

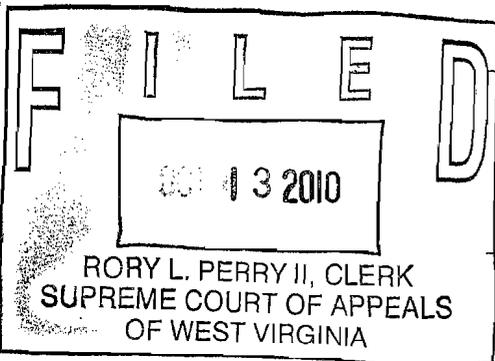
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543

JAMES D. MacDONALD and DEBBIE MacDONALD,
Plaintiff Below, Appellants,

vs.

CITY HOSPITAL, INC., and SAYEED AHMED, M.D.,
Defendants Below, Appellees



The Honorable Gray Silver, III, Judge
Circuit Court of Berkeley County
Civil Action No. 07-C-150

**BRIEF AND CROSS-APPEAL OF
APPELLEE DR. SAYEED AHMED, M.D.**

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I. INTRODUCTION

This is the brief and cross-appeal of the appellee, Dr. Sayeed Ahmed, M.D., in an appeal from an order of the Honorable Gray Silver, III, Judge of the Circuit Court of Berkeley County, following this Court's decisions in *Robinson v. Charleston Area Medical Center, Inc.*,¹ and *Verba v. Ghaphery*,² and applying the statutory cap on noneconomic damages under the Medical Professional Liability Act.

All of the arguments advanced by the appellants – violation of the right to a jury trial, violation of the separation of powers, violation of the right of access to courts, violation of the right to a certain remedy, violation of equal protection, and violation of the prohibition against special legislation – have been repeatedly rejected by this Court and the majority of other courts.

The provisions of the West Virginia Constitution relied upon by the appellants have not been amended since *Robinson* and *Verba* and, as recently as 2007, this Court has rejected a similar challenge to the cap on noneconomic damages in the Medical Professional Liability Act.³

Finally, there is no record evidence of any definitive empirical basis for the argument that damage caps in medical malpractice cases do not result in lower medical malpractice premiums than would exist in the absence of caps and, to the extent that a dispute in the empirical data exists, the appellants' remedy is with the Legislature, not with this Court.

Accordingly, Dr. Ahmed requests that this Court deny the appellants' appeal and remand this case, pursuant to his cross-appeal, for reduction of noneconomic damages to \$250,000.00.

¹ 186 W. Va. 720, 414 S.E.2d 877 (1991).

² 210 W. Va. 30, 552 S.E.2d 406 (2001).

³ See *Riggs v. West Virginia University Hospitals, Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007)(award of appeal limited to non-constitutional issues).

II. STATEMENT OF FACTS⁴

This was a rather typical medical malpractice case in which both liability and damages were hotly contested.⁵ Ultimately, the jury accepted plaintiffs' theory of liability, but the noneconomic damages awarded compared with the evidence presented makes this case a perfect example of why caps on noneconomic damages are needed.

Mr. MacDonald was diagnosed with diabetes in childhood. I Tr., Nov. 18, 2008, at 23, II Tr., Nov. 19, 2008, at 8. Eventually, diabetes caused end organ damage, resulting in a 1988 kidney transplant. *Id.* at 24; II Tr., Nov. 19, 2008, at 15. In both 2003 and 2004, he sought treatment at City Hospital for pneumonia. *Id.* During treatment in October 2004, he contends that he developed rhabdomyolysis, *id.* at 25, which can have many causes, including trauma, food poisoning, drug abuse, infections, medications, and autoimmune disease.⁶

Plaintiffs' theory of the case was that the use of certain drugs to treat Mr. MacDonald's pneumonia caused his rhabdomyolysis. *Id.* at 37-38. With respect to Dr. Ahmed, plaintiffs' theory was that certain drugs should not have been administered, based upon Mr. MacDonald's

⁴ It is not inconsequential that plaintiffs devote less than one page of their fifty page brief to the statement of facts, Appellant's Brief at 5, and that there are no record references for the factual representations that are made therein.

⁵ During closing argument, plaintiffs' counsel devoted only four of forty-one pages of argument to the issue of noneconomic damages. Tr., Nov. 24, 2008, at 199-202, 252. And, much of that argument concerned Mr. MacDonald's medical history; how much medical expert witnesses earn; Mr. MacDonald's alleged inability to dance as he had in the past; and what Mr. MacDonald is still able to do, including substitute teaching, working at a grocery store, and working out at the gym. *Id.*

⁶ Even plaintiffs' expert, David H. Goldstein, M.D., conceded that there are multiple causes of rhabdomyolysis. I Tr., Nov. 19, 2008, at 130. See also Lippincott Williams & Wilkins, HARWOOD-NUSS' CLINICAL PRACTICE OF EMERGENCY MEDICINE, 4TH EDITION, CH. 68 (2005) ("Rhabdomyolysis is a clinical syndrome resulting from injury to skeletal muscle. The most common causes are alcohol and drug abuse, seizures, crush injury, muscle compression, exercise, and infection, but it is not uncommon for there to be multiple causes of a single episode.").

history, or should have been discontinued once the results of blood testing changed during his stay at City Hospital. *Id.* at 40. With respect to City Hospital, plaintiffs' theory was that it should have known that the drugs it was administering, prescribed by Dr. Ahmed, could interact with one another causing negative side effects. *Id.* at 40-42.

Defendants' theory of the case was that there was no breach in the standard of Mr. MacDonald's care. Dr. Ahmed had treated Mr. MacDonald since 2003 and was well-aware of his medical history. *Id.* at 82, 132. When Mr. MacDonald was hospitalized in 2004, Dr. Ahmed consulted with a pulmonologist and a nephrologist to assist in his care. *Id.* at 83, 135. The hospital's pharmacists ran each of the changes in Mr. MacDonald's medications through a computer program to make certain there would be no negative interactions. *Id.* at 85. Moreover, many of the medications Mr. MacDonald was taking – for his diabetes, high cholesterol, kidney transplant, and pneumonia – had known side effects, which were explained to Mr. MacDonald. *Id.* at 86-88.

Defendants also noted that there were substantial risks if some of these medications had been withdrawn and that there are causes of rhabdomyolysis other than drug interaction. *Id.* at 116-17. Dr. Ahmed noted that the medications claimed by Mr. MacDonald to have caused his rhabdomyolysis in 2004 were the same medications he successfully prescribed to treat the same condition in 2003 when Mr. MacDonald was hospitalized for several weeks. *Id.* at 132; II Tr., Nov. 19, 2008, at 15. Dr. Ahmed also noted that he was aware that adding antifungal drugs to Mr. MacDonald's regimen created a slightly elevated risk of rhabdomyolysis, but the only way to treat his fungal lung infection was with an antifungal drug, *id.* at 136-137, particularly as Mr. MacDonald's lung problems became so grave on his second day of hospitalization that he was

moved into intensive care and placed on a ventilator, *id.* at 138.⁷ Dr. Ahmed also noted that Mr. MacDonald's medications were changed, during his hospitalization, as his condition changed. *Id.* at 140.

With respect to his outcome, Mr. MacDonald's symptoms were described by his counsel as "extreme muscle weakness," resulting in his use of a "four-pronged cane." I Tr., Nov. 18, 2008, at 25. At the time of trial, Mr. MacDonald was 68-years-old and living in Tennessee. II Tr., Nov. 19, 2008, at 6-7. In addition to his history of diabetes, high cholesterol, kidney transplant, and pneumonia, Mr. MacDonald had also suffered a series of strokes prior to his 2004 hospitalization. *Id.* at 19. Ultimately, Mr. MacDonald retired prior to his 2004 hospitalization. *Id.* at 22. Initially, following his discharge from City Hospital, Mr. MacDonald went through a brief period of rehabilitation in 2004; about six weeks of physical therapy and, ultimately, testified at the time of trial that he had less "physical strength" in his upper body than he did prior to his 2004 hospitalization and suffers some "balance" issues in his lower body. *Id.* at 37-38.

Still, at the time of trial, Mr. MacDonald testified that he could paint his house; operate a vacuum; prepare meals; engage in other household activities; exercise, including walking on a treadmill; operate a motor vehicle; and attend his son's wedding during a Caribbean cruise. *Id.* at 39-41, 45, 62, 108. Also, after his 2004 hospitalization, Mr. MacDonald returned to substitute teaching and even worked as a bagger at a local grocery store. *Id.* at 45. Mr. MacDonald also

⁷ Dr. Goldstein admitted that pneumonia was Mr. MacDonald's most serious acute condition in October 2004, and that a fungal infection was more likely to be fatal in Mr. MacDonald's case because his immune system was compromised by the immune-suppressing medications he was taking as a result of his kidney transplant. I Tr., Nov. 19, 2008, at 98-99. Mr. MacDonald himself testified that he can remember little of his treatment at City Hospital after his first day of hospitalization. II Tr., Nov. 19, 2008, at 26.

testified that he was eventually able to walk without the assistance of a cane.⁸ *Id.* at 44. Other than the foregoing, Mr. MacDonald testified to suffering no actual pain; rather, he initially suffered some ambulatory difficulties that, to a considerable degree, had subsided prior to trial.

Ms. MacDonald testified that her husband's symptoms in 2004 began when she was away on a business trip, but that they were the same as in 2003 when he was diagnosed and treated for pneumonia. *Id.* at 88-89. She testified that she saw her husband every day of his hospitalization at City Hospital from October 29, 2008, until November 10, 2008, when she had him transferred to a hospital in Winchester, Virginia. *Id.* at 89-90. Ms. MacDonald indicated that her husband's weakness did not appear until sometime after his hospitalization in Winchester after they were finally able to discontinue the respirator. *Id.* at 93. She described his brief period of rehabilitation between mid-November 2008 until December 31, 2008, when he was discharged. *Id.* at 98-99. She also described six weeks of physical therapy after which Mr. MacDonald joined a Gold's Gym. *Id.* at 99-100, 109. Other than hiring someone to perform some yard work and snow removal, *id.* at 107, Ms. MacDonald did not testify to employing anyone else to perform tasks previously performed by her husband. When asked about how her life was different, Ms. MacDonald testified that she and her husband still go the movies, on cruises, and out with friends, but that they do not go dancing or participate in T-ball with their grandchildren because her husband was afraid he might injure himself further. *Id.* at 109-111. Finally, Ms. MacDonald testified that despite her husband's many infirmities, they had "a very active sex life, up 'til '04," but "we don't have any of that any more." *Id.* at 114.

⁸ Indeed, although he had a cane with him at trial, his wife testified that he did not use a cane when he visited his mother because he allegedly did not want her to see him using a cane. *Id.* at 112.

With respect to plaintiffs' noneconomic damages, the trial court made several remarks prior to the verdict indicating the relative lack of evidence of noneconomic damages, including but not limited to the absence of any dollar amount for any alleged loss of services by Mr. MacDonald, Tr., Nov. 24, 2008, at 130, and the absence of evidence that Mr. MacDonald suffered a "permanent physical and functional injury that permanently prevents him from being able to independently care for himself and perform life-sustaining activities," *id.* at 131. Finally, in its order applying the cap on noneconomic damages, the trial court observed that while, in its judgment, a noneconomic damages award of \$250,000 might be inadequate, an award of \$500,000 is not inadequate. Order, May 14, 2009, at 23 ("the Court believes that while this (\$500,000) is a reasonable limitation, a lesser cap (\$250,000) in this situation might not be.").

Again, issues of liability in the case were hotly contested and, even after the jury had deliberated for three and a half hours, Tr., Nov. 25, 2008, at 12, 14, it requested a definition of proximate cause, *id.* at 15. Eventually, after deliberating another hour and a half, *id.* at 18, having been provided a copy of the entire charge, the jury returned a verdict allocating thirty percent of the fault to City Hospital; allocating seventy percent of the fault to Dr. Ahmed; and awarding Mr. MacDonald and Ms. MacDonald \$1 million and \$500,000 in noneconomic damages respectively, *id.* at 21. Based upon the evidence at trial, there is little logical explanation for an award of \$1.5 million in noneconomic damages, but there may be a clue in the closing argument of plaintiffs' counsel:

This man is younger than me. He's sixty years old. There's life in front of him. The question is how much is all that worth to somebody?

Now, I'm going to tell you, I brought in these figures of what these doctors are making to do this kind of thing. Why? For comparison. We've been here in trial since last Monday. People started testifying on Tuesday. Tuesday, Wednesday, Thursday and Friday, four days they testified. You have your notes and you see

what the healthcare profession – the healthcare provision charged to come in here and testify, you’re going to see it’s over \$50,000 and they all appear to be healthy. Let’s put some things in perspective here. What is the value of the rest of his life to him? Think about that. Think about what things cost. . . .

What is the value, if we’re paying doctors \$50,000 on both sides to come in here and testify about this case to find excuses instead of accepting responsibility for not doing the thing that should have been done, what’s the value to the common person?

Tr., Nov. 24, 2008, at 200-201.

In other words, plaintiffs’ counsel argued to the jury that it should take \$50,000, which was his calculation of the costs of the experts, and multiply it by some figure, perhaps twenty for Mr. MacDonald and ten for Ms. MacDonald, because of “the value of the rest of his life” and defendants offering “excuses instead of accepting responsibility,” and punish defendants by awarding Mr. MacDonald \$1 million for noneconomic damages and Ms. MacDonald \$500,000 in noneconomic damages. Obviously, what experts charge to testify, Mr. MacDonald’s life expectancy, or defendants’ non-admission of liability had nothing to do with plaintiffs’ noneconomic damages, but it is precisely these types of arguments designed to inflame jurors into awarding excessive noneconomic damages that warranted the legislative branch’s decision to place a cap on those damages in medical professional liability cases.

Even though plaintiffs knew that their ability to receive noneconomic damages in excess of \$250,000 would turn on whether Mr. MacDonald suffered a “permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system” or “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(b), they offered no expert witness who testified that either was the case nor did they ask the jury to make such a finding on the verdict form. Thus, the verdict is completely

silent on the issue. Nevertheless, the trial court speculated that the jury may have believed that Mr. MacDonald was “very feeble” and that his “quality of life has been greatly diminished by the rhabdomyolysis.” Order, May 14, 2009, at 13. So, even though the trial court correctly rejected plaintiffs’ argument that Mr. MacDonald’s injuries prevented him “from being able to independently care for himself” and “perform life sustaining activities,” as he was able to resume teaching, work in a grocery store, go on cruises, prepare meals, perform household chores, regularly work out at a gym, drive his car, walk without assistance, and otherwise take care of himself, it incorrectly determined that his muscular weakness in his lower extremities constituted a “partial loss of use of a limb or a partial use of a bodily organ system,” even though the statute does not include the term “partial,” but requires “loss of use of a limb or loss of a bodily organ system,” and reduced the noneconomic damages to \$500,000. *Id.* at 13-14.

With respect to plaintiffs’ constitutional arguments, the trial court correctly ruled that each had been rejected by this Court – with the right to jury trial argument rejected in *Robinson v. CAMC*, 186 W. Va. 720, 414 S.E.2d 877 (1992), *id.* at 22-23; the separation of powers argument rejected in both *Robinson, supra* at 726, 414 S.E.2d at 883, and *Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001), *id.* at 24; the open courts, certain remedy, and due process arguments rejected in *Robinson, supra* at 727-732, 414 S.E.2d at 884-889, *id.* at 25-26; and the equal protection and special legislation arguments rejected in *Robinson, supra* at 728-30, 414 S.E.2d at 885-887, *id.* at 27.

Ultimately, on August 20, 2009, the trial court denied defendants’ Rule 50 and Rule 59 motions from its judgment order of May 14, 2009, and plaintiffs have appealed and defendants are cross-appealing that judgment order.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

The standard of review in an appeal challenging the constitutionality of a statute is *de novo*.⁹ With respect to such challenges, “The general powers of the legislature are almost plenary,” this Court has observed, “It can legislate on every subject not interdicted by the constitution itself.”¹⁰ Thus, this Court has shown appropriate deference to the exercise of legislative power: “In considering constitutional restraint, the negation of legislative power must be manifest beyond reasonable doubt.”¹¹ Moreover, this Court has noted:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).¹²

Finally, with respect to statutes implicating economic rights, including the right to recover damages in civil actions, this Court has stated:

⁹ *State v. Rutherford*, 223 W. Va. 1, 3, 672 S.E.2d 137, 139 (2008)(citations omitted).

¹⁰ Syl. pt. 2, *State Road Comm'n v. Kanawha County Court*, 112 W. Va. 98, 163 S.E. 815 (1932).

¹¹ Syl. pt. 2, *State Road*, *supra* (emphasis supplied).

¹² *Id.* (emphasis supplied).

“‘Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.’” Syllabus Point 7, [as modified,] *Atchinson v. Erwin*, [172] W. Va. [8], 302 S.E.2d 78 (1983).⁷ Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W. Va. 538, 328 S.E.2d 144 (1984).” Syllabus Point 4, *Gibson v. West Virginia Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).¹³

Here, the negation of legislative power is not manifest beyond a reasonable doubt and there is no need to reinvent the wheel because this Court has repeatedly applied these constitutional standards to sustain the constitutionality of the MPLA’s cap on noneconomic damages,¹⁴ as have the clear majority of other courts.¹⁵

¹³ Syl. pt. 6, *Hartley Hill Hunt Club v. County Comm’n*, 220 W. Va. 382, 647 S.E.2d 818 (2007)(emphasis supplied).

¹⁴ The current West Virginia caps are consistent with other current noneconomic damages caps. See ALASKA STAT. § 09.17.010 (\$400,000 or \$8,000 times life expectancy); CAL. CIV. CODE § 3333.2 (\$250,000 cap on noneconomic damages); COLO. STAT. § 13-64-302 (\$250,000); FLA. STAT. ANN. § 394.9085 (\$200,000); FLA. STAT. ANN. § 766-118 (\$500,000); FLA. STAT. ANN. § 766.207 (\$250,000 in medical malpractice cases submitted to binding arbitration); FLA. STAT. ANN. § 766.209 (\$350,000 in medical malpractice cases where plaintiffs refuse to participate in binding arbitration); HAWAII STAT. § 663-8.7 (\$375,000); IDAHO STAT. § 6-1603 (\$250,000); KANSAS STAT. § 60-19a02 (\$250,000); LA. STAT. ANN. § 40:1299.42 (limiting damages in general to \$500,000 exclusive of future medical care and related benefits); MASS. GEN. L. ANN. 231 § 60H (\$50,000); MD. CODE § 3-2A-9 (\$650,000); MICH. STAT. § 600.1483 (\$280,000/ \$500,000); MICH. STAT. § 600.2959 (requiring complete remittitur of noneconomic damages if plaintiff’s comparative fault exceeds that of defendant); MISS. CODE. ANN § 11-1-60 (\$500,000); MO. STAT. § 538.210 (\$350,000); MONT. STAT. § 25-9-411 (\$250,000); N.D. CODE ANN. § 32-42-02 (\$500,000); N.M. STAT. ANN. §41-5-6 (limiting total malpractice damages to \$600,000); NEV. REV. STAT. ANN. § 41A.035 (\$350,000); OHIO REV. CODE § 2323.43 (\$250,000/\$350,000/\$500,000); OKL. STAT. ANN. § 1-1708.1F (\$300,000); OR. REV. STAT. § 30.298 (no noneconomic damages recoverable against state agency); OR. REV. STAT. § 31.715 (no noneconomic damages in action arising from motor vehicle accident in which plaintiff was driving uninsured or under the influence); S.C. CODE § 15-32-220 (\$350,000); S.D. STAT. § 21-3-11 (\$500,000); TEXAS CIV. PRAC. & P. § 74.301 (\$250,000); UTAH STAT. § 78B-3-410 (\$400,000); VA. CODE §8.01-581.15 (limiting total malpractice damages to \$1.5 million); VI. CODE ANN. § 166(b)(\$75,000); WISC. STAT. § 893.55 (\$750,000); Moreover, damages caps are nothing new in West Virginia:

Under the 1967 version of W. VA. CODE § 55-7-6, in effect when *Kesner* was decided, there was a \$10,000 cap on wrongful death damages; a \$100,000 cap on compensatory damages arising from the death; and damages were provided for reasonable funeral, hospital, medical and other expenses incurred as a result of the death.

Vargo v. Pine, 208 W. Va. 146, 155, 541 S.E.2d 11, 20 (2000). Of course, under appellants' arguments, such caps would also have been unconstitutional.

¹⁵ It has been noted that, "[T]he legislature may make rules concerning the types of damages recoverable and the manner in which damages are paid. Furthermore, statutory caps on noneconomic and punitive damages do not violate the doctrine of separation of powers." 16 C.J.S. Constitutional Law § 230 (2010)(footnotes omitted).

As of the date of this brief, courts have upheld limits on noneconomic damages or all damages in at least 24 jurisdictions: *Evans v. Alaska*, 56 P.3d 1046 (Alaska 2002); *Fein v. Permanente Med. Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985); *Garhart v. Colombia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Estate of McCall v. United States*, 663 F. Supp. 2d 1276 (N.D. Fla. 2009); *Kirkland v. Blaine Cty. Med. Ctr.*, 134 Idaho 464, 4 P.3d 1115 (2000); *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980); *Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 789 P.2d 541 (1990), *overruled on other grounds*, *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991); *Butler v. Flint Goodrich Hosp. of Dillard University*, 607 So. 2d 517 (La. 1992); *Peters v. Saft*, 597 A.2d 50 (Me. 1991)(dram shop); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (Md. 1992); *Zdrojewski v. Murphy*, 254 Mich. App. 50, 657 N.W.2d 721 (2002); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992); *Meech v. Hillhaven W., Inc.*, 238 Mont. 21, 776 P.2d 488 (1989); *Gourley v. Nebraksa Methodist Health Sys., Inc.*, 265 Neb. 918, 663 N.W.2d 43 (2003)(\$1.25 million cap on all damages); *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002); *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E.2d 420 (2007); *Greist v. Phillips*, 322 Ore. 281, 906 P.2d 789 (1995); *Wright v. Colleton Cty. School Dist.*, 301 S.C. 282, 391 S.E.2d 564 (1990)(governmental torts); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990)(cap on all damages); *Judd v. Drezga*, 2004 Ut. 91, 103 P.3d 135 (2004); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 257 Va. 1, 509 S.E.2d 307 (Va. 1999)(cap on all damages); *Davis v. Omitowaju*, 883 F.2d 1155 (3d Cir. 1989)(Virgin Islands caps); and *Robinson*, *supra*. See also Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps.").

Moreover, at least 10 states have upheld limitations on punitive damages, including provisions requiring that a certain percentage of awards be allotted to a designated public fund: *Reust v. Alaska Petroleum Contrs., Inc.*, 127 P.3d 807 (Alaska 2005); *Gordon v. Florida*, 608 So.2d 800 (Fla. 1992); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993); *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612 (Iowa 1991); *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993)(upholding requirement that courts, not juries, calculate punitive awards); *Fust v.*

B. THE CAP ON NONECONOMIC DAMAGES DOES NOT VIOLATE THE RIGHT TO JURY TRIAL BECAUSE, AS THIS COURT HAS ALREADY HELD, THE REEXAMINATION CLAUSE DOES NOT APPLY TO THE LEGISLATURE.¹⁶

This Court has already dealt with the claim that a statutory cap on damages violates the constitutional right to a trial by jury as follows: “The language of the ‘reexamination’ clause of the constitutional right to a jury trial, W. VA. CONST. ART. III, § 13, does not apply to the legislature, fixing in advance the amount of recoverable damages in all cases of the same type, but, instead, applies only to the judiciary, acting ‘in any [particular] case.’”¹⁷

In other words, the Legislature is free to enact statutes that prescribe both limitations and enhancements to damages awarded by juries.¹⁸ For example, are treble damages statutes¹⁹

Missouri Atty. Gen., 947 S.W.2d 424 (Mo. 1997); *Meech v. Hillhaven W., Inc.*, 238 Mont. 21, 776 P.2d 488 (1989); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004); *DeMendoza v. Huffman*, 334 Or. 425, 51 P.3d 1232 (2002).

Conversely, courts in only 9 states have ruled, at various times, that these limitations are unconstitutional: *Moore v. Mobile Infirmery Ass’n*, 592 So.2d 156 (Ala. 1991); *Atlantic Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 228 Ill. Dec. 636, 689 N.E.2d 1057 (1997); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (1999); *Knowles v. United States*, 1996 S.D. 10, 544 N.W.2d 183 (1996); *Sophie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989); *Ferdon v. Wisconsin Patients Comp. Fund*, 284 Wis. 2d 573, 701 N.W.2d 440 (2005). Of those states, both Oregon and South Dakota have subsequently enacted caps on noneconomic damages, which have not been declared unconstitutional. See OR. REV. STAT. § 31.715; S.D. STAT. § 21-3-11. Moreover, this Court rejected most of these cases or their antecedents in *Robinson* and *Verba*, while others have been questioned by later decisions in their own states.

¹⁶ Plaintiffs’ criticisms of the trial court’s rejection of this challenge, Appellants’ Brief at 33-34, are unfair as the trial court was bound to follow this Court’s decisions in *Robinson* and *Verba*.

¹⁷ Syl. pt. 4, *Robinson*, *supra* (emphasis supplied).

¹⁸ Similarly, as appellants acknowledge, jury verdicts are subject to reexamination, for example, by both the trial court and this Court. Appellants’ Brief at 36. It is no more unconstitutional for the Legislature to set caps on jury verdicts than for this Court, for example, in *Roberts v. Stephens Clinic Hospital, Inc.*, 176 W. Va. 492, 345 S.E.2d 791 (1986), to reduce a \$10 million verdict arising from the death of a child from \$10 million to \$3 million as excessive.

unconstitutional because they enhance damages awarded by juries? Of course, the answer is “no” because the Legislature has almost plenary power to regulate the damages available for various causes of action.²⁰

Likewise, as this Court recognized in *Robinson*, statutory limitations on damages do not implicate the right to a jury trial under the West Virginia Constitution.²¹ Again, “reexamination” of jury verdicts under “law” is expressly permitted under the West Virginia Constitution. Thus, none of the appellants’ “right to jury trial” arguments have any merit.²²

The Legislature has established damages caps not only for medical malpractice suits, but for suits against the State and its political subdivisions. If the noneconomic damages cap in medical malpractice cases violates the right to a jury trial, then so do those statutes.

¹⁹ W. VA. CODE § 17A-6A-16(1) (treble damages for cancellation of automotive dealers agreements); W. VA. CODE § 31-3-3 (treble damages for removing, altering, or defacing log or timber marks); W. VA. CODE § 37-15-6a(b) (treble damages for certain statutory violations by landlords); W. VA. CODE § 47-18-9 (treble damages for certain violations of antitrust provisions); W. VA. CODE § 59-3-7(c) (treble damages against newspapers charging in excess of statutory rates); W. VA. CODE § 61-3-48a (treble damages for damage or conversion of timber, trees, logs, posts, fruit, nuts, growing plant or product of any growing plant); W. VA. CODE § 61-3-50(b) (treble damages for unauthorized transfer of certain audio or video recordings).

²⁰ *State ex rel. Palumbo v. Graley's Body Shop, Inc.*, 188 W. Va. 501, 506 n.5, 425 S.E.2d 177, 181 n.5 (1992)(“other courts have recognized that treble damages do not constitute a criminal penalty.”)(citations omitted).

²¹ Incredibly, nowhere in the section of the appellants’ brief devoted to the jury trial argument is this addressed. Appellants’ Brief at 33-40. Instead, they make the argument specifically rejected by this Court in *Robinson* as if the opinion had never been written. Moreover, they ignore the fact that this principle has been applied by the Court in other contexts for over 100 years. See, e.g., *Addair v. Majestic Petroleum Co., Inc.*, 160 W. Va. 105, 110, 232 S.E.2d 821, 824 (1977); *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S.E. 447 (1883).

²² It is ironic that the appellants seek to rely on federal law to support their contention that legislatures lack the power to place limits on damages as this Court relied upon *Davis v. Omitowaju*, *supra* (rejecting constitutional claims under federal “reexamination” which is virtually identical to West Virginia’s “reexamination” clause); *Franklin v. Mazda Motor Co.*, 704 F. Supp. 1325, 1331-32 (D. Md. 1989)(same); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989)(same). See *Robinson*, *supra* at 731, 414 S.E.2d at 888.

Indeed, like the West Virginia Legislature, Congress has enacted various caps on damages. See, e.g., *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008) (“Class actions are specifically mentioned in the TILA provision addressing claims for damages. See § 1640(a)(2)(B). There, Congress established a cap of the lesser of \$500,000 or 1 percent of the creditor’s net worth on the total recovery of damages in class actions.”); *Abner v. Kansas City Southern Railroad Co.*, 513 F.3d 154, 163 (5th Cir. 2008) (“Congress has set a cap on the sum of compensatory and punitive damages.”); *Gandy Nursery, Inc. v. United States*, 318 F.3d 631, 638 (5th Cir. 2003) (“Although Congress raised this cap to \$1,000,000.00 in 1996, see 26 U.S.C. § 7433(b), the higher damages cap applies only ‘in the case of proceedings commenced after the date of the enactment of this Act [July 30, 1996].’”).

The United States Supreme Court cases cited by the appellants are completely inapposite. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998), did not involve any cap on damages, but merely involved whether a copyright plaintiff was entitled to a jury trial. In this case, no one challenged the plaintiffs’ right to a jury trial and a jury trial was conducted. Likewise, *Hetzl v. Prince William County*, 523 U.S. 208, 211 (1998), did not involve any cap on damages, but involved a district court’s absolute, as opposed to a conditional, remittitur of damages and, indeed, the Court confirmed a district court’s right to order a remittitur as long as the plaintiff is offered a new trial: “The Court of Appeals’ writ of mandamus, 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.” Indeed, the Court itself has held, “[T]he Constitution imposes a substantive limit on the size of punitive damages awards.” *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994), obviously irrespective of a jury’s verdict.

Moreover, neither *Lakin* nor *Nestlehutt* are persuasive on the issue. First, *Lakin* was rejected in *Verba*, supra at 38 n.1, 552 S.E.2d at 414 n.1. Second, *Lakin* did not involve a medical malpractice cap, but a cap that applied to all cases. *Lakin*, supra at 66, 987 P.2d 463, 467. Third, the *Lakin* court rejected the analysis of the Virginia Supreme Court, our sister state, in *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 528-29 (1989), in favor of the analysis of the Washington Supreme Court in *Sofie*, supra, but this Court embraced *Etheridge* in *Robinson*, supra at 728-29, 414 S.E.2d at 885-86, but rejected *Sofie* in both *Verba*, supra at 38 n.1, 552 S.E.2d at 414 n.1 (Starcher, J., dissenting), and *Robinson*, supra at 728-29, 414 S.E.2d at 885-86. Fourth, the constitutional provisions in *Lakin*, supra at 67 n. 2 and 3, 987 P.2d at 467, n. 2 and 3, (“no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say that there is no evidence to support the verdict,” ORE. CONST., ART. VI, § 3, and “In all civil cases the right of Trial by Jury shall remain inviolate,” ORE. CONST., ART. I, § 17), are completely different than in West Virginia. Fifth, as noted by the court in *Nestelhutt*, supra at 738 n.8, 691 S.E.2d at 738 n.8, Georgia’s constitutional “jury trial” provision, “[t]he right to trial by jury shall remain inviolate.” GA. CONST., ART. I, § I, is much more restrictive than other states, like West Virginia, where its constitutional provision merely states, “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, which on its face allows the reexamination of jury verdicts “according to . . . law” and a statute is obviously a “law.” So, comparing Oregon’s and Georgia’s constitutional provisions with West Virginia’s is like comparing apples and orangutans. Finally, *Nestlehutt*, supra at 735-36, 691 S.E.2d at 223, relies

C. THE CAP ON NONECONOMIC DAMAGES DOES NOT VIOLATE THE SEPARATION OF POWERS BECAUSE, AS THIS COURT HAS ALREADY HELD, THE LEGISLATURE HAS THE RIGHT TO ALTER, AMEND, CHANGE, REPUDIATE, OR ABROGATE THE COMMON LAW.

As the appellants acknowledge, “In 2001, this Court rejected a separation of powers challenge . . . because the Court reasoned that such legislative action was within the Legislature’s power to alter or amend the common law.”²³ Indeed, as stated in *Verba*²⁴:

In *Edmonds v. Murphy*, 83 Md. App. 133, 149, 573 A.2d 853, 861 (1990), *aff’d*, 325 Md. 342, 601 A.2d 102 (Md.1992), the Court of Special Appeals of Maryland recognized that the power to alter the common law includes “the power to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize.” (*Quoting Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1336 (1989)). The court reasoned “that if the legislature can, without violating separation of powers principles, establish statutes of limitation, establish statutes of repose, create presumptions, create new causes of action and abolish old ones, then it also can limit noneconomic damages without violating the separations of powers doctrine[.]” *Id.* We concur with this reasoning and acknowledge the power of the legislature to set reasonable limits on recoverable damages in civil causes of action.

The appellants’ separation of powers arguments are not only contrary to *Verba*, they are not new and, in some respects, are specious.

First, the appellants argue that, “A court has no judicial authority ‘to substitute its opinion for that of the jury,’”²⁵ but courts routinely substitute their judgment for that of juries. For example, R. Civ. P. 50 authorizes trial judges to not only set aside jury verdicts, but to actually enter final judgments, as a matter of law, for the party against whom the jury has awarded

upon *Lakin*, *Moore*, and *Sofie*, all of which have been rejected by this Court and other courts whose analysis has been adopted by this Court.

²³ Appellants’ Brief at 40.

²⁴ *Supra* note 2 at 35, 552 S.E.2d at 411.

²⁵ Appellants’ Brief at 42 (citation omitted).

damages. R. Civ. P. 59 authorizes trial judges to set aside jury verdicts and to award new trials. R. Civ. P. 60 authorizes trial judges to set aside jury verdicts because of newly discovered evidence, fraud, misrepresentation, or other reasons justifying various forms of relief from a jury's verdict. As previously noted, the federal and state constitutions require trial judges to set aside excessive punitive damages awards and many statutes require trial judges either to increase or decrease jury verdicts. The appellants' argument that jury verdicts are somehow immutable is absurd.

Second, the appellants argue that legislative limits on damages violate federal law citing "the seminal case of *Marbury v. Madison*,"²⁶ but someone apparently forgot to tell Congress and the federal courts as there are many federal statutes imposing caps on damages which have been upheld by federal courts. For example, in *Franklin v. Mazda Motor Corp.*,²⁷ cited by this Court in *Verba*, the court, in upholding the constitutionality of a Maryland statute limiting noneconomic damages in personal injury actions to \$350,000, stated as follows:

As the Supreme Court has noted:

Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, e.g., *Silver v. Silver* [280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221 (1929)], *supra*, (automobile guest statute); *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 [3 S. Ct. 679, 27 L. Ed. 1038] (1883) (limitation of vessel owner's liability); *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F. Supp. 338 (SDNY 1944) (Warsaw Convention limitation on recovery for injuries suffered during

²⁶ Appellants' Brief at 41-42 (citation omitted).

²⁷ *Supra* at 1331-32 (emphasis supplied).

international air travel). *Cf. Thomason v. Sanchez*, 539 F.2d 955 (CA3 1976) (Federal Driver's Act).

Duke Power Co., 438 U.S. at 88 n. 32, 98 S. Ct. at 2638 n. 32 (citations omitted); *see also Tull v. United States*, 481 U.S. at 427, 107 S. Ct. at 1840 (“Congress could, I suppose, create a private cause of action by one individual against another for a fixed amount of damages . . .”) (Scalia, J., with Stevens, J., concurring in part and dissenting in part).

Thus, their solemn invocation of *Marbury* notwithstanding, the appellants' separation of powers argument finds absolutely no support in federal law.

Finally, appellants ignore two rather obvious constitutional impediments to their separation of powers argument. First, W. VA. CONST., ART. VIII, § 13, which is the article of our West Virginia Constitution dealing specifically with the judiciary, expressly states, “Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue [to be] the law of this State until altered or repealed by the legislature.” (emphasis supplied). The Legislature did not enact this provision; rather, it was approved by the people when they approved the Judicial Reorganization Amendment of 1974.

How can a statute enacted pursuant to a provision that the people adopted as part of the article of the West Virginia Constitution governing the judiciary violate the separation of powers? Moreover, to “repeal” the common law means to abrogate it completely, which the Legislature has done on multiple occasions.

Here, the Legislature has not “repealed” the common law of damages in medical malpractice cases; rather, it has simply “altered” it to place a cap on noneconomic damages. Second, W. VA. CONST., ART. III, § 13, does not preclude reexamination of a jury verdict, but rather states, “No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.” (emphasis supplied). Thus, both this Court and the Legislature are

expressly authorized to “reexamine” jury verdicts and there is no separation of powers violation when the Legislature does what it is expressly authorized in the West Virginia Constitution to do.

D. THE CAP ON NONECONOMIC DAMAGES DOES NOT VIOLATE ACCESS TO THE COURTS BECAUSE, AS THIS COURT HAS ALREADY HELD, A STATUTE LIMITING A REMEDY DOES NOT DEPRIVE A PLAINTIFF OF A “CERTAIN REMEDY” AND THE LEGISLATURE’S POWER TO ABROGATE THE COMMON LAW INCLUDES THE POWER TO ELIMINATE CERTAIN CAUSES OF ACTION AND REMEDIES.

The appellants’ next argument, that the cap deprives plaintiffs of access to the courts and denies to them a “certain remedy,” again completely ignores this Court’s jurisprudence.

As recently as 2008, for example, this Court rejected a “certain remedy” challenge to employer immunity from common law causes of action for negligence, stating as follows:

Regarding Appellant’s second assignment of error, Appellant asks this Court to find that the circuit court’s decision represents an unconstitutional violation of West Virginia’s Certain Remedies Clause, as its decision violated her right to seek redress. The Certain Remedies Clause found in Article III, § 17 of the West Virginia Constitution, says:

[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.

In assessing the merits of this argument, we find Appellant’s argument wholly unconvincing and thus summarily dismiss it. Under the laws of West Virginia, a claim seeking workers’ compensation benefits could have been filed. Additionally, Appellant’s case below, Civil Action No. 06-C-613, remains pending before the circuit court as a deliberate intent case against Appellee Union Drilling. The record also reflects that Appellant is currently pursuing a negligent entrustment theory against Linda Hall, the owner of the vehicle, in order to obtain coverage under a homeowner’s policy of insurance. Thus, we have no reason to believe that Appellant will be left without any form of redress violating our Certain Remedies Clause.²⁸

²⁸ *Falls v. Union Drilling, Inc.*, 223 W. Va. 68, 77-78, 672 S.E.2d 204, 213-14 (2008)(emphasis supplied and footnotes omitted).

In other words, as long as an injured party is afforded “some remedy,” a statute cannot violate the right to a “certain remedy.” As workers’ compensation benefits provide “some remedy,” albeit limited, the statutory immunity provided to employers for common law negligence actions cannot be deemed unconstitutional.²⁹ Here, the appellants were afforded a remedy and, indeed, recovered a total of \$629,000 in damages.³⁰ Thus, their “certain remedy” argument simply has no merit.³¹

²⁹ Indeed, because the Legislature can completely abrogate common law causes of action, statutes may constitutionally provide no remedy. For example, although it existed at common law, the causes of action for breach of the promise of marriage and alienation of affections has been completely abrogated, W. VA. CODE § 56-3-2a, the constitutionality of which was affirmed by this Court in *Wallace v. Wallace*, 155 W. Va. 569, 184 S.E.2d 327 (1971), *overruled on other grounds*, *Belcher v. Goins*, 184 W. Va. 395, 400 S.E.2d 830 (1990). Indeed, as this Court succinctly observed in *Wallace*, *supra* at 579, 184 S.E.2d at 333, “No provision of the Constitution of this State preserves or guarantees the existence of the common law cause of action” For example, in *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190, 640 S.E.2d 540 (2006), this Court upheld a statute barring the recovery of any damages for so-called mental/mental claims and, as noted in a concurring opinion:

“The legislature has the power to alter, amend, change, repudiate, or abrogate the common law.” *Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001). . . .

This Court has long held that “[i]t is not the province of the courts to make or supervise legislation[.]” *State v. General Daniel Morgan Post No. 548*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). We “may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations[.]” *Lewis*, 185 W. Va. at 692, 408 S.E.2d at 642.

Id. at 207, 640 S.E.2d at 557 (Davis, C.J., concurring). For example, spouses who otherwise would have a common law cause of action for loss of consortium have no remedy whatsoever under the workers’ compensation statute. *Id.* at 208, 640 S.E.2d at 558 (“Workers’ compensation has never been intended to make the employee whole – it excludes benefits for pain and suffering, for loss of consortium, and it provides a cap on wage benefits.”)(citation omitted). Thus, Ms. MacDonald’s argument that the MPLA cap violates her right of access to the courts and a certain remedy has no merit.

³⁰ Ms. MacDonald complains that her suit was “completely eviscerated,” Appellants’ Brief at 46, but she was afforded a jury trial and, after application of the cap, is certainly free to share Mr. MacDonald’s award of noneconomic damages. Her claim, however, as noted, is

E. THE CAP ON NONECONOMIC DAMAGES DOES NOT VIOLATE EQUAL PROTECTION OR CONSTITUTE SPECIAL LEGISLATION BECAUSE, AS THIS COURT HAS ALREADY HELD, THE RIGHT TO SEEK MONETARY DAMAGES IS ECONOMICALLY-BASED AND LIMITATIONS ON THAT RIGHT ARE NOT SUBJECT TO STRICT SCRUTINY.

As the appellants acknowledge, “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* thus characterized the cap . . . as ‘simply an economic regulation, which is entitled to wide judicial deference.’”³²

derivative of his claim, and this Court has repeatedly recognized that consortium claims may be treated differently than primary claims.

³¹ In their brief, the appellants resurrect the same economic and policy arguments previously rejected by this Court in *Robinson* and *Verba*. Appellants’ Brief at 49-50. As previously noted, this Court has consistently held that it will “not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.” *Bias, supra* note 18 at 207, 604 S.E.2d at 557 (Davis, C.J., concurring)(citation omitted). With respect to the cap on noneconomic damages, the Legislature made specific findings after conducting hearings and being presented with conflicting evidence. W. VA. CODE § 55-7B-1 (“That it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage. . . . Therefore, the purpose of this article is to provide for a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to: (1) Compensation for injury and death; (2) The regulation of rate making and other practices by the liability insurance industry, including the formation of a physicians’ mutual insurance company and establishment of a fund to assure adequate compensation to victims of malpractice; and (3) The authority of medical licensing boards to effectively regulate and discipline the health care providers under such board.” Of course, the opponents of this legislation disagreed with the Legislature’s findings and policy choices, but as this Court has consistently held, their remedy lies not with the judiciary, but with the legislative branch. Thus, the appellants and others may take their “evidence available to the legislature,” Appellants’ Brief at 17-32, including their newspaper and law review articles, none of which by the way are contemporaneous with adoption or reduction of noneconomic damages in medical malpractice cases, back to the Legislature and try to convince it of the merits of their policy arguments.

³² Appellants’ Brief at 12-15.

Without any authority, however, and ignoring this Court’s contrary authority, the appellants advocate a “strict scrutiny” test based upon the premise that “the cap indisputably impinges on . . . the fundamental right of a trial by jury and the cluster of rights to access to the courts, a certain remedy, and complete justice.”³³

Of course, if as this Court and others have held, a statutory damages cap does not implicate the right to a jury trial because the reexamination clause does not apply to the Legislature and does not implicate the right of access to the courts or a certain remedy because the Constitution expressly permits the Legislature to modify or abrogate the common law, then the appellants fail to explain how strict scrutiny is supposed to apply.

If the cap violated the right to a jury trial, the right of access to the courts, or the right to a certain remedy, then the appellants would not need to resort to a strict scrutiny analysis. Simply put, the appellants’ strict scrutiny argument makes no sense.³⁴

Tacitly conceding the lack of merit in their “strict scrutiny” argument, the appellants alternatively advocate an “intermediate scrutiny” analysis.³⁵ But again, the source of the

³³ *Id.*

³⁴ Indeed, appellants cite not a single case in which any court has applied a strict scrutiny test in an equal protection challenge to a statutory cap on damages.

³⁵ Appellants’ Brief at 15-17. Their brief cites *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) and, although that court stated it was applying an intermediate scrutiny test, it was expressly overruled in *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 760, 917 A.2d 707, 720 (2007), stating, “we believe that we must abandon the intermediate scrutiny test we developed in *Carson* because related principles of law have so far developed as to have left this test ‘no more than a remnant of abandoned doctrine.’”(citation omitted). The only other case relied upon is *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978), but nowhere in that opinion does the court state that it is applying an intermediate scrutiny test and, indeed, it applied a rational basis test as this Court did in *Robinson* and *Verba*, and as has a legion of courts considering equal protection challenges to caps on damages.

appellants' argument is the right to a jury trial³⁶ and, as discussed, this Court has steadfastly agreed with other courts that the reexamination clause does not apply to the Legislature. Once the foundation of the appellants' "intermediate scrutiny" argument fails, *i.e.*, a legislative enactment cannot compel reexamination of a jury verdict,³⁷ their entire argument collapses.

Finally, if the Court does not adopt their arguments for "strict" or "intermediate" scrutiny, the appellants assert that the cap lacks a "rational basis."³⁸ The core problem with their argument, however, is that merely because it "treats medical malpractice victims differently from others"³⁹ does not compel its invalidation as many statutes differentiate between causes of action.

For example, those injured by a breach of a promise to marry recover nothing;⁴⁰ those injured by an alienation of affections recover nothing; those suffering emotional damages as the result of workplace accidents recover nothing;⁴¹ those enduring pain and suffering as a result of a

³⁶ *Id.* at 25 ("West Virginia's jury-trial right, if not fundamental, surely is an important substantive right, meriting intermediate scrutiny.").

³⁷ None of the cases cited, of course, by the appellants, involve the impact of a statute on reexamination of a jury's verdict and, as already discussed, this Court has held that the reexamination clause applies only to the judiciary and, even then, allows reexamination of a jury verdict under R. CIV. P. 50, R. CIV. P. 59, and R. CIV. P. 60, and pursuant to constitutional limitations on punitive damage awards. To accept the appellants' argument would be to accept the proposition that these rules and limitations are likewise unconstitutional because of the sanctity of a jury's verdict.

³⁸ Appellants' Brief at 17-32.

³⁹ *Id.*

⁴⁰ Syl. pt. 4, *Wallace, supra* ("Section 2a, Article 3, Chapter 56, Code, 1931, as amended, which provides that no civil action shall lie or be maintained in this State for breach of promise to marry or for alienation of affections unless such action was instituted prior to the effective date of the statute, is constitutional and valid.").

⁴¹ *Id.*

workplace accidents recover nothing;⁴² those suffering consortium damages as the result of workplace accidents recover nothing;⁴³ those suffering emotional distress as the result of workplace accidents not causing physical injuries recovery nothing;⁴⁴ those injured by the acts of

⁴² *Bias v. Eastern Associated Coal Corp.*, supra at 208, 640 S.E.2d at (Davis, C.J., concurring)(“The exclusivity provision is the bedrock of the workers’ compensation system. The legislature has determined that it is the quid pro quo for workers receiving a guarantee of prompt benefits for work-related injuries without regard to fault or common-law defenses and without the delay inherent in tort litigation. Workers’ compensation has never been intended to make the employee whole--it excludes benefits for pain and suffering, for loss of consortium, and it provides a cap on wage benefits. Thus, the exclusion of an independent tort action ... is not contrary to public policy or the statutory scheme. Any enlargement of benefits and remedies must originate with the legislature.”)(citation omitted).

⁴³ *Id.* This alone demonstrates the absurdity that because Ms. MacDonald’s claim was “eviscerated” by the cap, it must fail for violation of equal protection. Appellants’ Brief at 7-11. If that were the case, then the workers’ compensation statute’s failure to provide damages for the spouses of workers who suffer workplace injuries would render it unconstitutional. A medical malpractice suit by a patient’s spouse is derivative. *Jones v. Aburahma*, 215 W. Va. 521, 522 n.1, 600 S.E.2d 233, 234 n.1 (2004)(“Mr. Jones also filed a derivative loss of consortium claim.”). And, a “derivative cause of action for loss of consortium cannot provide greater relief than the relief permitted for the primary cause of action.” *West Virginia Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 54, 602 S.E.2d 483, 497 (2004)(citation omitted). Here, the statute provides a per occurrence cap of \$250,000/\$500,000 cap on noneconomic damages, see Syl. pt. 6, *Robinson*, supra (“W. Va. Code, 55-7B-8, as amended, which provides that ‘the maximum amount recoverable as damages for noneconomic loss’ in a medical professional liability action ‘against a health care provider’ is \$1,000,000, applies as one overall limit to the aggregated claims of all plaintiffs against a health care provider, rather than applying to each plaintiff separately.”). Indeed, in *Robinson*, supra at 732 n.11, 414 S.E.2d at 889 n. 11, this Court expressly stated, “Like the United States Court of Appeals for the Fourth Circuit in *Starns* and *Boyd v. Bulala*, we believe awards in excess of the statutory ‘cap’ should be set aside by eliminating awards to secondary claimants, such as for consortium, prior to eliminating any excessive amount for the noneconomic loss incurred by the physically injured person. Thus, here, each of the parents’ respective \$1,000,000 awards are set aside, and \$1,500,000 of the award for the noneconomic loss of Mark A. Robinson, II is then set aside, leaving a recoverable \$1,000,000 award for the noneconomic loss of Mark A. Robinson, II.”)(emphasis supplied). Obviously, as discussed in *Robinson*, West Virginia is not alone in applying caps to derivative claims in this manner and appellants cite not a single case in which any court has declared any statute unconstitutional because it failed to provide a recovery for derivative claims, including claims for loss of consortium.

⁴⁴ Syl. pt. 3, *Bias*, supra (“An employee who is precluded by W. VA. CODE § 23-4-1f (1993) from receiving workers’ compensation benefits for a mental injury without physical

a ski patrol rendering emergency care recovery nothing;⁴⁵ and those injured by acts of the State that are not covered by insurance recover nothing.⁴⁶ In each of these situations, legislative policy decisions have been made to bar any recovery. So, appellants' argument that it is unconstitutional to limit their recovery to only \$629,000, which is obviously better than nothing, is without merit.

Moreover, there are many other statutes which limit claims or the damages for those claims. For example, those injured in whitewater accidents are treated differently than other plaintiffs;⁴⁷ those injured in skiing accidents are treated differently than other plaintiffs;⁴⁸ those injured in equestrian accidents are treated differently than other plaintiffs;⁴⁹ those involved in ATV accidents using the facilities of the Hatfield-McCoy Regional Recreation Authority are treated differently than other plaintiffs;⁵⁰ those receiving care from physicians who render services at school athletic events are treated differently than other plaintiffs;⁵¹ those involved in accidents on excursion train trips organized by non-profits are treated differently than other

manifestation cannot, because of the immunity afforded employers by W. VA. CODE § 23-2-6 (1991), maintain a common law negligence action against his employer for such injury.”).

⁴⁵ W. VA. CODE § 57-7-16(a).

⁴⁶ Syl. pt. 3, *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). Moreover, W. Va. Code § 55-17-4(3) provides, “No government agency may be ordered to pay punitive damages in any action,” which would be unconstitutional under appellants' analysis.

⁴⁷ W. VA. CODE §§ 20-3B-1, et seq.

⁴⁸ W. VA. CODE §§ 20-3A-1, et seq.

⁴⁹ W. VA. CODE §§ 20-4-1, et seq.

⁵⁰ W. VA. CODE §§ 20-15-1, et seq.

⁵¹ W. VA. CODE § 55-7-19(a).

plaintiffs;⁵² those injured as a result of the willful, malicious, or criminal acts of children are treated differently than other plaintiffs;⁵³ and, those involved in accidents involving political subdivisions are treated differently than other plaintiffs.⁵⁴ Obviously, if the Legislature can completely abrogate common law causes of action, as it has done, it can limit common law causes of action, and has done so in many contexts other than medical professional negligence.

For example, in *O'Dell v. Town of Gauley Bridge*,⁵⁵ the plaintiffs, as in this case, argued that a statute violated their equal protection rights because it treated their tort action different than other identical tort actions. Specifically, under the Tort Claims and Insurance Reform Act, political subdivisions are immune from suit if the injured party has workers' compensation benefits available for the particular injury involved. Rejecting plaintiffs' argument that something greater than a rational basis test was required because the statute impacted their right to recover any tort damages, this Court stated:

We have recognized that "the right to bring a tort action for damages, even though there is court involvement, is economically based and is not a 'fundamental right' for . . . state constitutional equal protection purposes." *Robinson v. Charleston Area Medical Ctr.*, 186 W. Va. at 728-29, 414 S.E.2d at 885-86. Accord *Lewis v. Canaan Valley Resorts, Inc.*, supra; *Gibson v. West Virginia Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991). Thus, for purposes of equal protection

⁵² W. VA. CODE § 55-7-20.

⁵³ W. VA. CODE § 55-7A-2 ("Recovery hereunder shall be limited to the actual damages based upon direct out-of-pocket loss, taxable court costs, and interest from date of judgment.").

⁵⁴ W. VA. CODE §§ 29-12A-1, *et seq.* Indeed, W. VA. CODE § 29-12A-7(a) provides, "In any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited," which would be unconstitutional under appellants' analysis. Moreover, W. VA. CODE § 29-12A-7(b) provides, "[D]amages awarded that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences that represent noneconomic loss shall not exceed five hundred thousand dollars in favor of any one person," which also would be unconstitutional under appellants' analysis.

⁵⁵ 188 W. Va. 596, 425 S.E.2d 551 (1992).

analysis, the legislative classifications involved in this case “are subjected to a minimum level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose.” *Randall v. Fairmont City Police Dep’t*, 186 W. Va. 336, 345, 412 S.E.2d 737, 746 (1991).⁵⁶

Applying this test in *O’Dell*, even though it resulted in plaintiffs having absolutely no cause of action and, in the case of Mr. O’Dell, having absolutely no recovery for loss of consortium, this Court held:

W. Va. Code, 29-12A-5(a), was designed to make liability insurance more affordable to political subdivisions by reducing the number of tort cases filed against them. Subsection (11) did so by creating a narrow bar as to suits by those plaintiffs who meet the foregoing four-criterion test. When viewed from the perspective of the other class of plaintiffs who are barred from suing a political subdivision by virtue of receipt of workers' compensation benefits, i.e., the subdivision's own employees, and in view of the clear legislative intent to protect political subdivisions, the disparity is not such that the line drawn violates equal protection.⁵⁷

Obviously, the instant case is no different than *O’Dell*: (1) the right to bring a tort action for medical negligence is not a fundamental right, but is economically based; (2) any distinctions in the right to bring a tort action are subject to a minimum level of scrutiny; (3) the statutory caps on noneconomic damages were designed to make liability insurance more affordable to health care providers; (4) increasing the availability and affordability of liability coverage, an expressly stated purpose of the MPLA, is a legitimate governmental purpose; and (5) limiting damages in suits against health care providers bears a rational relationship to this legitimate governmental purpose. Unless this Court intends to overrule not only *Robinson* and *Verba*, but *O’Dell* and any number of cases in which it has upheld the abolition or limitations on tort actions, it should reject appellants’ rational basis challenge in this case.

⁵⁶ 188 W. Va. at 602, 425 S.E.2d at 557 (emphasis supplied).

⁵⁷ *Id.* at 603-04, 425 S.E.2d at 558-59 (emphasis supplied).

The appellants also ignore something that should be fairly obvious – the Legislature has supplanted the common law cause of action for medical professional negligence with a statutory cause of action. Just as it did when it enacted the workers’ compensation statute, the Legislature has redefined every aspect of the common law cause of action of medical professional negligence. It has defined which persons may sue for medical professional negligence.⁵⁸ It has defined which persons and entities are subject to suits;⁵⁹ how the joint liability of multiple defendants is to be allocated;⁶⁰ and when third-party claims may be filed.⁶¹ It has defined what types of acts may form the predicate for suit⁶² and has placed greater restrictions on suits arising from injuries suffered during the course of emergency medical treatment.⁶³ It has defined when the cause of action must be filed.⁶⁴ It has defined what must be done prior to filing suit,⁶⁵ exceptions to pre-suit requirements;⁶⁶ and when pre-suit mediation must be used.⁶⁷ It has defined some standards for document production,⁶⁸ prescribed certain time frames for the

⁵⁸ W. VA. CODE §§ 55-7B-2(l), (m), and (n).

⁵⁹ W. VA. CODE §§ 55-7B-2(f) and (g).

⁶⁰ W. VA. CODE § 55-7B-9

⁶¹ W. VA. CODE § 55-7B-9b.

⁶² W. VA. CODE §§ 55-7B-2(e) and (i).

⁶³ W. VA. CODE § 55-7B-9c.

⁶⁴ W. VA. CODE § 55-7B-4.

⁶⁵ W. VA. CODE § 55-7B-6(b).

⁶⁶ W. VA. CODE §§ 55-7B-6(c) and (d).

⁶⁷ W. VA. CODE §§ 55-7B-6(f) and (g).

⁶⁸ W. VA. CODE § 55-7B-6a.

processing of cases;⁶⁹ and provided for summary jury trials.⁷⁰ It has defined each and every of the elements of proof.⁷¹ It has defined when expert witnesses are required and prescribed criteria for the admissibility of expert opinion.⁷² It has defined what types of injuries qualify for the recovery of damages.⁷³ It has defined what damages are available.⁷⁴ It has set limits on the amount of noneconomic damages recoverable.⁷⁵ It has defined a collateral source rule and how it is to be applied.⁷⁶ It has defined a role for a state agency, the Board of Risk and Insurance Management⁷⁷ and created a self-funded program to make medical professional liability insurance more available and affordable.⁷⁸ Indeed, it is difficult to think of any aspect of medical professional liability suits that is not defined in the MPLA, but is defined with reference to the common law.

Consequently, just as the workers' compensation statute supplanted the common law applicable to suits arising from workplace injuries,⁷⁹ the MPLA has supplanted the common law

⁶⁹ W. VA. CODE § 55-7B-6b.

⁷⁰ W. VA. CODE § 55-7B-6c.

⁷¹ W. VA. CODE § 55-7B-3.

⁷² W. VA. CODE § 55-7B-7.

⁷³ W. VA. CODE § 55-7B-2(m).

⁷⁴ W. VA. CODE § 55-7B-2(k).

⁷⁵ W. VA. CODE § 55-7B-8.

⁷⁶ W. VA. CODE § 55-7B-2(b); W. VA. CODE § 55-7B-9a.

⁷⁷ W. VA. CODE § 55-7B-2(a).

⁷⁸ W. VA. CODE § 55-7B-12.

⁷⁹ Syl. pt. 2, *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S.E.2d 138 (1996) (“W. VA. CODE 23-4-2(c) (1991) represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be

applicable to suits arising from health care injuries, which explains the references to “a statutory medical negligence cause of action.”⁸⁰ Of course, where a statutory cause of action, like a suit for medical professional negligence, is involved, the Legislature’s authority to determine what damages will be recoverable is plenary.⁸¹ Consequently, the appellants’ equal protection arguments, grounded in the alleged infringement of the constitutional right to a jury trial, are wholly without merit.⁸²

Appellants’ rational basis equal protection arguments have already been rejected by this and other courts. They first argue that the cap does not treat similarly situated persons in an equal manner, Appellants’ Brief at 18-20, but each of their examples does not involve similarly situated persons.

First, persons with severe injuries and persons with slight injuries, the appellants’ first example, are not similarly situated and appellants cite no cases in which courts have used that distinction to invalidate a damages cap on equal protection grounds. For evidence that cases are rare where injuries are severe, it has been nearly a decade since this Court’s decision in *Verba* without reconsideration of the constitutionality of the cap.

replaced by a statutory direct cause of action by an employee against an employer expressed within the workers’ compensation system.”).

⁸⁰ *Riggs*, supra note 3 at 661, 656 S.E.2d at 116 (Davis, C.J., concurring).

⁸¹ *Bullman v. D&R Lumber Co.*, 195 W. Va. 129, 133, 464 S.E.2d 771, 775 (1995)(“when a statute creates a cause of action and provides the remedy, the remedy is exclusive unless the statute states otherwise.”).

⁸² Indeed, even as one of the dissenters in *Verba*, supra note 2 at 41 n.1, 552 S.E.2d at 417 n.1, conceded, “[A]s appellee rightly points out, the present case involves a statutory cause of action for wrongful death, which falls outside the ambit of this constitutional provision.” (McGraw, J., dissenting).

Second, persons with large economic damages and those with small economic damages are not similarly situated, which is probably why the appellants cite no cases in which courts have used that distinction to invalidate a damages cap on equal protection grounds. Certainly, Bill Gates' economic damages would be much greater than Joe the Plumber's, but the value of their noneconomic damages would be the same. Frankly, this argument appears to be more about plaintiffs' counsel, rather than plaintiffs. If a medical malpractice claimant suffers little economic loss, such is wholly irrelevant to the value of his or her noneconomic loss.

Third, persons who suffer noneconomic damages by medical malpractice and those who suffer such damages from other torts are not any more similarly situated than a host of other examples, which is probably why appellants cite no cases in which courts have used that distinction to invalidate a damages cap on equal protection grounds. For example, a worker who suffers emotional distress injuries without physical injury as a result of a workplace injury involving a co-worker recovers nothing, but that same worker suffering the same workplace injury as a result of a third-party's negligence may recover, or a worker who is injured in an automobile accident with another employee during the course and scope of employment recovers nothing from his fellow employee, but a worker who is injured in an automobile accident with a third party may recover.

Fourth, persons who suffer noneconomic damages as a result of the professional negligence of one provider and those who suffer such damages as a result of multiple providers are not similarly situated, which is probably why appellants cite no cases in which courts have used that distinction to invalidate a damages cap on equal protection grounds. Whether a plaintiff suffers \$600,000 in noneconomic damages as a result of the professional negligence of

one provider or three providers, the cap itself is not unconstitutional because it operates to reduce the award to either \$250,000 or \$500,000, whichever applies.

Finally, spouses who suffer loss of consortium as a result of medical malpractice rather than other torts are not any more similarly situated than a host of other examples, which is probably why appellants cite no cases in which courts have used that distinction to invalidate a damages cap on equal protection grounds. For example, a spouse who suffers loss of consortium as a result of a workplace injury recovers nothing, while a spouse who suffers a loss of consortium as a result of another tort may recover damages.

The appellants' "evidentiary" presentation to attempt to demonstrate that the cap is not rationally related to what even they concede is a legitimate governmental purpose, Appellants' Brief at 20, is all very interesting, but is directed to the wrong forum. As West Virginia citizens, they have a right to go to the Legislature with their "evidence" and attempt to convince the Legislature that its findings in 1986 and 2003 were wrong. W. VA. CODE § 55-7B-1.

As is often the case, for every statistic and study cited by the opponents of medical malpractice reform, the proponents can also cite statistics and studies. For example, the United States Department of Health and Human Services, hardly an advocacy organization, studied the impact of state laws limiting malpractice awards on the geographic distribution of physicians, including in West Virginia, and concluded:

Between 1970 and 2000, the supply of physicians per capita increased at a faster rate in those States that passed tort reform laws that capped damage payments in malpractice cases (see Tables 1A and Table 1B). In 1970, before any States had enacted caps, the average number of physicians per 100,000 population per county was 69 in States that eventually enacted caps between 1970 and 2000, compared with 67 in States that never enacted caps. This difference (69 vs. 67) is statistically insignificant ($P=0.22$). However, by the year 2000, the States that had enacted caps had a significantly higher number of doctors per 100,000 population per county (135) compared with States that did not enact caps (120) ($P=0.006$).

This trend indicates that caps may have possibly increased the availability of physicians. To examine whether this was indeed the case, we controlled for other State and county characteristics that may have also impacted physician availability (such as medical residency programs, HMO penetration, etc.). In particular, this study utilizes information about such numerous State characteristics in the years 1985, 1990, 1995, and 2000, as well as information about numerous county characteristics in 1996, 1997, 1998, 1999, and 2000 to ascertain the relationship between State tort reform laws that cap damage payments in malpractice cases and the supply of physicians. This study finds evidence supporting the claim that States with caps on noneconomic damages awards or caps on total damage awards benefit from about 12 percent more physicians per capita than States without such laws.⁸³

As Mark Twain famously said, “There are three kinds of lies: lies, damn lies, and statistics,”⁸⁴

and for every study, statistic, or newspaper article referenced by appellants, a contradictory

⁸³ U.S. Dept. of Health & Human Resources, Agency for Healthcare Research and Quality, Impact of State Laws Limiting Malpractice Awards on Geographic Distribution of Physicians, at <http://www.ahrq.gov/research/tortcaps/tortcap2.htm> (emphasis supplied). Similarly, in 2003, the Maine legislature enacted the Dirigo Health Act which required Maine’s superintendent of insurance to research and submit a report regarding “the impact on the cost of such insurance of a cap on non-economic damages of \$250,000.” ME. R. CIV. P. 80M, EXHIBIT. The report concluded, “A \$250,000 cap on non-economic damages could reduce expected loss and allocated loss adjustment expense by 15%-22%. A non-economic damage cap of \$350,000 could produce reductions of 12%-17%, while a \$500,000 cap has estimated reductions of 8%-12%.” *Id.* Moreover, the study reported:

Of 22 actuarial studies [See Appendix 2] that specifically address the impact of non-economic damage caps, the majority reach the same conclusion: caps on non-economic damages will reduce the amount of dollars spent to settle insurance losses. The amount of the reduction varies due to differences in the structure of the cap, the state under review and the assumption of how much of current total losses are attributable to non-economic damages. Studies which compared states with caps to states without caps on key statistics such as cumulative rate increases, premium levels, combined loss ratios, and per physician average payments concluded that caps are effective in reducing costs.

Id. (emphasis supplied).

⁸⁴ See *Stamp v. Metropolitan Life Ins. Co.*, 466 F. Supp. 2d 422, 431-432 n.3 (D. R.I. 2006) (“In his autobiography, Twain attributes the phrase to Benjamin Disraeli, but Disraeli scholars dispute that the English Prime Minister ever wrote or spoke the phrase, so the Twain attribution stands.”).

study, statistic, or newspaper article can be referenced by Dr. Ahmed and has been cited by amici.⁸⁵

For example, appellants use Table No. 1 attached to their brief to argue, “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 been catching up steadily.” Appellants’ Brief at 20-21. The table, however, starts in 1963 and ends in 2007, but the Medical Professional Liability Act was enacted in 1986 and *Robinson* was decided in 1991.

According to appellants’ own table, the number of physicians in West Virginia per 100,000 in population in 1983 was 24.5 percent less than the number of physicians nationally. By 2002, however, according to appellants’ own table, the number of physicians in West Virginia per 100,000 in population was only 14.9 percent less than the number of physicians nationally. In other words, after the enactment of medical malpractice reform, West Virginia gained 39.2 percent or nearly doubled its number of physicians per 100,000 population from 1983 to 2002 compared to the rest of the nation. Again, there are “lies, damn lies, and statistics,”⁸⁶ and it is not the function of an appellate court to serve as the trier of fact⁸⁷ and sift through contradictory evidence as to whether a rational basis existed for legislation.⁸⁸

⁸⁵ See, e.g., Amici Brief of the West Virginia State Medical Association, et al., filed in this case.

⁸⁶ See also Appellants’ Brief at 22, citing a Charleston Gazette article using similar statistics but ignoring the impact of medical malpractice reform on the increase in physicians relative to West Virginia’s population between 1990, after reforms were enacted, and 2000. Likewise, appellants discuss another Charleston Gazette article noting a decline in the number of medical malpractice claims between 1993, after the reforms were enacted, and 2001. Appellants’ Brief at 23-24. Essentially, the Legislature found in 1986 that adopting medical malpractice reforms would increase the number of physicians by placing reasonable restrictions on medical malpractice claims and now because those reforms have worked, appellants and their allies argue that success means that the reforms should never have been adopted in the first place. Whether there was a rational basis, however, for the enactment of legislation depends upon the state of affairs at the time of enactment and appellants’ own evidence undermines rather

Moreover, appellants' "evidence" of the lack of a rational basis involves not information available to the Legislature at the time of the enactment and amendment of the MPLA, but information developed much later which is wholly irrelevant.

In *Heller v. Doe*,⁸⁹ for example, which has been relied upon by this Court,⁹⁰ the United States Supreme Court discussed a plaintiff's burden in a rational basis case as follows:

We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." . . . Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." . . . For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. . . . Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." . . . Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

than supports its arguments as the number of physicians has increased, the number of physicians has increased relative to states, and the number of medical malpractice claims have decreased.

⁸⁷ See *State v. Guthrie*, 194 W. Va. 657, 669 n9, 461 S.E.2d 163, 175 n.9 (1995)("An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact. It is for the jury to decide which witnesses to believe or disbelieve. Once the jury has spoken, this Court may not review the credibility of the witnesses.")

⁸⁸ Appellants cite *Moore*, supra, but this Court rejected the Alabama court's analysis in *Verba*, as have courts in *Gourley*, supra; *Evans*, supra; *Pulliam*, supra; and *Butler*, supra. Even the Alabama Supreme Court has noted the "erosion" of *Moore* in its own state because, since its issuance, it has upheld the constitutionality, for example of a legislative cap on punitive damages. *Mobile Infirmary Medical Center v. Hodgen*, 884 So. 2d 801, 813-14 (Ala. 2003). Likewise, the case of *Ferdon*, supra, has not been relied upon by any other court in striking a damages cap as unconstitutional, but was expressly rejected in *Arbino*, supra.

⁸⁹ 509 U.S. 312, 319-320 (1993)(emphasis supplied and citations omitted).

⁹⁰ See, e.g., *Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (2005).

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” . . . A statute is presumed constitutional . . . and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” . . . whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it “is not made with mathematical nicety or because in practice it results in some inequality.” . . . “The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific.”⁹¹

⁹¹ Because of the extraordinarily heavy burden imposed on those asserting equal protection challenges subject to the rational basis test, this Court's decisions are legion in which it has rejected such challenges. See *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 672 S.E.2d 345 (2008)(rejecting rational basis challenge to statutory limitation or preclusion of use of safety belt evidence); *Hartley Hill*, supra (rejecting rational basis challenge to statute allowing local initiative on Sunday hunting); *Kalany v. Campbell*, 220 W. Va. 50, 640 S.E.2d 113 (2006)(rejecting rational basis challenge to statute exempting certain small employers from anti-discrimination laws); *Jones v. West Virginia Bd. of Educ.*, 218 W. Va. 52, 622 S.E.2d 289 (2005)(rejecting rational basis challenge to statute excluding home-schooled children from participation in interscholastic athletics); *Marcus*, supra (rejecting rational basis challenge to statute differentiating workers' compensation benefits for part-time employees); *Foundation for Independent Living, Inc. v. Cabell-Huntington Bd. of Health*, 214 W. Va. 818, 591 S.E.2d 744 (2003)(rejecting rational basis challenge to indoor air regulations that restricted smoking in public places); *Verizon West Virginia, Inc. v. Bureau of Employment Programs*, 214 W. Va. 95, 586 S.E.2d 170 (2003)(rejecting rational basis challenge to increased premium taxes on self-insured employers); *State ex rel. Dept. of Health and Human Resources v. Carpenter*, 211 W. Va. 176, 564 S.E.2d 173 (2002)(rejecting rational basis challenge to policy of not seeking reimbursement of birth and medical expenses from mothers, but seeking such reimbursement from fathers); *Citizens Bank of Weston, Inc. v. City of Weston*, 209 W. Va. 145, 544 S.E.2d 72 (2001)(rejecting rational basis challenge to B&O tax which required challenger to pay a greater proportion than other similar taxpayers outside jurisdiction of taxing authority); *Sale v. Goldman*, 208 W. Va. 186, 539 S.E.2d 446 (2000)(rejecting rational basis challenge to curfew ordinance); *Bogess v. Workers' Compensation Division*, 208 W. Va. 448, 541 S.E.2d 326 (2000)(rejecting rational basis challenge to legislative rule requiring exclusive use of Kory predicted normal values for interpreting ventilatory function tests); *Carvey v. West Virginia Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831 (1999)(rejecting rational basis challenge to statute requiring principal academy attendance even if outside the term of employment); *Morgan v. City of Wheeling*, 205 W. Va. 34, 516 S.E.2d 48 (1999)(rejecting rational basis challenge to ordinance requiring employees to reside within city or county); *McCoy v. Vankirk*, 201 W. Va. 718, 500 S.E.2d 534 (1997)(rejecting rational basis challenge to statute giving abutting landowners a right of first refusal with respect to abandoned state property); *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 474 S.E.2d 906 (1996)(rejecting rational basis challenge to statute requiring

claimants to have a medical impairment of at least 50% to be considered for PTD award); *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 474 S.E.2d 599 (1996)(rejecting rational basis challenge to fuel use tax); *Appalachian Power Co. v. Tax Department*, 195 W. Va. 573, 466 S.E.2d 424 (1995)(rejecting rational basis challenge to electric generation tax); *State ex rel. Lambert v. County Comm'n*, 192 W. Va. 448, 452 S.E.2d 906 (1994)(rejecting rational basis challenge to statute requiring employers to contribute to public employees health plan even if they elected not to participate in plan); *E.H. v. Matin*, 189 W. Va. 102, 428 S.E.2d 523 (1993)(rejecting rational basis challenge to legislative decision to build mental hospital rather than regional health centers); *O'Dell*, supra (rejecting rational basis challenge to statute prohibiting suits against political subdivision where plaintiff received workers' compensation benefits for injuries); *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991)(rejecting rational basis challenge to statute providing qualified immunity for political subdivisions); *Frasher v. Bd. of Law Examiners*, 185 W. Va. 725, 408 S.E.2d 675 (1991)(rejecting rational basis challenge to court rules holding applicants for admission to bar to higher standards than those already admitted); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991)(rejecting rational basis challenge to statute limiting causes of action against ski operators); *Tony P. Sellitti Const. Co. v. Caryl*, 185 W. Va. 584, 408 S.E.2d 336 (1991)(rejecting rational basis challenge to statute excluding speculative builders from consumer sales and service tax and use tax exemptions); *Gibson v. Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991)(rejecting rational basis challenge to statute providing ten-year statute of repose for construction deficiencies); *State ex rel. Deputy Sheriff's Ass'n v. County Comm'n*, 180 W. Va. 420, 376 S.E.2d 626 (1998)(rejecting rational basis challenge to statute making civil service coverage optional for counties under 25,000 in population); *State ex rel. Moody v. Gainer*, 180 W. Va. 514, 377 S.E.2d 648 (1988)(rejecting rational basis challenge to statute setting magistrate salaries based on county population); *Janasiewicz v. Bd. of Educ.*, 171 W. Va. 423, 299 S.E.2d 34 (1982)(rejecting rational basis challenge to statute treating public and nonpublic school children differently in terms of allocations of state aid); *Donaldson v. Gainer*, 170 W. Va. 300, 294 S.E.2d 103 (1982)(rejecting rational basis challenge to statute predicating magistrate and staff salaries on population served); *Town of Stonewood v. Bell*, 165 W. Va. 653, 270 S.E.2d 787 (1980)(rejecting rational basis challenge to statute authorizing different zoning treatment for mobile homes); *Stephens v. Raleigh Co. Bd. of Educ.*, 163 W. Va. 434, 257 S.E.2d 175 (1979)(rejecting rational basis challenge to statute giving preference to previous owner in disposition of school board property in rural areas); *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978)(rejecting rational basis challenge to statute permitting county courts to elect not to subscribe to workers' compensation fund); *Woodring v. Whyte*, 161 W. Va. 262, 242 S.E.2d 238 (1978)(rejecting rational basis challenge to legislative decision not to make new enhanced good time credit retroactive); *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607 (1976)(rejecting rational basis challenge to statute prohibiting governor from seeking third consecutive term); *Cimino v. Bd. of Educ.*, 158 W. Va. 267, 210 S.E.2d 485 (1974)(rejecting rational basis challenge to statute exempting teachers and other professional persons from general prohibition against spouses of board of education members being employed by board); *State ex rel. Heck's, Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965)(rejecting rational basis challenge to statute providing certain exemptions to Sunday closing requirements); *Chesapeake & Potomac Telephone Co. v. City of Morgantown*, 143 W. Va. 800, 105 S.E.2d 260 (1958)(rejecting rational basis challenge to statute differentiating between franchised and non-

Yet, appellants seek to do in this case nearly everything that is expressly prohibited by these well-established principles of equal protection analysis, i.e, to have this Court sit as a super-legislature and fact-finder, judging the wisdom, fairness, and logic of the Legislature's decision to enact caps on noneconomic damages in medical malpractice cases and shifting the burden to the State by arguing that if there are any reasonably conceivable facts that would not provide a rational basis for the statute, it somehow violates equal protection, referencing disputed empirical and anecdotal evidence that was never presented or considered by the Legislature, even though there was empirical evidence that was actually presented and considered by the Legislature providing a reasonable basis for a limitation on noneconomic damages.⁹²

Whether reasonable minds might differ on the wisdom, fairness, or even logic of the Legislature's decision to impose caps on noneconomic damages in medical malpractice cases is not the issue. As this and other courts have held, the issue is whether the classification is based on economic factors (in this case, balancing the economic interests of those injured by professional negligence against the economic interests of health care providers, particularly with respect to the availability and affordability of medical malpractice coverage); whether the classification bears a reasonable relationship to a proper governmental purpose (in this case, appellants' own statistics and other studies referenced herein and elsewhere demonstrate that those states that have imposed damages caps have experienced increases in the number of physicians per person than those states without caps); and whether all persons within the

franchised businesses for purposes of license taxes); *Tweel v. Racing Comm'n*, 138 W. Va. 531, 76 S.E.2d 874 (1953)(rejecting rational basis challenge to statute exempting existing horse racing tracks from local option election requirements); *State v. Tinch*, 81 W. Va. 441, 94 S.E. 503 (1917)(rejecting rational basis challenge to statutory presumption of intent to engage in unlawful sale of liquor from possession of liquor above a certain quantity).

⁹² Indeed, this evidence was presented to the Court attached to the briefs in *Robinson*.

classification are treated equally (in this case, the \$250,000/\$500,000 caps apply to all persons within the classification of those injured by medical negligence).

Accordingly, as in *Robinson, Verba*, and the clear majority of courts in other jurisdictions which have considered the issue, this Court should reject appellants' equal protection challenge to the cap on noneconomic damages.⁹³

IV. CROSS-ASSIGNMENT OF ERROR⁹⁴

A. THE TRIAL COURT ERRED BY NOT APPLYING THE \$250,000 CAP ON NONECONOMIC DAMAGES.

As previously noted, the trial court applied the \$500,000 cap, rather than the \$250,000 cap, because it speculated that the jury may have believed that Mr. MacDonald was "very feeble" and that his "quality of life has been greatly diminished by the rhabdomyolysis," Order, May 14, 2009, at 13, and that, muscular weakness in his lower extremities constituted a "partial loss of use of a limb or a partial use of a bodily organ system," even though the statute does not include the term "partial," but requires "loss of use of a limb or loss of a bodily organ system," *id.* at 13-14. Dr. Ahmed submits that this was erroneous and should be reversed.

One of the legislative findings in the Medical Professional Liability Act is "our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional

⁹³ Appellants also make a passing reference to the prohibition against special legislation, Appellants' Brief at 32-33, but they cite no cases in which other courts have used such prohibitions to strike damages caps as unconstitutional. Nor do appellants, as throughout their brief, acknowledge that this argument has been considered and rejected not only by *Robinson* and *Verba*, but by other courts.

⁹⁴ This cross-appeal is filed pursuant to R. APP. P. 10(f) which provides, "Appellee, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof. Such cross assignment may be made notwithstanding the fact that appellee did not file a separate petition for an appeal within the statutory period for taking an appeal."

negligence, and any limitation placed on this system must be balanced with and 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. Under our system of justice, those who suffer more injury deserve more monetary compensation and, conversely, those who suffer less injury deserve less monetary compensation.

Thus, the legislative branch has enacted a two-tiered system for noneconomic loss. First, litigants are entitled to a minimum cap of \$250,000 in all except extraordinary cases:

[T]he 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.

W. VA. CODE § 55-7B-8(a). Second, if certain criteria are satisfied, litigants are entitled to an higher cap:

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(b) (emphasis supplied).

1. The Trial Court Improperly Re-Wrote the Statute by Adding the Term “Partial” and Its Decision that Mr. MacDonald Suffered the “Loss of Use of a Limb” is Contrary to the Evidence.

In this case, the trial court departed from the statute by finding that evidence of a “partial loss of use of a limb or a partial use of a bodily organ system” satisfied the statute. Order, May

14, 2009, at 14. As courts are not permitted to rewrite statutes,⁹⁵ but must apply the language as written,⁹⁶ the trial court clearly erred.⁹⁷

⁹⁵ *Helton v. Reed*, 219 W. Va. 557, 563, 638 S.E.2d 160, 166 (2006)(Benjamin, J., concurring)(“A statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten to achieve some other resort; and while it may be unfortunate to this taxpayer that the Legislature did not foresee the situation now before us, this Court should not rewrite the statute so as to provide the relief sought by respondent.”); *McVey v. Pritt*, 218 W. Va. 537, 540-41, 625 S.E.2d 299, 302-03 (2005)(“This court ‘cannot rewrite [a] statute so as to provide relief . . . nor can we interpret the statute in a manner inconsistent with the plain meaning of the words.’ *VanKirk v. Young*, 180 W. Va. 18, 20, 375 S.E.2d 196, 198 (1988).”).

⁹⁶ Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968)(“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.”); Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) (“A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.”).

⁹⁷ Although plaintiffs submitted special interrogatories, they were not in the form of the statutory language and, moreover, they neither filed a post-trial motion assigning as error the failure to give those interrogatories nor filed a petition for appeal assigning as error the failure to give those interrogatories. In *Mobile Infirmary*, supra, the Alabama Supreme Court was deciding a case, like the instant case, under a two-tiered cap on damages. Because no special interrogatory was submitted regarding the amount of economic damages it would have awarded if not precluded from doing so by Alabama’s medical professional liability statute, which abolished the collateral source rule, the court held that it was improper for the trial court, as occurred in the instant case, to speculate what the jury would have determined if a special interrogatory had been submitted to the jury and directed plaintiff to accept reduction of a punitive damages award or a new trial would be awarded. Similarly, in *Scott v. Battle*, 249 Ga. App. 618, 548 S.E.2d 124 (2001), the court applied the statutory cap on punitive damages where, as in this case, no special interrogatory was submitted to the jury. See also *Madison v. Williamson*, 241 S.W.3d 145 (Tex. Ct. App. 2007)(before a court will apply the exception to the statutory damages caps to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct constituting a felony, a plaintiff must obtain jury findings that the defendant violated one of the criminal code provisions listed in the statute, and that the violation was committed knowingly or intentionally); *Quay v. Heritage Financial, Inc.*, 247 Ga. App. 358, 617 S.E.2d 618 (2005)(punitive damages award was limited to statutory cap where plaintiff failed to request instructions or special interrogatory on statutory findings for award of punitive damages in excess of \$250,000 statutory cap); *McDaniel v. Elliott*, 269 Ga. 262, 497 S.E.2d 786 (1998)(in order to avoid \$250,000 cap on punitive damages, plaintiffs must request a specific finding of specific intent to cause harm by trier of fact); 89 C.J.S. *Trial* § 953 (2010)(“The failure to request the submission of questions of fact constitutes a waiver of the right to have the jury pass thereon”)(footnote omitted); *id.* at § 961 (“Each question or special issue should incorporate the matter of the burden of proof. The questions submitted to the jury should be so framed as to put the burden of proof on the party on whom it rightly rests.

Under W. VA. CODE § 55-7B-8(b), other than wrongful death, a litigant can recover noneconomic damages in excess of \$250,000 only when suffering “(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.”

Here, after his treatment, Mr. MacDonald returned to substitute teaching, worked as a bagger in a grocery store, works out at a gym, performs many household activities, and obviously is not permanently prevented from independently caring for himself. Even the trial court agreed. Moreover, he obviously suffered no physical deformity nor lost any bodily organ system.

Rather, the only question is whether he suffered “loss of use of a limb.” Again, Mr. MacDonald obviously has not suffered the loss of use of any limb as he can walk on a treadmill without assistance, walk without a cane, drive a car with no special devices, and otherwise use his legs. Even the trial court agreed.

Rather, the trial court concluded that Mr. MacDonald suffered a “partial” loss of use of his legs because they are weaker than they were before his treatment. Clearly, however, this does not satisfy the statute’s clear requirement that the patient suffer “loss of use,” not “partial loss of use.”

When the legislature intends to allow “partial loss” to satisfy the criteria for recovery, it uses the term “partial loss.” See W. VA. CODE § 23-4-6(f) (“For the partial loss of vision in one or both eyes, the percentages of disability shall be determined by the commission, using as a basis the total loss of one eye. . . . For the partial loss of hearing in one or both ears, the

Jury interrogatories that substantially follow a statute setting forth the burden of proof are not erroneous.”)(footnotes omitted).

percentage of disability shall be determined by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, using as a basis the total loss of hearing in both ears.”).⁹⁸

Conversely, when the legislature intends to require “complete loss” to satisfy the criteria for recovery, it uses the term “loss.” See W. VA. CODE § 23-4-6(f) (“The loss of a great toe shall be considered a ten percent disability. . . . The loss of a foot shall be considered a thirty-five percent disability.”).

In this case, however, the trial judge interpreted “loss of a great toe” as “partial loss of a great toe” and “loss of a foot” as “partial loss of a foot.” Obviously, this interpretation is untenable.

In *Holstein v. State Compensation Director*, 150 W. Va. 315, 145 S.E.2d 455 (1965), for example, this Court held that severance of a portion of a claimant’s index finger was not a loss of that finger for purposes of a six percent permanent partial disability award.⁹⁹

⁹⁸ W. VA. CODE § 30-4A-2(a)(“‘Deep conscious sedation/general anesthesia’ includes partial loss of protective reflexes and the patient retains the ability to independently and continuously maintain an airway.”)(emphasis supplied); W. VA. CODE § 33-17-9 (“All insurers providing fire insurance on real property in West Virginia shall be liable, in case of total loss by fire or otherwise, as stated in the policy, for the whole amount of insurance stated in the policy, upon such real property; and in case of partial loss by fire or otherwise, as aforesaid, of the real property insured, the liability shall be for the total amount of the partial loss, not to exceed the whole amount of insurance upon the real property as stated in the policy. This section does not apply where such insurance has been procured from two or more insurers covering the same interest in such real property.”)(emphasis supplied).

⁹⁹ See also *Haines v. Workmen’s Compensation Comm’r*, 151 W. Va. 152, 150 S.E.2d 883 (1966)(policy of Workmen’s Compensation Commission that uncorrected visual loss of 20/200 constituted industrial blindness and entitled employee who sustained injury resulting in partial loss of vision in one eye to full award of 33% for total and irrevocable loss of sight of one eye was in conflict with statute which provides for 33% disability for irrevocable loss of sight of one eye and could not stand); *Bates v. Inter-Ocean Cas. Co.*, 126 W. Va. 620, 29 S.E.2d 469, 470 (1944)(“The policy in question specifically covers loss by accident of certain parts of the body, and disability resulting from accident. There seems to be no general coverage under its provisions relating to loss of a member of the body. The coverage is entirely specific and only

Likewise, in this case, evidence of a reduction of function in Mr. MacDonald's legs was insufficient where the statute requires "loss of use of a limb" and where he still can quite substantially use his legs. Thus, this case should be remanded with directions to reduce the plaintiffs' noneconomic damages award to \$250,000.

V. CONCLUSION

There is nothing in the appellants' brief that has not already been rejected by this Court. Each and every one of the appellants' arguments was rejected in *Robinson* and *Verba* and there is no reason for this Court to revisit those cases.

Just last month,¹⁰⁰ in *DRD Pool Service, Inc. v. Freed*,¹⁰¹ the Maryland Supreme Court rejected a similar attempt by plaintiffs to reconsider its previous rejection of constitutional challenges to a statutory cap on noneconomic damages, stating as follows:

the provision applying to the loss of a foot covers the loss of a leg. There is no additional coverage for the entire or partial loss of a leg or an arm."); *Fuhrman-Peretz v. Ferragamo*, 2006 WL 2587981 at *4 (S.D.N.Y.)("'[T]o qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total.' *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 299 (2001). A partial loss of use of a body organ, member, function or system does not meet the statutory definition. Id.")(emphasis supplied); *Martel v. M.M. Mades Co.*, 121 N.H. 231, 232-33, 427 A.2d 522, 522-23 (1981) (partial loss of use of a hand and wrist could not be the basis for a finding of loss of an arm or loss of use of an arm under the relevant statute).

¹⁰⁰ Likewise, just last month, the court in *Watson v. Hortman*, 2010 WL 3566736 (E.D. Tex.), reaffirmed Texas' position regarding the constitutionality of its cap on noneconomic damages in medical malpractice cases. With respect to the "certain remedy" challenge, the court held, "The Supreme Court has stated that 'statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.' *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978)." Id. at *2. With respect to the "equal protection" challenge, the court held, "The cap on noneconomic damages is reasonably related to the State of Texas's goals of reducing malpractice insurance premiums and improving access to care. See id. at 331 (explaining that, under the rational basis test, challenged legislation must be upheld if it is 'rationally related to a legitimate government purpose'). Although the plaintiffs put forth a variety of statistical evidence and studies to challenge the Texas Legislature's findings, this evidence is insufficient to show that the legislation lacks a rational basis, particularly in light of the record that was before the Legislature at the time of the adoption of H.B. 4." Id. at *3. See also *Parham v. Florida Health Services Center, Inc.*, 2010 WL 1222925 (Fla. Ct. App.)(rejecting request to reconsider previous decision upholding constitutionality of noneconomic damages cap

We have previously ruled on the constitutionality of the Cap on non-economic damages imposed by § 11-108 of the Courts and Judicial Proceedings Article. See *Oaks v. Connors*, 339 Md. 24, 660 A.2d 423 (1995); *Murphy v. Edmonds*, 325 Md. 342, 325 Md. 342, 601 A.2d 102 (1992). The principle of *stare decisis* controls our decision today. We have said that *stare decisis* means “to stand by the thing decided,” and is “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Livesay v. Baltimore County*, 384 Md. 1, 14, 862 A.2d 33, 40-41 (2004) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720, 736-37 (1990)). The United States Supreme Court noted the importance of *stare decisis* in ensuring that, “the law will not merely change erratically, but will develop in a principled and intelligible fashion.” *Livesay*, 384 Md. at 14, 862 A.2d at 41 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598, 610 (1986)).

The tests for departing from *stare decisis* are extremely narrow in Maryland, and there are few exceptions for when this Court should set aside precedent. *Livesay*, 384 Md. at 15, 862 A.2d at 41. In *Livesay* we said:

While we have never construed the doctrine of *stare decisis* to preclude us from changing or modifying a common law rule when conditions have changed or that rule has become so unsound that it is no longer suitable to the people of this State, departure from the rule should be the extraordinary case, especially so when the change will have a harmful effect upon society.

384 Md. at 15, 862 A.2d at 41. Accordingly, the doctrine of *stare decisis* is not completely unyielding, but allows for only a few exceptions. *State v. Adams*, 406 Md. 240, 259-60, 958 A.2d 295, 307 (2008), cert. denied, --- U.S. ---, 129 S. Ct. 1624, 173 L. Ed. 2d 1005 (2009).

We have recognized two circumstances when it is appropriate for this Court to overrule its own precedent. First, this Court may strike down a decision that is, “clearly wrong and contrary to established principles.” *Adams*, 406 Md. at 259, 958 A.2d at 307 (quoting *Townsend v. Bethlehem-Fairfield Shipyard, Inc.*, 186 Md. 406, 417, 47 A.2d 365, 370 (1946)). Further, “previous decisions of this court should not be disturbed . . . unless it is plainly seen that a glaring injustice has

in medical malpractice cases when defendant requests arbitration); *McGinnes v. Wesley Medical Center*, 43 Kan. App. 2d 227, 224 P.3d 581 (2010)(rejecting request to reconsider previous decision upholding constitutionality of statutory damages caps); *C.J. v. Dept. of Corrections*, 151 P.3d 373 (Alaska 2006)(rejecting request to reconsider previous decision upholding constitutionality of damages caps).

¹⁰¹ 2010 WL 3718897 (Md.).

been done or some egregious blunder committed.” *State v. Green*, 367 Md. 61, 79, 785 A.2d 1275, 1285 (2001) (quoting *Greenwood v. Greenwood*, 28 Md. 369, 381 (1868)). Second, precedent may be overruled when there is a showing that the precedent has been superseded by significant changes in the law or facts. *Livesay*, 384 Md. at 15, 862 A.2d at 41; *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 459, 456 A.2d 894, 903 (1983) (allowing departure from *stare decisis* when there are “changed conditions or increased knowledge that the rule has become so unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people”).

Id. at *7 (footnotes omitted).

The Maryland court rejected each and every argument advanced by the appellants in this case in their effort to have this Court overrule *Verba*.

First, the Maryland court rejected plaintiffs’ request for heightened scrutiny under the equal protection clause by stating, “Nonetheless, the Freeds argue in favor of heightened scrutiny, stating rational basis scrutiny should not apply because § 11-108 implicates the important personal rights to full redress for injury and trial by jury. We evaluated and rejected this argument in *Murphy*. 325 Md. at 362, 373, 601 A.2d at 114, 118.” *Id.* at *9. More specifically, the Maryland court stated:

Equal protection is also not violated by the statutory limitation on non-economic damages. The Freeds argue that the Cap created a classification between less seriously injured tort plaintiffs, who are entitled to keep everything awarded by a jury, and more seriously injured plaintiffs, who are not entitled to receive non-economic damages that exceed the cap. Under this theory, the Freeds argue that this classification should be subjected to a heightened standard of review.

The Freeds’ contention was rejected in *Murphy* and we uphold our previous decision. In Maryland, this Court has noted that the General Assembly may modify common law rights and remedies. *Murphy*, 325 Md. at 362, 601 A.2d at 112. Such changes will invariably favor one party to the disadvantage of another in litigation. *Murphy*, 325 Md. at 363, 601 A.2d at 112. This result, however, does not create a classification between affected parties, and certainly not a classification subject to heightened scrutiny. *Id.* Instead, we follow the United States Supreme Court standard for reviewing classifications that are challenged under the equal protection guarantees. *Murphy*, 325 Md. at 362, 601 A.2d at 111. The Cap is the type of economic classification that has been regularly reviewed under the traditional rational basis test.

The Freed's contention that the Cap fails even rational basis scrutiny is also without merit. The rational basis test is highly deferential; it presumes a statute is constitutional and should be struck down only if the reviewing court concludes that the Legislature enacted the statute irrationally or interferes with a fundamental right. *Conaway v. Deane*, 401 Md. 219, 274-75, 932 A.2d 571, 604 (2007). As discussed in *Murphy*:

The General Assembly's objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public. This is obviously a legitimate legislative objective. A cap on noneconomic damages may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services. The cap, therefore, is reasonably related to a legitimate legislative objective.

325 Md. 342, 369-370, 601 A.2d 102, 115. On the basis of the record before us, we see no reason to disavow our rationale as explained in *Murphy*.

Id. at *9-10 (footnotes omitted).

Second, the Maryland court rejected plaintiffs' access to courts argument by stating, "Regarding access to the courts, we stated, '[t]here is a distinction between restricting access to the courts and modifying the substantive law to be applied by the courts. [A] plaintiffs' cause of action based on negligence was not abolished by § 11-108. Instead, § 11-108 simply modifies the law of damages to be applied in tort cases.' *Murphy*, 325 Md. at 366, 601 A.2d at 114." *Id.*

Finally, the Maryland court rejected plaintiffs' right to jury trial by stating, "Further, the right to a jury trial is likewise unaffected by the Cap. The Cap reflects a policy judgment by the General Assembly which does not interfere with the underlying right to a trial by jury because plaintiffs will still have a jury determine the facts and assess liability. *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1341 (D. Md. 1989)." *Id.*

The circumstances of this case are no different than the circumstances in *Freed*.

In Syllabus Point 2 of *Dailey v. Bechtel Corporation*, 157 W. Va. 1023, 207 S.E.2d 169 (1974), this Court held, “An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of *stare decisis*, which is to promote certainty, stability, and uniformity in the law.”

Here, no conditions regarding the information considered by the Legislature in the enactment of the cap on noneconomic damages have changed since *Robinson* and *Verba*. There was no serious judicial error in *Robinson* or *Verba* and, indeed, those cases have been repeatedly relied upon by other courts, in the clear majority, in rejecting similar constitutional challenges.

West Virginia’s present caps are well in line with the range of those caps in other jurisdictions. Appellants’ own evidence regarding the relative increase in the number of physicians per 100,000 in population compared to other states since enactment of the caps creates a strong inference that the caps are serving their intended purpose and studies support the proposition that jurisdictions with damages caps have more physicians per population than jurisdictions without such caps.

To argue that limits on noneconomic damages in medical malpractice actions have no rational relationship to a legitimate governmental purpose is absurd. The logic of those limits is obvious.

Statutory limits on noneconomic damages promote a more uniform treatment of claimants in medical malpractice actions. By capping noneconomic damages, the exposure of health care providers to aberrant noneconomic damages awards is decreased, which limits the risk to the providers of medical malpractice insurance and makes medical professional liability coverage more available and affordable. By making liability coverage more available and

affordable, the overall cost of providing health care decreases, making it more available and affordable to the consumers of health care, the government, employers, employees, and beneficiaries of governmental programs. Balancing all of these interests is uniquely within the province of the legislative branch, which is why the overwhelming majority of courts have rejected constitutional challenges to limits on noneconomic damages.

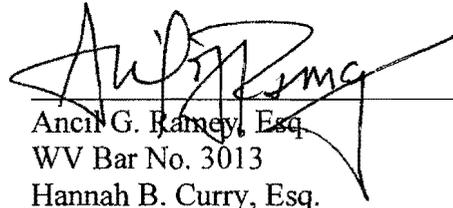
Certainly, some of the burden of balancing the various economic interests surrounding the provision of health care under the MPLA falls upon those claiming to have been injured by medical professional negligence. Against that burden on the very few whose noneconomic damages are limited, however, is the benefit to the vast majority of our citizens whose health care is more available and affordable because of those limitations. This is the very essence of the legislative branch's nearly plenary prerogative to balance competing economic interests of a few against the economic interests of the many and enact statutes that allocate the risks and benefits of legislation among those interests.

Our Legislature has acted like many others throughout the country and has balanced the interests of those seeking noneconomic damages in medical malpractice cases against the interests of those who will pay those noneconomic damages. In *Robinson* and *Verba*, this Court wisely joined those courts with similar constitutional and statutory provisions in rejecting challenges to this legislative balancing of competing interests and Dr. Ahmed respectfully submits that there is no legitimate reason to depart from that well-worn path.

WHEREFORE, the appellee, Dr. Sayeed Ahmed, M.D., respectfully requests that this Court reaffirm its holdings in *Verba* and *Ghaphery*, but reverse the Circuit Court of Berkeley County and remand the case with directions to reduce plaintiffs' noneconomic damages award to \$250,000.

DR. SAYEED AHMED, M.D.

By Counsel

A handwritten signature in black ink, appearing to read 'Ancil G. Ramey', is written over a horizontal line. The signature is stylized and somewhat cursive.

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that on October 13, 2010, I served a copy of the foregoing "BRIEF AND CROSS-APPEAL OF APPELLEE DR. SAYEED AHMED, M.D." upon counsel of record by depositing a true copy of the same in the United States mail, postage prepaid, addressed as follows:

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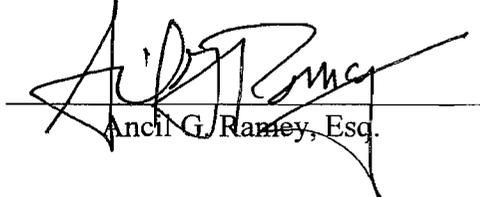
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