NO. 35543
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

FILED
SEP 10 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JAMES D. MACDONALD and
DEBBIE MACDONALD,

Petitioners/Plaintiffs,

vs.

CITY HOSPITAL, INC. and
SAYEED AHMED, M.D.,

Respondents/Defendants.

From the Circuit Court of
Berkeley County, West Virginia
CIVIL ACTION NO. 07-C-150

BRIEF OF *AMICUS CURIAE*

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Table of Authorities

Amicus Curiae West Virginia Labor Federation, AFL-CIO, defers the cases cited by Plaintiffs/Appellants in support of the constitutional arguments.

Interest of Amicus Curiae

The West Virginia Labor Federation, AFL-CIO, is a federation of 406 local unions, over 60 districts, and 13 central bodies from 58 national and international labor unions representing 123,000 West Virginia active and retired working men and women from every walk of life. The West Virginia AFL-CIO is affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with a total membership in excess of 13 million active working men and women. The West Virginia AFL-CIO works to assist in the development of jurisprudence establishing legal standards which affect its members and families. The issues presented to the Court in this case are of vital importance to its members.

Statement of Facts

Your amicus adopts the Statement of Facts of Plaintiffs/Appellants James D. MacDonald and Debbie MacDonald.

Argument

I. The cap on non-economic damages set forth in West Virginia Code §55-7B-8 is not rationally related to a legitimate state interest because it presents arbitrary and irrational classifications.

The brief of the Plaintiffs/Appellants addresses the issues of whether West Virginia Code §55-7B-8 fails a rational basis review because the caps set arbitrary and irrational classifications and fails to achieve its stated objectives. Your amicus defers to the briefs of the Plaintiffs/Appellants which sets forth the facts and issues and expertly presents the constitutional challenges present in the non-economic caps imposed by West Virginia Code §55-7B-8. Your amicus does not believe that it can improve on the presentation of the arguments on those issues. However, your amicus does believe that there are certain policy considerations that are specific

both to your amicus' Federation of Unions, as well as other laborers and workers of the State of West Virginia, that are affected by the arbitrary and irrational classification created by West Virginia Code §55-7B-8.

The non-economic caps imposed by West Virginia Code §55-7B-8 were ostensibly established to stabilize malpractice insurance premiums. Others have put forth meritorious arguments that other means were available to accomplish this goal. There have also been meritorious arguments that certain suspect classes are disproportionately affected by non-economic caps. What is lost, however, is the impact on West Virginia's working class population: the people that perform the day to day labor necessary to keep our economy strong.

Non-economic damage caps should ideally affect everyone equally. And while on its face West Virginia Code §55-7B-8 appears to do so, in reality it does not. Many examples undoubtedly exist on how this cap affects West Virginia citizens differently. But for your amicus, the examples are particularly relevant when focused on West Virginia's working families.

We are currently living in what has been variously described as a recession or mild depression. In times of economic downturn, layoffs are rampant. Most layoffs occur to those in less skilled positions. Unemployment rates rise. Fewer people are working. Workers who are unable to work are disproportionately affected by non-economic caps than those who are working.

A person injured by medical malpractice while out of work due to an economic downturn has limited or non-existent economic damages. Injuries that disable workers from returning to work (that may someday become available) are only compensable as non-economic items of damage. If an injured worker is out of work, there are no economic damages to award. The

notion that the worker may return to work at some unknown date in the future at a wage rate that is unidentified is impossible to calculate; often, such evidence is rejected as speculative.

The effect of non-economic damage caps on the labor force is to punish hourly wage earners more so than white collar workers, who often keep their salaried jobs at the expense of hourly workers. Those who are unemployed, temporarily or indefinitely, are more adversely affected by non-economic caps than those capable of maintaining employment. A worker who is indefinitely laid off from work and who sustains the same injury as a management employee who is not missing time from their salaried employment is treated differently, insofar as management employees are capable of collecting economic loses along with non-economic losses. However, the temporarily-out-of-work wage earner has no economic losses to claim. Therefore, their sole source of compensation is non-economic losses. A temporary change is one's work status thus has a dramatic impact on the compensation available to a victim of malpractice.

Moreover, many permanent injuries affect an hourly wage earner more profoundly than white collar workers. A worker who loses a limb to medical negligence for instance, may return to work. A construction worker, nurse, driver, or other labor-intensive worker who has suffered a severe disability may face struggles far exceeding that of a worker who has a desk-related occupation. While rarely acknowledged, labor-intensive workers with such disabilities have reduced work expectancy, limited advancement opportunities, and greater difficulty completing ordinary tasks. A cap on non-economic damages has a disparaging impact on such workers.

Likewise, a younger worker with a given disability is more disadvantaged by non-economic caps than an older worker. Becoming partially disabled from medical malpractice at a younger age means more suffering with less compensation than one who suffers the same injury

at an advanced age. A construction worker who loses a limb at twenty-five years of age, but manages to stay working, must deal with that disability for a much longer period than a fifty-year-old. Yet, non-economic damages for both are capped. Clearly, one suffers more and may have less opportunity than another. But the cap vitiates a jury's determination that the younger worker's injury requires greater compensation. Regardless of what a jury would award, the caps would equalize both claims.

West Virginia Code §55-7B-8 also provides protection from large verdicts based on non-economic damages for workers in one industry, while providing no such protection for workers of other industries West Virginia Code §55-7B-8 protects those practicing in the health care industry, such as physicians, from a large verdict based on non-economic damages that are greater than the statutory caps. No other industry receives this protection. The West Virginia AFL-CIO represents diverse areas of labor including manufacturing, construction, transportation, service persons, teachers, communication workers and governmental workers. Workers in industries such as those represented and comprising the West Virginia AFL-CIO do not receive this protection from large verdicts based on non-economic damages over the statutory caps. A plaintiff with severe injuries without large economic damages will not be affected by West Virginia Code §55-7B-8, if he or she files suit and receives a large verdict caused by a non-medical tortfeasor. The same plaintiff will have a limited recovery if he or she files suit and receives a large verdict against a physician.

A plaintiff should not get less than full recovery because he or she was injured by a physician. Similarly workers of all industries should be subjected to the same responsibility and liability for their actions. A defendant should be accountable for **all** the injuries and damages he or she causes a plaintiff by his or her negligence. West Virginia Code §55-7B-8 enables a

physician defendant to be less responsible for the losses that he or she causes. West Virginia Code §55-7B-8 is unjust because it provides less than full recovery for a plaintiff injured by a defendant that is in the health care industry and provides that a defendant member of the health care industry that is negligent is less responsible or liable for his or her negligent acts.

As stated previously, your amicus defers to the briefs of Plaintiffs/Appellants on the issues of whether West Virginia Code §55-7B-8 fails a rational basis review because the caps fail to achieve their stated objectives. Those arguments were expertly put forth by the Plaintiffs/Appellants. Your amicus certainly agrees with all of the arguments advances to overturn West Virginia Code §55-7B-8. Your amicus encourages the Court to consider the impact these caps have on the working families of West Virginia.

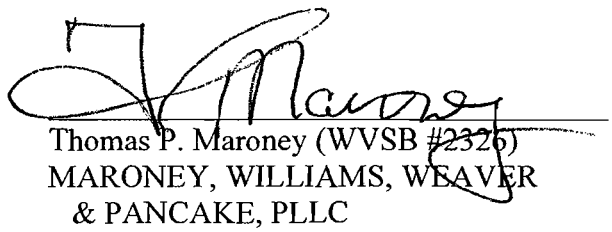
Your amicus has tried to set forth some additional circumstances under which non-economic caps work to the detriment of West Virginia citizens, and in particular those citizens with lower paying jobs and who are more subject to downturns in the economy. Certainly, many other examples exist. It is hoped that this Court will consider these policy arguments with the many other policy arguments advanced by other parties to this action to arrive at the conclusion that caps on non-economic damages not only frustrate the constitutional purpose behind compensating injured victims, but also frustrates a jury's determination as to what would be appropriate in any one instance.

Conclusion

West Virginia Code §55-7B-8 disparately affects the citizens of the State of West Virginia that make up the organizations represented by the West Virginia AFL-CIO. The non-economic damages cap has the potential to greatly reduce a verdict given to an individual worker temporarily laid off due to an economic slump in a particular industry. Workers that earn hourly

wages are more affected by the non-economic damages cap than workers that earn a salaried wage. For the foregoing reasons, the West Virginia Labor Federation, AFL-CIO, respectfully requests that this Honorable Court declare § 55-7B-8 unconstitutional, remand the case for entry of judgment in conformity to the jury's verdict, and provide any other relief this Honorable Court deems fair and just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, THOMAS P. MARONEY, General Counsel for the West Virginia Labor Federation, AFL-CIO, do hereby certify that I served a true and accurate copy of the foregoing **BRIEF OF *AMICUS CURIAE*** via the United States Postal Service, postage pre-paid, on the 10th day of September 2010, upon the following counsel of record:

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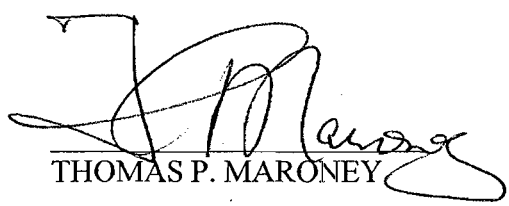

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