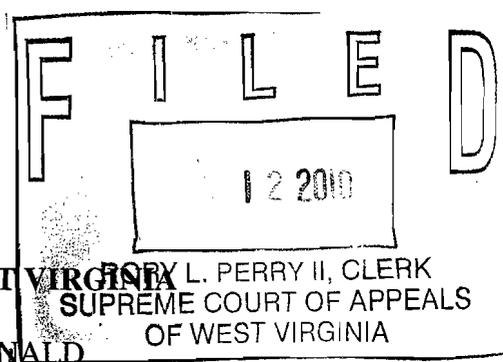


No. 35543



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES D. MACDONALD and DEBBIE MACDONALD,

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants.

**BRIEF FILED
WITH MOTION**

From the Circuit Court of Berkeley County, West Virginia
Civil Action No. 07-C-150

**AMICI CURIAE BRIEF OF THE WEST VIRGINIA STATE MEDICAL ASSOCIATION,
COMPONENT SOCIETIES OF THE WEST VIRGINIA STATE MEDICAL
ASSOCIATION, WEST VIRGINIA ACADEMY OF FAMILY PHYSICIANS, WEST
VIRGINIA HOSPITAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION,
WEST VIRGINIA ORTHOPAEDIC SOCIETY, WEST VIRGINIA CHAPTER
AMERICAN ACADEMY OF PEDIATRICS, WEST VIRGINIA ACADEMY OF
OTOLARYNGOLOGY – HEAD AND NECK SURGERY, INC., WEST VIRGINIA
PODIATRIC MEDICAL ASSOCIATION, WEST VIRGINIA MEDICAL GROUP
MANAGEMENT ASSOCIATION, WEST VIRGINIA RADIOLOGICAL SOCIETY,
AND WEST VIRGINIA STATE NEUROSURGICAL SOCIETY, HEALTH COALITION
ON LIABILITY AND ACCESS, PHYSICIANS INSURERS ASSOCIATION OF
AMERICA, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY
INSURERS ASSOCIATION OF AMERICA, AND NFIB SMALL BUSINESS LEGAL
CENTER IN SUPPORT OF RESPONDENTS/DEFENDANTS**

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Charles A. Wright, *Damages for Personal Injuries*, 19 Ohio St. L.J. 155 (1958)5

STATEMENT OF THE QUESTION PRESENTED

Whether W. Va. Code § 55-7B-8, which allows noneconomic damages up to \$250,000 in any professional liability action against a health care provider, and permits noneconomic damages of up to \$500,000 in cases involving certain permanent and substantial physical or mental injuries, with each maximum adjusted upwards annually for inflation, is constitutional.

INTEREST OF AMICI CURIAE

As organizations representing a wide range of West Virginia health care professionals, hospitals, small business owners, and their insurers, that depend upon access to affordable health care for their patients and employees, *amici* have a substantial interest in the continuing applicability of the state's limit on noneconomic damages in medical malpractice claims. *Amici's* members support protections against subjective, runaway noneconomic damage awards and would be adversely impacted if the subject statute is nullified.

STATEMENT OF THE FACTS

Amici adopt Respondents/Defendants' Statement of the Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Noneconomic damages awards are highly subjective and inherently unpredictable. There is "no market for pain and suffering." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545, 549 (2006). Consequently, legal scholars have long recognized that putting a "monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Probs. 219, 222 (1953). "[J]uries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking*

Intangible Injuries: A Focus on Remedy, 73 Cal. L. Rev. 772, 778 (1985). One commentator noted the difficulty expressed by jurors in putting a price on pain and suffering:

Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical[s]. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

Plaintiffs' lawyers understand these dynamics and suggest that juries award extraordinarily large amounts for pain and suffering. That was the situation here, where the jury awarded Mr. MacDonald \$1 million in damages for past and future pain and suffering and his wife \$500,000 for sorrow, mental anguish and solace, stemming from Mr. MacDonald's treatment for pneumonia. These amounts were in addition to Mr. MacDonald's recovery of \$92,000 for medical expenses and \$37,000 in lost wages. The trial court reduced the plaintiffs' noneconomic damages from \$1.5 million to \$500,000 in accordance with W. Va. Code § 55-7B-8. This brief focuses on the sound constitutional, legal, and public policy bases underlying the statute's fair outer limit on noneconomic damages.

Large pain and suffering awards, such as in the subject appeal, are of fairly recent vintage. Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff's actual pecuniary loss, such as medical expenses. That is not true today. Following World War II, and particularly since the 1960s, a confluence of factors led to a rapid and substantial rise in the size of pain and suffering awards. This trend continued as West Virginia's Legislature, among many others, recognized the need for statutory upper limits to guard against excessive and unpredictable outlier awards.

Statutory limits, such as W. Va. Code § 55-7B-8, promote more uniform treatment of individuals with comparable injuries, *see* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995) (unpredictability “undermines the legal system’s claim that like cases will be treated alike”), facilitate settlements, address “over or under precautions by affected industries and insurers,” *id.*, and limit arbitrariness that may raise potential due process problems. *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) (“A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled ‘punitive.’”); *see also* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1414 (2004) (“The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.”).

W. Va. Code § 55-7B-8 was a rational legislative response to the increasing frequency or large noneconomic damage awards in health care liability cases, rising health care costs, and concerns about excessive liability that were contributing to a lack of available doctors, particularly certain specialists, in West Virginia. The Legislature drew a careful balance when it enacted the law. To promote greater access to affordable health care for all West Virginians, the Legislature decided upon a substantial, but not unlimited, remedy for the distinct minority of individuals who may find themselves as medical malpractice claimants with extraordinary noneconomic loss. Such limits have contributed to reduced medical malpractice premiums and increased the number of doctors in the state.

The noneconomic damage limit does not take away from an injured patient’s recovery of medical bills, lost wages, lost domestic services, or other expenses. Nor does the statutory limit

on noneconomic damages preclude courts from imposing an award of punitive damages to deter and punish malicious conduct in appropriate situations. Overall, the law is pro-patient despite the claimed negative impacts to a few, such as the Petitioners/Plaintiffs here.

This Court should follow the doctrine of *stare decisis* and adhere to its decisions in *Robinson v. Charles Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991) and *Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001), which properly respected the Legislature’s public policy judgment with respect to setting outer limits on noneconomic damages. See Victor Schwartz, Mark Behrens & Monica Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

ARGUMENT

I. THE EVOLUTION AND RISE OF PAIN AND SUFFERING AWARDS

A. Modest Beginnings

Initially, the common law rarely recognized damages beyond pecuniary harm. Until the mid-nineteenth century, damages that compensated plaintiffs for intangible losses were often referred to as “exemplary damages.” Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 614-15 (2003). An early law review article recognized, “[t]he difficulty of estimating compensation for intangible injuries, was the cause of the rise of [exemplary damages] . . . [W]hen the early judges allowed the jury discretion to assess beyond the pecuniary damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment.” Edward C. Eliot, *Exemplary Damages*, 29 Am. L. Reg. 570, 572 (1881) (presently entitled U. Pa. L. Rev.); see also Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 519 (1957) (“In the 1760’s some courts began to explain large verdicts awarded by

juries in aggravated cases as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings”). By the mid-1900s, the law firmly established that pain and suffering awards were to compensate for intangible injuries; punitive damages punished a defendant for wrongful conduct.

Prior to the Twentieth Century, there were only two reported cases affirmed on appeal involving total damages in excess of \$450,000 in current dollars, each of which may have included an element of noneconomic damages. See Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Legal Stud. 365, 396 (2007). High noneconomic damage awards were uniformly reversed. See *id.* at 379-87. As recently as the 1930s, pain and suffering awards were generally modest. See Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959). An award in excess of \$10,000 (approximately \$130,000 in present value based on the Consumer Price Index) was rare. *Id.*

B. The Turning Point

The size of pain and suffering awards took its first leap after World War II, as trial lawyers such as Melvin Belli began a campaign to increase such awards. See Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). Plaintiffs’ lawyers became adept at increasing pain and suffering awards. For example, during a nine-month period in 1957, there were fifty-three verdicts of \$100,000 or more. See Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy’s First Responses*, 34 Cap. U. L. Rev. 545, 568 (2006). Scholars began to question such awards. See Charles A. Wright, *Damages for Personal Injuries*, 19 Ohio St. L.J. 155 (1958).

Overall, in inflation-adjusted terms, the average pain and suffering award grew from \$38,000 in the 1940s and 1950s to \$48,000 in the 1960s. See David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989). The pace continued. From the 1960s to the 1980s pain and suffering awards in wrongful death cases grew 300%. See *id.* Pain and suffering awards became the most substantial part of tort costs. As the Third Circuit found, “in personal injuries litigation the intangible factor of ‘pain, suffering, and inconvenience’ constitutes the largest single item of recovery, exceeding by far the out-of-pocket ‘specials’ of medical expenses and loss of wages.” *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

Scholars largely attribute this rise to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs’ attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that “someone should pay”; and (5) better organization by the plaintiffs’ bar. See Merkel, *supra*, at 553-66; see also Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004). This rise may also be due, in part, to increasing constitutional, statutory, and common law restrictions on punitive damage awards, which have led lawyers to bolster other forms of recovery. See Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into “Punishment,”* 54 S.C. L. Rev. 47 (2002).

C. The Recent and Rapid Skyrocketing of Awards

The continuing skyrocketing of pain and suffering awards in recent years, both nationally and in West Virginia, shows the foresight of the Legislature’s enactment of a rational outer limit.

Between 1994 and 2000, jury awards in personal injury cases grew by an alarming 176%. See Perry J. Argires, *There is an Attack on Medical Profession*, Sunday News (Lancaster, Pa.), May 16, 2004, at 1, available at 2004 WLNR 11275968 (citing Jury Verdict Research data). The bulk of this rise can be attributed to pain and suffering awards. One study found that pain and suffering awards accounted for sixty to seventy-five percent of jury awards between 1998 and 2000. See *id.* Another study reports that pain and suffering awards represent more than half of all personal injury tort damages. See Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System* 17 (2003), available at https://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (pain and suffering awards represent twenty-four percent of U.S. tort costs; economic damages represent twenty-two percent); see also Thomas H. Cohen, *Civil Justice Survey of State Courts*, No. NCJ 228129 (U.S. Dep't of Justice, Bureau of Justice Statistics, Nov. 2009), available at <http://www.ojp.gov/bjs/pub/pdf/tbjtsc05.pdf> (monetary payouts from cases disposed of by bench or jury trial in a national sample of state courts of general jurisdiction in 2005 were distributed as follows: economic damages (47%), noneconomic damages (44%), and punitive damages (9%)).

As Fourth Circuit Judge Paul Niemeyer has recognized, money for pain and suffering “provides the grist for the mill of our tort industry.” Niemeyer, 90 Va. L. Rev. at 1401; see also Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (pain and suffering awards in the U.S. are over ten times greater than in the most generous other nations). Some plaintiffs’ attorneys and their allies may champion extraordinarily high verdicts, but they go beyond the plaintiff’s needs, distort the civil justice system, and place undue strain on the accessibility of health care and on the economy.

II. THE SOUND PUBLIC POLICY BASES UNDERLYING WEST VIRGINIA'S LIMIT ON NONECONOMIC DAMAGES

A. The Litigation and Health Care Climate Leading to Enactment of the Reform

The legislative history of the statute demonstrates the Legislature's ongoing concern, and repeated efforts, to improve the affordability and accessibility of health care for West Virginians. Rising damages awards, which had contributed to a spike in medical malpractice insurance costs, were a key element of the problem. The Legislature's initial effort in 1986 included a \$1 million noneconomic damage limit, a limit on joint and several liability, regulation of rate making and insurance practices, and new authority of medical licensing boards to effectively discipline health care providers *Robinson*, 414 S.E.2d at 881.

In 2001, the health care environment had again deteriorated, compelling the Legislature to seek additional options. In order to help the situation, the Legislature provided physicians with a tax credit for insurance premiums paid, finding that "the retention of physicians practicing in this state is in the public interest and promotes the general welfare of the people of this state" and that "promotion of stable and affordable medical malpractice liability insurance premium rates will induce retention of physicians practicing in this state." W. Va. Code § 11-13P-1. The Legislature also required plaintiffs to file a certificate of merit along with their medical malpractice suit in order to discourage unsupported claims, among a package of other reforms. *See* H.B. 601 (W. Va. 2001) (codified at W. Va. Code § 55-7B-6(f)).

Despite these needed reforms, West Virginia's health care environment continued to worsen. In 2002, West Virginia Governor Bob Wise declared the "collapse of the medical malpractice insurance system" in his State of the State Address. West Virginia State of the State Address 2002, Jan. 10, 2002, at <http://www.stateline.org/live/details/speech?contentId=16098>.

The National Governors Association listed West Virginia as a case study of a medical malpractice insurance crisis. See National Governors Ass'n Center for Best Practice, Addressing the Medical Malpractice Insurance Crisis, at 12 (2002), available at <http://www.nga.org/cda/files/1102medmalpractice.pdf>. West Virginia doctors paid substantially higher premiums than those in neighboring Ohio and Virginia, liability carriers reported substantially higher defense costs than the national average, a lead medical malpractice insurer left the market, 40 percent of physicians were considering leaving West Virginia and 30 percent were considering retirement, and all or part of 50 of 55 counties were considered medically underserved. *Id.*

For instance, three neurosurgeons in Charleston, faced a nearly \$800,000 insurance premium, more than their entire take-home pay combined. Therese Smith Cox, *Doctors Facing Dilemma: Neurosurgeons Must Pay Big Malpractice Fee or Leave*, Charleston Gazette, Apr. 10, 2002, at 1A, available at 2002 WLNR 1053244. Such high costs led to the absence of neurosurgeons in Wheeling, Logan, and Beckley and those remaining in other areas of the state steadily departed. See *id.* The lack of trauma surgeons to treat emergency bone, brain, and spinal injuries led West Virginia's Department of Health and Human Resources ("DHHR") to downgrade the Charleston Area Medical Center (CAMC) trauma center from a Level I to a Level III facility in August 2002. See Dawn Miller, *CAMC Loses Trauma Status: People With Serious Multiple Injuries to go to Morgantown, Elsewhere*, Charleston Gazette, Aug. 24, 2002, at 1A, available at 2002 WLNR 1058321. Due to the distance needed to obtain emergency care, West Virginia residents who experienced serious injuries stemming from car accidents to gunshots may have died or become paralyzed when they might have been otherwise saved. See Joy Davia, *Trauma Patients Forced to Make Longer Trips to Get Care*, Charleston Gazette, Sept. 11, 2002, at 1C, available at 2002 WLNR 1025530. Late in the year, DHHR Secretary Paul Nusbaum

counted only five or six orthopedic surgeons taking trauma calls when four years earlier there were twelve or fifteen. Phil Kabler, *Trauma Care Crisis Not Over, Official Says*, Charleston Gazette, Oct. 22, 2002. For these reasons, *amicus* American Medical Association named West Virginia one of twelve "crisis states" for medical liability in its first such listing in 2002.

The decline continued into 2003. The year began with a work stoppage by surgeons who intended to draw attention to the state's lack of action in responding to the rising price of medical malpractice insurance, requiring hospitals to transfer patients who did not need emergency care to Ohio and Pennsylvania. See Gavin McCormick, *West Virginia Surgeons Leave Jobs in Protest*, Post-Gazette (Pittsburgh, Pa.), Jan. 2, 2003, available at <http://www.post-gazette.com/localnews/20030102surgeonsr4.asp>. The American College of Obstetricians and Gynecologists issued a "red alert" for West Virginia, finding that the state's high OB/GYNs premiums, exceeded only by doctors in Florida, threatened the ability of physicians to deliver babies. See American College of Obstetricians and Gynecologists, *The Current Tort System* (2003), at http://www.acog.org/from_home/publications/press_releases/Stats-ACM03-CurrentTorts.pdf. In some rural areas, the sole community provider hospitals closed their OB units because obstetricians could not afford malpractice insurance. See U.S. Dep't of Health & Human Servs., Assistant Secretary for Planning & Evaluation, Office of Disability, Aging & Long-Term Care Policy, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care* at 4-5 (2003), available at <http://aspe.hhs.gov/daltcp/reports/mediab.pdf> (citing *Advancing Health in America*, June 12, 2002, Statement before the House Judiciary Subcommittee on Commercial and Administrative Law). The shortage of neurosurgeons, orthopedic surgeons, and lack of available trauma care continued with rising premiums. See Gina Shaw, *Liability Crisis Endangers Neurosurgeons*,

Survey Finds, 2 *Neurology Today* 13-14 (2003), available at http://journals.lww.com/neurotodayonline/Fulltext/2002/11000/Liability_Crisis_Endangers_Neurosurgeons,_Survey.2.aspx.

It was in that ominous environment that the Legislature revisited the \$1 million limit and established the current tiered system that permits pain and suffering awards of up to \$250,000 in most medical professional liability cases and a higher, \$500,000 limit in cases involving certain severe, permanent physical and mental injuries. *See* H.B. 2122 (W. Va. 2003). The change was part of a comprehensive package that included formation of a physicians' mutual insurance company, new tax credits for physicians, additional oversight of physicians, elimination of joint liability, collateral source reform, safeguards for reliable expert testimony, and creation of a patient compensation fund, among other reforms. *See id.*

Thus, the legislative history and health care environment underlying the 2003 reforms suggest that the Legislature did not view reducing damages as a "silver bullet" to fixing the state's health care system, but as a key element of comprehensive reform during a public health crisis. The Legislature acted only after careful and prolonged observation and deliberation, ultimately finding that it was necessary to reduce the limit only after trying numerous other options.

B. The Sound Public Policy Underlying the Limit on Noneconomic Damages

A reasonable limit on noneconomic damages is an important, rational measure that controls outlier awards, stabilizes medical malpractice insurance premium costs for physicians, and helps maintain an accessible health care system. As states around the country have adopted such measures, rates have fallen and the number of physicians, particularly specialists in rural

areas, has increased. West Virginia's health care environment has significantly improved since its adoption of reforms, including the 2003 sliding-scale limiting noneconomic damages here.

1. Controlling Outlier Awards

As part of its reform effort, the Legislature sought to provide greater consistency and predictability in West Virginia's medical liability system, while continuing to provide injured citizens with adequate compensation. See W. Va. Code § 55-7B-1. As West Virginia's Insurance Commissioner recognized, "[h]igher and more volatile jury awards" contributed to the most recent insurance crisis. See West Virginia Offices of the Ins. Comm'n'r, State of West Virginia: Medical Malpractice Report, Insurers With 5% Market Share 2 (Nov. 2009) [hereinafter Ins. Rep.], available at <http://wvinsurance.gov/LinkClick.aspx?fileticket=KHt9sy2Fod4%3d&tabid=207&mid=798>.

Certainly, no amount of money can eliminate the suffering of a person who will experience difficulty walking for the rest of his life. This understandable sympathy, however, cannot and should not provide a basis for overturning the rational judgment of the Legislature to protect the availability of health care for all West Virginia residents. Fairness dictates the need for some reasonable bounds.

There is a continuing need to rein in the occasional extraordinary noneconomic damage award. See, e.g., *Riggs v. West Virginia Univ. Hosps., Inc.*, 656 S.E.2d 91 (W. Va. 2007) (affirming applicability of \$1 million limit to \$10.1 million in noneconomic damages award to woman who alleged that she contracted a bacterial infection during knee surgery); Chris Dickerson, *Famous Attorney Wins Big Malpractice Case*, W. Va. Record, Mar. 30, 2006, available at <http://www.wvrecord.com/news/176971-famous-attorney-wins-big-malpractice-case> (reporting \$17 million verdict, including \$5 million in noneconomic damages (reduced to \$1

million), in which plaintiff claimed obstetrician waited too long to do an emergency C-section). There are likely many other examples of noneconomic damage awards outside the norm, some of which do not make headlines. In addition, settlement values may be impacted by the potential for an extraordinary award at trial. *See* Ins. Rep. at 21 (reporting that sixty percent of medical malpractice insurance claims are settled out of court).

2. Reducing the Cost of Medical Malpractice Insurance

There is a sizable body of literature demonstrating that a state's legal environment affects the affordability and accessibility of health care. *See* Carol Kane & David Emmons, *The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent Literature* at 1 (Am. Med. Ass'n 2007), available at <http://www.ama-assn.org/ama1/pub/upload/mm/363/prp2007-1.pdf> (analyzing ten independent studies that looked at how limits on pain and suffering awards and medical liability risk affect insurance premiums, physician supply and defensive medicine costs, and finding that such limits reduce insurers' claims payouts, which lead to lower premium rates for doctors and alleviate physician shortages). Research shows that, on average, internal medicine premiums are 17.3 percent less in states with limits on noneconomic damages than in states without caps. *Id.* at 3 (citing Meredith L. Kilgore *et al.*, *Tort Law and Medical Malpractice Insurance Premiums*, 43 *Inquiry* 255 (2006)). Limits on noneconomic damages have an even greater impact on doctors practicing in critical areas. Those practicing general surgery and obstetrics/gynecology experienced 20.7 percent and 25.5 percent lower premiums, respectively, than in sister states permitting unbounded pain and suffering awards. *See id.*¹

¹ Due to the adoption of reforms across the country, tort costs from medical malpractice liability have fallen nationwide four years in a row when adjusted for inflation. Such costs decreased from \$30.4 billion in 2007 to \$29.8 billion in 2008. *See* Towers Perrin, *2009 Update on U.S. Tort Cost Trends*, (Footnote continued on next page)

West Virginia's 2003 amendment of W. Va. Code § 55-7B-8 achieved similar results. As award values become more predictable and medical malpractice claims dropped, insurance rates declined. *See* Ins. Rep. at 51. The average premium per physician nearly dropped in half between 2004 and 2008 from \$40,034.93 to \$21,026.19, respectively. *Id.* In fact, physicians insured with the state's largest medical-malpractice insurer, West Virginia Mutual Insurance Company, have experienced an overall average decrease in premiums of 32 percent with many specialists receiving as much as a 55 percent reduction since the insurer formed in 2004. *See* West Virginia Mut. Ins. Co., Annual Report 2 (2009), *available at* <http://www.wvmic.com/docs/2009%20WV%20Mutual%20Annual%20Report.pdf>. In other words, premiums are one-third to one-half the amount that they were in 2004, depending on the area of practice. *Id.* at 4-5. This year, West Virginia Mutual provided a ten percent dividend credit to all renewing doctors as additional premium relief. *See* West Virginia Mut. Ins. Co., Quarterly Coverage, at 3 (Summer 2010), *available at* <http://www.wvmic.com/docs/Summer%202010%20Newsletter.pdf>. The insurer directly attributes its ability to provide such rate relief for policyholders to the 2001 and 2003 reforms. *See id.* at 1.

at 11, 18, *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf; *see also* Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Quarterly J. of Econ. 353 (1996) (finding that tort reforms such as reasonable limits on noneconomic damages, can reduce health care costs by five percent to nine percent without substantial effects on mortality or medical complications); Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Senator Orrin Hatch, Oct. 9, 2009 (finding that tort reform, including a limit on noneconomic damages, at the federal level, would reduce the deficit by \$54 billion over ten years). Even without an inflation adjustment, nationally, medical malpractice costs fell in 2008 for the first time ever. *Id.*; *see also* Amy Lynn Sorrel, *Liability Premiums Stay Stable, But Insurers Warn This Might Not Last*, American Medical News, Nov. 30, 2009, *at* <http://www.ama-assn.org/amednews/2009/11/23/pr121123.htm>. Nullification of state limits on noneconomic damages threatens to again lead to rising costs, higher prices for patients, and reduced access to medical care.

3. Increasing Access to Health Care

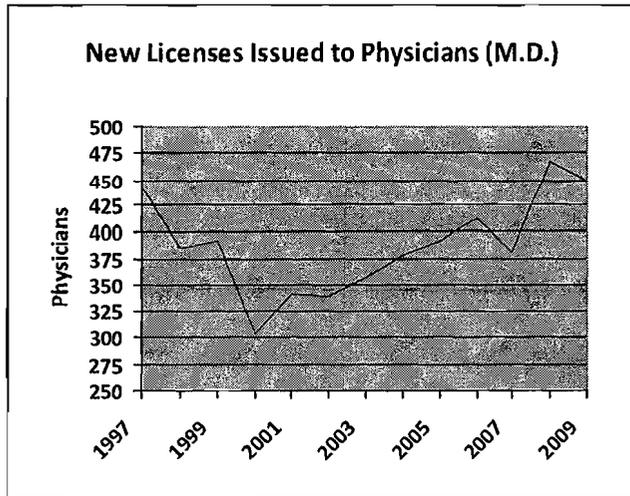
Studies show that states that have adopted limits on medical liability have experienced greater increases in the number of doctors per capita than those that have not. *See, e.g.,* William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Affairs W5-250 (May 31, 2005), available at <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.250v1>. Encinosa & Hellinger also found that a \$250,000 limit on noneconomic damages had a much larger effect on the number of surgeons and OB-GYNs per capita in rural areas than limits above \$250,000. *Id.* at W5-257.

For instance, after Texas enacted tort reform legislation in 2003 and 2005 that included a \$250,000 limit on noneconomic damages, the cost of insurance significantly declined and over 7,000 physicians reportedly flooded into Texas, with many going into underserved regions. *See* Joseph Nixon, Editorial, *Why Doctors Are Heading for Texas*, Wall St. J., May 17, 2008, at A9, available at <http://www.texaspolicy.com/pdf/2008-05-17-WSJ-JN.pdf>. The most striking surge was in essential specialties, such as obstetricians, orthopedic surgeons, and neurosurgeons. *See* Ralph Blumenthal, *More Doctors in Texas After Malpractice Caps*, N.Y. Times, Oct. 5, 2007. Patients with critical illnesses might have otherwise gone untreated without access to such doctors. *See* Jason Roberson, *How Lawsuit Reform Has Affected Patients and Doctors*, Dallas Morning News, June 17, 2007, available at <http://www.tortreform.com/node/427>.

While the results may be less dramatic in West Virginia, which is fourteen times smaller in population than Texas, West Virginia has experienced positive results. Given the drop in the cost of medical malpractice insurance in West Virginia following adoption of the 2003 reforms, it comes as no surprise that the state now has more doctors today than it did prior to that time. In fact, after stagnating for five years, the number of actively licensed physicians practicing in West

Virginia increased each and every year between 2004 and 2007, from 3,532 to 3,837 respectively, before leveling out at 3,730 in 2009. *See* West Virginia Board of Medicine, *Licensure Activity*, at <http://www.wvbom.wv.gov/activity.asp>; *see also* Ins. Rep. at 50 (recognizing an “overall favorable increase” in physicians practicing in West Virginia).

In addition, more new doctors are locating their practices in West Virginia. According to Board of Medicine statistics, from the mid 1990s to 2002 there was a decline in the number of new licenses issued, demonstrating that West Virginia was not an attractive place to practice medicine. *See* West Virginia Board of



Medicine, *Licensure Activity*, available at <http://www.wvbom.wv.gov/activity.asp>. Then beginning in 2001, and continuing steadily since 2003 through recent years, the number of new licenses increased. *See id.* The increase in new licenses has translated into improved physician recruitment and retention in the hospital field. Hospitals are reporting that physicians are expressing more interest in practicing at facilities throughout the state in light of advances in medical liability reform. Hospitals are also reporting improved retention in that physicians are no longer leaving the state or taking early retirement as was the case prior to the passage of House Bill 2122 in 2003.

4. Ensuring that Pain and Suffering Awards Serve a Compensatory, Not Punitive, Function

Since the Legislature enacted the initial \$1 million limit on noneconomic damages in 1986, new pressures have emerged that encourage plaintiffs’ lawyers to urge juries to inflate pain

and suffering awards. Most notably, increasing restrictions on punitive damages have led plaintiffs' lawyers to find other ways to increase total damages.

In 1991, the U.S. Supreme Court began a sea change in constitutional law when it recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 12 (1991), that punitive damages awards had "run wild" in this country and should be subject to due process limitations. Since then, the Court has increasingly placed legal controls on both the amount and procedures for exemplary awards while reemphasizing its concern that excessive punitive damages may infringe upon fundamental constitutional rights. These legal controls include substantive due process restrictions on the amount of punitive awards, procedural due process requirements for the assessment of punitive damages and for meaningful judicial review, and limitations on a state's ability to use activity outside its jurisdiction as a basis for punishment.

Juries may be influenced to award noneconomic damages based on a defendant's wrongful conduct or perceived wealth, leading to an award for pain and suffering that is inflated based on a desire to punish the defendant. There are numerous instances around the country in which this has occurred.² The resultant noneconomic damage awards are over and above their compensatory purpose. Such awards, which are rooted in animus toward a particular defendant,

² See, e.g., *Pellicer v. St. Barnabas Hosp.*, 974 A.2d 1070, 1089 (N.J. 2009) (finding that award of \$50 million for pain, suffering, and loss of enjoyment of life, in addition to an award of over \$20 million in economic damages, was due, in part, to argument designed to inflame the jury); *Harris v. Mt. Sinai Med. Ctr.*, 876 N.E.2d 1201, 1207-08 (Ohio. 2007) (granting new trial due to plaintiffs' counsel misconduct and improper passion and prejudice resulted in \$30 million verdict, including \$15 million in noneconomic damages); *Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147, 154-55 (Cal. Ct. App. 2006) (remitting award of \$105 million for pain and suffering to a woman paralyzed in an SUV rollover case, in addition to \$246 million in punitive damages), *vacated and remanded*, 127 S. Ct. 2250 (2007); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004) ("Plaintiffs' counsel was making a punitive damages argument for intentional fraud when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to inflame and prejudice the jury."); *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 585 S.E.2d 557, 559-66 (Va. 2003) (finding that plaintiffs' counsel's arguments improperly appealed to "the economic fears and passions" of the jury, leading to a \$60 million compensatory award).

are meant to punish, not compensate for injuries. Moreover, inflated noneconomic damage awards that include a punitive element may avoid constitutional standards applicable to punitive damage awards. *See id.* at 64-66. West Virginia's limit on noneconomic damages helps discourage such improper practices.³

5. Boosting Confidence in West Virginia's Civil Justice System

West Virginia's civil justice system has received considerable scrutiny and criticism. *See, e.g.,* Victor E. Schwartz *et al.*, *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 West Va. L. Rev. 757 (2009). Even those that are highly critical of West Virginia's liability environment, however, have given credit where credit is due, recognizing the positive impact of the Legislature's enactment of medical malpractice reforms and this Court's respect for the Legislature's prerogative to take action to protect its citizens. *See, e.g.,* Manhattan Inst., Center for Legal Policy, *Trial Lawyers, Inc.: West Virginia 5* (2008), available at http://www.triallawyersinc.com/pdfs/tli_update_6.pdf (recognizing West Virginia's "notable improvements in one crucial area of litigation – medical malpractice").

III. LACK OF MERIT IN ARGUMENTS RAISED BY VARIOUS PLAINTIFFS' AMICI

Some *amici* allied with the plaintiffs suggest that a limit on noneconomic damages unfairly impacts women or others that provide unpaid domestic services such as household labor or child care because, if they do not have lost wages, they lack compensable economic damages. *See, e.g.,* Brief of *Amicus Curiae* Public Justice, P.C., at 5-6. This assertion is a misstatement of

³ Another factor that encourages inflation of noneconomic damage awards that has emerged since the 1986 adoption of the \$1 million limit on noneconomic damages is a change in federal tax policy. In 1989, Congress amended federal tax law to provide that, unlike compensatory damages, punitive damages are taxable gross income. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2379 (codified at 26 U.S.C. § 104(a) (1994)).

West Virginia law. Plaintiffs who suffer an injury and can no longer provide domestic services can recover for such losses, which are not subject to the noneconomic damage limit, so long as they provide evidence of their pecuniary value. *See Karpacs-Brown v. Murthy*, 686 S.E.2d 746, 752, 755 (W. Va. 2009) (finding that since estate presented no evidence of specific, quantifiable services provided by grandmother, such as babysitting, cooking, or aiding in other household tasks for her grandchildren, jury award would be treated as noneconomic loss).

In addition, some *amici* confuse the compensatory purpose of noneconomic damages with purposes served by punitive damages. *See, e.g.,* Brief of *Amicus Curiae* Public Justice, P.C., at 2 (“The cap on non-economic damages further sends a dangerous message to health care providers that no matter how egregious or repulsive the malpractice perpetrated on the victim with limited economic damages, the cost to the health care provider will never exceed actual economic damages plus either \$250,000.00 or \$500,000.00.”), *id.* at 4 (referring to negligent defendant as “wrongdoer” and suggesting liability to deter “future bad acts”). West Virginia’s statutory limit on noneconomic damages, however, does not preclude courts from imposing an award of punitive damages to deter and punish malicious conduct in appropriate situations.

Another *amicus* argues that health care providers should pay high noneconomic damage awards when a patient who is injured also has the misfortune of being unemployed at the time and therefore has no lost wages. *See, e.g.,* Brief of *Amicus Curiae* West Virginia Labor Federation, AFL-CIO, at 2-3. Such an approach is antithetical to the civil justice system, which is intended to compensate for actual losses, not address general socioeconomic conditions. A plaintiff should receive such compensatory damages as are supported by the evidence and law, but noneconomic damages should not be inflated to compensate for a person’s income level or employment status.

Finally, the organization representing the state's plaintiffs' lawyers suggests that this Court sit as a finder of fact as to the validity of information potentially relied upon by members of the Legislature in enacting W. Va. Code § 55-7B-8 and whether the law was a necessary and effective means of addressing the Legislature's public policy goals. *See Amicus Brief of the West Virginia Association for Justice on Behalf of Appellant*, at 13-14. The Association urges the Court to depart from precedent, characterizing the Court's prior application of rational basis review as "toothless." *Id.* at 13-14. It then offers its own interpretation of the data and health care underlying the 2003 law, and invites this Court to substitute its own conclusion for that of the elected legislature. *See id.* at 14-32. As discussed below, this approach violates core principles of the separation of powers.

IV. LEGITIMATE, CONSTITUTIONAL LEGISLATIVE POLICY UNDERLYING WEST VIRGINIA'S LIMIT ON NONECONOMIC DAMAGES

Not only is setting a limit on subjective noneconomic damages in health care liability cases sound public policy, it is firmly within the Legislature's constitutional authority.

A. The Legislature's Longstanding Authority to Develop Tort Law

A fundamental part of legal history has been largely overlooked in the debate about whether courts or legislatures should develop state tort law. State legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first acts of state legislatures was to "receive" the common and statutory law of England as of a certain date and have that provide a basis for a state's tort law. *See Charles A. Bane, From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. Miami L. Rev. 351, 363 (1983) (recognizing that "reception statutes were the mechanism for transferring the common law of England to the new United States. . ."). In that legislation, called a "reception statute," state legislators *delegated* to state courts the authority to

develop the English Common Law in accordance with the public policy of the state. These long-forgotten statutes were the basic vehicle through which the power to recognize the generally accepted torts was vested in state judiciaries. See Kent Greenwalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621, 649 (1987).

Early state legislatures delegated the task of developing tort law to state judiciaries, because the legislatures did not have the time (or perhaps the inclination) to formulate an extensive “tort code.” They faced more extensive and pressing tasks, such as the formulation of the basic principles for a “new society,” including the development of criminal codes. As many “reception statutes” made clear, however, what the legislature delegated, it could retrieve at any time. See, e.g., W. Va. Code § 2-1-1.

In West Virginia, the Legislature has had a preeminent role in developing public policy from the very founding of the State. Article 8, Section 13, of the West Virginia Constitution provides that:

Parts of existing law effective. 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. 8, § 13 (emphasis added). A similar provision appeared in each of Article VIII’s prior versions. See Robert M. Bastress, *The West Virginia State Constitution; A Reference Guide* 222 (1995). The West Virginia Code has included a codification of this principle throughout the state’s existence. See W. Va. Code § 2-1-1. These provisions demonstrate the Legislature’s longstanding authority to establish public policy for the citizens of the State.

As this Court has recognized, by virtue of authority of the state constitution and this statute, “it is within the providence of the legislature to enact statutes which abrogate the common law.” *Verba*, 552 S.E.2d at 408.

**B. Judicial Second Guessing of the
Legislature's Policy Judgment is Inappropriate**

Amici here and other members of the health care community know that the limit on noneconomic damages has fostered a more stable and predictable health care environment with less risk of excessive awards. These factors positively impact insurance rates and accessibility to health care in West Virginia. Petitioners/Respondents, joined by several other *amici*, apparently disagree. Which side of this debate has the greatest merit is not an issue for this Court, but appropriately lies with the Legislature.

As discussed earlier, in addition to reducing insurance premiums, there are other benefits that underlie the Legislature's intent, such as eliminating outlier awards, treating plaintiffs more consistently, and helping ensure that such awards are not based on bias or intent to punish a defendant. In addition, given the close regulation of the medical profession, the economic incentive that a large award may provide to deter negligence may be less meaningful for physicians than other professions. Developing a more predictable civil justice system by limiting the variability of pain and suffering awards that do not lend themselves to objective measurement is, *in itself*, a reasonable objective within the constitutional authority of the Legislature.

For the purposes of the Court's constitutional review, the test is whether the Legislature had a rational basis for enacting the law, including a factual basis that the Legislature could reasonably conceive to be true that justifies its action. *Robinson*, 414 S.E.2d at 883, 887. As this Court recognized, "[i]n addressing complicated social and economic problems, the Legislature must be free to attempt a remedy, even when the results are uncertain." *Id.* at 887. It is not for the judiciary to reexamine the factual basis underlying a statute, nor is it inappropriate for the Legislature to rely upon the information available to it at the time, even if incomplete or conflicting. *Id.* That such changes will necessarily favor one party to the detriment of another in

litigation is not a classification warranting higher scrutiny. *See id.* The same concept has been expressed by the Supreme Court of the United States, which has stated:

Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (internal citations omitted).

Constitutional law does not demand that the Legislature craft legislation that is perfectly tailored to accomplish its goals. Nor is a statute's constitutionality to be judged based on its effectiveness in delivering the desired results. As this Court held in *Robinson*, "Courts are not concerned with questions related to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary." *Robinson*, 414 S.E.2d at 883; *see also* M. Margaret Branham Kimmel, Comment, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

Additional support for the law is found in the separation of powers and the inherent strengths of the legislative process. Tort law impacts go far beyond a particular case. The Legislature can focus more broadly on how tort law, including unbounded and growing pain and suffering awards, impacts consistency and predictability in the civil justice system, insurance

rates, and the broader economic climate. The Legislature has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved. *See* W. Va. Code § 55-7B-1 (finding “[t]hat 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”).

Legislatures are uniquely well equipped to reach fully informed decisions about the need for complex public policy changes in the law. Through the hearing process, the Legislature is the body best equipped to hold a full discussion of the competing principles and controversial issues of tort liability, because it has broad access to information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, then an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in complicated policy deliberations and to formulate legislation carefully:

The legislature has the ability to hear from everybody — plaintiffs’ lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 *Seton Hall L. Rev.* 688, 689 (2001).

A similar point was made by Justice Harlan Stone, who cautioned that “the only check upon [the Court’s] exercise of power is [the Court’s] own sense of self-restraint. For the

removal of unwise laws from the statute books *appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*” *United States v. Butler*, 297 U.S. 1, 79 (1936).

In the area of medical liability, courts are repeatedly exposed to the testimony of patients who allege that they received inadequate care. These unfortunate instances, however, represent a distinct minority of those who receive medical treatment. Legislators hear from numerous others who are concerned about the availability and affordability of health care and from doctors facing steep medical liability premium rates. These important views do not come before the judiciary in individual cases, but are only raised on appeal by *amici curiae*.

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the U.S. Supreme Court noted in a landmark decision regarding punitive damages, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . .” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added). The Supreme Court’s statement is particularly applicable here.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide “cases and controversies.” This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective “fair notice” to everyone potentially affected.

This Court has repeatedly recognized the legislature's authority to develop tort law, whether the change favors plaintiffs or defendants. Aside from upholding a limit on noneconomic damages in *Robinson* and *Verba*, this Court has upheld:

- a statute precluding admission of evidence showing that a plaintiff was not wearing his or her seatbelt when injured in a car accident, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 672 S.E.2d 345 (W. Va. 2008).
- statutory tort immunity for ski area operators, *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634 (W. Va. 1991);
- a ten-year statute of repose for improvements to real property, *Gibson v. West Virginia Dept. of Hwys.*, 406 S.E.2d 440 (W. Va. 1991); and
- the qualified tort immunity provisions of Governmental Tort Claims and Insurance Reform Act, *O'Dell v. Town of Gauley Bridge*, 425 S.E.2d 551 (W. Va. 1992); *Pritchard v. Arvon*, 413 S.E.2d 100 (W. VA. 1991); *Randall v. Fairmont City Police Dept.*, 412 S.E.2d 737 (W.Va. 1991).

In contrast to this Court's tradition and the greater weight of decisions from other states, Petitioners and their allied *amici* ask this Court to use an expansive view of the West Virginia Constitution to sit as a "superlegislature." *But see Robinson*, 414 S.E.2d at 883 (recognizing that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations" such as the limit on noneconomic damages enacted in 1986). This plea brings to mind a highly discredited period in the Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this "*Lochner* era" (after *Lochner v. New York*, 198 U.S. 45 (1905)), the Court nullified laws it disagreed with as a matter of public policy, using the United States Constitution as a cloak to cover its highly personalized decisions.

Lochner-like decisions create unnecessary tension between the legislative and judicial branches and undermine public confidence in the courts. See Comment, *State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000) (Ohio Supreme Court's decision to strike down a tort reform law drove "a deeper wedge between the Ohio judiciary and its legislature" and "may have undermined the Ohio Supreme Court's valued position as a defender of the constitution."); Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001). This Court should reject Plaintiffs' invitation to roll back the clock.⁴

C. Principles of Stare Decisis Support Upholding the Law

While the West Virginia Legislature has chosen to revise the statute, the law's purpose, function, and supporting public policy basis remain the same. Moreover, the constitutional challenge to the statute presents essentially the same arguments that this Court has previously considered and rejected. For this reason, the Court should apply principles of *stare decisis* and uphold the law.

⁴ See also Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 Seton Hall L. Rev. 649, 664 (2001) ("If too many state courts insist on preserving an ahistorical, illegitimate law-making power to frustrate civil justice reform, perhaps it is not too far-fetched to imagine a federal court solution to the problem."); M. Margaret Branham Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

As the Court found when it was asked in 2001 to reconsider a limit on noneconomic damages that it had found valid a decade earlier, “we find no reason to revisit the constitutional issues previously raised in *Robinson*.” *Verba*, 552 S.E.2d at 410. These constitutional issues included the equal protection clause, the separation of powers clause, the right to a jury trial, the open court and certain remedy clauses, and the due process and special act clause, all of those whose applicability had already been decided. *See id.* at 410 n.1.

Another ten years has passed since *Verba* and now a new set of plaintiffs has requested that the Court again decide these already decided issues. While the Legislature has opted to reduce the limit on noneconomic damages in professional liability cases from \$1 million to a maximum of \$500,000, the legislative history makes clear that it did so as part of a comprehensive effort to attack spiking insurance premiums that limited access to doctors for West Virginia residents. It is also clear that a limit at the \$1 million level applied to very few cases - no more than fifteen verdicts per year. *See* Ins. Rep. at 22. Moreover, research has shown that every \$100,000 increase in a limit on noneconomic damages raises premiums by 3.9 percent. *See* Kane & Emmons, *supra* (citing Kilgor, *supra*). Enacting a \$250,000 limit in states without caps, or with higher level caps, such as West Virginia, would result in premium savings of \$1.4 billion (eight percent of current premiums) nationwide. *Id.*

As this Court has properly understood, “it is up to the legislature . . . to decide whether its legislation continues to meet the purposes for which it was originally enacted.” *Verba*, 552 S.E.2d at 412. Clearly, the Legislature here decided that a limit on noneconomic damages was working and, indeed, a more stringent limit was necessary to more effectively address a health care crisis in West Virginia.

As this Court has also recognized, the Court should not change the law unless there is evidence of “a palpable mistake or error.” *Verba*, 552 S.E.2d at 410. Otherwise, the law loses its value because the public is unable to rely upon court decisions. *See id.*; *see also* Victor E. Schwartz, Phil Goldberg & Cary Silverman, *Toward Neutral Principles of Stare Decisis In Tort Law*, 58 S.C. L. Rev. 317, 320-23 (2006) (tracing the origin and public policy purpose of *stare decisis*). This Court has properly ruled – twice – that it is within the Legislature’s authority to place limits on noneconomic damages as a means of improving the state’s health care environment. For reasons of *stare decisis* alone, these decisions should stand. *See DRD Pool Serv., Inc. v. Freed*, No. 104, 2010 WL 3718897, at *7-*10 (Md. Sept. 24, 2010) (applying principles of *stare decisis* to find that the rationale for upholding the state’s limit on noneconomic damages in personal injury cases expressed in two prior decisions upholding the limit and the statutory limit itself “have become embedded in the bedrock of Maryland law”).

V. LIMITS ON NONECONOMIC DAMAGES UPHOLD IN NUMEROUS OTHER STATES

West Virginia is not alone in trying to restrain outlier pain and suffering awards. Most other states have placed bounds on noneconomic damage awards. *See* Nat’l Ass’n of Mut. Ins. Cos., *Noneconomic Damage Reform*, at [http://www.namic.org/reports/tortReform/Noneconomic Damage.asp](http://www.namic.org/reports/tortReform/NoneconomicDamage.asp) (surveying statutory noneconomic damages limits). West Virginia is among many states that have adopted a limit specifically applicable to health care liability actions.⁵

⁵ *See, e.g.*, Ind. Code § 34-18-14-3; La. Rev. Stat. Ann. § 40:1299.42; Md. Cts. & Jud. Proc. Code Ann. § 3-2A-09; Miss. Code Ann. § 11-1-60; Mo. Rev. Stat. § 538.210; Neb. Rev. Stat. § 44-2825; 63 Okla. Stat. § 1-1708.1F; S.C. Code Ann. § 15-32-220; Tex. Civ. Prac. & Rem. Code Ann. § 74.301. Several states have enacted limits on noneconomic damages applicable to all personal injury claims. *See, e.g.*, Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5(3)(a); Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. Ann. § 60-19a02(b); Md. Ct. & Jud. Proc. Code Ann. § 11-108; Miss. Code Ann. § 11-1-60(2); Ohio Rev. Code Ann. § 2315.18.

Many state courts that have considered the constitutionality of noneconomic damage limits applicable to medical malpractice claims have upheld the legislature's prerogative to set needed bounds on inherently subjective awards in order to preserve access to the health care system.⁶ At least four state courts, including neighboring Virginia, have upheld laws that go further – by limiting total recovery in medical malpractice cases, not just the noneconomic damage portion of the award.⁷ Several other courts have upheld the constitutionality of limits on noneconomic damages that generally apply to all personal injury actions, not only those involving medical malpractice claims.⁸ Most recently, Maryland's highest court held that

⁶ See *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985) (\$250,000 noneconomic damages limit did not violate equal protection or due process); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (\$250,000 limit on noneconomic damages in medical malpractice claims when party submits to a binding medical arbitration panel did not violate equal protection, due process, takings, right to jury trial, single subject requirement, or nondelegation doctrine); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992) (noneconomic damages limit did not violate state or federal equal protection guarantees or open courts provision of state constitution); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002) (noneconomic damages limit did not violate equal protection, separation of powers, or the right to have damages determined by a jury); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) (\$500,000 general damages limit for health care providers did not violate open courts, right to redress, or equal protection); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) (\$500,000 limit on noneconomic damages “remains in full force and effect”); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (\$250,000 noneconomic damages limit did not violate open courts, uniform operation of laws, due process, right to jury trial, or separation of powers).

⁷ See *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004) (\$1 million aggregate limit did not violate equal protection, right to jury trial, or separation of powers); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) (\$1.25 million aggregate damages limit did not violate prohibition against special legislation, equal protection, open courts, right to remedy, right to jury trial, takings, or separation of powers); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) (\$1 million limit did not violate right to jury trial, prohibition against special legislation, separation of powers, takings, due process, or equal protection); *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989) (\$750,000 limit on total recovery in medical malpractice actions did not violate due process, right to jury trial, separation of powers, prohibition against special legislation, or equal protection); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980) (upholding \$100,000 limit on total amount recoverable against single health care provider and \$500,000 limit against all providers).

⁸ See *C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *overruled in part* (Footnote continued on next page)

Maryland's noneconomic damages cap did not violate the right to jury trial or right to remedy provisions of the Maryland Constitution or the equal protection provisions of the Maryland or United States Constitutions. *See DRD Pool Serv., Inc.*, 2010 WL 3718897. State courts have also upheld noneconomic damage limits in various other contexts.⁹ They are joined by several federal courts that have rejected challenges based on the U.S. Constitution or an interpretation of applicable state law.¹⁰ Most recently, a federal magistrate recommended that the Eastern District

on other grounds, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *DRD Pool Serv. Inc. v. Freed*, No. 104, 2010 WL 3718897 (Md. Sept. 24, 2010); *Oaks v. Connors*, 600 A.2d 423 (Md. 1995), *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

⁹ *See, e.g., Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. App. 2004) (noneconomic damages limit in product liability actions did not violate equal protection, separation of powers, or the right to have damages determined by a jury); *Mizrahi v. North Miami Med. Ctr., Ltd.*, 761 So. 2d 1040 (Fla. 2000) (wrongful death statute precluding adult children from recovering nonpecuniary damages in action for a parent's death due to medical malpractice did not violate equal protection); *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989) (\$100,000 limit on noneconomic damages for wrongful death did not violate equal protection, due process, or right to jury trial); *Adams v. Via Christi Reg'l Med. Ctr.*, 19 P.3d 132 (Kan. 2001) (same); *Peters v. Saft*, 597 A.2d 50 (Me. 1991) (\$250,000 limit on nonmedical damages recoverable against servers of liquor did not violate equal protection, due process, right to jury trial, or right to remedy); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) (\$400,000 limit on damages for embarrassment, emotional distress, and loss of consortium did not violate right to remedy); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (statute precluding award of noneconomic damages to uninsured motorists in actions arising from automobile accidents did not violate right to jury trial or right to remedy).

¹⁰ *See, e.g., Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (California's \$250,000 limit on noneconomic damages in medical malpractice suits did not violate equal protection); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996) (upholding Kansas's \$250,000 limit on noneconomic losses in health care liability actions); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005) (Michigan's limit on noneconomic damages in medical malpractice cases did not implicate protected jury rights, and thus, did not violate the Seventh Amendment), *cert. denied*, 347 U.S. 1111 (2006); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (Virginia's limit on recovery in medical malpractice actions had reasonable relation to valid legislative purpose-maintenance of adequate health care services and did not violate due process or equal protection); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002) (New Mexico's medical liability limit was not arbitrary and capricious); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991) (finding medical malpractice liability limit valid under the Louisiana Constitution); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands' limit on noneconomic damages did not violate Seventh Amendment); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990) (upholding Maryland's \$350,000 limit on noneconomic damages in personal injury actions); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (noneconomic damage limit not unconstitutional).

of Texas reject a challenge to the \$250,000 limit on noneconomic damages in health care liability claims adopted by the Texas Legislature in 2003. *See Watson v. Hortman*, 2010 WL 3566736 (E.D. Tex. Sept. 13, 2010) (Magistrate Report and Recommendation).

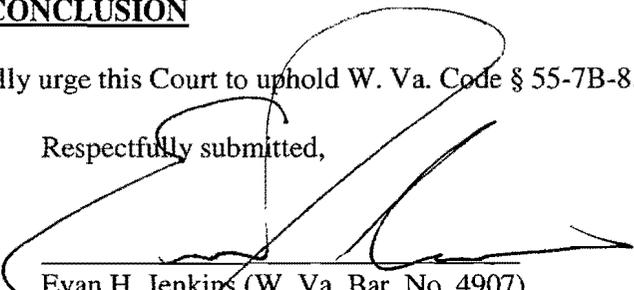
While several state courts have engaged in judicial nullification of such laws, including, most recently, Georgia and Illinois,¹¹ the clear trend is to uphold such legislation, as this Court did in *Robinson and Verba*. *See* Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005) (“Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps.”). In fact, more than twice as many state courts of last resort have upheld statutory limits on noneconomic damages awards than have struck them down. These courts have recognized, “It is not this court’s place to second-guess the Legislature’s reasoning behind passing the act,” *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 69 (Neb. 2003).

¹¹ For cases striking down limits on noneconomic damages, *see Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Smith v. Dep’t of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *LeBron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lakin v. Senco Prods. Inc.*, 987 P.2d 463 (Or. 1999); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005); *see also Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752 (Mo. 2010) (retroactive application of noneconomic damage cap for health care liability actions to accrued claims violated prohibition against retroactive laws in Missouri Constitution).

CONCLUSION

For these reasons, *amici* respectfully urge this Court to uphold W. Va. Code § 55-7B-8.

Respectfully submitted,



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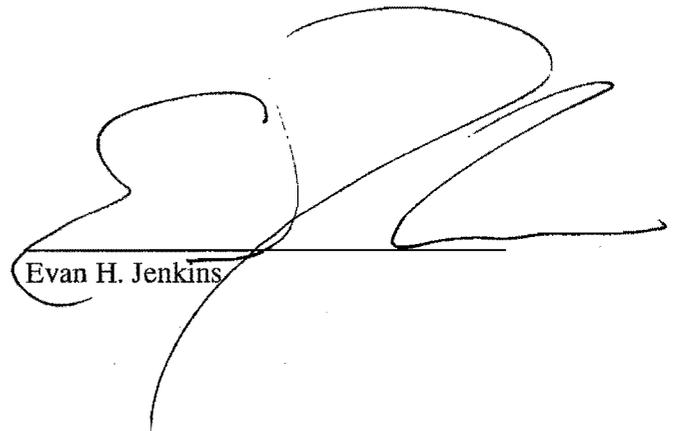
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