ANOTHER ONE BITES THE DUST: FLORIDA'S CURRENT TREND IN OUTLAWING STATUTORY CAPS ON NON-ECONOMIC DAMAGES RESULTING FROM MEDICAL MALPRACTICE CLAIMS. ARE THE ARBITRATION STATUTES NEXT TO GO?

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Doctors vs. Lawyers, a tale as old as time. Both professions dedicate their lives and careers to helping others; however, they generally end up on opposite sides of a lawsuit. Medical malpractice litigation is costly, emotional, and—no matter the verdict—the parties will never be able to go back in time to act differently. The mourning family or injured party needs someone to blame, and the law provides them an avenue to seek justice.

I. Background

During the 1980's, Florida health care experienced an insurance "crisis" as excessive medical malpractice premiums forced physicians out of practice—effectively limiting patients' access to medical treatment throughout the state.[1] Insurance premiums were skyrocketing as a result of the increased cost of medical care, coupled with large jury verdicts in favor of claimants.[2] In an effort to rectify the "crisis" that caused some insurance premiums to be more than 400% greater in some areas of Florida[3],

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[1] Watkins and Lavery, *Medical Negligence Arbitration Proceeding Before Florida's Division of Administrative Hearings*, FLA. B.J., May 2015, at 33.
[2] *Id.*
[3] Among its many findings, the Task Force found that:

> 1) a family physician who performs no surgery and practiced outside Dade and Broward Counties saw a 229% increase in medical malpractice insurance premiums for the period of 1983 to July 1, 1987; and 2) a family physician who performs no surgery and practices in Dade or Broward County saw a 300% increase in medical malpractice

the legislature sought to create a solution to the problem. The legislature implemented a law requiring "presuit investigation" prior to any filing of a medical malpractice claim, in order to eliminate meritless claims and avoid litigation.[4] Additionally, various methods of alternative dispute resolution−including mediation and arbitration−were encouraged and required throughout various times of the lawsuit.[5] The legislature even went so far as to create statutory caps on the amount of non-economic damages available to plaintiffs who succeed in their medical malpractice lawsuits.[6] Those very statutes are the crux of this analysis.

II. Statutes Resulting from Florida's Tort Reform

In response to Florida's insurance "crisis," physicians petitioned legislatures to make changes in the policy surrounding personal injury cases.[7] The movement of tort reform focused on minimizing economic losses from malpractice litigation by limiting the amount of damages awardable to plaintiffs.[8] These limitations

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> insurance premiums for the same period. Furthermore, the Task Force found that rates for specialties also increased sharply. For example, the rates for obstetricians increased by 444% in Dade and Broward Counties, as compared to 304% in the rest of the state.18 These facts support the Legislature's conclusion that increased costs in medical malpractice insurance premiums have resulted in increased health care costs and made liability insurance "functionally unavailable" for some physicians.

University of Miami v. Echarte, 618 So.2d 189, 196 (Fla.1993) *(*citing Academic Task Force for Review of the Insurance and Tort Systems, Preliminary Fact-Finding Report on Medical Malpractice (Aug. 14, 1987) Fact-Finding Report at 26-31, 36, 239-40).

[4] *See* § 766.106, Fla. Stat. (2018).

[5] *See* §§ 766.207; 766.209; 766.108, Fla. Stat. (2018).

[6] *See Id.*; § 766.118, Fla. Stat. (2018).

[7] Michelle Diaz, *The Real Emergency: Will Florida Follow Georgia in Medical Malpractice Reform?*, 40 Nova L. Rev. 185, 188 (2015).

[8] *Id.* at 189.

would be placed on a claimant for a number of reasons, however this analysis will focus on three statutes specifically.

a. Section 766.207, Florida Statutes: Voluntary binding arbitration of medical negligence claims.

One requirement of the medical malpractice "presuit investigation" is for claimants to notify the defendants of their intent to initiate litigation for the alleged injury.[9] At that point, either party may elect to settle the claim through a voluntary binding arbitration proceeding.[10] As a pre-requisite to attending the presuit arbitration, the defendants must first admit liability for the injury, and the arbitration continues only to determine the issue of damages.[11] The arbitration panel is composed of three arbitrators: one selected by the claimant; one selected by the defendant; and one administrative law judge who would serve as the chief arbitrator.[12] In the arbitration hearing, the claimant would be entitled to receive economic and non-economic damages, however, the non-economic damages would be statutorily capped.[13] Specifically:

> Noneconomic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages.[14]

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[9] § 766.106, Fla. Stat.
[10] § 766.207(2), Fla. Stat.
[11] § 766.207(3), Fla. Stat.; D'Alesio Jr., *The Benefits and Risks of Using Presuit Voluntary Binding Arbitration as an Alternative Dispute Resolution Process in Medical Malpractice Cases*, FLA. B.J., Dec 2015, at 21.
[12] § 766.207(4), Fla. Stat.
[13] § 766.207(7)(a-b), Fla. Stat.
[14] § 766.207(7)(b), Fla. Stat.

The most common forms of non-economic damages sought after in a medical malpractice case include: the inconvenience of the injury; disability or disfigurement; pain and suffering; mental anguish; loss of consortium; and loss of the enjoyment of life. Despite the statutory cap on the non-economic damages available to the claimant, some benefits to presuit arbitration include the amount of time saved, efficient pay out, and the claimant's attorney's fees falling on the defendant.[15]

b. Section 766.209, Florida Statutes: Effects of failure to offer or accept voluntary binding arbitration.

Despite the "voluntariness" of the presuit binding arbitration proceeding, a party's decision to forego arbitration once it has been offered, does have a chilling effect on the rejecting party. Until recently[16], if a claimant offered to settle their medical malpractice claim through arbitration−and the defendant rejected the offer−the claimant would then be entitled to recover a greater amount of non-economic damages, up to the limits articulated in section 766.118, Florida Statutes (2018).[17] On the reverse notion, if the defendant offered to admit liability and settle the issue of damages through an arbitration proceeding−to which the claimant rejected−the claimant will only be able to receive up to $350,000 in non-economic damages, regardless of the actual jury award.[18] Illustrative of this point, if a jury determines a claimant is entitled to $4 million in non-economic damages for their pain and suffering, but the claimant previously rejected the defendants' offer to settle the claim in presuit arbitration, that claimant will only be entitled to $350,000 of the $4 million award; merely $100,000 more than they could have received in the actual presuit arbitration.

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[15] § 766.207(7)(f-g), Fla. Stat.

[16] Portions of section 766.118 were eventually found to be unconstitutional, and such provisions no longer limit the non-economic damages awardable to a medical malpractice claimant. *See North Broward Hospital District v.Kalitan*, 219 So. 3d 49, 59 (Fla. 2017); *see also Estate of McCall v. United States*, 134 So.3d 894, 916 (Fla. 2014).

[17] §§ 766.209(3)(a); 766.118, Fla. Stat.

[18] § 766.209(4)(a), Fla. Stat.

c. Section 766.118, Florida Statutes: Determination of Noneconomic Damages.

While sections 766.207 and 766.209 were enacted by the legislature during the birth of Florida's tort reform in 1988, it was not until 2003 that Florida created a strict cap on non-economic damages overall in medical negligence claims.[19] Interestingly, the resulting statute, section 766.118, created differing limits on non-economic damages resulting from the negligence of practitioner or non-practitioner defendants. Specifically, section 766.118(2) provided that in a cause of action for personal injury arising from the negligence of practitioners, the non-economic damages award cannot exceed $500,000 per claimant; however, if the negligence resulted in a permanent vegetative state or death, or if the negligence caused a catastrophic injury, then non-economic damages could be awarded up to $1 million.[20] Section 766.118(3), however, similarly limits the non-economic damage award but to $750,000 and $1.5 million respectively, when the injury resulted from the negligence of a non-practitioner or hospital.[21] Notably, of each of the above described statutes, section 766.118 is the only statute which contains provisions that are no longer good law following recent decisions stemming from the Florida Supreme Court.[22]

III. Constitutional Implications Called into Question

a. Access to the Courts

After being implemented in 1988, sections 766.207 and 766.209, which limit the amount of non-economic damages awardable to a medical malpractice claimant in presuit arbitration, went unchallenged. The constitutional implications of these statutes were not raised to the Florida Supreme Court until 1993 in

[19] § 766.118, Fla. Stat.
[20] § 766.118(2), Fla. Stat.
[21] § 766.118(3), Fla. Stat.
[22] *See Kalitan*, 219 So. 3d at 59; *McCall*, 134 So.3d at 916.

University of Miami v. Echarte.[23] In *Echarte*, a young girl was treated for a minor brain tumor and as a result of medical negligence, the young girl's right hand and forearm needed to be amputated to save her life.[24] The defendant requested to settle the claim through presuit arbitration which then triggered the applicability of sections 766.207 and 766.209.[25] Due to the arbitration statutes being triggered, the young girl's parents would only be able to obtain up to $250,000 in non-economic damages if they agreed to arbitration, or up to $350,000 if they rejected the offer.

The Echartes moved for declaratory judgement and the trial court agreed that sections 766.207 and 766.209 violated a number of constitutional rights including: access to the courts; right to trial by jury; equal protection; procedural and substantive due process; single subjection requirement; taking without just compensation; and improper delegation of authority.[26] The Third District Court of Appeals affirmed the trial court's holding, however they limited their written opinion specifically to the right of access to the courts challenge, and expressly declined to discuss the other constitutional rulings.[27] Upon *de novo* review, the Florida Supreme Court ultimately reversed the holding and declared the statutes were in fact constitutional.[28] However, similar to the district court, they limited their discussion specifically to the validity of the statutes under the right of access to courts, and offered little insight into why they believed the statutes did not violate the right to trial by jury, equal protection, substantive and procedural due process, the single subject requirement, the taking clause, or the non-delegation doctrine.[29]

In determining whether the right of access to courts was violated pursuant to article I, section 21, of the Florida Constitution, the Florida Supreme Court relied on the seminal case *Kluger v.*

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[23] *University of Miami v. Echarte*, 618 So.2d 189 (Fla.1993).
[24] *Id.* at 190.
[25] *Id.*
[26] *Id.* at 191.
[27] *Id.* at FN 10.
[28] *Id.* at 198.
[29] *Id.* at 191.

White[30] which articulated the relative standard. In *Kluger*, the court declared:

> [T]he Legislature is without power to abolish [the right of access to courts] 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.[31]

The court in *Echarte* relied on the second prong of the *Kluger* test which required a legislative finding that an "overpowering public necessity" existed, and that "no alternative method of meeting such public necessity can be shown."[32] The court ultimately found that the arbitration statutes which limited the non-economic damages awardable, were necessary to meet and potentially resolve Florida's medical malpractice alleged insurance crisis.[33] The court further opined that no alternative or less onerous method of meeting the crisis was provided, so sections 766.207 and 766.209 satisfied the *Kluger* test and were, in fact, constitutional.[34]

Though the Florida Supreme Court in *Echarte* created binding statewide precedent as to the constitutionality of the medical malpractice arbitration statutes, sections 766.207 and 766.209 were once again brought into inquiry for a constitutional analysis in 2010. A similar issue was presented to the Second District Court of Appeals of Florida in *Parham v. Florida Health Sciences Center,*

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[30] *Kluger v. White*, 281 So.2d 1 (Fla.1973).
[31] *Id.* at 4.
[32] *Echarte*, 618 So.2d at 195 (citing *Kluger*, 281 So.2d at 4).
[33] *Id.* at 197.
[34] *Id.* at 197-98.

Inc.[35] In *Parham*, a mother lost her newborn baby allegedly by the negligence of a physician who never requested a surgical consult, and the medical provider failed to have a pediatric surgeon on staff.[36] After trial, the jury awarded the parents of the newborn $12 million in non-economic damages, $8 million to the mother and $4 million to the father.[37] Immediately after the verdict, the defendants filed a motion for remittitur to enforce the limitation of non-economic damages, because the claimants refused to settle the case in presuit arbitration which was previously offered by the defendants.[38] Following the precedent set in *Echarte*, the Second District Court of Appeals was required to reduce the $12 million award for the parents, to only $700,000 total−$350,000 for the mother and $350,000 for the father−since the claimants refused to settle the claim in voluntary binding arbitration once offered.[39] Though the court affirmed the reduction of the claimants' damage award, they also opined that some of the claimants' constitutional arguments warranted discussion.[40]

The claimants in *Parham* argued that the *Echarte* decision was no longer good law, and that their case should be reconsidered for a number of reasons; however, the court only acknowledged a few arguments in their published opinion. First, the court analyzed the benefits of voluntary presuit arbitration, finding the main benefit to be the speed and efficiency of finalizing an otherwise extensive and time-consuming medical negligence claim. However, the court also insinuated the potential equal protection violations stating that the efficiency of presuit arbitration, "would appear to be a valuable tool for the claimant with a small claim, but it places great limitation on a claimant who has or will endure extensive pain and suffering."[41] The court further opined that the "reasonable

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[35] *Parham v. Florida Health Sciences Center, Inc.*, 35 So.3d 920 (Fla. 2d DCA 2010).
[36] *Id.* at 923.
[37] *Id.*
[38] *Id.* at 924.
[39] *Id.* at 929.
[40] *Id.* at 924.
[41] *Id.* at 925.

alternative" to accessing the courts, required by the *Kluger* standard, was not met by section 766.209.[42] The court specifically noted that the "reasonable alternative" would be for claimants to accept the arbitration offer, which would effectively lower the potential damage award to only $250,000, providing an even more limited remedy than the $350,000 damage cap for rejecting arbitration.

Perhaps most notably, the claimants in *Parham* argued that even if there was an "overpowering public necessity" for limiting the non-economic damage award during Florida's insurance "crisis" when the *Echarte* decision was made, the limitation should not last in perpetuity.[43] The court acknowledged that "the legislature should have some obligation to reassess [the insurance crisis] conditions occasionally to confirm the continuing existence of an overpowering public necessity."[44] The claimants in *Parham* believed they would be able to successfully show the insurance "crisis" was no longer an issue, and therefore the "overpowering public necessity" that the court relied on in *Echarte*—when it decided the arbitration statutes were constitutional—would no longer be applicable.[45] However, because the *Echarte* decision was binding on the *Parham* court, reversing the holding in *Echarte* was never an option. The Second District Court of Appeals, therefore, certified the constitutional question of whether section 766.209, limiting the non-economic damages in medical malpractice arbitration, remained constitutional even though 1) the amount of the cap had never been adjusted for inflation since its creation in 1988, and 2) the legislature had never been required to reconfirm the continued existence of the "overpowering public necessity" supporting the need for the statute.[46] While this certified question was raised to the Florida Supreme Court, it was never answered as the defendants very intentionally settled the case prior to it reaching the supreme court docket. Since the *Parham* decision in 2010, the constitutionality of

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 929.

the medical malpractice arbitration statutes have never been reviewed by an appellate court.

b. Equal Protection Analysis

Section 766.118, the younger medical malpractice statute limiting any non-economic damage award to claimants after trial, however, was challenged more recently in 2014. In *Estate of McCall v. U.S.*, the Florida Supreme Court narrowly addressed whether section 766.118 was unconstitutional as it pertained to wrongful death cases.[47] In its analysis, the court expressly discussed the alleged insurance crisis in Florida, and finally determined there was no longer any rational basis for limiting claimants' non-economic damages as it violated the Equal Protection Clause of the Florida Constitution.[48] Specifically, the court stated:

> The statutory cap on wrongful death noneconomic damages fails because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. In such circumstances, medical malpractice claimants do not receive the same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims. Further, the statutory cap on wrongful death noneconomic damages does not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.[49]

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[47] *Id.* at 900.
[48] *Estate of McCall v. U.S.*, 134 So. 3d 894, 905, 914-15 (Fla. 2014).
[49] *Id.* at 901.

In demonstrating how section 766.118 violated the Equal Protection clause, the court described three injuries of three hypothetical parties, each injury of differing magnitude. Plaintiff A was injured moderately, suffering pain and disability for a month; plaintiff B was severely injured, suffering pain and disability for a year; and plaintiff C was drastically injured, suffering permanent pain, disability, or death.[50] The court found a capped non-economic damage award pursuant to section 766.118 may be reasonable and appropriate for plaintiff A's injury, as A suffered for only a month. However, requiring a similar capped award for plaintiff C would treat C's injury differently because the statute would "automatically reduc[e] the jury's award for a lifetime of pain and disability, without regard to whether or not the verdict, before reduction, was reasonable and fair."[51] It was due to this unequal treatment that the court determined reducing non-economic damages pursuant to section 766.118(2) and (3) was "not only arbitrary, but irrational" and that it "offends the fundamental notion of equal justice under the law."[52]

In *McCall*, the court further opined that the cap on non-economic damages failed the rational basis test by failing to bear a rational relationship to a legitimate state objective.[53] The court reviewed the legislature's original reasoning for enacting section 766.118, and found that some of the research concluding the insurance "crisis" stemmed from high jury awards in favor of the plaintiff was "most questionable."[54] Additionally, the court noted that even if Florida was in a medical insurance crisis in the 1980's, such a condition is not permanent; "[c]onditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation."[55] Ultimately, the Florida Supreme Court found that

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[50] *Id.* at 902.
[51] *Id.* (citing *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057, 1075 (1997)).
[52] *Id.* at 903.
[53] *Id.* at 905.
[54] *Id.* at 906.
[55] *Id.* at 913.

section 766.118(2) and (3) irrationally impacted plaintiffs experiencing different levels of injuries, and that there was no longer a medical crisis to support to a legitimate governmental purpose for the statute. Though it applied strictly to wrongful death claims resulting from medical negligence, the court's holding outlawed non-economic damage limitations pursuant to section 766.118(2) and (3) as it violated the Equal Protection Clause of the Florida Constitution.[56]

Those familiar with the laws surrounding Florida health care and medical malpractice claims knew that the *McCall* decision would open the door to future litigation, specifically when it questions the constitutionality of non-economic damage caps.[57] Due to the narrow holding in *McCall*, applying strictly to wrongful death claims, it came as no surprise to researchers when the constitutional implications of section 766.118 was called into question regarding *all* medical negligence claims−including those in which the plaintiff survived.[58] Most recently in 2017, the Florida Supreme Court in *North Broward Hospital District v. Kalitan* was once again required to determine whether section 766.118 was constitutional, but this time, as it pertained to a living plaintiff.[59]

In *Kalitan*, the court reiterated its previous analysis in *McCall* describing how "the cap on noneconomic damages arbitrarily discriminates between slightly and severely injured plaintiffs while benefitting the tortfeasor."[60] The court disagreed with the argument that section 766.118 should be constitutionally implemented in a personal injury claim, while rejected in a wrongful death claim.[61] Relying on the same Equal Protection analysis used in *McCall*, the court ultimately expanded the previous ruling and

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[56] *Id.* at 916. Notably, the Florida Supreme Court is *McCall* referred to its previous analysis in *Echarte*. The court expressly stated its decision to find section 766.118 unconstitutional was not inconsistent with its previous decision in *Echarte* because it solely addressed an equal protection challenge−while *Echarte* was interpreting an access to courts challenge. *McCall*, 134 So. 3d at 904.
[57] Diaz, *supra* note 7, at 208.
[58] *Id.*
[59] *North Broward Hospital District v. Kalitan*, 219 So.3d 49 (Fla. 2017).
[60] *Id.* at 54.
[61] *Id.* at 56.

declared section 766.118(2) and (3) unconstitutional in *all* medical negligence actions, regardless of the nature of the claim.[62] In support of its Equal Protection analysis, the court used a similar hypothetical to depict the non-economic damage cap distinctions articulated in section 766.118(2) and (3):

> Plaintiff A suffers a moderate injury; therefore recovery is capped at $500,000 if caused by a practitioner and $750,000 if caused by a nonpractitioner. Plaintiff B suffers a statutorily defined "catastrophic injury," such as the loss of a hand; therefore recovery may be capped at $1 million if caused by a practitioner and $1.5 million if caused by a nonpractitioner. Plaintiff C suffers a drastic injury, such as a permanent vegetative state; therefore recovery is capped at $1 million if caused by a practitioner and $1.5 million if caused by a nonpractitioner. Under these circumstances, plaintiff A has the best chance of being fully compensated, plaintiff B may have a chance of being fully compensated, and plaintiff C has utterly no chance of being fully compensated. Clearly, under sections 766.118(2) and (3), plaintiff C's damages award is arbitrarily diminished, even though plaintiff C has suffered the most grievous injury.[63]

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[62] *Id.*
[63] *Id.* at 58.

The court in *Kalitan* also reiterated that the very purpose for section 766.118 failed the rational basis test, observing the lack of evidence demonstrating how the statutory cap alleviated the alleged insurance crisis.[64] "Because addressing the medical malpractice crisis was the Legislature's stated objective when passing section 766.118, if the objective no longer exists, then there is no longer a 'legitimate state objective' to which the caps could 'rationally and reasonably relate.'"[65] As the law stands today, section 766.118(2) and (3) have been declared unconstitutional in violating the Equal Protection Clause of the Florida Constitution. As a result, claimants are generally no longer limited in their non-economic damage award for successful medical negligence claims.[66] With this recent trend and new analysis, it may be time to revisit the *Echarte* decision which found that capped non-economic damage awards in presuit arbitration are constitutional−the only broad statutory cap on medical malpractice damages that still remains.

IV. An Inevitable Decision

In reviewing the court's analysis in *Echarte*, it is important to note that while the claimant challenged sections 766.207 and 766.209 for a number of constitutional violations, the court limited its discussion only to the right of access to courts.[67] As established in *Kluger v. White*, access to the courts is a fundamental right that can only be removed in two circumstances: 1) when there is a reasonable alternative to protect the right to redress for injuries; or 2) when there is an "overpowering public necessity for the abolishment of [the] right, and [that] no alternative method of meeting [the] public necessity can be shown."[68] In their analysis, the Florida Supreme Court in *Echarte* relied heavily on the second prong of the *Kluger* test when finding the arbitration statutes

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[64] *Id.*
[65] *Id.* at 59.
[66] Section 766.118(4)-(6) provide other non-economic damage limitations in narrow circumstances.
[67] *University of Miami v. Echarte*, 618 So.2d 189, 191 (Fla.1993).
[68] Diaz, *supra* note 7, at 202.

constitutional. The court opined the statutes "are necessary to meet the medical malpractice crisis" even when they limit an individual's access to the courts.[69] However, with the *McCall* decision proving that even *if* a medical malpractice insurance crisis did previously exist, the condition is no longer in effect−making the "overpowering public necessity" analysis in *Echarte* void.[70] With these new findings, the holding in *Echarte* is no longer constitutional as the arbitration statutes no longer pass the *Kluger* test; the violation of the public's access to the courts is no longer justified by an overpowering government interest in lowering malpractice insurance premiums for Florida physicians. If a new case reaches the Florida Supreme Court questioning the constitutionality of sections 766.207 and 766.209 as it pertains to access of the courts, the *Echarte* holding will likely be quashed with additional findings proving a medical insurance crisis no longer exists.

Additionally, with the recent trend of the Florida Supreme Court outlawing statutory caps of medical malpractice damages on the basis of Equal Protection, it is likely the arbitration statutes are next to go.[71] With the incredibly detailed analysis provided by the court in both *McCall* and *Kalitan*, any new case that reaches the state's high court questioning the constitutionality of sections 766.207 and 766.209 as violating the Equal Protection Clause, will almost certainly be successful. The precedent created by the former two cases leaves no room for dispute, a compelling reason for unequal treatment towards plaintiffs with differing injuries−whether wrongful death or personal injury−no longer exists. Once a physician or medical provider offers to settle a medical malpractice claim in voluntary presuit arbitration, the injured party will only be able to earn up to $250,000 if they accept the offer, or $350,000 if they reject. These capped values do not account for the severity of the injury and are not adjusted upon discovery of more egregious medical negligence. Those who are most severely injured have almost no opportunity to be made whole, while those only mildly

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[69] *Echarte*, 618 So.2d at 197.
[70] *McCall*, 134 So. 3d at 913; see also Diaz, *supra* note 7, at 207.
[71] Bingo. (See Title page)

injured will have the opportunity to be compensated appropriately. It is this unequal treatment between medical malpractice claimants, the same unequal treatment described in *McCall* and *Kalitan*, that make sections 766.207 and 766.209 unconstitutional.

Those in favor of statutory caps for noneconomic damages resulting from medical malpractice claims may argue that the "voluntary" nature of the arbitration statutes makes them unique, and therefore the court cannot apply the same analysis as it did when it outlawed section 766.118(2) and(3). However, anything more than a shallow understanding of sections 766.207 and 766.209 would indicate that the application of the statutes is hardly voluntary at all. Any potential non-economic damages for the claimant are capped the very moment the defendant offers to admit liability and settle the claim in arbitration. Regardless of whether the claimant decides to accept the offer to attend arbitration, he or she can no longer receive a single penny over $350,000 in non-economic damages the moment the defendant's offer was made. Assuming the claimant decided to reject the offer, and a jury determined the claimant should be awarded $12 million for the physical pain and disfigurement, the mental pain and suffering, the permanent disability and loss of enjoyment of life, the claimant could only ever see $350,000 of the award. However, if it was the claimant who first instigated the offer to settle the claim in arbitration, and the defendant chose to proceed to trial, the claimant's non-economic damage award would *still* be limited pursuant to section 766.118.[72] Justice Shaw described it best in his dissenting opinion of *Echarte*, articulating that the arbitration statutes "presen[t] the classic case of 'heads I win, tails you lose.'"[73] Though the arbitration statutes still remain good law today, the current lack of a medical insurance crisis denies any rational basis for imposing the non-economic damage limitations outlined in sections 766.207 and 766.209. It is only a

[72] This analysis only applied prior to the *McCall* and *Kalitan* decisions which found section 766.118(2) and (3) violated the Equal Protection Clause of the Florida Constitution. Now, if a defendant rejects a claimant's offer to settle the malpractice claim in arbitration, the non-economic damage award will not be limited.

[73] *Echarte*, 618 So.2d at 200.

matter of time until the arbitration statutes are declared unconstitutional for violating the Equal Protection Clause and an individual's right of access to the courts under the Florida Constitution.

V. Alternative Remedy

Though potentially outlawing sections 766.207 and 766.209 would appear to favor plaintiffs in the state of Florida, other non-economic damage award limitations would still remain in lawful existence.[74] For example, a claimant's non-economic damages are limited when seeking an award for the negligence of a physician or medical provider bestowing emergency services and care.[75] Additionally, a limitation can be implemented when a physician is providing services to a Medicaid recipient.[76] Simply outlawing the medical malpractice presuit arbitration statutes would not tip the scales in favor of the plaintiff, as a majority of defendants do not choose to even utilize the voluntary presuit arbitration process.

As a pre-requisite to the arbitration, defendants must admit liability leaving only the calculation of damages at issue.[77] Once a defendant has admitted liability, though the non-economic damages would be capped, the defendant would still be responsible for all *economic* damages resulting from the claim; such damages have never been capped in value, even during the alleged insurance crisis. For this reason, the presuit arbitration process may only appeal to defendants who are not confident in their actions, and believe liability is a strong possibility if the case went to trial. These defendants would want to avoid trial and attempt to resolve the claim as efficiently as possible, leaving binding arbitration as the quickest and most cost-effective method.

Alternatively, those defendants who are confident in their actions and truly believe they would not be found liable at trial, have

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[74] § 766.118(4)-(6), Fla. Stat.
[75] § 766.118(4)-(5), Fla. Stat.
[76] § 766.118(6), Fla. Stat.
[77] § 766.207(3), Fla. Stat.

no incentive to admit liability just to resolve the lawsuit in presuit arbitration. Some practitioners may feel their integrity would be at stake if they admitted liability for the sole purpose of continuing with the arbitration process, despite self-confidence in their own medical decision making. On the other side, claimants who are seriously injured, or even those who are mildly injured but believe they are entitled to more than $250,000 in non-economic damages, would also not be enticed to settle the claim in presuit arbitration. It is for this reason a majority of medical negligence claims are settled in mediation at a later time throughout the lawsuit, rather than during presuit arbitration.

Mediation provides the same—if not more—benefits as arbitration, therefore potentially making it the perfect compromise for claimants and defendants who wish to efficiently settle a medical negligence claim without litigation. The Florida Supreme Court in *Echarte* listed a number benefits which can result from arbitration including: 1) the opportunity to recover without the risk of a civil trial; 2) the quickness of determining whether the defendant has any defenses with merit; 3) the saved cost of attorney and expert witness fees needed to otherwise prove liability; 4) the relaxed evidentiary standard for arbitration proceedings; and 5) the prompt payment of damages.[78] Mediation, on the other hand, offers those same exact benefits as arbitration with additional perks for both parties. In mediation, the claimant would be able to experience a truly voluntary process as there would be no statutory caps on their non-economic damage award if they choose to attend, or forego, the mediation. Additionally, the defendant would not need to admit liability prior to agreeing to attend mediation. The confidential process would be beneficial to both parties as it would allow defendants to settle similar claims for a diverse amount, helping defendants keep their costs low, while still providing an opportunity for justice to an injured party without a statutory limitation on their non-economic award.

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[78] *See Echarte*, 618 So.2d at 194.

If the parties of a medical malpractice claim forego the opportunity to settle the case in presuit arbitration, an in-person mandatory mediation is required 120 days after the complaint is filed.[79] While the claimant's non-economic damages would *not* be limited in the later mandated mediation, a defendant would have the power to trigger the arbitration statutes by offering to settle the claim in presuit; the claimant's non-economic damages would be limited at the point of the arbitration settlement offer. Assuming the constitutionality of the arbitration statutes are in jeopardy, it may be in the legislature's best interest to replace voluntary presuit arbitration with mandatory presuit mediation. There may be numerous benefits−and likely some complications−with proactively replacing the voluntary presuit arbitration statutes with an earlier mandated mediation statute, however, I leave that thesis to the next student.

[79] § 766.108(1), Fla. Stat.