

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543

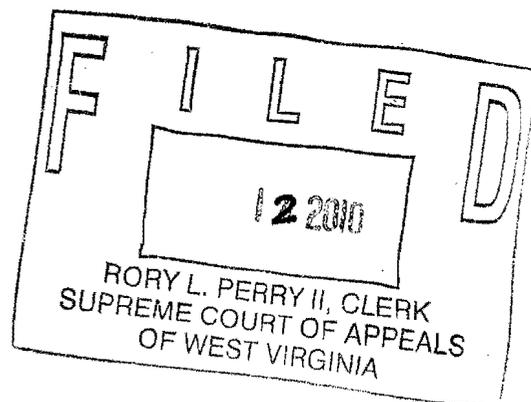
**James D. MacDonald and  
Debbie MacDonald,**

**Appellants,**

v.

**City Hospital Inc., and  
Sayeed Ahmed, M.D.,**

**Appellees.**



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

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**AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE DEFENSE TRIAL  
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## INTRODUCTION

The Defense Trial Counsel of West Virginia (“DTCWV”) respectfully submits this amicus brief asking the Court to uphold the West Virginia Medical Professional Liability Act’s (the “Act”) limit on noneconomic damages (the “damages cap”) found in W. Va. Code § 55-7B-8. As explained below, the DTCWV believes that the public's interest in the consistent application of uniform laws that govern all West Virginians alike, and the public's interest that those laws be "fixed, definite, and known," supports the position of City Hospital, Inc., and Sayeed Ahmad, M.D., the Appellees. A bedrock philosophy of law historically articulated by this Court is the doctrine of *stare decisis*, "which rests on the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority." *Verba v. Ghaphery*, 210 W. Va. 30, 34, 552 S.E.2d 406, 410 (2001) (internal citations and quotations omitted). Indeed, this Court has, on two separate occasions, heard challenges to the constitutionality of the damages cap and answered the very questions posed by the McDonalds, the Appellees. On both occasions, the Court affirmed the Act’s cap on noneconomic damages and upheld the reduction of awards in medical malpractice cases, just as the Circuit Court of Berkeley County did in the proceeding below in this case. Because this Court has twice upheld the Act’s cap on noneconomic damages as a permissible legislative exercise, DTCWV respectfully requests that the Court again uphold the damages cap and the circuit court’s application of that cap reducing the McDonalds’ damages.

## STATEMENT OF INTEREST

The Defense Trial Counsel of West Virginia is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil litigation in West Virginia. The Defense Trial Counsel of West Virginia is an affiliate of the Defense Research Institute (“DRI”), a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Although it does not routinely seek leave to file amicus briefs, the Defense Trial Counsel of West Virginia is interested in the issue before the Court regarding the validity of the Act’s cap on noneconomic damages because of the DTCWV’s position generally advocating that West Virginia interpret and apply its laws, both statutory and otherwise, in a consistent and uniform manner and apply statutes in a clear, consistent, and common-sense fashion to effectuate their purpose. For example, in *State ex rel. Chemtall v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), DTCWV submitted a brief asking the Court to apply West Virginia’s class action rules in a fashion similar to equivalent federal rules. Likewise, in *Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 566 S.E.2d 624 (2002), DTCWV submitted a brief in support of a manufacturer’s assertion that the plain language of West Virginia’s Unfair Trade Practices Act did not apply to self-insured entities. Both positions were ultimately adopted by the Court.

The DTCWV Board of Governors has authorized the filing of an *amicus curiae* brief on behalf of the DTCWV’s membership.

## STATEMENT OF EXPERIENCE

Members of the DTCWV are routinely involved in defending clients in medical malpractice actions as well as other actions dealing with statutes adopted by our Legislature and the construction of those statutes. It is our members’ experience that all parties benefit from

consistent application of such statutes. DTCWV believes that the application of West Virginia statutes, and specifically the damages cap in question, should be applied in a fixed, definite, and known -- and ultimately predictable -- fashion. In this case, DTCWV believes that upholding the validity of the damages cap is consistent with the long-held policy that the application of the laws of the State of West Virginia should be uniform and consistent, especially considering that the damages cap in question was only recently upheld in *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001). If we, as counsel, are unable to reasonably predict the application of statutory laws such as the MPLA's damages cap, we will be unable to effectively counsel our clients on these issues, which will adversely impact settlement negotiations, mediation, and virtually all other aspects of medical malpractice cases.

## DISCUSSION

### 1. STANDARD OF REVIEW

This appeal challenges constitutionality of the limitations on noneconomic loss, or "caps," set forth in W. Va. Code § 55-7B-8, as amended in 2003. As such, the standard for appeal in this instance is *de novo*. Syl. Pt. 1, *State v. Rutherford*, 233 W. Va. 1, 672 S.E.2d 137 (2008). Furthermore, when considering the constitutionality of a legislative enactment:

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

Syl. Pt. 1, *Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

Where economic rights are concerned, the Court looks 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. *See, e.g., Verba*, 210 W. Va. at 34, 552 S.E.2d at 410. Under this standard of review, this Court has upheld the constitutionality of the very statute in question on two separate occasions: *Robinson v. CAMC, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991), and *Verba, supra*. And, under this standard of review, the Court should again uphold the constitutionality of the MPLA's cap on damages in this case.

**2. THIS COURT HAS, ON TWO SEPARATE OCCASIONS, UPHOLD THE MPLA'S DAMAGES CAP ON NONECONOMIC DAMAGES, AND THE NEED FOR CONSISTENT, AND UNIFORM APPLICATION OF THE LAW NECESSITATES THAT THE COURT UPHOLD IT AGAIN.**

The DTCWV's position is a simple one: the Court has already answered the questions presented by the McDonalds in this appeal and found in favor of the constitutionality of W. Va. Code § 55-7B-8. It should do so again. That statute provides:

(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.

The McDonalds argue that this statute violates the Equal Protection Clause and Special Legislation Clause of the West Virginia Constitution; and violates constitutional provisions concerning the right to trial by jury, separation of powers, the guarantee of access to courts, and the right to a "certain remedy." The McDonalds give short thrift to *Robinson* and *Verba*. This Court should not. Indeed, the Court should pay special attention to the reasoning in *Verba*, which upheld *Robinson* and the MPLA's damages cap on noneconomic losses.

The Court in *Verba* was called upon to revisit its decision in *Robinson* and to determine specifically whether the MPLA's damages cap on noneconomic losses violated the State constitutional provisions that govern equal protection, special legislation, state constitutional substantive due process, "certain remedy," or right to jury trial. To answer this question, the *Verba* Court looked to the long-standing principle of *stare decisis*: "We believe that our prior ruling [in *Robinson*] is subject to the judicial doctrine of *stare decisis*, which rests on the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority." *Verba*, 210 W. Va. at 34, 552 S.E.2d 410 (internal citations and quotations omitted). *See also* Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W.Va. 1023, 207 S.E.2d

169 (1974) ("An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of *stare decisis*, which is to promote certainty, stability, and uniformity in the law").

The rehashed and restated arguments of the McDonalds fail to provide this Court with sufficient reason to revisit, much less reverse, *Robinson* and *Verba*. *Banker v. Banker*, 196 W.Va. 535, 546 n. 13, 474 S.E.2d 465, 476 n. 13 (1996) ([U]nder the doctrine of *stare decisis*, a case is important only for what it decides—for the "what," not for the "why" and not for "how"). Nor do the myriad statistics and non-legal resources presented by the McDonalds, which argue that the purpose of the MPLA is no longer met, compel a different result. Indeed, in *Verba*, both appellants and appellees submitted statistics to either refute or support the legislative findings regarding the MPLA's cap on noneconomic damages. The Court responded as follows:

[W]e ordinarily will not re-examine 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 . . . Our review of the legislature's findings and declaration of purpose in W. Va. Code § 55-7B-1 leads us 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. Further, we resolve any reasonable doubts on this question in favor of the constitutionality of the cap.

*Verba*, 210 W. Va. 35, 552 S.E.2d 411. Here, the Court need not act as a "superlegislature" to judge the wisdom of legislative policy arguments. *Robinson*, 186 W. Va. at 726, 414 S.E.2d at 883. The Court has already determined that this damages cap is constitutional, and it is up to the legislature to determine whether a statute continues to meet the purposes for which it was originally enacted. *Verba*, 210 W. Va. 30 at 36, 552 S.E.2d at 412.

to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize." *Id.* (internal citations and quotations omitted).

The McDonalds finally argue that the damages cap violates Article III, Section 17 of the West Virginia Constitution, which provides that "[t]he courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." This argument was specifically rejected in *Robinson*. Indeed, *Robinson* noted that the "certain remedy" provision of the West Virginia Constitution states that "the remedy constitutionally guaranteed for an injury done is qualified by the words 'by due course of law,' thereby extending considerable latitude to the legislature." Once again, this Court has already addressed the arguments raised by the McDonalds and found in favor of the constitutionality of W. Va. Code § 55-7B-8.

The public policy that underlies that principle of *stare decisis* demands that the laws by which men are governed should be "fixed, definite, and known" and strongly supports -- yet again -- upholding the constitutionality of W. Va. Code § 55-7B-8. The need for the consistent application of the statute in question is not merely lip service -- it has teeth. Without predictability in the interpretation and application of the law, statutory or otherwise, the ability to counsel clients and parties in medical malpractice and other legal actions will be adversely affected. It should be noted that the cap does not affect economic damages -- only open-ended, noneconomic damages. With a concrete limit to noneconomic damages in place, counsel can affectively advise their clients regarding these damages, which will further the public's interest in promoting the resolution of disputes.

## CONCLUSION

This Court has answered all of questions presented by the McDonalds in their appeal. First, their contention that the cap on noneconomic damages violates the right to trial by jury has no merit because they ignore the fact that the language of the reexamination clause of the constitutional right to a jury trial contained in W. Va. Const. art. III, § 13, does not apply to the legislature. *Id.* at Syl. Pt. 4. A legislative cap on the recovery of noneconomic damages in a medical malpractice case, therefore, does not violate the constitutional right to trial by jury. *Id.* at 731, 414 S.E.2d at 888.

Second, the MPLA cap on noneconomic damages does not violate the equal protection clause or act as special legislation. *Id.* at 729, 414 S.E.2d at 886. The thrust of the McDonalds' argument is that the cap "completely eviscerates Ms. McDonald's claim for loss of consortium." That argument, however, is unavailing because this Court has recognized that legitimate and constitutional statutory restrictions may do just that. For example, in *Robinson*, both the father and the mother of the injured party were awarded \$1,000,000 in noneconomic damages by the jury. Because of the application of the damages cap, however, both of their awards were effectively reduced to zero. As detailed in *Robinson* and *Verba*, the cap here is a rational response of the legislature to a perceived problem regarding the cost of insurance coverage and access to healthcare in West Virginia. The McDonalds have not presented any arguments that would compel a different result.

Again, this Court in *Verba* held that the MPLA's cap on noneconomic damages did not violate the separation of powers. Appellants' arguments otherwise are of no merit. Indeed, it is axiomatic in our state that the legislature has the power to alter, amend, change, repudiate, or abrogate the common law. *Verba*, 210 W. Va. 35, 552 S.E.2d at 411. This includes "the power

Common sense application of the uniform statutes involved in this Certified Question supports the Appellees' position. Because of its interest in the consistent application of uniform laws, DTCWV asks the Court to hold that the MPLA's cap on noneconomic damages is a valid and constitutional exercise by the legislature.

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Circuit Court of Berkley County  
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**CERTIFICATE OF SERVICE**

I, Jeffrey A. Foster, do hereby certify that I have served a true and accurate copy of the foregoing *AMICUS CURIAE* BRIEF SUBMITTED ON BEHALF OF THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF PETITIONERS via the United States Postal Service, postage pre-paid, on the 12<sup>th</sup> day of October, 2010, upon the following counsel of record:

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