitutional. In *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989), we upheld the constitutionality of a limit of recovery of damages under the parental liability statute, Neb. Rev. Stat. § 43-801 [***39] (Reissue 1998). In determining that § 43-801 did not violate principles of equal protection or the prohibition against special legislation, we cited *Prendergast* for the proposition that "certain limitations on recovery and differentiation among types of tort-feasors are

permissible." *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. at 852, 443 N.W.2d at 572. We again cited *Prendergast* with favor in 1991. *Haman v. Marsh*, 237 Neb. 699, 713, 467 N.W.2d 836, 847 (1991) ("there are substantial reasons for legislative discrimination in regard to malpractice actions"). Further, in 2000, this court quoted and relied on language from *Prendergast*, stating that in *Prendergast*, we were "dealing with the fundamental right to adequate medical care" and affirming "the right of the Legislature to exercise the police power to promote the general health and welfare of the citizens of this state." [*942] *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 857, 620 N.W.2d 339, 348 (2000). We also quoted *Prendergast* as follows:

"Defendant . . . assumes the legislation was enacted to relieve doctors or insurance companies [***40] of some of their burden. We do not accept defendant's premise. Doctors and insurance companies are able to protect themselves against financial burdens by passing the cost on to their patients. Because they were doing so, [they] created part of the problem. The Legislature deemed it necessary to exercise its police power to make available qualified medical services at reasonable prices for the Nebraska public. We find no constitutional violation of this effort."

Bergan Mercy Health Sys. v. Haven, 260 Neb. at 857, 620 N.W.2d at 348. Thus, we have recognized on repeated occasions that the classification in the Nebraska Hospital-Medical Liability Act is based upon a reason of public policy. Further, we have recognized the existence of a substantial difference of situation or circumstances that justified diverse legislation for the classification.

The Gourleys argue, however, that § 44-2825(1) was not justified. The Gourleys [**68] point out that there was disagreement in the Legislature at the time § 44-2825(1) was enacted and conflicting testimony at the hearing on the motion for new trial. Thus, they argue that there never was an insurance crisis and that lifting [***41] the cap would have little effect on the cost of medical services. The Gourleys essentially ask that we independently review the wisdom of enacting the cap. We decline to do so.

[26,27] [HN26] Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846 *supra*. The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

[28,29] It is commonly held that courts will not reexamine independently the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of the statute. See, e.g., *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). [***42] Instead, courts have inquired into "whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based." *Robinson v. Charleston Area Med. Center*, 186 W. Va. at 730, 414 S.E.2d at 887. See *Prendergast v. Nelson*, 199 Neb. 97 *supra*. See, also, *Phillips v. Mirac, Inc.*, 251 Mich. App. 586 *supra* (considering whether any set of facts either known or which could be reasonably assumed supports the legislature's judgment). As one author has stated:

The legislature has the ability to hear from everybody-plaintiff's [943] lawyers, health care professionals, defense lawyers, consumer groups, unions, and large and small business. . . . And, ultimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voter's disfavor. These are but a few reasons why, over the years, legislators have received some due deference from courts.

Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688 (2001). This [***43] court does not sit as a superlegislature to review the wisdom of legislative acts. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds*, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001).

[30-32] Also, [HN27] all reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. *State v. Hunt*, 220 Neb. 707 *supra*. If the Legislature had any evidence to justify its reasons for passing the act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified. See *Prendergast v. Nelson*, 199 Neb. 97 *supra*. We reach this determination by considering what the Legislature could have found at the time the act was passed. See, generally, *In re Estate of Kittenbrink*, 200 Neb. 678, 264 N.W.2d 868 (1978).

[**69] [33] It is not this court's place to second-guess [***44] the Legislature's reasoning behind passing the act. Likewise, "it is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted." *Verba v. Ghaphery*, 210 W. Va. at 36, 552 S.E.2d at 412 (upholding constitutionality of damages cap). Because we give deference to legislative factfinding and presume statutes to be constitutional, any argument that the record contains evidence that the act was not wise or necessary when it was enacted does not change the analysis.

Section 44-2825 was adopted under 1976 Neb. Laws, L.B. 434, but the legislative history is found under 1976 Neb. Laws, L.B. 703. At the committee hearing, the Legislature heard from [*944] both proponents and opponents of the act. There was testimony from witnesses indicating that there was a problem recruiting physicians in the state and that increases in medical malpractice insurance were raising the cost of medical care. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. (Jan. 27, 1976). There was also testimony that a cap would not affect the cost of medical care, and some expressed the belief that the act was [***45] nothing more than a boon for insurance companies. *Id.* Generally, the proponents of the act expressed concern that an insurance crisis existed, but admitted that it was likely impossible to know if a cap on damages would solve the problem. Based on the information before it, the Legislature generally believed that a damages cap would solve the problem, especially when combined with the medical review panel and the Excess Liability Fund. *Id.* Thus, the Legislature set out a specific statement of findings and intent in the Nebraska Hospital-Medical Liability Act. In § 44-2801, the Legislature stated:

(1) The Legislature finds and declares that it is in the public interest that competent medical and hospital services be available to the public in the State of Nebraska at reasonable costs, and that prompt and efficient methods be provided for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims. It is essential in this state to assure continuing availability of medical care and to encourage physicians to enter into the practice of medicine in Nebraska [***46] and to remain in such practice as long as such physicians retain their qualifications.

(2) The Legislature further finds that at the present time under the system in effect too large a percentage of the cost of malpractice insurance is received by individuals other than the injured party. The intent of sections 44-2801 to 44-2855 is to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to ensure the availability of malpractice insurance coverage at reasonable rates.

[*945] Here, the Legislature had evidence to justify their reasons for passing the act. The class is based upon reasons of public policy and substantial differences of situation or circumstances that suggested the justice or expediency of diverse legislation.

Other states have also expressed agreement that a cap on damages for medical malpractice does not constitute special legislation. See *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 5 Va. Law Rep. 1438 (1989). See, also, *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). [***47] There is recognition by both this court and others that there is [**70] evidence to justify the Legislature's actions.

[34] To the extent that other courts have found damages caps to constitute special legislation, those cases do not conform to our legal precedent and are unpersuasive. See, e.g., *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997) (Miller, J., concurring in part, and in part dissenting) (explaining reasons for disagreement with special legislation analysis as applied in *Best*). See, also, Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 Wash. & Lee L. Rev. 315 (2001) (criticizing cases holding that damages caps are unconstitutional). We conclude that the cap does not violate principles prohibiting special legislation.

(c) Equal Protection

The Gourleys next contend that the cap violates the equal protection clause of the Nebraska Constitution. They first argue that the cap affects fundamental rights and ask that this court apply a "searching" or rigorous review. Brief for appellees the Gourleys at 56.

[35] Neb. Const. art. I, § 3, states: [***48] [HN28] "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." [HN29] The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause. See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995).

[36-41] [HN30] The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. [*946] *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict accordance must exist between the classification and the statute's purpose. The result the Legislature seeks to carry out must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. [***49] On the other hand, if a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation. *Schindler v.*

Department of Motor Vehicles, 256 Neb. 782, 593 N.W.2d 295 (1999); *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996). Some legislative classifications, such as those based on gender, are reviewed under an intermediate level of scrutiny. See, e.g., *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

A majority of jurisdictions apply a rational basis or other similar test and determine that a statutory cap on damages does not violate equal protection. See, e.g., *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) [***50] (en banc); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); [**71] *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368 (1985); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 5 Va. Law Rep. 1438 (1989); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). See, also, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (reaching this conclusion but stating that it [*947] was not binding precedent); *Trujillo v. City of Albuquerque*, 1998 NMSC 31, 125 N.M. 721, 965 P.2d 305 (1998) (overruling use of heightened standard, but remanding for determination of constitutionality under rational basis standard); *Morris v. Savoy*, 61 Ohio. St. 3d 684, 576 N.E.2d 765 (1991) [***51] (finding no violation of equal protection, but finding damages cap unconstitutional on other grounds). A few jurisdictions have applied a heightened standard under their state constitution. See, *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

The Gourleys contend that a heightened level of scrutiny should be applied to this case because the cap affects fundamental rights such as the right to a jury trial, full remedy, property, and medical care. They also argue that the cap affects a suspect class because plaintiffs with damages awards over the cap are "saddled with disabilities." Brief for appellees the Gourleys at 51. They also appear to argue that heightened scrutiny should apply because the Nebraska Unicameral system is more susceptible to influences from special interests. We disagree that a heightened level of scrutiny should be applied.

[42] [HN31] The right of access to the courts is important, but that right is impaired only by state action that limits or blocks access to the courts. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 *supra*. The damages cap at issue does not limit [***52] access to the courts. Instead, it limits a plaintiff's recovery in court. *Id.* Further, [HN32] access to the courts to pursue redress for injuries is not the type of fundamental right which requires heightened

scrutiny. *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21 *supra*. In addition, the classification created by § 44-2825 is not based on suspect criteria. Instead, the Gourleys' interest in unlimited damages is economic. See *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21 *supra*. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 *supra*. We find no merit in the argument that plaintiffs with damages awards over the cap are a suspect class or that heightened scrutiny should be applied because Nebraska has a unicameral legislative system. Because the interests at issue are economic, we apply the rational basis test.

[43-45] [HN33] Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the [*948] classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification [***53] to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Thus, when determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

[**72] [46-49] As with their arguments about special legislation, the Gourleys contend that the act was unwise and unnecessary. But as we already discussed, we will not second guess the conclusions of the Legislature. Further, [HN34] in economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265 *supra*; *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996). [***54] The fact that other schemes could have been selected does not mean that the scheme chosen is constitutionally infirm. *Id.* See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). As long as the classification scheme chosen by the Legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred. See *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265 *supra*. Social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational. *State v. Atkins*, 250 Neb. 315 *supra*.

The district court concluded that § 44-2825 was unconstitutional partially because it is a cap on all damages instead of a cap on only noneconomic damages. This does not change the analysis. [HN35] A statute will not offend equal protection if a rational relationship exists between a

legitimate state interest and the statutory means selected by the Legislature to accomplish [***55] that [*949] end. We note that other courts have upheld statutes that cap all damages. See, *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 5 Va. Law Rep. 1438 (1989); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

Here, the Legislature was concerned about a perceived insurance crisis that could affect the ability of the state to recruit and retain physicians and increase the costs of medical care. Reducing health care costs and encouraging the provision of medical services are legitimate goals which can reasonably be thought to be furthered by lowering the amount of medical malpractice judgments. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).

We have previously recognized these goals as legitimate legislative concerns. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), *disapproved on other grounds*, *Jorgensen v. State Nat. Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1998). [***56] Also, a rational relationship exists between the concern and the statutory means selected by the Legislature to accomplish its goal. We note that § 44-2825 was generally based on an Indiana act. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. 17 (Jan. 27, 1976). In *Johnson v. St. Vincent's Hospital, Inc.*, 273 Ind. 374 *supra*, the Indiana Supreme Court upheld the damages cap in the Indiana act, and it noted that the act established a form of government-sponsored insurance, set limitations upon liability, and placed the burden upon persons injured by the industry. The court then stated:

An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred. It must, however, be accepted that the badly injured plaintiff who may require constant care will not recover full damages, yet at the same time we are impressed with the large amount which is recoverable [***73] and its probable ability to fully compensate a large proportion of injured patients. In the same vein, badly injured patients would have little or no chance of recovering large sums of money if the evil the act was intended to prevent were to come about, [***57] i.e., that an [*950] environment would develop in the State in which private or public malpractice insurance were unavailable or unused. Of some relevance here is also the fact that after suit and recovery against a health care provider is completed, there continues a total life-time dependency upon other health care providers for vital treatment of the residuum of illness from the prior negligence and of new and unrelated illnesses. Thus to the extent that the limitation upon recovery is successful in preserving the availability of health care services, it does so to the benefit of the entire community including the badly injured plaintiff.

Johnson v. St. Vincent's Hospital, 273 Ind. at 396, 404 N.E.2d at 599. Although one may disagree with this reasoning, the Nebraska Legislature heard similar comments when it was considering enacting § 44-2825. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. (Jan. 27, 1976).

[50] Finally, we note that some jurisdictions have held that a cap on damages violates equal protection. In some cases, the jurisdiction applied a heightened level of scrutiny, which we reject. See, *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); [***58] *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978). Another is unclear about the level of scrutiny. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991). Several fail to give deference to the Legislature and engage in judicial factfinding, which we also reject. See, *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 *supra*; *Arneson v. Olson*, 270 N.W.2d 125 *supra*. Another requires the provision of a replacement remedy, quid pro quo, to limit recovery of damages, which we reject and which will be discussed when dealing with the open courts provision of the Nebraska Constitution. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). We find these cases unpersuasive. Thus, we conclude that the cap on damages in § 44-2825 satisfies principles of equal protection.

(d) Open Courts and Right to Remedy

The Gourleys contend that § 44-2825 violates the open courts provision of the Nebraska Constitution and denies them their right to a remedy. They argue that common-law rights and remedies that were in place at the time the constitution was adopted are protected from legislative change.

[*951] Neb. Const. art. [***59] I, § 13, provides: [HN36] "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay"

A majority of jurisdictions have held that a cap on damages does not violate the open courts and right to remedy provisions of their state constitution. *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976). See, generally, *Evans ex rel. Kutch v. [**74] State*, 56 P.3d 1046 (Alaska 2002); *Trujillo v. City of Albuquerque*, 1998 NMSC 31, 125 N.M. 721, 965 P.2d 305 (1998). [***60] A minority of courts have held that a cap on damages violates a state

constitution's open courts or right to remedy provision. *Matter of Certif. of Questions of Law*), 1996 SD 10, 544 N.W.2d 183 (S.D. 1996); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988).

[51,52] It has long been the law of Nebraska, however, that [HN37] the Legislature is free to create and abolish rights so long as no vested right is disturbed. *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989). When upholding the constitutionality of the review panel provision of the act, we stated in *Prendergast v. Nelson*, 199 Neb. 97, 104, 256 N.W.2d 657, 663-64 (1977):

Basically the contention is that the Legislature is powerless to alter a common law right. The law itself as a rule of conduct may be changed at the will or even at the whim of the Legislature unless prevented by constitutional limitations. . . . The Constitution does not forbid the creation of new rights, nor the abolition of old ones recognized by the common law, to attain a permissible legislative object.

Thus, we have held that [HN38] no one has a vested interest in any rule of the common [***61] law or a vested right in any particular remedy. *Peterson v. Cisper*, 231 Neb. 450 *supra*.

The Gourleys contend that rights that were in place when the constitution was adopted are an exception to these rules. In the [*952] alternative, they contend that the Legislature cannot change a remedy without providing an adequate replacement, or quid pro quo. We disagree.

Rejecting an argument that the common law in place at the time the constitution was adopted could not be changed, the Idaho Supreme Court stated: "To adopt that argument would be to hold that the common law as of 1890 governs the health, welfare and safety of the citizens of this state and is unalterable without constitutional amendment." *Jones v. State Board of Medicine*, 97 Idaho at 864, 555 P.2d at 404. Relying on a Colorado case, the court further noted that the open courts provision did not discuss the common law. Instead, the common law was adopted through another constitutional provision and through statute in Idaho. *Jones v. State Board of Medicine*, 97 Idaho 859 *supra*, citing *Vogts v. Guerrette*, 142 Colo. 527, 351 P.2d 851 (1960).

[HN39] In Nebraska, the common law of England was adopted [***62] by statute. Neb. Rev. Stat. § 49-101 (Reissue 1998). Thus it exists here by legislative enactment and may be repealed. See *Vogts v. Guerrette*, *supra*. [HN40] Section 44-2825(1) also does not bar access to the courts or deny a remedy. Instead it redefines the substantive law by limiting the amount of damages a plaintiff can recover. Although plaintiffs have a right to pursue recognized causes of action in

court, they are not assured that a cause of action will remain immune from legislative or judicial limitation or elimination. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc).

[53,54] We have also held that [HN41] if a common-law right is taken away, nothing need be given in return. *Prendergast v. Nelson*, 199 Neb. 97 *supra*. Because the Legislature can eliminate a common-law cause of action entirely, it can also alter the remedy for a cause of action without providing a replacement remedy, or quid pro quo. We conclude that § 44-2825(1) does not violate Neb. Const. art. I, § 13.

(e) Jury Trial

The Gourleys contend that the cap violates their right to a trial by jury. Knolla and the OB/GYN Group counter that [***63] the Legislature can abolish a common-law [**75] cause of action and that [*953] therefore, it follows that it can limit the amount of damages that can be recovered.

Neb. Const. art. I, § 6, provides:

[HN42] The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.

Courts are split on whether a cap on damages violates the right to a jury trial. The majority of courts hold that a cap does not violate the right to trial by jury. *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000); *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); [*954] *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 *supra*; *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 5 Va. Law Rep. 1438 (1989). [***64] See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). In two of these cases, the constitutional provision at issue is generally the same as the provision in the Nebraska Constitution. *Kirkland v. Blaine County Medical Center*, 134 Idaho 464 *supra*; *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 *supra*. Other courts have applied language that is generally the same as the Nebraska Constitution and

have concluded that a cap on damages does violate a plaintiff's right to a jury trial. *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (1999); *Matter of Certif. of Questions of Law*, 1996 SD 10, 544 N.W.2d 183 (S.D. 1996); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 771 P.2d 711 (1989), *amended* 780 P.2d 260. We disagree with the reasoning of those courts.

[55,56] [HN43] The purpose of article I, § 6, is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999); [***65] *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). The primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. See *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc). The court, however, applies the law to the facts. *Id.* [HN44] Section 44-2825 provides the remedy in a medical malpractice action. The remedy is a question of law, not fact, and is not a matter to be decided by the jury. See, e.g., *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 *supra*; *Murphy v. Edmonds*, 325 Md. 342 *supra*; *Etheridge v. Medical Center Hospitals*, 237 Va. 87 *supra*. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 *supra*. Instead, the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function. See, e.g., *Murphy v. Edmonds*, 325 Md. 342 *supra*; *Etheridge v. Medical Center Hospitals*, 237 Va. 87 *supra*. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 *supra*.

[57] Further, as we have discussed, the Legislature has the right to completely abolish a common-law cause of action. *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989). [***66] If the Legislature has the constitutional power to abolish a cause of action, it also has the power to limit recovery in a cause of action. See, e.g., *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 *supra*. We conclude that § 44-2825 does not violate the right to a jury trial.

(f) Taking of Property

The Gourleys next contend that the cap acts to take property in violation of Neb. [**76] Const. art. I, § 21. They argue that a cause of action and a jury's determination of damages are property.

Article I, § 21, states: [HN45] "The property of no person shall be taken or damaged for public use without just compensation therefor." [HN46] Article I, § 21, applies to vested property rights. See *Tracy v. City of Deshler*, 253 Neb. 170, 568 N.W.2d 903 (1997).

[58] As previously discussed, we have held that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper*, 231 Neb. 450 *supra*. Further, courts have rejected the argument that a cause of action and determination of damages are property. *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 509

S.E.2d 307 (1999). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).

[***67] The cap on damages in § 44-2825 does not violate Neb. Const. art. I, § 21. We conclude that the Gourleys' argument is without merit.

[*955] (g) Separation of Powers

The Gourleys contend that § 44-2825 violates the separation of powers provision of Neb. Const. art. II, § 1. They argue that the cap legislatively transfers their property to another, acts as a legislative remittitur, and acts as a legislative judgment on damages.

We have already stated that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper*, 231 Neb. 450 *supra*. The Gourleys' argument about the legislative transfer of property is without merit. We also find no merit in the argument that the cap acts as a legislative judgment of damages. As we have discussed, the Legislature may abolish a common-law right or remedy. *Id.* For the same reasons the cap does not violate the right to a jury trial, it also does not act as a legislative determination of the amount of damages in any specific case.

We note that one court has held that a cap on damages improperly delegates to the Legislature the power to remit verdicts and judgments. [***68] *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997). See, also, *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 771 P.2d 711 (1989), *amended* 780 P.2d 260 (indicating in dicta that cap might violate separation of powers). In *Best*, the court concluded that the determination whether a verdict was excessive was a discretionary function of the trial court and that a cap on damages improperly delegated that function to the Legislature.

Other courts, however, have determined that a cap on damages does not violate principles of separation of powers. See, e.g., *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001); *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000); *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 5 Va. Law Rep. 1438 (1989). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). Most of these courts have specifically disagreed with the reasoning that a cap acts [***69] as a legislative remittitur. *Verba v. Ghaphery*, 210 W. Va. 30 *supra*; *Kirkland v. Blaine County Medical Center*, 134 Idaho 464 *supra*; *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21 *supra*. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 *supra*.

[*956] In *Kirkland*, the Idaho Supreme Court noted that nothing about the damages cap purported to limit the exercise of the judiciary's constitutional powers or jurisdiction. The court stated:

Rather, if anything, the statute is a limitation on the rights of plaintiffs, not the judiciary. Because it is properly within [**77] the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine.

Kirkland v. Blaine County Medical Center, 134 Idaho at 471, 4 P.3d at 1122.

[59] We agree that [HN47] the damages cap does not act as a legislative remittitur or otherwise violate principles of separation of powers. The cap does [***70] not ask the Legislature to review a specific dispute and determine the amount of damages. Instead-without regard to the facts of a particular case-the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. We have stated repeatedly that the Legislature may change or abolish a cause of action. Thus, the ability to cap damages in a cause of action is a proper legislative function. See, *Verba v. Ghaphery*, 210 W. Va. 30 *supra*; *Kirkland v. Blaine County Medical Center*, 134 Idaho 464 *supra*; *Etheridge v. Medical Center Hospitals*, 237 Va. 87 *supra*. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 *supra*. "Indeed, were a court to ignore the legislatively-determined remedy and enter an award in excess of the permitted amount, the court would invade the province of the legislature." *Etheridge v. Medical Center Hospitals*, 237 Va. at 101, 376 S.E.2d at 532. We determine that the cap on damages does not violate art. II, § 1.

5. Cross-Appeal

The Gourleys purported to file a cross-appeal assigning that the district court erred when it overruled the motion for new trial regarding the directed verdict for Nebraska [***71] Methodist. Nebraska Methodist filed a motion to dismiss, contending that this court lacks jurisdiction over the appeal because it was not filed within 10 days of the overruling of the motion for new trial. The motion [*957] was denied. Nebraska Methodist then filed a brief arguing that this court lacks jurisdiction over the cross-appeal and that the cross-appeal was not properly filed.

The Gourleys' brief states on the cover that it is the brief of appellees and cross-appellants. An assignment of error appears on page 2 of the brief. Statements about jurisdiction, scope of review, and propositions of law are covered together for both the brief and any cross-appeal. The brief does not set out a separately designated section of the brief as the brief on cross-appeal. Instead, portions of the purported cross-appeal are scattered throughout the brief.

Neb. Ct. R. of Prac. 9D(4) (rev. 2000) provides:

[HN48] Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the [***72] brief of appellant.

[60] The appellate courts of this state have repeatedly held that [HN49] a cross-appeal must be properly designated under rule 9D(4) if affirmative relief is to be obtained. *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002). See *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

The Gourleys admit that they "did not comply with most of the procedural requirements of [rule] 9D(4)." Reply brief for appellees the Gourleys at 8. They ask that this court exercise discretion and consider [**78] the cross-appeal although rule 9D(4) was not followed. We decline to do so.

VI. CONCLUSION

We reverse that portion of the district court's judgment finding that § 44-2825(1) is unconstitutional and affirm the judgment in all other respects. The district court shall enter judgment for the Gourleys in the amount of \$ 1,250,000.

Affirmed in part, and in part reversed.

Stephan and Miller-Lerman, JJ., not participating.

CONCUR BY: Connolly; Gerrard; Hendry (In Part); McCormack (In Part); Carlson (In Part)

CONCUR

Connolly, J., concurring.

I agree with and join the majority opinion but write separately to address several issues raised [***73] by Justice McCormack's dissent.

[*958] After foraging for facts outside the record, Justice McCormack concludes in his dissent that the reason for the damages cap-availability of malpractice insurance at reasonable rates-no longer exists. The dissenting opinion states that "now, 27 years after enactment of the cap, the information available indicates otherwise." Citing from the Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance (Med. Liab. Monitor 2002), the dissent concludes that the Nebraska Hospital-Medical Liability Act has not served to reduce the cost of medical malpractice insurance. But the dissent fails to provide all the data from the report. It also fails to note that while the cost of insurance has generally risen in all or most states, the overall cost of insurance in Nebraska is significantly less than it is in many states that do not have caps on damages. Thus, the data that the dissent uses can also support the argument that the cap has been effective in keeping the overall rate of insurance lower in Nebraska than in many other states.

Justice McCormack's dissent next refers to physicians' incomes, apparently for the proposition that because physicians [***74] earn substantial incomes, they can afford insurance. This misses the point. The Legislature was concerned when enacting the cap that physicians were leaving the medical practice or moving to states with a better malpractice climate because of the costs of insurance. A second concern was that as insurance prices rose, physicians would pass those costs on to their patients, resulting in more expensive health care. A physician's income is irrelevant to these problems. Physicians, like those in any other profession, seek to maximize income and thus will seek to practice in states where they have less overhead expenses and will pass any increase in overhead expenses on to their patients.

Although I find Justice McCormack's conclusions based on his statistical sources suspect, what is more inappropriate is that they are used at all. As the majority opinion stated, it is not the place of a court to second guess the wisdom of legislative acts, nor is it appropriate for a court to decide whether legislation continues to meet the purposes for which it was originally enacted. See *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001). See, also, *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), [***75] *disapproved on other grounds*, *State v. Palmer*, 224 Neb. 282, [*959] 399 N.W.2d 706 (1986); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). Of further concern is that the sources used in the dissent were not before the Legislature and are not in the record. Instead, if the evidence from the record were considered, the Gourleys presented little credible evidence that the cap was unwise or no longer necessary, while [**79] Knolla and the OB/GYN Group presented much more evidence supporting the cap.

Because the record and the dissent's use of statistics can be used to indicate differing points of view, one is left questioning which view is correct. What is clear is that a decision about the

necessity of a damages cap cannot be decided based on a few incomplete sources. Instead, many differing sources must be considered. See, e.g., H.R. Rep. No. 108-32(I) (House Report from Committee on the Judiciary recommending enactment of damages cap and citing to numerous sources of information both in support of and in opposition to bill). The consideration of statistical sources to determine the wisdom of an act is the concern of the Legislature, not an appellate court. [***76] Were this court to start second guessing legislative enactments, principles of fairness and due process would require us to consider many sources of statistical information and hear from experts in the field. This court does not have the time or resources to engage in such a process, nor should we. That is not a judicial function. It is a legislative function that was carried out by the Legislature when it enacted Neb. Rev. Stat. § 44-2825 (Reissue 1998). The determination whether it is wise to continue the cap is also a legislative function.

This court's function is to neutrally review the constitutionality of legislation. It should not act as a second legislative chamber that can overturn legislation that it disagrees with. Although I am not entirely in agreement with the provisions of § 44-2825, this court is limited to reviewing the constitutionality of the act without engaging in a form of judicial legislation. Despite any personal concerns I have about the act, I conclude that it is constitutional.

Justice McCormack's dissent also suggests that this court's decision in *Prendergast*, 199 Neb. 97 *supra*, is not binding or persuasive authority. In [***77] *Prendergast*, three justices determined that portions of the Nebraska Hospital-Medical Liability Act were constitutional. Neb. Const. art. V, § 2, provides:

[*960] The Supreme Court shall consist of seven judges A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges.

Thus, three is the constitutionally appropriate number of judges necessary to agree that a legislative act is constitutional. Because three justices in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), held that portions of the act are constitutional, *Prendergast* is binding precedent. Also, as the majority opinion notes, we have consistently relied on *Prendergast* for

the position that substantial reasons exist for legislative discrimination concerning malpractice actions. See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

Moreover, a reading of the majority opinion makes clear that although [***78] the majority cited *Prendergast*, it also decided the issue after a thorough analysis regardless of *Prendergast*. Based on the authority cited by the majority, I would determine that the cap on damages in § 44-2825 is constitutional even if *Prendergast* had never been decided.

Next, relying largely on equal protection cases, the dissent would apply to a special legislation analysis a level of scrutiny comparable to the intermediate scrutiny test employed in an equal protection analysis. This is incorrect because, as the majority opinion states, the special legislation test is [**80] not a heightened test. Instead, it is simply a different test from that of equal protection. The rule advocated by the dissent introduces principles of equal protection into a special legislation analysis. Under the dissent's rule, legislation that was subject to a rational basis review under equal protection would always receive heightened scrutiny under a special legislation analysis. The effect would be a back door way of using an equal protection analysis to find legislation that passes muster under equal protection to be unconstitutional. A special legislation analysis has a different focus from [***79] an equal protection analysis and should not be used as a second equal protection clause under which everyone gets heightened scrutiny.

[*961] Gerrard, J., concurring.

In 1976, a precipitous process in the final stage of legislation led to the enactment of the Nebraska Hospital-Medical Liability Act. The act in significant instances unfairly deprives the Gourleys of the full measure of *economic damages* that is the most fundamental element of a meaningful recovery for negligently injured people. In a number of cases, people injured through no fault of their own will be unable to even collect their proven medical expenses. While I reluctantly concur with the per curiam opinion's conclusion that the act does not violate any of the provisions of the Nebraska Constitution that have been raised, briefed, and argued in this case, it would be injudicious to sit idly by and silently concur in a matter of such importance to so many parties. I, therefore, write separately to express my serious concerns about the public policy upon which the act is purportedly based and whether the act adequately protects the substantive due process rights of injured persons.

ECONOMIC AND NONECONOMIC DAMAGES

[***80] The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1998), limits an injured person to a total recovery of \$ 1,250,000 for any single occurrence of medical professional malpractice. See § 44-2825(1). This limitation on total recovery ignores the distinctions to be made between different measures of damages and, as in

the present case, can result in the inability of injured persons to recover even the expenses for their medical care. This unwarranted restriction on economic damages is, in my view, a fundamental flaw.

There are two separate types of compensatory damages, economic and noneconomic. Economic damages include the cost of medical care, past and future, and related benefits, i.e., lost wages, loss of earning capacity, and other such losses. Noneconomic losses include claims for pain and suffering, mental anguish, injury and disfigurement not affecting earning capacity, and losses which cannot be easily expressed in dollars and cents. See *McKissick v. Frye*, 255 Kan. 566, 876 P.2d 1371 (1994). See, also, *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993); Neb. Rev. Stat. § 25-21,185.08 [***81] (Reissue 1995). While both economic and noneconomic damages are intended to compensate plaintiffs [*962] for their injuries, they do so in fundamentally different ways. Money damages are, at best, an imperfect means of compensating plaintiffs for intangible injuries. The effects of economic losses, on the other hand, can be fully ameliorated by the payment of money damages.

In other words, while the legal system cannot undo pain and suffering, it can and should provide that medical expenses be fully paid.

"When liability has been demonstrated, the first priority of the tort system is to [**81] compensate the injured party for the economic loss he has suffered. . . . It is unconscionable to preclude a plaintiff, by an arbitrary ceiling on recovery, from recovering all his economic damages, even though some lowering of medical malpractice premiums may result from the enactment of such a ceiling."

Fein v. Permanente Medical Group, 38 Cal.3d 137, 160 n.17, 695 P.2d 665, 681 n.17, 211 Cal.Rptr. 368, 384 n.17 (1985) (quoting "Rep. of Com. on Medical Professional Liability (1977) 102 ABA Ann.Rep. 786, 849").

Noneconomic damages are generally the largest portion of [***82] a medical liability settlement. Grace Vandecruze, *Has the Tide Begun to Turn for Medical Malpractice?*, 15 No. 2 Health Law. 15 (2002). More significantly, unbridled noneconomic damages have been said to present the primary threat to maintaining reasonable malpractice premiums, because such awards are based on highly subjective perceptions and resist actuarial prediction. See *Matter of Certif. of Questions of Law*, 1996 SD 10, 544 N.W.2d 183 (S.D. 1996). See, also, *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d

102 (1992); *Fein*, 38 Cal.3d 137 *supra*. See, generally, Mark C. Kendall, *Expectations, Imperfect Markets, and Medical Malpractice Insurance*, in *The Economics of Medical Malpractice* 167 (Simon Rottenberg ed., 1978); Judith K. Mann, *Factors Affecting the Supply Price of Malpractice Insurance*, in *The Economics of Medical Malpractice* 155 (Simon Rottenberg ed., 1978).

Recognizing these basic principles, the substantial majority of states that have enacted limitations on medical malpractice damages have limited noneconomic damages, but allowed complete [***83] recovery for economic losses. See, generally, 2 David W. Louisell [*963] and Harold Williams, *Medical Malpractice* P 18.26 (2002); Miles J. Zaremski and Frank D. Heckman, *Reengineering Healthcare Liability Litigation*, ch. 11 (1997 & Cum. Supp. 1999) (compiling state statutory provisions). Similarly, several courts upholding the constitutional validity of such limitations have, in so doing, noted the distinction between economic and noneconomic damages. See, *Franklin*, *supra*; *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Fein*, 38 Cal.3d 137 *supra*; *Edmonds v. Murphy*, 83 Md. App. 133, 573 A.2d 853 (1990), *affirmed* 325 Md. 342, 601 A.2d 102 (1992) (upholding statutes that permitted complete recovery of economic damages). Compare *Matter of Certif. of Questions of Law*, 1996 SD 10 *supra* (striking down cap because of limitation on recovery for economic damages).

LEGISLATIVE PROCESS

The legislative history of the Nebraska Hospital-Medical Liability Act reflects awareness of the need to protect recovery for economic losses, but also reflects a legislative process that short circuited attempts to address that need. [***84] The parameters of what would become the act were first set forth in L.B. 703, 84th Legislature, 2d Session. As originally drafted, L.B. 703 would have capped total recovery, much like the present act, at \$ 500,000. Testimony was heard by the [*964] Public Health and Welfare Committee reflecting the policy concerns set forth above, and it was decided to amend L.B. 703 to address those concerns. As amended by the committee, L.B. 703 would have capped general damages at \$ 500,000, but placed no limitation on special damages. See *Legislative Journal*, 84th Leg., 2d Sess. 796 (Feb. 26, 1976).

However, L.B. 703, as amended, was held up on the floor of the Legislature. Instead, the general provisions of the original version of L.B. 703, prior to the committee [**82] amendment, were amended into a bill that had originally dealt with meat retailers. See *Legislative Journal*, L.B. 434, 84th Leg., 2d Sess. 1240 (Mar. 19, 1976). L.B. 434 was enacted by the Legislature. See 1976 Neb. Laws, L.B. 434. Because of the circuitous process by which the act became law, there is little evidence that the specific decision to cap both economic and noneconomic damages was fully considered by the Legislature. The members [***85] of the Public Health and Welfare Committee were the only senators with the opportunity to hear and examine the witnesses who

testified regarding the act. But the committee's determination to at least allow complete recovery for special damages, based on that testimony, was undone on the floor of the Legislature by parliamentary maneuvering.

EXCESS LIABILITY FUND

Moreover, there is little suggestion that the Legislature fully considered how the different aspects of the act would interact. The primary concern of the Legislature seems to have been the problem of increasing malpractice insurance premiums, and it is evident that the cap on total damages was intended to reduce those premiums. However, an examination of the statutory scheme demonstrates that there is no significant relationship between the cap on total recovery and malpractice insurance premiums, because of the intervening effect of the Excess Liability Fund.

Under the act, a qualified health care provider shall not be liable to any patient for an amount in excess of \$ 200,000 arising from any occurrence. See § 44-2825(2). Instead, subject to the overall limit established by § 44-2825(1), any amount due from a judgment [***86] in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund. See § 44-2825(3). Health care providers are required to maintain professional liability insurance in the amount of \$ 200,000 per occurrence. See § 44-2827. See, generally, *Brewington v. Rickard*, 235 Neb. 843, 457 N.W.2d 814 (1990).

To compensate for judgments above \$ 200,000 per qualified health care provider, but below the cap on total recovery, the act creates the Excess Liability Fund (hereinafter the Fund), which is supported by a surcharge levied on all qualified health care providers. See § 44-2829. The amount of the surcharge is established by the Director of Insurance and is intended to maintain a reserve in the Fund "sufficient [*965] to pay all anticipated claims for the next year and to maintain an adequate reserve for future claims." See § 44-2830. However, the surcharge is not to exceed 50 percent of the annual premium paid by health care providers for their required malpractice insurance, except that a special surcharge may be levied if the amount in the Fund is inadequate to pay all claims for a calendar year. See §§ 44-2829(2)(a) and 44-2831(1). [***87] The director may also obtain reinsurance for the Fund. See § 44-2831(2).

The effect of this scheme is to attenuate, if not almost completely sever, the relationship between the cap on total recovery and malpractice insurance premiums. Malpractice insurance premiums are established based on actuarial principles which generally evaluate, inter alia, the risk of liability and the predicted value of successful claims. See, generally, Judith K. Mann, *Factors Affecting the Supply Price of Malpractice Insurance*, in *The Economics of Medical Malpractice* 155 (Simon Rottenberg ed., 1978). Because of the Fund, however, the exposure of malpractice insurance carriers is limited to \$ 200,000 arising out of any single occurrence for any single care

provider. It is that figure, and not the cap on total liability, [**83] which must provide the primary basis for actuarial determinations of malpractice insurance premiums.

The cap on total recovery, then, has some, but minimal, bearing on the market cost of medical malpractice insurance. The cap on total recovery does not serve to limit the liability of malpractice insurers; instead, it limits the liability of the Fund. Unfortunately, the Legislature, [***88] in enacting the act, does not seem to have reflected on whether each of the specific provisions of the act were necessary or warranted in light of the remaining provisions. When considering the public policy rationale for the cap on total liability-and, more particularly, the cap on economic damages-the question is, To what extent can a limitation on recovery for proven economic losses be justified by a need to limit the potential liability of the Fund?

SUBSTANTIVE DUE PROCESS

In my view, this question, when placed in its proper constitutional framework, implicates the constitutional right to substantive due process of law. There is a substantial overlap between the tests applied under due process and equal protection analysis. See, generally, *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989). The distinction is that equal protection and special legislation analyses are focused on the classes created by a statute and whether there is justification for making such classifications and treating those classes differently. See, e.g., *Bergan* [*966] *Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). Due process, on the other hand, questions [***89] the justification for abrogating a particular legal right, and the appropriate scrutiny is determined by the importance of the right that is at issue. See, generally, *Condemarin*, 775 P.2d 348 *supra*. Thus, while the act does not create suspect classifications, and there may be some rational basis for treating health care tort-feasors differently from other tort-feasors, whether economic damages may be taken from negligently injured persons is a separate issue and calls for a different constitutional analysis. Because my concerns regard the nature of the basic right that has been taken-the right to recover for proven economic damages-those concerns are properly addressed by a due process analysis.

However, as the per curiam opinion correctly determines, the issue of substantive due process has not been brought before this court, and we are precluded from deciding, on the record and briefing before us, whether the act comports with that constitutional mandate. Nonetheless, my judicial responsibilities compel me to express my serious reservations regarding the act's satisfaction of constitutional due process, for the benefit of other litigants, the members of the Legislature, and [***90] their constituents, the public.

The Nebraska Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law" Neb. Const. art. I, § 3. The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Marshall v. Wimes*, 261 Neb.

846, 626 N.W.2d 229 (2001). The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government. *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947). The Legislature may not, under the guise of regulation, set forth conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. *State ex rel. Dep't of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994).

Generally, classifications appearing in social or economic legislation require only a rational relationship between the state's legitimate interest and the means selected [**84] to accomplish that end. The ends-means fit need not be perfect; it need only be rational. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997). [*967] Accord *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). [***91] But measures adopted by the Legislature to protect the public health and secure the public safety and welfare must still have some reasonable relation to those proposed ends. See, *Jeffrey*, 247 Neb. 100 *supra*; *Louis Finocchiaro, Inc. v. Nebraska Liquor Control Com.*, 217 Neb. 487, 351 N.W.2d 701 (1984). See, also, *Rein*, 149 Neb. 67 *supra*. There must be some clear and real connection between the assumed purpose of the law and its actual provisions. *Finocchiaro, Inc.*, 217 Neb. 487 *supra*.

When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest. *Champoux*, 252 Neb. 769 *supra*. However, this begs the question whether the right to recover for economic losses is important enough to merit heightened scrutiny under the Nebraska Constitution. Although this court, because of the limitation on the issues presented, has no occasion in this case to determine the appropriate level of scrutiny to be applied in a due process analysis of a cap on economic damages, it is worth noting that several courts have concluded the right to [***92] recover damages for personal injury is essential, and caps on damages are subject to heightened judicial scrutiny in making constitutional determinations. See, e.g., [*968] *Matter of Certif. of Questions of Law*, 1996 SD 10, 544 N.W.2d 183 (S.D. 1996); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976). As explained by the Supreme Court of South Dakota:

Medical bills, lost wages, and prescription costs are tangible damages, whereas pain and suffering and like damages are largely intangible. Unbridled noneconomic damage awards present a real threat to maintaining reasonable malpractice insurance premiums, because such awards are unpredictable and based on highly subjective perceptions. . . . In truth, however, the . . . flat cap on total damages potentially cuts not only fat, but muscle, bone and marrow. If a malpractice patient's hospital bill, for example, exceeds the cap, then the patient can recover nothing for the remaining [***93] medical bills, future bills, past and future income lost, prescriptions, etc.

Matter of Certif. of Questions of Law, 544 N.W.2d at 200. The right to such recovery "is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life." *Condemarin*, 775 P.2d at 360, quoting *Hunter v. North Mason School Dist.*, 85 Wn. 2d 810, 539 P.2d 845 (1975).

The facts of the instant case demonstrate the callous effect of denying recovery for economic damages. The record shows that Colin suffered severe brain damage and will, for the rest of his life, be afflicted by cerebral palsy and extensive physical, cognitive, and behavioral deficiencies. The economic evidence presented by the Gourleys sets forth the expenses likely to be incurred over the course of Colin's life because of his disabilities, including medications, care, and medical treatment and equipment. The Gourleys' expert testified, without contradiction, that the expenses for Colin's care will total \$ 12,461,500.22 over the course of his life. This figure has a present value [***94] of \$ 5,943,111, of which the jury awarded \$ 5 million. In short, it is undisputed that the [**85] Gourleys will recover, because of § 44-2825(1), less than one-fourth of Colin's medical expenses alone.

This effect on the quality of life of an injured child, incurred because of a statutory limitation on the right to collect economic damages, must be balanced against the act's only direct effect: the maintenance of the Fund. The evidence in this case does not indicate that the Fund requires financial protection. In fact, the evidence is far to the contrary. In 1998, the surcharge for qualified health care providers was 5 percent. The balance in the Fund at the end of 1998 was \$ 62,625,074, and the estimated liabilities of (i.e., potential claims against) the Fund at that time were \$ 24,014,000. Between 1990 and 1998, the amount of total claims paid in any given year ranged from a low of \$ 1,795,069 in 1990 to a high of \$ 4,197,308 in 1991. In 1998, the Fund *earned* over three times more than it paid out in claims, even disregarding the additional funds obtained through the surcharge (which, it should be noted, was only one-tenth of the surcharge permitted under the act).

Given the stark [***95] comparison between the assets of the Fund and the potential poverty that can result from forcing negligently injured persons to find their own means of paying for catastrophic [*969] medical expenses, it may ultimately be determined that the act, in capping recovery for economic damages, is unconstitutional as applied to plaintiffs whose proven economic damages exceed the cap. This would not render the act completely inoperative, but would preclude application of the cap where it would prevent a complete recovery of economic damages. See, generally, *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091 (D. Neb. 1998), *affirmed*

192 F.3d 1176 (8th Cir. 1999); *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504, 38 Tex. Sup. Ct. J. 235 (Tex. 1995); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994) (distinguishing between facial challenge to statute, which asserts statute unconstitutional under all circumstances, and as-applied challenge, which asserts statute operates unconstitutionally because of party's unique circumstances).

I recognize the general principle that the wisdom and utility of legislation is a matter for the Legislature, [***96] and not the courts, and that judges should not substitute their social and economic beliefs for the judgment of legislative bodies. See, *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976); *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972). See, also, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *Okla. Ed. Ass'n v. Alcoholic Bev. Laws Enf. Com'n*, 889 F.2d 929 (10th Cir. 1989). However, the discretion of the Legislature is circumscribed, as always, by the Nebraska Constitution, particularly where the abrogation of fundamental rights is concerned. The effect of the act on a substantial right-recovery of economic damages-is especially troubling, and potentially unreasonable, when balanced against the negligible effect that such recovery would have on the Fund.

The parties in this case have not presented the question whether the act, as applied, violates substantive due process, and I agree with the per curiam opinion's determination that we should not overthrow a legislative enactment on the basis of authority not raised and argued by the [***97] parties. The per curiam opinion expressly reserves ruling on such issues, which means that some of the most important questions about the act remain, for the time being, unanswered. This does not, however, prevent the Legislature from considering whether the act, in its current form, is fair, wise, or necessary, nor should [**86] it preclude legislative [*970] changes to protect both the constitutional validity of the act and the well-being of the citizens of Nebraska.

CONCLUSION

As previously stated, I concur, albeit grudgingly, in the per curiam opinion's conclusions regarding the constitutional challenges to the act. I join in the opinion of the court regarding the other issues presented. I remain deeply troubled by the public policy choices reflected in the act, particularly the denial of economic recovery to negligently injured persons. It is pointedly unfair, and may well prove unconstitutional, for the law of this state to safeguard a surplus of tens of millions of dollars in the Excess Liability Fund by denying negligently injured persons money for needed medical care and potentially condemning them to undue poverty. But, because this case does not afford us the opportunity to decide that [***98] constitutional question, I reluctantly concur in the judgment of the court.

Hendry, C.J., joins in this concurrence.

DISSENT BY: Hendry (In Part); McCormack (In Part); Carlson (In Part)

DISSENT

Hendry, C.J., concurring in part, and in part dissenting.

I concur with Justice Gerrard insofar as he suggests that the cap on damages imposed by Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) may violate substantive due process rights of injured persons. I write separately, however, to state that for reasons similar to those expressed in my dissent in *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000) (Hendry, C.J., dissenting), I believe the Gourleys lack standing to challenge the Nebraska Hospital-Medical Liability Act as unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

In assessing a special legislation claim, we must first determine the privilege created by the statute and the particular class which is singled out to receive the privilege. *Haven*, 260 Neb. 846 *supra*. See, also, *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963). [***99] In my view, the privilege created by § 44-2825(1) is the cap on the total amount recoverable "from any and all health care providers . . . for any occurrence resulting in injury or death of a patient." The particular class singled out by the Legislature to receive the privilege is composed of "health care providers," which class is [*971] limited to physicians, nurse anesthetists, qualifying professional entities, and hospitals. Neb. Rev. Stat. § 44-2803 (Reissue 1998).

Next, we must determine the persons within the general class which is made the subject of the legislation who stand in the same relation to the privilege as the particular class that receives the privilege. *Haven*, 260 Neb. 846 *supra*. See, also, *Swanson*, *supra*; *Stanton*, 175 Neb. 767 *supra*. Further, we must then determine whether the statute violates Neb. Const. art. III, § 18, either because the particular class which receives the privilege is a permanently closed class, or because the particular class has no reasonable distinction or substantial difference from the general class. *Haven*, 260 Neb. 846 *supra*. See, also, *Swanson*, *supra*; *Stanton*, 175 Neb. 767 *supra*. [***100]

I believe that the general class of persons standing in the same relation to the privilege would be all other health care professionals who are not "health care providers" as defined by the act, but who nonetheless may be liable "for bodily injury or death on account of alleged malpractice, professional negligence, failure to provide care, breach of contract, or other claim based upon

failure to obtain informed [**87] consent for an operation or treatment." Neb. Rev. Stat. § 44-2822 (Reissue 1998). Such individuals could include, for example, optometrists (see Neb. Rev. Stat. § 71-1,135.06 (Cum. Supp. 2002)); dentists (see, generally, *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996), *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989), and *Pfeifer v. Konat*, 181 Neb. 30, 146 N.W.2d 743 (1966)); and chiropractors (see, generally, *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987)).

I therefore conclude that the only persons who would have standing to assert that § 44-2825(1) is unconstitutional [***101] special legislation are such members of the general class who do not benefit from the privilege of the cap on damages pursuant to § 44-2825(1). *Haven*, 260 Neb. 846 *supra*. See, also, *Swanson*, *supra*; *Stanton*, 175 Neb. 767 *supra*. Because in my view the Gourleys lack standing, I reserve judgment as to whether § 44-2825(1) violates Neb. Const. art. III, § 18, until the proper party, together with an adequate and proper record, is before the court.

Recognizing that courts are concerned only with the power of the legislative branch to enact statutes, and not a legislature's [*972] wisdom, with the exception of its analysis regarding special legislation, I concur with the per curiam opinion. See, *U.S.D. No. 229 v. State*, 256 Kan. 232, 238, 885 P.2d 1170, 1175 (1994) (stating that "'the function of the court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution-and not to approve or condemn the underlying policy,'" quoting *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 789 P.2d 541 (1990)); *Fagas v. Scott*, 251 N.J. Super. 169, 211, 597 A.2d 571, 593 (1991) [***102] (stating that "'judicial branch of the government does not and cannot concern itself with the wisdom or policy of a statute [and that s]uch matters are the exclusive concern of the legislative branch, and the doctrine is firmly settled that its enactment may not be stricken because a court thinks it unwise,'" quoting *N. J. Sports & Exposition Authority v. Mc Crane*, 61 N.J. 1, 292 A.2d 545 (1972)).

McCormack, J., concurring in part, and in part dissenting.

I agree with those portions of this court's per curiam opinion discussing the jury verdict, the life care plan, "What to Expect When You're Expecting," and the Gourleys' attempted cross-appeal. However, I respectfully dissent from the per curiam opinion's analysis of the constitutionality of Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) (the cap). I would find that the cap is special legislation in violation of Neb. Const. art. III, § 18.

PRENDERGAST V. NELSON

As recognized by the per curiam opinion, this court previously addressed the constitutionality of various provisions of the Nebraska Hospital-Medical Liability Act in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). [***103] I respectfully suggest that *Prendergast* is persuasive authority for next to nothing.

In *Prendergast*, a declaratory judgment action was brought by three health care providers against the director of the Nebraska Department of Insurance after the director refused to implement the provisions of the act. A three-judge plurality of this court upheld the constitutionality of numerous provisions of the act. Specifically, the plurality found that the cap was not an unconstitutional special privilege. *Prendergast v. Nelson*, 199 Neb. 97 *supra*. The plurality found it important that while a claimant who has not elected [*973] out of the act's [**88] provisions may be limited in the amount of recovery, the claimant is guaranteed the existence of a fund from which to recover and is also guaranteed a procedure to provide an assessment of his or her claim. *Prendergast v. Nelson*, 199 Neb. 97 *supra*. The ability to elect out of the act's provisions and the tradeoff of the amount of recovery for the assessment and certainty of recovery persuaded the plurality that the cap did not offend any constitutional prohibition on the passage of special legislation.

The plurality opinion authored by Justice [***104] Spencer is one of six opinions filed in the case and is the *only* opinion in which any member of the court found that the cap is constitutional. A review of several of the remaining opinions discloses the dubious procedural posture upon which the plurality made its findings.

Justice Clinton concurred with the plurality with respect to "the only justiciable issue before the court," i.e., whether the act granted the credit of the state in aid of an individual, association, or corporation under Neb. Const. art. XIII, § 3. *Prendergast v. Nelson*, 199 Neb. at 125, 256 N.W.2d at 674 (Clinton, J., concurring in part, and in part dissenting). As to the remaining issues, Justice Clinton admonished:

Today this court, to the best of my knowledge, for the first time in its history renders what is, for the most part, an advisory opinion. In this respect it lamentably disregards its constitutional functions as a court. This course, if followed in the future, has ominous implications for the future political welfare of this state.

Id. at 122, 256 N.W.2d at 672.

In addition to the suspect procedural posture of the case, *Prendergast* also resulted [***105] in a severely fractured court. While Justice Clinton declined to reach any constitutional issues not properly raised, Justice White found that the cap was unconstitutional special legislation. *Id.* (White, J., dissenting in part). Justice McCown concurred with Justice White's opinion that the cap was unconstitutional special legislation. *Id.* (McCown, J., dissenting in part). Finally, Justice Boslaugh found that the election provision of the act-the saving grace of the cap according to the plurality-was "unrealistic and illusory." *Prendergast v. Nelson*, 199 Neb. 97, 133, 256 N.W.2d 657, 677 (1977) (Boslaugh, J., dissenting in part).

[*974] The fractures and procedural defects in *Prendergast* noted above have not gone unnoticed by other states. The North Dakota Supreme Court has noted that *Prendergast*

is made less persuasive by the fact that the majority opinion is joined by only three of seven judges, with three others dissenting as to the constitutionality of a \$ 500,000 limitation on recovery, and one judge declining to reach constitutional questions, since he questions the standing of some of the parties and concludes that the opinion is only advisory. [***106]

Arneson v. Olson, 270 N.W.2d 125, 131 (N.D. 1978). See, also, *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988); *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368 (1985) (Bird, C.J., dissenting).

A court has the power neither to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before it. *Preiser v. Newkirk*, 422 U.S. 395, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975). The director of the Department of Insurance admittedly represented no person in *Prendergast* who was limited in the amount he or she could recover against a health care provider or whose constitutional rights were otherwise affected by the provisions of the act. *Prendergast v. Nelson*, 199 Neb. 97 *supra* [**89] (Clinton, J., concurring in part, and in part dissenting). Despite the lack of a concrete adversarial claim, a plurality of the court ventured forth to address whether the cap, evidently as applied to some hypothetical claimant, was constitutional. The present case suffers from no such defect. For the first time, the constitutionality of the cap has been presented to this [***107] court by parties with their own rights at stake. The Gourleys were awarded damages against Knolla and the OB/GYN Group in an amount exceeding the cap and now seek a determination that the cap is unconstitutional so that they may recover the full amount of their damages. The rights of the Gourleys and of Knolla and the OB/GYN Group are squarely at issue in this case.

The doctrine of stare decisis would typically require us to abide by the *Prendergast* decision and uphold the constitutionality of the cap, see *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996), ""unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so,"" [*975] (emphasis in original) *State v. Reeves*, 258 Neb. 511, 527-28, 604 N.W.2d 151, 163 (2000). The U.S. Supreme Court describes stare decisis as a principle of policy rather than an inexorable command. *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998). Where a fractured decision of this court rests upon tenuous procedural grounds, and where the current case presents [***108] clear adversaries serving to sharply focus the constitutional issues, I believe it would be a disservice to the parties to pronounce a decision based upon a case as ill-advised as *Prendergast*. Thus, I visit the issue anew.

SPECIAL LEGISLATION Neb. Const. art. III, § 18, provides:

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

....

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . .
 . In all other cases where a general law can be made applicable, no special law shall be enacted.

By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). A legislative act that applies only to particular individuals or things of a class is special legislation. *Id.* General laws embrace the whole of a subject, with their subject matter of common [***109] interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. *Id.* It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted. *Id.*

A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently

[*976] closed class. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). My focus is solely on whether the cap creates an arbitrary and unreasonable method of classification.

[**90] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Id.* Classifications for the purpose of legislation [***110] must be real and not illusive; they cannot be based on distinctions without a substantial difference. *Id.* When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. *Id.*

In *Haman v. Marsh*, 237 Neb. at 713, 467 N.W.2d at 846-47, we had the opportunity to describe this test in greater detail:

The narrower special legislation prohibition supplements the equal protection theory. . . . The test of validity under the special legislation prohibition is more stringent than the traditional rational basis test. Classifications must be based on some *substantial* difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

(Citation omitted.) (Emphasis in original.)

The above-quoted portion of *Haman* was necessary to resolve some confusion about the exact nature of the test and its [***111] relationship to the test applied in an equal protection case. The tests applied in an equal protection case are well known. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999). The party challenging a statute's constitutionality has the burden to show that the statute has no rational basis. See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). Upon a showing that such a rational relationship [*977] exists, courts will uphold the legislation. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782 *supra*. The intermediate scrutiny test requires that a party seeking to uphold a statute that

classifies individuals must show that the classification serves important governmental objectives and that the discriminatory means employed are *substantially* related to achievement of those objectives. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). [***112] See, also, *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). Finally, if a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict congruence must exist between the classification and the statute's purpose. The end the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782 *supra*.

In *Haman v. Marsh*, 237 Neb. 699, 713, 467 N.W.2d 836, 846 (1991), we described special legislation as being a "narrower" test than equal protection. We further explained that "the test of validity under the special legislation prohibition is *more stringent* than the traditional rational basis test." (Emphasis supplied.) *Id.* at 713, 467 N.W.2d at 846-47. See, also, *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). The level of scrutiny required by the above-mentioned test is [**91] "more stringent" because of the requirement that classifications be based upon [***113] some "*substantial*" difference of situation or circumstances. (Emphasis in original.) *Haman v. Marsh*, 237 Neb. at 713, 467 N.W.2d at 847. See, also, *City of Ralston v. Balka*, *supra*; *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (emphasizing that classifications must be based upon some *substantial* difference of situation or circumstances); *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980).

Because the test of validity under the special legislation prohibition is more stringent than the traditional rational basis test, I would apply a level of scrutiny comparable to the intermediate scrutiny test. It is well known that the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. See *Schindler v. Department of Motor Vehicles*, 256 Neb. 782 *supra*. [*978] That has proved to be the case in other states that have analyzed caps. Those states that have subjected caps to the minimal rational basis test have, as one might expect, found their caps to be constitutional. See, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); [***114] *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368 (1985); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Lelifeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991); *Matter of Certif. of Questions of Law*, 1996 SD 10, 544 N.W.2d 183 (S.D. 1996); *Etheridge v. Medical*

Center Hospitals, 237 Va. 87, 376 S.E.2d 525, 5 Va. Law Rep. 1438 (1989); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000). However, caps have generally [***115] been unable to survive a more stringent level of scrutiny. See, *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989). But see *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976).

In analyzing a special legislation claim, we must determine (1) the privilege created by the statute, (2) the particular class which is singled out to receive the privilege, (3) the persons within the general class that is made the subject of the legislation who stand in the same relation to the privilege as the particular class, and (4) whether a substantial difference exists between the particular class and the general class. See *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000) (Hendry, C.J., dissenting).

The cap grants a privilege to all health care providers whose negligence causes catastrophic damages, i.e., damages in excess of \$ 1,250,000, because they are liable for less than 100 percent [*979] of the damages [***116] they cause. The general class standing in the same relation to these health care providers is all other professional service providers who commit malpractice and cause catastrophic damages and who are liable for 100 percent of the damages they cause. Is there a substantial difference between these two classes? I do not believe that there is. Each class provides services to the public. Each class is subject to actions brought by the public for [**92] malpractice committed in the course of providing those services to the public. Each class is financially burdened by those actions which prove to be successful. Each class may impose the costs of those successful actions on the public at large. Yet the Legislature has chosen to provide a benefit to one subset of the general class by exempting those health care providers whose negligence causes damages in excess of \$ 1,250,000 from full liability for their negligent actions. Thus, I conclude that the cap is unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

As Justice Gerrard discusses in greater detail, I am equally concerned by the fact that the cap applies to *all* damages, whether economic or noneconomic. Several [***117] states have struck down statutes that impose a cap on all damages. *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *Arneson v. Olson*, 270 N.W.2d 125 *supra*; *State ex rel. OATL v. Sheward*, 86 Ohio St. 3d 451, 1999 Ohio 123, 715 N.E.2d 1062 (1999); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988). The majority of states with caps in effect today limit only the noneconomic damages a person may recover and do not limit recovery for economic damages. See Mark D. Clore, *Medical Malpractice Death Actions: Understanding Caps, Stowers, and*

Credits, 41 S. Tex. L. Rev. 467, appendix A (2000). As the per curiam opinion notes, evidence offered at trial indicates that the Gourleys' economic damages, reduced to present value, is a minimum of \$ 5,943,111. The jury failed to award even this amount, instead awarding \$ 5 million in economic damages and \$ 625,000 in noneconomic damages. However, by applying the cap and slashing the Gourleys' award to \$ 1,250,000, the Gourleys receive an award which will cover only a fraction of their expenses over the course of Colin's lifetime and, in effect, receive nothing for their pain and [***118] suffering. See *Arneson v. Olson*, 270 N.W.2d 125 (N.D. [*980] 1978). If Nebraska followed the majority of states with caps that limited only noneconomic damages, the Gourleys would have been able to recover a large percentage of the expenses they will be burdened with for the rest of Colin's life. Had a valid challenge to the cap been preserved on substantive due process grounds, I would find that the cap violates that constitutional mandate as well for the reasons expressed by Justice Gerrard in his concurring opinion.

One of the stated purposes of the Nebraska Hospital-Medical Liability Act is to "ensure the availability of malpractice insurance coverage at reasonable rates." Neb. Rev. Stat. § 44-2801(2) (Reissue 1998). As the per curiam opinion states, "the proponents of the act expressed concern that an insurance crisis existed, but admitted that it was likely impossible to know if a cap on damages would solve the problem. Based on the information before it, the Legislature generally believed that a damages cap would solve the problem" Now, 27 years after enactment of the cap, the information available indicates otherwise.

The following [***119] is a comparison of the base rates for physicians' liability insurance available in several states from various insurance companies for three different specialties: internal medicine, general surgery, and obstetrics-gynecology (OB/GYN). The data was obtained from Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance (Med. Liab. Monitor 2002) (see, generally, <http://www.medicaliabilitymonitor.com>).

[**93]

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
NEBRASKA			
Midwest Medical Insurance Co.:			
Internal Medicine	\$ 3,183	\$ 3,469	9.0 %

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
General Surgery	11,301	12,318	9.0
OB/GYN	17,297	18,854	9.0
PIC Wisconsin:			
Internal Medicine	\$ 2,256	\$ 2,786	23.4 %
General Surgery	7,114	9,474	33.1
OB/GYN	12,288	16,718	36.0
CALIFORNIA			
Cooperative of American			
Physicians:			
	\$ 7,701		
Internal Medicine	(So. Calif.)	\$ 9,070	17.6 %
	7,340		
Internal Medicine	(San Diego)	8,630	17.6
	6,590		
Internal Medicine	(No. Calif.)	7,750	17.6
	24,740		
General Surgery	(So. Calif.)	25,330	2.4
	23,520		
General Surgery	(San Diego)	24,080	2.4
	21,070		

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
General Surgery	(No. Calif.)	21,570	2.4
	42,330		
OB/GYN	(So. Calif.)	43,350	2.4
	40,230		
OB/GYN	(San Diego)	41,230	2.4
	36,020		
OB/GYN	(No. Calif.)	36,890	2.4
Northwest Psysicians Mutual			
Insurance Co.:			
	\$ 9,204		
Internal Medicine	(Los Angeles)	\$ 9,810	6.6 %
	7,592		
Internal Medicine	(San Diego)	8,092	6.6
	6,240		
	(No. Calif. &		
Internal Medicine	rest of state)	6,650	6.6
	25,808		
General Surgery	(Los Angeles)	30,704	15.3
	20,879		
General Surgery	(San Diego)	24,073	15.3

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
	17,783		
	(No. Calif. &		
General Surgery	rest of state)	20,448	15.0
	46,938		
OB/GYN	(Los Angeles)	56,406	20.1
	38,721		
OB/GYN	(San Diego)	43,776	13.1
	33,226		
	(No. Calif. &		
OB/GYN	rest of state)	37,238	12.1
COLORADO			
COPIC Insurance Co.:			
Internal Medicine	\$ 9,324	\$ 9,845	5.6 %
General Surgery	32,804	34,644	5.6
OB/GYN	29,265	30,905	5.6
Doctor's Co.:			
Internal Medicine	\$ 8,482	\$ 8,876	14.8 %
General Surgery	29,905	32,657	14.8
OB/GYN	38,578	39,494	14.8
FLORIDA			

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
First Professional Insurance			
Co.:			
	\$ 38,378		
Internal Medicine	(Dade Cty.)	56,143	46.3 %
	19,681		
	(rest of		
Internal Medicine	state)	28,796	46.3
	124,046		
General Surgery	(Dade Cty.)	174,268	40.5
	63,614		
	(rest of		
General Surgery	state)	89,368	40.5
	166,368		
OB/GYN	(Dade Cty.)	201,376	21.0
	85,317		
	(rest of		
OB/GYN	state)	103,270	21.0
Medical Assurance Co.:			
	\$ 17,611		
	(Dade, Broward		

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
Internal Medicine	Ctys.)	\$ 26,794	52.1 %
	10,232		
	(rest of		
Internal Medicine	states)	15,460	51.1
	63,189		
	(Dade, Broward		
General Surgery	Ctys.)	95,474	51.1
	36,277		
	(rest of		
General Surgery	state)	54,677	50.7
	108,043		
	(Dade, Broward		
OB/GYN	Ctys.)	136,231	26.1
	61,908		
	(rest of		
OB/GYN	state)	77,949	25.9
American Physicians Assurance			
Corp.:			
	\$ 30,272		
Internal Medicine	(Dade Cty.)	\$ 49,494	63.5 %

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
	15,136		
	(rest of		
Internal Medicine	state)	23,757	57.0
	75,164		
General Surgery	(Dade Cty.)	117,201	55.9
	37,582		
	(rest of		
General Surgery	state)	56,256	49.7
	156,166		
OB/GYN	(Dade Cty.)	210,576	32.3
	79,583		
	(rest of		
OB/GYN	state)	101,076	27.0
IDAHO			
Doctor's Co.:			
Internal Medicine		\$ 7,389	17.9 %
General Surgery		27,546	17.9
OB/GYN		32,262	17.9
Medical Insurance Exchange of			
California:			

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
Internal Medicine	\$ 4,320	\$ 4,320	0.0 %
General Surgery	15,544	15,544	0.0
OB/GYN	25,904	25,904	0.0
IOWA			
American Physicians Assurance			
Corp.:			
Internal Medicine	\$ 4,374	\$ 4,374	0.0 %
General Surgery	14,386	14,386	0.0
OB/GYN	27,839	27,839	0.0
Doctor's Co.:			
Internal Medicine		\$ 9,169	29.1 %
General Surgery		30,441	29.1
OB/GYN		39,852	29.1
Midwest Medical Insurance Co.:			
Internal Medicine	\$ 5,412	\$ 6,168	14.0 %
General Surgery	16,352	18,607	14.0
OB/GYN	33,237	37,883	14.0
KANSAS			
Kansas Medical Mutual			
Insurance Co.:			

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
Internal Medicine	\$ 5,234	\$ 6,082	16.2 %
General Surgery	21,343	24,801	16.2
OB/GYN	33,082	38,441	16.2
Medical Asurance Co.:			
Internal Medecine	\$ 3,522	\$ 3,522	0.0 %
General Surgery	14,090	14,090	0.0
OB/GYN	21,839	21,839	0.0
NORTH DAKOTA			
Doctor's Co.:			
Internal Medicine		\$ 6,712	0.8 %
General Surgery		18,006	0.8
OB/GYN		25,071	0.8
Midwest Medical Insurance Co.:			
Internal Medicine	\$ 4,719	\$ 5,427	15.0 %
General Surgery	12,583	14,470	15.0
OB/GYN	21,628	24,872	15.0
SOUTH DAKOTA			
Doctor's Co.:			
Internal Medicine		\$ 5,395	19.7 %
General Surgery		19,958	19.7

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
OB/GYN		23,950	19.7
Midwestern Medical Insurance Co.:			
Internal Medicine	\$ 2,527	\$ 2,906	15.0 %
General Surgery	6,737	7,748	15.0
OB/GYN	11,580	13,317	15.0

[***120] [*984] [**95] The statistics cited above indicate a general upward trend in malpractice rates in Iowa and North Dakota-states that do not cap damages in medical malpractice actions. Belying the story line advanced by cap proponents, however, the same general upward trend is exhibited in states *with* caps, such as Nebraska, California, Colorado, Florida, Idaho, Kansas, and South Dakota. It appears that at least one of the intended goals of caps, to ensure reasonable malpractice rates, remains unmet-unfortunate news to the catastrophically injured such as Colin and his family, who can recover only approximately 20 percent of their medical costs so that some medical providers can enjoy what they consider to be reasonable rates. And while the absolute amount for malpractice insurance may, in some states, be burdensome, the data available suggests that insurance rates are not so "practically prohibitive," as we stated in *Taylor v. Karrer*, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976), *disapproved on other grounds*, *Jorgensen v. State Nat. Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1998), relative to physicians' incomes, as seen from the following data compiled [***121] by the American Medical Association:

GENERAL PRACTICE:		
	MEAN	MEDIAN
Gross Revenue	\$ 457,800	\$ 369,000
Professional Expenses	263,000	184,000
Professional Liability	10,900	7,000

Income After All Expenses		
Including Malpractice Premiums	142,500	130,000
GENERAL INTERNAL MEDICINE:		
	MEAN	MEDIAN
Gross Revenue	\$ 419,400	\$ 357,000
Professional Expenses	225,900	160,000
Professional Liability	10,800	6,000
Income After All Expenses		
Including Malpractice Premiums	157,900	140,000
INTERNAL MEDICINE- CARDIOLOGY:		
	MEAN	MEDIAN
Gross Revenue	\$ 689,200	\$ 676,000
Professional Expenses	381,700	313,000
Professional Liability	27,1000	12,000
Income After All Expenses		
Including Malpractice Premiums	294,600	215,000
SURGERY-GENERAL:		
	MEAN	MEDIAN
Gross Revenue	\$ 454,100	\$ 359,000
Professional Expenses	201,700	131,000
Professional Liability	24,900	23,000
Income After All Expenses		

Including Malpractice Premiums	246,800	215,000
SURGERY-ORTHOPEDIC:		
	MEAN	MEDIAN
Gross Revenue	\$ 748,500	\$ 668,000
Professional Expenses	417,100	324,000
Professional Expenses	34,200	28,000
Income After All Expenses		
Including Malpractice Premiums	312,500	28,000
OB/GYN:		
	MEAN	MEDIAN
Gross Revenue	\$ 627,000	\$ 515,000
Professional Expenses	375,900	272,000
Professional Liability	35,800	33,000
Income After All Expenses		
Including Malpractice Premiums	214,400	200,000

[***122] [*985] [**96] Physician Socioeconomic Statistics 2000-2002 (John D. Wassenaar and Sara L. Thran, eds., Am. Med. Assn. 2001). While the income figures cited above are based on a nationwide sample of physicians, the study noted that "geographic differences in income are less pronounced than for other" categories tabulated. James W. Moser, *Physician Income Trends*, in Physician Socioeconomic Statistics 2000-2002, *supra*.

I respectfully dissent from the per curiam opinion's conclusion that the cap is constitutional.

[**97] Carlson, Judge, concurring in part, and in part dissenting.

I join in Justice McCormack's concurrence and dissent. I also agree with Justice Gerrard's concurrence in regard to his substantive due process analysis.

Liebeck v. McDonald's Restaurants

Westlaw

Not Reported in P.2d, 1995 WL 360309 (N.M. Dist.)
(Cite as: 1995 WL 360309 (N.M. Dist.))



Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

District Court of New Mexico, Second Judicial Dis-
trict, Bernalillo County.

Stella LIEBECK, Plaintiff,

v.

MCDONALD'S RESTAURANTS, P.T.S., INC.
and McDonald's International, Inc., Defendants.

CV-93-02419.

Aug. 18, 1994.

Kenneth R. Wagner & Associates, P.A. by Kenneth
R. Wagner, Albuquerque, for plaintiff.

Rodey, Dickason, Sloan, Akin & Robb, P.A. by
Tracy McGee, Albuquerque, for defendants.

JUDGMENT

ROBERT H. SCOTT, District Judge.

*1 THIS MATTER came on for trial before the
Court and a twelve (12) person jury on August 8, 9,
10, 11, 12, 15, 16 and 17, 1994. Defendant P.T.S.,
Inc. was dismissed with prejudice by stipulation of
the parties entered into during trial. The issues hav-
ing been duly tried and a jury having rendered its
verdict against the sole remaining defendant Mc-
Donald's Corporation as follows:

1. On Plaintiff's claim for product defect, for
Plaintiff:

2. On Plaintiff's claim for breach of the implied
warranty of merchantability, for Plaintiff:

3. On Plaintiff's claim for breach of the implied
warranty of fitness for particular purpose, for
Plaintiff:

4. On Plaintiff's claim that Plaintiff was com-

paratively at fault, Plaintiff was determined to be
twenty percent (20%) at fault;

5. On Plaintiff's claim for compensatory dam-
ages, Plaintiff is entitled to \$200,000.00 to be re-
duced by \$40,000.00, representing her twenty per-
cent (20%) comparative negligence, for a net judg-
ment of \$160,000.00;

6. On Plaintiff's claim for punitive damages,
punitive damages are awarded in the sum of
\$2,700,000.00.

IT IS HEREBY ORDERED, ADJUDGED
AND DECREED that Judgment is entered solely
against McDonald's Corporation and to Plaintiff in
the amount of \$160,000.00 for compensatory dam-
ages, and \$2,700,000.00 to Plaintiff for punitive
damages.

IT IS FURTHER ORDERED, ADJUDGED
AND DECREED that Plaintiff shall be awarded in-
terest as permitted by law.

IT IS FURTHER ORDERED, ADJUDGED
AND DECREED that Plaintiff shall be awarded her
costs to be determined upon presentation of a Cost
Bill to the Court in accord with applicable law.

N.M.Dist., 1994.

Liebeck v. McDonald's Restaurants, P.T.S., Inc.

Not Reported in P.2d, 1995 WL 360309 (N.M. Dist.)

END OF DOCUMENT

Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER,
INC., and LARRY C. STRONGOSKI, M.D., Appellants/Cross-
Appellees, v. WORTHIE E. KINSEY, JR., an incompetent by and
through DEBORAH KINSEY, his guardian, and DEBORAH KINSEY,
individually, Appellees/Cross-Appellants.

CASE Nos. 94-1210, 94-1262, 94-1549, (CONSOLIDATED)

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

655 So. 2d 1191; 1995 Fla. App. LEXIS 5342; 20 Fla. L. Weekly D
1211

May 18, 1995, Filed

SUBSEQUENT HISTORY: [**1] Released for Publication June 21, 1995.

PRIOR HISTORY: An appeal from the Circuit Court for Leon County. L. Ralph Smith, Judge.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with
directions.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, physician and medical center, sought review from the Circuit Court for Leon County (Florida), which confirmed an arbitration award and held appellants liable for the future damages of appellees, an incompetent by and through his guardian. Appellants argued the court lacked subject matter jurisdiction to confirm the arbitration award and could not hold appellants contingently liable for future damages; appellees cross-appealed.

OVERVIEW: Appellees, an incompetent by and through his guardian, obtained an arbitration award in a medical malpractice action where liability was admitted by appellants, physician and medical center. Appellees sought court confirmation of the award, and appellants objected on jurisdictional grounds and disputed responsibility as to future damages. Appellees also sought a final judgment and recovery against appellants' liability insurer. On review, the court found that the Florida Arbitration Code provided for confirmation of awards upon application of a party to the arbitration and determined that the motion to confirm the award was properly brought as was jurisdiction. The court then found that the arbitrators' decision to accept additional evidence as to future economic damages was a decision which they alone had the final authority to make. The court then ordered the trial court to enter a judgment in favor of appellees because they were entitled to future damages. The court finally held that appellants' liability insurer could have been joined as a party for the purposes of entering final judgment. Thus, appellant's arguments were overruled and appellee's arguments were sustained.

OUTCOME: The court directed the circuit court to enter judgment for appellees, an incompetent by and through his guardian, regarding future damages and held that the liability insurer of appellants, physician and medical center, could have been joined as a party for the purposes of entering final judgment. The court found that appellants' arguments as to jurisdiction and their responsibility for future damages were without merit.

CORE TERMS: arbitration, arbitrator, economic damages, arbitration award, claimant, binding arbitration, periodic, payments of future, insurer, annuity, join, present value, medical malpractice, liability insurer, periodic payments, hearing officer, medical negligence, admit

liability, admission of liability, confirmation, settlement, coverage, arbitration panel, collateral source, noneconomic, offset, notice of intent, final judgment, contingently, cross-appeal

LexisNexis(R) Headnotes

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Procedure > Alternative Dispute Resolution

[HN1] Fla. Stat.ch. 766.106 was originally enacted as a part of the Comprehensive Medical Malpractice Reform Act of 1985. Among its provisions is one which permits "an offer of admission of liability and for arbitration on the issue of damages" in response to a notice of intent to initiate medical malpractice litigation. The procedure for arbitration upon acceptance of such an offer is set out in subsections (10) through (12).

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN2] See Fla. Stat. ch. 766.201(2)(b).

Civil Procedure > Alternative Dispute Resolution > Judicial Review

[HN3] See Fla. Stat. ch. 766.207.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods

[HN4] See Fla. Stat. ch. 766.209.

Civil Procedure > Alternative Dispute Resolution > Judicial Review

Civil Procedure > Appeals > Reviewability > Notice of Appeal

[HN5] See Fla. Stat. ch. 766.212.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Administrative Law > Judicial Review > Reviewability > Final Order Requirement

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview

[HN6] Fla. Stat. ch. 766.212(1) states that an arbitration award is "final agency action," and provides, as in administrative matters, for review by a district court of appeal, rather than by a circuit court.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview

Civil Procedure > Judgments > Relief From Judgment > General Overview

[HN7] The Florida Arbitration Code provides for confirmation of awards upon application of a party to the arbitration, unless a timely motion to vacate, modify or correct the award has been filed.

Torts > Damages > General Overview

[HN8] See Fla. Stat. ch. 766.202(8).

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN9] Arbitrators are not constrained by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of proceedings. Moreover, they are the final judges of such matters as the admissibility and relevance of evidence.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview

Civil Procedure > Alternative Dispute Resolution > Judicial Review

[HN10] The standard of judicial review applicable to challenges of an arbitration award is very limited, with a high degree of conclusiveness attaching to an arbitration award.

COUNSEL: John D. Buchanan, Jr., of Henry, Buchanan, Mick, Hudson & Suber, P.A., Tallahassee, for Appellants/Cross-Appellees.

Lake Lytal, Jr., of Lytal & Reiter, P.A., West Palm Beach; Jane Kreusler-Walsh of Jane Kreusler-Walsh, P.A., West Palm Beach, for Appellees/Cross-Appellants.

Neil H. Butler of Butler & Long, P.A., Tallahassee; Teresa C. Nugent, Tallahassee, Attorneys for The Association of Voluntary Hospitals of Florida, Inc., Amicus Curiae; William A. Bell, Tallahassee, Attorney for Florida Hospital Association, Amicus Curiae.

JUDGES: WEBSTER, J., MICKLE and VAN NORTWICK, JJ., CONCUR.

OPINION BY: WEBSTER

OPINION

[*1192] WEBSTER, J.

These consolidated appeals present a number of novel questions regarding interpretation of portions of chapter 766 Florida Statutes (1993), which deals with medical malpractice. Following a notice of intent to initiate medical malpractice litigation sent by counsel for appellees to appellants, appellants, through counsel, offered to admit [**2] liability and to submit to voluntary binding arbitration of the amount of appellees' damages. Appellees accepted that offer,

and the matter was eventually heard by a panel of three arbitrators. Following an award of substantial damages by the arbitrators, appellees sought circuit court confirmation of the award, to which appellants objected on jurisdictional grounds. The circuit court denied appellants' motion to dismiss; denied a motion by appellees to join appellants' liability insurer; confirmed the arbitration award, but denied appellees' request for entry of a final judgment; and held that, notwithstanding purchase by appellants of an annuity to secure periodic payments of future economic damages, appellants would remain contingently liable for the future economic damages awarded, and subject to entry of a judgment against them should any of the future payments not be timely made.

Appellants now raise three issues: whether the circuit court erred (1) when it denied their motion to dismiss, for lack of subject matter jurisdiction, appellees' motion to confirm the arbitration award and, (2) when it held that they would remain contingently liable for payments of future economic [*3] damages, notwithstanding purchase by them of an acceptable annuity assuring that those payments would be made; and (3) whether the arbitrators' order setting the discount rate and the calculation date for future economic damages was impermissibly predicated [*1193] upon an unauthorized consideration of new evidence. By cross-appeal, appellees raise two issues: whether the circuit court erred (1) when it declined to issue a final judgment against appellants and, (2) when it denied their motion to join appellants' liability insurer. We affirm as to all of the issues raised by appellants; and reverse as to both of the issues raised by appellees.

[HN1] The substance of section 766.106, Florida Statutes (1993), was originally enacted as a part of the Comprehensive Medical Malpractice Reform Act of 1985. Ch. 85-175, § 14, at 1199-1202, Laws of Fla. Among its provisions is one which permits "an offer of admission of liability and for arbitration on the issue of damages" in response to a notice of intent to initiate medical malpractice litigation. § 766.106(3)(b)3., Fla. Stat. (1993). The procedure for arbitration upon acceptance of such an offer is set out in subsections (10) through (12). To the extent [**4] relevant, those provisions read:

(10) If a prospective defendant makes an offer to admit liability and for arbitration on the issue of damages, the claimant has 50 days from the date of receipt of the offer to accept or reject it. . . . If the claimant rejects the offer, he may then file suit. Acceptance of the offer of admission of liability and for arbitration waives recourse to any other remedy by the parties

(a) If rejected, the offer to admit liability and for arbitration on damages is not admissible in any subsequent litigation. . . .

(b) If the offer to admit liability and for arbitration on damages is accepted, the parties have 30 days from the date of acceptance to settle the amount of damages. If the parties have not reached

agreement after 30 days, they shall proceed to binding arbitration to determine the amount of damages as follows:

1. Each party shall identify his arbitrator to the opposing party not later than 35 days after the date of acceptance.
2. The two arbitrators shall, within 1 week after they are notified of their appointment, agree upon a third arbitrator. If they cannot agree on a third arbitrator, selection of the third arbitrator shall be in [**5] accordance with chapter 682 [the Florida Arbitration Code].
3. Not later than 30 days after the selection of a third arbitrator, the parties shall file written arguments with each arbitrator and with each other indicating total damages.
4. Unless otherwise determined by the arbitration panel, within 10 days after the receipt of such arguments, unless the parties have agreed to a settlement, there shall be a 1-day hearing, at which formal rules of evidence and the rules of civil procedure shall not apply, during which each party shall present evidence as to damages. Each party shall identify the total dollar amount which he feels should be awarded.
5. No later than 2 weeks after the hearing, the arbitrators shall notify the parties of their determination of the total award. The court shall have jurisdiction to enforce any award or agreement for periodic payment of future damages.

(11) If there is more than one prospective defendant, the claimant shall provide the notice of claim and follow the procedures in this section for each defendant. If an offer to admit liability and for arbitration is accepted, the procedures shall be initiated separately for each defendant, unless multiple [**6] offers are made by more than one prospective defendant and are accepted and the parties agree to consolidated arbitration. Any agreement for consolidated arbitration shall be filed with the court. No offer by any prospective defendant to admit liability and for arbitration is admissible in any civil action.

(12) To the extent not inconsistent with this part, the provisions of chapter 682, the Florida Arbitration Code, shall be applicable to such proceedings.

In 1988, the legislature again turned its attention to medical malpractice, enacting major amendments to what is now chapter 766. Ch. 88-1, §§ 48-87, at 164-86, Laws of Fla.; ch. 88-277, §§ 26-49, at 1473-95, Laws of Fla. While these amendments changed some portions of what is now section 766.106 and added additional subsections, the substance [*1194] of the provisions relating to admission of liability and voluntary binding arbitration of damages remained unchanged. However, the legislature also adopted a completely separate set of procedures for admission of liability and voluntary binding arbitration of damages. Ch. 88-1, §§

54-59, at 169-73, Laws of Fla.; ch. 88-277, §§ 30-35, at 1476-82, Laws of Fla. Those provisions were subsequently [**7] codified as sections 766.207 through 766.212, Florida Statutes (1993). While the motivation for enactment of those provisions is explained in section 766.201(2)(b), no reference is made to the provisions regarding admission of liability and voluntary binding arbitration of damages already set forth in section 766.106, or to the intended interplay, if any, between section 766.106 and sections 766.207 through 766.212. Section 766.201(2)(b) reads, in relevant part:

[HN2] (2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. . . . Arbitration shall be voluntary and shall be available except as specified.

. . . .

(b) Arbitration shall provide:

1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.
2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
3. Limitations on the noneconomic damages components of large awards to provide increased predictability [**8] of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

To the extent relevant, sections 766.207 through 766.212, Florida Statutes (1993), read:

[HN3] 766.207 Voluntary binding arbitration of medical negligence claims.--

. . . .

(2) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant. The evidentiary standards for voluntary binding arbitration of medical negligence claims shall be as provided in s. 120.58(1)(a) [part of the Administrative Procedure Act].

(3) Upon receipt of a party's request for such arbitration, the opposing party may accept the offer of voluntary binding arbitration within 30 days. . . . Such acceptance within the time period

provided by this subsection shall be a binding commitment to comply with the decision [**9] of the arbitration panel. The liability of any insurer shall be subject to any applicable insurance policy limits.

(4) The arbitration panel shall be composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative hearing officer furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. In the event of multiple plaintiffs or multiple defendants, the arbitrator selected by the side with multiple parties shall be the choice of those parties. If the multiple parties cannot reach agreement as to their arbitrator, each of the multiple parties shall submit a nominee, and the director of the Division of Administrative Hearings shall appoint the arbitrator from among such nominees.

(5) The arbitrators shall be independent of all parties, witnesses, and legal counsel

. . . .

(7) Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that:

(a) Net economic damages shall be awardable, including, but not limited to, [*1195] past and future medical expenses and 80 percent of wage [**10] loss and loss of earning capacity, offset by any collateral source payments.

(b) Noneconomic damages shall be limited to a maximum of \$ 250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his capacity to enjoy life would warrant an award of not more than \$ 125,000 noneconomic damages.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8) and shall be offset by future collateral source payments.

(d) Punitive damages shall not be awarded.

(e) The defendant shall be responsible for the payment of interest on all accrued damages with respect to which interest would be awarded at trial.

(f) The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.

(g) The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative hearing officer.

(h) Each defendant who submits to arbitration under [**11] this section shall be jointly and severally liable for all damages assessed pursuant to this section.

(i) A defendant's or claimant's offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof.

. . . .

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s. 766.106. . . .

(l) The hearing shall be conducted by all of the arbitrators, but a majority may determine any question of fact and render a final decision. The chief arbitrator shall decide all evidentiary matters.

. . . .

(9) The Division of Administrative Hearings is authorized to promulgate rules to effect the orderly and efficient processing of the arbitration procedures of ss. 766.201-766.212.

(10) Rules promulgated by the Division of Administrative Hearings pursuant to this section, s. 120.53, or s. 120.65 may authorize any reasonable sanctions except contempt for violation of the rules of the division or failure to comply [**12] with a reasonable order issued by a hearing officer, which is not under judicial review.

. . . .

[HN4] 766.209 Effects of failure to offer or accept voluntary binding arbitration.--

. . . .

(2) If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or to any available legal alternative

(3) If the defendant refuses a claimant's offer of voluntary binding arbitration:

(a) The claim shall proceed to trial without limitation on damages, and the claimant, upon proving medical negligence, shall be entitled to recover prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value.

(b) The claimant's award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration.

(4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:

(a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed \$ 350,000 per incident. . . .

(b) Net economic damages reduced to present value shall be awardable, including, but not limited to, past and future medical expenses and [**13] 80 percent of wage [*1196] loss and loss of earning capacity, offset by any collateral source payments.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8), and shall be offset by future collateral source payments.

. . . .

[HN5] 766.212 Appeal of arbitration awards and allocations of financial responsibility.--

(1) An arbitration award . . . [is] final agency action for purposes of s. 120.68. Any appeal shall be taken to the district court of appeal for the district in which the arbitration took place, shall be limited to review of the record, and shall otherwise proceed in accordance with s. 120.68. The amount of an arbitration award . . . , the evidence in support of [it], and the procedure by which [it] is determined are subject to judicial scrutiny only in a proceeding instituted pursuant to this subsection.

. . . .

(3) Any party to an arbitration proceeding may enforce an arbitration award . . . by filing a petition in the circuit court for the circuit in which the arbitration took place. A petition may not be granted unless the time for appeal has expired. If an appeal has been taken, a petition may not be granted [**14] with respect to an arbitration award . . . that has been stayed.

(4) If the petitioner establishes the authenticity of the arbitration award . . . , shows that the time for appeal has expired, and demonstrates that no stay is in place, the court shall enter such orders and judgments as are required to carry out the terms of the arbitration award Such orders are enforceable by the contempt powers of the court; and execution will issue, upon the request of a party, for such judgments.

As should be apparent from the foregoing, much of that portion of section 766.106 relating to voluntary binding arbitration of damages is inconsistent, and irreconcilable, with the provisions of sections 766.207 through 766.212.

Adding to the confusion created by the inconsistencies between section 766.106 and sections 766.207 through 766.212 is the fact that the parties elected not to follow either procedure in all

details. Instead, they chose to arbitrate using what might best be described as a hybrid of the two. In particular, they appear to have decided that, while most of the provisions of section 766.207 would be followed, some very important provisions would not--no hearing officer [**15] from the Division of Administrative Hearings participated in the arbitration, and the arbitration was not conducted according to the rules promulgated by the Division. Instead, as provided by section 766.106(10)(b), appellants and appellees each selected one arbitrator, and those two then decided upon the third. All three arbitrators were attorneys in private practice, with extensive experience in medical malpractice litigation.

We conclude that the parties' failure to comply with the provisions of section 766.207(4) requiring that "the chief arbitrator" be a hearing officer from the Division of Administrative Hearings precludes the parties from relying, on appeal, on the arbitration scheme set out in sections 766.207 through 766.212. It is clear that participation by a hearing officer in the arbitration process was intended by the legislature to be a critical feature of the arbitration scheme set out in those sections. This is why, for instance, it is specified that "evidentiary standards" shall be those found in section 120.58(1)(a) of the Administrative Procedure Act. § 766.207(2), Fla. Stat. (1993). It is also why the Division of Administrative Hearings is authorized to adopt [**16] rules applicable to the process. § 766.207(9), Fla. Stat. (1993). (In fact, the Division of Administrative Hearings has adopted an entire chapter of detailed rules for arbitration pursuant to sections 766.207 through 766.212. Ch. 60Q-3, Fla. Admin. Code.) Finally, it is the only explanation for [HN6] section 766.212(1), which states that an arbitration award is "final agency action for purposes of s. 120.68," and provides, as in administrative matters, for review by a district court of appeal, rather than by a circuit court. We conclude, instead, that, for purposes of this appeal, we will refer to the applicable provisions of section 766.106 and, "to the extent not inconsistent . . . , the provisions of chapter 682, the Florida Arbitration [**1197] Code." § 766.106(12), Fla. Stat. (1993).

We conclude, further, that the trial court did not err in denying appellants' motion to dismiss, for lack of subject matter jurisdiction, appellees' motion for confirmation of the arbitration award. Appellees' motion to confirm the award was made pursuant to [HN7] the Florida Arbitration Code, section 682.12 of which provides for confirmation of awards "upon application of a party to the arbitration," unless a timely [**17] motion to vacate, modify or correct the award has been filed. *See* §§ 682.13, 682.14, Fla. Stat. (1993). The essence of appellants' motion to dismiss was that the circuit court lacked jurisdiction because the procedure for enforcement of an arbitration award such as that at issue was set forth in section 766.212, rather than in the Arbitration Code, and appellees had failed to establish that they were entitled to enforcement pursuant to that section. As discussed above, we have concluded that the parties are precluded from relying, on appeal, on the arbitration scheme set out in sections 766.207 through 766.212. Instead, we will look to section 766.106 and, to the extent not inconsistent with section 766.106,

the Arbitration Code. We find nothing in section 766.106 to suggest that the provisions of the Arbitration Code relating to confirmation of awards not be applied. Accordingly, the circuit court correctly denied appellants' motion to dismiss appellees' motion to confirm the award.

We also conclude that the circuit court correctly refused to relieve appellants of all liability for future economic damages, notwithstanding the purchase by appellants of an annuity designed to ensure [**18] the payment of such sums. Resolution of this issue requires construction of [HN8] section 766.202(8), Florida Statutes (1993), which the parties agree was properly considered by the arbitrators in arriving at the periodic payments required on account of future economic damages to be experienced by appellees. To the extent relevant, that subsection reads:

(8) "Periodic payment" means provision for the structuring of future economic damage payments, in whole or in part, over a period of time, as follows:

(a) A specific finding of the dollar amount of periodic payments which will compensate for these future damages after offset for collateral sources shall be made. The total dollar amount of the periodic payments shall equal the dollar amount of all such future damages before any reduction to present value.

(b) The defendant shall be required to post a bond or security or otherwise to assure full payment of these damages awarded. A bond is not adequate unless it is written by a company authorized to do business in this state and is rated A+ by Best's. If the defendant is unable to adequately assure full payment of the damages, all damages, reduced to present value, shall be paid to the claimant [**19] in a lump sum. No bond may be canceled or be subject to cancellation unless at least 60 days' advance written notice is filed with the court and the claimant. Upon termination of periodic payments, the security, or so much as remains, shall be returned to the defendant.

It is undisputed that appellants have satisfied all monetary obligations imposed by the arbitration award except for future economic damages, which, according to the award, are to be paid in specified annual amounts through the year 2018. In an apparent effort to avoid having to pay the full amount of future economic damages, reduced to their present value, in a lump sum, as contemplated by section 766.202(8)(b), appellants offered to purchase an annuity from TransAmerica Occidental Life Insurance Company to guarantee that the future periodic payments would be made. (According to the evidence presented, TransAmerica was rated A+ by Best's, and was "one of the highest rated companies offering annuities to fund structured settlements.") However, appellants also argued to the circuit court (and argue on appeal) that, upon posting security acceptable pursuant to section 766.202(8)(b) to permit periodic payments (as opposed [**20] to a lump-sum payment) of future economic damages, appellees could be required to accept such security in full satisfaction of the award of future economic damages, and appellants would be entitled to be relieved of any further [*1198] liability for such damages.

The circuit court held that the annuity would be satisfactory "security" pursuant to section 766.202(8)(b) to permit periodic payments of future economic damages, as opposed to a lump-sum payment. However, it refused to relieve appellants of all liability for future economic damages, concluding, instead, that they would remain contingently liable because of the possibility that, for some reason, the payments contemplated by the annuity might not all be timely made.

We find nothing in section 766.202(8)(b) to support appellants' argument that, by posting "security" satisfactory to permit periodic payments of future economic damages, they are entitled to be relieved of all further liability for such damages. On the contrary, it seems to us from a reading of the language used by the legislature that the sole intent behind section 766.202(8)(b) was to permit defendants to avoid having to pay the entire amount of future economic damages, [**21] reduced to present value, in a lump sum. Had the legislature intended that posting of a satisfactory "bond or security" would relieve defendants of all further liability for future economic damages, it would have been an easy matter for it to have said so. In our opinion, the absence of any such language is strong evidence that the legislature did not intend the result urged by appellants. To presume such an intent in these circumstances would amount to the most blatant form of judicial legislation. We decline appellants' invitation to don the legislative mantle.

The third and final issue raised by appellants is whether the arbitrators' order setting the discount rate and the calculation date for future economic damages was impermissibly predicated upon an unauthorized consideration of new evidence. The record does not reflect that this issue was raised before either the arbitrators or the circuit court. Accordingly, it would appear that the issue has not been preserved for review. However, assuming that the issue is properly before us, it is clear that the matter complained of by appellants is not the type of action for which judicial review is appropriate. [HN9] Arbitrators are not constrained [**22] by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of proceedings. Moreover, they are the final judges of such matters as the admissibility and relevance of evidence. *See, e.g., Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34 (1st Cir. 1985); *Sorren v. Kumble*, 578 So. 2d 836 (Fla. 3d DCA 1991); *Lake County Education Association v. School Board of Lake County*, 360 So. 2d 1280 (Fla. 2d DCA), *cert. denied*, 366 So. 2d 882 (Fla. 1978). [HN10] "The standard of judicial review applicable to challenges of an arbitration award is very limited, with a high degree of conclusiveness attaching to an arbitration award." *Applewhite v. Sheen Financial Resources, Inc.*, 608 So. 2d 80, 83 (Fla. 4th DCA 1992). We conclude that the arbitrators' decision to accept additional evidence on the discount rate and the calculation date for future economic damages was the kind of decision which they, alone, had the final authority to make. Therefore, we see no reason to disturb that decision.

The first issue raised by appellees on their cross-appeal is whether the circuit court erred when it declined [**23] to enter a final judgment against appellants. We have previously concluded that purchase of an annuity by appellants to secure periodic payments of future economic damages does not relieve appellants of liability for such payments. Instead, appellants remain contingently liable, which contingency will mature should any future payment not be timely made. We have also previously concluded that, to the extent not inconsistent with section 766.106, the provisions of the Arbitration Code apply in this case. In relevant part, section 682.15 states that, "upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree." We see no inconsistency between section 682.15 and section 766.106. Accordingly, upon confirmation of the arbitration award by the circuit court, appellees were entitled to the entry of "judgment . . . in conformity therewith." On remand, we direct the circuit court to enter judgment for appellees consistent with the [*1199] provisions of the arbitration award regarding periodic payments of future economic damages. (It is undisputed that all other monetary obligations [**24] imposed by the award have been satisfied.) However, the judgment shall provide that appellees are prohibited from attempting to execute on it until and unless a future payment is not timely made.

The second, and final, issue raised by appellees on their cross-appeal is whether the circuit court erroneously denied their motion to join appellants' liability insurer. In that motion, appellees represented that appellants were insured by American Continental Insurance Company, and that the coverage afforded was in an amount greater than that of their recovery. Appellees argued that they were entitled to join the insurer pursuant to section 627.4136(4), Florida Statutes (1993), which, to the extent relevant, provides:

(4) At the time a judgment is entered or a settlement is reached during the pendency of litigation, a liability insurer may be joined as a party defendant for the purposes of entering final judgment or enforcing the settlement by the motion of any party, unless the insurer denied coverage under the provisions of s. 627.426(2) or defended under a reservation of rights pursuant to s. 627.426(2). A copy of the motion to join the insurer shall be served on the insurer

Appellants [**25] responded that section 627.4136(4) was inapplicable, because no "settlement" was involved, and no "judgment" had been entered. In its order denying the motion, the circuit court found "that American Continental Insurance Company provided liability insurance coverage to the [appellants] and is obligated pursuant to its contracts of insurance to indemnify the [appellants] for the full amount awarded to the [appellees] in the Arbitration Award." However, it accepted appellants' argument and, because it had declined to enter a judgment in favor of appellees, it concluded that appellees were not entitled to join the insurer. Because we are directing the circuit court, on remand, to enter a judgment in favor of appellees consistent with the provisions of the arbitration award regarding periodic payments of future economic

damages, we also reverse the circuit court's order denying joinder of appellants' liability insurer. On remand, the circuit court shall grant that motion, unless American Continental Insurance Company is able to satisfy it either that coverage had been denied, or that appellants' defense had been undertaken subject to a valid reservation of rights. § 627.4136(4), [**26] Fla. Stat. (1993).

In summary, we affirm as to the three issues raised by appellants. However, we reverse and remand as to both issues raised by appellees on their cross-appeal. On remand, the circuit court shall enter judgment for appellees consistent with the provisions of the arbitration award regarding periodic payments of future economic damages. However, the judgment shall provide that appellees are prohibited from attempting to execute on it until and unless a future payment is not timely made. The circuit court shall also grant appellees' motion to join appellants' liability insurer, unless the insurer is able to satisfy it either that coverage had been denied, or that appellants' defense had been undertaken subject to a valid reservation of rights.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions.

MICKLE and VAN NORTWICK, JJ., CONCUR.

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