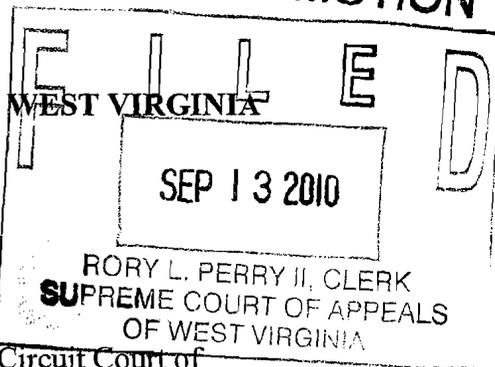


BRIEF FILED  
WITH MOTION

No. 35543

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JAMES D. MACDONALD and )  
DEBBIE MACDONALD, )  
 )  
Petitioners/Plaintiffs, )

From the Circuit Court of )  
Berkeley County, West Virginia )

vs. )

Civil Action No. 07-C-150 )

CITY HOSPITAL, INC. and )  
SAYEED AHMED, M.D., )  
 )  
Respondents/Defendants. )

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## INTRODUCTION

This case presents purely legal questions pertaining to the constitutionality of West Virginia Code § 55-7B-8, which limits noneconomic damages in actions brought against health care providers. The standard of review on the issues presented is *de novo*. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

The statute provides in pertinent part:

(a) In any professional liability action brought against a health care provider pursuant to this article, the maximum amount recoverable as compensatory damages for noneconomic loss shall not exceed two hundred fifty thousand dollars per occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, except as provided in subsection (b) of this section.

(b) The plaintiff may recover compensatory damages for noneconomic loss in excess of the limitation described in subsection (a) of this section, but not in excess of five hundred thousand dollars for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, where the damages for noneconomic losses suffered by the plaintiff were for: (1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.

W. Va. Code § 55-7B-8(a) & (b).<sup>1</sup>

These arbitrary statutory limitations on compensatory damages are constitutionally flawed in multiple ways. The Circuit Court, for example, recognized that the cap “completely

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<sup>1</sup> W. Va. Code § 55-7B-8(c) provides for the cap to be increased each year beginning on January 1, 2004 by an amount equal to the consumer price index published by the U.S. Department of Labor. Using the department’s calculator, the caps increased to \$288,527 and \$577,054 this year. *See* [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Sept. 5, 2010). For convenience’s sake, this brief will use the statutory amounts of \$250,000 and \$500,000 in all monetary references to the cap.

eviscerated” Petitioner Debbie MacDonald’s valid jury verdict of \$500,000 for her separate and distinct claim for loss of consortium. (Order Ruling on All Post Trial Motions Necessary Before Entry of Judgment Order 21 (hereinafter “Order”).) As a result, despite proving these damages at trial, Debbie MacDonald receives no compensation for her injury caused by the negligent acts of the defendants. The statute makes her cause of action meaningless merely because her husband suffered a sufficiently severe injury at the hands of the defendants that the cap preserved no part of her cause of action for loss of consortium, even though West Virginia recognizes it as a common-law right arising from the marital union. *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 49, 450 S.E.2d 635, 638 (1994). That complete denial of redress cannot be reconciled with the constitutional guarantees of rights of access to the courts, to a jury trial, to equal protection, and to be protected against special legislation, and the cap rendered her claim, her proof at trial, and the jury’s determination an utter nullity.

The operation of the cap on both Petitioners also runs into insuperable constitutional problems, including ones this Court previously identified. In *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 730, 414 S.E.2d 877, 887 (1991), this Court upheld an earlier \$1 million cap on noneconomic damages while “emphasiz[ing]” that its finding that the cap satisfied the constitutionally required reasonableness standard was “limited to the particular \$1,000,000 ‘cap’ before us.”<sup>2</sup> This Court then went on to endorse the view that

“any modification the legislature [would] make[ ] is subject to being stricken as unconstitutional. A reduction of non[economic] damages to a lesser cap at some point would be manifestly so insufficient as to become a denial of justice[.]” under, for example, the state constitutional equal protection or “certain remedy” provisions.

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<sup>2</sup> In *Verba v. Ghaphery*, 210 W. Va. 30, 34, 552 S.W.2d 406, 410 (2001), this Court subsequently chose not to “revisit” its *Robinson* ruling because of *stare decisis*.

*Id.*, quoting *Lucas v. United States*, 757 S.W.2d 687, 700 (Tex. 1988) (Gonzales, J., dissenting) (alteration in original).

The *Robinson* Court premised its holding, in part, on the cap's role as "an integral part of the comprehensive resolution of the clear social and economic problem reasonably perceived by the legislature in enacting the Act," which included "regulation of rate making and other health care liability insurance industry practices" and increased "authority of medical licensing boards to regulate effectively and to discipline health care providers." *Id.* at 729, 724, 414 S.E.2d at 886, 881. In addition, it rejected a challenge based on the right to trial by jury, relying heavily on a series of decisions by lower federal courts, whose reasoning the U.S. Supreme Court has since disclaimed.

Not only is the cap at issue in this matter significantly less than the prior cap and thus not within *Robinson's* determination of what might be reasonable, it is also not integral to a larger scheme designed to address a legitimate problem. This challenge relies on a proper reading of the relevant federal and West Virginia constitutional guarantees, including jury-trial rights, separation of powers, the certain-remedy right, the prohibition on special legislation, and equal-protection. A fair reading of these rights mandates that the cap be invalidated.

#### **KIND OF PROCEEDING AND NATURE OF RULING BELOW**

The questions presented arise out of a civil action in the Circuit Court of Berkeley County, West Virginia, against City Hospital, Inc. and Sayeed Ahmed, M.D. In 2003, Plaintiff James D. MacDonald was treated by Dr. Ahmed at City Hospital for pneumonia, the treatment of which was complicated by a kidney transplant Mr. MacDonald received 20 years earlier and the medication that he was taking in connection with the transplanted kidney. Mr. MacDonald returned to City Hospital for treatment in 2004, but the treatment proved harmful, resulting in

significant muscle damage (myopathy). Plaintiff Debbie MacDonald removed her husband from treatment by Dr. Ahmed and City Hospital and transferred him to Winchester Hospital, where he was diagnosed with rhabdomyolysis, a severe form of muscle damage that resulted from the inappropriate medication therapy he had received at City Hospital. He was hospitalized for several months, during which he also received rehabilitation in order to regain his ability to walk, first with the aid of a walker and now only with a four-pronged cane. Still, Mr. MacDonald cannot walk very far, has difficulty maintaining balance, and has fallen repeatedly.

On November 25, 2008, after a full trial of the matter, the jury returned a verdict for the Plaintiffs. Mr. MacDonald's damages were assessed by the jury as consisting of:

- \$92,000 for past reasonable and necessary medical expenses;
- \$37,000 for past lost wages;
- \$250,000 for past pain and suffering; and,
- \$750,000 for future pain and suffering.

Mrs. MacDonald's damages were assessed by the jury as consisting of:

- \$500,000 for sorrow, mental anguish and solace.

The trial court rejected Defendants' motion for a new trial, as well as Plaintiffs' challenge to the constitutionality of the statutory cap. The trial court then reduced the jury's determination of noneconomic damages, the \$1 million awarded to Mr. MacDonald and the \$500,000 awarded to Mrs. MacDonald, to a total of \$500,000, all of which was designated as Mr. MacDonald's compensation while finding that the higher cap for permanent and substantial physical deformity contained in W. Va. Code § 55-7B-8(b)(2) applied.

Petitioners assert that the trial court erred in reducing the jury's verdict because the statutory cap contained in W. Va. Code § 55-7B-8 and applied to this action is unconstitutional.

## **STATEMENT OF THE FACTS OF THE CASE**

When a patient presents himself for treatment of pneumonia and has a history of kidney problems, routine blood work, including the BUN and Creatinine tests, is conducted to assess kidney function. Defendants failed to conduct those tests and instead began a regimen of the drug Diflucan, which is contraindicated because of the high risk of muscle damage it entails for a patient on the kidney medications that Defendants knew Mr. MacDonald was taking. The new drug worsened Mr. MacDonald's kidney function and, failing to obtain routine laboratory data, Defendants made no change in medication despite continued decline in function. Only upon removal from Defendants' care was a proper diagnosis and care undertaken through which some of Mr. MacDonald's functionality was restored.

Today, Mr. MacDonald struggles to walk even short distances, has the gait of a man significantly older than he is, falls frequently, and cannot get up from the floor on his own when he falls. Defendants' failure has resulted in significant physical, emotional, and psychological trauma for Mr. MacDonald and his wife, while also substantially lessening both Plaintiffs' enjoyment of life.

### **ASSIGNMENT OF ERROR RELIED UPON AND THE MANNER IN WHICH IT WAS DECIDED IN THE CIRCUIT COURT**

1. The Circuit Court erred by holding that W. Va. Code § 55-7B-8's cap on noneconomic damages does not violate W. Va. Const. art. III, § 13's guarantee of the right to trial by jury.

2. The Circuit Court erred by holding that W. Va. Code § 55-7B-8's cap on noneconomic damages does not violate W. Va. Const. art. V, § 1 and art. VIII, § 1, guaranteeing separation of powers and restricting the exercise of judicial power to the judicial branch.

3. The Circuit Court erred by holding that W. Va. Code § 55-7B-8's cap on noneconomic damages does not violate W. Va. Const. art. III, § 17, guaranteeing access to the courts and a "certain remedy" for all tortious injuries while also preventing the sale, denial, or delay of justice.

4. The Circuit Court erred by holding that W. Va. Code § 55-7B-8's cap on noneconomic damages does not violate the inherent guarantee of equal protection of the laws or W. Va. Const. art. VI, § 39's prohibition on special legislation.

#### **POINTS OF AUTHORITIES RELIED UPON AND DISCUSSION OF LAW**

##### **I. THE CAP VIOLATES EQUAL PROTECTION AND THE PROHIBITION ON SPECIAL LEGISLATION**

Although West Virginia's Constitution contains no express equal protection guarantee, this Court has recognized that such protection is "inherent," *Bd. of Educ. of County of Kanawha v. West Virginia Bd. of Educ.*, 219 W. Va. 801, 806, 639 S.E.2d 893, 898 (2006), and implicit. *Gibson v. Dept. of Highways*, 185 W. Va. 214, 218-19, 406 S.E.2d 440, 444-45 (1991); Syl. pt. 4, *Israel v. West Virginia. Secondary Schools Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989). Equal protection derives from Article III, § 10's due process clause, *id.*, from Article III, § 17's certain remedy clause, and Article VI, § 39's prohibition on special legislation.<sup>3</sup> *State ex rel. Collins v. Bedell*, 194 W. Va. 390, 399 n.5, 460 S.E.2d 636, 645 n.5 (1995).

These guarantees bar the State from arbitrarily treating "similarly situated persons in a disadvantageous manner." Syl. pt. 11, *Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517,

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<sup>3</sup> W. Va. Const. art. VI, § 39 specifically prohibits the Legislature from enacting special laws in 18 enumerated categories, including "regulating the practice in courts of justice," and broadly commands "[t]he legislature shall provide, by general laws, for the foregoing and all other cases for which provision can be so made; and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for."

532 (2005) (emphasis added).<sup>4</sup> Equal protection challenges are subject to one of three different tests, depending on the classification of the claim. Regardless of which level of scrutiny applies, strict, intermediate, or rational-basis, the cap fails to pass constitutional muster.

**A. The Cap “Completely Eviscerated” Mrs. Macdonald’s Claim for Damages**

The unconstitutional effect of the cap is most stark in its application to Mrs. MacDonald’s claim for loss of consortium. The court below recognized that the cap “completely eviscerated” Mrs. MacDonald’s cause of action. (Order 21.) Thus, she is being treated differently from other similarly situated individuals in violation of equal protection and special legislation. *See* Syl. pt. 2, *Israel, supra* (equal protection is implicated when persons similarly situated are treated dissimilarly).

The common-law cause of action for loss of consortium dates back at least to the eighteenth century when “English courts recognized the husband’s actionable right for loss of a wife’s consortium.” *DuPont v. United States*, 980 F.Supp. 192, 194 (S.D. W. Va. 1997). It was soon adopted by American courts and expanded, as the rights of women to equal status was secured, to include a wife’s claim for loss of her husband’s consortium. *Id.* at 195. At least since the “seminal case of *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950),” “[i]nvasion of the consortium is an independent wrong directly to the spouse so injured.” *DuPont*, 980 F.Supp. at 195, citing *Hitaffer*, 183 F.2d at 815. Since *Hitaffer*, courts and legislatures have agreed that each spouse has a separate, actionable right for loss of the material support and services of the other, as well as for loss of “companionship, love, felicity,

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<sup>4</sup> This Court has stated that the tests for a violation of equal protection, substantive due process and special legislation are the same. *E.H. v. Matin*, 189 W. Va. 102, 106 n.6, 428 S.E.2d 523, 527 n.6 (1993). *See also O’Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 607, 425 S.E.2d 551, 562 (1992) (finding that the special-legislation analysis is subsumed within equal protection and making it unnecessary to do a separate analysis).

and sexual relations.” *Id.*, citing *Hitaffer*, 183 F.2d at 819; see Jo-Anne M. Baio, Note, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 Fordham L. Rev. 1344, 1345 (1982) (“It is also now generally recognized that loss of consortium is a separate injury of the loss of consortium spouse.”).

West Virginia law makes clear that Mrs. MacDonald’s claim for loss of consortium is “personal,” “can accrue to no one else,” *Warner v. Hedrick*, 147 W. Va. 262, 266-67, 126 S.E.2d 371, 374 (1962), and comprises “a right which gives rise to damages.” *Shreve v. Faris*, 144 W. Va. 819, 824, 111 S.E.2d 169, 173 (1959) (citations omitted).

The effect of the cap, however, is to eliminate Mrs. MacDonald’s separate, actionable right for loss of consortium entirely, when others with that same claim, whose spouse was not as grievously injured, will receive full compensation for their personal loss. The absurdity of compensating lesser losses but requiring those suffering greater losses to bear that loss is as patent as it is arbitrary and irrational. See *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 465 & n.115 (Wis. 2005). That discriminating impact is magnified by the disproportionate way that the cap’s burdens fall on women. See Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L. Rev. 1263, 1285-86 (2004) (using California closed claim data and finding women recovered 52 percent of men’s average award).

In *St. Mary’s Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), the Florida Supreme Court addressed a similar equal-protection problem to the one presented here. The Court declared that it would violate equal protection to cap noneconomic damages in the aggregate, regardless of the number of claimants, as § 55-7B-8 does here. *Id.* at 971-72. The court’s analysis recognized that the effect of a law that limited noneconomic damages in the aggregate was to

ascribe greater value to smaller families with fewer claimants. The cap operated so that the greater the number who suffer a loss the less each was eligible to receive. In light of this unequal treatment solely because the loss each suffers arises out of the same nucleus of operative fact, it declared,

We fail to see how this classification bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability industry. *Such a categorization offends the fundamental notion of equal justice under the law and can only be described as purely arbitrary and unrelated to any state interest.*

*Id.* at 972 (emphasis added).

The equal-protection violation identified by the *Phillipe* court is plainly present here. The jury's verdict found two separate noneconomic damage awards merited, one for Mr. MacDonald and one for Mrs. MacDonald. Because of the severity of Mr. MacDonald's injury, his noneconomic compensation exceeded the maximum permitted by the cap and resulted in eliminating Mrs. MacDonald's compensation altogether. Thus, despite competent evidence of negligence on the part of Defendants and of her loss presented in a fair and proper trial, the cap, post-verdict, locked the courthouse door to Mrs. MacDonald after the fact, merely because of the severity of her husband's separate injury and claim, when it would not have had that effect if her spouse's injury was less profound. The cap thus disproportionately places the burden for resolving the state's purported medical-care crisis on Mrs. MacDonald and those whose spouses are so catastrophically injured that their claims absorb the full value of the cap.<sup>5</sup>

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<sup>5</sup> Additionally, where there were many negligent persons and thus the cost of providing compensation to an injured party is spread among them, the statute irrationally benefits tortfeasors who are but one of multiple negligent defendants. Thus, regardless of the number of claimants, a defendant who commits medical malpractice on his own is in a worse position than a group of doctors, nurses and other health care providers who commit the exact same tort, causing the same type of injury. The creation of a classification that reduces responsibility in this fashion, too, is arbitrary and irrational, with no

The test of equal protection, under its most deferential standard, is whether it classifies people based on “some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.” *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964) (quotation omitted). *See also* Syl. pts. 6 & 7, *Atchinson v. Erwin*, 172 W. Va. 8, 302 S.E.2d 78 (1983). *Cf. Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (the Supreme Court’s “cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”).

Thus, the rational-basis test properly asks whether treating Mrs. MacDonald differently from other spouses who still receive full compensation for their losses is rationally related to the Legislature’s goal of responding to an alleged crisis in the availability of health care. *See James v. Strange*, 407 U.S. 128, 140 (1972). Asking the question provides its answer: the classification and purpose are decidedly unrelated and, as the Supreme Court observed in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the “State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 446.

While the rational-basis test is “not a toothless one,” *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and plainly sufficient to invalidate the cap as applied to Mrs. MacDonald, a more exacting standard, strict scrutiny, applies. The cap’s complete evisceration of Mrs. MacDonald’s

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relation to the availability and affordability of health care, the purported aim of the cap. Thus, the cap places the entire burden for resolving the state’s health care issues on each injured party, rather than among those responsible for the injuries. That approach has properly been described as “neither fair nor equitable.” *Ferdon*, 701 N.W.2d at 466-67.

cause of action (*see* Order 21), certainly interferes with, if not directly violates, her constitutional right of access to the courts as guaranteed by Article III, sections 10 and 17 of the West Virginia Constitution. *See* Syl. pt. 8, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988) (“It is beyond argument that the courts of this state are open to all.”). These guarantees assure “that all citizens have a right to seek redress for injuries in the courts of this state.” *Hinchman v. Gillette*, 217 W. Va. 378, 393, 618 S.E.2d 387, 402 (2005). In addition, as described *infra*, the cap also infringes Mrs. MacDonald’s fundamental right to a jury trial but nullifying the jury’s determination of liability and damages.

The implication of these fundamental rights warrants application of the strict-scrutiny test. *See Sale ex rel. Sale v. Goldman*, 208 W. Va. 186, 193, 539 S.E.2d 446, 453 (2000) (citations omitted) (strict scrutiny applies when the challenged action or statute “affects the exercise of a fundamental right.”) Under strict scrutiny, the party defending the statute’s constitutionality bears the burden and “must prove that [the government’s] action is necessary to serve some compelling State interest” and that “any denial or infringement of the fundamental right . . . [is] narrowly tailored” to accomplish that compelling interest by means that minimally invade the implicated right. *Kanawha*, 219 W. Va. at 807, 639 S.E.2d at 899 (citation omitted). It is a burden that cannot be borne, as it is apparent that means are available through insurance regulation, *see German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 413-18 (1914) (discussing both the authority and the public interest involved in insurance regulation), or the institution of tax incentives or subsidies to offset premium increases, *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.) (“a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the

change”), to address the problems identified by the Legislature without impairing Mrs. MacDonald’s constitutional rights.

**B. The Cap Violates Mr. MacDonald’s Equal Protection and Special Legislation Protections**

Strict scrutiny applies to equal-protection challenges when a statute merely “impinges” or “infringes” on a fundamental right, *Kanawha*, 219 W. Va. at 807, 639 S.E.2d at 899, or does so little as “involve[ ]” the right, *State ex rel. Lambert v. County Comm’n of Boone County*, 192 W. Va. 448, 456, 452 S.E.2d 906, 914 (1994); *Women’s Health Ctr. of West Virginia, Inc. v. Panepinto*, 191 W. Va. 436, 447 n.2, 446 S.E.2d 658, 666 n.2 (1993), or “affects the exercise of a fundamental right.” *Sale*, 208 W. Va. at 193, 539 S.E.2d at 453 (citations omitted) (emphasis added) (quoting *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995) (internal citations omitted)).

Importantly, although statutes are generally presumed constitutional, Syl. pt. 6, *Gibson*, 185 W. Va. 214, 406 S.E.2d 440, that presumption evaporates under the strict-scrutiny test as the party defending the statute’s constitutionality bears the burden of justifying the interference with a fundamental right. *Kanawha*, 219 W. Va. at 807, 639 S.E.2d at 899 (citation omitted). Defendants cannot satisfy their burden under this stringent standard.

**1. The cap implicates fundamental rights.**

Strict scrutiny applies because the cap indisputably impinges on, if it does not directly violate, the fundamental right of trial by jury and the cluster of rights to access to the courts, a certain remedy, and complete justice, found in Article III, § 17. The jury trial right is “fundamental.” *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 561, 567 S.E.2d 265, 277 (2002). So are the three rights guaranteed by Art. III, § 17. *Mathena v. Haines*, 219 W. Va. 417, 422, 633 S.E.2d 771, 776 (2006).

To be sure, *Robinson* assumed that “the right to bring a tort action for damages . . . is economically based and is not a ‘fundamental right’ for . . . equal protection purposes.” *Robinson*, 186 W. Va. at 728-29, 414 S.E.2d at 885-86. *Robinson* thus characterized the cap at issue in that case as “simply an economic regulation, which is entitled to wide judicial deference.” *Id.* at 729, 414 S.E.2d at 886. *Robinson* applied an incorrect standard. West Virginia’s formulation that economic rights merit rationality review derives from U.S. Supreme Court jurisprudence. Yet, that Court has instructed that economic rights merit that low level of scrutiny only for an economic classification “that neither proceeds along suspect lines *nor infringes fundamental constitutional rights.*” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). Here, its burden on fundamental rights removes the cap from the realm of mere economic regulation.

To claim that the cap affects money judgments imposed on tortfeasors, and thus economic rights, would allow any imposition or relief from costs to be transformed into economic rights. Such an analysis is untenable. The test is not whether the challenged legislation is designed or intended to have an economic impact. A poll tax, for example, impinges upon the fundamental right to vote and does not escape strict scrutiny merely because it involves the payment of money or is intended to raise revenue. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 664 (1966) (applying strict scrutiny to a \$1.50 poll tax on the fundamental right to vote and then holding that that economic regulation denied equal protection). Nor could statutory abrogation of an accused’s right to appointed counsel or trial by jury be deemed “simply an economic regulation” and thus subjected to only minimal, “rational basis scrutiny” because the statute was aimed at easing taxpayers’ burdens.

The fact is the cap at issue here does not regulate economic policy but only the conduct of trials and the authority of judges and juries, while truncating the express constitutional rights of persons injured through medical negligence. These persons' right to be free from injury caused by another, or to be made whole for such an injury, cannot be denominated an economic right.

**2. The cap does not promote a compelling interest and is not narrowly tailored.**

In enacting § 55-7B-8, the Legislature set out a variety of purposes largely grouped around the idea that it needed to reduce the costs of medical malpractice insurance, while being “considerate of the need to fairly compensate patients who have been injured as a result of negligent and incompetent acts by health care providers.” W. Va. Code § 55-7B-1. It is difficult to imagine how the purpose of reducing insurance costs constitutes a compelling state interest sufficient to override constitutionally guaranteed rights. Even if one viewed that purpose instrumentally as a means toward a broader end of improving health care more generally, the connection is so attenuated as to amount to a failure in logic. The cap's justification would have to be that meritorious noneconomic damage awards falling between the prior cap of \$1 million and the new caps of \$250,000 and \$500,000 were responsible for the health care crisis. In 2003, the year the caps were enacted, only 315 medical malpractice cases were filed. Kelly Kotur, *An Extreme Response or a Necessary Reform? Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Medical Malpractice Insurance Rates*, 108 W. Va. L. Rev. 873, 895 (2006). According to the U.S. Justice Department's survey of national data involving the nation's largest counties, which tends to have higher awards, plaintiffs prevailed in 26.8 percent of medical malpractice cases in 2001 and won median awards of combined economic and noneconomic damages of \$464,000. U.S. Dep't of Justice, Bureau of Justice

Statistics Bulletin, NCJ 228129, *Tort Bench and Jury Trials in State Courts, 2005*, at 12 (Nov. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>. If one extrapolated those percentages, plaintiffs won 84 medical malpractice cases filed in West Virginia in 2003. Meanwhile, the median compensatory award total suggests very few of those 84 cases resulted in noneconomic damages in excess of the \$250,000 cap, let alone the \$500,000 cap. That small number logically cannot bear the burden of boosting the economics of the medical malpractice insurance industry as a result of any savings.

At the same time, as presaged by the *Robinson* Court's recognition that a cap smaller than \$1 million dollars would raise serious constitutional problems, 186 W. Va. at 730, 414 S.E.2d at 887, the companion statutory purpose of fair compensation fails miserably. Moreover, on its face, the cap may not be viewed as a narrowly tailored means of achieving the statute's purposes, as reducing malpractice insurance premiums may be directly accomplished through insurance regulation without trenching on injured people's rights.

The cap fails to satisfy the heavy burden of equal protection's strict-scrutiny test.

### **C. The Cap Also Fails Under "Intermediate Scrutiny"**

Even courts that do not view the rights to trial by jury, certain remedy, and access to the courts as fundamental, at least where caps are concerned, nevertheless regard these rights as sufficiently important to warrant a heightened, intermediate scrutiny of any statute that impairs their exercise. *See, e.g., Carson v. Maurer*, 424 A.2d 825, 831 (N.H. 1980) *overruled on other grounds by Cmty. Res. for Justice, Inc. v. City of Manchester*, 917 A.2d 707 (N.H. 2007)<sup>6</sup> (right to recover

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<sup>6</sup> The New Hampshire Supreme Court overruled *Carson* because the test used by the court in *Carson* did not go far enough in protecting against legislative "justifications that are hypothesized or 'invented post hoc in response to litigation,' [or] 'overbroad generalizations.'" *Cmty. Res. for Justice*, 917 A.2d at 721. New Hampshire would find the statute more grossly unconstitutional under the new standard.

damages for medical malpractice, while not fundamental, was “an *important substantive* right,” warranting heightened scrutiny (emphasis added)); *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978). Intermediate scrutiny requires proof that the statute’s “classifications . . . serve an *important* governmental objective and must be *substantially related* to the achievement of that objective.” *Marcus*, 217 W. Va. at 523, 618 S.E.2d at 532 (emphasis added) (citation omitted).

West Virginia’s jury trial right, if not fundamental, surely is an important substantive right, meriting intermediate scrutiny. *See, e.g., Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 508, 345 S.E.2d 791, 807-08 (1986) (McHugh, J., dissenting) (noting that West Virginia’s constitution “preserv[es] not only the right to a jury trial but also . . . the fruits thereof”). Additionally, this Court has repeatedly underscored the importance of the jury in determining the amount of noneconomic damages in tort cases. *See, e.g., Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 76, 380 S.E.2d 238, 243 (1989) (“substantial money to compensate for pain, suffering, humiliation, economic losses other than wages, and punitive damages cannot be awarded without a jury.”); *Addair v. Majestic Petroleum Co.*, 160 W. Va. 105, 112, 232 S.E.2d 821, 825 (1977) (reexamination of noneconomic damages awarded by a jury is limited to the common-law remedy of a new trial where the jury award is so extreme and outrageous as to indicate passion or prejudice, because the constitution “did not repose in the bench the responsibility for finding facts, but in the peers of those seeking justice.”).

As under the “narrowly tailored” prong of strict scrutiny, the intermediate scrutiny test requires a proper fit between the means adopted and the important object to be achieved. *Marcus*, 217 W. Va. at 523, 618 S.E.2d at 532. The current cap fails that requirement. If the goal is to lower medical malpractice premiums, less restrictive means, such as regulating insurance premiums, which do not adversely affect anyone’s rights, are readily available, *see German Alliance Ins. Co.*,

233 U.S. at 413-18 (discussing insurance regulation), or the institution of tax incentives to offset premium increases. *See Mahon*, 260 U.S. at 416 (“a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change”). The cap fails the intermediate scrutiny test.

#### **D. The Cap Cannot Even Meet the Rational-Basis Test**

Even if this Court applied the lowest level of equal-protection scrutiny, rational-basis analysis, the cap fails because it arbitrarily and unreasonably treats medical malpractice victims differently from other tort claimants and discriminates as well within that class, unjustifiably subjecting the most severely injured medical malpractice plaintiffs to extreme deprivation. Although the rational-basis test is deferential to legislative choices, it is not toothless and “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne*, 473 U.S. at 439. Courts “applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.” *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

The rational-basis test requires a court to consider four factors: (1) whether the statute treats similarly situated persons in an “equal” manner; (2) whether the statute is intended to serve a “proper” governmental purpose, *id.*; (3) whether the statute “is a rational one based on social, economic, historic or geographic factors,” *id.*; and (4) whether the statute “bears a reasonable relationship” to its purposes. *Marcus*, 217 W. Va. at 523-24, 618 S.E.2d at 532-33.

**1. The cap does not treat similarly situated person in an “equal” manner.**

The cap plainly violates the constitutional injunction against unequal treatment by arbitrarily treating malpractice victims worse than similarly situated persons and creates at least six unnecessary, arbitrary, and irrational classifications that implicate equal protection. For example, the cap:

a) discriminates between slightly and severely injured victims of medical malpractice, perversely limiting the noneconomic damages that a court may award to the most severely injured malpractice victim while allowing patients with modest injuries to receive all the damages the factfinder deems warranted by the evidence. The cap comes into play only after the factfinder determines that a plaintiff’s case is meritorious and that noneconomic damages exceed \$250,000/\$500,000. It is well-established that the damages awarded in personal injury cases correlate closely to the injuries themselves, *i.e.*, more severe injuries lead to higher awards of damages. *See generally* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1120-23 (1996) (surveying the empirical literature). *See also* Nicholas M. Pace, *et al.*, *Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA* (RAND Institute for Civil Justice 2004) (finding that California’s \$250,000 medical-malpractice cap operates to impose a great hardship on the most vulnerable and the most catastrophically injured Californians).

Thus, under the usual cap, malpractice victims with noneconomic injuries worth less than \$250,000 receive full compensation, while severely injured persons, *i.e.*, those who suffer more than \$250,000 in noneconomic damages that decrease their quality of life—chronic pain, disfigurement, emotional distress, physical difficulties and/or reliance on daily custodial care, inability to have children, or damage to their marital relationship—receive only a fraction of the

damages the evidence shows is warranted. Conversely, tortfeasors who cause minor injuries must pay in full, while tortfeasors who commit major errors that lead to calamitous damages receive a discount for the harm they cause. Indeed, the greater the harm the greater the discount;

b) discriminates between severely injured malpractice victims who suffer large amounts of noneconomic damages and severely injured malpractice victims who suffer injuries of equivalent value that are economic in nature. The cap also discriminates between plaintiffs with comparable injuries, where one plaintiff's injuries are primarily economic in nature and the other's are predominantly noneconomic; the former can be compensated in full for his injuries, while the latter's recovery will be capped if the noneconomic damages exceed \$250,000/\$500,000. Women, children, the elderly, and low-income individuals typically receive less in compensation for wages lost and rely upon noneconomic damages as a greater proportion of their compensatory recovery. *See Finley, supra*. Thus, the cap disproportionately affects the recovery of these categories of plaintiffs;

c) discriminates between malpractice victims and other tort victims who suffer comparable injuries. Thus, if identical twins suffer identical injuries, one by medical malpractice and the other by way of another tort; only the former's injuries are subject to the cap;

d) discriminates between malpractice victims who have been injured by the malpractice of one health care provider and those who have been injured by multiple health care providers, by arbitrarily and irrationally reducing the amount of noneconomic damages that the latter may recover from each defendant even when injuries result from a series of ensuing events;

e) discriminates between malpractice victims injured by multiple acts of malpractice and those who have been injured only by a single act, by arbitrarily and irrationally reducing the noneconomic damages that may be recovered for each distinct injury; and,

f) discriminates between the spouses of severely injured malpractice victims and the spouses of other malpractice victims, by denying the former any opportunity to recover damages for loss of consortium when the malpractice victim has noneconomic damages equal to or exceeding the cap, as detailed earlier.

**2. The cap is intended to serve a “proper” governmental purpose.**

*Robinson* found the “overriding” purpose of the cap at issue in that case “was to encourage and facilitate the provision of the best health care services to the citizens of this state.” *Robinson*, 186 W. Va. at 724, 414 S.E.2d at 881. The cap at issue in this case shares that same goal: “the best medical care and facilities available.” H.B. 2122, Acts 2003, ch. 147, *Legislative findings and declaration of purpose*, ¶ 1, codified in W. Va. Code § 55-7B-1. The Legislature’s stated purpose is an unquestionably “proper” one for equal-protection purposes. *Marcus*, 217 W. Va. at 523-24, 618 S.E.2d at 532-33. Still, there must be a proper fit between what is enacted and what the statute seeks to accomplish. *Id.*

**3. The cap is not a rational response.**

The critical question is not whether the Legislature’s goals are the proper subject of legislation but whether the cap is a rational response to “social, economic, historic or geographic factors,” *Marcus*, 217 W. Va. at 523, 618 S.E.2d at 532, based on acceptable premises:

- Was West Virginia truly suffering from a “loss” of physicians to other states? W. Va. Code § 55-7B-1, *Legislative findings and purposes*, ¶ 10;
- Were “malpractice claims” truly becoming more “frequent” in number and rising improperly in size, *id.* at ¶ 9; and
- Were ostensibly more frequent and larger malpractice claims the reason why “the cost of liability insurance coverage has continued to rise dramatically.” *Id.* at ¶ 10.

As shown below, the evidence available to the Legislature when it enacted the cap established that each of these findings were demonstrably false.

**a. West Virginia was *not* suffering from a “loss” of physicians.**

There is simply no truth to the Legislature’s assumption that West Virginia was suffering from a “loss” of physicians in the years before the cap was enacted. Not only was there no evidence whatsoever to support the proposition that rising malpractice premiums (or the risk of high or increasing premiums) had caused doctors to retire or leave West Virginia, unimpeachable data shows that from 1963 until 2002 (the year before the cap was enacted) the number of physicians grew steadily in the State, both in absolute numbers and, more importantly, in the relative number of physicians per 100,000 people. These facts are drawn from the American Medical Association’s authoritative annual compendium, *Physician Characteristics and Distribution in the U.S.* (2002) (“PC&D”),<sup>7</sup> which, in turn is based on data obtained from state licensing boards such as the West Virginia State Board of Medicine.

As shown in Table 1 and Graph 1 (attached as Exhibits 1 and 2), the number of physicians per 100,000 people in West Virginia increased by 158 percent in the four decades from 1963 until 2002, *i.e.*, from 95 MDs/100,000 people in 1963 to 245 MDs/100,000 people in 2002. The growth had not slowed in the decade before the cap was enacted. Instead, the number of physicians per 100,000 people in West Virginia increased by 22.5 percent from 1993 until 2002, *i.e.*, from 200 MDs/100,000 people in 1993 to 245 MDs/100,000 people in 2002.

Table 1 and Graph 1 also show that while the number of physicians per 100,000 people in West Virginia has ranked below the average for the United States as a whole, West Virginia has

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<sup>7</sup> The AMA describes the *Physician Characteristics and Distribution in the U.S.* as “the most accurate and complete source for statistical data about Doctors of Medicine . . . supply in the United States.” AMA Press Online Catalog, [https://catalog.ama-assn.org/Catalog/product/product\\_detail.jsp?productId=prod1030002](https://catalog.ama-assn.org/Catalog/product/product_detail.jsp?productId=prod1030002) (last visited Sept. 8, 2010). PC&Ds are routinely relied upon by courts and scholars. *See, e.g., FormyDuval v. Bunn*, 530 S.E.2d 96, 101 (N.C. App. 2000); *Vargas v. Cummings*, 149 F.3d 29, 35 (1st Cir. 1998); Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Healthcare*, 83 Ind. L.J. 71, 83 n.89 (2008).

been catching up steadily. Thus, while the number of physicians per 100,000 people in West Virginia in 1963 (95/100,000) was only 70 percent of the average number of physicians per 100,000 in the country as a whole (135/100,000), by 2002 the number of physicians per 100,000 people in West Virginia in 2002 (245/100,000) had climbed to 85 percent of the national average (288/100,000).

The AMA data tracks independent research by the federal Government Accounting Office<sup>8</sup> and the staff of The Charleston Gazette, which examined data from the U.S. Census Bureau and West Virginia State Board of Medicine and then reported “[b]etween 1990 and 2000 the State saw a 14.3 percent increase in its number of doctors, while the State’s entire population for the same period grew at only 0.7 percent.” Martha Leonard, *State Has Seen Sharp Increase in Number of Doctors*, The (Charleston) Sunday Gazette-Mail, Feb. 25, 2001, available at <http://www.wvgazette.com/News/PriceofPractice/200102250010>. Thus:

In the past 10 years the State has gained more than 440 doctors with active licenses who practice in the State. . . . According to U.S. Census information, 3,017 M.D.s were practicing medicine in West Virginia in 1990. That number grew to 3,525 in 2000, according to state Board of Medicine records. Year 2000 Census data on physicians practicing in the State is not yet available, but records from West Virginia University’s Office of Health Services Research show the number of doctors even higher, at 3,546.

*Id.*

The newspaper further found, “more [medical school] graduates are remaining in the State than ever before, to do their residency and to set up permanent practice,” with 40 percent

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<sup>8</sup> See also U.S. General Accounting Office, GAO 04-124, *Physician Workforce: Physician Supply Increased in Metropolitan and Nonmetropolitan Areas But Geographic Disparities Persisted* 27 (Oct. 2003) (reporting the number of physicians per 100,000 population in West Virginia increased between 1991 and 2001 in both metropolitan and nonmetropolitan areas and among both generalists and specialists).

of the in-state graduates remaining in the State compared with 32 percent just “a few years ago.” *Id.* (citation omitted).

In sum, there is no credible evidence to support the finding that rising malpractice premiums caused West Virginia to suffer from a “loss” of doctors in the years leading up to enactment of the cap. Indeed, the data from the AMA, the U.S. General Accounting Office, and the West Virginia State Board of Medicine, show just the opposite: a net *increase* in physicians.

**b. West Virginia was not suffering from a growing malpractice litigation problem.**

There was simply no evidence to substantiate the Legislature’s finding that malpractice claims were becoming more “frequent” in the unspecified period preceding the cap’s enactment and there was equally no evidence to confirm the allegations of insurers and physicians that malpractice awards had been exploding in size.

In fact, independent studies determined that West Virginia malpractice insurers were increasing their premium rates despite the fact that the number of malpractice claims in West Virginia had decreased in number while malpractice awards in the State were barely keeping pace with inflation. Thus, an analysis of the nearly 2,300 malpractice claims reported to the West Virginia State Board of Medicine (as required by law) between 1993 and 2001 revealed:

The number of malpractice claims has declined over the eight-year period.

\* \* \*

The total amount of settlements and verdicts reported each year has been fairly consistent, and has actually declined since the early 1990s.

National figures, meanwhile, rank West Virginia in the bottom-half of states for both the total and the median payment in malpractice claims. The State ranks below all of its neighbors for total settlements and verdicts, and below or with its neighbors for median payments, the figures show.

\* \* \*

Million-dollar settlements or jury verdicts are relatively rare in West Virginia, the filed reports show. Only 63 settlements and verdicts topped \$1 million, about 4 percent of the 1,523 cases resolved in the plaintiff's favor. The median settlement during those eight years was less than \$100,000, while the median verdict was \$343,323.

West Virginia ranked behind all of its neighbors for total settlements and verdicts reported in 1999, the most recent year for available data. It lagged behind all of those states except Kentucky for total payments each year between 1992 and 1998.<sup>9</sup>

Lawrence Messina, *Malpractice Claims Have Decreased: Study's Findings Run Counter to Medical Association Allegations*, The (Charleston) Sunday Gazette-Mail, Feb. 25, 2001, available at <http://www.wvgazette.com/News/PriceofPractice/200102250011>.<sup>10</sup>

Another organization conducted an independent evaluation of identical and similar data from official sources and made substantially identical findings:

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<sup>9</sup> According to Gazette-Mail researchers: "[t]he number of malpractice claims dropped from 321 in 1995 to 301 in 1999. The average for the eight-year period remained steady at about 300. These numbers include settlements, jury verdicts for the doctor and patient, dismissed cases and cases that never made it to court. In 1999, the Legislature amended the law, saying dismissed cases no longer needed to be reported to the Board of Medicine. This law went into effect in mid-1999, though more than 100 dismissals have been reported since then. Total amount of settlements and judgments also went down. In 1995, \$48.2 million was paid to plaintiffs, compared with \$32.3 million in 2000. The highest total amount paid between 1995 and 2000 was \$50.7 million in 1997." Martha Leonard, *Insurance Rates Up Dramatically: Reasons for Malpractice-Coverage Rates Unclear*, The (Charleston) Sunday Gazette-Mail, Feb. 26, 2001, available at <http://www.wvgazette.com/News/PriceofPractice/200102260007>.

The Gazette-Mail study also found "[l]ess than one-fifth of the doctors licensed in the State were involved in a claim reported during the entire period. Less than 4 percent of the doctors were involved in claims filed, on average, in any given year. Nearly 200 doctors accounted for three or more claims each; more than 20 had more than five. More than two-thirds of the cases ended with a settlement or damage award verdict. Forty doctors account for more than one-fourth of the \$354 million worth of verdicts and settlements reported during this period." Messina, *Malpractice Claims Have Decreased*, *supra*.

<sup>10</sup> Subsequent research by the same newspaper updated and confirmed these factual findings, Joy Davia, *Putting a Price on Pain*, The (Charleston) Gazette-Mail, Nov. 17, 2002, available at <http://www.wvgazette.com/News/Doctor+Dilemma/200211170003?page=2&build=cache>.

Government data show that medical malpractice awards have remained steady, despite claims of the medical lobby. Statistics from the federal government's National Practitioner Data Bank show the median medical malpractice payment by a West Virginia physician through the first nine months of 2002 was \$145,000. This is the same amount that it was in 1997, it actually represents a significant decrease if you account for medical inflation.

Government data reveals that medical malpractice awards in West Virginia have not kept pace with national increases in health insurance premiums. While NPDB data show no change in the median malpractice payments in West Virginia between 1997 and 2002, the national average premium for single health insurance coverage increased 39 percent over that time period (9.5 percent a year). Payments for healthcare costs, which directly affect health insurance premiums, make up the lion's share of most medical malpractice awards. In spite of this, payments to malpractice claimants in West Virginia have remained steady.

In fact, the number of large verdicts by West Virginia juries and the amount paid in medical malpractice cases has consistently decreased, not increased, during the past five years.

Public Citizen's Congress Watch, *Medical Misdiagnosis in West Virginia: Challenging the Medical Malpractice Claims of the Doctors' Lobby*, 10-11 (Jan. 2003) (footnotes and citations omitted), [http://www.citizen.org/documents/WestVirginia\\_Medical\\_Misdiagnosis.pdf](http://www.citizen.org/documents/WestVirginia_Medical_Misdiagnosis.pdf).<sup>11</sup>

In sum, although there was no credible evidence to support the Legislature's finding that West Virginia was suffering from a malpractice claims-and-awards litigation problem, there was abundant reliable evidence that showed that claims were falling and awards were declining.

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<sup>11</sup> See also Americans for Insurance Reform, *Medical Malpractice Insurance: Stable Losses/Unstable Rates in West Virginia*, 1 (Jan. 2003), <http://www.centerjd.org/air/StableLossesWV.pdf> ("over the last 10 years, the amount that medical malpractice insurers have paid out, including all jury awards and settlements, has approximately tracked the rates of medical inflation. When measured in constant dollars, the average payouts per doctor rose from 1976 to 1991, but fell sharply between 1992 and 1999.").

**c. Malpractice claims and awards, which were declining in number and size, were *not* the reason why the cost of liability insurance coverage “continued to rise dramatically.”**

Given the fact that malpractice claims were being filed less frequently and malpractice awards were declining in size in the State, it is hardly surprising that there was no objective evidence which supported the Legislature’s finding that litigation was the cause of a malpractice insurance crisis. *See Leonard, Gazette-Mail, supra.*

Lacking hard evidence, the State’s largest malpractice insurer, Medical Assurance, Inc., resorted to hard cash to convince doctors that premium increases were caused by malpractice awards and claims and could only be cured by capping the size of the former. According to a confidential filing that Medical Assurance (whose stock was publicly traded) submitted to the federal Securities and Exchange Commission, that company:

paid the State Medical Association at least \$115,000 a year since 1995, or an estimated \$690,000 to date, as part of a confidential agreement. This secret deal requires association members to lobby legislators on the company’s behalf . . . Association members can reap a share of the \$208 million company’s annual profits, as well as a series of breaks on their premiums—provided they buy their policies from Medical Assurance. In exchange for such perks, association members “shall assist Medical Assurance, as requested,” with fact-finding projects, while the two groups “shall cooperate and assist each other in monitoring proposed legislation and administrative regulations in West Virginia,” the agreement says. . . . [Thus,] Medical Assurance has provided the information for the “talking points” that association members have wielded when talking to reporters and lawmakers. The points blame the insurer’s rising rates on “the frequency and severity” of mostly “meritless” lawsuits.

Lawrence Messina, *Medical Association, Insurance Firm Make Secret Deal: Medical Assurance Has Paid [WVMA] \$690,000 For Lobbying Efforts*, The (Charleston) Gazette-Mail, Feb. 26, 2001, available at <http://www.wvgazette.com/News/PriceofPractice/200102260006>.

Most analysts recognize that spikes in malpractice rates are invariably caused by the insurance cycle, not the litigation system. The West Virginia Insurance Commissioner confirmed:

the insurance industry is cyclical and necessarily competitive. We have witnessed these cycles in the Medical Malpractice line in the mid-'70s, the mid-80s and the present situation. This particular cycle is, perhaps, worse than previous cycles as it was delayed by a booming economy in the '90s and is now experiencing not just a shortfall in rates due to competition, but a subdued economy, lower interest rates and investment yields, the withdrawal of a major medical malpractice writer and a strong hardening of the reinsurance market. Rates will, at some point, reach an acceptable level to insurers and capital will once again flow into the Medical Malpractice market.

Public Citizen, *Medical Misdiagnosis, supra*, at 5 (quoting Office of the West Virginia Insurance Commission, *State of West Virginia Medical Malpractice Report on Insurers With Over 5 Percent Market Share* (Nov. 2002)).

Public Justice found:

that amounts charged for premiums do not track losses paid, but instead rise and fall in concert with the State of the economy. When the economy booms and investment returns are high, companies maintain premiums at modest levels; however, when the economy falters and interest rates fall, companies increase premiums. Insurer mismanagement compounded the problems. Underpriced premiums, reckless cash-flow policies, and ill-fated involvement with [companies like] Enron . . . .

Public Citizen, *Medical Misdiagnosis, supra*, at 3.

The fact that the declining malpractice claims and decreasing malpractice awards did not cause rising malpractice premiums is borne out by the fact that:

[i]nsurance costs are increasing overall, not just for malpractice. The same cyclical economic forces that pushed up malpractice premiums in West Virginia also influenced the costs of other categories of insurance. In 2001-2002, increases for medical malpractice insurers ranged from 17.9 percent to 26.4 percent in West Virginia. Rate increases for health insurance in the State

varied between 20.7 and 23 percent in 2002. And increases in homeowners insurance premiums ranged from 5.8 percent to 27.5 percent.

*Id.* at 2. *See also id.* at 5-8.

Numerous scholars have confirmed that finding. *See, e.g.,* Tom Baker, *The Medical Malpractice Myth* 45-67 (2005); Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393, 394 (2005); Finley, 53 Emory L.J. at 1270; William M. Sage, *Medical Malpractice Insurance and the Emperor's Clothes*, 54 DePaul L. Rev. 463, 469-70 (2005).

No evidence supported the notion that the malpractice litigation system was out of control and responsible for rising malpractice premiums or that rising premiums had caused the State to somehow suffer a “loss” of doctors. Therefore, there was no rational basis to impose a much tighter cap on malpractice damages in the hope that it would reduce insurance premiums and boost the number of doctors.

#### **4. The cap is not reasonably related to its purposes**

Just as there was no objective, factual evidence of the problems the statute was intended to cure, there was no credible evidence that the cap would lower insurance or increase the number and availability of physicians.<sup>12</sup> To the contrary, there was considerable evidence, which

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<sup>12</sup> The requirement of some objective basis for reasonable legislators to expect their enactment would in fact accomplish its purposes mirrors the rational basis test administered by federal courts. As the U.S. Supreme Court has explained, even under “the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632 (1996). “[W]hile the connection between means and ends need not be precise, *it, at the least, must have some objective basis.*” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 537 (1982) (Blackmun, J., concurring) (emphasis added).

This Court has not hesitated to strike down legislative acts without a rational relationship to their asserted objectives. *See, e.g., Kyriazis v. Univ. of West Virginia*, 192 W. Va. 60, 450 S.E.2d 649 (1994) (state university requirement that student sign release of liability as condition for playing club sports violated equal protection under rational-basis test); *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W.

was available to the Legislature when it enacted the cap, that demonstrated that caps are ineffective in growing the physician population in underserved areas.

The best evidence comes from the AMA. As depicted in Table 2 and Graph 2 (attached as Exhibits 3 and 4), the existence or absence of a cap has no causal effect on the number of physicians per 100,000 in a state. Thus, of West Virginia's twelve neighbors, three (Indiana, Maryland, and Virginia) had caps in place when W. Va. Code, § 55-7B-8(a) was enacted and nine did not (Delaware, the District of Columbia, Illinois, Kentucky, New Jersey, North Carolina, Ohio, Pennsylvania, and Tennessee). At that time, West Virginia had more physicians per 100,000 than two of these ten jurisdictions, one of which has had a cap since 1975 (Indiana), and one of which never has (Kentucky). Similarly, while West Virginia had fewer physicians per 100,000 than two of its neighbors that had had caps in place for many years (Maryland and Virginia), it also trailed behind each of the nine jurisdictions that did not. Notably, while two of the three states that anchor the bottom of the list *had* caps (West Virginia and Indiana), nine of the ten jurisdictions that rank above West Virginia *did not* have caps.

Perhaps most importantly, the trend lines for Illinois and Ohio show no variation in slope (or increase/decrease over time) before and after caps were enacted by the legislatures of those states and before and after the supreme courts of those states invalidated those caps on state constitutional grounds. This simultaneously belies three common myths: (a) caps are needed

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Va. 223, 231, 438 S.E.2d 15, 23 (1993) (invalidating statute that excluded minors bringing injury claims against political subdivisions from the benefit of general statutory tolling provisions; the Court determined that eliminating the relatively few suits by minors would not substantially further the goal "to limit potential litigation and, thereby, to assist political subdivisions in obtaining affordable insurance."); *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977) (statute barring tort claims against municipalities unless written notice was filed within 30 days of injury violated equal protection and due process under rational-basis standard).

because doctors are fleeing; (b) caps are a panacea and will induce doctors to return to a state if caps are enacted; and (c) doctors will flee again if caps are struck down.

There is equally voluminous evidence that caps do not even reduce insurance premiums and that the only effective way to do so is through insurance regulation. Thus, “the available evidence suggests that caps, by themselves, have little or no effect in reducing insurance premiums.” Edward J. Kionka, *Things To Do (Or Not) To Address the Medical Malpractice Insurance Problem*, 26 N. Ill. U. L. Rev. 469, 515 (2006). See Mitchell J. Nathanson, *It’s the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 Penn. St. L. Rev. 1077, 1108 (2004); Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Healthcare?*, 37 Akron L. Rev. 417, 459 (2004).<sup>13</sup> Indeed, the insurance industry has conceded that noneconomic damages caps have little or no effect on reducing insurance premiums. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1092 (Ohio 1999) (citing “a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, found that the savings from various tort reforms, including a \$250,000 cap on non-economic damages, were ‘marginal to nonexistent’”).

Tellingly, a year-long study of medical malpractice issues by a bipartisan committee of the West Virginia General Assembly found “[t]hat any limitations placed on the judicial system will have no immediate effect on the cost of liability insurance for healthcare providers.” Insurance Availability and Medical Malpractice Industry Committee, *Final Report to the Joint*

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<sup>13</sup> See also Franklin D. Cleckley & Govind Hariharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live With Inefficient Doctors?*, 94 W. Va. L. Rev. 11, 30 (1991) (concluding that enacted tort reforms had made no significant impact on medical malpractice premium rates).

*Committee on Government and Finance* (Jan. 7, 2003). Indeed, in enacting the cap the Legislature explicitly found the cause of rising malpractice premiums lay in the “historic inability of this state to effectively and fairly regulate the insurance industry so as to guarantee our citizens that rates are appropriate.” W. Va. Code § 55-7B-1. That finding tellingly undermines the cap’s rationale.

After reviewing and summarizing similar data, the Wisconsin Supreme Court found: “the correlation between caps on noneconomic damages and the reduction of medical malpractice premiums or overall healthcare costs is at best indirect, weak, and remote.” *Ferdon*, 701 N.W.2d at 485 (finding that state’s cap on medical-malpractice noneconomic damages violated equal protection under a rational-basis test). Other courts have made identical findings and, like the Wisconsin Supreme Court, have accordingly struck down caps. *See, e.g., Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 168 (Ala. 1991); *Carson*, 424 A.2d 825.

The irrationality of the cap is further demonstrated by the fact the cost of the cap is not shared equally by all the citizens of the State. Instead, the cap singles out the victims of medical negligence—indeed, the most seriously hurt victims—to shoulder this burden. A rational classification that does not seek a remote and speculative benefit for the state at large by imposing an immediate loss on those who have already been victimized by medical negligence. In fact, this Court struck down a limitation on the right to bring claims against governmental misconduct, finding the classification irrational because the advantages sought for governmental units did not outweigh the impact on injured tort victims. *O’Neil*, 160 W. Va. at 700-01, 237 S.E.2d at 508.

Furthermore, the cap undermines rather than improves health care in the State. It not only deprives victims of reasonable compensation, as determined by judge or jury based on the

evidence adduced, but also dilutes the deterrent effect of holding a physician or hospital accountable for misconduct. See David Fink, *Best v. Taylor Machine Works, The Remittitur Doctrine, and the Implications for Tort Reform*, 94 N.W. U. L. Rev. 227, 228-29 n.11 (1999). Instead of spreading the risks of injury, it requires the injured party to bear a greater burden, and it diminishes financial incentives to monitor and discipline incompetency.

For all of the foregoing reasons, the cap violates the equal protection of the laws guaranteed by the West Virginia Constitution.

**5. The cap violates art. VI, § 39's prohibition against special laws.**

As noted above, W. Va. Const. art. VI, § 39 specifically bars the Legislature from enacting special laws “regulating the practice in courts of justice,” and broadly commands “[t]he legislature shall provide, by general laws, for the foregoing and all other cases for which provision can be so made; and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for.” *Id.*

This Court has found the special legislation prohibition to be the flip-side of the equal protection guarantee. *O'Dell*, 188 W. Va. at 607, 425 S.E.2d at 562. The equal-protection clause bars the State from unreasonably treating some people worse than others who are similarly situated, while the proscription against special legislation bars the Legislature from arbitrarily treating some classes better than similarly situated classes. *Id.* This Court applies the same test in determining if a statute violates equal protection or special legislation. See, e.g., *Matin*, 189 W. Va. at 106 n.6, 428 S.E.2d at 527 n.6. Accordingly, for each of the arbitrary discriminations discussed in the equal protection section, there is a correspondingly arbitrary special treatment for a particular class of defendants. Plaintiffs have already discussed at length how the classifications created by the cap are unnecessary, arbitrary, unreasonable, and not rationally

related to any legitimate state purpose. For those same reasons, the cap violates the constitutional prohibitions against special laws.

## II. THE CAP ON NONECONOMIC DAMAGES APPLIED IN THIS CASE VIOLATES THE RIGHT TO TRIAL BY JURY

The Circuit Court upheld the constitutionality of W. Va. Code § 55-7B-8's cap on noneconomic damages against a jury trial challenge because it read this Court's decision in *Robinson* to give the Legislature plenary authority to set the damages applicable in any action as part of its power to "create or repeal causes of action, so long as its actions are reasonable." (Order 22-23.)

West Virginia's Constitution guarantees:

[i]n suits at common law . . . the right of trial by jury, if required by either party, shall be preserved; . . . . No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.

W. Va. Const. art. III, § 13. The right applies to actions for money damages, like this one, as well as to actions "where the legal remedy of damages is full and adequate and can do complete justice between the parties." *Realmark Devs., Inc. v. Ranson*, 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003) (citation omitted).<sup>14</sup>

When the Circuit Court upheld the cap it rendered the jury trial guarantee hollow—and in Mrs. MacDonald's cause of action wholly superfluous—by permitting legislative revision of a jury's factual finding of the damages necessary to effect "full and adequate and . . . do complete

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<sup>14</sup> Necessarily, by artificially and arbitrarily capping plaintiffs' compensatory damages at an amount significantly less than the jury found was factually required, the Legislature has impaired this essential principle that underlies the right to trial by jury: full and adequate damages where the jury trial right is invoked. By overriding the jury's verdict, the Legislature has made the legal remedy of money damages something considerably less than "full and adequate" and no longer accomplishes "complete justice between the parties."

justice between the parties.” Moreover, the Circuit Court gave no effect to the “modified historical test” this Court employs when applying the right to a jury trial. *Perilli v. Bd. of Educ. Monongalia County*, 182 W. Va. 261, 263, 387 S.E.2d 315, 317 (1989).<sup>15</sup> Under that test, the question is “whether the nature of the injury and the related relief would have merited a jury trial in 1880,” the date of the amendment’s ratification. *Id.*

It is beyond dispute that juries decided liability and damages in medical malpractice cases long before 1880. *See, e.g., Wright v. Central DuPage Hosp. Ass’n*, 347 N.E.2d 736, 742 (1976) (recognizing that actions for medical malpractice are rooted in Anglo-American common-law); Kenneth Allen De Ville, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* 25 (1990) (noting that after 1835, “patients suddenly began to sue their physicians at an increasing and unprecedented rate”); *id.* at 47 (noting that by the 1840s, “[j]ury trials were the almost unalterable rule”). In fact, cases that sound in tort fully qualify. *Perilli*, 182 W. Va. at 263, 387 S.E.2d at 317; *cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999).

Because the structure and language of our jury trial guarantee is “substantially similar” to that of the Seventh Amendment, *Salyers*, 181 W. Va. at 76, 380 S.E.2d at 243, this Court has repeatedly acknowledged that “interpretation of that amendment by the U.S. Supreme Court can certainly inform our understanding of our similar state jury trial guarantee.” *Id.* at 76-77, 380 S.E.2d at 243-44. *See also Addair*, 160 W. Va. at 109, 232 S.E.2d at 823.

Both constitutions recognize that the “constitutional scriveners” reposed responsibility for finding facts in the jury. *See Addair*, 160 W. Va. at 112, 232 S.E.2d at 825; Syl. pt. 4,

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<sup>15</sup> The U.S. Supreme Court employs a similar test under the Seventh Amendment. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

*Harrison v. Town of Eleanor*, 191 W. Va. 611, 447 S.E.2d 546 (1994) (“determinations of fact are within the province of the jury”); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 625 (1991). Jurors are the judges of facts, including damages. *State Road Comm’n v. Young*, 100 W. Va. 394, 130 S.E. 478, 480 (1925) (“jurors are the triers of fact, and should be free from the court’s opinion as to the weight of evidence, or as to the amount of damages they should find”).

U.S. Supreme Court decisions are emphatic about the preeminent, constitutionally assigned role the jury holds in determining damages. Employing the same historical test used in West Virginia, but referencing 1791, the date of the Seventh Amendment’s ratification, the U.S. Supreme Court found that, under the English common-law, “the jury are judges of the damages.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (citing *Townsend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677)). See also *Wilford v. Berkeley*, 97 Eng. Rep. 472, 472 (K.B. 1758) (“the damages to be assessed . . . [are] strictly and properly the province of the jury”); *Fabrigas v. Mostyn*, 96 Eng. Rep. 549, 549 (C.P. 1773) (“the jury (not the Court) are to estimate the adequate satisfaction.”). Sir William Blackstone<sup>16</sup> echoed these sentiments and said, “where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the *whole damages* laid in the declaration.” 3 William Blackstone, *Commentaries on the Common Law of England* 397 (1765; 1992 reprint) (emphasis added).

Respected longstanding scholarship confirms the U.S. Supreme Court’s findings and traces the jury’s unquestioned authority to determine damages as part of its factfinding role at least as far back as the time of Lord Coke, at which time the issue was considered settled. Austin

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<sup>16</sup> Blackstone’s *Commentaries* were widely accepted as “the most satisfactory exposition of the common law of England. . . . [U]ndoubtedly, the framers of the Constitution were familiar with it.” *Schick v. United States*, 195 U.S. 65, 69 (1904).

Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 675 (1918); see also Edward Coke, *First Part of the Institutes of the Laws of England* § 155b (15th ed. 1794). See also Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935) (“The amount of damages . . . from the beginning of trial by jury, was a ‘fact’ to be found by the jurors.”), cited in *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 470 (Or. 1999).

The issue has never become unsettled. The common-law prerogatives of the jury to determine noneconomic damages have not changed. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446-47 (2001) (quoting *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915)) (explaining that pain and suffering compensation “involves only a question of fact”). In fact, the U.S. Supreme Court has recognized that “nothing is better settled than that, in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991) (quoting *Barry v. Edmunds*, 116 U.S. 550, 565 (1886)).

Just as a judge may not revise a jury’s verdict that is the result of a fair trial and proper instructions “unless plainly contrary to the weight of the evidence or without sufficient evidence to support it,” Syl. pt. 6, *Marsch v. American Elec. Power Co.*, 207 W. Va. 174, 530 S.E.2d 173 (1999), the Legislature may not revise a jury verdict to achieve a result more to its liking when it has done nothing more to the cause of action than require that a judge conform the judgment to one of the Legislature’s arbitrary and inflexible preferred damage limitations. As remittitur practice makes plain, the right to a jury trial includes the right to reject a judgment that is reduced from the jury’s verdict and insist instead on a new jury trial in order to preserve the right guaranteed in our Constitution. Syl. pt. 9, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). The U.S. Supreme Court has also held that recalculating damages

after the jury's assessment constitutes a remittitur. *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998) (per curiam). That Court added that "requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment." *Id.* It requires no great leap of logic to conclude as well that requiring a trial judge to enter judgment for a lesser amount than that determined by the jury without allowing the plaintiff the option of a new jury trial cannot be squared with West Virginia's cognate jury trial right.

The Circuit Court's rationale in this case that the Legislature may apply the jury's factual determination to establish a different compensatory amount was examined and rejected by the U.S. Supreme Court in *Feltner*, where the defendant argued that the jury completed its job when it reached a verdict. The defendant in *Feltner* further contended that the constitutional jury trial guarantee "does not provide a right to a jury determination of the amount of the award." *Feltner*, 523 U.S. at 354. In making the argument, the defendant relied on *Tull v. United States*, 481 U.S. 412 (1987),<sup>17</sup> which had upheld a statute that allowed judges to affix the civil penalty involved after the jury's determination of liability. *Tull*, however, dealt with the application of the jury trial right pursuant to an action not recognized at common-law; instead the action was based on the Clean Water Act. Denying *Tull's* relevance, the *Feltner* Court emphasized the need to maintain the distinction between causes of action that existed as a matter of legislative grace and those derived from the common-law, declaring *Tull* "inapposite" when the claim was one recognized under the jury trial right's historic test. *Feltner*, 523 U.S. at 355.

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<sup>17</sup> In *Robinson*, this Court accorded the Legislature broad authority to revise the jury's verdict by relying heavily on the Fourth Circuit's decision in *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) and several other federal cases, see *Robinson*, 186 W. Va. at 727-28, 731, 414 S.E.2d at 884-85, 888, each of which relied on *Tull* and did not have the benefit of the Supreme Court's subsequent decision in *Feltner*, which found *Tull* "inapposite" on this point.

For common-law actions, the Court held that “if a party so demands, a jury must determine the actual amount of . . . damages.” *Id.* Relying on venerable caselaw that establishes that “in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury,” *id.* at 353 (citation omitted), the Court further held that any other approach to finalizing the award of damages would fail “to preserve the substance of the common-law right of trial by jury,” as required by the Constitution. *Id.* at 355 (citation omitted). Thus, statutorily capping damages in a common-law cause of action, so that the jury’s determination of necessary compensation, supported by competent evidence, is set aside in favor of an arbitrary and inflexible number, similarly fails to preserve the substance of the common-law right of trial by jury, made part of our organic law in the West Virginia Constitution.

Even if viewed as a legislative attempt to define the “legal” import of the jury’s factual determination of necessary compensatory damages, the legislative revision of the jury’s assessment of damages would still fail to “preserve the substance of the common law-right” by supplanting the jury’s preeminent and fundamental role in assessing damages with an arbitrary number divorced from the evidentiary record, as W. Va. Code § 55-7B-8(a) requires. Nor does it make sense to treat the jury’s findings of fact, including its determination of the amount of money necessary to provide compensation for the wrong committed, as susceptible to a different, legislatively assigned “legal” meaning. Beyond the obvious circularity of such an argument, if such a rationale were valid, the Legislature could enact laws that turn a jury’s factual determination that a party was negligent to mean the absence of negligence, a determination of not guilty to mean guilty, and a determination that \$100 in damages in a common-law action meant \$1,000,000. Not only would such a legislative corruption of jury findings of fact be

intolerable, illogical, irrational, and utterly arbitrary, but it would rob the constitutionally guaranteed right of its central meaning.

Faced with an argument that the Legislature merely defined the legal impact of the jury's finding and subscribing to an approach to its cognate right to trial by jury similar to West Virginia's, the Oregon Supreme Court held:

Although it is true that [the Oregon cap statute] does not prohibit a jury from assessing . . . damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect. We conclude that to permit the legislature to override the effect of the jury's determination of . . . damages would "violate" plaintiffs' right to "Trial by Jury" guaranteed in [the Oregon Constitution].

*Lakin*, 987 P.2d at 473.

Earlier this year, the Georgia Supreme Court invalidated a similar noneconomic damage limitation on the basis of that state's right to jury trial guarantee. In doing so, the Court said that a legislatively required reduction of "a noneconomic damages award determined by a jury . . . clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010). The Georgia Supreme Court further stated that although the "Legislature has authority to modify or abrogate the common law, we do not agree with the notion that this general authority empowers the Legislature to abrogate *constitutional* rights that may inhere in common law causes of action." *Id.* (emphasis in original). It then added, "[l]ikewise, while we have held that the Legislature generally has the authority to define, limit, and modify available legal remedies, the exercise of such authority simply cannot stand when the resulting legislation violates the constitutional right to jury trial." *Id.* at 224 (citations omitted).

The MacDonalds' constitutional rights to a jury trial, guaranteed by W. Va. Const. art. III, § 13, were violated when the jury's determination of damages, a finding of fact committed to

the jury and which was rendered consistent with the evidence and the court's instructions, is rendered advisory, rather than treated as constitutionally mandated. Such an approach, as the U.S. Supreme Court observed, fails "to preserve the substance of the common-law right of trial by jury."

### **III. THE CAP ON NONECONOMIC DAMAGES CANNOT BE RECONCILED WITH THE GUARANTEE OF SEPARATION OF POWERS**

West Virginia's Constitution establishes that the "legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others." W. Va. Const. art. V, § 1. It also vests all judicial power "solely" in the courts and the judges of those courts. *Id.* at art. VIII, § 1.

In 2001, this Court rejected a separation of powers challenge to the prior noneconomic damage cap, which characterized the limitation as an unconstitutional legislative remittitur, because the Court reasoned that such legislative action was within the Legislature's power to alter or amend the common-law. *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411. It further found the cap at issue there to be no different than those laws establishing statutes of limitation, statutes of repose, the creation of presumptions, or the abolition of old causes of action. *Id.* Plaintiffs respectfully submit that those analogies do not stand up to scrutiny because none of those other indisputable powers of the Legislature requires a judge, after a fair and proper trial, to displace the jury's factfinding and replace it with one that ignores the record established in the case.

As Georgia's Supreme Court recently held, the Legislature's authority to change the common-law does not grant authority to Legislature "to abrogate constitutional rights that may inhere in common law causes of action." *Nestlehutt*, 691 S.E.2d at 223. Unlike replacing a common-law cause of action with a statutory cause of action with offsetting benefits for what is changed, such as workers compensation, the statutory cap maintains everything about the

preexisting common-law cause of action except the respect that the Constitution mandates for the jury's verdict. Under our Constitution, the only proper way to reduce a jury's verdict in a common-law cause of action is through remittitur, an inherently judicial undertaking. *See Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 905 (Ill. 2010) (recognizing the judicial nature of remittitur and invalidating a noneconomic damage cap as an unconstitutional legislative remittitur).

In addition to its exercise of remittitur authority, the cap has a different separation of powers flaw that impels a declaration of unconstitutionality. The cap requires a judge to reduce the jury's verdict even when the judge finds that the jury's verdict properly reflects a reasonable view of the record. In doing so, the cap statute overrides the constitutional limits on a judge's authority and commandeers that authority to the service of the Legislature.

The authority of the judicial branch secured by the U.S. Constitution and as described by the Supreme Court of the United States in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) "applies with equal force in West Virginia." *Randolph County Bd. of Educ. v. Adams*, 196 W. Va. 9, 24, 467 S.E.2d 150, 165 (1995). Specifically, under that authority, the Constitution:

establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. . . . The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the . . . Judiciary the power, not merely to rule on cases, but to *decide* them[.]

*Id.* (citation omitted).

The arbitrary cap contained in W. Va. Code § 55-7B-8 interferes with judicial authority to decide a case by unconstitutionally mandating that a judge depart from the trial record and enter a judgment at odds with the result he or she would otherwise determine was fair and proper. At least since the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

(finding a congressional grant of additional jurisdiction to the U.S. Supreme Court unconstitutional), it is black-letter law that legislatures may not authorize additional judicial authority where the Constitution has withheld that authority. West Virginia's cap transgresses this bright-line by requiring judges to order a judgment at odds with the established record.

Thus, a court has no judicial authority "to substitute its opinion for that of the jury." Syl. pt. 2, *Bennett v. Angus*, 192 W. Va. 1, 449 S.E.2d 62 (1994) (citation omitted). In fact, this Court has held that a jury's verdict is entitled to "considerable deference," that a court's determination that a verdict is excessive must be accompanied by a "detailed appraisal of the evidence bearing on damages," and that the verdict must be left undisturbed if "supported by some competent, credible evidence going to all essential elements of the award." Syl. pt. 4, *Reed v. Wimmer*, 195 W. Va. 199, 465 S.E.2d 199 (1995). Because that limitation on judicial authority derives from the constitutional right to a jury trial, the missing authority may not be supplied by the Legislature, nor may the Legislature arrogate to itself the authority to substitute its opinion for the jury's findings of fact. Instead, verdicts for pain and suffering damages must reflect the record in the case. A judgment at odds with that record, at least in common-law actions that do not exist by virtue of legislative grace, is manifestly erroneous and must be set aside. *See* Syl. pt. 2, *Marsch*, 207 W. Va. at 177, 530 S.E.2d at 176 (citations omitted).

When a judge, by legislative act, is required to enter judgment at odds with the record, the invasion of judicial prerogative is palpable. The Illinois Supreme Court spoke powerfully and persuasively to this issue in *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715 (Ill. 1952) (citations omitted):

The power to adjudge, determine and render a judgment is beyond all question a judicial act, and can only be employed by judicial authority. The rendition of a judgment by default has been held to be manifestly a judicial act. The legislature cannot direct the

judiciary how cases shall be decided. It is evident that the rendition of judgments by the courts is one of the most important inherent judicial powers of the courts, and may not be surrounded by legislative rules regulating such determinations.

*Id.* See also *Best v. Taylor Machine Works, Inc.*, 689 N.E.2d 1057, 1079 (Ill. 1997) (invalidating a statutory damage cap).

W. Va. Code § 55-7B-8 violates these timeless and universally American precepts by presupposing that jury awards a judge would uphold but that still fall above the arbitrary limitations it enshrines in law are excessive and must be reduced. Thus, W. Va. Code § 55-7B-8 arrogates to the Legislature the inherent judicial authority to determine whether, and to what extent, a verdict is excessive, as well as what judgment should be rendered as a result. It unconstitutionally permits the Legislature to claim the role of super-judiciary.

The founders, relying upon Montesquieu, rejected such a role for the legislative branch. James Madison, arguing in favor of the Constitution's approach to separation of powers quoted Montesquieu's *The Spirit of the Laws* as stating, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul." *The Federalist No. 47*, at 302 (James Madison) (Clinton Rossiter ed. 1961). It was a lesson wrought from experience. Legislative interference with judicial authority during the colonial and early national periods taught Americans the critical importance of separated powers. As historian Gordon Wood wrote, the common "system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression" contravened American ideals about individualized justice because "legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments." Gordon Wood, *The Creation of the American Republic 1776-1787*, at 154-55 (1969).

Early state legislatures constantly interfered with judicial business. Historian Henry Steele Commager wrote that legislatures “played fast and loose with the very structure of the judiciary, meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines, dissolved marriages, and relieved debtors of their obligations almost with impunity.” Henry Steele Commager, *The Empire of Reason* 214 (1977). In fact, Madison drew sharp contrast between the independent judiciary established in the federal Constitution and the undesirable tendency then prevalent in some states whereby “cases belonging to the judiciary department frequently (were) drawn within legislative cognizance and determination.” *The Federalist No. 48*, at 312 (James Madison) (Clinton Rossiter ed., 1961).

Strict adherence to constitutional separation of powers prevents a repetition of those unhappy experiences, as this Court has recognized. Syl. pt. 1, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981) (separation of powers “is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed”). Plainly, the West Virginia Legislature has no authority to try a case. It may not decide an issue of liability within judicial cognizance. *And it may not supplant the judge or jury in determining the amount of damages appropriate in a common-law action tried in our system of individualized justice.*<sup>18</sup> To do so is to transgress the bright lines that separate the judicial from

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<sup>18</sup> To permit otherwise risks authorizing a taking of property without just compensation. After all, a lawsuit is a form of property known as a “chose in action.” *State ex rel. Frieson v. Isner*, 168 W. Va. 758, 771, 285 S.E.2d 641, 651 (1981). *Cf. Logan*, 455 U.S. at 428 (stating that it is “affirmatively settled” that an unadjudicated “cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.”); *Martinez v. California*, 444 U.S. 277, 281-82 (1980) (state tort claim is “[a]rguably . . . a species of ‘property’ protected by the Due Process Clause”); *see also In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 n.19 (9th Cir. 1980) (“There is no question that claims for compensation are property interests that cannot be taken for public use without just compensation.”). Moreover, the injury to a plaintiff’s bodily integrity also embraces injury to property sufficient to raise the takings issue. *Cf. Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O’Connor, J., concurring) (suggesting that in some circumstances a state’s refusal to provide a remedy for a tort may create a takings claim

the legislative branches. That is why the Washington Supreme Court held, when striking down a similar cap on noneconomic damages, that “[a]ny legislative attempt to mandate legal conclusions would violate the separation of powers.” *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989).

Here, the Legislature has similarly overstepped its authority by usurping the judicial authority to assure that judgments properly reflect the evidence adduced at trial. This Court has recognized that it “must be wary of any legislation that undercuts the power of the judiciary to meet its constitutional obligations.” *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 25, 454 S.E.2d 65, 70 (1994). Here, the cap undercuts the responsibility of the judge to order judgment that conforms to the evidence. Under normal circumstances the failure to discharge that obligation constitutes a reversible abuse of discretion. *Brace v. Salem Cold Storage, Inc.*, 146 W. Va. 180, 194-95, 118 S.E.2d 799, 807 (1961); Syl. pt. 4, *Bronson v. Riffe*, 148 W. Va. 362, 135 S.E.2d 244 (1964). The judicial discretion inherent in the act of translating a verdict into a judgment is rendered non-discretionary by the cap, making the judge an agent of the Legislature

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requiring just compensation, provided the victim has been refused redress in state court and stating that “the just compensation requirement means that the remedies made available must adequately compensate for any takings that have occurred.”) (citations omitted); *Poindexter v. Greenhow*, 114 U.S. 270, 303, 306 (1884) (“No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law.”). See also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 83-87 (1999) (explaining that the requirement of just compensation for takings of private property was articulated by some state courts in the 19<sup>th</sup> century as a limit on the ability of legislatures to reform tort law). If a plaintiff’s compensatory damages are arbitrarily limited to achieve some overriding public purpose, takings jurisprudence emphasizes the inappropriateness of such a legislative choice because it forc[es] some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Hence, as Justice Holmes wrote, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Mahon*, 260 U.S. at 416.

and jettisoning all obligation to conform the judgment to the record. The cap must be invalidated as an intrusion into the judicial realm.

#### **IV. THE CAP ON NONECONOMIC DAMAGES CANNOT BE RECONCILED WITH THE GUARANTEE OF ACCESS TO THE COURTS AND A CERTAIN REMEDY**

West Virginia's Constitution guarantees "[t]he courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." W. Va. Const. art. III, § 17. The provision encompasses three distinct, independent, and mutually reinforcing rights. *Gibson*, 185 W. Va. at 221, 406 S.E.2d at 447. The first right guarantees "access to the courts." *Mathena*, 219 W. Va. at 422, 633 S.E.2d at 776 & (Syl. 2). The second guarantees a "certain remedy" for all tortious injuries, *Gibson*, 185 W. Va. at 221, 406 S.E.2d at 447, while the third right prevents the "sale" "denial," or "delay" of justice. *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 694, 408 S.E.2d 634, 644 (1991).

The cap on noneconomic damages established by W. Va. Code, § 55-7B-8 violates each of Section 17's three rights because the cap: (a) deprives the Plaintiffs and all similarly situated malpractice victims of a certain remedy for all personal injuries; (b) creates unconstitutional barriers to medical malpractice victims' right of access to the courts; and (c) denies complete and impartial justice to such plaintiffs. In the case of Petitioner Debbie MacDonald, as the Circuit Court itself put it, the cap rendered her claim "completely eviscerated." (Order 21.) Moreover, as the *Robinson* Court acknowledged, a cap for a lesser amount than the \$1 million approved in that case would be vulnerable to a challenge under Section 17. *Robinson*, 186 W. Va. at 730, 414 S.E.2d at 887.

The present cap plainly deprives the MacDonalds of a "certain remedy" for their causes of action. Under West Virginia law, Mr. MacDonald has a well-recognized common-law cause

of action for medical negligence, a cause of action that has always allowed a jury to award noneconomic damages. Mrs. MacDonald's claim for loss of consortium is also well-established in this state, and noneconomic damages for such injuries have long been available. Pursuant to those claims, the jury awarded Mr. MacDonald \$1 million in noneconomic compensation and Mrs. MacDonald \$500,000 in noneconomic compensation.

W. Va. Code § 55-7B-8 infringes their constitutionally protected right to a certain remedy in two significant ways. First, it arbitrarily denies Mrs. MacDonald *any* compensation for the noneconomic harms visited upon her through Respondents' negligence. Second, it arbitrarily denies *any* compensation for the most serious noneconomic harms visited upon them, those the jury valued above the \$500,000 that the Circuit Court awarded to James MacDonald alone. Far from receiving a certain remedy for all "injur[ies] done to [the]m, in [their] person, property or reputation," as guaranteed by Section 17, the cap assures that Mrs. MacDonald receive *no* remedy at all and Mr. MacDonald receive no remedy for his most severe injuries, injuries that push their rightful compensation above the capped amount. In fact, in the most serious cases, the cap rebates a portion of each plaintiff's cause of action to the tortfeasor, in order to relieve that tortfeasor of some portion of the liability payment. Such an approach to issues of insurance affordability and health care availability is utterly irrational and cannot satisfy the constitutional guarantee of a certain remedy.

*Robinson* establishes that a statutory "alteration or repeal of the existing cause of action or remedy" does not violate Section 17 if the statute's "purpose . . . is to eliminate or curtail a *clear* social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a *reasonable* method of achieving such purpose." *Robinson*, Syl. pt. 3, 186 W. Va.

723, 414 S.E.2d 880 (emphasis added) (quoting Syl. pt. 5, *Lewis*, 185 W. Va. 684, 408 S.E.2d 634).

The cap at issue here cannot survive even the minimal scrutiny set out in the two-part *Lewis* test. First, as explained in detail in the equal protection section of this petition *infra*, the social or economic problems that the lowered caps of § 55-7B-8 were supposed to eliminate or curtail were anything but clearly established. To the contrary, evidence available to the Legislature showed: malpractice claims were not growing in frequency but falling in absolute number and in relation to both the State's population and the overall number of tort claims and/or civil claims; the amounts awarded were not growing but declining in both absolute dollar figures and in relation to the overall and/or medical Consumer Price Index; neither the trauma care system nor malpractice insurance premiums were adversely affected by malpractice claims, but resulted from the insurance industry's cash-flow underwriting practices and its reactions to the periodic business cycle; and West Virginia was not at a competitive disadvantage in attracting and retaining health care providers, but enjoying increases in the physician population both in absolute numbers and in relation to the State's population. *See pp. 20-5 supra*.

Second, claims falling within the interstices between the current caps and the prior \$1 million cap could not have caused problems in either insurance or health care availability. Accordingly, the cap fails the relevant test, as limitations on the rights of persons asserting claims were not and could not comprise "a *reasonable* method of achieving [the statute's alleged] purposes."

In conclusion, because the cap arbitrarily deprives Plaintiffs and other malpractice victims of the full value of their fairly assessed jury verdicts and because the cap arbitrarily benefits certain malpractice defendants by discounting lawful damages properly assessed against

them, this Court should hold that the cap violates the right to a certain remedy secured by Section 17.

While the *substantive* right to receive an appropriate remedy is guaranteed by Section 17's "certain remedy" provision, the *procedural* right to initiate and pursue those suits is secured by Section 17's access to the courts clause. Section 17 "clearly contemplates that every person who is damaged in his person, property, or reputation shall have recourse to the courts to seek the redress of his injuries," especially for "cause[s] of action sounding in tort." *G.M. McCrossin, Inc. v. West Virginia Bd. of Regents*, 177 W. Va. 539, 544, 355 S.E.2d 32, 37 (1987) (citation omitted). The cap violates Section 17 by undermining malpractice victims' access to the courts.

Indisputedly, medical malpractice caps like those at issue here are designed to reduce the number of cases filed and the amounts by which successful plaintiffs are compensated. *See Baker, The Medical Malpractice Myth* at 179; Stephen Daniels & JoAnn Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access To The Civil Justice System*, 55 DePaul L. Rev. 635, 668 (2006). They do so without reducing the incidence of malpractice, thus placing the burden of solving supposed societal problems in health care on the victims of the most serious instances of malpractice. *See Galanter*, 55 Md. L. Rev. at 1120 ("[c]ontrary to the assertion that awards for so-called noneconomic damages are capricious and erratic, leading researchers of medical malpractice and product liability concur that such awards track the seriousness of injury").

Moreover, in those cases where the injury is likely to be significant in noneconomic terms and thus a higher percentage of the likely compensatory damages will be noneconomic, the

expense of proving a medical malpractice case coupled with the limited recovery will render those cases economically infeasible, resulting in a complete denial of access to the courts.

As previously detailed, the access issue is compounded in this case because W. Va. Code § 55-7B-8 caps Petitioners' damages at \$500,000 "regardless of the number of plaintiffs," thereby denying Mrs. MacDonald any recovery.

Section 17's third prong, that "justice shall be administered without sale, denial or delay," embodies a separate and reinforcing guarantee of equal protection to all classes and groups of persons in the State. *See, e.g., State ex rel. Collins v. Bedell*, 194 W. Va. 390, 399 n.5, 460 S.E.2d 636, 645 n.5 (1995). In that respect, the guarantee provides a double protection against the equal-protection violation discussed *supra*.

In sum, § 55-7B-8's cap on noneconomic damages violates each of Section 17's three "basic and fundamental" rights, depriving Plaintiffs of a certain remedy for all personal injuries, creating an unconstitutional barrier to the malpractice victims' access to the courts and denying equal justice to similarly situated malpractice plaintiffs. Accordingly, this Court should invalidate on these grounds.

### CONCLUSION

For the foregoing reasons, the MacDonalds respectfully request 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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**EXHIBITS**

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