

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35543

JAMES D. MACDONALD AND DEBBIE MACDONALD,

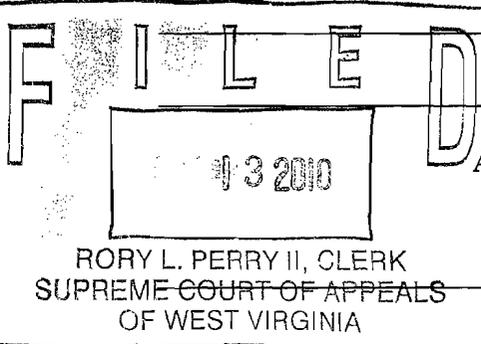
APPELLANTS/PLAINTIFFS,

v.

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

APPELLEES/DEFENDANTS.

**FROM THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 07-C-150**



**APPELLEE CITY HOSPITAL, INC.'S BRIEF
AND
CROSS ASSIGNMENT OF ERROR**

**THOMAS J. HURNEY, JR.
(WVSB NO. 1833)
JENNIFER M. MANKINS
(WVSB NO. 9959)
JACKSON KELLY PLLC
POST OFFICE BOX 553
CHARLESTON, WV 25322
(304) 340-1000
(304) 340-1050 FAX**

**CHRISTINE S. VAGLIENTI
(WVSB 4987)
POST OFFICE BOX 8128
MORGANTOWN, WV 26506-4199
(304) 598-4199**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	KIND OF PROCEEDING, NATURE OF RULING BELOW, AND STATEMENT OF THE FACTS OF THE CASE	2
III.	ARGUMENT AND AUTHORITIES RELIED UPON.....	6
A.	STANDARD OF REVIEW	6
B.	STATUTE AT ISSUE	7
C.	THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE EQUAL PROTECTION OR ACT AS SPECIAL LEGISLATION.	8
1.	The MPLA Limitation is Subject to Rational Basis Review.	9
2.	The MPLA Limitation Passes the Rational Basis Test.	10
a.	1986: Enactment of the MPLA	12
b.	2001: House Bill 601	13
c.	2003: House Bill 2122	15
D.	THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY.....	24
E.	THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE SEPARATION OF POWERS.	32
F.	THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE THE ACCESS TO COURTS OR CERTAIN REMEDY CLAUSES.....	34
IV.	CROSS ASSIGNMENT OF ERROR.....	37
A.	ARGUMENT AND AUTHORITIES RELIED UPON.....	38
1.	STANDARDS OF REVIEW.....	38

2. BECAUSE PLAINTIFFS DID NOT PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A PRIMA FACIE RIGHT TO RECOVER FROM CITY HOSPITAL, THE CIRCUIT ERRED WHEN IT DENIED CITY HOSPITAL’S MOTION FOR SUMMARY JUDGMENT, MOTION FOR JUDGMENT AS A MATTER OF LAW, AND MOTION FOR A NEW TRIAL 39

3. THE CIRCUIT COURT ERRED WHEN IT DENIED CITY HOSPITAL’S MOTION TO ALTER OR AMEND JUDGMENT. 44

V. CONCLUSION..... 45

TABLE OF AUTHORITIES

Cases

<i>Arbino v. Johnson & Johnson</i> , 116 Ohio St.3d 468, 476, 880 N.E.2d 420, 432 (Ohio 2007)	31
<i>Atchinson v. Erwin</i> , 172 W. Va. 8, 302 S.E.2d 78 (1983).....	9
<i>Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt</i> , 286 Ga. 731, 691 S.E.2d 218 (Ga. 2010).....	25
<i>Bair v. Peck</i> , 248 Kan. 824, 811 P.2d 1176 (1991).....	21
<i>Bias v. Eastern Associated Coal Corp.</i> , 220 W. Va. 190, 206 n.1, 640 S.E.2d 540, 556 n.1 (2006).....	36
<i>Boyd v. Bulala</i> , 877 F.2d 1191, 1196 (4 th Cir. 1989)	26, 27, 29
<i>Boyd v. Merritt</i> , 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986).....	34
<i>Brooks v. Harris</i> , 201 W. Va. 184, 495 S.E.2d 555 (1997).....	38
<i>Carson v. Maurer</i> , 120 N.H. 925, 424 A.2d 825, 831 (1980).....	10
<i>Davis v. Omitowoju</i> , 883 F.2d 1155, 1161-1165 (C.A.3 1989).....	29
<i>Devane v. Kennedy M.D.</i> , 205 W. Va. 519, 519 S.E.2d 522 (1999).....	14
<i>Edmonds v. Murphy</i> , 83 Md.App. 133, 573 A.2d 853	21, 27, 28, 33
<i>Etheridge v. Medical Ctr. Hosps.</i> , 237 Va. 87, 376 S.E.2d 525 (1989).....	21, 26, 33
<i>Fein v. Permanente Medical Group</i> , 38 Cal.3d 137, 695 P.2d 665, 679-84, 211 Cal.Rptr. 368.....	21
<i>Feltner v. Columbia Pictures Television</i> , 523 U.S. 340, 118 S. Ct. 1279, 140 L. Ed. 2d 438 (1998).....	26
<i>Findley v. State Farm Mut. Auto. Ins. Co.</i> , 213 W. Va. 80, 576 S.E.2d 807 (2002).....	38
<i>Franklin v. Mazda Motor Corp.</i> , 704 F.Supp. 1325, 1334 (D. Md. 1989).....	27, 28, 33
<i>Fredeking v. Tyler</i> , 224 W. Va. 1, 680 S.E.2d 16 (2009).....	38
<i>Gasperini v. Center for Humanities, Inc.</i> , 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).....	29
<i>Gibson v. West Virginia Department of Highways</i> , 185 W. Va. 214, 406 S.E.2d 440 (1991).....	9

<i>Gill v. Foster</i> , 157 Ill.2d 304, 626 N.E.2d 190 (1993).....	43
<i>Hartssock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.</i> , 174 W. Va. 538, 328 S.E.2d 144 (1984).....	9
<i>Heston v. Jefferson Bldg. Corp.</i> , 332 Ill.App. 585, 76 N.E. 248 (Ill. App. Ct. 1947).....	43
<i>Judd v. Drezga</i> , 103 P.3d 135 (Utah 2004).....	26, 33
<i>Judy v. Grant County Health Dept.</i> , 210 W.Va. 286, 557 S.E.2d 340 (2001).....	40
<i>Lakin v. Senco Products, Inc.</i> , 329 Or. 62, 987 P.2d 463 (Or. 1999).....	25
<i>Lewis v. Canaan Valley Resorts, Inc.</i> , 185 W. Va. 684, 408 S.E.2d 634 (1991).....	9, 30, 36
<i>Lucas v. U.S.</i> , 757 S.W.2d 687, 699-700 (Tex. 1988).....	20, 21, 23
<i>Marcus v. Holley</i> , 217 W. Va. 508, 618 S.E.2d 517 (2005).....	36
<i>Mathena v. Haines</i> , 219 W. Va. 417, 421, 633 S.E.2d 771, 775 (2006).....	36
<i>McManamon v. Ohio Dept. of Ins.</i> , 179 Ohio App. 3d 776 (Ohio App. 10 th Cir. 2008).....	14
<i>Morrison v. Sharma</i> , 200 W. Va. 192, 488 S.E.2d 467 (1997).....	38
<i>Murphy v. Edmonds</i> , 325 Md. 342, 373, 601 A.2d 102, 117 (Md. 1992).....	31
<i>O'Dell v. Town of Gauley Bridge</i> , 188 W. Va. 596, 425 S.E.2d 551 (1992).....	36
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994).....	38
<i>Phillips v. Mirac, Inc.</i> , 251 Mich.App. 586, 651 N.W.2d 437 (2002).....	26
<i>Powell v. Time Ins. Co.</i> , 181 W. Va. 289, 382 S.E.2d 342 (1989).....	43
<i>Randall v. Fairmont City Police Department</i> , 186 W. Va. 336, 412 S.E.2d 737 (1991).....	9
<i>Randall v. Fairmont City Police Dept.</i> , 186 W. Va. 336, 412 S.E.2d 737 (1991).....	36
<i>Robinson v. Charleston Area Medical Center, Inc.</i> , 186 W. Va. 720, 724, 414 S.E.2d 877, Syl. Pt. 5 (1991).....	<i>passim</i>
<i>Rohrbaugh v. Wal-Mart Stores, Inc.</i> , 212 W. Va. 358, 572 S.E.2d 881 (2002).....	39
<i>Samsel v. Wheeler Transport Services, Inc.</i> , 246 Kan. 336, 789 P.2d 541 (1990).....	21
<i>Sanders v. Georgia-Pacific Corp.</i> , 159 W. Va. 621, 225 S.E.2d 218 (1976).....	39

<i>Short v. Appalachian OH-9, Inc.</i> , 203 W. Va. 246, 507 S.E.2d 124 (1998).....	39
<i>Smith v. Botsford Gen. Hosp.</i> , 419 F.3d 513, 519 (6th Cir. 2005)	28
<i>Spencer v. McClure</i> , 217 W. Va. 442, 618 S.E.2d 451 (2005).....	43
<i>State ex rel. Appalachian Power Co. v. Gainer</i> , 149 W. Va. 740, 143 S.E.2d 351, Syl. Pt. 1 (1965)	7
<i>State ex rel. Johnson & Johnson Corp. v. Karl</i> , 220 W. Va. 463, 647 S.E.2d 899 (2007).....	40
<i>State v. Rutherford</i> , 223 W. Va. 1, 672 S.E.2d 137, Syl. Pt. 1 (2008)	6
<i>Taylor v. Cabell Huntington Hospital, Inc.</i> , 208 W. Va. 128, 538 S.E.2d 719 (2000).....	40
<i>Tolley v. ACF Industries, Inc.</i> , 212 W. Va. 548, 575 S.E.2d 158 (2002).....	40
<i>Tolliver v. Shumate</i> , 151 W. Va. 105, 150 S.E.2d 579 (1966).....	40
<i>Tull v. United States</i> , 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987).....	27, 39
<i>Verba v. Ghaphery</i> , 210 W. Va. 30, 551 S.E.2d 406, Syl. Pt. 3 (2001)	<i>passim</i>
<i>West v. West Virginia Dept. of Transp., Div. of Highways</i> , 224 W. Va. 563, 687 S.E.2d 346 (2009).....	39
<i>West Virginia Public Employees Retirement System v. Dodd</i> , 183 W. Va. 544, 396 S.E.2d 725, Syl. Pt. 2 (1990).....	7
<i>Williams v. Precision Coil, Inc.</i> , 194 W. Va. 52, 459 S.E.2d 329 (1995).....	40
<i>Wilson v. United States</i> , 375 F. Supp.2d 467 (2005)	23
<i>Witt v. Sleeth</i> , 198 W. Va. 398, 481 S.E.2d 189 (1996).....	38
<i>Zaleski v. West Virginia Physicians' Mut. Ins. Co.</i> , 220 W. Va. 311, 647 S.E.2d 747 (2007).....	15

Statutes

W. Va. Code § 11-13P-1.....	14
W. Va. Code § 11-13T-1.....	17
W. Va. Code § 29-12-3(a)(1).....	14
W. Va. Code § 29-12-3(c)(1), (2)	14
W. Va. Code § 29-12B-2	14
W. Va. Code § 29-12B-6	14, 17
W. Va. Code § 29-12C-1	18
W. Va. Code § 30-3-14.....	17
W. Va. Code § 33-20F-2(b) (2003)	15, 16
W. Va. Code § 33-26-8(1)(a) (1985)	14
W. Va. Code § 33-3-14.....	16

W. Va. Code § 4-11A-2	16
W. Va. Code § 55-7B- 9 (1986).....	13
W. Va. Code § 55-7B-1 (2003).....	35
W. Va. Code § 55-7B-3 (1986).....	13
W. Va. Code § 55-7B-6	15
W. Va. Code § 55-7B-6 (2001).....	15
W. Va. Code § 55-7B-8	<i>passim</i>

Constitutional Provisions

W. Va. Const. art. V, § 1.....	7, 32
W. Va. Const. art VI, § 39	8
W. Va. Const. art. III, § 13.....	24
W. Va. Const. art. VIII, § 13.....	34
W. Va. Const., art. III, § 13.....	24

I. INTRODUCTION

City Hospital, Inc. (“City Hospital”), Defendant below and Appellee, files its opposition to Appellants James and Debbie MacDonald’s Brief and its own Cross Appeal pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure.

The sole issue raised by the MacDonalds on appeal is certainly no stranger to this Court: a challenge to the constitutionality of Section 55-7B-8 (2003) of the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq.*, (“MPLA”). On two prior occasions, this Court affirmed the Legislature’s power to enact limitations on noneconomic damages in medical professional liability actions, and it should do so again. *See Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 724, 414 S.E.2d 877 (1991); *Verba v. Ghaphery*, 210 W. Va. 30, 551 S.E.2d 406 (2001) (*per curiam*). Section 55-7B-8 was and is an important and significant part of the Legislature’s effort to resolve a critical crisis in the availability and affordability of medical malpractice insurance in 2001 and 2003. The effort, which included regulatory, tax, and civil justice reform, was successful, and today West Virginia has a thriving Mutual Insurance Company providing the critical insurance coverage absent in 2001-03. This Court should review the Legislature’s solutions as consistent with its role in our constitutional scheme, and the order of the Circuit Court upholding and applying W. Va. Code § 55-7B-8 should be affirmed.

On cross appeal, City Hospital asserts the Circuit Court committed reversible error by denying its Motion for Summary Judgment, Motion for Judgment as a Matter of Law, and Motion for a New Trial because Plaintiffs did not prove a breach of the standard of care causing Mr. MacDonald’s injury. City Hospital also asserts the Circuit Court erred when it denied the Defendants’ Motion to Alter or Amend Judgment and applied the \$500,000 limitation to

Plaintiffs' noneconomic damages award, instead of the \$250,000 limitation, by order dated August 20, 2009, and joins with Dr. Sayeed Ahmed ("Dr. Ahmed") in urging reversal of the Circuit Court's order.

II. KIND OF PROCEEDING, NATURE OF RULING BELOW, AND STATEMENT OF THE FACTS OF THE CASE

In May 2003, James MacDonald was admitted to City Hospital by Dr. Ahmed for severe pneumonia, which required treatment with multiple antibiotics, admission to the intensive care unit, and intubation. Defs' Joint Ex. No. 2, City Hospital History and Physical and Discharge Summ., May 2003 admission; I Tr., Nov. 21, 2008, at 75-77. On October 29, 2004, Mr. MacDonald was again admitted to City Hospital by Dr. Ahmed because he was suffering from symptoms consistent with pneumonia. I Tr., Nov. 18, 2008 at 24; II Tr., Nov. 19, 2008, at 15.

Prior to these 2003 and 2004 admissions, Mr. MacDonald had a significant medical history—he suffered from hypertension, hyperlipidemia, and insulin dependent diabetes mellitus, which led to a kidney transplant in 1988 that ultimately failed, resulting in a second kidney transplant. *Id.* Prior to his hospitalization at City Hospital in October 2004, Mr. MacDonald was taking multiple medications, including Cyclosporin, Imuran, and Prednisone to prevent rejection of his transplanted kidney, as well as Procardia, Lasix, Hydrochlorothiazide, Humulin, and Lipitor. Defs' Joint Ex. No. 1, City Hospital History and Physical and Discharge Summ., October 2004 admission.

During Mr. MacDonald's October 2004 admission, Dr. Ahmed consulted with a lung specialist and a kidney specialist to assist in Mr. MacDonald's care. I Tr., Nov. 18, 2008, at 83, 85. As had happened during his May 2003 admission, Mr. MacDonald's symptoms progressed, and he was transferred to the intensive care unit and intubated. *Id.* at 138. Dr. Ahmed added

Zithromax (an antibiotic), Levaquin (an antibiotic) and Diflucan (an antifungal) to Mr. MacDonald's drug regimen to treat his pneumonia. 1 Tr., Nov. 21, 2008, at 84-105.

Each time a drug was prescribed, or the dosage of a drug was changed, City Hospital's pharmacy checked for potential drug-drug and drug-food interactions using a computer program known as MediTech. *Id.* at 85. None of the drugs prescribed for Mr. MacDonald during his 2004 hospitalization were known to have more than mild interactions with each other, so there was no report to Dr. Ahmed. City Hospital Exs. 1 and 2; II Tr., Nov. 21, 2008, at 12-13; 14-15; and 18-27; I Tr., Nov. 21, 2008, at 71-74.

On November 10, 2004, Dr. Ahmed discontinued Mr. MacDonald's Lipitor after noting an elevation in his CPK levels. Defs' Joint Ex. No. 1; II Tr., Nov. 21, 2008, at 6-11. Mr. MacDonald was subsequently transferred to Winchester Medical Center on November 10, 2004, at Mrs. MacDonald's request. At Winchester Medical Center, Mr. MacDonald was diagnosed with rhabdomyolysis. Mr. MacDonald's treating physician at Winchester Medical Center noted that:

It appeared that he had acute rhabdomyolysis, the extent of the muscle weakness was not clear until the time he was to be initially extubated...It was unclear as to the cause. This appeared to be occurring prior to the time of transfer and continued (*sic*) this time. The cause is really unclear and will never be settled. However, it is felt possibly this could be due to the fact that patient was critically ill, he had renal failure and then the combination of Cyclosporin, Lipitor and Azithromycin. However, his rhabdomyolysis appeared to resolve. His CK eventually normalized by the time of discharge...

The physicians at Winchester Medical Center discontinued Propofol, a sedative used for intubated patients, because it has also been reported to cause rhabdomyolysis. Defendants' Joint Ex. No. 3, Discharge Summary and Consultation Reports from Winchester Medical Center.

Plaintiffs contend Mr. MacDonald developed rhabdomyolysis during his October 2004 admission at City Hospital as a result of certain drugs prescribed to treat his pneumonia.

Rhabdomyolysis, a disease involving destruction of skeletal muscle, has many causes, including prolonged inactivity, and may be drug-induced. The MacDonalds sued Dr. Ahmed, claiming he breached the standard of care by prescribing medications, alone or in combination, which were known to cause or contribute to rhabdomyolysis, and City Hospital, claiming that through its pharmacy department, it breached the standard of care by failing to warn Dr. Ahmed of the potential risk of rhabdomyolysis as a result of the medication regimen he prescribed.

Notably, Dr. Ahmed testified at trial that notification of these mild potential drug interactions would not have changed his course of treatment. II Tr., Nov. 21, 2008 at 22-23; I Tr. Nov. 21, 2008 at 75-77. In particular, he testified he was aware of a potential interaction between Lipitor and Diflucan, but that the risk of discontinuing Lipitor was outweighed by its benefit to Mr. MacDonald until November 10, 2004, when Mr. MacDonald's CPK level became elevated. I Tr., Nov. 21, 2008, at 84-105; II Tr., Nov. 21, 2008 at 6-11. Dr. Ahmed further testified that he had successfully prescribed these same medications to treat Mr. MacDonald for the same condition during Mr. MacDonald's May 2003 admission at City Hospital. I Tr., Nov. 18, 2008, at 132; II Tr., Nov. 19, 2008, at 15.

At trial, Plaintiffs' expert witnesses acknowledged Mr. MacDonald had to continue to take Cyclosporin and other immunosuppressant drugs, as well as antibiotics and Diflucan, an antifungal, to treat his chronic and acute medical conditions. However, Plaintiffs' experts testified it was not necessary to continue Lipitor while Mr. MacDonald was acutely ill, and implicated an interaction between Lipitor and Diflucan as the cause of Mr. MacDonald's rhabdomyolysis. II Tr., Nov. 18, 2008, at 46-49; 86-93; 97; 112; I Tr., Nov. 19, 2008, 29-34; 38-43; 51-52. However, Plaintiffs' experts also acknowledged it was the physicians, not the City

Hospital pharmacy, who were responsible for performing the risk-benefit analysis for each of the drugs prescribed for Mr. MacDonald. II Tr., Nov. 18, 2008, at 117-119.

This action was tried to a jury in the Circuit Court of Berkeley County, West Virginia, the Honorable Gray Silver, III, presiding, from November 17, 2008 to November 25, 2008. The jury returned a verdict finding both Defendants breached the standard of care and proximately caused the Plaintiffs' injuries, apportioning 70 percent fault to Dr. Ahmed and 30 percent fault to City Hospital. The jury awarded damages as follows:

- 6. What damages, if any, do you award to Plaintiff James D. MacDonald in this case?
 - a. Past reasonable and necessary medical expenses \$92,000
 - b. Past pain and suffering \$250,000
 - c. Future pain and suffering \$750,000
 - d. Past lost wages \$37,000
 - Total \$1,129,000

- 7. What damages, if any, do you award to Plaintiff Debbie MacDonald?
 - a. Sorrow, mental anguish and solace which may include society, companionship, comfort, guidance, kindly offices and advice of James D. MacDonald.¹ \$500,000

After the verdict, but before a judgment order was entered, the Circuit Court entertained argument on several issues, including Plaintiffs' assertion that W. Va. Code § 55-7B-8 is unconstitutional.² Defendants filed a joint response on February 27, 2009,³ and the Circuit Court held oral argument on March 4, 2009.⁴

¹ Jury Verdict Form, Docket No. 436.

² See Pls.' Mem. of Law on the Constitutionality of W. Va. Code § 55-7B-8(a), Docket No. 480.

On May 14, 2009, the Circuit Court entered an “Order Ruling on All Pending Post Trial Motions Necessary Before Entry of a Judgment Order,”⁵ and a “Judgment Order,”⁶ which, among other things, reduced the verdict for noneconomic damages to the Plaintiffs in compliance with W. Va. Code § 55-7B-8(b).⁷ The award of \$1.5 million in noneconomic damages was reduced to \$500,000. Both Defendants filed timely post trial motions on May 29, 2009,⁸ and June 1, 2009.⁹ Plaintiffs responded,¹⁰ and on August 20, 2009, the Circuit Court entered a Final Order denying the Defendants’ post trial motions.¹¹

Plaintiffs filed a Petition for Appeal on October 19, 2009, relying on Rule 4A of the West Virginia Rules of Appellate Procedure to proceed without a transcript, contending the Circuit Court erred by upholding the MPLA cap. City Hospital and Dr. Ahmed responded on November 18, 2009. Appellants’ Petition was granted by this Court on April 14, 2010.

III. ARGUMENT AND AUTHORITIES RELIED UPON

A. STANDARD OF REVIEW

The standard of review for an appeal that challenges the constitutionality of a statute is *de novo*. *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137, Syl. Pt. 1 (2008). Additionally:

³ See Defs.’ Joint Reply to Pls.’ Resp. to Defs.’ Objections to Proposed J Order and Pls.’ Mem. of Law on the Constitutionality of W. Va. Code § 55-7B-8(a), Docket No. 508.

⁴ See Original Transcript of March 4, 2009 Hearing, Docket No. 521. Other issues argued on March 4, 2009 included Defendants’ motion to reduce the verdict under the collateral source limitations of W. Va. Code Section 55-7B-9a; Defendants’ motion to conform the verdict to the \$250,000 limit of Section 55-7B-8; and Defendants’ motion challenging Mr. MacDonald’s award of lost wages.

⁵ See Docket No. 539.

⁶ See Docket No. 542.

⁷ According to Plaintiffs’ Petition., it is the May 14, 2009, Orders that are the focus of the appeal.

⁸ See Dr. Ahmed’s Mot. for New Trial, or in the Alternative, Mot. to Alter or Amend J., Docket No. 547.

⁹ See Def. City Hospital, Inc.’s Mot. for J. as a Matter of Law, Mot. for New Trial and Mot. to Alter or Amend J.; and Mem. of Law in Support of Def. City Hospital, Inc.’s Mot. for J. as a Matter of Law, Mot. for New Trial and Mot. to Alter or Amend J., Docket No. 555.

¹⁰ See Pls.’ Resp. and Opp. to Def. Sayeed Ahmed, M.D.’s Mot. for New Trial, or, in the Alternative, Mot. to Alter or Amend J., Docket No. 562; Pls.’ Resp. and Opp. to Def. City Hospital, Inc.’s Mot. for J. as a Matter of Law, Mot. for New Trial and Mot. to Alter or Amend J., Docket No. 574.

¹¹ See Order Denying Def. City Hospital, Inc.’s Mot. for J. as a Matter of Law, Mot. for New Trial and Mot. to Alter or Amend J. and Granting in Part and Denying in Part Dr. Ahmed’s Mot. for New Trial, or in the Alternative, Mot. to Alter or Amend J., Docket No. 578; and Final Order, Docket No. 585.

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. [W. Va. Const. art. V, § 1.] 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.

State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351, Syl. Pt. 1 (1965); *West Virginia Public Emp. Retirement Sys. v. Dodd*, 183 W. Va. 544, 396 S.E.2d 725, Syl. Pt. 2 (1990) (emphasis added).

B. STATUTE AT ISSUE

Appellants challenge the constitutionality of Section 55-7B-8 (2003) of the West Virginia Code, which states:

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

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

(c) On the first of January, two thousand four, and in each year thereafter, the limitation for compensatory damages contained in subsections (a) and (b) of this section shall increase to account for inflation by an amount equal to the consumer price index published by the United States Department of Labor, up to fifty percent of the amounts specified in subsections (b) and (c) as a limitation of compensatory noneconomic damages.

(d) The limitations on noneconomic damages contained in subsections (a), (b), (c) and (e) of this section are not available to any defendant in an action pursuant to this article which does not have medical professional liability insurance in the amount of at least one million dollars per occurrence covering the medical injury which is the subject of the action.

(e) If subsection (a) or (b) of this section, as enacted during the regular session of the Legislature, two thousand three, or the application thereof to any person or circumstance, is found by a court of law to be unconstitutional or otherwise invalid, the maximum amount recoverable as damages for noneconomic loss in a professional liability action brought against a health care provider under this article shall thereafter not exceed one million dollars.

W. Va. Code § 55-7B-8 (2003).

On cross appeal, City Hospital challenges the Circuit Court's rulings denying its motion for summary judgment, and for judgment as a matter of law made during and post trial. Defendants challenge the Circuit Court's application of the \$500,000 limitation to the jury's verdict for noneconomic loss instead of the \$250,000 limitation.

C. THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE EQUAL PROTECTION OR ACT AS SPECIAL LEGISLATION.

The MacDonald's assertion that the MPLA limitation on noneconomic loss, or "cap," violates the equal protection¹² and special legislation¹³ provisions of the West Virginia Constitution has been rejected by this Court on two prior occasions, *See Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 724, 414 S.E.2d 877, Syl. Pt. 5 (1991); *Verba v. Ghaphery*, 210 W. Va. 30, 551 S.E.2d 406, Syl. Pt. 3 (2001) (per curiam), and should be rejected here.

¹² The equal protection guarantee is implicitly set forth in Article III, Section 10 of the West Virginia Constitution, which states, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." *Robinson*, 186 W. Va. at 725 n.4, 414 S.E.2d at 882 n.4.

¹³ *See* Article VI, Section 39, which states in relevant part, "[I]n no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case." W. Va. Const. art VI, § 39.

1. The MPLA Limitation is Subject to Rational Basis Review.

Appellants devote a good bit of their brief arguing this Court should abandon the well established principle that economic regulations like W. Va. Code § 55-7B-8 are subject to rational basis review. Seeking to change the rules, Appellants argue for a strict or intermediate scrutiny review of the statute. Appellant's Br. at 7-12. This argument cannot be reconciled with the decisions of this Court, which held in *Robinson* and again in *Verba* that a statutory limitation on recovery "is simply an economic regulation" subject to rational basis review. *Robinson*, 186 W.Va. at 729, 414 S.E.2d at 886 (citation omitted); *Verba*, at Syl. Pt. 2. In *Robinson*, this Court expressly rejected strict scrutiny or intermediate/middle tier scrutiny tests, holding:

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).¹⁴ Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, [174] W. Va. [538], 328 S.E.2d 144 (1984).¹⁵ Syl. pt. 4, *Gibson v. West Virginia Department of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).

Robinson, at Syl. Pt. 2; see also *Verba*, at Syl. Pt. 2.¹⁴

The elimination of Mrs. MacDonald's consortium award does not warrant a heightened level of review. Appellants again ignore *Robinson*, which upheld the elimination of separate \$1,000,000 consortium awards to the parents of a brain damaged infant (as well as a \$1,500,000 reduction in noneconomic damages awarded to the infant).¹⁵ "The right to bring a tort action for damages, even though there is court involvement, is economically based and is not a

¹⁴ See also *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737, Syl. Pt. 4 (1991); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634, Syl. Pt. 2 (1991).

¹⁵ *Id.* at 732 n.11, 414 S.E.2d at 889 n.11.

‘fundamental right’ . . . for state constitutional equal protection purposes,” meaning that legislation which not just limits damages but completely eliminates certain common-law causes of action is subject to rational basis review as well. *Id.* at 728-29, 414 S.E.2d at 885-86 (citation omitted).¹⁶ Heightened scrutiny of economic legislation is not the law in West Virginia; Appellants’ argument that it is must be rejected.

2. The MPLA Limitation Passes the Rational Basis Test.

Appellants claim the cap fails the rational basis test because it “arbitrarily and unreasonably treats medical malpractice victims differently from other tort claimants and discriminates as well within that class, unjustifiably subjecting the most severely injured medical malpractice plaintiffs to extreme deprivation.” Appellant’s Br. at 17. These arguments were made and rejected in *Robinson*,¹⁷ where this Court stated:

Concerning the first claim . . . the legislature's limited application of the statutory “cap” (on the amount of recoverable noneconomic damages) to medical malpractice actions, instead of applying the “cap” to all tort actions, did not violate state constitutional equal protection principles because the legislature had responded at that time to a liability insurance “crisis” in the particular area of medical malpractice, and the statute is rationally related to the legitimate state purposes of furthering the collectibility of judgments against tortfeasors who are health care providers and of promoting the continued delivery of high quality health care to the citizens of the state . . . [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.

Concerning the second claim of impermissible discrimination . . . the statutory “cap” did not violate state constitutional equal protection principles because the

¹⁶ Appellants cite to *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980) to support their claim that the cap should be subject to intermediate scrutiny. Appellant’s Brief at 15. However, the *Robinson* Court did not find *Carson* persuasive for this very reason. *Robinson*, 186 W. Va. at 728-29, 414 S.E.2d at 885-86.

¹⁷ See *Robinson*, 186 W. Va. at 729, 414 S.E.2d at 886:

With respect to the challenges here under the state constitutional equal protection or special legislation provisions, the claim of impermissible discrimination under the statutory ‘cap’ at issue is twofold: W. Va. Code, 55-7B-8, as amended, allegedly discriminates impermissibly between (1) medical professional liability victims and other tort victims and between (2) medical professional liability victims with a noneconomic loss not exceeding \$1,000,000 and medical professional liability victims with a noneconomic loss exceeding \$1,000,000.

legislature may have believed reasonably that it was fairer to medical malpractice plaintiffs in general to reduce only the very large noneconomic damage awards, rather than to establish a lower “cap” and thereby diminish the more modest recoveries for noneconomic damages which occur in the great bulk of cases.

Id. at 729-30, 414 S.E.2d at 886-87 (internal citations omitted).

The West Virginia Legislature in enacting both the original and amended noneconomic damages limitations set forth in the MPLA had a rational basis for balancing (i) the rights of individual citizens to adequate and reasonable compensation with (ii) “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.” W. Va. Code 55-7B-1 (2003). As recognized in *Robinson*, when “faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for any of their damages,” the Legislature can conclude “it [is] in the public interest to attempt to obtain some cost savings by limiting noneconomic damages.” *Robinson*, 186 W. Va. at 730, 414 S.E.2d at 887 (emphasis added).

This Court’s review of the Legislature’s express findings and declaration of purpose in enacting the MPLA in 1986 led it “to conclude that the legislature reasonably could conceive to be true the facts on which the Medical Professional Liability Act, including the medical malpractice cap, is based.” *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411. The “mere passage of time” did not render the MPLA cap unconstitutional or invalid. *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411. As in 1986, the Legislature in 2003 amended the cap in response to its finding, among others, that the cost of liability insurance had continued to rise “dramatically,” this time resulting in the state’s loss of physicians. W. Va. Code 55-7B-1 (2003). This Court recognized the cap was a reasonable method rationally related to a legitimate state interest in *Robinson* and *Verba*, and the same holds true today.

Appellants' brief contains "copious statistics to this Court to . . . refute the legislature's findings in support of the medical malpractice cap," *Verba*, 210 W. Va. at 34-35, 552 S.E.2d at 410-11, in an attempt to show: 1) West Virginia was really not suffering from a loss of physicians or an increase in malpractice claims and awards and 2) malpractice claims and awards did not cause the increase in the cost of liability insurance coverage. Appellant's Br. at 20-28. To the contrary, for example, the amicus brief of the West Virginia State Medical Association ("WVSMA") offers studies supportive of the legislative action, *See*, Br. at 3, 8-18. However, as made clear in *Robinson* and *Verba*, this Court "will not reexamine independently the factual basis for the legislative justification for a statute. Instead, the inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based." *Verba* at 35, 552 S.E.2d at 411, *quoting Robinson*, 186 W. Va. at 730, 414 S.E.2d at 887 (citation omitted).

The Legislature reasonably conceived there was a crisis in the affordability and availability of liability insurance for health care providers when it amended the MPLA cap in 2003. The Appellants however challenge § 55-7B-8 and discuss it in a vacuum, as if the cap was the only thing the Legislature did to respond to the crisis when it enacted House Bill 2122 in 2003. To appreciate the Legislature's actions, § 55-7B-8 must be viewed in the context of House Bill 2122, its predecessor House Bill 601, and the enactment of the MPLA itself.

a. 1986: Enactment of the MPLA

West Virginia's first crisis in affordability and availability of medical malpractice insurance culminated in the enactment of legislation in 1986,¹⁸ when the Legislature passed a comprehensive reform of health care liability insurance, medical board discipline, and tort

¹⁸ *See* West Virginia Offices of the Insurance Commissioner, *Medical Malpractice Report: Insurers With 5% Market Share* at 1-2, Nov. 2008 ("2008 WVIC Report") available at: <http://www.wvinsurance.gov/Default.aspx?tabid=207>.

liability. *Robinson*, 186 W. Va. at 724, 414 S.E.2d at 881. The ultimate and critical point of the reforms was to ensure West Virginians had access to quality health care.

Part of the 1986 reform was the MPLA, which codified “medical professional liability,” setting forth the elements of the cause of action,¹⁹ and establishing, among other things, a one million dollar cap on noneconomic damages,²⁰ and a limitation on joint and several liability.²¹

b. 2001: House Bill 601

In 2001, fifteen years after the initial enactment of the MPLA, doctors and other health care providers in West Virginia faced another crisis in the affordability and availability of medical malpractice insurance.²² Governor Wise, in his 2002 State of the State address, referred to the “collapse of the medical malpractice insurance system.”²³ In that time period, St. Paul, the state’s leading insurer exited the market nationally,²⁴ and there were failures of PHICO and PIE.²⁵ What insurance was available to many physicians, particularly specialists, was too

¹⁹ W. Va. Code § 55-7B-3 (1986).

²⁰ W. Va. Code § 55-7B-8 (1986).

²¹ W. Va. Code § 55-7B-9 (1986).

²² See 2008 WVIC Report, *supra* note 18, at 1-2.

²³ Governor Wise’s 2002 State of the State address is available online at: <http://www.stateline.org/live/details/speech?contentId=16098>.

²⁴ St. Paul announced the exit on December 12, 2001, although it was already heavily rumored. “Because of heavy losses, the St. Paul Companies will exit the medical malpractice insurance business, ending coverage for 750 hospitals, 42,000 physicians and 73,000 other health care workers nationwide, the company said yesterday.” Milt Freudenheim, *St. Paul Cos. Exits Medical Malpractice Insurance*, N.Y. Times, Dec. 13, 2001 (available online at www.nytimes.com/2001/12/13/business/st-paul-cos-exits-medical-malpractice-insurance.html); See also Office of the West Virginia Insurance Commission, *Medical Malpractice Report on Insurers With Over 5% Market Share* at 13, Nov. 2002 (“2002 WVIC Report”) (“As is well known by all, St. Paul is withdrawing from the medical malpractice market. It is expected that by March, 2003 St Paul (and ACIC) will no longer be in the West Virginia malpractice market. St Paul together with ACIC represented over 39% of the 2001 direct written premium in the state. Thus, over the course of the current year, nearly 40% of the market will need to find a new carrier. It is known that BRIM II has been picking up a sizeable share of this business.”). St. Paul’s withdrawal was not completed until March 2003. See Office of the West Virginia Insurance Commission, *Medical Malpractice Report on Insurers With Over 5% Market Share* at 26, Nov. 2004 (“2004 WVIC Report”).

²⁵ PHICO’s failure led to a negotiation between the Governor, the Insurance Commissioner and Medical Assurance to offer coverage to PHICO’s doctors left without insurance. “Gov. Bob Wise announced this morning that Medical Assurance of West Virginia has agreed to renew at least 90 percent of its current policies plus cover 90 percent of those 160 state doctors now insured by troubled Pennsylvania insurer PHICO Insurance Co.” Therese Smith Cox, *Doctors Get Malpractice Insurance: State Negotiates Temporary Action With Medical Insurer*, Charleston Daily Mail, (Charleston, WV), Sept. 5, 2001, at <http://www.highbeam.com>. Before PHICO, West Virginia physicians weathered other insurer insolvencies, including PIE Mutual Insurance Company. PIE experienced financial

expensive, causing difficulty in attracting physicians to either stay in or come to West Virginia, resulting in reduced availability of health care for West Virginians:

[T]he retention of physicians practicing in this state is in the public interest and promotes the general welfare of the people of this state. The Legislature further finds that the promotion of stable and affordable medical malpractice liability insurance premium rates will induce retention of physicians practicing in this state.²⁶

Thus,

The Legislature finds and declares that there is a need for the state of West Virginia to assist in making professional liability insurance available for certain necessary health care providers in West Virginia to assure that quality medical care is available for the citizens of the state.²⁷

House Bill 601 established, through the Board of Risk and Insurance Management (“BRIM”), an optional insurance program for health care providers. W. Va. Code § 29-12B-6(a).²⁸ “The Legislature took temporary measures to alleviate the medical liability insurance problem by creating programs to provide coverage through the West Virginia Board of Risk and Insurance Management [...] until the legislative ‘mechanism for the formation of a physicians’ mutual insurance company’ was actuated.” *Zaleski v. West Virginia Physicians’ Mut. Ins. Co.*,

problems and was ordered into rehabilitation in December 1997, and on March 23, 1998, it was ordered into liquidation. See *McManamon v. Ohio Dept. of Ins.*, 179 Ohio App. 3d 776 (Ohio App. 10th Cir. 2008). See also *Verba*, 210 W. Va. at 37, 552 S.E.2d at 413 (Starcher, J, dissenting) (discussing PIE Mutual). Another carrier, ICA, later purchased by PIE, was declared insolvent in Texas in 1997. See *Devane v. Kennedy M.D.*, 205 W. Va. 519, 523, 519 S.E.2d 522, 523 (1999). These insolvencies left many West Virginia physicians without the insurance coverage they purchased, and subject to much lower limits (\$300,000), under the West Virginia Insurance Guaranty Act. See W. Va. Code § 33-26-8(1)(a) (1985) (Repl.Vol. 1996).

²⁶ W. Va. Code § 11-13P-1.

²⁷ W. Va. Code § 29-12B-2.

²⁸ The bill created a preferred professional liability insurance program and a high risk professional liability insurance program. To establish the optional insurance, the state insurance program was re-organized, W. Va. Code § 29-12-3(a)(1), and was given supervision and control over the optional medical liability insurance programs created in House Bill 601, W. Va. Code § 29-12-3(c)(1), (2). The programs, known as the “preferred medical liability program” and the “high risk medical liability program,” provided for insurance coverage for private practice physicians who met statutory requirements, generally meaning they were unable to obtain affordable insurance on the commercial market within statutory guidelines. W. Va. Code § 29-12B-6.

220 W. Va. 311, 314-15, 647 S.E.2d 747, 750-51 (2007), *quoting* W. Va. Code § 33-20F-2(b) (2003) (Repl. Vol. 2006).²⁹ This state insurer became known as “BRIM II.”

House Bill 601 also amended the MPLA, adding Notice of Claim and Screening Certificate of Merit as a mandatory prerequisite to filing suit;³⁰ mandatory pre-suit mediation;³¹ exchange of medical records;³² management and scheduling directives designed to expedite actions;³³ voluntary summary jury trials;³⁴ an increase in the number of jurors from six to twelve with nine required to prevail;³⁵ and elimination of “third party” insurance claims under the Unfair Trade Practices Act.³⁶

c. 2003: House Bill 2122

House Bill 601 did not resolve the problem of insurance availability and affordability, and the state was increasingly drawn into insuring private physicians. As a result, the Legislature passed House Bill 2122 on March 8, 2003, which amended the MPLA and established the tiered noneconomic damages limitation challenged here. House Bill 2122, like its predecessors, was a comprehensive response to the issue of insurance affordability and availability.³⁷

²⁹ Describing BRIM II in his State of the State address on January 9, 2003, Governor Wise stated: “We provided state-sponsored medical liability insurance to West Virginia physicians and hospitals when their insurance companies abandoned them. By the end of this month we will cover 1,000 doctors—doctors who would have been forced to leave our state if we had not acted. We also provided needed coverage to 28 hospitals and health facilities.” Governor Wise’s address is available at <http://www.stateline.org/live/details/speeCh?contentId=16142>.

³⁰ W. Va. Code § 55-7B-6 (2001).

³¹ W. Va. Code § 55-7B-6(f) (2001).

³² W. Va. Code § 55-7B-6a (2001).

³³ W. Va. Code § 55-7B-6b (2001).

³⁴ W. Va. Code § 55-7B-6c (2001).

³⁵ W. Va. Code § 55-7B-6d (2001). The twelve person jury was struck down as unconstitutional in *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005).

³⁶ W. Va. Code § 55-7B-5(b). The right of the health care provider to file a first party action against a carrier is preserved, but may not be filed until after the underlying matter is resolved. W. Va. Code § 55-7B-5(b).

³⁷ In his State of the State address on January 9, 2003, Governor Bob Wise discussed the need for reform at length. See n. 29, *supra*.

Central to the 2003 reforms was the enactment of “a mechanism for the formation of a physicians’ mutual insurance company to provide a means for physicians to obtain medical liability insurance that is available and affordable, and compensation to persons who suffer injuries as a result of medical professional liability...”³⁸ The West Virginia Mutual Insurance Company was “formed in 2004 ... to address the ‘nationwide crisis in the field of medical liability insurance’ causing ‘physicians in West Virginia who find it increasingly difficult, if not impossible, to obtain medical liability insurance either because coverage is unavailable or unaffordable.’”³⁹ Funding was provided by appropriating money from the West Virginia tobacco settlement medical trust fund for “use as the initial capital and surplus of the physicians’ mutual insurance company....”⁴⁰

House Bill 2122 provided for the transfer of all “BRIM II” physicians to a private insurer (the Mutual)⁴¹ and for the State’s exit from the private medical malpractice market.⁴² The West Virginia Health Care Provider Professional Liability Insurance Availability Act, previously created in House Bill 601, was amended to enable physicians to purchase the necessary tail

³⁸ W. Va. Code § 33-20F-2(b).

³⁹ *Zaleski*, 220 W. Va. at 314, 647 S.E.2d at 750, quoting W. Va. Code § 33-20F-2 (a)(1) and (6) (2003) (Repl. Vol. 2006).

⁴⁰ W. Va. Code § 4-11A-2(c). As a factual finding for this action, the Legislature found “certain dedicated revenues should be preserved in trust for the purpose of stabilizing the state’s health related programs and delivery systems.” W. Va. Code § 4-11A-2(a). Section 33-3-14 provided for replenishment of the Tobacco Settlement Account for a portion of taxes received by the Insurance Commissioner from insurance policies for medical liability insurance. W. Va. Code § 33-3-14(a). The statute further levied an additional premium tax, W. Va. Code § 33-3-14a, and provided for certain tax credits for reinsurance. W. Va. Code § 33-4-15a, *et seq.* The Legislature also amended provisions related to rate making. *See* W. Va. Code § 33-20B-2, *et seq.*

⁴¹ W. Va. Code § 29-12-5(c)(2)(R).

⁴² W. Va. Code § 29-12-5(d) (stating that after September 1, 2002, if the board assigned coverage or transferred insurance obligations, “then the board shall not thereafter offer or provide professional liability insurance to any health care provider pursuant to the provisions of subsection (c) of this section or the provisions of Article 12-b of this Chapter unless the Legislature adopts a concurrent resolution authorizing the Board to reestablish medical liability insurance programs.”). *See also Zaleski*, 220 W. Va. at 315, 647 S.E.2d at 751, citing W. Va. Code § 33-20F-9(b)(1) (2003); 2003 W. Va. Acts c. 147.

coverage to allow a move to the Mutual,⁴³ and certain tax credits were created for the purchase of insurance and tail coverage.⁴⁴

According to the West Virginia Insurance Commissioner, the reforms established in House Bills 601 and 2122 worked to stabilize the insurance market:

As this report will show, West Virginia's medical malpractice insurance results have displayed continuous improvements as compared to that of the years subsequent to the recent "*hard*" market period. Rate level changes which have been approved over the last few years, the passage of H.B. 601 and H.B. 2122 creating the policyholder owned *West Virginia Mutual Insurance Company* have all contributed to the change in the Medical Malpractice Liability results in West Virginia. In 2007, we experienced an overall stabilization in rate (*i.e. little to no change*) from the majority of admitted writers in West Virginia.⁴⁵

House Bill 2122 also addressed professional oversight and discipline of physicians and osteopaths by the West Virginia Board of Medicine and the West Virginia Board of Osteopathy by providing both Boards with the power to initiate disciplinary proceedings based on information received from medical peer review committees, physicians, podiatrists, hospital administrators, professional societies, and others.⁴⁶ Both Boards must investigate licensees upon notice of three or more judgments, or any combination of judgments and settlements resulting in five or more unfavorable outcomes arising from medical professional liability within a five-year period, and can initiate suspension or revocation proceedings, and can also do so based on information received from any person.⁴⁷ Formal disciplinary procedures against physicians by peer review groups, hospitals, managed care organizations and others must be reported to the

⁴³ W. Va. Code § 29-12B-6(d).

⁴⁴ House Bill 2122 also "provided a tax credit for certain medical malpractice liability insurance premiums and medical malpractice liability tail insurance premiums paid." The Legislature found "the retention of physicians practicing in this state is in the public interest and promotes the general welfare of the people of this state. The Legislature further finds that the promotion of stable and affordable medical malpractice liability insurance premium rates and medical malpractice liability tail insurance premium rates will induce retention of physicians practicing in this state." W. Va. Code § 11-13T-1.

⁴⁵ 2008 WVIC Report, *supra* note 18, at 2.

⁴⁶ W. Va. Code § 30-3-14 (physicians); W. Va. Code § 30-14-12a (osteopathic physicians).

⁴⁷ *Id.*

Boards within sixty days.⁴⁸ Circuit clerks must report adverse medical professional liability judgments or criminal actions against physicians to the Boards as well.⁴⁹

House Bill 2122 also amended the MPLA (“MPLA III”). MPLA III applies to actions filed after July 1, 2003.⁵⁰ MPLA III reduced the noneconomic damages limitation to \$250,000, with an increased limitation of \$500,000 for more serious cases,⁵¹ and provided a single \$500,000 limitation on all damages, both economic and noneconomic, in “trauma” cases.⁵² Further amendments included: limitations on the use of “loss of chance”;⁵³ elimination of joint and several liability;⁵⁴ collateral source adjustment;⁵⁵ expert qualifications;⁵⁶ restrictions on ostensible agency;⁵⁷ limits on actions against health care providers by third parties;⁵⁸ and the creation a patient compensation fund.⁵⁹

As in the 1986 Act, MPLA III included the Legislature’s express findings and declaration of purpose:

That liability insurance is a key part of our system of litigation, affording compensation to the injured while fulfilling the need and fairness of spreading the cost of the risks of injury;

...

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;

That in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ W. Va. Code § 55-7B-10(b) (2003).

⁵¹ W. Va. Code § 55-7B-8(a),(b) (2003). These limitations are adjusted for inflation. W. Va. Code § 55-7B-8(c) (2003).

⁵² W. Va. Code § 55-7B-9c(a) (2003).

⁵³ W. Va. Code § 55-7B-3(b) (2003).

⁵⁴ W. Va. Code § 55-7B-9 (2003).

⁵⁵ W. Va. Code § 55-7B-9a (2003).

⁵⁶ W. Va. Code § 55-7B-7 (2003).

⁵⁷ W. Va. Code § 55-7B-9(g) (2003).

⁵⁸ W. Va. Code § 55-7B-9b (2003).

⁵⁹ W. Va. Code § 29-12C-1 (2003).

providers, the health care facilities and the injured without the full benefit of professional liability insurance coverage;

...
That the cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers.^{60 61}

As in 1986, in 2003 the Legislature amended the MPLA in response to its finding, among others, that the cost of liability insurance had continued to rise “dramatically,” this time resulting in the state’s loss of physicians. *See* W. Va. Code 55-7B-1 (2003). These findings demonstrate the Legislature’s stated intent to enact reforms in the tort system necessary to allow compensation for injured patients, while at the same time allowing for the regulation of rate making and other practices by liability insurers, “including the formation of a physician’s mutual insurance company and establishment of a fund to assure adequate compensation to victims of malpractice . . .”⁶² They demonstrate the Legislature “reasonably could conceive to be true the facts on which the Medical Professional Liability Act, including the medical malpractice cap, is based.” *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411.

Against this backdrop, Appellants’ claim that W.Va. Code § 55-7B-8 is not reasonably related to its purposes because “there was no credible evidence that the cap would lower insurance or increase the number and availability of physicians,” is flat wrong. Appellant’s Br. at 28. The Legislature had plenty of evidence of a problem, and devised a solution. Appellants simply ignore this point:

It is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted. If the

⁶⁰ W. Va. Code § 55-7B-1 (2003). This Court relied on the original legislative findings included in the 1986 MPLA in upholding challenges to the one million dollar limitation on noneconomic loss. *See Robinson and Verba*.

⁶¹ Similar findings were also made regarding the cost of insurance for the State’s long term health care facilities, such as nursing homes. W. Va. Code § 55-7B-1 (2003).

⁶² *Id.*

legislature finds that it does not, it is within its power to amend the legislation as it sees fit. This Court may not 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.

Verba, 210 W. Va. at 36, 552 S.E.2d at 412 (citation omitted). Appellants' arguments and statistics--refuted, indeed, in the WVSMA amicus brief--are for the Legislature and not this Court. "[I]n addressing complicated social and economic problems [the legislature] must be free to attempt a remedy, even when the results are uncertain. In the real world, social policy must frequently be made on the basis of incomplete and even conflicting information." *Robinson* at 730, 414 S.E.2d at 887 (citation omitted). Applying the rational basis test, W.Va. Code § 55-7B-8 clearly passes muster; Appellants' arguments should be rejected.

Appellants and supporting amicus devote much of their brief arguing that caps disproportionately affect women, children, and low wage earners. In essence, they argue that because economic damages are low, not allowing a large noneconomic award is unconstitutionally impermissible because women, children, and low income workers presumably can't get a large enough award. This argument is nonsense on its face as § 55-7B-8 applies equally to all claimants, direct or derivative.

Appellants also rely on *dicta* in *Robinson* to argue a "cap" lower than \$1 million is unconstitutional:

We emphasize at this point that our holding that the statutory "cap" at issue is reasonable is limited to the particular \$1,000,000 "cap" before us. "[A]ny modification the legislature [would] make[] is subject to being stricken as unconstitutional. A reduction of non[economic] damages to a lesser cap at some point would be manifestly so insufficient as to become a denial of justice[,]" under, for example, the state constitutional equal protection or "certain remedy" provisions. *Lucas v. United States*, 757 S.W.2d 687, 700 (Tex.1988) (Gonzales, J., dissenting).

Id. at 730, 414 S.E.2d at 887.

On analysis, this *dicta* does not support Appellants' argument. *Robinson* quoted the dissenting opinion of Texas Supreme Court Justice Gonzalez, who concluded that Texas's statutory cap on noneconomic damages was constitutional. He found the opinions of other jurisdictions which struck down caps were not persuasive:

The majority cites with approval the language used by the Supreme Court of Florida: "[I]f the legislature may constitutionally cap recovery at \$450,000 there is no discernable reason why they could not cap the recovery at some other figure, perhaps \$50,000 or \$1,000 or \$1." This argument ignores the fact that any modification the legislature makes is subject to being stricken as unconstitutional. A reduction of nonmedical damages to a lesser cap at some point would be manifestly so insufficient as to become a denial of justice.

Lucas v. U.S., 757 S.W.2d 687, 699-700 (Tex. 1988) (Gonzales, J., dissenting) (citation omitted).

It is noteworthy that Justice Gonzalez responded to a "slippery slope" argument about hypothetical caps of "\$50,000 or \$1,000 or \$1." No such caps are at issue here.

The question here is whether the current cap is "manifestly so insufficient" that it violates equal protection. *Robinson* and *Verba* dealt with the original noneconomic damages limit of one million dollars, which was not only "the largest cap on noneconomic damages of which" the Court was aware, but also "higher than almost every cap elsewhere on all (or total) damages." *Id.* at 730, 414 S.E.2d at 887. Importantly, the *Robinson* Court relied on cases from other jurisdictions which upheld noneconomic caps of \$250,000⁶³ and \$350,000,⁶⁴ as well as caps of \$750,000 on all damages.⁶⁵

⁶³ See *Robinson*, 186 W. Va. at 727-28, 414 S.E.2d at 884-85, citing *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 679-84, 211 Cal.Rptr. 368, 382-87 (en banc), appeal dismissed for want of substantial federal question, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed. 2d 215 (1985); *Davis v. Omitowoju*, 883 F.2d 1155, 1158-65 (3rd Cir. 1989); *Samsel v. Wheeler Trans.t Services, Inc.*, 246 Kan. 336, 789 P.2d 541 (1990), overruled on another point, *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176, 1189, 1191 (1991).

⁶⁴ See *id.*, citing *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325, 1330-38 (D. Md. 1989); *Edmonds v. Murphy*, 83 Md.App. 133, 573 A.2d 853, 857-68, *aff'd*, 325 Md. 342, 601 A.2d 102 (Md. 1992).

⁶⁵ See *id.*, citing *Boyd v. Bulala*, 877 F.2d 1191, 1195-97 (4th Cir. 1989); *Etheridge v. Med. Ctr.r Hosp.*, 237 Va. 87, 376 S.E.2d 525, 528-34 (1989).

In *Verba*, one argument by the appellant was the 1986 cap was invalid because it did not account for inflation. Dismissing this argument, the *Verba* Court found the cap was “one of the most liberal caps in the country. In fact, no state has a cap set at a higher amount.” *Id.* at 37, 552 S.E.2d at 413. “Accepting the fact that the cap now has only a present value of approximately \$648,147, this amount is still greater than many of the states which limit medical malpractice awards,” citing caps on noneconomic damages in the amount of \$250,000,⁶⁶ \$350,000,⁶⁷ \$400,000,⁶⁸ \$500,000,⁶⁹ as well as caps on total damages.⁷⁰ *Id.*

The caps here, limiting noneconomic damages to \$250,000 or \$500,000 in cases with catastrophic injuries,⁷¹ are adjusted upward annually based on the Consumer Price Index.⁷² They “place no limit on the recovery of economic (or ‘pecuniary’ or ‘special’) damages, but only on noneconomic damages, which are open-ended.” *Robinson*, 186 W. Va. at 730, 414 S.E.2d at 887.

Applying this Court’s reasoning in *Robinson* and *Verba*, there is no merit to the argument that these caps are “manifestly so insufficient” as to violate equal protection. The 2003 caps are

⁶⁶ See *Verba*, 210 W. Va. at 37 n.4, 552 S.E.2d at 413 n.4, citing California (Cal. Civil Code § 3333.2(b) (1975)), and Kansas (Kan. Stat. Ann. § 60-19a02(b) (1988)).

⁶⁷ See *id.*, citing Missouri (Mo. Ann. Stat. § 538.210 (1986)).

⁶⁸ See *id.*, citing Idaho (Idaho Code § 6-1603(1)(1987)).

⁶⁹ See *id.*, citing Maryland (Md.Code Ann., [Courts and Judicial Proceedings] § 11-108 (2000)).

⁷⁰ See *id.*, citing Virginia (Va.Code Ann. § 8.01-581.15 (1999)) and Louisiana (La.Rev.Stat. Ann. 40 § 1299.42B (1991)).

⁷¹ The \$500,000 cap applies in cases where there is:

- (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) (2003).

⁷² See W. Va. Code 55-7B-8(c) (“On the first of January, two thousand four, and in each year thereafter, the limitation for compensatory damages contained in subsections (a) and (b) of this section shall increase to account for inflation by an amount equal to the consumer price index published by the United States department of labor, up to fifty percent of the amounts specified in subsections (b) and (c) as a limitation of compensatory noneconomic damages.”).

a far cry from the hypothetical caps of “\$50,000 or \$1,000 or \$1.” *Lucas v. U.S.*, 757 S.W.2d 687, 699-700 (Tex. 1988) (Gonzales, J., dissenting).

In fact, W. Va. Code § 55-7B-8 was enforced and applied by a Virginia District Court in *Wilson v. United States*, 375 F. Supp.2d 467 (2005). The District Court held the MPLA applied to plaintiff’s claim under the Federal Tort Claim Act (FTCA) for injuries occurring at a Veterans’ Administration hospital in West Virginia. Addressing plaintiff’s constitutional challenge, the District Court found the West Virginia Legislature, “in enacting both the original and amended damages limitations set forth in the MPLA, had a rational basis for balancing (i) the need for fair compensation for patients injured by medical negligence with (ii) the ability of health care providers and their insurance carriers to afford such compensation.” *Id.* at 472-73. Accordingly, the District Court ruled the plaintiff could not recover damages in excess of the \$250,000 cap.⁷³

Just as in *Robinson*, the limitations on noneconomic damages were a part of the MPLA, one of three areas of reform the Legislature determined in 2003 “must be enacted together” in order “to provide for a comprehensive, integrated resolution” of the malpractice insurance crisis that was both a “detriment [to] the injured and health care providers.” *Robinson*, 186 W. Va. at 724, 414 S.E.2d at 881. The caps are not only reasonably related to the Legislature’s attempt to remedy the situation, but integral to achieving the remedy.

⁷³ The court also rejected plaintiff’s challenge to the retroactive application of the 2003 cap, finding the Legislature clearly intended the limitations to apply to all suits filed after July 1, 2003. *Id.* at 472. Moreover, the court found that such an application was not unconstitutional, stating legislatures can enact retroactive legislation as long as there is a rational basis. *Id.* at 472.

Applying the appropriate test--rational basis--this Court should affirm the ruling below which applied W. Va. Code § 55-7B-8, and expressly reject Appellants' constitutional challenge.⁷⁴

D. THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY.

Echoing *Robinson* and *Verba*, Appellants assert that § 55-7B-8 violates the right to jury trial provision set forth in Article III, Section 13 of the West Virginia Constitution, which provides:

In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. 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.

Appellants claim the caps violate the jury trial right by allowing “legislative revision of a jury’s factual finding of damages.”⁷⁵ The elephant in the room ignored by Appellants is this Court’s holding in Syllabus Point 4 of *Robinson*: “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.’” *Id.* at Syl. Pt. 4 (emphasis added).⁷⁶ Thus, “the predetermined, legislative limit on the recoverable amount of a noneconomic loss in a medical professional liability action does not violate the ‘reexamination’ clause of such jury trial provision.” *Robinson*, 186 W.Va. at 731, 414 S.E.2d at 888.

⁷⁴ Not mentioned anywhere in Appellants’ brief is W. Va. Code § 55-7B-8(c), which provides that if § 55-7B-8(a) and (b) are struck down, the limitation reverts to the \$1 million dollars established in 1986.

⁷⁵ Appellants’ Br. at 33.

⁷⁶ In reaching this conclusion, the *Robinson* Court looked to *Davis v. Omitowoju*, 883 F.2d 1155, 1165 (3d. Cir. 1989), which held that the “reexamination” clause of the Seventh Amendment of the U.S. Constitution applies to the judiciary and was not meant to limit the legislature’s authority in establishing damage caps in medical liability actions.

Ten years later in *Verba*, this Court found “no reason to revisit” its holding in *Robinson* on this issue;⁷⁷ Appellants here provide no new grounds to give this Court a “reason to revisit” *Robinson* either.⁷⁸

The only West Virginia cases cited by Appellants that were decided after *Verba*⁷⁹ have nothing to do with the constitutionality of legislative caps on damages.⁸⁰ Appellants rely on *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (1999) and *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010), which address whether a legislative cap on damages violates the right to a jury trial. *Lakin* was summarily rejected by the *Verba* Court, which saw “no reason to revisit the constitutional issues previously raised in *Robinson*.” *Verba*, 210 W. Va. at 34, 552 S.E.2d at 410.⁸¹ *Nestlehutt*, a 2010 decision finding a

⁷⁷ *Verba*, 210 W. Va. at 34, 552 S.E.2d at 410.

⁷⁸ Of the 26 cases cited by Appellants, 15 were decided before *Robinson*, and 23 were decided before *Verba*. The pre-*Robinson* cases are: 1) *Perilli v. Bd. of Educ. Monongalia Cty.*, 182 W. Va. 261, 387 S.E.2d 315 (1989); 2) *Wright v. Cent. Du Page Hosp. Ass’n*, 63 Ill.2d 313, 347 N.E.2d 736 (Ill. 1976); 3) *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989); 4) *Addair v. Majestic Petroleum Co., Inc.*, 160 W. Va. 105, 232 S.E.2d 821 (1977); 5) *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); 6) *State Rd. Comm’n v. Young*, 100 W. Va. 394, 130 S.E. 478 (1925); 7) *Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1773); 8) *Schick v. U. S.*, 195 U.S. 65 (1904); 9) *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); 10) *Barry v. Edmunds*, 116 U.S. 550, 6 S.Ct. 501, 29 L.Ed. 729 (1886); 11) *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); 12) *St. Louis, Iron Mountain & S. Railway Co. v. Craft*, 237 U.S. 648, 35 S.Ct. 704, 59 L.Ed. 1160 (1915); 13) *Townsend v. Hughes*, 86 Eng. Rep. 994 (C.P. 1677); 14) *Tull v. U. S.*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); and 15) *Wilford v. Berkeley*, 97 Eng. Rep. 472 (K.B. 1758). The pre-*Verba* cases, in addition to the 15 pre-*Robinson* cases, are: 16) *Harrison v. Town of Eleanor*, 191 W. Va. 611, 447 S.E.2d 546 (1994); 17) *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998); 18) *Marsch v. Am. Elec. Power Co.*, 207 W. Va. 174, 530 S.E.2d 173 (1999) (per curiam); 19) *Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 118 S.Ct. 1210, 140 L.Ed.2d 336 (1998) (per curiam); 20) *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (Or. 1999), 21) *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999); 22) *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996); and 23) *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

⁷⁹ *Realmark Dev., Inc. v. Ranson*, 214 W. Va. 161, 588 S.E.2d 150 (2003); *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010).

⁸⁰ *Realmark* addressed whether tenants were entitled to a jury trial on an unjust enrichment claim against their former landlord. *Perrine* addressed whether the owner of a zinc smelter facility was entitled to a reduction in punitive damages awarded by the jury in a class action asserting claims of negligence, public and private nuisance, trespass, and medical monitoring arising out of alleged environmental contamination.

⁸¹ The *Lakin* decision was cited by both Justices Starcher and McGraw in their dissenting opinions in *Verba*. See *Verba*, 210 W. Va. at 38 n.1, 552 S.E.2d at 414 n.1 (Starcher, J., dissenting); *Id.*, 210 W. Va. at 41 n.1, 552 S.E.2d at 417 n.1 (McGraw, J., dissenting).

legislative cap on noneconomic damages violated the right to jury trial, was based on the Georgia Constitution's right to a jury trial provision, which states, "[t]he right to trial by jury shall remain inviolate." West Virginia's jury trial provision, which provides that the jury trial right "shall be preserved", is less "comprehensive" than Georgia's "inviolable" jury trial provision, and is therefore distinguishable as recognized by the *Nestlehutt* Court. *See Nestlehutt*, 286 Ga. at 738 n. 8, 691 S.E.2d at 224 n. 8 ("While we recognize that this conclusion finds authority to the contrary from some other jurisdictions, those decisions are . . . governed by less comprehensive constitutional jury trial provisions, see, e.g., *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (constitution provides that right to jury trial "inviolable" only in capital cases); *Phillips v. Mirac, Inc.*, 251 Mich.App. 586, 651 N.W.2d 437 (2002) (constitution provides that "right of trial by jury shall remain"); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989) (constitution provides that "trial by jury is preferable ... and ought to be held sacred").").

Appellants try to undermine *Robinson* with *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 118 S. Ct. 1279, 140 L. Ed. 2d 438 (1998),⁸² which they incorrectly contend "disclaimed" the reasoning used in a series of lower federal court opinions that *Robinson* relied upon "heavily." Appellant's Br. at 37 n. 17. Though the argument is tough to follow, Appellants claim:

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

Appellant's Br. at 37 n. 17.

⁸² *Feltner* held that in copyright infringement actions, the Seventh Amendment of the U.S. Constitution provides the right to a jury trial on all issues pertinent to the award of statutory damages, including the amount.

This argument fails for several reasons. *Feltner* was decided in 1998, well before *Verba*, yet this Court saw “no reason to revisit” *Robinson*’s ruling that the “cap” did not violate the right to jury trial. *Verba*, 210 W. Va. at 34, 552 S.E.2d at 410.

Another problem with Appellants’ reliance on *Feltner* is the illusion that *Robinson* was based on *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) and several other federal cases⁸³ that relied upon *Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987),⁸⁴ and which were therefore ultimately disclaimed by *Feltner*. This is simply not the case. In *Boyd*, the United States Court of Appeals for the Fourth Circuit, in a footnote, “note[d] in passing that the Supreme Court has recently suggested that the right to a jury trial may not even extend to the ‘remedy phrase of a civil trial.’ *Tull v. U. S.*, 481 U.S. 412, 426 n. 9, 107 S.Ct. 1831, 1840 n. 9, 95 L.Ed.2d 365 (1987).” *Id.*, 877 F.2d at 1196 n. 5. In *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1334 (D. Md. 1989), the other federal case cited in *Robinson*, the federal district court stated:

If, as *Tull* suggests, the right to a jury trial does not extend to the remedy phase of a civil trial, then the Maryland legislature clearly can set reasonable limits on damages recoverable under recognized causes of action. The Court need not go so far to uphold the cap, however, as it is satisfied that the power of the legislature to abolish common law causes of action includes the power to set reasonable limits on recoverable damages.

⁸³ The other federal decisions cited in *Robinson*’s analysis on the jury trial issue are: 1) *Davis v. Omitowoju*, 883 F.2d 1155, 1165 (3rd Cir. 1989) (upheld \$250,000 statutory cap on noneconomic damages in medical liability actions; finding it did not violate Seventh Amendment right to jury trial); and 2) *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325, 1334 (D. Md. 1989) (upheld \$350,000 cap on noneconomic damages in personal injury actions imposed by Maryland legislature; finding it did not violate federal or state right to jury trial). *Robinson*, 186 W. Va. at 731, 414 S.E.2d at 888.

Robinson also cited a Virginia Supreme Court decision, *Etheridge v. Med. Ctr. Hosp.*, 237 Va. 87, 376 S.E.2d 525, 528-29 (1989), which found that a \$750,000 cap on the total amount of damages in a medical liability action, which was applied after the jury fulfilled its fact-finding function, did not impinge on the right to jury trial, as well as a Maryland state court decision, *Edmonds v. Murphy*, 83 Md. App. 133, 573 A.2d 853 (Md. Ct. Spec. App. 1990), *aff’d*, 325 Md. 342, 601 A.2d 102 (Md. 1992), which found Maryland’s statutory \$350,000 cap on noneconomic damages in personal injury actions did not impinge on the jury trial right. *Robinson*, 186 W. Va. at 731, 414 S.E.2d at 888.

⁸⁴ *Tull* held that the Seventh Amendment does not guarantee a jury trial to assess civil penalties under the Clean Water Act. The *Feltner* Court, although it found *Tull* to be inapposite, did not overrule *Tull*.

Id. (emphasis added). To suggest these federal decisions “relied” on *Tull* misses the mark.

Contrary to Appellants’ claim, the decisions relied on by *Robinson* have not been rejected or disclaimed by *Feltner*, and, in fact, are still “good law.” In 2005, for example, the United States Court of Appeals for the Sixth Circuit, in *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005), relied on *Boyd* in finding that Michigan’s cap on noneconomic damages in medical liability actions did not violate the Seventh Amendment.⁸⁵ The *Botsford* court, like this Court in *Robinson*, found persuasive *Boyd*’s reasoning that “[i]f a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well.” *Id.* (citation omitted). The U.S. Supreme Court in 2006 denied the *Botsford* plaintiff’s petition for a writ of certiorari on the issue of whether Michigan’s cap violated the Seventh Amendment. *See* 547 U.S. 1111, 126 S. Ct. 1912, 164 L. Ed. 2d 664 (2006).

If, as Appellants contend, *Feltner* stands for the proposition that legislative caps on damages violate the Seventh Amendment, then why did the U.S. Supreme Court let *Botsford* stand? The answer, as noted by the Virginia Supreme Court in *Pulliam v. Coastal Emergency Services of Richmond, Inc.*⁸⁶ is because Appellants’ “reliance on *Feltner* is [] misplaced.” Like

⁸⁵ Like *Boyd*, the other decisions relied on by the *Robinson* Court that Appellants contend were ultimately disclaimed by *Feltner* have not been overruled but instead have been relied on by other courts post-*Feltner* as persuasive authority. *See, e.g., Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002) (in finding that legislative caps on noneconomic and punitive damages did not violate the Alaska Constitution, the Court indicated, “We agree with the reasoning of the federal court that decided *Franklin v. Mazda Motor Corp.*, interpreting Maryland law.”); *Id.*, 56 P.3d at 1050-51 (“We agree with the reasoning employed by the Third Circuit Court of Appeals, which interpreted the Seventh Amendment to the United States Constitution to allow damages caps. In *Davis v. Omitowaju*, the court held that a damages cap did not intrude on the jury’s fact-finding function, because the cap was a ‘policy decision’ applied after the jury’s determination, and did not constitute a re-examination of the factual question of damages.”); *Id.*, 56 P.3d at 1051 (agreeing with *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 528-29 (1989) that “[t]he decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury.”); *University of Maryland Medical System Corp. v. Malory*, 143 Md. App. 327, 355, 795 A.2d 107, 123 (Md. Ct. Spec. App. 2001) (finding Maryland caps on noneconomic damages was constitutional based on the Court’s holding in *Edmonds v. Murphy*, 83 Md. App. 133, 573 A.2d 853 (Md. Ct. Spec. App. 1990), which “is controlling.”).

⁸⁶ 257 Va. 1, 11-13, 509 S.E.2d 307, 312-313 (Va. 1999).

Appellants, the plaintiff in *Pulliam* contended Virginia's statutory cap impinged on the right to jury trial, including "the right to receive the amount of damages awarded by a jury after a proper jury trial."⁸⁷ To support his argument, which the *Pulliam* Court summarily rejected, plaintiff relied on *Feltner*:

The plaintiff says that [*Feltner*] support[s] his conclusion that the medical malpractice cap violates his right to a jury trial. We do not agree. . . . [T]he [*Feltner*] Court dealt primarily with whether Columbia was entitled to a jury trial even though it elected to seek statutory damages. The Court concluded that Columbia had the right to a jury trial because the common law afforded copyright owners causes of action for infringement, and these actions were tried before juries The Court did not address the validity of a cap on the recovery of damages.⁸⁸

The *Pulliam* Court also pointed out that the United States Supreme Court, in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)⁸⁹ noted:

While we have not specifically addressed the issue, courts of appeals have held that district court application of state statutory caps in diversity cases, postverdict, does not violate the Seventh Amendment." See *Davis v. Omitowoju*, 883 F.2d 1155, 1161-1165 (C.A.3 1989) (Reexamination Clause of Seventh Amendment does not impede federal court's postverdict application of statutory cap); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (C.A.4 1989) (postverdict application of statutory cap does not violate Seventh Amendment right of trial by jury).⁹⁰

The *Pulliam* court logically concluded that because the legislature can "enact a statute of limitations completely barring recovery in a particular cause of action without impinging upon the right of trial by jury, it should be permissible for the legislature to impose a limitation upon the amount of recovery as well."⁹¹

This sentiment was echoed in *Robinson*, which noted the Legislature's power to define, augment, or even abolish complete causes of action "must necessarily include" the power to

⁸⁷ *Id.* at 11, 509 S.E.2d at 312.

⁸⁸ *Id.* at 12, 509 S.E.2d. at 313.

⁸⁹ 518 U.S. 415, 429 n. 9, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996).

⁹⁰ *Pulliam*, 257 Va. at 12-13, 509 S.E.2d. at 313. See also *M.D. v. U.S.A.*, 2010 WL 3893750, *3 (M.D. Fla. 2010) (noting that plaintiffs' claims that noneconomic damage caps violate the U. S. Constitution's Seventh Amendment right to trial by jury "have been uniformly rejected by federal courts") (citations omitted).

⁹¹ *Id.*, 257 Va. at 13-14, 509 S.E.2d at 314.

define by statute what damages may be recovered.⁹² As recognized in *Verba*: “[T]he legislature has the power to alter, amend, change, repudiate, or abrogate the common law.”⁹³ This includes the power to bar or limit liability as evidenced in statutes that impose governmental immunity,⁹⁴ immunity for employers,⁹⁵ ski resort operators,⁹⁶ whitewater rafting outfitters,⁹⁷ operators of equestrian businesses,⁹⁸ “Good Samaritans,”⁹⁹ peer review organizations,¹⁰⁰ statutes of limitations¹⁰¹ and repose.¹⁰² Indeed, in 2009 this Court, on two separate occasions, enforced sovereign immunity, thereby denying recovery to plaintiffs.¹⁰³ Just this Term, the Court denied recovery to a plaintiff in a medical professional liability action by enforcing the statute of limitations.¹⁰⁴ The Legislature also has the power to increase the amount of jury awards via

⁹² 186 W. Va. at 731, 414 S.E.2d at 888.

⁹³ *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411.

⁹⁴ See W. Va. Code § 29-12A-1, *et seq.* (“The Governmental Tort Claims and Insurance Reform Act;” the Act provides tort immunity to political subdivisions in certain instances); *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991) (upholding the Governmental Tort Claims and Insurance Reform Act); *O’Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992) (upholding section of Governmental Tort Claims and Insurance Reform Act that immunized political subdivision from liability if claim is covered by workers’ compensation).

⁹⁵ See W. Va. Code § 23-2-6 (establishing general immunity for employers who subscribe and pay into the workers’ compensation fund from employee suits resulting from work-related injuries for damages at common law, with the exception of cases where the employer deliberately intended to produce the injury).

⁹⁶ See W. Va. Code § 20-3A-1, *et seq.* (“The West Virginia Skiing Responsibility Act;” the Act immunizes ski area operators from tort liability for the inherent risks in skiing); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991) (finding the West Virginia Skiing Responsibility Act is constitutional).

⁹⁷ See W. Va. Code § 20-3B-1, *et seq.* (“The Whitewater Responsibility Act;” the Act immunizes commercial whitewater outfitters and guides from tort liability for the inherent risks in rafting).

⁹⁸ See W. Va. Code § 20-4-1, *et seq.* (“The Equestrian Activities Responsibility Act;” the Act immunizes operators of equestrian businesses from tort liability for the inherent risks in equestrian activities).

⁹⁹ See W. Va. Code § 55-7-15, 19 (“Good Samaritans” who provide emergency or volunteer medical services in good faith in emergencies and at athletic events have immunity from liability); See also W. Va. Code § 30-3-10A(a) (immunity for retired physicians who obtain a special volunteer medical license and provide care without pay for the indigent, absent gross negligence or willful misconduct).

¹⁰⁰ See W. Va. Code § 30-3C-2 (“Health Care Peer Review Organization Protection;” providing immunity to peer review organizations and to persons who provide information to peer review organizations “from liability for loss or injury to the person whose activities are being reviewed.”).

¹⁰¹ See, e.g., W. Va. Code § 55-2-12 (two-year statute of limitation period for personal injury actions “for which no other limitation is otherwise prescribed”).

¹⁰² See, e.g., W. Va. Code § 55-2-6a (ten-year statute of repose for deficiencies in planning, design, or supervision of construction of improvement to real property); *Gibson v. West Virginia Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991) (holding Section 55-2-6a is constitutional).

¹⁰³ See *Wrenn v. West Virginia Dept. of Trans., Div. of Highways*, 224 W. Va. 424, 686 S.E.2d 75 (2009); *State ex rel. Corp. of Charles Town v. Sanders*, 224 W. Va. 630, 687 S.E.2d 568 (2009).

¹⁰⁴ See *Mack-Evans v. Hilltop Healthcare Ctr., Inc.*, WL 3619479 (W. Va. Sept 16, 2010).

statutes that impose treble damages.¹⁰⁵ If the Legislature can increase the amount of jury awards as a matter of law without impinging on the right to a jury trial, then “the corresponding decrease as a matter of law cannot logically violate that right.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 476, 880 N.E.2d 420, 432 (Ohio 2007).

This Court recognized in *Robinson* that the Legislature, in setting limits on damages, is not acting “as a fact finder in a legal controversy” or usurping the “jury function” and acknowledged the fact that juries “always find facts on a matrix of laws given to them by the legislature and by precedent.” *Robinson*, 186 W. Va. at 731, 414 S.E.2d at 888. Appellants had a Berkeley County jury resolve the factual issues with regard to liability and the amount of noneconomic damages; the cap therefore did not interfere “with the jury’s proper role and its ability to resolve the factual issues which [were] pertinent to” Appellants’ case. *Murphy v. Edmonds*, 325 Md. 342, 373, 601 A.2d 102, 117 (Md. 1992). Appellants’ argument that their right to a jury trial was violated because they did not receive the full amount of damages awarded by the jury simply ignores the fact that the Legislature can statutorily set limits on “recoverable damages it chooses to allow in the courts of law.” *Robinson*, 186 W. Va. at 731, 414 S.E.2d at 888.¹⁰⁶

¹⁰⁵ See, e.g., W. Va. Code § 17A-6A-16 (allowing new motor vehicle dealer who prevails in an action against a manufacturer or distributor to recover treble damages and attorney’s fees); W. Va. Code § 47-18-9 (allowing recovery of treble damages, attorney’s fees, and costs for antitrust violations); W. Va. Code § 61-3-48a (allowing recovery of treble damages for unlawful timbering).

¹⁰⁶ Appellants also claim the cap acts as a legislative remittitur in violation the jury trial right and cite to *Hetzel v. Prince William Cty.*, 523 U.S. 208, 211 (1998), a U.S. Supreme Court opinion which held that judicial remittitur of a jury verdict without giving a plaintiff the option of new trial violated the Seventh Amendment right to jury trial. *Hetzel* is inapposite, as this Court recognized in *Verba* that the cap is not a legislative remittitur, but instead is simply an exercise of the legislature’s power. See *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411. This is consistent with the Virginia Supreme Court’s decision in *Pulliam*, in which the Court rejected plaintiff’s attempt to equate remittitur with the medical malpractice cap. *Id.* Plaintiff, who contended the cap was a remittitur, argued that application of the cap violated Virginia’s right to a jury trial, based on *Hetzel*. *Id.* The Court rejected plaintiff’s argument because it wisely recognized that remittitur and the cap “are not equivalent and do not come into play under the same circumstances.” (*Pulliam*, 247 Va. at 12, 509 S.E.2d at 313). The Court explained that remittitur is utilized only after a court has determined that a party has not received a fair and proper jury trial, whereas the cap is applied only after a plaintiff has had the benefit of a proper jury trial and therefore has no right to a new trial. *Id.*

E. THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE SEPARATION OF POWERS.

Noneconomic damage limitations do not violate the “separation of powers” doctrine. *Verba*, 210 W. Va. at 35, 552 S.E.2d 406.¹⁰⁷ Indeed – as they must – Appellants acknowledge *Verba* found “no merit” to the claim that the cap acted as a legislative remittitur in contravention of the separation of powers, based on the “indisputable fact . . . that the legislature has the power to Change the common law of this State.” *Id.* (citations omitted). Thus, “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.*

Like their other arguments, Appellants urge this Court to just ignore *Verba* because its analyses “do not stand up to scrutiny because none of those other indisputable powers of the Legislature requires a judge, after a fair and proper trial, to displace the jury’s fact finding . . .” Appellants’ Br. at 40.¹⁰⁸ This Court, as well as courts in nine other jurisdictions, has found these analogies do in fact stand up to scrutiny, demonstrating that legislative limitations do not act as a legislative remittitur or otherwise infringe impermissibly on the judicial role in the separation of

¹⁰⁷ This doctrine is found in Article V, Section 1 of the West Virginia Constitution, which states:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature.

W. Va. Const. art. V, § 1.

¹⁰⁸ City Hospital agrees with Appellants that there is a distinction between the cap and the statutes of limitations and repose. The cap actually allows a plaintiff to receive a “fair and proper trial” and recover damages; the statutes of limitations and repose do not.

powers. These jurisdictions include Maryland (federal and state court), Utah, Nebraska, Alaska, Idaho, Virginia, Colorado, and Florida.¹⁰⁹

Appellants rely on *Best v. Taylor Mach. Works*,¹¹⁰ an Illinois opinion, and *dicta* in a Washington case, *Sofie v. Fibreboard Corp.*,¹¹¹ to support the argument that § 55-7B-8 violates the separation of powers.¹¹² Both *Best*, a 1997 decision, and *Sofie*, a 1989 decision, have been rejected by this Court. In *Robinson*, this Court found *Sofie* was “not persuasive in this jurisdiction.” *Robinson*, 186 W. Va. at 728, 414 S.E.2d at 885. *Best*, relied on by Justice Starcher in his dissent in *Verba*,¹¹³ was plainly not persuasive to the majority in *Verba* either.¹¹⁴

The Appellants spend the bulk of their argument rehashing issues already considered and rejected by this Court, which has already determined that legislative limits on damages do not

¹⁰⁹ For Maryland, see *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1336 (1989) (cited with approval in *Verba*); *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) (cited with approval in *Verba*); *DRD Pool Service, Inc. v. Freed*, No. 104 at 18-19 (Md. Sept. 24, 2010). For Utah, see *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004) (“There is a legitimate and long-established role for legislative involvement in jury trials. . . . The damage cap represents law to be applied, not an improper usurpation of jury prerogatives. Consequently, it does not violate the separation of powers provision of the constitution.”). For Nebraska, see *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 663 N.W.2d 43, 77 (2003) (*per curiam*) (holding that a statutory damages cap is not a judicial remittitur, but instead is a legitimate exercise of legislative power). For Alaska, see *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002) (“The damage caps cannot violate the separation of powers, because the caps do not constitute a form of remittitur.”). For Idaho, see *Kirkland ex rel. Kirkland v. Blaine Cty. Med. Ctr.*, 134 Idaho 464, 471, 4 P.3d 1115, 1122 (Idaho 2000) (holding that legislative caps do not infringe on judiciary’s power of remittitur). For Virginia, see *Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 101, 376 S.E.2d 525, 532 (1989) (concluding that a ceiling on medical malpractice damages “was a proper exercise of legislative power” and therefore did not violate the separation of powers doctrine); *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 257 Va. 1, 20, 509 S.E.2d 307, 318 (Va. 1999) (legislative damage caps do not invade the province of the judiciary.). For Colorado, see *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004) (finding that the legislative cap does not violate separation of powers because “the trial court still retains its authority to reduce by remittitur an award it determines to be excessive in light of the evidence before the jury” and because the legislature, having created a statutory cause of action for medical malpractice, “can prescribe reasonable limits on the amount of damages recoverable under the statute.”). For Florida, see *M.D. v. U.S.A.*, 2010 WL 3893750, *6 (M.D.Fla. filed Sept. 30, 2010) (because the noneconomic damage cap “does not purport to vest the Legislature with authority to make a fact intensive, case-by-case determination of the propriety of damage awards in individual cases, it does not usurp the authority of the judiciary.”).

¹¹⁰ 179 Ill.2d 367, 415, 228 Ill.Dec. 636, 689 N.E.2d 1057, 1081 (1997).

¹¹¹ 112 Wash.2d 636, 654, 771 P.2d 711, 721, modified 780 P.2d 260 (Wash. 1989).

¹¹² The *Sofie* Court stated in *dicta* that “[a]lthough we do not decide the case on this basis, the [damages] limit may, indeed, violate the separation of powers.” *Id.* at 654, 771 P.2d at 721.

¹¹³ See *Verba*, 210 W. Va. at 38 n. 1, 552 S.E.2d at 414 n. 1 (Starcher, J., dissenting).

¹¹⁴ In *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004), the Court expressly “declin[e]d to follow” *Best*, and instead agreed and joined “[s]everal other jurisdictions,” including West Virginia, that “have upheld damages caps as not infringing impermissibly on the judicial role in the separation of powers.”

usurp the “jury function,” *Robinson*, 186 W. Va. at 731, 414 S.E.2d at 888, or the judge’s function, *Verba*, 210 W. Va. at 35, 552 S.E.2d 406, nor do they act as a legislative remittitur. *Id.*¹¹⁵

The Appellants simply ignore the Legislature’s role in West Virginia’s system of government. “It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation,” *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986), and in order to fulfill its duties, the Legislature has been given, by virtue of Article VIII, Section 13 of the West Virginia Constitution,¹¹⁶ “the power to alter, amend, change, repudiate, or abrogate the common law.” *Verba*, 210 W. Va. at 35, 552 S.E.2d 411. This power is “beyond dispute.” *Id.*

F. THE MPLA LIMITATION ON NONECONOMIC DAMAGES DOES NOT VIOLATE THE ACCESS TO COURTS OR CERTAIN REMEDY CLAUSES.

Continuing with arguments already posed in *Robinson* and *Verba*, Appellants contend that Section 55-7B-8 violates Article III, Section 17 of the West Virginia Constitution, which states, “The 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.”¹¹⁷ Appellants claim Section 55-7B-8(b) deprives

¹¹⁵ Appellants contend the cap gives the legislature judicial authority that even judges do not have by allowing the legislature to reduce a jury verdict without giving the plaintiff, if he does not consent to the reduction, the opportunity for a new trial on damages. However, as discussed in footnote 105, this Court recognized in *Verba* that the cap is not a legislative remittitur, but instead is simply an exercise of the legislature’s power.

¹¹⁶ Article VIII, Section 13 of the West Virginia Constitution provides:

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 the law of this state until altered or repealed by the Legislature.

W. Va. Const. art. VIII, § 13 (emphasis added).

¹¹⁷ This provision has been referred to as the “Certain Remedy” clause, “Open Courts” clause, and “Access to Courts” clause. See *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190, 206 n. 1, 640 S.E.2d 540, 556 n.1 (2006) (Davis, J. concurring).

them of a certain remedy “for all personal injuries” and undermines their access to the courts. Appellant’s Br. at 46.¹¹⁸

These arguments were made, analyzed, and rejected in *Robinson*. Faced with a certain remedy challenge, the *Robinson* Court announced the test for determining whether the cap violated the certain remedy provision was whether “the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.” *Id.* at Syl. Pt. 3.¹¹⁹ Appellants’ argument on this issue has already been summed up by the *Robinson* Court:

With respect to the challenges here under the state constitutional ... “certain remedy” provisions, the principal claims are in essence that there was no clear social or economic problem in the form of a medical malpractice insurance “crisis” or, even if one existed, the statutory “cap” in question was not a reasonable method of eliminating or curtailing the problem, as the legislature arguably could only speculate as to the “cap’s” effect on medical malpractice insurance premiums.

Id., 186 W. Va. at 730, 414 S.E.2d at 887.

As discussed, the Legislature, contrary to Appellants’ belief, had a legitimate and rational basis to establish the cap in 1986 and amend it in 2003. The cap was amended in response to its finding, among others, that the cost of liability insurance had continued to rise “dramatically,” this time resulting in the state’s loss of physicians. W. Va. Code § 55-7B-1 (2003). This Court

¹¹⁸ Appellants also claim that the cap violates Article III, Section 17 because it denies equal justice to them and other plaintiffs in medical liability actions, which falls under their equal protection argument. Appellant’s Br. at 46, 50. As such, City Hospital incorporates Section IIIC of its Brief in response to this claim.

¹¹⁹ The *Robinson* Court did not find a Florida decision persuasive because the Florida “certain remedy” test, which required a showing of “overpowering public necessity,” imposed a higher level of scrutiny. *Robinson*, 186 W. Va. at 728, 414 S.E.2d at 885. The U.S. District Court for the Middle District of Florida recently held that Florida’s statutory cap on noneconomic damages in medical liability cases still passed Florida’s heightened “certain remedy” test. *M.D. v. U.S.A.*, 2010 WL 3893750, *3 (M.D. Fla. 2010) (“This court elects to defer to the well supported conclusions of the Task Force and the Legislature that Florida’s medical malpractice insurance crisis presented an overpowering public necessity requiring the adoption of the liability caps found in Florida Statute § 766.118.”).

held the cap was a reasonable method to address these problems in 1991 in *Robinson*, and in 2001 in *Verba*, and it remains so today.

Appellants claim the cap creates unconstitutional barriers to medical malpractice victims' right of access to the courts for two reasons. First, they theorize that in cases where noneconomic damages are significant, the "expense of proving a medical malpractice case coupled with the limited recovery will render those cases economically infeasible, resulting in a complete denial of access to the courts." Appellant's Br. at 50. Second, Appellants contend the cap, which applies regardless of the number of plaintiffs in the suit, eliminated Debbie MacDonald's loss of consortium claim, *id*, and disproportionately affects women.

These arguments ignore the "commonly recognized principle that such right of access [to the courts] is not without limitations." *Mathena v. Haines*, 219 W. Va. 417, 421, 633 S.E.2d 771, 775 (2006). Justice Davis, in her concurring opinion in *Bias v. E. Associated Coal Corp.*, 220 W. Va. 190, 206 n.1, 640 S.E.2d 540, 556 n.1 (2006) (Davis, J. concurring) illustrated this point, noting:

[O]ur prior decisions interpreting the Certain Remedy Clause make clear that the Clause does not provide an absolute right to a remedy for an injury. See *Marcus v. Holley*, 217 W. Va. 508, 618 S.E.2d 517 (2005) (upholding statute giving part-time employees lower temporary total disability benefits, or permanent partial disability benefits or permanent total disability benefits); *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992) (upholding statute immunizing political subdivision from liability if claim is covered by workers' compensation); *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991) (upholding statute that limited damages in medical malpractice actions); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991) (upholding statute barring action against ski resort operators); *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991) (upholding statute granting qualified tort immunity to political subdivisions).

*Id.*¹²⁰

Likewise, *Robinson* acknowledged the right to bring a tort action “is not a fundamental right” that cannot be limited, but instead found “the legislature may reasonably consider clear economic or social conditions in this state in deciding to alter or repeal the common law.” *Id.* at 727, 414 S.E.2d at 884 (citation omitted).¹²¹

Robinson found no constitutional issue with the cap eliminating consortium awards to secondary claimants. In *Robinson*, an infant who suffered permanent brain injury during the labor and delivery process was awarded \$2,500,000 in noneconomic damages, and his parents, who had consortium claims, each received \$1,000,000 for noneconomic damages. After finding that all three of the awards for noneconomic loss were subject to the same overall cap, the *Robinson* Court set aside the parents’ respective \$1,000,000 awards.¹²² The claim that elimination of Mrs. MacDonald’s consortium award violates her access to the courts and certain remedy is without merit in light of *Robinson*. Likewise, there is simply no basis to the claim that Mr. MacDonald, who received \$629,000 in damages after a jury trial, was denied a remedy and access to the court either.

IV. CROSS ASSIGNMENT OF ERROR

City Hospital submits the following cross assignment of errors:

¹²⁰ See also *State ex rel. City of Martinsburg v. Sanders*, 219 W. Va. 228, 632 S.E.2d 914 (2006) (finding statutory immunity provided to employers under the Workers’ Compensation Act prohibited municipal employees from maintaining common law theories of liability for medical monitoring against their municipal employer).

¹²¹ The United States District Court for the Eastern District of Texas recently held Texas’s statutory limit on noneconomic damages in medical liability cases does not violate the U.S. Constitution’s guarantee of right of access to the courts. *Watson v. Hortman*, 2010 WL 3566736 (E.D. Tex. 2010). The District Court rejected the plaintiffs’ claims that the cap deprives health care liability plaintiffs of a full and complete remedy and deprives the plaintiffs of adequate legal counsel to pursue their medical malpractice claims.

¹²² *Id.* at 732 n. 11, 414 S.E.2d at 889 n. 11.

A. The Circuit Court erred when it denied City Hospital's Motion for Summary Judgment under Rule 56 of the West Virginia Rules of Civil Procedure by order dated October 24, 2008.

B. The Circuit Court erred when it denied City Hospital's Motion for Judgment as a Matter of Law under Rule 50(b)(1) of the West Virginia Rules of Civil Procedure at the close of Appellants' case-in-chief and at the close of all evidence.

C. The Circuit Court erred when it denied City Hospital's Motion for a New Trial under Rule 59(a) of the West Virginia Rules of Civil Procedure.

D. The Circuit Court erred when it denied City Hospital's Motion to Alter or Amend Judgment under Rule 59(e) of the West Virginia Rules of Civil Procedure.

A. ARGUMENT AND AUTHORITIES RELIED UPON

1. STANDARDS OF REVIEW

The standard of review for a trial court's grant or denial of a motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure is *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 Syl. Pt. 1 (1994); *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807, Syl. Pt. 1 (2002). The standard of review for a trial court's denial of a renewed motion for judgment as a matter of law, after trial, is also *de novo*. *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16, Syl. Pt. 1 (2009).

A trial judge has the authority to weigh the evidence and consider the credibility of the witnesses, and if he finds that the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, he may set aside the verdict, even if supported by substantial evidence, and grant a new trial. *Witt v. Sleeth*, 198 W. Va. 398, 481 S.E.2d 189, Syl. Pt. 1 (1996); *Morrison v. Sharma*, 200 W. Va. 192, 488 S.E.2d 467 (1997) (per curiam); *Brooks v. Harris*, 201 W. Va. 184, 495 S.E.2d 555 (1997) (per curiam).

“Although the ruling of a trial court in granting or denying a motion for new trial is entitled to great respect and weight, the trial court’s ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.” *Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W. Va. 358, 572 S.E.2d 881, Syl. Pt. 1 (2002); *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218, Syl. Pt. 4 (1976); *See also West v. West Virginia Dept. of Transp., Div. of Highways*, 224 W. Va. 563, 687 S.E.2d 346 (2009) (per curiam).

2. BECAUSE PLAINTIFFS DID NOT PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A PRIMA FACIE RIGHT TO RECOVER FROM CITY HOSPITAL, THE CIRCUIT ERRED WHEN IT DENIED CITY HOSPITAL’S MOTION FOR SUMMARY JUDGMENT, MOTION FOR JUDGMENT AS A MATTER OF LAW, AND MOTION FOR A NEW TRIAL.

The bases for City Hospital’s cross assignment of these errors are simple. The Plaintiffs did not present sufficient evidence to establish a *prima facie* right to recover from City Hospital. Consequently, the Circuit Court should have granted City Hospital’s Motion for Summary Judgment. In the alternative, the Circuit Court should have granted City Hospital’s Motion for Judgment as a Matter of Law at the close of Plaintiffs’ case-in-chief. Failing this, the Circuit Court should have set aside the verdict against City Hospital and granted its Motion for Judgment Notwithstanding the Verdict or granted City Hospital’s Motion for a New Trial.

An essential element of a plaintiff’s burden of proof in a medical professional liability action is that an expert must testify that the health care provider’s deviation from the standard of care was a proximate cause of the plaintiff’s injury. West Virginia Code §55-7B-3(a)(2). Accord, *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 Syl. Pt. 4 (1998) (plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of the injury); *Farley v. Shook*, 218 W.Va. 680, 685, 629 S.E.2d 739, 744

(2006) (“[E]xpert testimony is required for [plaintiffs] to meet their burden of proving negligence and lack of skill on the part of the physician and the causal connection of that negligence to their injuries.”). *See also Tolliver v. Shumate*, 151 W. Va. 105, 150 S.E.2d 579, Syl. Pt. 2 (1966); *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 538 S.E.2d 719, Syl. Pt. 1 (2000) (per curiam). Indeed, there is no question that proximate cause¹²³ is an essential element to the finding of negligence and therefore vital to a plaintiff’s recovery. *Judy v. Grant Cty. Health Dept.*, 210 W.Va. 286, 557 S.E.2d 340 Syl. Pt. 7, (2001) (per curiam).

Further, West Virginia law is clear that merely a possibility of potential causation is not enough to warrant a finding of causation. *Tolley v. ACF Indus., Inc.*, 212 W. Va. 548, 558, 575 S.E.2d 158, 168 (2002) (per curiam). *See also Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60 n. 10, 459 S.E.2d 329, 337 n. 10 (1995) (“(w)e need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences.”).

Plaintiffs’ evidence completely failed to establish that City Hospital committed a breach of the standard of care that was a proximate cause of Mr. MacDonald’s injury. Plaintiffs never claimed that the City Hospital pharmacy breached the standard of care by failing to warn Mr. MacDonald directly of the risks associated with his drug therapy, nor would such a position have been tenable, as “(p)atient counseling is not required for inpatients of a hospital or institution where other licensed health care workers are authorized to administer the drugs . . .” W. Va. Code St. R. § 15-1-19, 13-6(b); *see also State ex rel. Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 484, 647 S.E.2d 899, 920 (2007) (Starcher, J. concurring)(“...patients in the emergency room or in surgery have little ability to read warnings, and all decision-making must rest in the

¹²³ Proximate cause is the “last negligent act contributing to the injury and but for this act the injury would not have occurred.” *Hartley v. Crede*, 140 W. Va. 133, 82 S.E. 2d 672, Syl Pt. 5 (1954), overruled on other grounds, *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983); *see also Mays v. Chang*, 213 W. Va. 220, 579 S.E. 2d 561, Syl. Pt. 1 (2003) (per curiam).

learned intermediary—the doctor, or nurse, or the paramedic. And besides, the end-consumer isn't the one 'using' the product in that circumstance. It is the medical care provider who is making all the decisions.”).

Instead, the only breach of the standard of care asserted against City Hospital by Plaintiffs and their expert, James Backes, Pharm.D., at trial was the pharmacy's failure to advise Dr. Ahmed of the risks associated with prescribing Lipitor in combination with the other drugs that Mr. MacDonald was taking during his hospitalization at City Hospital in October and November 2004. II Tr. Nov. 18, 2008, at 68-70.¹²⁴ However, plaintiffs' evidence established that the risk-benefit analysis performed when prescribing multiple medications to Mr. MacDonald was the responsibility of the physicians, not the City Hospital pharmacy. II Tr., Nov. 18, 2008, at 117-119. Evidence of a breach of the standard of care by City Hospital was murky, at best.

Plaintiffs completely failed to prove the second element necessary for recovery against City Hospital—causation. Although their expert, Dr. James Backes, testified that City Hospital failed to warn Dr. Ahmed of the potential risks of interactions among the drugs he had ordered for Mr. MacDonald, he was unable to testify to a reasonable degree of medical probability that any such warning by the City Hospital pharmacy would have altered Dr. Ahmed's course of treatment for Mr. MacDonald:

Question by Mrs. Vaglianti: You don't have any way of knowing what actions Dr. Ahmed would have taken in 2004 if the City Hospital pharmacy had alerted to them, alerted him to some potential interaction between Diflucan and Lipitor and cyclosporine; correct?

Answer by Dr. Backes: Only he knows that.

II Tr., Nov. 19, 2008, at 109.

¹²⁴ Dr. Backes' testimony was vigorously disputed by City Hospital's pharmacy expert, Rodney Richmond, R.Ph. I Tr. Nov. 20, 2008, at 72; 76; 85; 88 and 91.

Question: ...If you don't know what Dr. Ahmed would have done with the information that might have been provided to him by City Hospital pharmacy, you can't say what actions would have been taken differently and whether anything that City Hospital did or didn't do caused Mr. MacDonald to have rhabdomyolysis?

Answer: You know, I can't speculate as to what Dr. Ahmed would have done. You know, then again it goes back to what the role of the pharmacist is. And that is to notify the prescriber of the interaction. You know, what he does from there on out is his decision.

II Tr., Nov. 19, 2008, at 111.

Plaintiffs presented no testimony or other evidence to suggest that Dr. Ahmed would have changed his planned course of drug therapy for Mr. MacDonald if he had received a warning from the City Hospital pharmacy concerning the use of Lipitor with the other drugs being administered to Mr. MacDonald. To the contrary, the only evidence for the jury's consideration on this point was Dr. Ahmed's emphatic, unchallenged testimony that: 1) he was aware of the risks associated with the drug therapy he prescribed, including the risk of rhamdomyolysis; and 2) a warning of the risk of rhabdomyolysis from the City Hospital pharmacy would not have changed the drug regimen he prescribed for Mr. MacDonald because he assessed the risk of Mr. MacDonald developing rhabdomyolsis as being less than the risks to Mr. MacDonald for developing other, more life-threatening complications if the drug regimen had been changed. I Tr., Nov. 21, 2008 at 79; 82-105; II Tr., Nov. 21, 2008, at 10-11; 22-23. In addition, the jury was presented with evidence that during a previous hospitalization for the same medical condition, Dr. Ahmed treated Mr. MacDonald with the same drug regimen used in October and November 2004. I Tr. Nov. 21, 2008, 75-77.

Failure to provide a warning creates no liability where it will be of no avail, where it will be impractical, or where the lack thereof does not contribute to the accident. 65 C.J.S. Negligence § 169 (June 2008); *Stedman v. Spiros*, 23 Ill.App.2d 69, 161 N.E.2d 590; *Heston v.*

Jefferson Bldg. Corp., 332 Ill.App. 585, 76 N.E. 248; *see also Gill v. Foster*, 157 Ill.2d 304, 626 N.E.2d 190 (1993) (nurse's failure to inform a treating physician of patient's complaint of chest pain while being discharged from the hospital did not proximately cause delay in correct diagnosis of patient's condition because the physician was already aware of patient's complaints of chest pain).

There was simply no credible evidence from which a reasonable jury could have found that an alleged failure by City Hospital to warn Dr. Ahmed of the potential risks associated with the drug regimen he prescribed for Mr. MacDonald caused or contributed to Mr. MacDonald's injuries. Dr. Ahmed's medical judgment to continue Lipitor along with Mr. MacDonald's other medications, despite the known risks, was the proximate cause—and the only proximate cause—of Mr. MacDonald's injuries established by Plaintiffs' evidence.¹²⁵

City Hospital raised these arguments at the summary judgment stage, during Rule 50 motions at the close of Plaintiffs' case-in-chief, and again at the close of all evidence, and on post trial motion. "When the plaintiff's evidence, considered in the light most favorable to him, fails to establish a *prima facie* right of recovery, the trial court should direct a verdict in favor of the defendant." *Powell v. Time Ins. Co.*, 181 W. Va. 289, 299, 382 S.E.2d 342, 351 (1989). *See also Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451 (2005) (per curiam) (finding that circuit court properly granted judgment as a matter of law in favor of defendant in personal injury action arising out of motor vehicle accident because plaintiffs failed to present sufficient evidence to prove that defendant proximately caused plaintiffs' injuries). Despite the

¹²⁵Causation was also vigorously disputed by Defendants' experts. For example, Dr. Marik, an internal medicine and critical care medicine specialist retained by City Hospital, testified that maintaining patients with pneumonia on a statin such as Lipitor decreased their risk of dying. II Tr. Nov. 20, 2008, at 145-146; 158-159. Dr. Chillag, an internal medicine specialist retained by Dr. Ahmed, testified that the most likely cause of Mr. MacDonald's rhabdomyolysis was critical care neuropathy not related at all to the Diflucan and Lipitor. II Tr. Nov. 21, 2008, at 102-103.

unequivocal, unchallenged testimony of Dr. Ahmed that he was already aware of the risks associated with the drug regimen he prescribed for Mr. MacDonald and that he would have continued the drug regimen despite any warnings which the pharmacy might have provided to him, the Circuit Court erroneously denied City Hospital's various motions.

This Court should review the evidence on this crucial issue and find that Plaintiffs failed to prove that City Hospital's alleged breach of the standard of care (its failure to warn Dr. Ahmed of the risks of the drug regimen he prescribed for Mr. MacDonald) was a proximate cause of Plaintiffs' injuries because Plaintiffs presented no evidence that any warning the pharmacy might have given to Dr. Ahmed would have changed the drug regimen Dr. Ahmed intended for Mr. MacDonald. To the contrary, the only evidence presented to the jury was that Dr. Ahmed continued the drug regimen in question in order to address and/or prevent various medical conditions which Dr. Ahmed, in his medical judgment, deemed more likely and more life-threatening than the remote possibility that Mr. MacDonald might develop rhabdomyolysis. Whether under Rule 56, or Rule 50, the absence of this evidence was a fatal flaw in the case, and City Hospital should have been dismissed on summary judgment, or on judgment as a matter of law, or on post trial motion.

3. THE CIRCUIT COURT ERRED WHEN IT DENIED CITY HOSPITAL'S MOTION TO ALTER OR AMEND JUDGMENT.

The Circuit Court committed reversible error when it denied the Defendants' motion to alter or amend the judgment and applied the \$500,000 limitation on noneconomic damages instead of the \$250,000 limit.

Under Section 55-7B-8(b), a plaintiff may recover up to \$500,000 in noneconomic damages 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). Based upon the evidence at trial, there was no factual basis upon which the Circuit Court could make the determination that Mr. MacDonald fell into any of these categories. As set forth in detail in Dr. Ahmed’s Cross Appeal, at most, the Circuit Court concluded that Mr. MacDonald’s legs are weaker than they were before treatment—this clearly does not satisfy any of the three categories established by the legislature in W. Va. Code § 55-7B-8(b). Accordingly, City Hospital joins in Dr. Ahmed’s Cross Appeal and requests that the Circuit Court’s ruling be set aside and the case remanded with directions to reduce Plaintiffs’ noneconomic damages award to \$250,000.

V. CONCLUSION

The limitations on noneconomic damages are an important part of the comprehensive reform crafted by the Legislature in 2001 and 2003 to stabilize the medical professional liability insurance market in an effort to ensure quality health care for West Virginians. This effort included not only civil justice reform, but reform related to the policing of physicians and the establishment of a mutual insurance company.

There was more than ample evidence to support these legislative solutions under a rational basis analysis. Moreover, the principles of *stare decisis* dictate that this Court follow its holdings in *Robinson* and *Verba* and uphold the noneconomic limitations as a valid exercise of legislative power. This Court should respect the Legislature’s prerogative and reject the Plaintiffs’ challenge, and hold W. Va. Code 55-7B-8 is constitutional in all respects. If the Court determines that W. Va. Code 55-7B-8 is unconstitutional, then the applicable limitation is one million dollars pursuant to W. Va. Code 55-7B-8(c).

For its Cross Appeal, City Hospital asserts there was a fatal flaw in the Plaintiffs' claim of negligence because there was no evidence produced before or at trial to demonstrate that a warning by the City Hospital pharmacy to Dr. Ahmed would have changed his decision with regard to the medications prescribed for Mr. MacDonald. Indeed, Plaintiffs' expert could only speculate, and Dr. Ahmed testified he was aware of the risks and believed the medications were necessary. There was simply no evidence of causation.

As to the Circuit Court's decision to apply the increased "cap" of \$500,000, City joins with Dr. Ahmed in urging this Court to review the record, as it demonstrates there was no evidence showing Mr. MacDonald's injuries satisfied the elements of W.Va. Code 55-7B-8(b).



Thomas J. Hurney, Jr. (WVSB No. 1833)
Jennifer M. Mankins (WVSB No. 9959)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, WV 25322
(304) 340-1000
(304) 340-1050 Fax

Christine S. Vaglienti (WVSB No. 4987)
Post Office Box 8128
Morgantown, WV 26506-4199
(304) 598-4199

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Appellee City Hospital, Inc.'s Brief and Cross Assignment of Error upon counsel by United States mail, postage prepaid, addressed as follows:

D. Michael Burke
Burke, Shultz, Harman & Jenkinson
P. O. Box 1938
Martinsburg, WV 25402

Robert S. Peck
Center for Constitutional Litigation
777 6th Street, N.W., Suite 520
Washington, DC 20001

Barry J. Nace
Christopher T. Nace
Paulson & Nace
1615 New Hampshire Avenue, NW
Washington DC 20009

Stacie D. Honaker
Stephen R. Brooks
Flaherty, Sensabaugh & Bonasso, PLLC
965 Hartman Run Road, Suite 1105
Morgantown, WV 26505

The Hon. Darrell C. McGraw
West Virginia Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305

Ancil G. Ramey
Steptoe & Johnson PLLC
P. O. Box 1588
Charleston, WV 25326

Harry G. Deitzler
President, Public Justice Foundation
Hill, Peterson, Carper, Bee & Deitzler, PLLC
500 Tracy Way
Charleston, WV 25311

Troy N. Giatras
Stacy N. Jacques
The Giatras Law Firm
118 Capitol Street, Suite 400
Charleston, WV 25301

Paul T. Farrell, Jr.
Green, Ketchum, Bailey, Walker, Farrell &
Tweel
P. O. Box 2389
Huntington, WV 25724-2389

Christopher J. Regan
Bordas & Bordas
1358 National Road
Wheeling, WV 26003

Charles R. Bailey
Bailey & Wyant, PLLC
P. O. Box 3710
Charleston, WV 25337

Evan H. Jenkins
West Virginia State Medical Association
P. O. Box 4103
Charleston, WV 25364

Mark A. Behrens
Cary Silverman
Shook, Hardy & Bacon, L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 2004

This 13th day of October, 2010


Thomas J. Hurney, Jr. (WVSB 1833)