

# CAPPING NON-ECONOMIC MEDICAL MALPRACTICE DAMAGES: HOW THE FLORIDA SUPREME COURT SHOULD DECIDE THE ISSUE

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*That the right of trial by jury “shall remain inviolate,” means that the right shall, in all cases in which it was enjoyed when the Constitution was adopted, remain unbridged by any act of legislation.*<sup>1</sup>

## I. INTRODUCTION

There is no greater constitutional guarantee than the ancient right to trial by jury. The Florida Supreme Court has “always considered the right to jury trial an indispensable component of our system of justice” aimed at achieving justice.<sup>2</sup> The United States Supreme Court has similarly characterized the jury trial right as “the glory of the English law” and “the most transcendent privilege which any subject can enjoy.”<sup>3</sup> Consistent with the sanctity of this right, Florida’s Constitution plainly guarantees that

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1. *Blanchard v. Raines’ Ex’x*, 20 Fla. 467, 476 (Fla. 1884) (emphasis added).

2. *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997).

[T]he Founders, mindful of royal encroachments on jury trial” and fearful of leaving this precious right to the whims of legislative prerogative, included protection of the right in the Declaration of Independence and included three separate provisions in the Constitution for the right to jury trial: Article III and later the Sixth and Seventh Amendments.

*Id.* at 1212–1213 (internal citations omitted).

3. *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 23 n. 22 (1955) (quoting Justice Sutherland in *Dimick v. Schiedt*, 293 U.S. 474, 485–486 (1935)).

“[t]he right of trial by jury shall be secure to all and remain inviolate.”<sup>4</sup> The principle that the right shall “remain inviolate” has been recognized since Florida’s first Constitution in 1838.<sup>5</sup> It is also recognized in the Federal Bill of Rights<sup>6</sup> and in almost every other state in the country.<sup>7</sup>

The Florida Supreme Court first defined the word “inviolate” as it is used in the State’s Constitution in 1848 when it interpreted the word to mean that the jury trial right “shall not be *impaired*.”<sup>8</sup> The Court further recognized that “the plain and obvious meaning” of the inviolate right to trial by jury is that “the General Assembly has no power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation.”<sup>9</sup>

The special constitutional significance of the jury’s role in civil cases is reflected in the traditional role of the jury to determine the facts of the case, including the amount of compensatory damages to be awarded an injured party, if any.<sup>10</sup> Compensatory damages include both economic and non-economic (e.g., pain and suffering) damages.<sup>11</sup> To the extent that the jury’s

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4. Fla. Const. art I, § 22. Florida has applied the “common and statute laws of England” since November 6, 1829:

The common and statute laws of England[,] which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Fla. Stat. § 2.01 (2012) (originally codified on Nov. 6, 1829).

5. *Bottoson v. Moore*, 833 So. 2d 693, 714 (Fla. 2002) (Shaw, J., concurring in result only). “The Constitution of 1838 became effective on March 3, 1845 when Florida was admitted into the Union.” Henry P. Trawick, Jr., *Trawick’s Florida Practice & Procedure* § 23:2 n. 2 (2011 ed.). The original jury trial provision in Florida’s Constitution provided “[t]hat the right of trial by jury, shall for ever remain inviolate.” Fla. Const. art I, § 6 (1838).

6. U.S. Const. amend. VII.

7. E.g. Ga. Const. art. I, § 1, ¶ 11.

8. *Flint River Steam Boat Co. v. Roberts*, 2 Fla. 102, 114 (Fla. 1848) (emphasis in original).

9. *Id.*

10. *Miller v. James*, 187 So. 2d 901, 902 (Fla. 2d Dist. App. 1966) (stating that “[i]n a long line of cases, the appellate Courts of Florida have held that the amount of damages to be awarded plaintiff in a negligent action is peculiarly the province of the jury”).

11. Fla. Stat. § 766.202(8) (2012).

“Non[-]economic damages” means nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity

damage determination exceeds reasonable bounds, it is subject to review by the trial court, which has the discretion to reduce awards deemed excessive by remittitur or grant a new trial.<sup>12</sup> Given these ancient principles, it would seem difficult to imagine that a state legislature could override the effect of a jury's determination and impose an artificial cap on the amount of damages to be awarded. Yet that is exactly what has transpired over the last forty years.

Beginning in the 1970s, states began adopting so-called tort reform legislation.<sup>13</sup> The high-water mark for such legislation was in 1986, when more than thirty states (including Florida) adopted some type of tort reform.<sup>14</sup> Florida's 1986 Tort Reform and Insurance Act provided for a cap on non-economic damages in a wide variety of tort cases, including medical malpractice cases.<sup>15</sup> In 1987, the Florida Supreme Court ruled that portions of the law were unconstitutional, including those related to medical malpractice actions.<sup>16</sup> Non-economic damage caps were subsequently reinstated by the legislature in 1988 for medical malpractice cases.<sup>17</sup>

In 2003, the Florida legislature's most recent cap on non-economic damages in medical malpractice cases went into effect.<sup>18</sup> Like previous tort reform measures, the legislation was enacted

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for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.

*Id.*

12. *McDonald v. Stone*, 114 Fla. 608, 608 (Fla. 1934). See Robert S. Peck, *Violating the Inviolable: Caps on Damages and the Right to Trial by Jury*, 31 U. Dayton L. Rev. 307, 311 n. 30 (2006) (compiling a list of state statutes).

13. On December 12, 1975, California became the first state to limit non-economic damages in medical malpractice cases. Medical Injury Compensation Reform Act of 1975, Cal. Civ. Code § 3333.2(b) (2012). That Act provides: "In no action [for injury against a healthcare provider based on professional negligence,] shall the amount of damages for non[-]economic losses exceed two hundred fifty thousand dollars (\$250,000)." *Id.*

14. See Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 Cornell L. Rev. 628, 628-629 (1988) (discussing the evolution of tort reform and analyzing the effectiveness of those objectives); see also Tort Reform and Insurance Act of 1986, Fla. Stat. § 768.80 (1986) (repealed by Laws 1991, c. 91-223, § 11) (reforming Florida tort law).

15. Fla. Stat. § 768.80 (1986) (repealed by Laws 1991, c. 91-223, § 11).

16. See *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1095 (Fla. 1987) (holding some portions of Florida's tort reform legislation constitutional and others unconstitutional).

17. Fla. Stat. §§ 766.207, 766.209 (2012). Additional tort reform legislation was passed in 1999. Fla. Stat. § 768.075 (1999 Florida Tort Reform Act).

18. Fla. Stat. § 766.118 (2003).

in response to the perceived dramatic increase in the cost of medical malpractice insurance.<sup>19</sup> The legislature determined that there was “overwhelming public necessity” for such legislation to “ensur[e] the availability of affordable professional liability insurance for physicians,” and thereby “ensuring that physicians continue to practice in Florida.”<sup>20</sup> In short, the legislation sets upper limits on how much a plaintiff can recover against medical practitioners regardless of the individual circumstances of the case. The law limits the amount of non-economic damages a plaintiff can recover against a medical practitioner for acts of negligence to five hundred thousand dollars (\$500,000) per claimant; and each occurrence of negligence that results in wrongful death is capped at one million dollars (\$1,000,000), “regardless of the number of claimants.”<sup>21</sup> Non-economic damages for non-practitioners are capped at seven hundred fifty thousand dollars (\$750,000) per claimant, except where the negligence results in a permanent vegetative state or death, in which case the cap is increased to one and a half million dollars (\$1,500,000) for all claimants.<sup>22</sup>

The limitations on damages implemented by various state legislatures over the past four decades, such as those adopted in Florida, have since emerged as the most controversial legislative impingement on the right to trial by jury. Florida’s legislative cap on damages in medical malpractice actions is now subject to review by the State’s highest court in *Estate of McCall v. United States*.<sup>23</sup> Although there are an array of constitutional challenges that have been levied in *McCall*<sup>24</sup>—any one of which could justify striking down the law—arguably the most fundamental is the claim that the caps violate the right to trial by jury. Accordingly, this Article focuses on this most fundamental of all constitutional

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19. *Franks v. Bowers*, 62 So. 3d 16, 18 (Fla. 1st Dist. App. 2011).

20. 2003 Fla. Sess. L. Serv. ch. 416, § 1 (West).

21. Fla. Stat. § 766.118(2) (2012).

22. *Id.* at § 766.118(3)(b).

23. On May 27, 2011, the Eleventh Circuit Court of Appeals granted plaintiffs’ motion to certify questions of Florida constitutional law regarding the cap on non-economic damages in medical malpractice cases to the Florida Supreme Court. Or., *Est. of McCall v. United States*, <http://www.ca11.uscourts.gov/opinions/ops/200916375cert.pdf> (11th Cir. May 27, 2011) (No. 07-00508-CV-MCR/EMT at \*19).

24. For example, the plaintiffs assert violations of the right to fair compensation, access to the courts, and equal protection. *Est. of McCall v. United States*, 663 F. Supp. 2d 1276, 1297–1306 (N.D. Fla. 2009).

guarantees as it has been applied in Florida to limit non-economic damages in medical malpractice cases.<sup>25</sup>

In addressing the constitutionality of the damage caps, codified at Section 766.118, Florida Statutes, the Florida Supreme Court must determine: (1) whether the right to trial by jury is a fundamental right; (2) whether the statute impairs that right; and, if so (3) whether there is a compelling state interest that justifies such a limitation.<sup>26</sup> This Article argues that the jury trial right is a fundamental right, that the caps are an unconstitutional violation of the “inviolable” provision of Florida’s Constitution, and that the caps fail the strict scrutiny analysis to which the statute must be subjected. The Article thus concludes that the Florida Supreme Court should find the damage caps unconstitutional.

It is likely that by the time this Article is published the Florida Supreme Court will have already handed down its decision in *Estate of McCall*, potentially relegating this Article to the annals of scholarly history. So that this Article may serve a more lasting purpose, the Author has surrounded the discussion of *Estate of McCall* with arguments and citations that may be of value to attorneys and scholars regardless of the case’s disposition.

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25. See *Vainio v. Brookshire*, 852 P.2d 596, 604 (Mont. 1993) (Trieweiler, J., concurring in part and dissenting in part) (explaining that “[t]he right to trial by jury is the most fundamental protection in our state and in our country against tyranny by judges, legislators, bureaucrats, and other governmental officials.”). For additional discussion of Florida constitutional issues relative to the legislature’s attempt to limit non-economic damages, see Pamela Burch Fort et al., *Florida’s Tort Reform: Response to a Persistent Problem*, 14 Fla. St. U. L. Rev. 505 (1986) (analyzing the legal effects and deficiencies of the Tort Reform and Insurance Act of 1986); R. Kyle Gavin, *The Constitutionality of Florida’s Cap on Noneconomic Damages in the Tort Reform and Insurance Act of 1986*, 39 U. Fla. L. Rev. 157 (1987) (discussing the constitutionality of Florida’s cap on damages under the Due Process Clause and Equal Protection Clause); Leonard Schulte, *Availability, Affordability, and Accountability: Regulatory Reform of Insurance*, 14 Fla. St. U. L. Rev. 557 (1986) (examining legislative history to resolve the insurance crisis and the constitutional implications of the Tort Reform and Insurance Act of 1986).

26. See *State v. J.P.*, 907 So. 2d 1101, 1109–1110 (Fla. 2004) (applying strict scrutiny analysis in a separate context); Andrew D. Gowdown, *The Noneconomic Damages Cap of Ohio Revised Code Section 2744.05(c)(1): Legislative Usurpation of the Constitutional Right to Trial by Jury*, 22 U. Dayton. L. Rev. 283, 288–298 (1997) (analyzing the constitutionality of Ohio legislation effecting the right to a trial by jury).

## II. THE FACTS OF ESTATE OF MCCALL v. UNITED STATES

In February 2006, Michelle McCall was a healthy twenty-year-old woman receiving prenatal care through the Air Force's family practice department instead of the OB/GYN department.<sup>27</sup> During a routine prenatal checkup in mid-February 2006, doctors discovered that Michelle's blood pressure had increased.<sup>28</sup> Doctors later discovered that Michelle had severe preeclampsia, a serious condition requiring immediate hospitalization for the induction of labor.<sup>29</sup> Michelle was induced, and after almost twenty-four hours of labor, her doctors decided to perform a cesarean section but realized that the only doctor capable of cesarean delivery was busy with another surgery and was not immediately available.<sup>30</sup> Her doctors decided to await the arrival of that doctor instead of calling an alternate obstetrician.<sup>31</sup>

Meanwhile, Michelle's labor resumed, and she was allowed to continue with a vaginal delivery even after the obstetrician arrived.<sup>32</sup> Thirty-five minutes after the birth, when the placenta still had not been delivered, two doctors tried unsuccessfully to manually remove the placenta.<sup>33</sup> Michelle's blood pressure began dropping and continued to drop, which went unnoticed by the medical staff for two and a half hours.<sup>34</sup> Michelle then began losing a significant amount of blood, the extent of which her physicians underestimated.<sup>35</sup> An hour after the delivery, the obstetrician manually removed the placenta and repaired Michelle's vaginal wall.<sup>36</sup> Following the procedure, he ordered an immediate blood count and, if necessary, a transfusion to compensate for the amount of blood Michelle lost during the procedure.<sup>37</sup> For over an hour, no one attempted to perform a blood count, and no one monitored Michelle's condition.<sup>38</sup> When the nurse finally went to draw

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27. *Est. of McCall*, 663 F. Supp. 2d at 1283–1284.

28. *Id.* at 1284.

29. *Id.*

30. *Id.* at 1284–1285.

31. *Id.* at 1285.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1286.

36. *Id.* at 1285.

37. *Id.* at 1286.

38. *Id.*

Michelle's blood to perform the blood count, Michelle was unresponsive.<sup>39</sup> Michelle never regained consciousness and "was removed from life support a few days later," dying on February 27, 2006.<sup>40</sup>

Michelle McCall's estate, her parents, her son, and her son's father brought suit against the United States under the Federal Tort Claims Act<sup>41</sup> ("FTCA") seeking damages for the medical negligence that resulted in her death.<sup>42</sup> After a bench trial, the Federal District Court held the defendant liable and awarded nearly three million dollars (\$3,000,000), which included two million dollars (\$2,000,000) in non-economic damages.<sup>43</sup> Of the non-economic damages, the court awarded five hundred thousand dollars (\$500,000) to McCall's son for "loss of parental companionship, instruction, and guidance," as well as for his mental pain and suffering.<sup>44</sup> The court awarded an additional seven hundred fifty thousand dollars (\$750,000) each to Michelle's parents for their pain and suffering.<sup>45</sup> The federal court judge then reduced the plaintiffs' non-economic damages to one million dollars (\$1,000,000) in total pursuant to Florida's statutory cap on medical malpractice damages codified in Section 766.118, Florida Statutes.<sup>46</sup>

The plaintiffs then filed a motion for summary judgment in the district court challenging the constitutionality of Florida's damages cap.<sup>47</sup> The plaintiffs raised the argument that the cap violated their right to trial by jury.<sup>48</sup> The court summarily rejected this argument, finding that because the plaintiffs had no jury trial right under the FTCA in the first instance, the court had "no occasion to consider the issue."<sup>49</sup>

The family appealed the decision to the Eleventh Circuit Court of Appeals, arguing that the cap on malpractice damages

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39. *Id.*

40. *Id.*

41. 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

42. *Est. of McCall*, 663 F. Supp. 2d at 1283.

43. *Id.* at 1293–1294.

44. *Id.* at 1294.

45. *Id.*

46. *Id.* at 1295.

47. *Id.*

48. *Id.* at 1298.

49. *Id.* at n. 37.

was unconstitutional.<sup>50</sup> The court disagreed and upheld the lower court's reduction of damages in accordance with Florida's statute, determining that the cap does not violate the United States Constitution.<sup>51</sup> With respect to the plaintiffs' claim that the cap violated their right to trial by jury as guaranteed by Florida's Constitution, the plaintiffs argued that the lower court should have considered their argument.<sup>52</sup> Specifically, they argued that "the FTCA waives sovereign immunity and authorizes tort actions against the United States 'in the same manner and to the same extent as a private individual under like circumstances.'"<sup>53</sup> Thus, "if the statutory cap violates the right to jury trial in state suits against private parties, the cap is void in the state courts[;] therefore, it is void in the FTCA context as well."<sup>54</sup> The court agreed and granted plaintiffs' motion to certify this question and plaintiffs' other state-law questions to the Florida Supreme Court.<sup>55</sup> In doing so, the court stated that "this case raises important questions about the interpretation and application of Florida constitutional law in areas that remain unsettled."<sup>56</sup> For purposes of this Article, the relevant question certified by the Eleventh Circuit was: "Does the statutory cap on non[-]economic damages, [Florida Statutes Section] 766.118, violate the right to trial by jury under Article I, Section 22 of the Florida Constitution?"<sup>57</sup>

### III. ANALYSIS

#### A. The Fundamental Right to Trial by Jury

The Seventh Amendment to the United States Constitution declares:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

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50. See generally *Est. of McCall ex rel. McCall v. United States*, 642 F.3d 944, 948 (11th Cir. 2011) (detailing the appeal to the Eleventh Circuit).

51. *Id.* at 953.

52. *Id.* at 948–949.

53. *Id.* at 952.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

re-examined in any Court of the United States, than according to the rules of the common law.<sup>58</sup>

“The right to trial by jury is, of course, one of the most sacred and fundamental rights of our legal system.”<sup>59</sup> The right is considered to be “a *fundamental right* under both the United States and Florida [C]onstitutions.”<sup>60</sup> It “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. . . . [It] is meant to ensure [the people’s] control in the judiciary.”<sup>61</sup> The United States Supreme Court has described the jury trial guarantee as “one of the most important safeguards against tyranny which our law has designed.”<sup>62</sup> The Supreme Court went on to note:

[T]he right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England. . . . The founders of our Nation considered the right of trial by jury . . . an important bulwark against tyranny and corruption . . . . [J]uries represent the layman’s common sense, the “passional elements in our nature,” and thus keep the administration of law in accord with the wishes and feelings of the community.<sup>63</sup>

Despite the Seventh Amendment to the United States Constitution’s importance, it has not been made applicable to the states through the Fourteenth Amendment.<sup>64</sup> For this reason, it was left to the individual states to incorporate these jury-right guarantees, if at all. Forty-seven states subsequently opted to do so,

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58. U.S. Const. amend. VII.

59. *Fischer v. State*, 429 So. 2d 1309, 1311 (Fla. 1st Dist. App. 1983); see also *State v. Griffith*, 561 So. 2d 528, 530 (Fla. 1990) (stating that right of trial by jury is “indisputably one of the most basic rights guaranteed by our constitution”); *Vainio*, 852 P.2d at 604 (Trieweiler, J., concurring in part and dissenting in part) (explaining that “[t]he right to trial by jury is the most fundamental protection in our state and in our country against tyranny by judges, legislators, bureaucrats, and other governmental officials”).

60. *Fox v. City of Pompano Beach*, 984 So. 2d 664, 668 (Fla. 4th Dist. App. 2008) (emphasis added).

61. *Blakely v. Wash.*, 542 U.S. 296, 305–306 (2004).

62. *Lee v. Madigan*, 358 U.S. 228, 234 (1959).

63. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340–344 (1979) (internal citations omitted).

64. *Blair v. State*, 698 So. 2d 1210, 1213 n. 5 (Fla. 1997).

including Florida, and extended this guarantee to both criminal and civil cases.<sup>65</sup>

Florida's Constitution expressly provides that "the right of trial by jury shall be secure to all and remain inviolate."<sup>66</sup> This phrasing is typical of many other state constitutions.<sup>67</sup> While it is clear that Florida's jury trial right was modeled after the federal rule,<sup>68</sup> it is also clear that Florida intended to provide its citizens with an even higher degree of protection than its federal counterpart in declaring that this right shall "remain inviolate," which is missing from the federal rule.

In 1848, the Florida Supreme Court interpreted the word "inviolate" to mean that the right to trial by jury "shall not be *impaired*."<sup>69</sup> Almost forty years later, the Court reaffirmed its position when it said, "[t]hat the *right* of trial by jury 'shall remain inviolate,' means that the right shall, in all cases in which it was enjoyed when the Constitution was adopted, remain unbridged by any act of legislation."<sup>70</sup> This constitutional provision, however, "does not *confer* upon every party in all classes of cases a right of trial by jury."<sup>71</sup> Rather, Article I, Section 22 "guarantees the right to trial by jury in those cases in which the right was enjoyed at the time this [S]tate's first constitution became effective in 1845."<sup>72</sup> In other words, Florida's right to trial by jury extends to those proceedings where the right existed when the State's Constitution was adopted. Florida's historical approach to

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65. *Id.* at 1213. Colorado, Louisiana, and Wyoming do not provide a constitutional right to a jury trial in a civil action. *Id.*; see also Peck, *supra* n. 12, at 311 n. 30 (compiling a list of state constitutional provisions that provide jury trial guarantees).

66. Fla. Const. art. I, § 22.

67. Kevin J. Gfell, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 Ind. L. Rev. 773, 784 (2004).

68. *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986) (describing Florida's constitutional jury trial right as the State's "counterpart" to the Seventh Amendment to the United States Constitution). In fact, most states opted for language that was different from the federal rule and more similar to Florida's. See Peck, *supra* n. 12, at 312 (stating that most states, such as Ohio, have renounced the federal formulation of the jury right); see e.g. Mont. Const. art. II, § 26 (providing that "the right of trial by jury is secured to all and shall remain inviolate").

69. *Flint River*, 2 Fla. at 114 (emphasis in original).

70. *Blanchard*, 20 Fla. at 476 (citing *Flint River*, 2 Fla. at 114) (emphasis in original).

71. *Id.* at 476-477 (emphasis in original).

72. *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d at 434. Thus, for instance, this right "does not extend the right to cases ordinarily cognizable in courts of equity, or for the enforcement of liens, or cases of distress for rent, where the right of trial by jury did not before exist." *Blanchard*, 20 Fla. at 477.

assessing the jury trial right is consistent with the approach taken in other states,<sup>73</sup> and Florida courts construe this right liberally.<sup>74</sup> To satisfy this historical test, then, two elements must exist: (1) there must have been a common law jury trial right for claims involving medical negligence when Florida's Constitution was adopted; and (2) the determination of damages must have been within the jury's province at that time.<sup>75</sup>

### *1. Medical Negligence Claims Derive from the Common Law*

The constitutional right to trial by jury applies with full force to claims of medical malpractice.<sup>76</sup> Tort claims derive from common law battery, defined as the unlawful touching of another, where the remedy was an action of trespass *vi et armis*, or by force of arms.<sup>77</sup> At common law, trespass was the remedy applied to all forcible and direct injuries, whether to person or property, and implied a lack of consent.<sup>78</sup> Over time, courts began to realize that medical malpractice actions did not clearly fit into the framework of the traditional battery theory of liability, primarily because the concept of an unlawful, forcible touching did not exist in the typical medical case.<sup>79</sup> In the usual malpractice case, the patient consents to the physician's initial touching for treatment,

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73. See e.g. *Belding v. State*, 169 N.E. 301, 302 (Ohio 1929) (stating “[t]hat guaranty only preserves the right of trial by jury in cases where under the principles of the common law it existed previously to the adoption of the Constitution”); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 468 (Or. 1999) (explaining that “whatever the right to a jury trial in a civil case meant in 1857 [when the Oregon Constitution was adopted], it has the same meaning today”).

74. See *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65, 71 (Fla. 1975) (explaining that “the right to a jury trial should be resolved . . . in favor of the party seeking the jury trial”).

75. Peck, *supra* n. 12, at 318.

76. See *id.* (explaining that the jury trial right “indisputably” applies to the types of tort claims that are subject to damage caps).

77. *Osepchook v. Gateway Ins. Co.*, 298 So. 2d 169, 171 (Fla. 4th Dist. App. 1974) (Cross, J., dissenting). “The action of trespass ‘vi et armis,’ or by force and arms, or, in other words, by unlawful means, is the remedy for injuries accompanied with force or violence, or where the act done is in itself an *immediate* injury to another’s person or property.” *Leonard v. Nat Harrison Assocs., Inc.*, 122 So. 2d 432, 443–444 (Fla. 2d Dist. App. 1960). Trespass *vi et armis* is a lawsuit at common law called a tort. Cathaleen A. Roach, *A River Runs through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 *Ariz. L. Rev.* 667, 685 (1994).

78. *Osepchook*, 298 So. 2d at 171 (Cross, J., dissenting).

79. Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 *Yale L.J.* 219, 224–225 (1985).

just not the doctor's subsequent act of negligence.<sup>80</sup> As a result, actions for malpractice based on negligence—the doctor's failure to exercise reasonable care—eventually replaced actions for battery in the context of medical malpractice.<sup>81</sup> Medical negligence tort claims thus have their roots in the common law.<sup>82</sup>

## 2. *It Was the Jury's Responsibility at Common Law to Determine Damages*

It is beyond dispute that it is within the jury's province to determine damages.<sup>83</sup> Florida's Supreme Court made this clear more than a century ago when it struck a statute that purported to assign the assessment of damages to a court.<sup>84</sup> In *Wiggins v. Williams*,<sup>85</sup> the Court held that a statute allowing a "court of equity to assess damages for a trespass under the conditions prescribed by the statute" was "unauthorized" because "[i]t deprives a party of the right of trial by jury in a case according to the course of the common law when the [C]onstitution was adopted."<sup>86</sup> The Court added that the legislature was without power to authorize any other body to "assess damages in a case clearly triable at law by a jury."<sup>87</sup> It is also within the jury's province to award "pain and suffering" damages if the evidence supports such an award.<sup>88</sup>

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80. See R. Jason Richards, *How We Got Where We Are: A Look at Informed Consent in Colorado—Past, Present, and Future*, 26 N. Ill. U. L. Rev. 69, 83 (2005) (explaining that the failure to inform the patient is not usually an intentional act).

81. *Id.*

82. See Charles M. Key, *Toward a Safer Health System: Medical Injury Compensation and Medical Quality*, 37 U. Mem. L. Rev. 459, 474 (2007) (stating that "[m]odern medical injury law has its roots in the feudal English common law of trespass"); see also Kristen Peters, *Protecting the Millennial College Student*, 16 S. Cal. Rev. L. & Soc. Just. 431, 440 (2007) (stating that "[n]egligence law is derived primarily from common law").

83. See generally *Wiggins v. Williams*, 18 So. 859 (Fla. 1896) (finding unconstitutional a statute that allowed the court to perform the role of assessing damages).

84. *Id.* at 866.

85. 18 So. 859.

86. *Id.* at 866.

87. *Id.*; see also *Feltner v. Columbia Pictures TV, Inc.*, 523 U.S. 340, 353 (1998) (stating juries have always served as the "judges of the damages"); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (stating that "nothing is better settled than that, in such cases as [intentional torts], and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict").

88. *Smith v. Bagwell*, 19 Fla. 117, 117 (Fla. 1882) (stating that "[c]ompensatory damages are defined as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses[,] and bodily pain and suffering").

As more recently observed by Florida's Third District Court of Appeal in *Owens-Corning Fiberglas Corp. v. McKenna*,<sup>89</sup> “[u]nder our system, it is ordinarily, indeed almost invariably, the *jury* which is entrusted with the function of determining how much is enough and how much is too little or too much for the damages that have been demonstrated and described in the courtroom.”<sup>90</sup> This role is especially important with respect to non-economic damages because pain and suffering are so difficult to quantify.<sup>91</sup>

### B. Damage Caps Necessarily Impair the Jury Trial Right

The constitutional guarantee of a right to trial by jury is not a mere procedural formality.<sup>92</sup> Rather, it is a fundamental reservation of power enshrined in both the United States Constitution and the Florida Constitution.<sup>93</sup> As such, “we are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so.”<sup>94</sup>

By imposing a legislative cap on the amount of non-economic damages a jury can award, the legislature is denying a party the full benefit of the right to a jury trial, including the jury's common law responsibility to assess damages. This *ipso facto* means the jury trial right has been “impaired”<sup>95</sup> or “diminished”;<sup>96</sup> it no

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89. 726 So. 2d 361 (Fla. 3d Dist. App. 1999).

90. *Id.* at 364 (quoting *Oakes v. Pitt. Corning Corp.*, 546 So. 2d 427, 429 (Fla. 3d Dist. App. 1989) (emphasis in original)).

91. See *Oakes*, 546 So. 2d at 429 (explaining that it is the jury's function to determine whether damages for mental and physical pain are too high or too low); see also *Daniels v. Weiss*, 385 So. 2d 661, 664 (Fla. 3d Dist. App. 1980) (observing that “the determination of the amount of damages is a matter particularly within the province of the jury to decide inasmuch as pain and suffering have no market price, are not capable of being exactly and accurately determined[,] and have no standard whereby damages can be measured”); *Ratner v. Arrington*, 111 So. 2d 82, 87 (Fla. 3d Dist. App. 1959) (stating that “[i]t has long been the rule in this state and elsewhere that the amount to be allowed as compensation for pain and suffering must be determined by the trier of the facts based upon the evidence submitted”).

92. See *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969) (distinguishing between the procedural nature waiving a jury trial right and the substantive nature of the right itself); *State v. Thorup*, 659 So. 2d 1116, 1117 (Fla. 2d Dist. App. 1995) (referring to “the substantive right to a trial by jury”).

93. *Fox v. City of Pompano Beach*, 984 So. 2d 664, 668 (Fla. 4th Dist. App. 2008).

94. *Smith*, 507 So. 2d at 1089.

95. *Flint River*, 2 Fla. at 114 (interpreting the word “inviolate” in the State's constitution to mean the jury trial right “shall not be *impaired*”) (emphasis in original).

96. *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 722 (Wash. 1989) (striking down the damage cap and finding “[f]or [the jury trial right] to remain inviolate, it must not *diminish*

longer “remains inviolate” as the Florida Constitution requires.<sup>97</sup> Damage caps, in any amount, thus violate the right to trial by jury. Numerous other state courts have similarly held that caps on non-economic damages violate the fundamental right to trial by jury, including Alabama,<sup>98</sup> Florida,<sup>99</sup> Georgia,<sup>100</sup> Kentucky,<sup>101</sup> Ohio,<sup>102</sup> Utah,<sup>103</sup> Washington,<sup>104</sup> and Oregon.<sup>105</sup>

The central question most courts consider is whether the jury’s function has been “impaired.” The Oregon Supreme Court’s 1999 decision in *Lakin v. Senco Products, Inc.*,<sup>106</sup> provides a good example of the rationale typically used by courts to strike down damage caps.<sup>107</sup> Using the same historical analysis employed in Florida and elsewhere, the Court first considered the context of the role jurors played when the right to jury trial was adopted in the State Constitution.<sup>108</sup> The Court concluded that it was the jury’s function to determine damages when the Oregon Constitution was adopted in 1857.<sup>109</sup> That being the case, the legislature could not take that power from the jury by passing a statutory cap

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over time and must be protected from all assaults to its essential guarantees”) (emphasis added).

97. Fla. Const. art I, § 22 (stating that “[t]he right of trial by jury shall be secure to all and remain inviolate”). Florida’s provision that the right of a trial by jury shall remain inviolate is nearly identical to the language used in other states that have found damage caps unconstitutional. *See e.g.* Ala. Const. art. I, § 11 (stating “[t]hat the right of trial by jury shall remain inviolate”); Kan. Const. Bill of Rights § 5 (stating that “[t]he right of trial by jury shall be inviolate”); Ohio Const. art. I, § 5 (stating that “[t]he right of trial by jury shall be inviolate”); Tex. Const. art. I, § 15 (stating that “[t]he right of trial by jury shall remain inviolate”); Wash. Const. art. 1, § 21 (stating that “[t]he right of trial by jury shall remain inviolate”).

98. *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 164 (Ala. 1991).

99. *Smith*, 507 So. 2d at 1089.

100. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010).

101. *Williams v. Wilson*, 972 S.W.2d 260, 268–269 (Ky. 1998).

102. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994).

103. *Condemarin v. U. Hosp.*, 775 P.2d 348, 364, 366 (Utah 1989).

104. *Sofie*, 771 P.2d at 728.

105. *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 474–475 (Or. 1999); *see* Robert S. Peck, *Caps on Damages: Adding Injury to Injury*, 38 Trial 21, 23–25, 27 (2002) (arguing that the legislature may not take away a jury’s authority to freely determine damages by placing a cap on them).

106. 987 P.2d 463.

107. *See id.* at 467–475 (discussing the definition of “inviolate” as it relates to trial by jury; the pre-constitutional application of the right to a jury as adopted by the State’s Constitution; the role of the jury to determine all issues of fact, including the amount of damages suffered by the plaintiff; and the unconstitutionality of the legislature’s arbitrary and mandatory cap on damages as it interferes with the jury’s function as fact-finder).

108. *Id.* at 468–469.

109. *Id.* at 470.

without violating the State's Constitution.<sup>110</sup> In reaching its decision, the Court rejected numerous claims that have been raised successfully in other courts that have upheld damage caps.<sup>111</sup>

The Court rejected the claim that it was constitutional to impose caps on damages in wrongful death cases because such actions did not exist at common law.<sup>112</sup> The Court held that the legislature had no power to limit jury awards in cases existing at common law before the legislature was created.<sup>113</sup>

Here, the broad powers of the legislature must yield to a litigant's specific right to a "Trial by Jury" guaranteed in Article I, [S]ection 17, as that right was understood in 1857. We conclude that Article I, [S]ection 17, prohibits the legislature from interfering with the full effect of a jury's assessment of non[-]economic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature.<sup>114</sup>

The Court also rejected the claim that limiting damages is the legislative equivalent of a judicial remittitur, which is permissible.<sup>115</sup> As noted by the Court, with remittitur the trial judge has the discretion to offer a reduced jury award based on the facts in a particular case, and the plaintiff is free to reject the offer and obtain a new jury trial on damages.<sup>116</sup> Thus, remittitur is a valid exercise of judicial discretion, incident to a judge's authority to award a new trial when the evidence does not support the verdict.<sup>117</sup> A legislative cap on damages, on the other hand, mandates remittitur on a wholesale basis without regard to the facts and without the ability to obtain a new jury trial on damages.<sup>118</sup> The Court concluded by saying,

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110. *Id.* (stating that "[t]he amount of [the] damages . . . from the beginning of trial by jury[ ] was a 'fact' to be found by the jurors") (quoting Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935)) (internal quotations removed).

111. *Id.* at 474 (acknowledging that while other courts have upheld statutory damage caps under various theories, rejecting statutory damage caps as an unconstitutional infringement on the right to jury "is supported by the better-reasoned authorities").

112. *Id.* at 473.

113. *Id.*

114. *Id.*

115. *Id.* at 472.

116. *Id.*

117. *Id.*

118. *Id.*

Although it is true that [the Oregon cap statute] does not prohibit a jury from assessing . . . damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect. We conclude that to permit the legislature to override the effect of the jury's determination of . . . damages would "violate" plaintiffs' right to "Trial by Jury" guaranteed in [the Oregon Constitution]. Limiting the effect of a jury's . . . damages verdict eviscerates "Trial by Jury" as it was understood in 1857 and, therefore, does not allow the common[ ]law right of jury trial to remain "inviolated."<sup>119</sup>

In *Sofie v. Fibreboard Corp.*,<sup>120</sup> the Washington Supreme Court similarly struck down the State's non-economic damages cap as violative of the State's constitutional guarantee to trial by jury.<sup>121</sup> Although the plaintiffs challenged the cap on the grounds that it violated the right to trial by jury, equal protection, and due process, the Court held the dispositive issue to be the right to trial by jury.<sup>122</sup> In reaching a decision, the Court focused on the word "inviolated" in the State's Constitution,<sup>123</sup> which provides that "[t]he right of trial by jury shall remain inviolate,"<sup>124</sup> similar to Florida's Constitution.<sup>125</sup> The Court defined the word to mean "free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact."<sup>126</sup> Based on this definition, the Court concluded that "[f]or such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees."<sup>127</sup> After concluding that it was the jury's function to determine damages when the Washington Constitution was adopted, and because the cap "restricts the jury's ability to reach its damages verdict,"<sup>128</sup> the Court struck down the statute as unconstitutional.<sup>129</sup>

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119. *Id.* at 473.

120. 771 P.2d 711.

121. *Id.* at 728.

122. *Id.* at 715.

123. *Id.* at 721.

124. Wash. Const. art. I, § 21.

125. Fla. Const. art. I, § 22.

126. *Sofie*, 771 P.2d at 722 (quoting *Webster's Third New International Dictionary* 1190 (Philip B. Grove, ed., G & C. Merriam Co. 1976)).

127. *Id.*

128. *Id.* at 723.

129. *Id.*

Similarly, in the 1987 case of *Smith v. Department of Insurance*,<sup>130</sup> the Florida Supreme Court struck down the legislature's first attempt to cap non-economic damages.<sup>131</sup> There, the Court found that a non-economic damages cap of four hundred fifty thousand dollars (\$450,000) in tort cases violated the victim's constitutional right to access the courts.<sup>132</sup> Florida's Constitution guarantees the right to access the courts,<sup>133</sup> and the underlying tenant of this right is to address injuries.<sup>134</sup> The Court further determined that the right to access the courts must be read in conjunction with the right to trial by jury.<sup>135</sup> As the Court explained it,

[a] plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at \$450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.<sup>136</sup>

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130. 507 So. 2d 1080.

131. *Id.* at 1095.

132. *Id.* at 1088–1089.

133. Fla. Const. art. I, § 21.

134. *Smith*, 507 So. 2d at 1088.

135. *Id.*

136. *Id.* at 1088–1089; *but see U. of Miami v. Echarte*, 618 So. 2d 189, 194 (Fla. 1993) (rejecting the conclusion that medical malpractice arbitration statutes do not provide a claimant with commensurate benefits). *Echarte* is an example of one of the discrete ways a court may uphold a damage cap when faced with a constitutional challenge involving the right to trial by jury, which is to provide an offsetting benefit for the right infringed, or a quid pro quo. *Id.*; Kevin Sean Mahoney, Student Author, *Alaska's Cap on Noneconomic Damages: Unfair, Unwise and Unconstitutional*, 11 Alaska L. Rev. 67, 92 (1994) (stating that courts can circumvent the jury trial challenge to uphold a damages cap to supply a remedy for the infringed right). In *Echarte*, which involved an injury rather than a wrongful death as in *Estate of McCall*, the Florida Supreme Court upheld caps on non-economic damages in medical malpractice claims because the legislature had provided a “commensurate benefit.” *Echarte*, 618 So. 2d at 194–195. The Court also found that the legislative findings showed “an overpowering public necessity” and “that no alternative method of meeting such public necessity” existed. *Id.* at 195 (internal quotations omitted). The statute at issue in *Echarte* essentially substituted binding arbitration for the common law right to trial by jury. *Id.* at 190. Because the statute provided this offsetting benefit in exchange for the monetary cap, it passed constitutional muster. *Id.* Conversely, there is no “commensurate benefit” or quid pro quo available in Section 766.118, which is at issue in *Estate of McCall*. 663 F. Supp. 2d at 1302.

In 2010, the Georgia Supreme Court reached a similar result in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*,<sup>137</sup> finding that Georgia's legislative cap "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."<sup>138</sup> The Court tersely and sweepingly held: "The very existence of the caps, in any amount, is violative of the right to trial by jury."<sup>139</sup>

Most recently, in July 2012, a divided Missouri Supreme Court held in *Watts v. Lester E. Cox Medical Centers*<sup>140</sup> that the State's statutory cap on non-economic damages violates the right to trial by jury guaranteed by the Missouri Constitution, overturning the Court's twenty-year-old precedent.<sup>141</sup> Similar to Florida's Constitution, Missouri's Constitution provides that "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate."<sup>142</sup> Relying on the "plain language" of this constitutional provision, the Court first found that the limitation on damages enacted by the legislature was not permitted at common law when Missouri's Constitution was first adopted in 1820.<sup>143</sup> In other words, "[t]he right to trial by jury 'heretofore enjoyed' was not subject to legislative limits on damages" at common law.<sup>144</sup> Having established that, the Court went on to find that the constitutionally protected jury trial right cannot logically be said to "remain inviolate" if the legislature is allowed to limit a jury's damage determination:

Once the right to a trial by jury attaches, as it does in this case, the plaintiff has the full benefit of that right free from the reach of hostile legislation. [The statute] imposes a cap on the jury's award of non-economic damages that operates wholly independent of the facts of the case. As such, [the statute] directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law. . . . The individual right

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137. 691 S.E.2d 218.

138. *Id.* at 223.

139. *Id.*

140. 376 S.W.3d 633 (Mo. 2012).

141. *Id.* at 633.

142. Mo. Const. art. I, § 22(a).

143. *Watts*, 376 S.W.3d at 640.

144. *Id.* at 639.

to trial by jury cannot “remain inviolate” when an injured party is deprived of the jury’s constitutionally assigned role of determining damages according to the particular facts of the case.<sup>145</sup>

In overruling more than two decades of precedent that had clearly decided this issue the other way,<sup>146</sup> the Court acknowledged that “adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.”<sup>147</sup> This was just such a case. Although admittedly “hesitant” to do so, overturning erroneous precedent was “necessary to protect the constitutional rights of Missouri’s citizens.”<sup>148</sup>

### C. Florida’s Damage Caps Fail Strict Scrutiny Analysis

As noted, the right to trial by jury is a “fundamental right” guaranteed by the Florida Constitution.<sup>149</sup> And because Florida’s damage caps substitute the will of the legislature for that of a jury—and essentially nullify the jury’s damage determination if it exceeds the statutory limit—they *impact* a fundamental right; as such, the statute is subject to the highest level of judicial scrutiny.<sup>150</sup> This requires the government to show that there is a

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145. *Id.* at 640.

146. See *Adams By and Through Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992) (holding that the statutory cap on non-economic damages does not violate the right to trial by jury).

147. *Watts*, 376 S.W.3d at 644 (quoting *Med. Shoppe Int’l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 335 (Mo. 2005)).

148. *Id.*

149. *Fox*, 984 So. 2d at 668.

150. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 551 (1977) (noting that the strict scrutiny standard applies when a fundamental interest is involved); *Kenyon v. Hammer*, 688 P.2d 961, 971 (Ariz. 1984) (employing strict scrutiny analysis in an equal protection challenge because the right is “fundamental”); *In re Z.C. (1)*, 88 So. 3d 977, 994 (Fla. 2d Dist. App. 2012) (recognizing that “courts must review statutes and procedures that impact fundamental rights under a strict scrutiny analysis”); *T.M.H. v. D.M.T.*, 79 So. 3d 787, 792–793 (Fla. 5th Dist. App. 2011) (stating that “[s]tatutes that interfere with a fundamental right are presumptively unconstitutional and subjected to strict scrutiny”); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 195 (Mich. 2004) (Cavanagh, J., dissenting) (stating that “[b]ecause the right to a jury trial is a fundamental right, the damages cap must withstand strict scrutiny to be deemed constitutional”); *Pfost v. State*, 713 P.2d 495, 505 (Mont. 1985) (applying strict scrutiny analysis to a statute capping non-economic damages); *Lane v. Gilbert Constr. Co.*, 681 S.E.2d 879, 884 (S.C. 2009) (stating that “[t]he right

“compelling governmental interest” that is “strictly tailored to remedy the problem in the most effective way” without “restrict[ing] a person’s rights any more than absolutely necessary.”<sup>151</sup> Moreover, statutes that interfere with fundamental rights are “presumptively unconstitutional unless proved valid.”<sup>152</sup> Therefore, the government bears a “heavy burden” of proof.<sup>153</sup>

Upon review, Florida’s legislative cap on damages does not come close to satisfying the strict scrutiny standard. No credible evidence exists to support the notion that Florida’s legislature had a *compelling* state interest in enacting Section 766.118 or that even if it did, the legislation fulfilled this objective by the *least restrictive* means available.

The Florida legislature enacted Section 766.118 to address the medical malpractice insurance “crisis” in the State, which it determined had reached “unprecedented magnitude.”<sup>154</sup> According to the legislature, this crisis resulted in doctors leaving the State or refusing to perform risky procedures.<sup>155</sup> The legislation, therefore, was primarily aimed at reducing the medical malpractice insurance premiums for physicians to entice them to continue practicing medicine in the State, thereby making quality healthcare affordable and available to Florida citizens.<sup>156</sup>

The legislature’s rationale for capping non-economic damages is similar to that used by other state legislatures that have instituted tort reform measures, including Wisconsin.<sup>157</sup> The Wisconsin Supreme Court succinctly explained the legislature’s rationale for capping damages this way:

[A] \$350,000 cap on non[-]economic damages appears, at first blush, to be related to the legislative objective of keeping overall [healthcare] costs down. The central theory underlying the cap is that large payouts by insurance com-

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to trial by jury is a fundamental right[.]” and “[a]s such, any abridgement of that right is subject to strict scrutiny”) (internal citations omitted).

151. *Mitchell v. Moore*, 786 So. 2d 521, 527–528 (Fla. 2001).

152. *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003).

153. *Id.* at 646.

154. 2003 Fla. Laws ch. 2003–416 § 1.

155. *Id.*

156. *Id.*

157. *Ferdon ex rel. Petrucelli v. Wis. Patients Compen. Fund*, 701 N.W.2d 440, 465 (Wis. 2005).

panies (because of large judgments and settlements) raise malpractice insurance premiums. Therefore, the theory goes, a limitation on damages means insurance companies pay out less. Because insurance companies are paying out less, they will be able to reduce the premiums they charge [healthcare] providers. If insurance premiums decrease, [healthcare] providers should be able to charge less, thereby lowering [healthcare] costs for patients.<sup>158</sup>

Yet the Florida legislature's justifications for enacting the damage caps are conclusory and speculative. The findings are conclusory because the purported "crisis" relating to medical malpractice insurance did not exist when the legislation was enacted.<sup>159</sup> In fact, the Governor's Task Force recommendations, which served as the basis upon which the crisis was supposedly justified, did not actually reach such a conclusion.<sup>160</sup> Instead, the Task Force found that healthcare providers *feared* a bleak future, believed it *could* get worse in the coming years, and speculated that medical malpractice insurance premiums *may become* unaffordable or unavailable to many physicians and hospitals down the road.<sup>161</sup> Such equivocal language cannot be read to create an existing "crisis" sufficient to support a compelling state interest.<sup>162</sup> Neither was the issue of physician flight of any real concern, despite the legislature's statements to the contrary.<sup>163</sup> Indeed, empirical evidence indicates that "the number of doctors practicing in Florida had steadily increased over the decade preceding enactment of the statute, both in metropolitan and rural areas."<sup>164</sup>

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158. *Id.* at 483.

159. Initial Br. for Pls.-Appellants, *Est. of McCall v. United States*, 2011 WL 3560774 at \*\*14–15 (Fla. July 29, 2011) (No. SC11-1148).

160. *Id.* at \*14.

161. *Id.* at \*15 (citing *Governor's Select Task Force on Healthcare Professional Liability Insurance* 211–212 (Jan. 29, 2003) (available at <http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf>)).

162. *Stuart Circle Parish v. Bd. of Zoning Apps. of City of Richmond*, 946 F. Supp. 1225, 1239 (E.D. Va. 1996) (noting that "conclusory assertions [do not] constitute a compelling state interest . . . where there has been a showing of a substantial burden on [a constitutional right]").

163. Initial Br. for Pls.-Appellants, 2011 WL 3560774 at \*35.

164. *Id.* (citing U.S. Gen. Acctg. Off., *Physician Workforce: Physician Supply Increased in Metropolitan and Nonmetropolitan Areas but Geographic Disparities Persisted* 23 (Oct. 2003) (available at <http://www.gao.gov/new.items/d04124.pdf>)).

The legislature also lacked a compelling state interest because it relied on speculation to support its conclusion that non-economic damages increased medical malpractice insurance premiums and caused a healthcare crisis.<sup>165</sup> Again, contrary to the legislature's findings, empirical evidence indicates that limiting non-economic damages does not reduce insurance premiums, does not make healthcare more affordable and available to Florida citizens, and does not prevent doctors from fleeing the State.

Indeed, in striking down similar legislation under the less demanding rational basis test, the Wisconsin Supreme Court, relying on numerous published studies including a 2003 study from the non-partisan United States General Accounting Office, concluded that "medical malpractice insurance premiums are not affected by caps on non[-]economic damages."<sup>166</sup> The Court further pointed out that "even assuming that a \$350,000 cap affects medical malpractice insurance premiums and the [f]und's assessments on [healthcare] providers, medical malpractice insurance premiums are an exceedingly small portion of overall healthcare costs."<sup>167</sup> The Court concluded that such a reduction, if it materialized at all, "would have no effect on a consumer's [healthcare] costs."<sup>168</sup> Finally, the Court examined and rejected the claim that the increase in insurance premiums was leading to physician flight.<sup>169</sup> The Court again relied on studies from the United States General Accounting Office and elsewhere, which indicated "that caps on non[-]economic damages do not affect doctors' migration."<sup>170</sup> As cogently recognized by the Texas Supreme Court, "[i]n the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease."<sup>171</sup> Even assuming the statute would reduce doctors' insurance premiums, there is still no com-

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165. Alexander Blewett IV, Student Author, *Challenging the Constitutionality of Montana's Statute Limiting Medical Malpractice Non-Economic Damages*, 68. Mont. L. Rev. 451, 464 (2007).

166. *Ferdon ex rel. Petrucelli*, 701 N.W.2d at 471 (striking the law using a rational basis test).

167. *Id.* at 483.

168. *Id.* at 485.

169. *Id.* at 487.

170. *Id.* at 485.

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

PELLING State interest. This is because economic necessity cannot provide cover for the violation of a fundamental right such as the right to trial by jury.<sup>172</sup> Accordingly, the Florida legislature's justifications for the caps are insufficient to establish a *compelling* governmental interest.<sup>173</sup>

Even if a compelling interest could be shown, the statute is unconstitutional because the legislature did not use the least restrictive means of achieving its objectives. To be sure, the legislature could have used a host of other means to achieve its stated goals. It could have used its enormous authority to regulate medical malpractice insurance premiums.<sup>174</sup> It could have increased competition among insurers.<sup>175</sup> Or, it could have offered tax incentives to offset premium increases.<sup>176</sup> None of these viable alternatives—which would not adversely impact anyone's constitutional guarantees—were even offered. Instead, the legislature sought to attack the most fundamental of all constitutional rights—the right to trial by jury—and invade the jury's province to assess damages while concurrently denying justice for the most severely injured victims of medical malpractice.

Not only did the legislature fail to use any of the less restrictive means noted above, it also failed to take any action to address the heart of the problem—those physicians who single-handedly increase malpractice insurance premiums as a result of

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172. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo. 1991) (stating that “[e]conomic necessity, however, cannot provide the cover for government-supported infringements of speech”); *Newton v. McCotter Motors, Inc.*, 475 So. 2d 230, 234 n. 2 (Fla. 1985) (noting that “[t]he saving of welfare costs cannot justify an otherwise invidious classification”) (citing *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)); *Gladon v. Greater Cleveland Reg'l Transit Auth.*, 1994 WL 78468 at \*6 (Ohio App. 8th Dist. 1994) (concluding “that when a fundamental independent right such as the jury trial right is at issue, economic necessity is insufficient as a matter of law to justify penalization of that right”).

173. *Stuart Circle Parish*, 946 F. Supp. at 1239 (noting that “conclusory assertions [do not] constitute a compelling state interest . . . where there has been a showing of a substantial burden on [a constitutional right]”).

174. Blewett, *supra* n. 165, at 465; see also *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 413–418 (1914) (discussing the government's authority to regulate insurance in the public interest); *Smith*, 507 So. 2d at 1093 (upholding a law that required excess profits from insurance premiums be returned to policyholders who comply with risk-management guidelines).

175. Blewett, *supra* n. 165, at 465.

176. See Initial Br. for Pls.-Appellants, 2011 WL 3560774 at \*37 (citing *Rosenshein v. Fla. Dep't of Children & Fams.*, 971 So. 2d 837, 841 n. 3 (Fla. 3d Dist. App. 2007) (explaining how governments can use taxes to promote or deter certain behavior)).

their substandard medical care.<sup>177</sup> This is particularly surprising, given the United States General Accounting Office's recognition that "the ideal way to deal with the problem of increasing insurance costs" is to eliminate the conditions that lead to medical malpractice.<sup>178</sup>

Efforts to accomplish this may include (1) disciplining or removing from practice those physicians not providing an acceptable quality of care; (2) protecting patients from physicians who lose their licenses in one state but have them in another; and (3) developing and expanding risk management programs to educate providers concerning better ways of delivering an acceptable quality of [healthcare], minimizing the possibility of future malpractice suits.<sup>179</sup>

The legislature's failure to consider these less intrusive means or the more fundamental causes of increased premiums calls into doubt its motivation for enacting this tort reform legislation.<sup>180</sup> Regardless of individual motivation, the damage caps should fail a strict scrutiny analysis. The State did not have a "compelling governmental interest" in enacting Section 766.118 to address the putative medical-malpractice insurance "crisis" in the state, and less restrictive means were available to the legislature to accomplish its asserted goals.

#### IV. CONCLUSION

The Florida Supreme Court will soon decide the fate of the legislature's cap on non-economic damages in medical malpractice

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177. Blewett, *supra* n. 165, at 465.

178. U.S. Gen. Acctg. Off., *Medical Malpractice: A Framework for Action 3* (May 1987) (available at <http://www.gao.gov/assets/150/145353.pdf>).

179. *Id.* at 12.

180. See generally Craig K. Hemphill, Student Author, *Smoke Screens and Mirrors; Don't Be Fooled Get the Economic Facts behind Tort Reform and Punitive Damages Limitations*, 23 *Thurgood Marshall L. Rev.* 143 (1997) (arguing that the basis for tort reform was political). Indeed, it is curious to note that two of the Florida legislature's most outspoken supporters of Florida's tort-reform movement, Florida State Representatives Art Argenio and Mark Flanagan, did not allow their disdain for excessive damage claims to dissuade them from utilizing Florida's court system—which, incidentally, Mr. Flanagan calls "the most litigious society in the world"—to bring suit to recover for "severe" pain and suffering when it fit their needs. See Emily Gottlieb, *Not in My Backyard—Hypocrites of "Tort Reform"* 4–5 (Dec. 4, 2000) (available at <http://www.centerjd.org/content/white-paper-not-my-backyard-hypocrites-tort-reform>).

cases, Section 766.118, Florida Statutes.<sup>181</sup> Of the many constitutional challenges levied against the caps, perhaps the most important and convincing challenge is that the statute violates the plaintiff's constitutional right to trial by jury.

Florida's Constitution guarantees that the right to trial by jury shall remain "inviolated,"<sup>182</sup> which means that it "shall not be impaired"<sup>183</sup> and "shall . . . remain unabridged by any act of legislation."<sup>184</sup> Article I, Section 22 guarantees the right to have a jury determine common law non-economic damages in cases alleging medical negligence.<sup>185</sup> In such a regime, the legislature may not interfere with that right by enacting a statute that caps those damages and prevents the jury from fully determining the amount of damages suffered.<sup>186</sup> Indeed, as correctly recognized by the Georgia Supreme Court in 2010, "[t]he very existence of the caps, in any amount, is violative of the right to trial by jury."<sup>187</sup> Moreover, if Section 766.118 impairs the fundamental right to trial by jury, which it does, it must pass the highest level of judicial scrutiny, which it does not. Accordingly, the Florida Supreme Court, at minimum, should strike down the statutory cap on non-economic damages in medical malpractice cases on the ground that it violates the fundamental right to trial by jury. Only then can the full benefit of the jury trial right guaranteed by Article I, Section 22 be realized.

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181. Michael Adams, *Florida Supreme Court to Decide on Medical Malpractice Caps*, *Insur. J.*, <http://www.insurancejournal.com/news/southeast/2012/04/02/241678.htm> (Apr. 2, 2012).

182. Fla. Const. art. I, § 22.

183. *Flint River Steam Boat Co.*, 2 Fla. at 114 (emphasis in original).

184. *Blanchard*, 20 Fla. at 476.

185. *Watts*, 376 S.W.3d at 639.

186. Peck, *supra* n. 12, at 327.

187. *Atlanta Oculoplastic Surgery, P.C.*, 691 S.E.2d at 223.