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The Real Emergency: Will Florida Follow georgia In Medical Malpractice Reform?

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Abstract

With the high increased costs of insurance premiums and advances in medicine, tort reform has become a rising area of conflict in the law.¹ States are found in conflict with the high costs of insurance while at the same time protecting an individual's rights to seek just compensation in the law

KEYWORDS: emergency, malpractice, reform

THE REAL EMERGENCY: WILL FLORIDA FOLLOW GEORGIA IN MEDICAL MALPRACTICE REFORM?

MICHELLE DIAZ*

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I. INTRODUCTION

With the high increased costs of insurance premiums and advances in medicine, tort reform has become a rising area of conflict in the law.¹ States are found in conflict with the high costs of insurance while at the same time protecting an individual's rights to seek just compensation in the law.² Many legislators have adopted distinct standards in order to respond effectively to the needs of their state.³ States, such as Georgia, Arizona, North Carolina, and others, are revolutionizing medical malpractice reform by increasing the burden of proof required in emergency physicians' medical malpractice cases from the standard torts preponderance of the evidence to a clear and convincing standard.⁴

Increasing the standard of proof to a clear and convincing standard makes it close to impossible for a plaintiff to raise a successful claim against a doctor who committed malpractice.⁵ Nevertheless, tort reform is rapidly occurring across the United States; many lobbyists of these reforms promise that the restrictions on a plaintiff will bring lower insurance costs for everyone.⁶ Statistical evidence contradicts that promise, with a showing of four hundred thousand dollars as the average amount that a jury awards in medical malpractice cases.⁷

Following the wave of tort reform, Florida has passed caps on the amount of damages that can be awarded to a plaintiff and has made the distinction between cases of emergency physicians and general practitioners.⁸ With recent cases, such as *Estate of McCall v. United States*,⁹ the constitutionality of tort reform has been called into question when caps

1. See F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 457, 517 (2006); Steve Cohen, *On Tort Reform, It's Time to Declare Victory and Withdraw*, FORBES (Mar. 02, 2015, 9:59 AM), <http://www.forbes.com/sites/stevecohen/2015/03/02/on-tort-reform-its-time-to-declare-victory-and-withdraw>.

2. See Hubbard, *supra* note 1, at 438, 441, 446; Cohen, *supra* note 1.

3. *Sample Legislation*, AM. C. EMERGENCY PHYSICIANS, <http://www.acep.org/Content.aspx?id=33178> (last visited Dec. 18, 2015).

4. *Id.*

5. See Cohen, *supra* note 1.

6. Cohen, *supra* note 1; *Sample Legislation*, *supra* note 3.

7. Cohen, *supra* note 1.

8. FLA. STAT. § 766.118(2), (4) (2014).

9. 134 So. 3d 894 (Fla. 2014).

are applied in wrongful deaths cases but not personal injury.¹⁰ If Florida chooses to continue tort reform and creates a distinction between medical practices, like its sister state Georgia, it would encounter many hurdles in establishing a rational basis for the distinct treatment.¹¹ The biggest hurdle for tort reformers to overcome is the Florida Constitution because it is unique from other states, as it provides equal protection and guarantees its citizens access to the courts.¹²

Setting aside the issue of whether caps on damages in malpractice cases are constitutional under equal protection, this Comment will discuss the following question: Will Florida be able to follow Georgia in its tort reform and increase the burden of proof in emergency care cases?¹³ Part II will introduce a brief history of modern tort reform that leads to the issue today of targeting tort reforms towards medical malpractice.¹⁴ Part III will analyze the national modern attempts to encourage tort reform in medical malpractice.¹⁵ Part IV will discuss Georgia's reasoning behind an increased burden of proof.¹⁶ Part V will discuss the individuality of Florida law and the change after *Estate of McCall*.¹⁷ Finally, Part VI will conclude with how Florida is unable to follow Georgia in its path towards reform.¹⁸

II. BRIEF HISTORY OF MODERN TORT REFORM

A. *What Is Tort Reform?*

The area of tort law in civil litigation was created to provide justice and to compensate those who have been injured due to negligence or with purposeful intent.¹⁹ The purpose of tort law is to place the victim, who suffered a loss, in the same position before the breach of duty.²⁰ Tort law, majorly based on common law, imposes legal liability on an individual who deviates from the norm and compensates the victim with monetary awards.²¹

10. *Id.* at 899.

11. *See id.* at 914; Greg Roslund, *The Medical Malpractice Rundown: A State-by-State Report Card*, EMERGENCY PHYSICIANS MONTHLY (July 21, 2014), <http://www.epmonthly.com/departments/subspecialties/medico-legal/the-medical-malpractice-rundown-a-state-by-state-report-card>.

12. *See* FLA. CONST. art. I, §§ 2, 21; *Estate of McCall*, 134 So. 3d at 933.

13. *See infra* Part V.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* Part VI.

19. *See* DAN B. DOBBS, *THE LAW OF TORTS* 1 (2000).

20. Hubbard, *supra* note 1, at 440.

21. DOBBS, *supra* note 19, at 2.

Tort law's quick adaptation to legislative enactments due to various interests from insurance companies, corporations, and legal practitioners makes it a dynamic area of law open to criticism.²² Tort reform is often defined as a movement that limits the ability and award that a plaintiff can attain when pursuing a civil tort lawsuit in order to address a series of *crises*.²³ Tort reform often involves distinct actors, such as the American Medical Association or State Farm Insurance, with multiple interests but who share a common goal for efficiency.²⁴ Other times tort reform is part of a political movement, which is subject to economic needs.²⁵

Critics often debate whether some of these reforms violate constitutional principles, such as those of due process, and whether this constant adaption to social policies opens the floodgates for courthouses over the country with frivolous lawsuits.²⁶ Supporters of tort reform propose changes to the judicial system to decrease costs in the economy, as insurance premiums rise and medical innovation expands.²⁷ It is frequently deemed as a controversial area of law because tort reform often aims at limiting the amount of recovery a victim can receive for his or her injury.²⁸ The reasoning behind such limitations is the increase in high insurances, but often the effect goes beyond limiting the compensation system and is done at the cost of guaranteed constitutional rights.²⁹

B. *Modern Tort Reform in the 1970s*

In order to understand whether states, such as Florida, can adopt other states' standards in medical malpractice cases, it is essential to give a brief historical introduction to important tort reforms that have lead to the common practice today.³⁰ While tort law is considered common law and was introduced in the United States as early as the 1800s, the true identity of reform began in the 1970s when the insurance market quickly rose.³¹ As a result, physicians petitioned legislators to make changes in personal injury cases.³² In 1975, California enacted its famous medical malpractice statute

22. See Hubbard, *supra* note 1, at 438–39, 471.

23. *Id.* at 438, 472.

24. *Id.* at 472.

25. See *id.* at 475–76.

26. *Id.* at 474, 523.

27. See Scott DeVito & Andrew W. Jurs, “Doubling-Down” for Defendants: *The Pernicious Effects of Tort Reform*, 118 PA. ST. L. REV. 543, 549 (2014).

28. See *id.* at 544.

29. See *id.* at 543–44, 596.

30. See *id.* at 543, 546, 549.

31. *Id.* at 551; see also Hubbard, *supra* note 1, at 439.

32. DeVito & Jurs, *supra* note 27, at 551.

that placed a cap on non-monetary awards on pain and suffering, therefore, slowing the price increase of medical malpractice premiums.³³

The movement of tort reform in the 1970s focused on placing an economical focus on civil litigation and limited the amount of damages that could be awarded.³⁴ A decrease in the number of carriers and increase in the number of claims caused premiums to rise and created an air of distrust towards the court system.³⁵ Subsequently, the medical community blamed the judicial system and lobbied the legislature to place limitations on recoveries for plaintiffs.³⁶ Nevertheless, many insurers were slow to increase and adjust their rates because of the uncertainty of the constitutionality of these limits.³⁷

C. *The 1980s and the Reagan Administration*

In the 1980s, the increased tort reform in the United States boosted the demand for insurance coverage, and many critics claim that this is a cause of the tort reform itself.³⁸ The Reagan Administration blamed the insurance crisis of the 1980s on tort reform.³⁹ Groups were formed, such as the Tort Policy Working Group, who believed that a doubling in the 1970s of lawsuits and an increase in award damages in medical malpractice suits would cause individuals to experience a high increase in insurance premiums.⁴⁰ The group recommended for the first time placing caps on damage awards and increasing the burden of proof.⁴¹

The Reagan Administration's Republican platform consisted of preventing insurance from rising and blamed the civil suits for the high costs of insurance and lack of healthcare available.⁴² The movement to limit civil trials in the courtroom and to decrease costs began to increase momentum when many states in the 1980s began a reform to adopt legislation to limit recovery on claims.⁴³ As well, many states focused on the abolition or

33. CAL. CIV. CODE § 333.2(a)–(b) (West 2015); FRANK A. SLOAN & LINDSEY M. CHEPKE, *MEDICAL MALPRACTICE* 117 (2008).

34. See G. EDWARD WHITE, *TORT LAW IN AMERICA* 216 (expanded ed. 2003).

35. DeVito & Jurs, *supra* note 27, at 549–50.

36. *Id.* at 550.

37. SLOAN & CHEPKE, *supra* note 33, at 97.

38. See DeVito & Jurs, *supra* note 27, at 551; Hubbard, *supra* note 1, at 438.

39. DeVito & Jurs, *supra* note 27, at 551.

40. *Id.*

41. *Id.*

42. REPUBLICAN NAT'L COMM., *THE REPUBLICAN PARTY PLATFORM OF 1988: AN AMERICAN VISION: FOR OUR CHILDREN AND OUR FUTURE* (1988), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25846>.

43. See DeVito & Jurs, *supra* note 27, at 551–53.

limitation of joint and several liability.⁴⁴ In joint and several liability, each tortfeasor is held liable for damages, and each defendant must then prove that they were not the sole proximate cause of the injury.⁴⁵ The plaintiff may elect from the group of defendants which one to seek payment from, but joint and several liability is often critiqued in that it entices plaintiffs to seek judgment from the wealthiest defendant.⁴⁶

Between 1986 and 1987, thirty-five states quickly adapted to tort reforms, within them abolishing the common law theory of joint and several liability.⁴⁷ However, some states, such as Arizona, adopted a slower approach by merely limiting joint and several liability.⁴⁸ Other states, such as Florida, moved towards completely abolishing it and received popular opposition in its tort reform movements.⁴⁹ The Supreme Court of Florida held that the complete abolition of joint and several liability did not violate the U.S. Constitution nor the Florida Constitution under equal protection, due process, and access to the courts.⁵⁰ However, the court ruled that caps on non-economic damages violated the Florida Constitution because they deny the plaintiff's access to the courts.⁵¹

III. MODERN ATTEMPTS TO ENCOURAGE TORT REFORM IN MEDICAL MALPRACTICE

Tort reform is often looked at as an answer for the insurance crisis.⁵² Therefore, because of the connection between insurance companies and medical malpractice, this then becomes an area of law often targeted by legislators and companies.⁵³ A second Republican attempt to limit tort reform occurred in 2000 with the Bush Administration after a repeated insurance crisis.⁵⁴ The Bush Administration proposed further tort reform by imposing a \$250,000 cap on non-economic damages in medical malpractice

44. See Mike Stenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 TORT & INS. L.J. 482, 485 (1987).

45. See James J. Scheske, Comment, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. AIR L. & COM. 627, 635 (1988).

46. *Id.*

47. *Id.* at 642.

48. *Id.*

49. See *id.* at 642–43.

50. U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 9, 21; *Smith v. Dep't. of Ins.*, 507 So. 2d 1080, 1091 (Fla. 1987); Scheske, *supra* note 45, at 643.

51. FLA. CONST. art. I, § 21; *Smith*, 507 So. 2d at 1095.

52. See Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis"*, 23 STAN. L. & POL'Y REV. 477, 478 (2012).

53. *Id.* at 480–81.

54. *Id.* at 482–83.

avoided.⁶⁵ Protection to insurers and health care providers is justified by the fear that practitioners will leave the state due to malpractice suits and a common objective to reduce defensive medicine.⁶⁶ However, with the relatively small number of malpractice claims that make it to court, the effectiveness of these restrictions becomes questionable.⁶⁷ Are patients being limited their rights in order to achieve affordable care?⁶⁸ Will other states, such as Florida, with their unique state constitutions be able to follow political tort reform to increase efficiency and diminish costs by restricting fundamental rights?⁶⁹

IV. INCREASING THE BURDEN OF PROOF RATIONALE

A. *Introduction to the Emergency Room Malpractice*

Generally, in civil actions, including medical malpractice, the plaintiff has the duty to prove every element of the case by a preponderance of evidence.⁷⁰ Preponderance of evidence means that the plaintiff, in a more than probable standard, can establish a persuasive chain of causation between the injury and the defendant.⁷¹ The evidence must show that it is more probable that the practitioner caused the plaintiff's injury; however, causation can often be difficult to prove.⁷² Defendants in medical claims have the ability to blame the injury on many external factors and on the plaintiff's previous medical history.⁷³ In medical cases, the breach is determined in accordance to what the physician should have done differently; however, it is not conclusive.⁷⁴ Emergency claims are made even more difficult for a plaintiff when emergency practitioners are not required to follow the same standard as the general profession and are allowed to use their best judgment.⁷⁵

65. Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1253–54 (2012); Jason R. Graves, Note, *State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health*, 45 GA. L. REV. 275, 293 (2010); see also Bayer, *supra* note 56, at 131.

66. Graves, *supra* note 65, at 280.

67. See *id.* at 291.

68. See *id.* at 280.

69. See FLA. CONST. art. I, § 21; Graves, *supra* note 65, at 281.

70. Stein, *supra* note 65, at 1217.

71. *Id.*

72. *Id.*

73. *Id.*

74. See *id.* at 1215–17.

75. See Stein, *supra* note 65, at 1212.

Emergency care, unlike general care, focuses on the immediate care provided to a patient in times of emergency.⁷⁶ Unlike general practitioners, emergency doctors do not have extensive knowledge of the patient's medical history or any prior relationship to the patient, and they must rely on split-second decisions.⁷⁷ An emergency physician is responsible for providing diagnosis and care to episodic illness.⁷⁸ Emergency physicians are often liable for a broad area of medical expertise unlike other practitioners who are able to specialize in a specific area.⁷⁹ Some states have even allowed other medical specialists to serve as expert witnesses against an emergency physician.⁸⁰

Part of the reasoning behind why many states have taken the approach to make a distinction with emergency room practitioners involves the fast pace they encounter daily and the distinct regulation from general practitioners.⁸¹ A greater portion of the population is relying significantly more on emergency room services than a clinic with a general practitioner, even in situations where an emergency is not warranted.⁸² As a result, a conflict arises in determining what is a true emergency and to what standard an emergency practitioner will be held liable.⁸³ Emergency practitioners often treat conditions that are not critical but that patients seek because of lack of health care based on their financial situation.⁸⁴

B. *Georgia and Its Reform to Heightened Burden of Proof*

In 2005, the Georgia General Assembly, in Senate Bill 3, reasoned that liability insurance caused the state at the time to suffer a crisis that affected the quality of health.⁸⁵ Therefore, the assembly believed that the regulation of civil action in the healthcare would resolve the crisis and result in stability and predictability in the economy.⁸⁶ As a result of healthcare problems and the individuality of emergency physician malpractice, the State of Georgia enacted section 51-1-29.5 of the Georgia Code, establishing that no emergency physicians shall be held liable for negligence unless it is

2011). 76. RICHARD M. PATTERSON, HARNEY'S MEDICAL MALPRACTICE 569 (5th ed.

77. *See Graves, supra* note 65, at 279.

78. PATTERSON, *supra* note 76, at 569.

79. *Id.*

80. *Id.*

81. *See Stein, supra* note 65, at 1212.

82. Graves, *supra* note 65, at 298.

83. PATTERSON, *supra* note 76, at 569–70.

84. *See Graves, supra* note 65, at 298.

85. *Id.* at 284; S. 3, 148th Gen. Assemb., Reg. Sess. § 1 (Ga. 2005).

86. *See Graves, supra* note 65, at 284; Ga. S. 3 § 1.

proven with a higher clear and convincing standard and with a showing of gross negligence.⁸⁷

Georgia's healthcare is unique because most physicians are covered by one insurer, MAG Mutual Insurance Company, and therefore, the high premium insurance crisis is more evident when there is not much diversity in the insurance market for physicians.⁸⁸ Besides lacking competition in insurance, another cause of the health care crisis was affirmative duty statutes that required public hospitals to treat all patients who seek care in emergency rooms.⁸⁹ Georgia's affirmative duty to treat all patients often led to hospitals being over-occupied with higher traffic, forcing emergency physicians to work at a faster pace.⁹⁰ While Georgia blamed medical malpractice cases for the lack of affordability in insurance, distinct factors accelerated the insurance crisis in Georgia.⁹¹ For example, competition with one of the greatest health insurance companies, St. Paul Insurance Company, ultimately caused competition to rise to the point where premium rates dropped rapidly until insurance companies were no longer capable of providing coverage at such low rates.⁹²

The Georgia General Assembly introduced Senate Bill 3 with the purpose to lower healthcare costs and make healthcare more accessible.⁹³ However, Senate Bill 3 raised much opposition from individuals, such as Senator David Adelman, who commented that by raising the burden of proof, it would, as a result, become difficult for those patients who suffer from injury or even death to seek justice in the law.⁹⁴ When the legislators raised the standard of proof to *clear and convincing*, they made it nearly impossible—or at least almost to the criminal standard of a *beyond a reasonable doubt*—for a plaintiff to bring a successful claim against an emergency physician.⁹⁵ Not only has the legislature raised the standard, but it has also changed the negligence norm to a gross negligence standard, which is almost a “mission impossible for plaintiffs.”⁹⁶

87. GA. CODE ANN. § 51-1-29.5(c) (2015).

88. Graves, *supra* note 65, at 284, 301.

89. See *Williams v. Hosp. Auth. of Hall Cty.*, 168 S.E.2d 336, 337 (Ga. Ct. App. 1969); Graves, *supra* note 65, at 301.

90. See *Williams*, 168 S.E.2d at 337; Jade Hindmon, *E.R. Overcrowding*, WTVM, <http://www.wtvm.com/story/4710750/er-overcrowding> (last visited Dec. 18, 2015).

91. See Graves, *supra* note 65, at 299–300.

92. *Id.* at 301.

93. *Id.* at 284; see also S. 3, 148th Gen. Assemb., Reg. Sess. § 1(a), 8(c) (Ga. 2005).

94. See Ga. S. 3 § 8(c); Graves, *supra* note 65, at 287.

95. See Graves, *supra* note 65, at 287, 289.

96. Graves, *supra* note 65, at 287.

1. Georgia's Conflict with *Clear and Convincing*

The Supreme Court of Georgia's ruling in *Gliemmo v. Cousineau*,⁹⁷ faced public backlash after the passing of Senate Bill 3, when a medical malpractice action was filed questioning the constitutionality of Georgia's heightened burden of proof and the raised standard of gross negligence.⁹⁸ Plaintiffs in this case alleged that the distinction between emergency room and general medical malpractice cases violated Georgia's Constitution because it provided a *special laws clause*, which made any law that is not applied uniformly, unconstitutional.⁹⁹ Due to the uniqueness in the Georgia Constitution, the court held that a gross negligence and heightened burden of proof was constitutional because it was not a special law, and it did not deny equal protection and due process.¹⁰⁰

The plaintiffs in *Gliemmo* alleged that because section 51-1-29.5(c) only applies to some emergency physicians, it is considered a special law that discriminates against practitioners outside the emergency room and thus, is in violation of the Georgia Constitution.¹⁰¹ The court reasoned that the statute is not a special law because it is applied uniformly to all claims in emergency care and without a specific time frame.¹⁰² The General Assembly's legislative intent behind the distinct treatment showed that both emergency and general practitioners are having great difficulty affording insurance, and because emergency care is distinct from general care, it is sufficient to heighten the burden of proof to reach those goals.¹⁰³ However, the court and the legislature do not discuss doctors who are not emergency physicians but who undergo similar emergency situations, and patients with severe injuries and yet do not qualify for a heightened burden of proof.¹⁰⁴ This argument will be discussed further in depth later in this Comment.¹⁰⁵ Subsequently, the court then cites to *State Farm Mutual Auto Insurance Co.*

97. 694 S.E.2d 75 (Ga. 2010).

98. *Id.* at 77; *see also* GA. CODE ANN. § 51-1-29.5(c) (2015); S. 3, 148th Gen. Assemb., Reg. Sess. (Ga. 2005).

99. *Gliemmo*, 694 S.E.2d at 77 (emphasis added).

100. *Id.* at 79–80; *see also* GA. CONST. art. III, § VI, para. IV(c).

101. *Gliemmo*, 694 S.E.2d at 77; *see also* GA. CONST. art. III, § VI, para. IV; GA. CODE ANN. § 51-1-29.5(c).

102. *Gliemmo*, 694 S.E.2d at 78–79; *see also* GA. CONST. art. III, § VI, para. IV(c); GA. CODE ANN. § 51-1-29.5(c).

103. *Gliemmo*, 694 S.E. 2d at 79.

104. *See id.*

105. *See infra* Section V.A.2.

v. *Five Transportation Co.*,¹⁰⁶ which held that treatment that is not uniformly identically applied does not necessarily offend the Georgia Constitution.¹⁰⁷

V. IN FLORIDA'S CASE

A. *Florida's Tort Reform Direction*

1. Introduction

Tort reform is becoming a popular new movement, which all states are taking part in but that many face conflict with because of the individuality of each state's constitution.¹⁰⁸ In order to understand whether Florida can continue its tort reform path, it is essential to understand the case law and special constitutional provisions that do not allow Florida to continue tort reform like its sister state, Georgia.¹⁰⁹ In Georgia, the legislature has successfully enacted statutes that increase the standard of the proof that makes it close to impossible for a victim to successfully bring a case to court.¹¹⁰ Contrastingly, the effectiveness of tort reform in states such as Florida becomes questionable when Florida still has some of the highest insurance premiums in the country even when it has different cap amounts in place and expert witness reform.¹¹¹

a. *1986 Florida Reform*

The Medical Malpractice Reform Act, one of Florida's earliest reforms in 1975, was enacted in order to diminish the cost of medical insurance to patients at a time when the state began to suffer through a health care crisis, and the cost of insurance was excessively gross.¹¹² In Florida, the tort reform movement did not become recognized until a move from the contributory negligence standard to the comparative negligence norm occurred in *Hoffman v. Jones*,¹¹³ to adopt a more equitable system of

106. 271 S.E.2d 844 (Ga. 1980).

107. *Gliemmo*, 694 S.E.2d at 79; *State Farm Mut. Auto. Ins. Co.*, 271 S.E.2d at 848; see also GA. CONST. art. III, § VI, para. IV.

108. See Roslund, *supra* note 11.

109. See *supra* Section IV.B; *infra* Sections V.A.1.a–c, V.A.2.

110. See Roslund, *supra* note 11.

111. See *id.*; *Estate of McCall v. United States*, 134 So. 3d 894, 934 (Fla. 2014).

112. Medical Malpractice Reform Act of 1975, ch. 75–79, 1975 Fla. Laws 13; see also Thomas Horenkamp, Comment, *The New Florida Medical Malpractice Legislation and Its Likely Constitutional Challenges*, 58 U. MIAMI L. REV. 1285, 1287 (2004).

113. 280 So. 2d 431 (Fla. 1973).

relief.¹¹⁴ Notably, the Tort Reform and Insurance Act of 1986 demonstrated that Florida's aim to move towards comparative fault in negligence cases.¹¹⁵ This would be the first attempt to slowly abolish the doctrine of joint and several liability in Florida.¹¹⁶ Subsequent reforms followed the passage of section 768.81, such as allocating fault to the plaintiff and removing joint and several liability to a defendant who has a less percentage of fault, which changed medical malpractice law.¹¹⁷ The 1986 reform was based on the legislature's attempt to decrease insurance premiums and as a result, implemented insurance profit laws and insurance rate rollbacks.¹¹⁸

b. *Republicans Make the Change*

In 1996, Florida gained a Republican majority controlling the Florida House and Senate, which caused the legislators to aim their focus on improving business relations in Florida.¹¹⁹ The changes in office began a movement to change the civil court system in order to increase prosperity for insurance companies.¹²⁰ The legislators gained wide support for the limitation of litigation; they claimed that the floodgate of civil cases in the courthouses was causing insurance companies and the market to fail in Florida.¹²¹ Despite the fact that in 1996 Florida's economy was strong as the gross state product rose by 19.5%, the unemployment rate fell by 4.9%, and Florida ranked third in greatest number of new businesses, legislators still blamed the small percentage of civil cases in Florida for a non-existent decline.¹²² Further statistics in the 1990s show that medical claims were not the culprit because when the 1986 reform was passed negligence cases only consisted of 8.9% of civil cases, and they have been in decline since 1990.¹²³

114. *Id.* at 438.

115. Michael S. Hooker & Guy P. McConnell, *Joint and Several Liability in Florida: Are Reports of Its Demise Greatly Exaggerated?*, FLA. B. J., Dec. 2006, at 10, 12; see also FLA. STAT. § 768.81 (2014).

116. Hooker & McConnell, *supra* note 115, at 12; see also FLA. STAT. § 768.81.

117. Hooker & McConnell, *supra* note 115, at 12; see also FLA. STAT. § 768.81.

118. Kenneth D. Kranz, *Tort Reform 1997–98: Profits v. People?*, 25 FLA. ST. U. L. REV. 161, 163–64 (1998).

119. *Id.* at 165.

120. *See id.*

121. *See id.*

122. *See id.*; Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 433 (2000).

123. Kranz, *supra* note 118, at 176–77.

The only increase that has occurred in civil cases is due to the standard population increase of Floridians.¹²⁴

c. *House Bill 775*

In 1999, Florida once again made changes to tort law with the passage of House Bill 775 that reformed joint and several liability, punitive damages, statute of repose, and vicarious liability in motor vehicle cases.¹²⁵ The doctrine of joint and several liability was further limited in the 1999 reform when a plaintiff's economic losses were limited to a total of a one million dollar cap, but it only applied when the defendant was more than fifty percent at fault.¹²⁶ Significantly, under the new reform, multiple defendants could not be held to be joint and severally liable for more than one million dollars.¹²⁷

A common method used by tort reformists in order to gain public support for the limitation of the civil litigation system was the reference to a fictitious *tort tax* to the public.¹²⁸ Reference to the tort law system as a tax on civilians was used to quickly gain negative opposition against individuals who brought claims to court.¹²⁹ Vice President Dan Quayle made a statement to a group of business leaders that the tort litigation system costs Americans three hundred billion dollars, a figure that has no statistical support but that quickly gained momentum.¹³⁰ Fictitious information, negative terminology, such as *tort tax*, and company lobbyists have falsely led the tort reform in Florida when no accurate information demonstrates that civil litigation burdens Florida's economy in any manner.¹³¹ Other costs, such as natural disasters—specifically hurricanes—have caused a decline in Florida's economy, but are not accounted for when the legislature looks for a culprit in the downfall of the economy.¹³²

124. *Id.* at 177.

125. H.B. 775, 1999 Leg., Reg. Sess. (Fla. 1999) (Act effective Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400); Peck et al., *supra* note 122, at 406.

126. Peck et al., *supra* note 122, at 409.

127. *Id.*

128. *Id.* at 421.

129. *Id.*

130. *Id.* at 421–22.

131. *See* Peck et al., *supra* note 122, at 422.

132. *Id.* at 426.

2. Medical Malpractice Reform Gains Momentum

In 2003, the legislature focused its attempts on medical malpractice cases by placing statutory caps on non-economic damages.¹³³ The medical malpractice reform also enacted provisional steps to protect consumers from medical negligence, such as allowing insurance companies to avoid suit by tendering the limit of the defendant's policy in two hundred ten days.¹³⁴ The 2003 legislature also expressed that the new cap on non-economic damages would be on an aggregate basis, and in cases where there were several plaintiffs, the cap would be even lower.¹³⁵ As a result, section 766.118 of the Florida Statutes was enacted to limit the amount of non-economic damages a plaintiff could receive to five hundred dollars per claimant.¹³⁶ The statute aimed at limiting frivolous lawsuits and enforcing mediation before trial in order to protect insurance companies from excessive claims.¹³⁷ In order to pass the Statute, Senate Bill 2-D provided several legislative findings, many are no longer presently applicable.¹³⁸

Overall, the 2003 Florida Legislature for Senate Bill 2-D found that Florida was in the middle of a medical malpractice crisis and that it caused decreased availability of healthcare for Floridians.¹³⁹ The legislature claimed that Florida is one of the states with the highest medical malpractice insurance and therefore reasoned that this was why medical practitioners were leaving Florida.¹⁴⁰ The legislature reasoned that it could not provide its citizens with access to proper healthcare when doctors were leaving the state to practice somewhere else with lower insurance premiums.¹⁴¹ As a result, the legislature publicized a correlation between the numbers of doctors leaving the state; nonetheless it was only *anecdotal* data that was merely implied.¹⁴²

Organizations, such as the American Medical Association, have blamed the American jury system for the increase in insurance premium

133. Tracy S. Carlin, *Medical Malpractice Caps Move from the Legislature to the Courts: Will They Survive?*, FLA. B. J., May 2004, at 10, 10.

134. See Horenkamp, *supra* note 112, at 1290–91.

135. See S.B. 2-D, 2003 Leg., Spec. Sess. (Fla. 2003); Horenkamp, *supra* note 112, at 1289.

136. FLA. STAT. § 766.118(2)(a) (2014); Horenkamp, *supra* note 112, at 1290.

137. See FLA. STAT. § 766.118; Horenkamp, *supra* note 112, at 1289, 1291.

138. See *Estate of McCall v. United States*, 134 So. 3d 894, 913 (Fla. 2014) (discussing that in Florida there no longer exists a healthcare crisis to provide a rational basis for caps); Fla. S.B. 2-D; *infra* Part V.C.

139. See Fla. S.B. 2-D; Horenkamp, *supra* note 112, at 1299–1300.

140. Fla. S.B. 2-D; Horenkamp, *supra* note 112, at 1298.

141. See Fla. S.B. 2-D; Horenkamp, *supra* note 112, at 1298–99.

142. Horenkamp, *supra* note 112, at 1302.

costs and the limitation of accessibility to healthcare.¹⁴³ Tactics to support the allegation of excessive jury awards include placing emphasis on individual high jury awards and claiming that the award system is the true culprit.¹⁴⁴ Insurance companies repeatedly claim that litigation and excessive awards are responsible for the national crisis and high costs of healthcare, however, significant data shows otherwise.¹⁴⁵ In 2001, a total of 1303 claims were made against doctors in Florida that totaled to \$361.1 million.¹⁴⁶ If insurance companies claim that medical malpractice suits are driving doctors out of Florida and are excessive, the numbers of the amount of cases that actually make it to court do not match the allegations.¹⁴⁷

Other arguments made by tort reformers are that jurors are often sympathetic to plaintiffs because they only see the injuries caused and that often the medical standard is too complex for them to understand, even with expert testimony.¹⁴⁸ Tort reformers argue that medical malpractice is too complex for jurors because it involves multiple parties, difficult medical issues, and a complex method to award appropriate damages.¹⁴⁹ However, all these legislative findings on the need for tort reform in the medical malpractice area do not discuss how insurance premium costs have increased due to the losses in the reserve amount of negligent doctors and the lack of proper management of healthcare companies in the industry.¹⁵⁰

In 2004, further reforms continued as Florida passed the *Three Strikes Rule*, also referred to as *Amendment 8*, which became section 456.50 of the Florida Statute.¹⁵¹ The Act focused on preventing physicians who have repeatedly committed malpractice from maintaining or obtaining a physician's license.¹⁵² While the Act may at first seem to benefit the plaintiff, the Act also heightens the standard of proof required to deny a license to a physician to a *clear and convincing* standard if the act or acts are not part of the *Amendment 8* list.¹⁵³ This standard is the same standard of proof required in Georgia against emergency physicians, with the exception

143. *Id.* at 1305.

144. *Id.* at 1306–07.

145. *See id.* at 1305–07.

146. Horenkamp, *supra* note 112, at 1307.

147. *See id.* at 1306–07.

148. Edward L. Holloran, III, Comment, *Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations*, 26 NOVA L. REV. 331, 335–36 (2001).

149. *Id.*

150. Horenkamp, *supra* note 112, at 1312.

151. FLA. STAT. § 456.50 (2014); Dinah Stein, *Florida's "Three Strikes" Legislation: A Defense Perspective*, 29 TRIAL ADVOC. Q., Spring 2010, at 22, 22.

152. FLA. STAT. § 456.50(2); Stein, *supra* note 151, at 22–23.

153. *See* FLA. STAT. § 456.50; Stein, *supra* note 151, at 22–23.

1. *Kluger v. White*

As established by *Kluger v. White*,¹⁶⁴ access to the courts is given to Floridians as a fundamental right in their constitution and can only be removed in two circumstances: (1) when there is a reasonable alternative to protect the right to redress for injuries or (2) “an *overpowering public necessity* for the abolishment of [the] right, and [that] no alternative method of meeting [the] public necessity can be shown.”¹⁶⁵ However, protection under access to the courts is only extended to rights that existed at common law, such as personal injury claims.¹⁶⁶ The holding of *Kluger* was essential to bring awareness into Florida on whether the tort reform was violating an individual’s access to the courts by increasing the difficulty for a plaintiff to seek relief.¹⁶⁷ The Supreme Court of Florida addressed that the legislation cannot abolish the right to access the courts without providing an alternative to guarantee an individual a way to redress.¹⁶⁸

2. *Mitchell v. Moore* and Defining an Overpowering Public Necessity

Denial of an individual’s access to the courts includes burdening or restricting an individual’s access right to redress.¹⁶⁹ In *Mitchell v. Moore*,¹⁷⁰ a prisoner sought his petition to be reviewed by the appellate court; however, his petition was denied unless he filed various copies of the pleadings.¹⁷¹ The petitioner stated that this was a violation of his access to courts guaranteed by the Florida Constitution because it was unduly burdensome in his condition as a prisoner to provide additional copies.¹⁷² The Supreme Court of Florida agreed that the statute requiring him to provide extensive copies only provided difficulty and delay with no possible alternative to access the courts for the prisoners.¹⁷³ Therefore, if a fundamental interest is being taken, then the statute must meet the rational basis test and strict scrutiny test.¹⁷⁴ The court in *Mitchell* held that the *compelling government interest* is equivalent to the *overpowering public necessity* and, therefore, the statute was to be held under a strict scrutiny analysis instead of a lower

164. 281 So. 2d 1 (Fla. 1973).

165. *Id.* at 4 (emphasis added); *see also* FLA CONST. art. I § 21.

166. *See* Fla. Const. art. I § 21; *Kluger*, 281 So. 2d at 4.

167. *See Kluger*, 281 So. 2d at 10; Horenkamp, *supra* note 112, at 1292–93.

168. *Kluger*, 281 So. 2d at 4.

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

170. 786 So. 2d 521 (Fla. 2001).

171. *Id.* at 523–24.

172. *See id.* at 524; FLA CONST. art. I § 21.

173. *Mitchell*, 786 So. 2d at 525.

174. *Id.* at 527.

rational basis standard.¹⁷⁵ However, this all applies if the legislature's finding to limit access to the courts is current, and in cases where legislative findings do not parallel the present findings, the court has the ability to correct them.¹⁷⁶

C. Estate of McCall *Changes Florida's Justification for Tort Reform*

One of the most recent Supreme Court of Florida cases, *Estate of McCall*, directly addresses the alleged medical malpractice crisis in Florida.¹⁷⁷ In *Estate of McCall*, a woman named "Michelle McCall received prenatal medical care [from] a United States Air Force clinic" when she was diagnosed with severe preeclampsia.¹⁷⁸ The patient was treated by the family practice department instead of the required obstetrics-gynecology.¹⁷⁹ Since the Air Force hospital was unavailable, the patient was transferred to the Fort Walton Beach Medical Center where she delivered the baby.¹⁸⁰ Dr. Archibald, the obstetrician in charge of the procedures, left after the delivery, but he was called after the family practitioner could not remove the placenta, and the patient had already lost a great amount of blood.¹⁸¹ The practitioners informed Dr. Archibald of the blood loss; however, forty minutes thereafter, a nurse attempted to draw blood from Ms. McCall.¹⁸² As a result, Ms. McCall underwent cardiac arrest and never regained consciousness.¹⁸³ The district court awarded a total of \$2,000,000—\$500,000 for her son and \$750,000 for each of her parents.¹⁸⁴ However, with the application of section 766.118(2), the cap on wrongful death cases, the case was limited to \$1,000,000.¹⁸⁵ The petitioners then appealed the case on the basis that the cap violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, was an unlawful taking under the Fifth Amendment, and was a violation of Florida's right of access to the courts, the right to jury trial, and equal protection under the Florida Constitution.¹⁸⁶

175. *Id.* at 528, 531.

176. *See* Horenkamp, *supra* note 112, at 1294.

177. *Estate of McCall v. United States*, 134 So. 3d 894, 897 (Fla. 2014).

178. *Id.*

179. *Id.* at 898.

180. *Id.*

181. *Id.* at 898–99.

182. *Estate of McCall*, 134 So. 3d at 898–99.

183. *Id.* at 899.

184. *Id.*

185. *Id.*; FLA. STAT. § 766.118 (2014); *Estate of McCall*, 134 So. 3d at 899.

186. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V; FLA. CONST. art. I,

§§ 2, 21–22; *Estate of McCall*, 134 So. 3d at 899.

1. Why *Estate of McCall* Matters

Although *Estate of McCall* is a wrongful death case that discusses the constitutionality of caps on medical malpractice claims, for the purposes of this Comment we will only discuss the effect *Estate of McCall* has on medical malpractice claims in Florida, and the continuation of further tort reform.¹⁸⁷ The court in *Estate of McCall* ruled that the statutory cap on wrongful death cases violates the Equal Protection Clause under the Florida Constitution because there is no longer a rational basis reasoning for a legitimate state objective behind it.¹⁸⁸ Where the importance of the recent case is the court's explanation and reasoning behind why the caps are unconstitutional; the court analyzes the present day situation in Florida with the alleged medical malpractice case.¹⁸⁹

In *Estate of McCall*, the court addressed the responsibility given under *Warren v. State Farm Mutual Automobile Insurance Co.*¹⁹⁰ to assure that the statute that was passed serves a legitimate government purpose and therefore, obligates itself to analyze the alleged insurance crisis.¹⁹¹ The court discussed the reasoning that the Florida Legislature has utilized in order to enact statutes limiting malpractice liability; the Florida Legislature Task Force has alleged that Florida has such a high cost of insurance premiums that it has forced medical practitioners to leave the state.¹⁹² The court dismissed this finding and asserts that in 2003, “the United States General Accounting Office [“GAO”] found that from 1991 to 2001, [the amount of physicians] grew from 214 to 237 in metropolitan areas.”¹⁹³ This is contrary to the Task Force's findings that malpractice litigation was driving practitioners out and limiting the availability of health care to practitioners.¹⁹⁴ As well, the alleged increase of jury verdicts statement by the Task Force has been exaggerated—a study revealed that only 7.5% of malpractice cases actually involve a jury trial verdict, and most of the cases were resolved in settlements.¹⁹⁵ Therefore, as the court stated, the Task

187. U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1; FLA. CONST. art. I, §§ 2, 21–22; *Estate of McCall*, 134 So. 3d at 899.

188. *See Estate of McCall*, 134 So. 3d at 905, 914–15.

189. *Id.*

190. 899 So. 2d 1090 (Fla. 2005).

191. *See Estate of McCall*, 134 So. 3d at 905–06; *Warren*, 899 So. 2d at 1095.

192. *Estate of McCall*, 134 So. 3d at 906; JOHN C. HITT ET AL., GOVERNOR'S SELECT TASK FORCE ON HEALTHCARE LIABILITY INSURANCE XVII (2003).

193. *Estate of McCall*, 134 So. 3d at 906.

194. *See id.*; Hitt et al., *supra* note 192, at XVII.

195. *Estate of McCall*, 134 So. 3d at 906; Hitt et al., *supra* note 192, at 64.

Force's findings that jury awards in medical malpractice cases were the culprits for the increased costs of insurance are deemed *most questionable*.¹⁹⁶

The court quotes the opinion of Joanne Doroshow, Executive Director of the Center for Justice and Democracy, who claims that:

[T]his so-called *crisis* is nothing more than the underwriting cycle of the insurance industry, and driven by the same factors that caused the *crises* in the 1970s and 1980s [W]ith each crisis, there has been a severe drop in the investment income for insurers, which has been compounded by sever[e] under-pricing of insurance premiums [D]uring years of high interest rates or excellent insur[ance] profits that are invested for maximum return, the insurance companies engage in fierce competition [W]hen investment income drops . . . the insurance industry responds by sharply increasing premiums and reducing coverage. [T]ort reform changes in the 1980s . . . was caused instead by [the] modulations in the insurance cycle throughout the country.¹⁹⁷

The court acknowledged that the reason for the insurance crisis in Florida was due to the increases in the amount of money that insurance companies place for reserve.¹⁹⁸ The allegation that insurance is driving practitioners out of Florida is not supported because the practitioners are leaving to other states, such as North Carolina, that have the same crisis with high malpractice insurance rates.¹⁹⁹ The alleged statement that the number of frivolous lawsuits has allegedly increased in Florida is contradicted by the deputy director of Florida Office of Insurance Regulations who confirmed that there is no evidence of an increase in the number of frivolous lawsuits or excessive jury verdicts.²⁰⁰

In accordance with the GAO, some providers have even purported that because of the medical malpractice suits, physicians are forced to cut back on services that are seen as high risk.²⁰¹ However, the GAO debunked that allegation as unrepresentative of the physician population as the surveys only had a twenty percent response rate.²⁰² The American Medical Association claimed that twenty-four percent of physicians stopped performing these procedures but failed to mention that responses for the

196. *Estate of McCall*, 134 So. 3d at 906; HITT ET AL., *supra* note 192, at 64.

197. *Estate of McCall*, 134 So. 3d at 907–08 (alteration in original) (emphasis added); *see also* HITT ET AL., *supra* note 192, at 64.

198. *Estate of McCall*, 134 So. 3d at 908.

199. *Id.* at 909.

200. *Id.* at 908.

201. U.S. GEN. ACCOUNTING OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 20 (2003).

202. *Id.*

survey were only ten percent.²⁰³ States with caps on non-economic damages claim that they have lower premium rates because of this; however, they exclude many factors such as hospitals and nursing homes.²⁰⁴ Other factors, such as the manner in which plaintiffs are permitted to collect damages, alter the award amount depending on whether the plaintiff files claims for multiple defendants together or individually.²⁰⁵

Today, even if Florida was in the same medical crisis as it was in the 1980s, a crisis is not a permanent condition.²⁰⁶ The court emphasizes that, “even if section 766.118 may have been rational when it was enacted . . . it will no longer be rational where the factual premise upon which the statute was based has changed.”²⁰⁷ Florida courts have a duty to evaluate both data before a statute is passed and its constitutionality after.²⁰⁸ Further data contradicts any allegations of lack of access to healthcare when there are more active physicians in Florida than in the past, while, at the same time, the Office of State Courts Administrator reports that medical malpractice cases in Florida have decreased from 5829 to only 2491 in 2012.²⁰⁹ In 2003, the 5829 medical malpractice cases only constituted 3% of civil actions, and later the actions filed for medical malpractice decreased by more than 60% in 2012.²¹⁰

As a result of the court’s findings, the Supreme Court of Florida established that there is no current medical malpractice crisis in Florida and that if there was in the past, it was no longer practical.²¹¹ The lack of a present medical malpractice crisis denies any rational basis reasoning to impose caps by section 766.118 and any legitimate state purpose to limit litigation, equal protection, and access to the courts.²¹² Nonetheless, the court decided not to answer any of the remaining questions regarding access to the courts because *Estate of McCall* was a wrongful death case, which is not considered common law or a statute protected by the Florida Constitution.²¹³

203. *Id.*

204. *Id.* at 30.

205. *Id.* at 37.

206. *Estate of McCall v. United States*, 134 So. 3d 894, 907, 913 (Fla. 2014);

see also HITT ET AL., *supra* note 192, at 64.

207. *Estate of McCall*, 134 So. 3d at 913.

208. *See id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Estate of McCall*, 134 So. 3d at 914; see also FLA. CONST. art. I, §§ 9, 21;

FLA. STAT. § 766.118 (2014).

213. *Estate of McCall*, 134 So. 3d at 915.

2. No Alternative Method

With *Estate of McCall* proving that there no longer exists a rational basis for medical malpractice reform, it is even more prevalent that any new reform in Florida would violate the Florida Constitution's right of access to the courts and equal protection.²¹⁴ In *University of Miami v. Echarte*,²¹⁵ the court held that mandatory arbitration and monetary caps on non-economic damages in medical malpractice claims are not unconstitutional because they "are necessary to meet the medical malpractice crisis" even when they limit an individual's access to the courts.²¹⁶ In *Echarte*, the court states that monetary caps on non-economic damages, known as the Medical Malpractice Reform Act, satisfies both the *overpowering necessity* and *no alternative method* of the *Kluger* test when a party is forced to request arbitration first.²¹⁷ Nonetheless, *Echarte* denies a plaintiff the right to access when they force a plaintiff to receive a lower amount of damages if they deny arbitration.²¹⁸

The arbitration option enforced in *Echarte* is no longer constitutional because under the new findings, it does not pass the *Kluger* test.²¹⁹ The legislature can no longer show an overpowering public necessity for abolishment of a right and no reasonable alternative without limiting access to the courts.²²⁰ In this situation, the plaintiff is undercompensated both when they choose arbitration and decide to go to trial, even though it is at the benefit of the defendant.²²¹ Not only is the plaintiff limited from being able to bring their claim to court as guaranteed under the Florida Constitution, but they are also denied full compensation with no legitimate rational reasoning behind it.²²² Florida's Malpractice Act allows jurors to use the caps of non-economic damages and leave a plaintiff undercompensated when they

214. See FLA. CONST. art. I, §§ 9, 21; *Estate of McCall*, 134 So. 3d at 913.

215. 618 So. 2d 189 (Fla. 1993).

216. *Id.* at 197–98.

217. *Id.* at 194–97; *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973); see also FLA. STAT. § 766.207(7)(b).

218. *Echarte*, 618 So. 2d at 197; see also FLA. CONST. art. I, § 21; FLA. STAT. § 766.207; Jessica Fonseca-Nader, Comment, *Florida's Comprehensive Medical Malpractice Reform Act: Is It Time for a Change?*, 8 ST. THOMAS L. REV. 551, 565–66 (1996).

219. See *Estate of McCall*, 134 So. 3d at 914; *Echarte*, 618 So. 2d at 197; *Kluger*, 281 So. 2d at 4; Fonseca-Nader, *supra* note 218, at 565–66.

220. Fonseca-Nader, *supra* note 218, at 563; see also *Estate of McCall*, 134 So. 3d at 914; *Echarte*, 618 So. 2d at 197.

221. Fonseca-Nader, *supra* note 218, at 558.

222. *Id.* at 561–62; see also FLA. CONST. art. I, § 21; *Echarte*, 618 So. 2d at

suffered an incredible loss.²²³ The arbitration option and other medical malpractice reforms punish the plaintiff when they do not seek arbitration because they wish to take their case to court.²²⁴ Further medical tort reform, such as increasing the burden of proof to a clear and convincing standard when treated by emergency physicians, would further punish and delay the plaintiff's right to redress.²²⁵

3. *North Broward Hospital District v. Kalitan*

Estate of McCall opens the door to future litigation when it questions the constitutionality of non-economic caps and when it completely exposes a no longer present need for limitations on plaintiffs based on their injuries.²²⁶ In the recent Fourth District Court of Appeal case *North Broward Hospital District v. Kalitan*,²²⁷ a patient brought an action against a hospital for medical malpractice when she suffered a catastrophic injury.²²⁸ The plaintiff's injuries consisted of an induced coma for several weeks, upper body pain, mental disorders, and loss of independence.²²⁹ The jury found in favor of the plaintiff and determined that the plaintiff had suffered a catastrophic injury and awarded a total of \$4,718,011 in total damages as well as a total of \$4,000,000 in non-economic damages.²³⁰ The trial court then moved to limit the amount of non-economic damages to \$2,000,000 under section 766.118(2) of the Florida Statutes and was further capped under sovereign entity to \$1,300,000.²³¹

The Fourth District Court of Appeal then moved to reference *Estate of McCall* to analyze whether section 766.118 of the Florida Statutes applies to both personal injury and wrongful death cases.²³² The court determined that, as established under *Estate of McCall*, if there is no longer an objective for the statute, then there is no longer a legitimate state objective to which the caps can *rationally relate*.²³³ Although *Estate of McCall* specifically refers to wrongful death cases, when the statute's objective as a whole is

223. Fonseca-Nader, *supra* note 218, at 564; *see also* FLA. STAT. § 766.207(7) (2014).

224. Fonseca-Nader, *supra* note 218, at 565.

225. *See* Stein, *supra* note 151, at 22–23.

226. *See Estate of McCall*, 134 So. 3d at 913.

227. 174 So. 3d 403 (Fla. 4th Dist. Ct. App. 2015).

228. *Id.* at 405.

229. *Id.*

230. *Id.* at 406.

231. *Id.* at 407; *see also* FLA. STAT. § 766.118(2) (2014).

232. *Kalitan*, 174 So. 3d at 411; *see also* FLA. STAT. § 766.118(2)(a); *Estate of McCall v. United States*, 134 So. 3d 894, 915 (Fla. 2014).

233. *Estate of McCall*, 134 So. 3d at 901; *Kalitan*, 174 So. 3d at 411.

discredited then reference to personal injury cases applies as well.²³⁴ It is a violation of equal protection when non-economic caps discriminate and allow claimants with little non-economic damages to claim all the damages, while claimants with serious injuries are capped.²³⁵ In *Kalitan*, the court demonstrates the intention to limit tort reform after *Estate of McCall* brought to light the lack of rational basis for distinction among medical malpractice plaintiffs.²³⁶ The *Kalitan* court decided not to address the statute's violation to access to courts or jury trials because *Estate of McCall* rationale applies to medical malpractice actions in general.²³⁷

4. Florida Cannot Continue in Its Tort Reform

What makes *Estate of McCall* so essential to today's tort reform in Florida is the assertion that Florida is no longer in a medical malpractice insurance crisis; therefore, the court's findings question the constitutionality of past reforms and any future attempts.²³⁸ *Estate of McCall* sets a distinct precedent for future cases and legislative actions; it limits any possibility of Florida continuing tort reform.²³⁹ Unlike the state of Georgia that overcame the equal protection hurdle in order to enact a heightened burden of proof when the legislature increased the standard, a similar reform would not pass Florida's scrutiny.²⁴⁰ Florida's case law, such as *Kluger*, *Estate of McCall*, and now *Kalitan*, note that there is no longer an overpowering public necessity and rational basis to place any more limitations on a plaintiff.²⁴¹ There no longer exists a compelling reason for unequal treatment towards plaintiffs with different injuries—whether wrongful death or personal injury.²⁴² Florida no longer has legislative findings to prove that it is still in a medical crisis.²⁴³

Nevertheless, because Florida under *Kluger* requires a test of *overpowering necessity*, it will be unsuccessful in enacting and justifying any further tort reform.²⁴⁴ The legislature is now unable to provide rational

234. *Estate of McCall*, 134 So. 3d at 897; *Kalitan*, 174 So. 3d at 411.

235. *Kalitan*, 174 So. 3d at 411.

236. See *id.* at 409, 10; *Estate of McCall*, 134 So. 3d at 901.

237. FLA. CONST. art. I, §§ 21–22; *Estate of McCall*, 134 So. 3d at 901; *Kalitan*, 174 So. 3d at 411.

238. See *Estate of McCall*, 134 So. 3d at 913.

239. See *id.* at 931.

240. *Id.* at 916; Gliemmo v. Cousineau, 694 S.E.2d 75, 80 (Ga. 2010).

241. See *Kluger v. White*, 281 So. 2d 1, 4–5 (Fla. 1973); *Estate of McCall*, 134 So. 3d at 901, 936; *Kalitan*, 174 So. 3d at 411.

242. See *Estate of McCall*, 134 So. 3d at 901, 916.

243. *Id.* at 906.

244. See *Kluger*, 281 So. 2d at 4 (emphasis added).

reasons for the different treatment for those individuals who suffer serious near death injuries caused by negligence, but who are forced to cap their damages.²⁴⁵ In contrast, plaintiffs in wrongful death cases have unlimited damages.²⁴⁶ The legislature also cannot pass the first part of *Kluger* with a reasonable alternative when the alternative is to go to arbitration.²⁴⁷ Even if arbitration is no longer mandatory, rather voluntary, it becomes mandatory when the plaintiff's non-economic damages are capped even further.²⁴⁸ The alternative arbitration creates a greater burden on the plaintiff, and it discourages the parties from settling.²⁴⁹

Florida already places caps on emergency practitioners and limits the award of non-economic damages available to plaintiffs who underwent medical care by an emergency physician to \$150,000.²⁵⁰ Increasing the burden of proof to a clear and convincing standard and gross negligence, like Georgia, would potentially deny an individual the right to access the courts, equal protection, and a full recovery.²⁵¹ If Florida attempts to continue tort reform by increasing the standard of proof, the plaintiff in an emergency practitioner claim would have to undergo arbitration, show negligence by a clear and convincing standard, and then be forced to limit the amount of damages.²⁵² The plaintiff will also have to prove by a *clear and convincing* standard to a lay jury who may have trouble with medical terminology comprehension.²⁵³

A plaintiff can no longer be labeled in accordance to the injury he or she suffered.²⁵⁴ A *clear and convincing* standard proposal in Florida will be subject to strict scrutiny because a justification for limitations would no longer exist, as malpractice claims are not the cause of high cost of insurance.²⁵⁵ As established by the court in *Estate of McCall*, “[h]ealth care policy that relies upon discrimination against Florida families is not rational

245. Fonseca-Nader, *supra* note 218, at 563–64.

246. *Estate of McCall*, 134 So. 3d at 915.

247. See FLA. CONST. art. I, § 21; *Kluger*, 281 So. 2d at 4; Fonseca-Nader, *supra* note 218, at 560–61, 565.

248. See Fonseca-Nader, *supra* note 218, at 560–61, 564–65.

249. See *id.* at 560–62.

250. FLA. STAT. § 766.118(4)(a) (2014).

251. See U.S. CONST. amend. XIV; FLA. CONST. art. I, § 21; GA. CODE ANN. § 51-1-29.5(c) (2015); *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) (denying or burdening an individual's access to the courts violates the Florida Constitution).

252. See FLA. STAT. §§ 766.118(4)(a), .207(2); GA. CODE ANN. § 51-1-29.5(c) (2015).

253. Holloran, III, *supra* note 148, at 343–44.

254. See *Estate of McCall v. United States*, 134 So. 3d 894, 914–15 (Fla. 2014).

255. *Id.* at 914; see also GA. CODE ANN. § 51-1-29.5(c); *Mitchell*, 786 So. 2d at 527; *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

or reasonable when it attempts . . . to create unreasonable classifications.”²⁵⁶ Making a distinction between patients who were treated in an emergency room, in contrast from those who were treated in a clinic, makes the same unreasonable classification.²⁵⁷ Forcing a plaintiff to demonstrate a showing of the *clear and convincing* standard of gross negligence based on which hospital door they entered would substantially burden and restrict a plaintiff’s right to redress.²⁵⁸

VI. CONCLUSION

In summary, Florida can no longer justify any new tort reforms, especially in the area of medical malpractice.²⁵⁹ There no longer exists legislative reasoning to limit the right of access to the courts and equal protection; the legislature can no longer enact statutes that limit the plaintiff’s right to sue malpractice doctors.²⁶⁰ A statute like Georgia’s statute that increases the burden of proof would violate Florida’s unique right of access to the courts clause because it would almost make it impossible for a plaintiff to bring a claim to court against an emergency physician when there is no source of rational reasoning or need for such limitation.²⁶¹ Historically, Florida has always been a state leading in tort reform; nonetheless, the new findings force the courts to reevaluate the constitutionality of statutes that reflect the needs of the state at the time they were enacted.²⁶² Doctors are not leaving the State of Florida anymore and so ensuring access to medical care is not reasoning behind further reform.²⁶³ Moreover, the arbitration option as an alternative to limit access to the courts works towards the detriment of the plaintiff by capping them at an even lower rate when they already have caps in place at court.²⁶⁴ Arbitration is not a good alternative; it penalizes a plaintiff for seeking justice in the law and it does not penalize a party who does not want to settle.²⁶⁵

Florida healthcare is at a high rate, and many individuals seek care from emergency rooms because of their financial situation.²⁶⁶ However, the

256. *Estate of McCall*, 134 So. 3d at 915.

257. *See id.*; Graves, *supra* note 65, at 293.

258. *See Mitchell*, 786 So. 2d at 527; Graves, *supra* note 65, at 293.

259. *See Estate of McCall*, 134 So. 3d at 914.

260. *See id.*; *Mitchell*, 786 So. 2d at 527.

261. *See* FLA. CONST. art. I, § 21; GA. CODE ANN. § 51-1-29.5(c) (2015); *Estate of McCall*, 134 So. 3d at 914.

262. *See Horenkamp*, *supra* note 112, at 1287, 1292.

263. *See id.* at 1302.

264. *See Fonseca-Nader*, *supra* note 218, at 568.

265. *Id.*

266. *See Graves*, *supra* note 65, at 298.

number of medical claims is not the cause of the healthcare problem.²⁶⁷ Florida needs to note that it is not in the same medical crisis as it was in the 1980s, and it must address all the limitations it has placed on plaintiffs who are denied their access to the courts and equal protection when they suffer an injury from medical practitioners.²⁶⁸ The Equal Protection Clause is violated when patients with different injuries are treated differently with no rational basis for discrimination.²⁶⁹ In the case of emergency practitioners, it is noted that they undergo distinct exposure from those practitioners in the normal practice, and it may seem logical that other malpractice suits may arise from this.²⁷⁰ However, the type of environment that emergency practitioners are involved and trained in does not give rational reasoning to limit basic Florida constitutional rights.²⁷¹ The right of access to the courts in article I, section 21 of the Florida Constitution cannot be expressed any more clearly; it is not a right dependent on the practice or the environment that a tortfeasor may encounter.²⁷² The right to access the courts is unique and absolute, and any form of further reform in the area of medical malpractice will not survive Florida scrutiny.²⁷³ As expressed in *Mitchell*, “[t]he right to access is specifically mentioned in Florida’s Constitution. Therefore, it deserves more protection than those rights found only by implication.”²⁷⁴

267. See *Estate of McCall v. United States*, 134 So. 3d 894, 914 (Fla. 2014).

268. See *id.*; Horenkamp, *supra* note 112, at 1287.

269. See U.S. CONST. amend. XIV, §1; *N. Broward Hosp. Dist. v. Kalitan*, 174 So. 3d 403, 409 (Fla. 4th Dist. Ct. App. 2015).

270. See Graves, *supra* note 65, at 279.

271. See FLA. CONST. art. I, § 21; Graves, *supra* note 65, at 279.

272. See FLA. CONST. art. I, § 21.

273. See *id.*; *Estate of McCall v. United States*, 134 So. 3d 894, 913 (Fla. 2014).

274. *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001); see also FLA. CONST. art. I, § 21.