IN THE CIRCUIT COURT OF THE 4TH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CIVIL DIVISION

CASE NO: 2006-CA-06423

SHIRLYN GALLAGHER and
DAVID GALLAGHER, her husband,

Plaintiffs,

v.

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC. d/b/a BAPTIST MEDICAL CENTER, a Florida Corporation,

Defendant.
_____/

PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSE INVOKING FLA. STAT. § 766.118 (CAPS ON NONECONOMIC DAMAGES) AS UNCONSTITUTIONAL

NOW COME the Plaintiffs, SHIRLYN GALLAGHER and DAVID GALLAGHER, and move the Court to strike the Defendant's reliance upon Fla. Stat. § 766.118, which imposes caps on noneconomic damages, as unconstitutional, and as grounds therefor, state as follows:

1. This is a medical malpractice action set to start trial on March 10, 2008.

2. In the Joint Compliance with Order Setting Cause for Jury Trial, the Defendant requested "[w]hether Shirlyn Gallagher suffered a 'catastrophic injury' pursuant to § 766.118, Fla. Stat., and the amount of statutory limits on non-economic damages" be included in the Concise Statement of Issues of Fact to Be Litigated. See id., ¶ (c)(7).

3. Fla. Stat. § 766.118 purports to cap a plaintiff's recoverable noneconomic damages against a hospital (called a "nonpractitioner" under the statute) at $750,000, id., § 766.118(3)(a),

unless the malpractice resulted in death or a permanent vegetative state, or a "catastrophic injury"[1]

[1]"Catastrophic injury" means a permanent impairment constituted by:

1. Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk;

2. Amputation of an arm, a hand, a foot, or a leg involving the effective loss of use of that appendage;

3. Severe brain or closed-head injury as evidenced by:

   a. Severe sensory or motor disturbances;

   b. Severe communication disturbances;

   c. Severe complex integrated disturbances of cerebral function;

to the patient, as determined by the jury, in which case the plaintiff's noneconomic damages are capped at $1.5 million, if the trial court finds that a "manifest injustice" would occur if the award was not increased due to the "special circumstances" of the case because the "noneconomic harm to the patient was particularly severe." Id., § 766.118(3)(b).

4. This statute thus caps a defendant hospital's liability for noneconomic damages at either $750,000 or $1.5 million no matter what the evidence is of the victim's "bodily injury. . .,

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d. Severe episodic neurological disorders; or

e. Other severe brain and closed-head injury conditions at least as severe in nature as any condition provided in sub-subparagraphs a.-d.;

4. Second-degree or third-degree burns of 25 percent or more of the total body surface or third-degree burns of 5 percent or more to the face and hands;

5. Blindness, defined as a complete and total loss of vision; or

6. Loss of reproductive organs which results in an inability to procreate.

Id., § 766.118(1)(a).

resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life experienced in the past and to be experienced in the future," Fla. Standard Jury Inst. No. 6(b), and no matter what the jury determines is "fair and just in the light of the evidence." Id.

5. And this statute thus violates the Plaintiffs' constitutional rights to access to courts, trial by jury, equal protection, due process, and to recover at least 90 percent of all damages above $250,000 as provided by the Florida Constitution.

6. The Plaintiffs accordingly move to strike the Defendant's reliance upon this statute as it is unconstitutional.

7. It is important to remember that notwithstanding the highly charged political climate in which we now live, the fact remains that the federal and state constitutions are the supreme laws of the land, and the Legislature cannot ignore the supreme law under the expedient rubric that is the currently popular notion of reforming the tort system at all costs. For such reform to occur, it must fall within the permissible confines of legislative authority, and without transgression upon the rights of individuals, as established by the United States and Florida Constitutions. Importantly, the courts are the guardians of these constitutional guarantees and limitations.

> To the judges belongs the power of expounding the laws; and although in the discharge of that duty they may render a law inoperative by declaring it unconstitutional, it does not arise from any supremacy which the judiciary possesses over the Legislature, but from the supremacy of the constitution over both.

Sebring Airport Authority v. McIntyre, 783 So.2d 238, 244 n.5 (Fla. 2001) (citation omitted) (emphasis in original).

> [T]o the extent . . . that . . . an act violates expressly or clearly implied mandates of the Constitution, the act must fall, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary.

Holley v. Adams, 238 So.2d 401, 405 (Fla. 1970) (emphasis added) (quoting Amos v. Mathews, 99 Fla. 1, 126 So. 308 (1930)) (emphasis added). With these critical tenets in mind, we turn to the constitutional issues presented hereby.

ACCESS TO COURTS

8. Article I, section 22 of the Florida Constitution, the Access to Courts Clause, provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay" (emphasis added). The Florida Supreme Court has held that, pursuant to this clause,

> where a right of access to the courts for redress for a particular injury ... has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So.2d 1, 4 (Fla. 1973) (emphasis added).

9. Clearly Fla. Stat. § 766.118 attempts to abolish the right of victims of medical malpractice to obtain redress for their full, and hence "any," injuries. "Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000." Smith v. Department of Ins., 507 So.2d 1080, 1088 (Fla. 1987).

10. Under Kluger, the Legislature was "without power" to enact this statute unless it provided a reasonable alternative to the damage recoveries to be denied malpractice victims, which it did not,[2] unless it could show an overpowering public necessity to abolish malpractice victims'

[2]For example, the Florida Supreme Court upheld the voluntary presuit medical malpractice arbitration damage caps in Fla. Stat. § 766.209 in University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993), because there the Legislature gave malpractice victims a reasonable alternative remedy to their full damages, to wit: presuit arbitration with prompt payment and full joint and several liability. Fla. Stat. § 766.118 offers malpractice victims no such tradeoff for losing their constitutional rights to full damages.

rights and that there was no other way of meeting the overpowering necessity involved.

11. Although the Legislature prefaced its adoption of this statute with "findings" about the cost of medical malpractice insurance and its effect on physicians and the delivery of medical care which it may have believed amounted to an overpowering public necessity, its "findings" and conclusions are not conclusive in that regard and must be examined by a Court examining the constitutional validity of a statute adopted in facial violation of the Access to Courts clause. See, e.g., North Florida Women's Health & Counseling Svcs., Inc. v. State, 866 So.2d 612, 627 (Fla. 2003) ("[w]hile courts may defer to legislative statements of policy and fact, courts may do so only when those statements are based on actual findings of fact, and even then courts must conduct their own inquiry"). Moreover, the Legislature did not and could not show that there was no other way of remedying the alleged necessity, such as regulating malpractice insurance companies, better policing and discipline of negligent healthcare providers, or increasing or lowering taxes as deterrents and incentives.

12. These factual issues will have be flushed out, if necessary, by discovery and an evidentiary hearing post-verdict, but suffice to say there is nothing on the face of the challenged statute to suggest it will pass constitutional muster under the Access to Courts clause upon due judicial examination. As heralded by the Florida Supreme Court in Smith,

> if it were permissible to restrict the constitutional right by legislative action, without meeting the conditions set forth in Kluger, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, as Mr. Smith puts it, "majoritarian whim." There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system.

507 So.2d at 1089.

TRIAL BY JURY

13. Article I, section 22 of the Florida Constitution provides, '[t]he right of trial by jury shall be secure to all and remain inviolate."

14. As explained by the Supreme Court of Florida, "[t]he constitutional right to a trial by jury is not to be narrowly construed." In re Forfeiture of 1978 Chevrolet Van VIN: CGD1584167858, 493 So.2d 433, 435 (Fla. 1986) (citation omitted).

> [T]he Constitution was intended to provide for the future as well as the past, to protect the rights of the people by every safeguard which their wisdom and experience then approved, whether those rights then existed by rules of the common law, or might from time to time arise out of subsequent legislation. All the rights, whether then or thereafter arising, which would properly fall into those classes of rights to which by the course of the common law the trial by jury was secured, were intended to be embraced within this article.

Id. (citation and quotation marks omitted). And as explained in another decision, the "[c]ommon law undeniably recognized actions for unliquidated damage awards. When a tribunal with the power to make such awards for humiliation and embarrassment tries an accused, that accused has an inalienable right to a jury trial." Broward County v. La Rosa, 505 So.2d 422, 424 (Fla. 1987).

15. It thus should be no surprise then that the Florida Supreme Court has already struck down a damage cap statute under this provision. See Smith, at 1088-89 ("because the jury verdict is being arbitrarily capped, . . . the plaintiff [is not] receiving the constitutional benefit of a jury trial as we have heretofore understood that right"). Smith examined the Tort Reform Act of 1986, section 59 of which capped noneconomic damages for tort claimants at $450,000. Fla. Stat. § 766.118 caps malpractice claimants' noneconomic damages from liable hospitals at either $750,000 or $1.5 million. If the jury awards the Plaintiffs in excess of the statute's caps, this statute clearly violates the Plaintiffs right of trial by jury because it replaces the jury in this case on the amount of

noneconomic damages they sustained with the Legislature as universal fact-finder, and must be struck down on this ground as well.

16. Moreover, by vesting the decision over whether "manifest injustice" would occur if the award was not increased due to the "special circumstances" of the case because the "noneconomic harm to the patient was particularly severe," Fla. Stat. § 766.118(3)(b), to the Court, the statute also violates the right of trial by jury and this provision should be struck down for this reason, too, see, e.g., La Rosa, 505 So.2d at 424, and these factual issues should be submitted to the jury for determination as with all other issues of fact.

EQUAL PROTECTION

A. The Florida Constitution

17. Article I, section 2 of the Florida Constitution provides:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property.... No person shall be deprived of any right because of race, religion, national origin, or physical disability.

(emphasis added).

18. "The reason for the equal protection clause was to assure that there would be no second class citizens." Osterndorf v. Turner, 426 So.2d 539, 545-46 (Fla. 1982). "The classification of 'physical handicap' was added to the protected classes listed in this section, thereby providing that governmental classifications based upon a person's physical handicap would be subject to strict scrutiny...." Comment to Art. I, § 2, Fla. Const. (citing 1974 Senate Joint Resolution 917) (emphasis

added). The clause was subsequently amended to change the word "handicap" to "disability." Commentary to 1974 and 1998 Amendments to Art. I, § 2 Fla. Const. (citing 1998 Constitutional Revision Commission Revision 9).

19. Accordingly, any statute classifying persons on the basis of race, religion, national origin, or physical disability must satisfy the strict scrutiny test or be struck down as unconstitutional.

20. The Act defines the class subject to its terms as to include claimants in a vegetative state, or who have suffered permanent impairment due to spinal cord injury, amputation of a limb or appendage, brain injury, burns, blindness, or loss of reproductive organs, Fla. Stat. § 766.118(3)(b), and thereby classifies on the basis of physical disability.

21. "In the strict scrutiny test, the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights any more than absolutely necessary.... Further, in strict scrutiny cases, there must be a compelling governmental interest which the statute purports to accomplish." Mitchell v. Moore, 786 So.2d 521, 527-528 (Fla. 2001) (citation omitted).

22. The Legislature has not shown and Defendant cannot show that the State of Florida has a "compelling government interest" in discriminating against physically disabled victims of malpractice, by caps or differentiation between cap levels, nor that the statute is "strictly tailored to remedy [any such compelling interest] in the most effective way" and therefore the Act cannot satisfy strict scrutiny and is thereby unconstitutional. As with the Access to Courts challenge, post-trial discovery and an evidentiary hearing will flush the facts on this issue out, but it is respectfully suggested that the Legislature had no compelling interest in arbitrarily selecting noneconomic

damage caps of $750,000 and $1.5 million for victims of medical malpractice, nor in arbitrarily assigning the physically disabled to one or the other cap number, further subject to the undefined discretion of a trial judge or jury as to whether undefined "manifest injustice," "special circumstances," and the "particularly severe" nature of the noneconomic damages requires recovery under the higher cap. It is also respectfully suggested that Fla. Stat. § 766.118's noneconomic damage caps were neither strictly tailored to remedy any such interest, nor was did the Legislature correctly determine that this was the most effective method of remedying the problems it believed it was confronting. As such, the statute must be struck down as violating the Plaintiffs' rights under the Florida Equal Protection clause.

B. The Fourteenth Amendment to the United States Constitution

23. Section 1 of the Fourteenth Amendment to the United States Constitution provides, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend XIV, § 1 (emphasis added).

24. Accordingly, any state action, such as Fla. Stat. § 766.118, classifying persons is unconstitutional unless it can be upheld under the applicable scrutiny test, as espoused by the U.S. Supreme Court.

25. The subject statute discriminates against victims of medical malpractice by denying them the right to obtain a full recovery of their common law damages based upon the business of their tortfeasor, when all other tort victims can make a full recovery of their common law damages

against all other tortfeasors, uninhibited by the statute. The statute further discriminates between victims of medical malpractice in is arbitrary two-tiered cap levels, depending upon whether a jury finds the victim has sustained a certain arbitrary type of injury, and whether a trial court finds that undefined "manifest injustice" requires one cap over the other. And the statute also discriminates between single and married victims of malpractice, those with minor children, and multiple survivors under the Wrongful Death Act, by capping damages regardless of the number of claimants. Fla. Stat. § 766.118(3)(b).

26. The Act is subject to strict scrutiny under the Fourteenth Amendment based upon Congress' passage of the Americans with Disabilities Act, which declared that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals...." 42 U.S.C. § 12101(a)(7), and because the U.S. Supreme Court has defined suspect classes by the fact that they are "discrete and insular" minorities who have historically been subject to discrimination. See, e.g., Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852 (1971).

27. In the alternative, if strict scrutiny does not apply under the Fourteenth Amendment, the statute's discrimination against victims of medical malpractice is unconstitutional under the Fourteenth Amendment's Equal Protection Clause because such malpractice victims are classified based upon circumstances beyond their control–e.g., disability caused by the negligence of their healthcare providers–and as such is subject to intermediate review.

28. Intermediate review requires that in order to be constitutional, the government must demonstrate that the classification "is substantially related to [a] legitimate state interest." Pickett v.

Brown, 462 U.S. 1, 14, 103 S.Ct. 2199, 2207, 76 L.Ed.2d 372 (1983).

29. In the alternative, if neither strict scrutiny nor intermediate review applies under the Fourteenth Amendment, the statute's discrimination against victims of medical malpractice is arbitrary in scope and internal classification, thus irrational, and hence cannot satisfy the rational basis test under the federal Equal Protection Clause in the Fourteenth Amendment.

30. The rational basis test requires that in order to be constitutional, "the classification drawn by the statute [must be] rationally related to a legitimate state interest." City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (citations omitted).

31. As discussed above, this statute is wrought with arbitrary determinations not based in fact and, as such, cannot withstand the applicable level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment and is therefore unconstitutional and should be struck down.[3]

DUE PROCESS

32. Article 1, section 9 of the Florida Constitution and section 1 of the Fourteenth Amendment to the United States Constitution both prohibit any state from denying any person due

[3]The Plaintiffs have set forth their challenge under the Florida Equal Protection Clause on the basis of physical disability, given its explicit reference in the clause by the 1974 amendment giving rise to strict scrutiny. Should that test not apply to the statute for any reason, of course, the statute is unconstitutional under the Florida Equal Protection Clause for the same reasons it is also unconstitutional under the Fourteenth Amendment. For simplicity, the Plaintiffs preserve those alternate arguments by reference here, rather than re-state them above.

process of law. A statute violates substantive due process unless it "bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive." Lasky v. State Farm Insurance Co., 296 So.2d 9, 15 (Fla.1974).

33. For the same reasons set forth above, and to be further illuminated through post-trial discovery and an evidentiary hearing if necessary, the manner in which the Legislature chose to address the malpractice liability insurance crisis, to wit, by simply capping damages of the victims of actual malpractice, is unfairly discriminatory, completely arbitrary in external and internal application, and is oppressive, particularly for the most-damaged victims, when none are rational nor will they result in a demonstrable cure of the insurance crisis. As such, Fla. Stat. § 766.118 violates the due process clauses and must be struck down as unconstitutional. See, e.g., Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc., 753 So.2d 55, 59 (Fla. 2000) (statute imposing prevailing party attorney fees on PIP medical provider claims, but not in claims made by insureds, violates due process because it was arbitrary and did not bear a reasonable relationship to a legitimate legislative objective, to wit, ensuring prompt payment of claims and deterring the denial of proper claims); Psychiatric Assoc. v. Siegel, 610 So.2d 419, 425 (Fla. 1992) (striking down statutes requiring physicians suing medical review boards to post a bond in an amount sufficient to cover the defendant's attorneys' fees and costs as violative of the physicians' constitutional right of access to courts and due process, inter alia, where legislature did not "show that the bond requirement is the only method of meeting the medical malpractice crisis and encouraging peer review" and which did not weed out meritorious from frivolous claims as "not reasonably related to the permissible legislative goal of preventing frivolous lawsuits..."), limited on other grounds, Agency for Health Care

Admin. v. Associated Indust. of Fla., Inc., 678 So.2d 1239, 1253 (Fla. 1996).

34. Moreover, while the Legislature defined "catastrophic injury" for the jury, it failed to define critically important phrases such as "permanent vegetative state," "manifest injustice," "the special circumstances of the case," and "the noneconomic harm sustained by the injured patient was particularly severe," Fla. Stat. § 766.118(3)(b), rendering the statute unconstitutionally vague under the due process clauses.

> "The test to determine whether a statute is unconstitutionally vague is whether people of common understanding and intelligence must necessarily guess at its meaning." Beverly Enterprises-Florida, Inc., v. McVey, 739 So.2d 646, 648 (Fla. 2d DCA 1999). A statute is unconstitutionally vague
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> > if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and is written in a manner that encourages or permits arbitrary or discriminatory enforcement. However, imprecise language does not render a statute fatally vague, so long as the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." [People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123, 130 (2000)]. And if a reasonable and practical construction can be given to the language of a statute, or its terms made reasonably certain by reference to other definable sources, it will not be held void for vagueness.

Orlando Reg. Healthcare Sys., Inc. v. Alexander, 909 So.2d 582, 587-88 (Fla. 5th DCA 2005) (quoting Cashatt v. State, 873 So.2d 430, 435 (Fla. 1st DCA 2004)), receded from in part on other grounds, Weeks v. Florida Birth-Related Neuro. Inj. Comp. Plan, 2008 WL 268704, 33 Fla. L. Weekly D392 (Fla. 5th DCA Jan 31, 2008).

35. By failing to define the subject phrases, which have no common and universal everyday use, and which are not single, insular words whose meaning can be ascertained from a dictionary, the Legislature has impermissibly cast the victims of medical malpractice into the arbitrary abyss of what those terms mean to the particular fact finder. The sad

travails of Terry Schiavo and her family bear witness that many people in this nation, the United States Congress, and numerous state and federal judges were in sharp conflict about the precise nature of Ms. Schiavo's condition and whether she was actually in a "permanent vegetative state". As for the other undefined phrases, if considered by a trial judge or appellate panel, whether "manifest injustice" would be wrought by a $750,000 cap, or whether "special circumstances" exist, or whether the plaintiff's noneconomic harm is "particularly severe" (mind you, not just "severe," but particularly so) so as to allow the higher $1.5 million cap, will be dependent upon those jurists' own experience in similar cases, to the extent that have any, and anecdotal reports of other jury verdicts and appellate decisions they may have seen or find, none of which use any of these phrases of art from this relatively new 2003 statute.

36. But if the Plaintiffs are correct that it is unconstitutional to leave these findings with the bench, just how is a jury of lay persons, who may have never even sat on a jury (let alone a substantial malpractice case), supposed to be able to know what "manifest injustice" (mind you, not just "injustice," but it must be "manifest" to them) means, whether the intangible harm is "particularly severe," or the case presents "special circumstances," when they have no past experience to compare it to? Do the parties now present expert testimony on the value of past cases? Or whether this case presents "special circumstances," as opposed to "ordinary circumstances"? And how would a plaintiff go about factually proving (or a defendant refuting) those undefined circumstances to a jury anyway?

37. When a statute in operation is "arbitrary and capricious," and ultimately

"intractably, and incurably, defective," it is the duty of the courts to strike it down as violating due process. Aldana v. Holub, 381 So.2d 231, 235, 238 (Fla. 1980). These vague, undefined phrases, the application of which necessary as it is to trigger a case's placement within the caps (if otherwise constitutional), can only lead to repeated confusion, unavoidable error, and foreseeable reversal, and this statute must be struck down on this basis as well.**AMENDMENT 3**

38. In 2004, the citizens of the State of Florida enacted Article I, section 26 of the Florida Constitution (more commonly known by its ballot numeration, "Amendment 3"), which provides:

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

(emphasis added).

39. As this is a "medical liability claim involving a contingency fee," id., the Plaintiffs are constitutionally entitled to at least 90 percent of all damages in excess of $250,000. By seeking to cap noneconomic damages above $750,000 or $1.5 million (both of which are above $250,000) at zero dollars ($0) rather than 90 percent or more of such damages, this statute on its face violates Article I, section 26 of the Florida Constitution and is thereby unconstitutional. See, e.g., In re Advisory Opinion to Atty. Gen., Limitation of Non-Economic Damages in Civil Actions, 520 So.2d 284, 287 (Fla.1988) ("statutes . . . which are inconsistent with the constitution, if it is amended, will simply have to give way.... [P]roposed amendments to the constitution are not required to be

consistent with statutory law"); Henderson v. State, 20 So.2d 649, 651 (Fla. 1945) ("[w]hen the provisions of statute collide with provisions of the Constitution the statute must give way"); State ex rel. Curley v. McGeachy, 6 So.2d 823, 826 (Fla. 1942) ("[t]he provisions of the Constitution will always prevail over statutes where there is conflict between the two").

WHEREFORE, the Plaintiffs, SHIRLYN GALLAGHER and DAVID GALLAGHER, respectfully request that the Court declare the noneconomic damage caps unconstitutional, submit the questions of whether manifest injustice would occur to the Plaintiffs if the higher cap (if otherwise constitutional) is not awarded due to the special circumstances and the severity of the Plaintiffs' noneconomic damages to the jury, and grant such further relief as it may deem just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail and fax on March 6, 2008 on Earl E. Googe, Jr., Esq., Smith, Hulsey & Busey, Counsel for the Defendant, 1800 Wachovia Bank Tower, 225 Water Street, P.O. Box 53315, Jacksonville, FL 32201-3315, and Stuart Ratzan, Esq., Ratzan Rubio, P.A., Counsel for the Plaintiff, Wachovia Financial Center, 54th Floor, 200 South Biscayne Boulevard, Miami, FL 33131.

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