IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D18-1809
L.T. CASE NO. 16-16511

TAYLOR POOLE, M.D., et al.,

Appellants,

vs.

DEBORAH DEFRANKO, et al.,

Appellees.

AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, small business owners, business leaders, doctors, and lawyers who are working towards the common goal of promoting predictability and personal responsibility in the civil justice system through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices. The Institute is the first independent organization focused solely on civil justice in Florida. Since its founding, and building upon the decades of medical malpractice reforms enacted by the Florida Legislature, the Institute has worked to increase the affordability of health care in Florida by supporting efforts to control increasing malpractice insurance costs and to maintain stability in Florida's malpractice insurance market. Encouraging the early and prompt resolution of medical negligence claims through voluntary, binding arbitration—including by imposing a conditional limit on noneconomic damages at trial as an incentive for claimants to agree to arbitration—is a longstanding part of Florida's medical malpractice law and has contributed to the more stable medical malpractice insurance market that Florida enjoys today. Consequently, the Institute's members support the reasonable and necessary limit on noneconomic damages set forth in sections 766.207 and 766.209, Florida Statutes.

SUMMARY OF THE ARGUMENT

This amicus curiae brief focuses on the trial court's erroneous conclusion that the conditional limit on noneconomic damages in sections 766.207(7)(k) and 766.209(4)(a), Florida Statutes, must be deemed unconstitutional in light of the Florida Supreme Court decisions *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), and *North Broward Hospital District v. Kalitan*, 219 So. 3d 49 (Fla. 2017). The trial court's conclusion is wrong for at least two reasons.

First, *McCall* and *Kalitan* do not control because they concerned a much broader cap on noneconomic damages in section 766.118, Florida Statutes, enacted as part of a specific set of medical malpractice reforms in 2003. In contrast, the narrow, conditional limit on noneconomic damages in sections 766.207(7)(k) and 766.209(4)(a) has been a critical component of Florida's medical malpractice presuit and voluntary arbitration process since 1988. This limit on noneconomic damages is part of a carefully balanced combination of civil justice reforms aimed at prompt resolution of meritorious medical negligence claims through: (1) a presuit investigation process to eliminate non-meritorious claims; and (2) a separate, voluntary arbitration process designed to encourage settlement of claims by providing incentives to both claimants and defendants to agree to arbitration instead of costly litigation. The trial court erred in using the Florida Supreme Court's analysis in *McCall* and *Kalitan* concerning 2003 legislative reforms to invalidate the

much older conditional limit on noneconomic damages at issue here, without considering the nature of the 1988 reforms and the significant legislative and evidentiary record supporting these reforms.

Second, the trial court ignored that, under binding Florida Supreme Court precedent, sections 766.207 and 766.209 are constitutional. In *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), the Florida Supreme Court held that the conditional limit on noneconomic damages in sections 766.207 and 766.209, Florida Statutes, is constitutional and does not violate equal protection guarantees. Further, the rational basis test does not demand a perfect solution from the Legislature, nor does it permit a de novo review of the evidence that was before the Legislature when it enacted these reforms. Under the rational basis test, "it is not this Court's task to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." *McCall*, 134 So. 3d at 919 (Pariente, J., concurring). Here, the 1988 Legislature had a legitimate goal—to increase the affordability of malpractice insurance—and the means chosen by the Legislature—to implement a conditional limit on noneconomic damages to encourage early arbitration of meritorious malpractice claims and to provide some predictability in noneconomic damages awards—were rationally related to that goal.

This Court should follow *Echarte* and uphold the challenged statutes.

ARGUMENT

A. Encouraging early arbitration of medical malpractice claims by conditionally limiting noneconomic damages awards has been one of the pillars of Florida's medical malpractice law since 1988.

The trial court erroneously applied the reasoning of *McCall* and *Kalitan* and decided that, even though *McCall* and *Kalitan* concerned a broader statutory cap on noneconomic damages enacted as part of different medical malpractice reforms in 2003, the Florida Supreme Court was just as likely to invalidate the much older, narrow noneconomic damages cap set forth in sections 766.207(7)(k) and 766.209(4)(a), Florida Statutes. Further, the trial court mistakenly viewed the arbitration caps as discriminatory and found that "any benefit a plaintiff derives from sections 766.207 and 209 is dwarfed by that bestowed upon a defendant: the ability to 'unilaterally limit the claimant's noneconomic damages . . . whether the claimant accepts arbitration, . . . or goes to trial.'" Trial Court Order at 7 (quoting *Echarte*, 618 So. 2d at 200 (Shaw, J., dissenting)). These conclusions ignore the significant legislative history and evidentiary record supporting the noneconomic damages cap in the arbitration context, a cap that has been in place since 1988, is part and parcel of reforms benefiting both claimants and defendants, and has been upheld by every other court that has considered it.

The statute at issue in both *McCall* and *Kalitan* was section 766.118, Florida Statutes, which capped, for ***all*** medical malpractice claimants, the noneconomic

damages available in wrongful death actions and in personal injury actions. *See, e.g.*, § 766.118(2)(a), Fla. Stat. ("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.").

The cap at issue here is narrower and a single but necessary component of a larger process aimed at early and prompt resolution of meritorious medical negligence claims.

In 1986, confronted with a crisis in the affordability of medical malpractice insurance, the Florida Legislature established the Academic Task Force for Review of the Insurance and Tort Systems (the "Task Force") to study the problem and recommend reforms. The Task Force was not populated by representatives of special interest groups with stakes in the tort and insurance systems; instead, its members were the presidents of three major Florida universities and two businessmen with distinguished public service backgrounds: Chairman Marshall Criser (President, University of Florida); Edward T. Foote, II (President, University of Miami); Preston Haskell (President, the Haskell Company, architects/engineers/contractors); P. Scott Linder (Chairman of Linder Industrial Machinery Company); and Bernard F. Sliger (President, Florida State University). *See* Academic Task Force for Review of the Insurance and Tort Systems, *Medical*

Malpractice Recommendations, at 7-8 (Nov. 6, 1987) (available at State Library and Archives of Florida) (hereinafter "Malpractice Recommendations").

The Task Force also had at its disposal a professional staff to independently research the perceived problems surrounding Florida's insurance and tort systems. *See id.* at 8. The Task Force's work was directed by an executive director and associate director—both law professors—who managed a research team of five other university professors with expertise in the areas of finance, insurance, law, economics, and actuarial science, as well as a physician and a number of research assistants. Academic Task Force for Review of the Insurance and Tort Systems, *Preliminary Fact-Finding Report on Medical Malpractice*, at 18-19 (Aug. 14, 1987) (available at State Library and Archives of Florida) (hereinafter "Fact-Finding Report"); *see also* Academic Task Force for Review of the Insurance and Tort Systems, *Final Recommendations*, at 7 (Mar. 1, 1988) (available at State Library and Archives of Florida) (hereinafter "Final Recommendations").

The Task Force and its staff conducted a thorough, independent study. As part of its work, the Task Force held seven public meetings across Florida, at which "[r]epresentatives of the medical profession, as well as those who had been injured as a result of medical maloccurrences and their lawyers, spoke frequently and vigorously about the medical malpractice situation." Fact-Finding Report at 1. The Task Force and its staff also undertook a comprehensive literature search and review

and performed eight research projects, including a medical malpractice closed-claims survey, surveys of insurance companies, physicians, and attorneys, and an analysis of Florida civil litigation rates. *Id.* at 23-24.

The result of that study was a 263-page preliminary fact-finding report with the following overarching findings: medical malpractice insurance premiums had risen due to a rapid increase in the frequency and amount of malpractice awards, together with a dramatic increase in defense costs. *Id.* at 7-8. While the frequency of medical malpractice claims had increased at a rate that outpaced Florida's population, *id.* at 11, 114-26, the greater contributing cause to the increase in total loss payments was their increasing size, *id.* at 126-28. For example, multimillion-dollar claims payments represented only 4.9% of total paid claims in 1981, but by 1986, this category accounted for 29.1% of all total paid claims. *Id.* at 12, 135. Defense costs had also risen over the past decade by ***543%***. *Id.* at 193. Perhaps of greater concern, the Task Force determined that of the total costs paid by insurance companies for malpractice claims, claimants received 43.1%, only a bit more than the parties' attorneys, who split 40% of the total costs paid by insurance companies. *Id.* at 15.

These factors all culminated in dramatically increasing malpractice insurance premiums; for example, a family practitioner who did not perform surgery experienced an average increase of ***229%*** in malpractice insurance costs from 1983

to 1987. *Id.* at 30-31. These premium increases were ultimately felt by patients. The Task Force found that in response to the resulting increases in malpractice insurance premiums, a substantial majority of physicians raised their fees, for an average increase of 34% per total fee during the study period. *Id.* at 240.

To address these issues, the Task Force made a number of recommendations designed to stabilize and reduce medical malpractice premiums through a fair and carefully balanced combination of reforms specifically addressed to its findings. A "core component" of those reforms was the prompt resolution of meritorious medical negligence claims through: (1) a presuit investigation process to eliminate frivolous claims; and (2) a separate, voluntary arbitration process designed to encourage settlement by providing incentives to both claimants and defendants to agree to arbitration. Malpractice Recommendations at 15-24. After requiring early investigation by both claimants and defendants in the presuit process, the next stage allowed parties to elect to have damages determined by an arbitration panel, with the defendant conceding fault. Such damages would include full economic damages and noneconomic damages determined in a more structured manner than jury awards. *Id.* at 21. Participation in this voluntary process would promote prompt resolution of claims and also provide the predictability necessary to encourage settlement, as well as to facilitate rate-making in the insurance system. *Id.* It also would limit potentially high awards for noneconomic damages. *Id.*

The Task Force determined that it was important for claimants and defendants alike to face incentives to arbitrate, as well as disincentives not to arbitrate. Under the Task Force's proposal, if the claimant requested arbitration, and the defendant refused, the plaintiff would be entitled to his full jury rights and also recover attorney's fees and prejudgment interest. *Id.* at 25. The Task Force reasoned that the risk of incurring attorney's fees and prejudgment interest served as significant incentives to the defendant to accept arbitration, and that prejudgment interest in particular would act as a disincentive for the defendant to delay in those cases which did proceed to trial. *Id.* If the defendant accepted the claimant's request to arbitrate, thereby conceding liability, the parties would proceed to arbitration wherein the defendant would pay the claimant's economic damages and reasonable attorney's fees, and noneconomic damages up to $250,000. *Id.* at 18, 21-22.

If, on the other hand, the claimant declined a defendant's offer to arbitrate, the claimant could still proceed to a jury trial and receive his or her full economic damages, but the claimant's noneconomic damages would be capped at $350,000. *Id.* at 26. If neither the claimant nor the defendant sought arbitration, the case would proceed to a full trial without any limit on damages. *Id.* at 18.

This conditional limit on noneconomic damages in the event the claimant refused arbitration was very important to the Task Force, and it was not

recommended lightly. Indeed, the Task Force stated that it recommended adoption of this conditional limitation:

> only as a part of a package that includes carefully balanced proposals for eliminating non-meritorious claims from the system, reducing transaction costs, limiting actual medical negligence through increased regulation of the quality of medical care and providing equitable reductions in malpractice premiums for those physicians who can demonstrate genuine hardship as a result of high malpractice premiums.[1]

Id. at 27. Given its research and findings, the Task Force specifically found that: (1) the conditional limit on noneconomic damages at trial gives the plaintiff greater incentive to accept the defendant's offer to arbitrate; and (2) the $350,000 limit on noneconomic damages represents an appropriate balance between the interests of ***all*** patients who ultimately pay for such losses through higher health care costs and the interests of those patients who are injured as a result of medical negligence. *Id.* at 26. The Task Force reasoned that the savings to be realized from expedited resolution of streamlined claims were at least as important in prompting this recommendation as any expectation of reduced liability payments directly attributable to the cap on noneconomic damages. *See* Final Recommendations at 63, 65.

[1] In addition to the presuit and voluntary arbitration process described above, the Task Force recommended measures to strengthen regulation of medical care providers to reduce the costs of the medical liability system by directly reducing incidents of actual medical negligence. *Id.* at 37-47.

The Legislature adopted the findings and recommendations of the Task Force and passed comprehensive reforms, including the incentives to claimants and defendants alike to participate in arbitration. *See generally* Ch. 88-1, §§ 54, 56, Laws of Fla.; *see also* Fla. S., tape recording of proceedings, (Feb. 3, 1988) (available at State Library and Archives of Florida) (Statements of Sen. Jennings) ("We had before us the Academics Task Force that we as a legislature had embodied and instructed to go forth and bring back recommendations. The Bill before you today incorporates these main provisions.").[2] Although the Legislature debated revisions to the Task Force's proposal, it ultimately passed the Task Force's recommendation regarding arbitration, including the conditional limitation on noneconomic damages, with little change. *See Id.* ("This amendment is the arbitration provision of the Academic Task Force, and in actuality…this was part of the bill. It was amended last night to change it…We would now like to put back in."); *see also Id*. ("[T]he Academic Task Force spent a lot of time looking at this. I think for that reason, this is the arbitration provision that should be included in the bill.") (later in the hearing).

[2] The Institute obtained audio files from the State Archives of the debate on the Senate floor regarding the bill that incorporated the Task Force's recommendations, SB-6E. The Institute had these audio files transcribed by Accurate Stenotype Reporters, Inc.

In its findings, the Legislature emphasized that ***both*** mandatory presuit investigation of claims and voluntary arbitration of claims were necessary to the prompt resolution of medical negligence claims. Ch. 88-1, § 48(2), Laws of Fla. With respect to arbitration, the Legislature specifically found that arbitration must and would include:

> 1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.
> 2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
> 3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

Ch. 88-1, § 48(2)(b), Laws of Fla..

Backed by the Task Force's thorough study and recommendations, the Legislature included within the enacted statute the explicit finding that "such conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration, and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result of medical negligence." § 766.209(4)(a), Fla. Stat.

In short, the conditional limit on noneconomic damages when a claimant refuses arbitration was the result of careful study and compromise, driven by the

independent findings and recommendations of the Task Force, and has been a critical component of the process to promptly resolve meritorious medical negligence claims presuit since 1988. Thus, the trial court was wrong to treat *McCall* and *Kalitan*—which concerned an altogether different cap on noneconomic damages resulting from separate reforms enacted more than a decade later—as controlling with respect to the economic damages limitation in sections 766.207(7)(k) and 766.209(4)(a).

B. Binding precedent compels the determination that this conditional limitation on noneconomic damages awards is constitutional.

The trial court also ignored binding precedent holding that the conditional limit on noneconomic damages in sections 766.207 and 766.209, Florida Statutes, is constitutional. Regardless, under the applicable equal protection analysis—the rational basis test—this limit bears a reasonable relationship with the Legislature's objectives to promptly resolve meritorious medical negligence claims and to reduce the costs associated with medical negligence litigation.

In *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), the Florida Supreme Court held that the conditional limit on noneconomic damages in sections 766.207 and 766.209, Florida Statutes, is constitutional and does not violate equal protection guarantees. *Id.* at 191. In so doing, the supreme court carefully considered the record described above before the Task Force and the Legislature in passing these reforms, and found that the statutes provide claimants with commensurate benefits for the loss of the right to fully recover noneconomic

damages. *Id.* at 194. The court observed that "[t]he defendant's offer to have damages determined by an arbitration panel provides the claimant with the opportunity to receive prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial." *Id.* In addition, the claimant "saves the costs of attorney and expert witness fees which would be required to prove liability" and receives the additional benefits of a relaxed evidentiary standard for arbitration proceedings, joint and several liability of multiple defendants in arbitration, interest penalties against the defendant for failure to promptly pay an arbitration award, and limited appellate review of the arbitration award. *Id.*

Echarte remains good law and the trial court was not free to disregard it. Although the supreme court's focus in *Echarte* was the plaintiff's access-to-courts challenge, the court also unequivocally ruled that the statutory cap on noneconomic damages in sections 766.207 and 766.209 does "not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, single subject requirement, taking clause, or nondelegation doctrine." 618 So. 2d at 191. Further, in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), the Florida Supreme Court examined the limitation on noneconomic damages applicable in arbitration proceedings set forth in section 766.207(7)(b), and rather than invalidate the entirety of the statutory caps on the basis of equal protection,

confirmed that the noneconomic damages cap survived constitutional scrutiny, so long as the cap "applies to each claimant individually." *Id.* at 971-72.

Neither *McCall* nor *Kalitan* constitute "doctrinal developments" that permit effectively overruling both *Echarte* and *Phillipe*. Indeed, Justice Lewis in his plurality opinion in *McCall* took great pains to distinguish *Echarte* and the conditional limitation on noneconomic damages in the arbitration context, observing that "arbitration provided commensurate benefits in exchange for the cap, such as saving the expense of attorney fees and expert witnesses." 134 So. 3d at 904 (Lewis, J., plurality op.). On the other hand, the noneconomic damages cap in section 766.118 at issue in *McCall* provided no such commensurate benefit, "only arbitrary reductions based upon the number of survivors." *Id.* Justice Lewis also distinguished *Phillipe* and the process at issue here, stating:

> [t]he statute at issue in *Phillipe*, related to damage limits, is not identical to the factors in the present case. **Phillipe** ***involved a very different statutory scheme, based upon noneconomic damage awards in the arbitration context, a factual scenario not presented here.*** Therefore, while *Phillipe* provides guidance and may be considered persuasive, it is not dispositive of our equal protection analysis today. ***We cannot take the drastic step of invalidating a statute simply by declaring it so and relying upon an unrelated case which evaluated an unrelated statute.***

Id. at 905 (emphasis added). Nothing in the majority's decision in *Kalitan* suggests that the Florida Supreme Court would not say the same for the noneconomic damages cap at issue here. Thus, the Court should heed Justice Lewis and not "take

the drastic step" of invalidating the conditional limitation on noneconomic damages in sections 766.207 and 766.209 when a claimant refuses arbitration "simply by declaring it so and relying upon [two] unrelated case[s]"—*McCall* and *Kalitan*—which evaluated an unrelated statute." *See id.*

Further, and notwithstanding *McCall* and *Kalitan*, the rational basis test does not demand perfection nor does it permit a de novo review of the evidence before the Legislature when enacting reforms. Under the rational basis test, "it is not this Court's task to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." *McCall*, 134 So. 3d at 919 (Pariente, J., concurring). Indeed, a law will be upheld under this test if it is "fairly debatable," as this Court recognized in explicitly finding that *McCall* did not serve to overrule the traditional rational basis test. *Silvio Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13, 29-31 (Fla. 3d DCA 2016) ("We cannot assume the Court intended to silently overturn such well-established, long standing, black letter law [regarding the rational basis test]."), *review denied*, No. SC16-616, 2016 WL 3486427 (Fla. June 27, 2016). Under the traditional rational basis test, the burden resting upon the party challenging the statute is a heavy one: the party must "show that there is no conceivable factual predicate which would rationally support the classification under attack." *Fla. High Sch. Activities Ass'n v. Thomas ex rel.*

Thomas, 434 So. 2d 306, 308 (Fla. 1983). As this Court has said, "although courts should not act as rubber stamps when analyzing a law under the rational basis test, neither should the courts presume to second guess the legislature by purporting to conduct a courtroom-style evidentiary hearing regarding a legislative finding that is really more of a value judgment than a historical fact." *Silvio Membreno*, 188 So. 3d at 28; *see also Progressive Am. Ins. Co. v. Eduardo J. Garrido D.C. P.A.*, 211 So. 3d 1086, 1092 (Fla. 3d DCA 2017) (confirming that, even after *McCall*, "the rational basis test does not allow judicial fact-finding to replace legislative fact-finding"), *review denied*, No. SC17-383, 2017 WL 2874837 (Fla. July 6, 2017).

Thus, under the dictates of the rational basis test, if the Court can conceive of a possible factual predicate that provides a rational basis in furtherance of a legitimate state interest, the statute does not violate the constitutional guarantees of equal protection. Here, the 1988 Legislature had a legitimate goal—to increase the affordability of malpractice insurance. The means chosen by the Legislature and supported by the Task Force's findings—to implement a conditional limit on noneconomic damages to encourage early arbitration of meritorious malpractice claims and to provide some predictability in noneconomic damages awards—were rationally related to that goal. The Legislature had a wealth of evidence before it that a system built upon the prompt resolution of meritorious medical negligence claims, including necessary incentives for both claimants and defendants to arbitrate,

would ultimately result in making the medical malpractice insurance market more affordable and stable.[3] This Court should not second guess the Legislature's and the Task Force's findings and invalidate a single component of the presuit and voluntary arbitration process that has been part of Florida's medical malpractice law since 1988—certainly not based upon *McCall* and *Kalitan*, which examined the legislative findings underpinning an entirely different medical malpractice reform scheme enacted 15 years later. Because it is at the very least fairly debatable that the challenged statutes bear a rational relationship to legitimate goals, under still binding precedent, this Court must find that sections 766.207(7)(k) and 766.209(4)(a), Florida Statutes, are constitutional.

CONCLUSION

This Court should reject the trial court's ruling that the conditional limitation on noneconomic damages when a claimant rejects arbitration is unconstitutional in light of *McCall* and *Kalitan*. The noneconomic damages cap at issue here is much different than the one examined in *McCall* and *Kalitan*, and has been a critical component of Florida's process for prompt resolution of medical negligence claims since 1988 through presuit investigation and voluntary arbitration. Further, neither

[3] The Institute believes that the Legislature acted rationally in 2003 based on a substantial evidentiary record, and the Institute submits that, under a correct application of the traditional rational basis test under an Equal Protection analysis, the noneconomic damages caps invalidated in *McCall* and *Kalitan* would have been upheld.

McCall nor *Kalitan* granted Florida courts a license to overturn every statutory limitation on noneconomic damages based upon a judicial reweighing and reevaluating of legislative findings. The binding precedent of *Echarte* and the rational basis test requires that this Court find that the limit on noneconomic damages in sections 766.207(7)(k) and 766.209(4)(a) is constitutional under equal protection guarantees.

Respectfully submitted on March 4, 2019.

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CERTIFICATE OF RULE 9.210 COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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