

IN THE SUPREME COURT OF FLORIDA

ESTATE OF MICHELLE
EVETTE McCALL, etc. et al.

Appellants,

v.

Case No. SC11-1148

UNITED STATES OF AMERICA,

Appellee.

**On Discretionary Review from the
United States Court of Appeals for the Eleventh Circuit
Case No. 07-00508CV-C-MCR/EMT**

AMICUS BRIEF OF PROFESSORS NEIL VIDMAR ET AL.

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IDENTITY AND INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Professors Neil Vidmar, Tom Baker, Ralph L. Brill, Martha Chamallas, Stephen Daniels, Thomas A. Eaton, Theodore Eisenberg, Marc Galanter, Valerie P. Hans, Edward J. Kionka, Thomas Koenig, Herbert Kritzer, Nancy S. Marder, Joanne Martin, Frank M. McClellan, Deborah Jones Merritt, James T. Richardson, and Michael L. Rustad (collectively, the “Academic Amici”), who are professors of law and social science at universities and law schools throughout the United States. They submit this brief to address a central issue in the questions presented to this Court: The impact of damage caps in medical malpractice cases on the supply of physicians.

The Academic Amici devote a significant portion of their work to studying this issue throughout the country, and their work has assisted courts facing this issue in other states. *See Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 667 n.229 (Wis. 2005) (striking down cap on noneconomic damages in medical malpractice cases and noting Professor Vidmar’s study reporting the absence of a factual basis for the assertion that “doctors were leaving the state as a result of medical malpractice actions and a rise in premiums”); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1068 (Ill. 1997) (stating that affidavits by Professors Vidmar, Galanter, Daniels, and Martin “clearly show[ed] that the legislative ‘findings’ listed in the [statute] do not provide a rational justification for the limitation of

compensatory damages for noneconomic injuries”).

SUMMARY OF THE ARGUMENT

The Academic Amici submit this brief to bring a dose of reality and demonstrate that the legislative findings underpinning the caps in section 766.118, Florida Statutes, are so “clearly erroneous, arbitrary or wholly unwarranted” as to justify this Court disregarding them in its constitutional analysis pursuant to well established case law. Specifically, they demonstrate that there is no factual basis for the central findings that Florida was losing practicing physicians due to high malpractice premiums and that a cap on noneconomic damages would lower malpractice premiums and therefore increase the physician supply.

As to the finding that Florida was losing physicians due to rising premiums, the Legislature had no competent evidence to support the finding. Legislative history reveals that the Legislature knew it lacked any empirical evidence and proponents of reform conceded as much. All the Legislature had was random anecdotal evidence, which was demonstrably unreliable. Similarly, there was no evidence that capping noneconomic damages would influence doctors’ decisions to practice in Florida. The evidence was to the contrary.

Moreover, empirical evidence gathered by the American Medical Association demonstrates that, in reality, the number of doctors in Florida steadily increased in the decades leading up to the 2003 enactment of section 766.118 in

every relevant metric: (1) absolute numbers and physicians per capita, (2) in relation to neighboring states and other states with caps, (3) doctors practicing in high-risk specialties, and (4) doctors practicing in rural communities.

As to the finding that caps would reduce premiums, the Legislature ignored clear evidence that the rise in premiums was caused by the underwriting cycle and not by any increase in the cost of malpractice claims. Indeed, there was no such increase. Finally, even the flawed information on which the Legislature relied demonstrated that the flexible \$500,000 cap would do “virtually nothing” to benefit Florida doctors.

ARGUMENT

Through their scholarship and review and analysis of the relevant empirical data, the Academic Amici seek to help this Court apply a dose of reality to conclude that section 766.118’s cap on non-economic damages in medical malpractice cases violates the Florida Constitution. The Appellants have thoroughly briefed the applicable constitutional tests, so the Academic Amici will not replot this ground. Instead, the purpose of this amicus brief is to demonstrate that the findings underlying section 766.118 should be rejected. As this Court has made clear:

Legislative findings and declarations of policy are presumed to be correct but are not binding upon the courts under all conditions. The courts will abide by such legislative decisions **unless such are clearly erroneous, arbitrary or wholly unwarranted.**

“... They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and **they are always subject to judicial inquiry**. Moreover, findings of fact made by the legislature do not carry with them a presumption of correctness if they are **obviously contrary to proven and firmly established truths** of which courts may take judicial notice.

Moore v. Thompson, 126 So.2d 543, 549-550 (Fla. 1961) (emphases added) (quoting *Seagram-Distillers Corp. v. Ben Greene, Inc.*, 54 So. 2d 235, 236 (Fla. 1951)); accord *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 615, 627-28 (Fla. 2003) (citing these principles in the course of holding the Parental Notice of Abortion Act unconstitutional); *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1034-36 (Fla. 1999) (applying similar principles to reject legislative findings and declare unconstitutional a statute precluding government lawyers from collective bargaining).

The Appellants and especially the amici Floridians for Patient Protections, Inc., and Florida Consumer Action Network, Inc., have extensively covered the legislative history of section 766.118 and the Legislature’s blanket incorporation of the findings and recommendations of the Governor’s Select Task Force on Healthcare Professional Liability Insurance (the “Task Force”), *available at* <http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf>. This brief demonstrates that there is no factual basis for the central findings by the Task

Force that Florida was losing practicing physicians due to high malpractice premiums and that a cap on noneconomic damages would lower malpractice premiums and therefore increase the physician supply.

I. THERE WAS NO FACTUAL BASIS FOR THE FINDING THAT FLORIDA WAS LOSING DOCTORS DUE TO THE COST OF MALPRACTICE INSURANCE.

A. The Legislature Had No Competent Evidence That Florida Was Experiencing a Net Loss of Practicing Physicians or That Capping Noneconomic Damages Would Keep Physicians in Florida.

The Legislature stated that it believed unaffordable malpractice insurance was causing doctors “to leave Florida, to not perform high-risk procedures, or to retire early,” threatening the availability of health care to Florida citizens. Ch. 2003-416, § 1(6), (14), Laws of Fla. In reality, however, the lawmakers were not presented with any information that the state was experiencing a net loss in its supply of physicians. The House Select Committee stated:

The records of both the Governor’s Task Force and the Select Committee are replete with anecdotal evidence of the possible changes in behavior by medical practitioners, including institutional service provisions changes; however there was only minimal information available about specific cumulative totals of changes in service availability or the direct impact on healthcare services in any county in Florida due specifically to the rise in premium costs for service providers.

Draft Report of the House Select Comm. on Med. Liability Ins. (Mar. 2003), at 4, *available at* http://www.leg.state.fl.us/data/Committees/House/535mls/draft_report

_030303.pdf. For that reason, the committee stated that “the quantity of practitioners terminating or reducing practices or the closing of specific hospital services can not be specifically calculated, using currently available data.” *Id.* at 5. And although the CEO of the Florida Medical Association presented anecdotal examples of newspaper reports of some physicians who had moved to other states, she was unable to testify as to the total number who had left Florida or how many were motivated to do so by malpractice insurance costs. (App. 176, 184-85) (Testimony of Sandra Mortham, Senate Judiciary Committee Meeting, July 14, 2003, at 117, 125-26). In fact, Ms. Mortham conceded that the total number of doctors practicing in Florida had actually **increased**, (App. 184), an admission consistent with the data discussed below.

Rather than base their decision on empirical evidence, the Legislature and the Task Force instead relied primarily on letters and emails from doctors complaining that malpractice premiums were becoming too high to continue their practice. *See* House Report at 4-5; Task Force Report at 70-102 (summarizing doctor submissions). Similarly, the Florida Medical Association submitted a survey in which more than half of responding physicians stated that they had either discontinued the practice of medicine or were considering doing so because of malpractice insurance concerns. Task Force Report at 110-11. Even the Task Force acknowledged “some merit” to charges that the inherent biases in this non-

random and self-selecting “data” rendered them “almost meaningless.” *Id.* at 115-16.

Indeed, the U.S. General Accountability Office (the “GAO”) and researchers who have studied anecdotal accounts of physicians fleeing from one state for another and examined surveys regarding physicians’ future plans have found them to be unreliable. *Ferdon*, 701 N.W.2d at 488 & 488 n.234 (citing the U.S. General Accountability Office GAO-03-836, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care* 6 (Aug. 2003), available at <http://www.gao.gov/new.items/d03836.pdf> (the “GAO Report”). The GAO found that media reports and even legislative testimony that physicians had retired or moved their practices to another state often proved false or unsubstantiated. GAO Report at 5-7, 13-14, 17-21, 28-29; *see also* Michelle Mello et al., *Changes in Physician Supply and Scope of Practice During a Malpractice Crisis: Evidence from Pennsylvania*, 26 *Health Affairs* 425, 433 (2007) (stating that medical society and other surveys – “including [hers]” – reporting that doctors were planning to flee the state or restrict their scope of practice proved inaccurate and unreliable).

There are, of course, many factors that might influence a doctor to relocate, refocus his or her practice, or retire. Ironically, for example, even as tort reform proponents lauded California’s damage cap as a means of stopping doctors from leaving Florida, the American Medical Association reported that “[m]ore than half

of the physicians in California are so dissatisfied” with the impact of HMOs and Medicaid cuts on their income “that they plan to quit, retire or move out of state in the next three years.” Jay Greene, *Dissatisfied Docs May Soon Be Singing “California, Here I Go!”: Managed Care and Low Reimbursement Cited as Reasons Why More than Half of the Doctors in California May Quit or Leave the State by 2004*, Am. Med. News (Aug. 6, 2001), available at <http://www.ama-assn.org/amednews/2001/08/06/prsd0806.htm>.

As with its finding that Florida is losing physicians, the Legislature had no factual basis to assume that capping noneconomic damages would have a significant influence on doctors’ decisions to stop practicing in Florida. Indeed, the CEO of the Florida Medical Association conceded that the anecdotal reports she offered included doctors who had relocated to New York and North Carolina, states which have no caps on damages. (App. 188-89) (Mortham Testimony, *supra*, at 129-30).

Significantly, the three scholars relied upon by the Task Force to explain the malpractice litigation system – Patricia M. Danzon, Vasanthakumer N. Bhat, and Frank Sloan – all rejected the assumption that capping damages will result in increasing a state’s number of physicians. Professor Danzon, whom the Task Force cited for the proposition that capping damages can reduce the size of judgments, cautioned against assuming that such reductions would result in lower

malpractice premiums. Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 *Law & Contemp. Prob.* 57, 79 (1986). Professor Bhat's state-by-state study of the supply of physicians and OB-GYN specialists concluded that "the medical malpractice system is not a significant factor in this supply." (App. 192-94) (Vasanthakumer N. Bhat, *Medical Malpractice: A Comprehensive Analysis* 172 (2001)). Another group of researchers reported that studies from across the country, including one on Florida by Professor Sloan, revealed that malpractice insurance premium increases "had little effect on physician practice location or supply." (App. 195-99) (Stephen Zuckerman et al., *Information on Malpractice: A Review of Empirical Research on Major Policy Issues*, 49 *Law & Contemp. Probs.* 85, 109 (1986) (citing, among other sources, Frank Sloan, *Economic Issues in Medical Malpractice*, in Fla. Medical Ass'n, *Medical Policy Guidebook* 43-45 (Manue ed. 1985))).

The assumption that caps would increase the number of physicians is further undermined by a more recent study of the supply of OB-GYNs in all 50 states, which concluded:

Although the costs of malpractice insurance are substantial for OB/GYNs, they do not appear to be significantly associated with the supply of OB/GYNs in a state. Most practitioners in this specialty do not respond to liability risk by relocating or discontinuing their practice.

Y. Tony Yang et al., *A Longitudinal Analysis of the Impact of Liability Pressure on*

the Supply of Obstetrician-Gynecologists, 5 J. Empirical Legal Studies 21, 53 (2008).

In short, the Legislature and Task Force had no competent evidence to support a finding that Florida was losing doctors due to malpractice premiums, much less that capping malpractice damages would alleviate the perceived problem.

B. In Reality, the Number of Florida Doctors Had Been Steadily Increasing for Years Before the Enactment of Section 766.118.

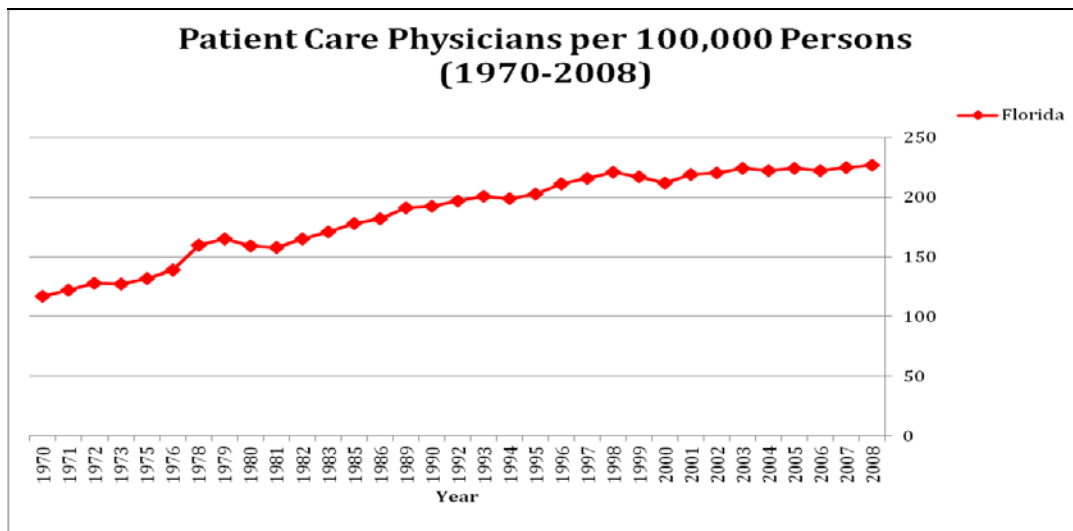
Research published in the American Medical Association’s authoritative annual compendium,¹ *Physician Characteristics and Distribution in the U.S.* (2009 ed.) (the “AMA Compendium”) (App. 34-129), conclusively demonstrates that the number of physicians engaged in patient care in Florida steadily increased, even during periods of so-called “crisis.” These data are summarized in tables provided in the appendix to this amicus brief. (App. 25-33.) The AMA data show an increase in the number of patient-care physicians practicing in Florida both in terms of absolute numbers and relative to Florida’s population. These increases include physicians practicing in high risk specialties, such as neurosurgeons and OB-GYNs, as well as doctors practicing in rural areas of the state.

¹ The AMA has described this compendium as “the most complete and extensive source of physician-related information in the United States.” (App. 35.)

1. The Number of Physicians in Florida Increased Steadily and Consistently over the Last Four Decades.

AMA data reveal that the total number of patient care physicians in Florida (excluding physicians engaged primarily in research, teaching, and administration or who are retired) has increased every year from 1971 through 2008. (App. 25-26.) This increase in the number of physicians spans the three “crisis” periods noted by the Task Force Report, including the latest one. Moreover, as the following graph illustrates, the same AMA data show that the number of doctors relative to Florida’s population also has grown steadily, rising from 117 patient-care physicians per 100,000 in 1970 to 227 in 2008.

Graph 1



(App. 25-26.)

Thus, contrary to the legislative findings, the number of patient care physicians in Florida has not only increased steadily, **but has increased faster**

than the State’s population, even during malpractice “crises.”

2. Florida’s Physician Supply Has Outpaced That of Most Neighboring States and of Some States with Caps.

Florida’s per capita supply of patient care physicians has outpaced that of many other states, including most of Florida’s neighbors and some states that have instituted caps on damages. (App. 27-28.) For example, in 2002, the year before section 766.118 was enacted, Florida had 220 patient-care physicians per 100,000 population. (App. 27.) This was nearly even with North Carolina (221) and ahead of South Carolina (205), Georgia (195), Alabama (187), and Mississippi (164) – states *without* caps on medical malpractice damages at the time.² (App. 27.) Florida was far ahead of Indiana (192), which has a stringent cap covering both economic and noneconomic damages. Ind. Code § 34-18-14-3 (2006) (formerly Ind. Code § 16-9.5-2-3 (adopted in 1975 and moved in 1993)); (App. 27). In fact, Florida’s physician supply was close to that of California (223), which has had a \$250,000 cap on noneconomic damages in malpractice cases since 1975. Cal. Civ. Code. § 3333.2 (1975); (App. 27).

3. The Number of High-Risk Medical Specialists Has Steadily Increased in Florida.

The Task Force indicated that “high-risk” medical specialties – such as

² Although Mississippi had no cap at the start of 2002, it enacted a \$500,000 limit on noneconomic damages that year. Miss. Code Ann. § 11-1-60(2) (2002).

neurosurgery and OB-GYN – were hit particularly hard by spikes in premiums and, therefore, that a cap on damages would be particularly effective in increasing the number of these specialists in Florida. Task Force Report at 196, 216. But the AMA data show that the number of both types of specialists practicing in Florida steadily increased before the cap was enacted as well as after. (App. 29-30.) It is clear from both sets of figures that escalation in the cost of malpractice insurance, even during the most recent “crisis” period, did not result in a dramatic loss of neurosurgeons or OB/GYNs serving Floridians.

4. The Number of Patient-Care Doctors Practicing in Florida’s Rural Areas Has Steadily Increased.

For many reasons, rural areas tend to attract fewer physicians than urban areas. The AMA data demonstrate that it is extremely unlikely that malpractice premiums are one of those reasons, however, because there was a consistent upward trend in the number of patient-care doctors serving rural Florida at least until 2003, when section 766.118 was enacted. (App. 31-33.)

In sum, people move out of the state for a variety of reasons, and they eventually either retire or die. Doctors are no different, and there is no question that a significant number of doctors have left the state, retired, or died in the thirty-plus years leading up to the enactment of section 766.118. But the AMA data conclusively demonstrate that an even larger number of new physicians have steadily been attracted to practicing in Florida and have more than made up for

these losses. Combined with the lack of any reliable evidence of any exodus due to malpractice premiums, a statutory cap based on fear of a loss of physicians is arbitrary and without factual basis.

II. THERE WAS NO FACTUAL BASIS FOR THE FINDING THAT A NONECONOMIC DAMAGE CAP WOULD LOWER MALPRACTICE PREMIUMS TO ATTRACT PHYSICIANS TO PRACTICE IN FLORIDA.

The Legislature determined that the crisis caused by the perceived loss of doctors' services in Florida would be alleviated by limiting noneconomic damages, which would lower malpractice premiums and thereby attract and keep doctors in the state. But the Legislature had no objective factual basis that would support even a reasonable expectation that the statute would accomplish this objective. There is no evidence that Florida doctors were paying more for malpractice claims than in the past. To the contrary, all competent evidence indicates that the rise in claims was instead the result of the underwriting cycle. Moreover, the Legislature ignored compelling and undisputed testimony that a cap of \$500,000 would have no impact in reducing doctors' premiums.

A. The Legislature Arbitrarily Blamed Dramatically Rising Malpractice Premiums on the Perceived Increasing Cost of Malpractice Claims.

The Legislature found that professional liability insurance was becoming unaffordable due to "the high cost of medical malpractice claims," which could only be alleviated by limiting noneconomic damages. Ch. 2003-416, § 1 (14)-(16),

Laws of Fla. Scholars who have examined empirical data from the years leading up to the rate hikes of 2001-02, however, have widely rejected that notion. In fact, they have observed that the number of medical malpractice claims and the severity of claims rose little, if at all, when adjusted for population growth and inflation. *See, e.g.,* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1268-70 (2004) (noting that “most of the available empirical research refutes the criticisms” that medical malpractice claims drove insurance costs up); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 992-95 (2003) (“[C]laims of the alleged ‘litigation explosion’ are exaggerated; indeed, [the] evidence casts doubt on the very existence of a significant increase.”) (citing, among other empirical research, Marc S. Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3 (1986)); David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid*, 59 Vand. L. Rev. 1085, 1086 (2006) (concluding that these kinds of attacks on the civil justice system are “facially implausible”).

Additionally, data supplied by Florida’s Department of Insurance confirms that insurers experienced no great increase in claims paid. Though the data were tabulated in slightly different ways by opponents of the cap (the “DeHaven-Smith

Report”) and its proponents (the “Milliman Report”). Either way, the data sets show that, even with no adjustment for inflation or the growth of Florida’s population, both the number of closed claims and the total payout by insurers during the most recent five years had **declined**.

Year	DeHaven-Smith Florida DOI Databases		Milliman USA, Inc. Florida DOI Databases	
	Total Amount Paid (\$)	Claims Closed	Total Amount Paid (\$)	Claims Closed
1991	148,875,447	786	146,534,933	771
1992	131,380,435	643	133,781,196	657
1993	126,156,950	736	125,845,187	724
1994	152,405,900	769	159,777,554	802
1995	203,347,516	933	206,449,199	942
1996	241,080,279	1,100	239,875,827	1,087
1997	208,843,088	1,003	202,750,624	955
1998	189,263,865	1,032	182,241,758	1,001
1999	207,541,531	791	220,966,498	828
2000	214,481,970	881	223,149,589	891
2001	(incomplete)		(Incomplete)	

Task Force Report at 132, Table 13 “Unadjusted Claim Totals.”

Moreover, the DeHaven-Smith Report concluded that, adjusting for inflation, the annual payout had not escalated since 1991. *Id.* at 133. The Task Force agreed that “these are reasonable findings.” *Id.* at 132-33. Thus, the Legislature had no competent evidence that the rise in premiums was based on a dramatic increase in the payment of malpractice claims.

B. The Legislature Arbitrarily Ignored Evidence That the Underwriting Cycle Was the Cause of Skyrocketing Malpractice Premiums.

Despite the fact that malpractice insurers were not paying out significantly more money on claims, the Task Force heard from physicians who reported experiencing increases of 300, 400, and even 500 percent in their medical malpractice insurance premiums. Task Force Report at 73-102. In light of the fact that claims' costs were not rising, a more likely explanation for the rate increase involves the "underwriting cycle," which the Task Force viewed as endemic to the malpractice insurance business. *Id.* at 31. As the Task Force explained, in a profitable "soft market," insurers compete by reducing rates and relaxing underwriting requirements. *Id.* "This rate cutting can continue until underwriting losses exceed the amount that insurers are willing to bear. This will cause some insurers to withdraw from the market and the remaining insurers will raise rates." *Id.* When insurers regain profitability, the cycle begins again. *Id.* at 30.

Independent social scientists and legal scholars, analyzing empirical data, state that this is precisely what occurred in 2001-02. Amicus Professor Tom Baker, from the University of Pennsylvania Law School and formerly the Director of the Insurance Law Center at the University of Connecticut Law School, has previously explained that "the two most recent medical liability insurance crises [mid-1980s and early 2000s] did not result from sudden or dramatic increases in

medical malpractice settlements or jury verdicts” but instead from the boom-and-bust insurance market. Tom Baker, *The Medical Malpractice Myth* 53-54 (2005); *see also* Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393, 394 (2005) (“Litigation behavior and malpractice claim payments did not change ... between 1996 and 2001. What changed, instead, were insurance market conditions and the investment and cost projections.”). Similarly, Professor Lucinda M. Finley described the market during those years as follows:

[W]ith profits padded by the burgeoning stock market, insurance companies reduced premiums, relaxed underwriting criteria, and liberally wrote policies. But, at the beginning of the new century, the liability insurance market significantly hardened. Investment returns plummeted, and some of the poor underwriting decisions made in the previous decade began to generate claims. Insurance companies, particularly in the medical malpractice area, began to raise premium rates dramatically while restricting coverage.

Finley, *supra*, 53 Emory L.J. at 1263.

Indeed, even the Task Force acknowledged that the “business cycle for medical malpractice insurance companies has had a significant impact on the increases in medical malpractice insurance levels in Florida.” Task Force Report at v. Nevertheless, the Legislature arbitrarily focused instead on limiting recoveries for the most seriously harmed victims of medical negligence.

C. There Was No Rational Basis for the Legislature to Expect That Capping Noneconomic Damages at \$500,000 Would Lower Malpractice Insurance Premiums.

The Legislature rejected the strong recommendation by the Task Force of a

firm cap on noneconomic damages at \$250,000. *Id.* at 336. Instead, section 766.118 caps noneconomic damages at \$500,000 in most cases, but raises the limit to \$1 million in cases of traumatic injury or death, as in this case. Even if, contrary to the above data and analysis, there were any reason to expect a \$250,000 cap would reduce malpractice premiums enough to influence doctors' decisions on where to practice, the notion that a \$500,000 cap would have the same impact is itself wholly arbitrary. In fact, as the president of First Professional Insurance Co., explained to the Senate Judiciary Committee, because eighty-five percent of Florida doctors carry policies with per-claim limits of \$500,000 or less, a cap of \$500,000 would do "virtually nothing" to benefit Florida physicians. (Appellant's App. at 40) (Testimony of Robert White, Senate Judiciary Committee Meeting, July 14, 2003, at 51). Similarly, the Task Force itself adopted the position of the American Academy of Actuaries that a cap set higher than \$250,000 would have little impact. Task Force Report at xiv, 220.

In sum, the Legislature's factual basis for section 766.118 was "clearly erroneous, arbitrary or wholly unwarranted." *Moore*, 126 So.2d at 549. The cap on noneconomic damages, therefore, cannot satisfy even minimal scrutiny under the Florida Constitution.

CONCLUSION

For the foregoing reasons, this Court should answer the certified questions in the affirmative.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the parties listed below by U.S. Mail and email and to the amici curiae listed on the below service list by email, this 8th day of August, 2011:

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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