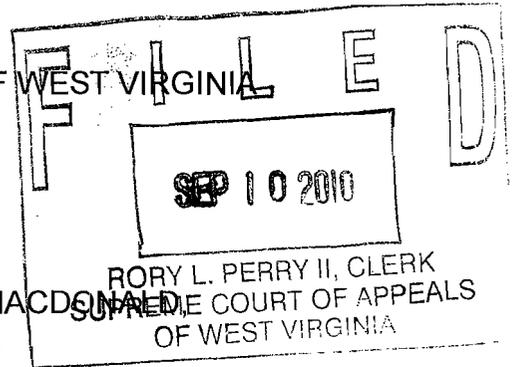


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543



JAMES D. MACDONALD and DEBBIE MACDONALD,  
Plaintiffs Below, Petitioners,

SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

v.

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

---

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

---

**BRIEF OF AMICUS CURIAE PUBLIC JUSTICE, P.C.,**

Harry G. Deitzler, Esq. (WVSB #981)  
President, Public Justice Foundation  
HILL, PETERSON, CARPER,  
BEE & DEITZLER, PLLC  
500 Tracy Way  
Charleston, WV 25311  
(304) 345-5667

And

Troy N. Giatras, Esq. (WVSB #5602)  
Stacy A. Jacques, Esq. (WVSB #9677)  
THE GIATRAS LAW FIRM, PLLC  
118 Capitol Street, Suite 400  
Charleston, WV 25301  
(304) 343-2900

*Counsel for Amicus Curiae Public  
Justice, P.C.*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICUS</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT.....	3
A. CAPS ON NON-ECONOMIC DAMAGES UNFAIRLY DISCRIMINATE AGAINST WOMEN, CHILDREN, THE ELDERLY, AND PEOPLE WITH DISABILITIES.....	4
B. BY UNFAIRLY DISCRIMINATING AGAINST WOMEN, CHILDREN, THE ELDERLY, PEOPLE WITH DISABILITIES, AND THE SEVERELY INJURED, CAPS ON NON-ECONOMIC DAMAGES OPERATE AS A BARRIER TO JUSTICE FOR THESE VICTIMS OF MEDICAL MALPRACTICE AND CREATE A DISINCENTIVE FOR HEALTH CARE PROVIDERS TO PROVIDE QUALITY, ERROR- FREE CARE.....	10
CONCLUSION.....	13
CERTIFICATIONS.....	14

## TABLE OF AUTHORITIES

### Cases

#### West Virginia

<i>Donley v. Bracken</i> , 452 S.E.2d 699, 706 (W. Va. 1994).....	2
<i>Israel ex rel. Israel v. West Virginia Secondary Sch. Activities Comm'n</i> , 388 S.E.2d 480 (W. Va. 1989).....	2
<i>Johnson v. Stevens</i> , 265 S.E.2d 764, 767 (W. Va. 1980).....	2
<i>Robertson v. Goldman</i> , 369 S.E.2d 888 (W. Va. 1988).....	2
<i>State ex rel. Boan v. Richardson</i> , 482 S.E.2d 162, 164-165 (W. Va. 1996).....	2

#### Other

<i>Brannigan v. Usitalo</i> , 587 A.2d 1232 (N.H. 1991).....	3
<i>Ferndon v. Wisconsin Patients Compensation Fund</i> , 701 N.W.2d 440 (Wis. 2005).....	3
<i>Lebron v. Gottlieb Memorial Hospital</i> , 930 N.E.2d 895 (Ill. 2010).....	3
<i>Lucas v. United States</i> , 757 S.W.2d 687 (Tex. 1988).....	3
<i>Moore v. Mobile Infirmary Ass'n</i> , 592 So.2d 156 (Ala. 1991).....	3
<i>Morris v. Savoy</i> , 576 N.E.2d 765 (Ohio 1991) .....	3

### Statutes

<i>W.Va. Code § 55-7B-8</i> (2010).....	<i>passim</i>
---	---------------

### Constitutional Provisions

<i>W.Va. Const., Art. III, Sec. 10, 17</i> (2010).....	<i>passim</i>
<i>W.Va. Const. Art. IV, Sec. 39</i> (2010).....	<i>passim</i>

## Additional Authorities

- Jennifer Arlen, *Tort Damages*, 2 Encyc. of Law & Econ., 682, 702 (2000).....10
- Martha Chamallas, *Questioning the use of Race-Specific and Gender-specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 Fordham L.Rev. 73, 75-77 (1994).....6
- Martha Chamallas, *Introduction to Feminist Legal Theory*, 198 (1999) .....6
- Stephen Daniels & Joanne Martin, *The Texas Two-Step: evidence on the Link Between Damage caps and Access to the Civil Justice System*, 55 DePaul L. Rev. 635, 646 (Winter 2006)..... 11,12
- Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1281 (2004).....6,7,8,9
- Thomas Koenig & Michale Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 Wash. L.Rev. 1, 84-85 (1995).....6,7,11
- Rebecca Korzec, *Maryland Tort Damages: A Form of Sex-Based Discrimination*, 37 U.Balt. L.F. 97, 99 (2007).....5
- Kelly Koutour, *Student Work: An Extreme Response or a Necessary Reform? Revealing How Caps on Non-Economic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates*, 108 W.Va. L. Rev. 873, 894-895 (2006).....3
- Michael Rustad, *Neglecting the Neglected: The Impact of Non-Economic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 Elder L.J. 331, 346 (2006).....8
- Kathy Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U.L. Rev. 1, 3-6 (1996).....5
- Andrew Smith, *Medical Error and Patient Injury*, 3 (1998)..... 11
- W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale*, 1 Mich. L. & Pol'y Rev. 141, 158 (1996).....12
- Rachel Zimmerman, *As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, Wall St. J., Oct. 8, 2004 at A1.....13

## STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Public Justice, P.C. is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in the courts. We specialize in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, environmental protection and safety, workers' rights, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless.

Throughout its history, Public Justice has participated in numerous cases challenging federal preemption, forced arbitration, limitations on attorneys' fees, unnecessary court secrecy, bans on class actions, and other devices that limit the ability of victims of fraud and dangerous products to hold responsible parties accountable. For example, we authored an *amicus* brief in *Dunlap v. Friedman's, Inc.*, 582 S.E.2d 841 (W.Va. 2003), urging this Court to strike down an installment retailer's mandatory arbitration clause as unconscionable because it would impose prohibitive costs and would limit the types of relief available to consumers. We then represented the plaintiffs in their successful opposition the defendants' *certiorari* petition to the U.S. Supreme Court.

In the present case, Public Justice believes that if the statutory damages cap is upheld, West Virginia's most vulnerable victims of medical negligence will be harmed; the deterrent purpose of the tort system will be stifled; and access to justice will be denied.

## SUMMARY OF ARGUMENT

The Constitution of West Virginia provides equal protection to all of its citizens regardless of age, gender, income, or disability.<sup>1</sup> See *State ex rel. Boan v. Richardson*, 482 S.E.2d 162, 164-65 (W. Va. 1996) (age); Syl. pt. 5, *Israel ex rel. Israel v. West Virginia Secondary Sch. Activities Comm'n*, 388 S.E.2d 480 (W. Va. 1989) (gender); *Johnson v. Stevens*, 265 S.E.2d 764, 767 (W. Va. 1980) (income); *Donley v. Bracken*, 452 S.E.2d 699, 706 (W. Va. 1994) (disability).

The cap on non-economic damages found in West Virginia Code § 55-7B-8 (2010) violates the Equal Protection Clauses of the West Virginia Constitution because it arbitrarily classifies plaintiffs based on their ability to collect economic damages. In so doing, it disproportionately limits the degree of recovery available to certain West Virginia citizens, including women, children, the elderly, and people with disabilities, and acts as a barrier to justice to those affected.

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 injury plus either \$250,000.00 or \$500,000.00. See W. Va. Code § 55-7B-8 (2010). Such limitations on the right to recovery have created a system in West Virginia where

---

<sup>1</sup> This protection, which is even greater than the protection provided by the Fourteenth Amendment of the United States Constitution, is provided primarily through Article III, Sections 10 and 17, which provide that: "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," and that: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers. See Syl. pt. 3, *Robertson v. Goldman*, 369 S.E.2d 888 (W. Va. 1988); W. Va. Const., Art. III, Sec. 10, 17 (2010); see also W. Va. Const., Art. IV, Sec. 39 (2010) (specifically prohibiting the West Virginia Legislature from "regulating the practice in courts of justice").

attorneys are unwilling to take medical malpractice cases where the victim does not have significant economic damages and where health care providers have no incentive to provide quality, error-free care to those patients who frequently are at the highest risk of harm, such as young children, the elderly, and people with disabilities. See Kelly Kotour, *Student Work: An Extreme Response or a Necessary Reform? Revealing How Caps on Non-Economic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates*, 108 W. Va. L. Rev. 873, 894-95 (2006).

### ARGUMENT

Caps on non-economic damages are the most prevalent feature of medical malpractice tort reform across the country. These caps are ardently advocated for by the insurance industry and by health care providers who believe, largely erroneously, that such caps will lower their medical malpractice premiums. Many legislatures have bowed to such pressure, including the West Virginia Legislature.

However, many courts are increasingly finding that their state's constitutions and other laws cannot permit any caps on non-economic damages to stand. See e.g. *Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895 (Ill. 2010); *Ferndon v. Wisconsin Patients Compensation Fund*, 701 N.W.2d 440 (Wis. 2005); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). One frequently prevailing reason why courts have struck down caps on non-economic

damages is because of the chilling effect such caps have had on certain groups of people's ability to access the equal protection of the courts.

In West Virginia, the \$250,000.00/\$500,000.00 non-economic damages cap set forth in West Virginia Code § 55-7B-8 (2010), violates the constitutional guarantees of equal protection and equal access to the courts set forth in Article III, Section 10, Article III, Section 17, and Article IV. Section 39 of the West Virginia Constitution because it unfairly and arbitrarily discriminates against women, children, the elderly, and people with disabilities. The purpose of this brief by Amicus Public Justice. P.C. is to act as a voice for those groups of individuals set forth above, many of whom do not have a powerful voice in the legislature, by focusing this Court's attention on the equal protection violations inherent in West Virginia Code § 55-7B-8 (2010).

**A. CAPS ON NON-ECONOMIC DAMAGES UNFAIRLY DISCRIMINATE AGAINST WOMEN, CHILDREN, THE ELDERLY, AND PEOPLE WITH DISABILITIES.**

Caps on non-economic damages discriminate against women, children, the elderly, and people with disabilities in three key ways: First, the caps interfere with these victims of medical malpractice's rights to full and fair compensation because these individuals, by virtue of their life circumstances, can only recover limited economic damages plus the capped amount of the non-economic damages: Second, the caps decrease and even eliminate the wrongdoer's incentive to improve standards and to ensure that future bad acts will no occur: Third, the caps effectively deny these victims access to the justice system to redress their injuries.

1. *Caps on Non-Economic Damages Unfairly Discriminate Against Women.*

One of the groups most at risk of victimization by caps on non-economic damages is women. Women are victimized by caps on non-economic damages in two ways. First, due to societal traditions and mores, women tend to earn less than their male counterparts. Therefore, a larger percentage of any medical malpractice award a woman might receive would be composed of non-economic damages. Caps thus have a more prejudicial effect on women than they do on men. Secondly, and perhaps more importantly, many of the types of injuries that are disproportionately suffered by women, including reproductive injuries, do not affect women in primarily economic terms. Rather, these injuries have an effect that is generally compensated through non-economic damages such as emotional distress.

First looking at earnings, in virtually every working environment women earn less than men. In 2005, women were paid seventy-seven cents for each dollar paid to men. In 2005, women were paid seventy-seven cents for each dollar paid to men. See America's Union Movement, *Equal Pay* (Mar. 1, 2007), <http://www.aflcio.org/issues/jobseconomy/women/equalpay.html>. Additionally, women are more likely than men to perform unpaid childcare, household work, and care of elderly relatives. See Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U.L. Rev. 1, 3-6 (1996).

These factors are reflected in personal injury jury awards. See Rebecca Korzec, *Maryland Tort Damages: A Form of Sex-Based Discrimination*, 37 U. Balt. L.F. 97, 99 (2007). For example, a stay at home mother who became disabled in a car wreck might not receive a large economic damages award

because it would be difficult for her to establish lost wages, but the effect on her family might be immeasurable. Most juries recognize this immeasurable effect on a woman's family through large awards of non-economic damages. This is seen in a nationwide study of personal injury awards by juries which showed that women received a far greater proportion of their jury awards in the form of non-economic damages than men did simply for the reasons set forth above. See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 Fordham L. Rev. 73, 75-77 (1994); Martha Chamallas, *Introduction to Feminist Legal Theory*, 198 (1999). Therefore, because a greater proportion of women's awards come in the form of non-economic damages, caps on these damages unfairly and arbitrarily discriminate against women in violation of West Virginia Constitution, Article III, Sections 10 and 17 and Article IV, Section 39.

The ways in which women are unfairly victimized by caps on non-economic damages in medical malpractice cases go beyond the lower wages earned by women. Several types of injuries disproportionately suffered by women do not affect women in primarily economic terms. See Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1281 (2004). These injuries include, but are not limited to, sexual assault, reproductive harm, and gynecological medical malpractice. See *id.*; see also See Thomas Koenig & Michale Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 Wash. L. Rev. 1, 84-85 (1995) (finding that nine out of ten victims of sexual abuse by health care providers are female). For example, a

woman who is the victim of a sexual assault by a health care provider or a woman who is rendered infertile due to the negligence of a health care provider probably will not be unable to work due to such injuries, but the emotional distress associated with these injuries is great.

Juries understand this and frequently award women who have been the victims of such acts large non-economic awards. See Finley, *Supra*, at 1281-86 (finding that, in California, a state where a non-economic damages cap has been in place for many years, prior to the institution of caps on non-economic damages, the average woman's award was 94% of the average man's award, but post-cap, the average woman's award was only 58.6% of the average man's award). For example, a recent study of 21 states that have capped non-economic damages in medical malpractice actions found that the typical pain and suffering award given to a female plaintiff was twice that awarded to a male plaintiff. See Koenig at 84-85. In fact, non-economic awards often become the only way juries have to signal to society that these injuries are important and to provide women plaintiffs with adequate compensation. To take away women's ability to receive a large non-economic damages award through a cap on such awards effectively denies women access to the courts and to the equal protection of the law. Thus, the non-economic damages cap set forth in West Virginia Code § 55-7B-8 (2010) cannot be deemed constitutional by this Court.

2. *Caps on Non-Economic Damages Unfairly Discriminate Against the Elderly.*

Older individuals are also unfairly affected by the caps on non-economic

damages set forth in West Virginia Code § 55-7B-8 (2010). Because older individuals often live on fixed or limited incomes, tort plaintiffs over the age of 65 typically receive minimal economic damages recoveries for lost income. See Michael Rustad, *Neglecting the Neglected: The Impact of Non-Economic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 Elder L.J. 331, 346 (2006). This is seen in the instant case where Mr. MacDonald had recently retired and thus did not receive an award for future lost income.

Nonetheless, medical malpractice injuries cause debilitating pain and greatly reduce the life activities of countless older individuals. Non-economic damages provide a significant means for juries to assess and compensate for these severe and life-altering effects of medical malpractice. For example, in one state with a cap on non-economic damages in medical malpractice actions, the post-cap mean recovery for elderly victims was only 65% of the total average jury award. See Finley, *Supra*, at 1287. Thus, without the availability of non-economic damages recovery, the majority of older individuals will be awarded only damages for current and future medical costs, and the pain and life-altering effects of medical malpractice will go as uncompensated as if these victims had been denied access to the courts altogether.

### *3. Caps on Non-Economic Damages Unfairly Discriminate Against Children.*

Children are also unfairly and adversely affected by caps on non-economic damages in medical malpractice actions due solely to their age. Lucinda Finley, a professor of law at the State University of New York in Buffalo recently performed a study that looked at, among other things, the impact caps

on non-economic damages in medical malpractice cases affect young victims. See Finley, *Supra*, at 1292-93.

Professor Finley found that in cases where an infant or child died, the median recovery was reduced by 79% when there was a cap on non-economic damages. Professor Finley also found a decrease in the median recovery when the child survived, although this difference was less profound. See *id.* Professor Finley theorized that this was because juries recognize the significant impact the death or injury of a child has on a family even when the child had no wage earning capacity. Professor Finley went on to note that “[t]his profoundly discriminatory effect of the cap is particularly irrational and cruel.” See *id.*

Families that have lost children and children that have been injured by medical malpractice should have the same access to the courts as adults have. Yet, caps on non-economic damages deny them this access. Accordingly, such caps must be stricken by this Court as they violate West Virginia’s constitutional mandate of equal protection to all.

*4. Caps on Non-Economic Damages Unfairly Discriminate Against People With Disabilities.*

There have not been the significant studies conducted on the effects that medical malpractice non-economic damages caps have on people with disabilities as there has been with regard to women, children, and elderly individuals. Perhaps this is because people with disabilities frequently have one of the weakest voices in the legislature and in the courts. Yet, people disabilities are one group for whom logic dictates would be most affected by non-economic damages caps. These individuals frequently need more health care services and

thus are at a greater risk of exposure to malpractice, but like children and the elderly, many individuals with disabilities are unable to earn equivalent wages on which to base an award of non-economic damages. Similarly, because of these facts, caps on non-economic damages likely will limit these most vulnerable of citizens' access to the courts. Accordingly, such caps must be stricken pursuant to the equal protection clauses of the West Virginia Constitution.

**B. BY UNFAIRLY DISCRIMINATING AGAINST WOMEN, CHILDREN, THE ELDERLY, AND PEOPLE WITH DISABILITIES, CAPS ON NON-ECONOMIC DAMAGES OPERATE AS A BARRIER TO JUSTICE FOR THESE VICTIMS OF MEDICAL MALPRACTICE AND CREATE A DISINCENTIVE FOR HEALTH CARE PROVIDERS TO PROVIDE QUALITY, ERROR-FREE CARE.**

*1. Non-Economic Damages Caps Provide a Disincentive to Eliminate Medical Errors.*

The possibility of tort liability, and the corresponding damages, provide a strong financial incentive for health care providers to invest adequately in safety. "Optimal deterrence requires that injurers bear the full social cost of their risk-taking activities, including nonpecuniary losses." See Jennifer Arlen, *Tort Damages*, 2 Encyc. of Law & Econ., 682, 702 (2000). West Virginia Code § 55-7B-8 (2010), however, immunizes tort-feasors from non-economic damages above the \$250,000.00/\$500,000.00 cap and greatly reduces the incentives to invest in safety.

Because women, the elderly, children, and people with disabilities are unable to recover significant economic damages to the extent of male, working age, non-disabled plaintiffs, West Virginia Code § 55-7B-8 (2010)

disproportionately reduces the deterrent effect of tort law in preventing injuries to these groups of victims of medical malpractice. Additionally, these groups are often the most vulnerable. For example, AARP's Public Policy Institute conducted a study that found that "patients age 65 and older experience medical injury two to four times as often as patients in age groups under the age of 45." See Andrew Smith, *Medical Error and Patient Injury*, 3 (1998). Likewise, as set forth above, women comprise 90% of the victims of sexual abuse by health care providers. See Koenig, *Supra*, at 84-85. Consequently, a cap on non-economic damages not only disproportionately deprives women, children, the elderly, and people with disabilities of full compensation, it also perpetuates medical malpractice injuries by reducing incentives to invest in personnel, training, management, security, and equipment needed to eliminate medical errors.

## 2. *Non-Economic Damages Caps Create a Barrier to Justice*

West Virginia Code § 55-7B-8 (2010)'s cap on non-economic damages in medical malpractice actions not only denies women, children, the elderly, and people with disabilities *full* compensation for their injuries, it also greatly reduces the incentive for attorneys to accept such cases on a contingency fee basis which effectively denies these victims of medical malpractice *any* compensation whatsoever.

Because most medical malpractice suits are so expensive to bring to trial, most plaintiffs can only afford to bring their claims to trial if attorneys accept their case on a contingent fee basis. See Stephen Daniels & Joanne Martin, *The*

*Texas Two-Step: evidence on the Link Between Damage caps and Access to the Civil Justice System*, 55 DePaul L. Rev. 635, 646 (Winter 2006) (“[T]he only way for most people to afford representation, especially in a matter like medical malpractice, is to hire a lawyer who will handle it on a contingency fee basis...”). Consequently, the prospect of retaining counsel on a contingency fee basis in a medical malpractice action is often the only prospect.

Contingency fees typically range from 33-40% of the gross award in a medical malpractice action. The costs of mounting the litigation, frequently six figures in complex medical malpractice cases, are then reimbursed from the clients’ portion with the client often netting less than 50% of the recovery. For victims with lower economic injury such as women, children, the elderly, and people with disabilities, non-economic damages play a “practical role...in facilitating the payment of legal fees.” See W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale*, 1 Mich. L. & Pol’y Rev. 141, 158 (1996). However, if these victims can never receive more than either \$250,000.00 or \$500,000.00 in non-economic damages, they may be unable to find any attorney willing to take their case.

By limiting access to attorneys who will represent women, children, the elderly, and people with disabilities in medical malpractice cases, West Virginia’s Cap increases the likelihood that these victims will be deprived of access to legal redress altogether. “[L]imits on [non-economic damages] awards may affect access to the civil justice system by making cases financially unattractive to plaintiffs’ lawyers working on a contingency fee basis.” See Daniels, *Supra*, at

645. Consequently, non-economic damages caps have “creat[ed] two tiers of malpractice victims,” where “lawyers are turning away cases involving victims that don’t represent big economic losses – most notably retired people, children, and housewives.” See Rachel Zimmerman, *As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, Wall St. J., Oct. 8, 2004, at A1. The ultimate outcome is that medical malpractice tortfeasors have little incentive to make meaningful changes to ensure that wrongful acts do not occur.

### **CONCLUSION**

This case has far reaching implications for women, children, the elderly, and people with disabilities and for all people in West Virginia who will be deprived equal protection under the law if the non-economic damages cap contained in West Virginia Code § 55-7B-8 (2010) is upheld. Mr. and Mrs. MacDonald are representative of many people who are disproportionately harmed by West Virginia’s statutory cap limiting non-economic damages in medical malpractice actions. These people should have a voice in this Court. Accordingly, Amicus Public Justice, P.C. respectfully submits this brief in support of Petitioner’s argument that this Court should declare unconstitutional West Virginia Code § 55-7B-8 (2010) and reverse the decision of the Circuit Court reducing the MacDonald’s non-economic damages award.

  
Harry G. Deitzler, Esq. (WVSB #981)  
President, Public Justice Foundation  
HILL, PETERSON, CARPER,  
BEE & DEITZLER, PLLC  
500 Tracy Way  
Charleston, WV 25311  
(304) 345-5667

And

Troy N. Giatras, Esq. (WVSB #5602)  
Stacy A. Jacques, Esq. (WVSB #9677)  
THE GIATRAS LAW FIRM, PLLC  
118 Capitol Street, Suite 400  
Charleston, WV 25301  
(304) 343-2900

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and the accompanying *amicus curiae* brief was sent by United States first class mail, postage prepaid, on this 10th day of September 2010, to each of the following:

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

*Counsel for Respondent/Defendant, Sayeed Ahmed, M.D.*

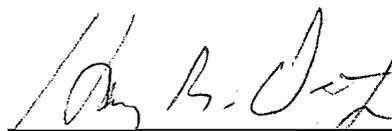
Christine S. Vaglianti, Esquire  
Associate Litigation Counsel  
West Virginia University Hospitals, Inc.  
P.O. Box 8128  
Morgantown, WV 26506-4199

*Counsel for Respondent/Defendant, City Hospital, Inc.*

D. Michael Burke, Esquire  
Burke, Shultz, Harman & Jenkinson  
Post Office Box 1938  
Martinsburg, WV 25402

*Counsel for Petitioners, James D. MacDonald & Debbie McDonald*

Darrell V. McGraw, Jr., Esquire  
State Capitol Complex  
Bldg. 1, Room E-26  
Charleston, WV 25305  
*West Virginia Attorney General*

  
\_\_\_\_\_  
Harry G. Deitzler, Esquire