No. 35543

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES D. MACDONALD and DEBBIE MACDONALD,	)	
Petitioners/Plaintiffs,	)	
	)	From the Circuit Court of Berkeley County, West Virginia
vs.	)	
	)	Civil Action No. 07-C-150
CITY HOSPITAL, INC. and SAYEED AHMED, M.D.,	)	
Respondents/Defendants.	)	

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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In response to Plaintiffs'[1] Opening Brief, the Defendants rely heavily on *Robinson* v. *Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991), which upheld the constitutionality of a $1 million cap on economic damages and *Verba v. Ghaphery*, 210 W. Va. 30, 551 S.E.2d 406 (2001) (per curiam), which did the same as a matter of *stare decisis*. Neither credits this Court's declaration in *Robinson* which "emphasized" that its finding the cap satisfied the constitutionally required reasonableness standard was "limited to the particular $1,000,000 'cap' before us." 186 W. Va. at 730, 414 S.E.2d at 887.

In addition, Defendants and their *amici* engage in a stratagem of misdirection, string-citing cases that uphold damage caps in causes of action that are of legislative origin, rather than are products of the common law, and studies originating from advocacy groups, rather than the credible, neutral, and official studies cited by Plaintiffs to demonstrate the pretextual nature of the claims made to justify this arbitrary and artificial limitation on compensatory damages.

Defendants also attack the underlying judgment in this case, questioning liability and the lower court's determination that the injury suffered by Mr. MacDonald is permanent and impairs him functionally in a significant way. These determinations are well supported by the record and provide no basis for reversal.

II. THE CAP VIOLATES EQUAL PROTECTION AND THE BAR ON SPECIAL LAWS

A. The Cap Unconstitutionally Eliminates Mrs. MacDonald's Remedy Entirely

In our Opening Brief, we noted that the court below recognized that the cap "completely eviscerated" Mrs. MacDonald's cause of action by eliminating her entire verdict. (Order Ruling

[1] As a convenience to the Court, this brief will refer to the Appellants/Cross-Appellees, who were plaintiffs below, as "Plaintiffs" and the Appellee/Cross-Appellants, who were defendants below, as "Defendants."

on All Pending Post Trial Motions Necessary Before Entry of Judgment 21, May 14, 2009.) We further stated that the cap effectively eliminated Mrs. MacDonald's proven, separate, actionable right for loss of consortium merely because of the severity of her husband's injury, when others with that exact same claim, whose spouse was not as grievously injured, will receive full compensation for their personal loss. Thus, the cap perversely operates to eliminate loss of consortium claims precisely when they are most cognizable simply because of the severity of the loss. The Florida Supreme Court recognized in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), that capping noneconomic damages in the aggregate, as § 55-7B-8 does here, creates serious equal protection problems and "can only be described as purely arbitrary and unrelated to any state interest." *Id.* at 972.

Defendants barely respond to this argument, with Dr. Ahmed consigning his response to a footnote. Ahmed Br. 23 n.43. Both Defendants erroneously claim that the constitutionality of this arrangement was confirmed in *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991). Ahmed Br. 23 n.43; City Hosp. Br. 9. It is true that the passage both Defendants cite states that "awards in excess of the statutory 'cap' should be set aside by eliminating awards to secondary claimants, such as for consortium, prior to eliminating any excessive amount for the noneconomic loss incurred by the physically injured person." *Id.* (citing *Robinson*, 186 W. Va. at 732 n.11, 414 S.E.2d at 889 n.11). However, this Court's statement in *Robinson* was plainly a matter of statutory interpretation and not a constitutional ruling. The *Robinson* opinion had upheld that statute's $1 million cap earlier in its opinion and, at that point in the decision, was merely addressing how the capped relief should be allocated because its limit applied per occurrence, rather than per plaintiff. Nothing in the opinion indicates that the plaintiffs argued that this means of allocating the permissible relief violated equal protection, a

question squarely presented here. Thus, *Robinson* neither provides precedent nor analysis that is useful in resolving the constitutional issue.[2]

Dr. Ahmed's further response is to assert that Mrs. MacDonald's loss of consortium claim is merely a derivative claim and that a "'derivative cause of action for loss of consortium cannot provide greater relief than the relief permitted for the primary cause of action,'" citing *West Virginia Fire & Casualty Co. v. Stanley*, 216 W. Va. 40, 54, 602 S.E.2d 483, 497 (2004) (citation omitted). Dr. Ahmed Br. 23 n.43. Given that the jury would have awarded Mrs. MacDonald lesser damages ($500,000) than they would have awarded Mr. MacDonald ($1.13 million), *Stanley* provides no guidance and has no relevance to the question before this Court.

Nor does the derivative status of the claim change the equal-protection analysis. While Plaintiffs suggest that a loss of consortium claim should not be treated as merely and completely derivative, *see* Appellant's Br. 7-8 (discussing cause of action for loss of consortium), the derivative or non-derivative status of a consortium claim does not matter to the equal-protection analysis. As this Court explained in *Staton v. Staton*, 218 W. Va. 201, 206, 624 S.E.2d 548, 553 (2005), noneconomic compensation "constitutes the separate nonmarital property of an injured spouse," while "loss of consortium . . . is the separate nonmarital property of the uninjured spouse." (citations and internal quotation marks omitted). Thus, a claim for loss of consortium is "personal," "can accrue to no one else," *Warner v. Hedrick*, 147 W. Va. 262, 266-67, 126 S.E.2d 371, 374 (1962), and comprises "a right which gives rise to damages." *Shreve v. Faris*, 144 W. Va. 819, 824, 111 S.E.2d 169, 173 (1959) (citations omitted). Having undertaken to provide "a right which gives rise to damages" to spouses of those injured, the right must be provided on an

[2] *Stare decisis* applies only to issues argued and decided. That which is expressed and not argued constitutes non-binding *obiter dictum*. *See Woodrum v. Johnson*, 210 W. Va. 762, 776 n.12, 559 S.E.2d 908, 922 n.12 (2001) (quoting with approval, *Newman v. Kay*, 57 W. Va. 98, 112, 49 S.E. 926, 931 (1905)).

equal basis. *See Israel by Israel v. West Virginia Secondary Schools Activities Comm'n*, 182 W. Va. 454, 458, 388 S.E.2d 480, 484 (1989) (citation omitted) ("Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner."). *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970) (having chosen to provide public welfare benefits, constitutional requirements must be observed). We have asserted, and Defendants do not deny, that Mrs. MacDonald has been treated differently than others with loss of consortium claims, whether derivative or not.

City Hospital merely lumps Mrs. MacDonald's equal-protection claim in with its general defense of the cap. It is error to do so. Unlike the extensive recitation that City Hospital makes about the supposed rationality of the Legislature's choice of caps as a means of lowering liability insurance premiums, the rational-basis test is focused, not just on the problem the Legislature sought to address, but on the rationality of treating the complaining plaintiff differently from those similarly situated in order to achieve a solution to that problem. *See Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (2005) (citations and internal quotations omitted) (a "reviewing court should not overturn a statute under the rational basis test unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court may only conclude that the law is irrational.").

Under that standard, even if the cap were merely subject to the rational-basis test, the question is not whether the Legislature could believe that caps generally work to increase the availability and affordability of malpractice insurance, but whether enacting a cap that eliminates a spouse's recovery for loss of consortium when the injury, and thus the noneconomic damages of the injured spouse, is so great that it necessarily occupies the entire cap space can be justified even when the cap results in larger recoveries for lesser injuries.

Thus, here, Mrs. MacDonald receives nothing for her meritorious and sufficiently proven loss of consortium claim because of the severity of her husband's permanent injury, while a spouse whose husband's injury is not as severe and is not permanent and who perhaps has only $50,000 in noneconomic damages would be eligible to receive up to $200,000 in loss of consortium damages under the cap. Plaintiffs submit that no rationale can justify a legislative scheme that permits $200,000 to a spouse of a modestly injured individual, while denying any recovery, let alone one valued at $500,000 by a jury, to Mrs. MacDonald as a result of the more severe and permanent injuries her husband suffered due to Defendants' negligence.

This type of comparison between Mrs. MacDonald and another spouse who will receive a larger recovery for a lesser injury is precisely the type of comparison this Court has employed in finding other equal-protection violations. For example, in *Whitlow v. Board of Education of Kanawha County*, 190 W. Va. 223, 438 S.E.2d 15 (1993), this Court found that the rational basis of seeking "to limit potential litigation and, thereby, to assist political subdivisions in obtaining affordable insurance" was insufficient to justify a tolling statute that treated minors *disparately and more severely* than "the insane" or others under disability. *Id.* at 231, 438 S.E.2d at 23. Defendants make no attempt to rationalize the cap's disparate and irrationally more severe treatment of spouses whose consortium claim is greater yet shut out from any recovery, and Plaintiffs submit that its irrationality—and its violation of equal protection—is plain.

Still, classifications that implicate fundamental rights, such as the right to trial by jury, are evaluated under the strict-scrutiny test, and certain other legislative classifications, such as those that are gender-based,[3] are evaluated under the intermediate-scrutiny test. *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991). As outlined in Plaintiffs'

[3] While loss of consortium claims are now available to either spouse, the injury recognized by loss of consortium disproportionately affect women. *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. Pa. L. Rev. 463, 511 (1998).

opening brief, the cap, as applied to Mrs. MacDonald as well as generally, should be evaluated under one of these other tests and patently fails either test, as it does the rational-basis test. *See* Appellant's Br. 15-17.

B. The Cap Generally Violates Equal Protection

Defendants' argument against Plaintiffs' other equal-protection claim asserts that strict or intermediate scrutiny is inapplicable because the cap merely affects "economic" rights, that medical malpractice plaintiffs with slight and severe injuries are not similarly situated for equal-protection purposes, and that the cap is constitutional because it is justified as rationally related to legitimate legislative objectives. Each assertion misapprehends the constitutional problems with the cap.

1. The cap implicates fundamental rights, not merely economic ones

The "economic-rights" argument, as Appellants acknowledged in their opening brief, derives from *Robinson's* statement that "the right to bring a tort action for damages, even though there is court involvement, is economically based and is not a 'fundamental right' for 'certain remedy' or state constitutional equal protection purposes." 186 W. Va. at 728-29, 414 S.E.2d at 885-86. It therefore applied the rational-basis test to its analysis.

Yet, this Court's subsequent decision in *Marcus*, 217 W. Va. at 523, 618 S.E.2d at 532, makes plain that the use of the rational-basis test is for *"other"* legislative classifications, including those involving economic rights, but *not for those that implicate suspect classifications, fundamental rights, or gender-based distinctions*. *Cf. F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (rational-basis test applies to an economic classification "that neither proceeds along suspect lines *nor infringes fundamental constitutional rights.*"). In fact, the United States Supreme Court has plainly stated that "[t]hough the latitude given state economic and social regulation is necessarily broad, when state statutory classifications

approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny". *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972) (emphasis added) (citing *Brown v. Board of Education*, 347 U.S. 483 (1954)).

Undeniably, the right to a jury trial is fundamental. *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 561, 567 S.E.2d 265, 277 (2002); *see also Jacob v. New York*, 315 U.S. 752, 752-53 (1942) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment."); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."). *Cf. The Declaration of Independence* para. 20 (U.S. 1776) (citing laws "depriving us, in many Cases, of the Benefits of Trial by Jury.").

Access to the courts is also a fundamental right. *Mathena v. Haines*, 219 W. Va. 417, 422, 633 S.E.2d 771, 776 (2006) ("The right of access to our courts is one of the basic and fundamental principles of jurisprudence in West Virginia."); *Blair v. Maynard*, 174 W. Va. 247, 252, 324 S.E.2d 391, 395 (1984). *Cf. Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (describing the right of citizens to resort to the courts as one of the most "fundamental" characteristics of society); *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) (describing the right of access to courts as "one of the highest and most essential privileges of citizenship").[4]

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[4] The U.S. Supreme Court has held that the right of access to the courts springs from multiple sources within the U.S. Constitution, as it is "grounded in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses." *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (citations omitted).

Plaintiffs' Opening Brief described how the implication of a fundamental right requires application of the strict-scrutiny test and that an outright violation of that fundamental right is not necessary, otherwise strict scrutiny under equal protection claims involving fundamental rights would be redundant of the underlying right burdened. Appellants' Br. 11, 12. *See also Clark v. Jeter*, 486 U.S. 456, 461 (1988) (strict scrutiny applies to statutes "affecting" fundamental rights); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988) ("interferes" with a fundamental right); *Weber*, 406 U.S. at 172 ("approach" fundamental rights). Thus, strict scrutiny cannot be dismissed as blithely as Defendants do, who then fail to carry the burden that the test imposes on them.

2. The cap treats similarly situated plaintiffs differently

As described above in the discussion of Mrs. MacDonald's consortium claim, even if one uses the more deferential rational-basis test, the focus of the inquiry should be on the cap's arbitrary but diverse treatment of certain plaintiffs and whether the resulting discrimination is supported by a rational basis. This Court has established that a

> legislative act which arbitrarily establishes diverse treatment for the members of a natural class results in invidious discrimination and where such treatment or classification bears no reasonable relationship to the purpose of the act, such act violates the equal protection and due process clauses of our federal and state constitutions.

Syll. Pt. 1, *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977).

Defendants make no attempt to explain why medical malpractice plaintiffs who receive slight and severe injuries should be treated differently, with the former receiving the full compensation determined by a jury and the latter receiving some fraction of that amount, and how doing so advances legislative goals. They are dismissive of the Wisconsin Supreme Court's determination that an equal protection violation is made out when the burdens of a noneconomic

malpractice cap "falls entirely on the most seriously injured victims," who are effectively "forc[ed] . . . to provide monetary relief to [tortfeasors] and their insurers" and further finding that such a cap perversely operates so that "the greater the injury, the smaller the fraction" of compensation the victim will receive. *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 466, 465 (Wisc. 2005). Although Dr. Ahmed maintains that Plaintiffs "cite no cases in which courts have used that distinction" and hold a cap invalid on equal protection grounds, Dr. Ahmed Br. 29, *Ferdon*, which was cited in Appellants' Opening Brief, plainly does. Others do as well. Thus, for example, in *Moore v. Mobile Infirmary Assoc.*, 592 So.2d 156, 168 (Ala. 1991) (citations omitted), the Alabama Supreme Court stated:

> There is no logically supportable reason why the most severely injured . . . should be singled out to pay for special relief to . . . tortfeasors and their insurers. The idea of preserving insurance by imposing huge sacrifices on a few victims is logically perverse. Insurance is a device for spreading risks and costs among large numbers of people so that no one person is crushed by misfortune. In a strange reversal of this principle, the statute concentrates the costs of the worst injuries on a few individuals.

The perverse logic of such statutes was also noted in *Phillipe*, 769 So.2d at 971-72; *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1095 (Ohio 1999); *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1075 (Ill. 1997); and *Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (N.H. 1991); *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

The illogic of this approach that overvalues lesser injuries is further corroborated by peer reviewed empirical research done by scholars from the Harvard School of Public Health, which demonstrates that the fiscal impact of caps on damages varies according to the type and severity of injury suffered by the plaintiff, with the most severely injured plaintiffs suffering the greatest adverse impact from caps and the burden imposed by the cap increasing with severity of injury. David M. Studdert, *et al.*, *Are Damage Caps Regressive?: a Study of Malpractice Jury Verdicts*

in California, 23 Health Affairs 54, 67 (2004). In cases where the plaintiffs had suffered grave injury, the cap imposed overall damage reductions that were seven times larger than the reductions for minor injuries. The researchers then noted that plaintiffs with the most severe injuries appear at highest risk for inadequate compensation. *See also* David Hyman, *et al.*, *Estimating the Effect of Damages Caps in Medical Malpractice Cases*, 1 J. of Legal Analysis 355 (2009).

City Hospital also avoids the compelling logic of *Ferdon* and its endorsement of Professor Finley's research and found that caps disproportionately and adversely affect women, children, seniors, and low wage earners by calling it "nonsense on its face as [the cap] applies equally to all claimants." City Hosp. Br. 20. This defense, advancing a cruel illusion under the guise of facial neutrality, recalls the proverbial statute which, "'in its majestic equality, forbids the rich as well as the poor to sleep under bridges.'" *Hill v. Colorado*, 530 U.S. 703, 744 (2000) (Scalia, J., dissenting) (quoting A. France, in J. Bartlett, *Familiar Quotations* 550 (16th ed. 1992)). The cap patently affects similarly situated individuals in vastly different ways.

3. The cap fails even the rational-basis test

Our Initial Brief established that the cap does not survive even rational-basis review because it is built on a house of cards, on a series of factual premises that do not withstand examination. In brief, there was no credible, empirical evidence to support the need for the cap, and significant empirical evidence from government and credible neutral sources that:

- $ West Virginia never truly suffered from malpractice litigation crisis, adversely affecting the availability of health care or responsible for fluctuating insurance premiums, Appellant's Br. 23-28; and,
- $ That a reduction of physicians in the number of physicians practicing in West Virginia was not occurring and the alleged "problem" could not be cured by capping damages, Appellant's Br. 21-23.

Thus, the cap is not a rational response to the alleged health care crisis and that discriminating between various plaintiffs with meritorious cases on the basis of the severity of their injury was arbitrary and irrational, in violation of the equal-protection guarantee and the special legislation prohibition.[5]

Defendants and their *amici* argue that this Court has no choice but accept the Legislature's assumptions justifying the cap. Yet, as our Opening Brief established, the rational-basis test is not "toothless," *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), "deference does not imply abandonment or abdication of judicial review," *Miller-El v. Cockrell*, 537 U.S. 322, 340, (2003), and that courts "applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

Defendants insist that the "Legislature had plenty of evidence of a problem," City Hosp. Br. 19, they never identify any of that "evidence." They lambast the numerous studies we cited and the data we relied on—such as federal government reports by the Government Accounting Office and the highly reliable and credible American Medical Association statistical compendia—as nothing but "'lies, damn lies, and statistics,'" Ahmed Br. at 32, 33 (citations omitted), they never explain what makes these statistics no better than "damn lies." After all, government studies are subject to judicial notice, *see, e.g., Tempel v. United States*, 248 U.S. 121, 130 (1918); *Spring v. American Tel. & Tel. Co.*, 86 W. Va. 192, 103 S.E. 206, 206-07

[5] In this brief, Plaintiffs will not rehearse again their arguments under the special legislation clause because the standard employed for evaluating those claims substantially overlap with the standards applicable to equal protection. *See O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 607, 425 S.E.2d 551, 562 (1992). Though Defendants argue that no case has ever invalidated a damage cap on special-legislation grounds, Dr. Ahmed Br. 29, Illinois has twice, *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) and *Wright v. Central Du Page Hospital Ass'n*, 347 N.E.2d 736 (Ill. 1976).

(1920), and the AMA statistics have the credibility of an admission against interest, as it favors the enactment of damage caps and filed an *amicus* brief supporting Defendants in this case. Dr. Ahmed, Br. 34, argues that post-enhancement evidence is irrelevant because it was not available to the legislature, but it is hornbook law that "the continued existence of Facts upon which the constitutionality of legislation depends remains at all times open to judicial inquiry." Norman J. Singer & J.D. Shambie Singer, 2 *Sutherland Statutory Construction* § 34.5 (7th ed. 2010) (citations omitted).

While Defendants attempt to muster their own studies, they identify only one study, a preliminary report that found "that States with caps on noneconomic damages awards or caps on total damage awards benefit from about 12 percent more physicians per capita than States without such laws." Ahmed Br. 31-2 (quoting U.S. Dept. of Health & Human Resources [sic], Agency for Healthcare Research and Quality, *Impact of State Laws Limiting Malpractice Awards on Geographic Distribution of Physicians* (July 2003)). That report, which was published four months after the current West Virginia cap was enacted, was so discredited for its numerous methodological flaws by the Director of the Program in Law and Public Health at the Harvard School of Public Health (SPH) that its authors later recanted its findings in favor of a new study, one whose much more modest claims was nevertheless still faulted for fundamental methodological mistakes.[6]

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[6] Dr. Michelle M. Mello, the Director of the Harvard SPH Program, described the AHRQ study as "[n]ot a strong analysis overall," as it did "not control for other tort reform," as its "[e]stimation method is not appropriate to the structure of the dataset," and as it "[g]roup[ed] together all kinds of caps." Mello, *Medical Malpractice: Impact of the crisis and effect of state tort reforms*, Robert Wood Johnson Foundation, Research Synthesis Report No. 10 (May 2006) at 25, http://www.rwjf.org/pr/synthesis/reports_and_briefs/pdf/no10_researchreport.pdf. As Professor Mello reported, the subsequent study by the same two authors found that caps increased physician supply by only 2 percent, not 12 percent. She was skeptical about even this much lower figure, noting that the authors had not published their data, and that their authors' unpublished results, which "showed that a

The other so-called "studies" that Defendants rely upon—which are cited solely in an *amicus* brief by the AMA and the West Virginia State Medical Association (WVSMA)—are more questionable.[7] Five of those "studies" are newspaper articles from the *Charleston Gazette* and the *Pittsburgh Post-Gazette*, each of which recycles unverified hearsay and unsubstantiated anecdotal hearsay about physician threats to flee West Virginia. WVSMA/AMA Br. 9-10. Federal government researchers who contemporaneously studied accounts of physicians supposedly fleeing from one state or another have found such accounts to be either false or otherwise completely untrustworthy.[8] Another cited newspaper "study," published in the *Lancaster (Pa.) Sunday News*, was merely an editorial by a Pennsylvania neurosurgeon who favored malpractice "reforms." *Id.*

The other "studies" the WVSMA/AMA cite are equally unreliable, as each one was written, commissioned, or published by a group devoted to malpractice or tort "reforms," i.e.:

- the AMA, WVSMA/AMA Br. at 13, 28;
- the American College of Obstetricians, *id.* at 10;
- the American Academy of Neurology, *id.* at 10-11;
- the West Virginia Board of Medicine, *id.* at 16;
- the National Association of Mutual Insurance Companies, *id.* at 29;

$250,000 cap was not significant but the higher cap was," was "counterintuitive, raising questions about the [authors' research] model." *Id.*

[7] By reference, Plaintiffs adopt the Motion in *Uberrima Fides* to Correct the Record, filed by the West Virginia Association for Justice, filed Oct. 20, 2010, which demonstrates errors in representations to this Court about the statistical landscape in West Virginia. The Motion is attached as Appendix A, for the Court's convenience.

[8] *See* U.S. General Accounting Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, GAO-03-836 (Aug. 2003) at 5-7, 13-14, 17-20, & 28.6 http:www.gao.gov/new.items/d03836.pdf. *See also Ferdon*, 701 N.W.2d at 488; Michelle M. Mello, *et al.*, *Changes in Physician Supply and Scope of Practice During a Malpractice Crisis*, 26 Health Affairs 425, 433 (2007).

- $ the West Virginia Mutual Insurance Company, *id.* at 14;
- $ Victor Schwartz (General Counsel of the American Tort Reform Association (ATRA)), *id.* at 4, 18, 24, 27, 29;
- $ the insurance industry accounting firm of Tillinghast Towers-Perrin, *id.* at 7, 13-14; and,
- $ the Manhattan Institute (another tort "reform" advocacy group, see Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U. L. Rev. 1637 (1993)).

Perhaps the best example of the utterly unreliable nature of the "[s]tudies show[ing] that states that [sic] have adopted limits on medical liability have experienced greater increases in the number of doctors per capita than those that have not," is a *Wall Street Journal* editorial by Joseph Nixon, principal legislative proponent of the malpractice cap Texas enacted in 2003 and permissible only because Texas amended its constitution. WVSMA/AMA Br. 15 (citations omitted). Nixon "reported" that "7,000 physicians . . . flooded into Texas," after the cap was enacted, "with many going into underserved regions." *Id.*

Two years ago, three highly regarded empirical scholars from the University of Texas looked behind Nixon's claims and discovered that what tort reform proponents praise as the "Texas miracle" is more accurately described as the "Texas mirage." Just like West Virginia, "Texas was not losing physicians before [the cap] took effect. The supply of direct patient care physicians grew every year" before the cap was enacted. Charles Silver, *et al.*, *The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric*, 44 Tex. Advoc. 25, 25 (2008).

And, just like in West Virginia, Professors Silver, Hyman, and Black found that—tort reform "fairy tales" to the contrary—"the number of [practicing] physicians grew a bit more slowly *after* [the cap] was enacted than before" and "[t]he physician population also grew more

rapidly during 1999-2002," the four years before Texas enacted its malpractice cap, "than it did *after* the 2003 [malpractice] reforms." *Id.* at 26-27 (emphasis added).

John Adams once told a Massachusetts court: "'Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.'" John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials* (1770), *in* John Adams, 3 *Legal Papers of John Adams* 269 (Wroth. ed. 1965). Here, because the facts stubbornly show the cap is not rationally related to a problem that justifies the discriminatory treatment of similarly situated medical malpractice plaintiffs with meritorious cases but differing injury severity, this Court should hold that the cap violates West Virginia's constitutional guarantee of equal protection and its prohibition on special legislation.

III. THE CAP VIOLATES THE RIGHT TO TRIAL BY JURY

Plaintiffs demonstrated in their Opening Brief, at 33-40, that under the historical test employed both in West Virginia and under the Seventh Amendment, (1) the determination of damages in actions recognized at common law was constitutionally assigned to the jury absent waiver, (2) that any deviation from the jury's damage determination without the plaintiffs' acceptance fails to preserve the substance of the right to trial by jury, and (3) that a critical distinction must be kept in mind between actions at common law that predate the Constitution and those causes of action that exist solely as a matter of legislative grace in applying the jury-trial right.

Defendants' response utterly ignores the historical test. Instead, they assert (1) that *Robinson* rejected a previous cap challenge premised on the jury-trial right and must be followed, (2) that the leading case that Plaintiffs rely upon, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), is either limited to copyright cases or otherwise does not mean what it says, (3) that scores of federal and state court decisions—the vast majority of which

Feltner would describe as "inapposite," *id.* at 355—have upheld caps against jury-trial challenges, and (4) the Legislature has transformed the common-law cause of action in medical malpractice into a statutory one. Plaintiffs submit that each argument misapprehends the relevant law.

A. *Robinson's* Treatment of the Jury Trial Right Is Not Controlling

Robinson upheld a $1 million cap on noneconomic damages, *inter alia*, against a challenge that the limitation on damages contravened the Reexamination Clause of the jury-trial right. *Robinson* does not control this challenge for two fundamental reasons. First, the *Robinson* Court solely considered and rejected a challenge premised on the Reexamination Clause, which it held constrains the judiciary but not the legislature. 186 W. Va. at 731, 414 S.E.2d at 888. Plaintiffs' challenge is not premised on the Reexamination Clause. Plaintiffs have asserted that failure to give effect to the jury's determination of damages deprives Plaintiffs of the "'substance of the common-law right of trial by jury,'" as required by the Seventh Amendment, *Feltner*, 523 U.S. at 355 (citation omitted) and W. Va. Const. art. III, § 13, which "preserves" the right to trial by jury "[i]n suits at common law."

Feltner establishes that in such cases the "jury are judges of the damages." 523 U.S. at 353 (citing *Townsend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677)). The *Feltner* Court rejected the argument that the Seventh Amendment "does not provide a right to a jury determination of the amount of the award," *id.* at 354, which is precisely the argument Defendants propound here. Thus, *Feltner* is not premised on the Reexamination Clause of the Seventh Amendment but instead relies upon its Preservation Clause. Because *Robinson* solely addressed the issue in light of the Reexamination Clause and not the right to a jury trial as

understood under the pre-constitutional common law pursuant to the Preservation Clause, it provides no guidance to this Court on Plaintiffs' challenge.

Second, even if *Robinson* could somehow be said to have addressed the present argument, it must be remembered that *stare decisis* "is not a rule of law but is a matter of judicial policy." *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 1029, 207 S.E.2d 169, 173 (1974) (quotation omitted). It is

> is neither an "inexorable command," nor "a mechanical formula of adherence to the latest decision," especially in constitutional cases. If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.

Citizens United v. Federal Election Comm'n, 130 S.Ct. 876, 920 (2010) (Roberts, C.J., concurring) (citations omitted). For that reason, the Supreme Court has long adhered to the admonition of Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting) that in constitutional cases,

> where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

See, e.g., *United States v. Scott*, 437 U.S. 82, 101 (1978) (quoting *Burnet*). *See also Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) (citation omitted) ("when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' . . . This is particularly true in constitutional cases . . .").

This Court has also subscribed to the same approach, explaining

> [n]o legal principle is ever settled until it is settled right. . . . "Where vital and important public and private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as

> well as the right of the court to consider them carefully, and to allow no previous error to continue, if it can be corrected."

Sizemore v. State Workmen's Comp. Comm'r, 159 W. Va. 100, 108, 219 S.E.2d 912, 916 (1975) (quoting *Weston v. Ralston*, 48 W. Va. 170, 180, 36 S.E. 446, 450 (1900)). *See also Woodrum v. Johnson*, 210 W. Va. 762, 776, 559 S.E.2d 908, 922 (2001) (citing cases). After all, "it is better to be right, than to be consistent with the errors of a hundred years." *Lovings v. Norfolk & W. Ry. Co.*, 47 W. Va. 582, 35 S.E. 962, 965 (1900). Thus, if *Robinson* is applicable to Plaintiffs' challenge, it is inconsistent with the authoritative decision of the United States Supreme Court on the right to a jury trial subsequently enunciated in *Feltner* and *Robinson's* rule ought not to be blindly followed.

B. *Feltner* Provides Authoritative and Relevant Precedent

By its own terms, contrary to Defendants' claims, *Feltner* is neither limited to copyright cases nor of no consequence in a challenge to a cap on common-law damages. *Feltner* specifically held that the jury trial right applies not only in "common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *Feltner*, 523 U.S. at 348 (quoting *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 42 (1989)). One of those elements is the right to a jury-determination of compensatory damages. *Id.* at 353. Copyright receives the same jury-right treatment as common law causes of action because, prior to ratification of the Seventh Amendment, "the common law and statutes in England and this country granted copyright owners causes of action for infringement." *Id.* at 348. Thus, it is because copyright actions were recognized at common law that the Seven Amendment, which applies to "Suits at common law,"

U.S. Const., amend. VII, can be invoked. As such, *Feltner's* holdings about the application and reach of the Seventh Amendment are material to all common law causes of action.

While Defendants point out that *Feltner* did not involve a challenge to the constitutionality of a damage cap, the *Feltner* Court nonetheless usefully reviewed the Seventh Amendment's history and unambiguously held that the right to a jury trial includes the right to a jury determination of damages. Thus, *Feltner* stressed that for common-law actions, "if a party so demands, a jury must determine the actual amount of . . . damages," 523 U.S. at 355, because any deviation from that approach would fail "'to preserve the substance of the common-law right of trial by jury,'" in violation of the Seventh Amendment. *Id.* (citation omitted).

That holding and actual uninterrupted practice demonstrate why Defendants are wrong to insist there could be no jury-trial violation, as Plaintiffs enjoyed a jury trial. The flaw in Defendants' approach is that the full meaning of the jury's determination was not reflected by the judgment by virtue of the arbitrary cap imposed after the verdict. Defendants' approach also fails to appreciate the special high place that the jury's determination of damages enjoys in the constellation of rights preserved by the constitutional guarantee of a jury trial. While it is often said that jurors are the judges of facts and that facts found by the jury are not subject to judicial revision, as a practical matter, it is not absolutely and always true. Rule 50(b) of the West Virginia Rules of Civil Procedure anticipates that occasionally litigants will argue that the jury's determination of such important factual issues as causation or even liability itself are against the manifest weight of the evidence and that the court should grant judgment as a matter of law. What is telling, however, is that the court does not have the same authority to pronounce judgment as a matter of law with respect to damages.

If a party believes that the jury's damage determination is against the manifest weight of the evidence, is contrary to law, or reflects a failure to take into account evidence in mitigation of the damages, a court may not issue judgment as a matter of law to change the damage amount. Instead, its authority is limited to the ordering of a new jury trial or the granting of a remittitur. As this Court has recently noted, "when a court grants a remittitur, the plaintiff is given the option of either accepting the reduction in the verdict or electing a new trial." *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815, 893 (2010). The reason that the option of a new jury trial must be made available to the plaintiff whose damages are reduced through remittitur is to preserve the plaintiff's right to a jury trial or, more specifically, to a jury determination of damages. *See Hetzel v. Prince William County, Va.*, 523 U.S. 208, 211 (1998). Thus, the right to a jury trial does not end at verdict, and the statutory damage cap thus takes away the exclusive authority of the jury to determine damages, an authority that may not be supplanted absent the option of a new jury trial.

C. Cases about Statutory Causes of Action Unknown at Common Law or Those Seeking to Apply the Seventh Amendment to State Law Provide No Guidance to this Court

Defendants attempt to escape the logic of *Feltner* by offering this Court scores of cases in which courts have rejected the application of the jury trial right to various limitations on damages. In doing so, Defendants mix apples and oranges, repeatedly citing cases in which the right to a jury trial did not attach at common law. Thus, for example, they cite cases in which damage caps in wrongful death actions are upheld. Yet, as this Court well knows, it is the "universal rule that the action for wrongful death is wholly a creature of statute and that such an action may be maintained only if authorized by statute." *Baldwin v. Butcher*, 155 W. Va. 431, 449, 184 S.E.2d 428, 437 (1971). Thus, Oregon's Supreme Court upheld that state's damage cap applicable to wrongful death actions against a challenge premised on the state constitution's

jury-trial right, even as it reaffirmed its decision in *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999), which had struck down a noneconomic damage cap as a violation of that same right to trial by jury. *Hughes v. PeaceHealth*, 178 P.3d 225 (Or. 2008). This is why Dr. Ahmed is wrong when he asserts that a wrongful death cap would be unconstitutional if this Court were to accept Plaintiffs' argument. *See* Ahmed Br. 10-11 n.14.

Defendants' reliance on statutory causes of action that authorize treble damages, *see* Ahmed Br. 12-13, similarly has no pertinence to the question before this court because those are statutory causes of action unknown to the common law.

Another group of cases cited by Defendants involve damage caps relating to government liability. *See, e.g.*, Ahmed Br. 18, 26 (asserting that the "instant case is no different than *O'Dell* [*v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992)]," a case involving the liability of a political subdivision). Of course, under the common law, government entities enjoyed sovereign immunity from tort liability. *See Parkulo v. West Virginia Bd. of Probation & Parole*, 199 W. Va. 161, 176, 483 S.E.2d 507, 522 (1996). In addition, Article VI, § 35 of the West Virginia Constitution grants immunity to claims against the State, its agencies, and its instrumentalities. No right to jury trial ever attached to these claims at common law, because the claims simply did not exist. When a legislature grants a right of action against a governmental unit, such as through a tort claims act, it is free to determine the extent of the liability it is voluntarily accepting and the common-law right to a jury trial places no limitation on that authority.

Likewise, Defendants confuse punitive damages with the jury-trial right's application to compensatory damages, citing cases upholding punitive damage caps. *See* Ahmed Br. 11-12 n.15. Of course, the United States Supreme Court has declared that punitive damages have

"evolved" from an earlier incarnation that fell within the Seventh Amendment and that the jury's role in awarding punitive damages was now one of "moral condemnation," rather than fact finding. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 437 n.11 (2001). For that reason, the Court concluded that the jury's determination of punitive damages was permissibly subject to judicial revision. *Id.* at 437 ("jury's award of punitive damages does not constitute a finding of 'fact,'" and thus a court's reduction of that award to comport with the requirements of due process "does not implicate the Seventh Amendment."). Even so, the Court noted that any facts found by the jury in support of a punitive award must still be respected as within the jury's province. *Id.* at 439 n.12.

The Court also contrasted its holding on punitive damages with the jury's "measure of actual damages suffered, which presents a question of historical or predictive fact," not subject to judicial revision. *Id.* at 437. Applying those same principles, in a case Defendants mistakenly cite for the proposition that caps are not violations of the right to a jury trial, the North Carolina Supreme Court held that capping punitive damages does not violate that state's jury-trial right because the right is limited to cases "respecting property," N.C. Const. art. I, § 25, which does not include punitive damages. Still, that court recognized that a cap on non-economic damages *would* violate the state constitution's jury provision. *Rhyne v. K-Mart, Corp.*, 594 S.E.2d 1, 12 (N.C. 2004) (distinguishing between "compensatory damages, which represent a type of property interest vesting in plaintiffs [at the time the tort is committed], and punitive damages, which do not").

To be sure, Defendants do cite a handful of post-*Feltner* decisions that hold that the jury-trial right is no obstacle to a non-economic damage cap, though the number of these cases are considerably fewer than Defendants claim, and state courts have split on this issue.[9]

Defendants also mistakenly rely on the Sixth Circuit's decision in *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005), *cert. denied,* 547 U.S. 1111 (2006). *See* City Hosp. Br. 28. *Botsford* only cryptically addresses the jury-trial issue; adopts the reasoning of *Boyd v. Bulala*, 877 F.2d 1191, 1196 n.5 (4th Cir. 1989) (relying on *Tull v. United States*, 481 U.S. 412 (1987), to say that the jury trial right does not extend to the remedy stage, a stance that *Feltner* rejects); fails to consider the import of *Feltner*, not mentioning the decision at all; engages in no historical analysis for a provision that requires a historical test; and fails to realize that the Seventh Amendment, having never been incorporated thorough the Fourteenth Amendment, does not apply to Michigan's noneconomic damage cap. *See Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). Thus, when Defendants ask rhetorically, "why did the U.S. Supreme Court let *Botsford* stand?," City Hosp. Br. 28, the answer does not come in a 1999 state case that predates *Botsford* as Defendant claims, but in the fact that the Seventh Amendment has never been applied to state law so that the result would not change.

The only other post-*Feltner* federal case cited by Defendants is *Wilson v. United States*, 375 F. Supp. 2d 467 (E.D. Va. 2005), which merely held that it was not unconstitutional to apply

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[9] The most recent decision on this issue is *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 2010 WL 1004996 (Ga. 2010), declaring Georgia's noneconomic damage cap applicable to medical malpractice cases unconstitutional. It is incumbent upon Plaintiffs to note that *Estate of McCall v. United States,* 663 F. Supp. 2d 1276 (N.D. Fla. 2009), cited in Ahmed Br. 11 n.15, is pending on appeal in the Eleventh Circuit, No. 09-16375-J, and due to be argued in late January 2011. *Watson v. Hortman*, 2010 WL 3566736 (E.D. Tex.), cited in Ahmed Br. 43 n. 100, is still pending in that court and involves a unique federal challenge to Texas's noneconomic damage cap, asking that the federal courts incorporate the Seventh Amendment through the Fourteenth Amendment in order to apply it to state law, because Texas amended its constitution, Tex. Const. art. III, § 66, to authorize such a cap after its supreme court struck down a previous damage cap in *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

West Virginia's reduced damage cap to an injury that predated enactment when the action was brought after the cap's effective date. Because retroactive effect is not at issue in this case, *Wilson's* holding and analysis is immaterial.

D. The Cap Is Not a Change in the Common Law Sufficient to Reduce the Jury's Constitutional Role

Defendants further argue that the Legislature has plenary authority to change the common law and either did so here, City Hosp. Br. 29-31, or transformed medical malpractice into a statutory cause of action. Ahmed Br. 27. Brief examination proves both arguments unavailing.

It would be a neat trick to think that the Legislature's authority to change the common law includes changing the constitutional authority of a jury as it was set by the common law that predated adoption of the Constitution. What makes that a neat trick is that the exercise of that authority had to have taken place before the jury-trial provision was adopted in the Constitution.

Here, however, the legislative changes have not so transformed medical malpractice lawsuits to some new and previously unrecognized form. The cases still proceed much as they have in the past, requiring proof of a departure from the standard of care and proof that the departure was the proximate cause of the injury. West Virginia Code § 55-7B-3 "has merely codified the common law requirements for establishing medical malpractice." *Sexton v. Grieco*, 216 W. Va. 714, 719, 613 S.E.2d 81, 86 (2005). It has not, as Dr. Ahmed contends, transformed medical malpractice into a statutory cause of action.

Nor has the legislature supplanted the common law by merely placing a cap on damages, the authority over which rests in the exclusive province of juries in any common law cause of action. Instead, a change in the common law sufficient to reduce the jury's constitutional role is exemplified by workers compensation. Prior to the development of workers compensation, workers injured on the job could bring an action in tort that would be heard before a jury. A new

system, changing the rules of liability and compensation both, was put into place. The new system was accurately described by the Illinois Supreme Court in 1920 as "set[ting] aside one body of rules to establish another system in its place" and replacing unlimited potential employer liability with guaranteed "moderate compensation in all cases of injury," which is "a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. *Grand Trunk Western Ry. Co. v. Industrial Comm'n*, 291 Ill. 167, 174, 125 N.E. 748 (1920) (upholding workers compensation as "set[ting] aside one body of rules to establish another system in its place" and replacing unlimited potential employer liability with guaranteed "moderate compensation in all cases of injury," which is "a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages"). The MPLA does not constitute a similar change in the common law that justifies a change in the jury's role.

In sum, legislative revision of a jury's assessment of damages, such as through the cap at issue here, fails to preserve the substance of the common-law right to trial by jury. The cap supplants the jury's preeminent role in assessing damages according to the evidence adduced at trial. It replaces the jury's determination, made on a case-by-case basis by jurors who have reviewed the particular evidence, with a pre-determined number, arbitrarily picked by legislators who never met the parties or reviewed the evidence, a number that must be applied on a one-size-fits-all basis. This Court should hold that the cap violates the MacDonalds' constitutional rights to a jury trial, guaranteed by W. Va. Const. art. III, § 13.

IV. THE CAP VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS

This Court has held that the separation of powers secured by W. Va. Const. art. V, § 1 "is not merely a suggestion" but a "part of the fundamental law of our State," which "must be strictly construed and closely followed." Syl. pt. 1, *State ex rel. Barker v. Manchin*, 167 W. Va.

155, 279 S.E.2d 622 (1981). W. Va. Const., art. VIII, § 1 separately vests all judicial power "solely" in the judges of those courts. This Court has recognized that these twin provisions are designed to be especially protective of the courts' vital role in preserving not only our tripartite system of government but democracy itself through the checks and balance embodied in a three-branches government and hence has warned that West Virginia courts "must be wary of any legislation that undercuts the power of the judiciary to meet its constitutional obligations." *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 25, 454 S.E.2d 65, 70 (1994).

As detailed in our Initial Brief, the cap violates these critical constitutional guarantees in three ways. First, it constitutes an impermissible legislative remittitur, one that supplants a trial court's inherent authority to grant judicial remittiturs on a case-by-case basis, in light of the particular facts and circumstances in a case.

Second, the cap overrides the constitution's limits on a judge's authority to remit damages in light of the particular evidence in a specific case, and commandeers that authority in such a way that a judge is compelled to reduce a jury's verdict even if the judge finds it properly reflects a reasonable view of the evidence. As such, the cap impermissibly usurps and interferes with the judicial authority (vested exclusively in the courts by article VIII, § 1) by requiring a court to enter a judgment at variance with an award the court would deem fair, proper, and justified by the record.

Finally, the cap unconstitutionally creates and furnishes to the courts authority not delegated to the courts by the Constitution. Because the long-standing limits on judicial authority to enter a verdict at variance with record derives from the jury trial right, the legislature is powerless to bestow additional authority on the courts. This issue was settled in 1803 when Chief

Justice Marshall, writing for a unanimous Court, held that Congress had no constitutional power to provide additional jurisdiction to the courts. *Marbury v. Madison*, 5 U.S. 137 (1803).

Defendants offer no principled response to any of these arguments. Instead, they merely contend that most other state courts have rejected the legislative remittitur concept pioneered by the Washington Supreme Court in *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989), embraced by the Illinois Supreme Court in *Best*, 689 N.E.2d at 1079, and reiterated by that Court earlier this year in *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 905 (Ill. 2010) (recognizing the judicial nature of remittitur and invalidating a noneconomic damage cap as an unconstitutional legislative remittitur). Defendants also insist that *stare decisis* is controlling, asserting that *Verba v. Ghaphery*, 210 W. Va. 30, 551 S.E.2d 406 (2001) explicitly considered and completely rejected the exact same arguments we present here. That is not true.

Our Initial Brief squarely acknowledged, at 40, that *Verba* had spurned a legislative remittitur argument that had been patterned on *Best* and *Sofie,* holding that the legislature indisputably "has the power to alter, amend, change, repudiate, or abrogate the common law," and can do so without violating the separation of powers, just as it can, for example "'establish statutes of limitation'" and repose and "'create presumptions.'" *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411 (citations omitted).

We clearly asserted, however, that those "analogies do not stand up to scrutiny because none of those other indisputable powers of the Legislature requires a judge, after a fair and proper trial, to displace the jury's factfinding and replace it with one that ignores the record established in the case." Appellants' Br. 40. *Verba* was never presented with this argument and certainly had no obligation to consider objections never made. But *Verba* also never rejected this argument, explicitly or implicitly.

Defendants do, however, have an obligation to respond to our argument. Notably, defendants have absolutely nothing to say in response to our argument, once again conceding by their silence the validity of the distinctions we made.

In lieu of addressing the arguments we made, they erect strawmen that we never mentioned. Even these, however, prove our argument, not theirs.

Dr. Ahmed says, for example, that "the federal and state constitutions require trial judges to set aside excessive punitive damages awards." Ahmed Br. 16. This is true but irrelevant because, as we noted above, punitive damages serve no compensatory purpose. Dr. Ahmed also says that West Virginia Rules of Civil Procedure 50, 59, and 60 authorize trial judges to "not only set aside jury verdicts, but to actually enter final judgments, as a matter of law, for the party against whom the jury has awarded," "to set aside jury verdicts and to award new trials," and "to set aside jury verdicts because of newly discovered evidence, fraud, misrepresentation, or other reasons justifying various forms of relief from a jury's verdict." *Id.* at 15-16.

Courts undoubtedly have such inherent powers (which are merely codified by rule), but they may exercise such powers solely through the exercise of individualized judicial discretion, with each judge responding to the facts of each on a case-by-case basis. They cannot set aside verdicts and award new trials, without heed of the record. Nor may they increase or decrease damage awards, without the opportunity for a new jury trial.

The legislature may not treat judges as an instrumentality to accomplish that. To do so is a commandeering of judicial power that, if otherwise exercised, would constitute an abuse of discretion. The Legislature may not supply the authority, as we have shown in our prior discussion of the legislative authority to change the common law.

Finally, Dr. Ahmed asserts that the U.S. Supreme Court has held that caps on damages in common law claims are above constitutional challenge, on any ground, because a "'person has no property, no vested interest, in any rule of the common law,'" because "'[t]he 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,'" and because "'statutes limiting liability are relatively commonplace and have consistently been enforced by the [federal] courts.'" Ahmed Br. 16-17 (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n. 32 (1978) (internal citations omitted)).

Dr. Ahmed misapprehends *Duke Power* and treats its dicta as its holding. Aside from the fact that the "statutes" it referenced as "hav[ing] consistently been enforced" involved either limitations on damages in cases not cognizable at common law or limitations on damages as the *quid pro quo* for defendants' waiver of all defenses and thus the certainty of some damages in every case without any proof of fault (as in workers compensation statutes), *Duke Power* itself involved the Price-Anderson Act, 42 U.S.C. § 2210, a federal statute governing tort claims following accidents at federally licensed nuclear power plants and which the Court found "provide[d] a reasonably just substitute for the common-law or state tort law remedies it replaces." 438 U.S. at 88.

Two elements were critical to the *Duke Power* Court's conclusion that the Price-Anderson Act constituted "a reasonably just substitute" for tort remedies it supplanted and thus did not violate the Fifth Amendment's guarantee of substantive Due Process. (The case had nothing to do with the separation of powers). First, the Act required that the nuclear industry waive all defenses. Such a provision was sufficiently similar to workers compensation statutes, which abolished negligence liability and certain damages for employers while entitling workers

to compensation for economic losses without regard to fault. *See Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981). Second and more significantly, Congress established itself in Price-Anderson as a guarantor against any liability in excess of the $560 million ceiling benefiting defendants and thereby assuring full compensation of each injured claimant. *Duke Power*, 438 U.S. at 93.

In other words, the Price-Anderson Act withstood constitutional challenge not because it capped tort victims' damage—it defintely did not—but because it capped tortfeasors' liability, and liability only, while including a mechanism assuring full compensation for plaintiffs.

In short, nothing in *Duke Power* or Defendants' brief rebuts our new contentions, never addressed in *Verba* or any other case in this State, that the cap is unlike statutes of limitation or repose or legislatively created presumptions because the none of those provisions requires a judge, after a proper and fair trial, to disregard the jury's findings of fact and replace those findings with ones that have nothing to do with record evidence in a given case. Statutes of limitation and such are easily reconciled with the separation of powers. This cap, however, cannot be squared with W. Va. Const. art. V, § 1 and art. VIII, § 1, and the MacDonalds respectfully request this Court so hold.

V. THE CAP VIOLATES THE GUARANTEE OF ACCESS TO THE COURTS AND A CERTAIN REMEDY

Article III, § 17 of the West Virginia Constitution guarantees "[t]he courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." This Court has explained that this guarantee secures three distinct, independent, and mutually reinforcing rights. *Gibson v. Dept. of Highways*, 185 W. Va. 214, 221, 406 S.E.2d 440,

447 (1991): access to the courts, a '"certain remedy'" for all tortious injuries, and the right that justice will not be delayed, denied, or sold.

As explained in our Opening Brief, the cap violates each of these three rights because: it deprives the MacDonalds (and all similarly situated malpractice victims) of a certain remedy for all personal injuries; imposes unconstitutional barriers to malpractice victims' right of access to the courts; and denies complete and impartial justice to such plaintiffs.

Like their responses to our other constitutional claims, defendants contend that *Robinson* and *Verba* dispose of our art. III, § 17 arguments and, in any event, the Constitution allows the legislature to alter or abolish any common law claim or remedy if the need is clear and the statute is reasonable. For the reasons stated above, *Verba* and *Robinson* are not controlling, that the diminishment of the cap, as *Robinson* recognized, reopens the issue, that the cap was not "clear[ly]" needed when enacted, is not "clear[ly]" required now, and, in either case, was not and is not a "reasonable" response to perceived economic and social problems.

RESPONSE AND OPPOSITION TO CROSS-ASSIGNMENTS OF ERROR

Defendants present this Court with two cross-assignments of error. First, City Hospital contends that the trial court erred on three occasions by denying City Hospital's Rule 56 Motion for Summary Judgment; City Hospital's Rule 50(b)(1) Motion for Judgment as a Matter of Law; and City Hospital's Rule 59(a) Motion for New Trial. Each of these motions contended that the Plaintiffs failed to establish a *prima facie* case of medical malpractice by failing to establish a sufficient causal nexus between any violations of the standard of care and the injury sustained by Mr. MacDonald. Second, both City Hospital and Dr. Ahmed assign error to the trial court's denial of their joint Rule 59(e) Motion to Alter or Amend Judgment. More precisely, Defendants contend that the trial court erred by applying the $500,000 cap as contained in W. Va. Code §

55-7B-8(b), as opposed to the $250,000 cap contained in W. Va. Code § 55-7B-8(c). For the reasons stated below, the trial court's rulings should be affirmed.

VI. THE TRIAL JUDGE CORRECTLY RULED ON THREE SEPARATE OCCASIONS THAT THE PLAINTIFFS HAD ESTABLISHED A *PRIMA FACIE* CASE OF MEDICAL MALPRACTICE, INCLUDING SUFFICIENTLY ESTABLISHING A CAUSAL NEXUS BETWEEN VIOLATIONS OF THE STANDARD OF CARE AND THE DAMAGES SUSTAINED

A. Standard of Review

The standard of review applied to a trial court's denial of a motion for summary judgment is *de novo*. *Hapchuck v. Pierson*, 201 W. Va. 216, 218, 495 S.E. 2d 854, 856 (1997). The standard of review is also *de novo* for a trial court's denial of a motion for judgment as a matter of law and motion for new trial. *Abrogast v. Mid-Ohio Valley Med. Corp.*, 214 W. Va. 356, 359, 589 S.E.2d 498, 501 (2003). However, as the *Abrogast* court explained:

> The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a [judgment as a matter of law] will be reversed.

Id. Further,

> We explained this standard in syllabus point 3 of *Alkire v. First National Bank,* 197 W.Va. 122, 475 S.E.2d 122 (1996), in part, by holding that "[w]hile a review of this motion is plenary, it is also circumscribed because we must review the evidence in a light most favorable to the nonmoving party." Moreover, in syllabus point 5 of *Orr v. Crowder,* 173 W.Va. 335, 315 S.E.2d 593 (1983), we indicated, in part, that in our review we must "assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; assume as proved all facts which the prevailing party's evidence tends to prove; and give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved."

> In reviewing a trial court's granting of a motion for [judgment as a matter of law], it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. *Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below.*

Abrogast, 214 W.Va. at 359-60 (emphasis added). Thus, the question before this Court is whether the jury and the trial judge could have found, as they did, a causal nexus between the negligent acts of City Hospital and the injury sustained by Mr. MacDonald.

B. Background

City Hospital assigns error to the trial court's denial of its summary judgment, judgment as a matter of law and new trial motions on the basis that Plaintiffs did not present sufficient evidence to establish a *prima facie* case of negligence. City Hospital argues that the Plaintiffs failed to establish that any deviation from the standard of care by the City Hospital pharmacy was a proximate cause of Mr. MacDonald's injuries. More precisely, City Hospital argues that the only violation of the standard of care presented to the jury as to City Hospital was that the City Hospital pharmacist failed to notify Mr. MacDonald's attending physician, Dr. Ahmed, that the combination of Lipitor, Cyclosporine, and Diflucan could be a dangerous and lethal combination. City Hospital then contends that because Dr. Ahmed testified at trial that he would not have conducted himself differently had the pharmacist comported with the standard of care and notified him of this dangerous interaction the Plaintiffs could not establish causation. In other words, even if the City Hospital pharmacy adhered to the standard of care, it would not have made a difference.[10]

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[10] Because Plaintiffs began this appeal solely on the constitutional issues, there was no need to prepare a record or order a transcript because no evidence from the trial was necessary to the appeal. Defendants have cross-appealed on the underlying liability and/or the application of the higher of the two available damage caps. In the time between their briefs, which were the first notice of the cross-appeals, and the due date for this brief, there was no opportunity to obtain a copy of the transcript to supply this

1. The evidence was unequivocal that the City Hospital pharmacy had a duty to inform the attending physician, Dr. Ahmed, of certain drug interactions and their severity

City Hospital does not appeal the finding that it violated the standard of care because there was ample evidence at trial that the standard of care required the City Hospital pharmacy *not only* to inform attending physicians of certain potential medication interactions, *but also* to inform them of the *severity* of such interactions. A *prima facie* case for medical negligence requires establishing the standard of care, establishing a violation of that standard of care, and causation. *Mays v. Chang*, 213 W. Va. 220, 579 S.E.2d 561 (2003). Plaintiffs presented expert evidence at trial that the City Hospital pharmacy had a duty not only to alert Dr. Ahmed to certain medication interactions, but also to alert him to the severity of these interactions. Expert testimony was presented by James Backes, Pharm.D., on behalf of Plaintiffs, as well as both defense expert Rodney Richmond, and City Hospital's corporate designee, Christian Miller. Each agreed that a pharmacy has a duty to alert physicians of medication interactions as well as the severity of those interactions.[11]

In fact, City Hospital pharmacy policies and procedures required that such interactions be brought to the attention of attending physicians. Plaintiffs' Trial Exhibit 8 was the City Hospital Pharmacy Service Policies and Procedures. That document plainly indicates that "[a]ny indication for change [of a medication] must be discussed with the authorized practitioner ordering medications." It thus cannot be argued that the pharmacy at City Hospital did not have a duty to inform Dr. Ahmed of the interactions between Cyclosporine, Diflucan, and Lipitor. In

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Court with record citations. If this Court deems it necessary, Plaintiffs are prepared to order a transcript and supply it to the Court.

[11] It should be noted that the dispute at trial revolved around whether the interaction in this case was known at the time—not whether a pharmacist's duty ceases to exist if a physician allegedly knows about a possible interaction.

fact, City Hospital does not assign error related to the jury's finding that it violated this standard of care.

2. Plaintiffs presented ample evidence to establish causation

a. Plaintiffs need only establish that City Hospital's negligence was *a* proximate cause, not *the* sole proximate cause.

It should first be noted that the Plaintiffs' burden is not to establish *the* proximate cause, but rather to establish that City Hospital's negligence was *a* proximate cause of Mr. MacDonald's injuries. This is hornbook law and was stated clearly in *Mays*: "It is axiomatic that in a medical malpractice lawsuit such as the instant case, a plaintiff must establish that the defendant doctor deviated from some standard of care, *and that the deviation was "a proximate cause" of the plaintiff's injury*. *Mays*, 213 W. Va. at 224, 579 S.E.2d at 565 (emphasis added). Thus, if the jury or trial judge could have concluded that City Hospital's negligence was *a* proximate cause of the injuries sustained then the trial judge's denial of City Hospital's motions must be affirmed.

b. Plaintiffs presented ample evidence that City Hospital's negligence was a cause of Mr. MacDonald's injuries

City Hospital argues that because Dr. Ahmed testified that he was aware of the risks of these drug interactions, the Plaintiffs could not establish that City Hospital's negligence was a proximate cause of Mr. MacDonald's injuries. City Hospital argues that the Plaintiffs failed to establish causation because "the only evidence for the jury's consideration on this point was Dr. Ahmed's emphatic, unchallenged testimony that: 1) he was aware of the risks associated with the drug therapy he prescribed, including the risk of the rhabdomyolysis; and 2) a warning of the risk of rhabdomyolysis from the City Hospital pharmacy would not have changed the drug regimen he prescribed for Mr. MacDonald because he assessed the risk of Mr. MacDonald developing

rhabdomyolysis as being less than the risks to Mr. MacDonald for developing other, more life-threatening complications if the drug regimen had been changed." City Hosp. Br. 42.

First, the simple fact that Dr. Ahmed testified that he was aware of certain interactions is not conclusive of this fact. It is within the jury's province to evaluate the credibility of witnesses and their testimony. *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). Dr. Ahmed testified and appeared as a very proud gentleman and physician. Having listened to and observed Dr. Ahmed, it is reasonable that the jury and the trial judge did not believe that Dr. Ahmed did in fact know of the risks associated with the interactions, despite his testimony to the contrary. Procedurally, the facts presented at trial and all reasonable inferences that can be taken from the evidence must be viewed in the light most favorable to the Plaintiffs as the non-moving party. *Williams*, 194 W. Va. at 59-60, 459 S.E.2d at 336-37. If the jury and trial judge were to view Dr. Ahmed in such a manner, which would be reasonable, and conclude that he did not, in fact, understand and/or appreciate the risks of the drug interactions, City Hospital's negligence could undoubtedly have been found to be a proximate cause of Mr. MacDonald's injuries.

Second, the jury and trial judge could have concluded that Dr. Ahmed did not appreciate the *severity* of the drug interaction, if he recognized there was an interaction at all. Expert testimony established that the severity of the interaction was extreme, far beyond what Dr. Ahmed assumed. *See* Testimony of David H. Goldstein, M.D. and James Backes, Pharm.D.. The jury and trial judge could have concluded—consistent with Plaintiffs' evidence—that the City Hospital pharmacy had a duty to alert Dr. Ahmed that the medication combination at issue could result in a *serious and severe* interaction beyond anything Dr. Ahmed understood. Had Dr.

Ahmed been given that information, a jury could have concluded that he would have acted in a number of different ways, including stopping certain medications; adjusting doses, or ordering certain lab tests, none of which were done. Thus the jury and trial judge could have concluded that (1) Dr. Ahmed did not in fact recognize that there was the potential for an interaction or (2) if he did, he did not recognize its potential severity. In either instance, the jury and trial judge could have found that had the City Hospital pharmacy adhered to the standard of care and revealed the correct degree of severity, Mr. MacDonald would not have suffered the injuries complained of. Under either tenable scenario, City Hospital's negligence would have thus been a proximate cause of Mr. MacDonald's injuries.

An additional issue presented at trial and considered by the jury and heard by the trial judge was the level of interaction, *i.e.,* was it "severe," "moderate," or "mild." Dr. Ahmed—along with City Hospital—argued throughout the case that the interaction of Cyclosporine, Diflucan, and Lipitor was a mild interaction. This was, of course, contrary to the Plaintiffs' evidence—including the expert testimony of both Dr. Goldstein and Backes—that it was in fact a severe interaction. Thus, the jury could have determined that Dr. Ahmed was not aware of the *severity* of the interaction and, had the City Hospital pharmacy adhered to the standard of care and properly notified Dr. Ahmed of the actual *severe* nature of the interaction, he would have changed his treatment plan. Taking this possibility in the light most favorable to Plaintiffs, the MacDonalds certainly established a *prima facie* case of causation.

Plaintiffs' pharmacy expert, Dr. Backes, testified that the pharmacy had a duty to alert Dr. Ahmed to this severe potential interaction. It was made clear at trial that Dr. Ahmed's assessment that this was a mild interaction was erroneous and a violation of the standard of care. While Dr. Ahmed did testify that he was aware of a potential interaction, he indisputably argued

that this interaction was mild. The Plaintiffs' evidence was that this was a severe reaction and that the standard of care required *both* Dr. Ahmed and the City Hospital pharmacy to recognize it as such. It thus is plain to see that the jury and trial judge could have determined that had the pharmacy done its job and adhered to the standard of care by recognizing the *serious* nature of the drug interaction and alerting Dr. Ahmed to that interaction, Dr. Ahmed would have altered his treatment. Certainly this is sufficient to establish a *prima facie* causal nexus to support the jury's finding as well as to support the trial court's denial of the City Hospital motions. Accordingly, City Hospital's argument that the Plaintiffs failed to establish a *prima facie* case of negligence, particularly as to causation, is without merit especially in light of the obligation to take the evidence in the light most favorable to the MacDonalds.

Finally, it is arguable whether expert testimony would even be necessary as to what Dr. Ahmed would have done had the City Hospital pharmacy adhered to the standard of care and alerted him to the severity of the drug interaction. City Hospital makes much of the fact that Plaintiffs' expert, Dr. Backes, testified that "only [Dr. Ahmed] knows [what he would have done]." City Hospital Br. 41-42. To be sure, there was evidence at trial that a reasonably competent physician would have adjusted the medication regiment if he or she recognized the severity of the potential interaction pursuant to the applicable standards of care. *See* Testimony of Dr. Goldstein The question that the jury and trial judge had to consider then, was whether it was more likely or not that Dr. Ahmed would have altered the medication regimen had the City Hospital pharmacy adhered to the standard of care. Given the testimony at trial that the standard of care prohibited a physician to prescribe these three medications concomitantly, and that the standard of care applicable to the City Hospital pharmacy required it to warn Mr. MacDonald's attending physician of the potential interaction, there was ample evidence—in fact overwhelming

evidence—for the trier of fact to determine that but for City Hospital's violation of the standard of care, Mr. MacDonald would not have suffered the injuries complained of.[12] Accordingly, the trial court's denial of City Hospital's motions for summary judgment, judgment as a matter of law, and new trial should be affirmed.

VII. THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO ALTER OR AMEND THE JUDGMENT TO APPLY THE $250,000 CAP RATHER THAN THE $500,000 CAP ON NON-ECONOMIC DAMAGES

A. Standard of Review

In reviewing a trial court's interpretation of a statute, the standard of review is *de novo*. *West Virginia Dept. of Transp., Div. of Highways v. Dodson Mobile Homes Sales & Serv., Inc.*, 218 W. Va. 121, 124, 624 S.E.2d 468, 471 (2005). The review that the Defendants seek, however, is not merely one of the interpretation of a statute. Rather, they seek review of the trial court's application of the law to the facts before it. This Court reviews such a claim by a different standard:

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

Phillips v. Fox, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995).

[12] It should also be noted that the jury found Dr. Ahmed seventy percent at fault and City Hospital thirty percent at fault. Thus, while there was ample testimony to find both parties violated the standard of care and that each violation was a proximate cause of the injuries sustained, the trier of fact did apportion liability in a manner that evidences a belief that Dr. Ahmed was more at fault than City Hospital. This very reasoned and deliberate verdict indicates that the trier of fact found Dr. Ahmed's conduct to be a bigger cause of the injuries sustained, but still that City Hospital's conduct was a proximate cause of the injuries. That, of course, is all that the law requires.

1. Defendants failed to preserve this issue by not requesting special interrogatories

Dr. Ahmed contends that Plaintiffs should somehow be limited in their argument on this issue because Plaintiffs did not seek special interrogatories as to whether Mr. MacDonald had suffered loss of use of a limb. Ahmed Br. 40 n.97. However, Defendants confuse where the burden lies. Defendants failed to request special interrogatories on this point as well. They now request that this Court reverse the trial court despite that failure, which must operate as a waiver of their argument. This Court has a long history of requiring parties appealing a trial court decision to have at least sought special interrogatories on points that might result in confusion. Contrary to Defendant's argument, the burden to request special interrogatories does not fall on the party with the burden of proof, but on the party seeking to benefit from the missing finding. Thus, in *Gerver v. Benevides*, 207 W. Va. 228, 530 S.E.2d 701 (1999), this Court rejected an argument on appeal by the defendants that because the verdict form did not separate general and special damages, the entire verdict amount must be overturned. In *Gerver*, the Court wrote that the "defendant did not object to the circuit court's instructions or verdict form, and did not submit special interrogatories that would allow the jury to segregate 'economic' from 'non-economic' losses. As there is no means to determine whether the non-economic damages assessed by the jury exceeded the $1,000,000 statutory limit, this Court will not presume that error occurred." *Id.* at 235, 530 S.E.2d at 708. In other words, the burden does not fall upon the plaintiffs to request special interrogatories such that they match the language of a statute; rather, that obligation was that of the defendants under the party-presentation principle. Accordingly, Defendants failed to preserve this issue by not requesting special interrogatories at the trial of this matter and, consequently, the trial court's application of W. Va. Code § 55-7B-8(b) should be affirmed.

2. The trial court did not abuse its discretion in applying W. Va. Code § 55-7B-8(b)

While Plaintiffs maintain that the cap is unconstitutional, the trial court correctly determined that, if any cap applied, it was the higher one established by W. Va. Code § 55-7B-8(b). Both City Hospital and Dr. Ahmed contend that the trial court should have applied W. Va. Code § 55-7B-8(a), which caps recovery for non-economic damages to $250,000 and would thus require that the jury award be reduced to that amount. West Virginia Code Section 55-7B-8(b), however, states that:

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

Under this subsection of the statute, an award may be limited to $500,000, rather than $250,000.

There was ample testimony that Mr. MacDonald was left permanently disabled as a result of the rhabdomyolysis. Specifically, Mr. MacDonald, Mrs. MacDonald, and their expert, David Goldstein, M.D., all tesitifed that rhabdomyolysis can and, in this instance, did result in permanent muscle damage. Defendants' experts agreed that this was a possible result. Mr. MacDonald testified extensively about his inability to dance, to keep his balance, to walk without assistance, to carry things, and to perform countless other day-to-day activities. The medical records were received in evidence. Indeed, *all* the medical records came into evidence at the request of Defendants. No one could suggest that those records are not replete with references to the extreme disability suffered by Mr. MacDonald who needed not only long term care at

Winchester Medical Center, but also at a rehabilitation facility. Without question, Mr. MacDonald suffered a permanent and substantial deformity of his muscles and a functional loss of two normal limbs. He has even suffered a permanent functional injury that would, for example, prevent him from protecting his life if he had to escape from a fire.

The trial judge—who witnessed Mr. MacDonald over the course of the two-week trial and heard all of the evidence and testimony—was certainly in the best position to determine whether Mr. MacDonald has suffered a permanent disability sufficient to qualify for the higher cap.

The simple fact that Mr. MacDonald can no longer use his legs the way he could prior to the Defendants' negligence, nor can he use his arms the way he could prior to the Defendants' negligence makes his injury a permanent one that functionally equals the loss of a limb, a physical deformity, or a functional injury that prevents Mr. MacDonald from being capable of independent care or other life-sustaining injuries. Mr. MacDonald's disability squarely falls within the terms outlined in subsection (b). Therefore, should this Court deem it necessary to apply a cap, it should do so pursuant to W. Va. Code §55-7B-8, rather than subsection (a).

Defendants nevertheless contend that the trial court improperly applied a standard of "partial" loss of use of a limb and direct this Court's attention to language in West Virginia's workers compensation statute. Of course, that statute includes a schedule that is much more detailed than the MPLA. Plaintiffs submit the two are not comparable.

Instead, a comparison of the two tiers of the MPLA indicates that sub-section (a) does not address permanent injury of any type; in contrast, subsection (b) governs permanent injury. In other words, the major clear difference between subsection (a) and (b) is "permanency" of injury, not severity. Thus, it seems clear and unambiguous that the legislature intended to cap

noneconomic damages at $250,000 (subsection (a)) when the injuries complained of were not permanent and functionally limiting, but to provide a $500,000 cap (subsection (b)) when the injuries complained of were in fact permanent and functionally limiting. The simple language of the two subsections proves this on its face. The words "permanent" and "functional injury" appear nowhere in subsection (a); rather, each item in subsection (b) is a "permanent" and "functional" injury.

Defendants do not argue that the injuries complained of are not permanent. They make specious arguments about Mr. MacDonald returning to use a treadmill, returning to teaching, and working at a grocery store. Quite honestly, these are shameful arguments. The Defendants know full well that the testimony at the trial of this matter was that Mr. MacDonald has sustained serious and permanent muscular damage such that simple tasks like walking are challenging—and dangerous—to him. Despite trying to equivocate Mr. MacDonald's injuries with "severance of a portion of . . . [an] index finger" Defendants do not contend that the injuries are not permanent. Ample evidence supports a finding that Mr. MacDonald's injuries were permanent and functionally limiting. At a bare minimum, the trial court did not abuse its discretion in applying W. Va. Code § 55-7B-8(b). Accordingly, the trial court's ruling should be affirmed.

CONCLUSION

For the foregoing reasons, and those outlined in their Initial Brief, the MacDonalds respectfully request that this Honorable Court declare § 55-7B-8 unconstitutional, remand the case for entry of judgment in conformity to the jury's verdict, and provide any other relief this Honorable Court deems fairs and just.

Respectfully Submitted,

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No. 35543

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES D. MACDONALD and
DEBBIE MACDONALD,

Appellants/Plaintiffs,

v.

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

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

Appellees/Defendants.

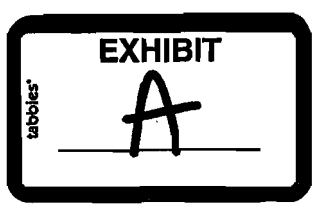
RESPONSE OF CITY HOSPITAL, INC.
TO THE "MOTION IN UBERRIMA FIDES TO CORRECT
THE RECORD BY THE WEST VIRGINIA ASSOCIATION FOR JUSTICE"

City Hospital responds to the unique Motion "to Correct the Record" filed by the West Virginia Association of Justice (WVAJ) which accuses the West Virginia Medical Association (WVSMA) of misstating facts in its amicus brief. For the following reasons, the Motion should be denied.

FACTS

"Uberrima fides" is Latin for "in the utmost good faith." The title of the current motion suggests the WVAJ, as an amicus, must "correct the record" and is demonstrating a high level of good faith by doing so. However, as an amicus, the WVAJ has no standing to file motions, nor is the motion, on examination, made in good faith.

The WVAJ filed a motion to appear as an amicus and filed a brief in this action on September 10, 2010. The motion sought leave as provided by Rule 19 of the West Virginia



Rules of Appellate Procedure and was accompanied by a proposed brief. Nowhere in the motion did the WVAJ seek the opportunity to file further motions or responses, or seek oral argument, nor could it have. The court's order, entered on October 14, 2010, granted the motion and allowed the filing of the brief, and no more.

ARGUMENT

The classic definition of amicus curiae is "friend of the court." The role of an amicus "assist in a case of general public interest, to supplement the efforts of counsel and to draw the court's attention to law that might otherwise escape consideration." 20A MOORE'S FEDERAL PRACTICE 329.11 (2010). The position of an amicus is not to provide a highly partisan account of the facts, but rather to aid the court in resolving doubtful issues of law. *U.S. v. State of Mich.*, 940 F.2d 143 (C.A.6 1991). Clearly, "an amicus curiae is not a party to litigation." *The Miller-Wohl Company v. Commissioner,* 694 F.2d 203, 04 (9th Cir. 1982)(denying award of fees to amicus). Amici simply are not litigants or intervenors, and do not have the same status as parties to litigation.

The classic view of the limited role of the amicus is reflected in Rule 19 of the West Virginia Rules of Appellate Procedure which provides:

> A brief of an amicus curiae may be filed by leave of Court granted on motion or at the request of the Court, except that consent or leave shall not be required when the brief is presented by the State of West Virginia or an officer or agency thereof, or by a county or municipality. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Except with the consent of all parties, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the brief will support unless the Court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing

> party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

Nowhere in Rule 19, or the remaining Rules of Appellate Procedure, are there provisions for further participation by an amicus as attempted here. There is no allowance for response or reply briefs such as those allowed the parties, WVRAP 10, and Rule 19 expressly states amicus may participate in oral argument only for *extraordinary* reasons.

In *United States v. Michigan*, 940 F.2d 143 (6th Cir.1991), a case involving prison conditions, the District Court denied intervention to two parties but allowed them to appear as "litigating amicus," granting "all of the participating rights of a named party in interest . . . including the right to file pleadings, to compel discovery, to initiate contempt proceedings, to formulate and join issues, to issue and enforce subpoenas, to compel attendance at compliance hearings, and to file motions to modify and amend the consent decree between the named parties in interest." On appeal, the Sixth Circuit found no statutory or rule basis for the creation of "litigating amicus curiae."

> Classical participation as an amicus to brief and argue as a friend of the court was, and continues to be, a privilege within "the sound discretion of the courts," . . . depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice. . . . Amicus, however, has never been recognized, elevated to, or accorded the full litigating status of a named party or a real party in interest, and amicus has been consistently precluded from initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion. . . . Historically, an amicus could not join issues not joined by the parties in interest, . . . and was not bound by the judgments in actions in which amicus was permitted to brief or argue. . . .

Id. (Citations omitted).

While the motion here is not as intrusive as the tactics seen in *U.S. v. Michigan*, the WVAJ has stepped beyond the bounds of amicus, both under the Rules as reflected above, and in taking an active, partisan role. This was done in two ways. First, by responding to the amicus of the WVSMA in the first place without any basis in the Rules, and second, by making the tacit accusation that the WVSMA is somehow misleading the Court.

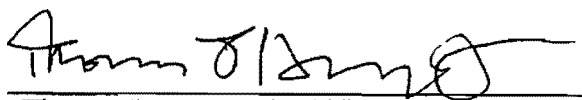
Here, the WVAJ filed its amicus brief arguing at some length about the Medical Professional Liability Act and suggesting there was simply no problem, crisis or reason for its passage or amendment. The WVSMA and others presented opposing views. All of the amicus briefs enlightened the court as to the competing facts and circumstances faced by the Legislature in 2001-03. The WVAJ's motion, which attacks the WVSMA's brief as untrue, demonstrates sharply the opposing views that had to be reconciled by the Legislature, and the logic of this court's deference to the Legislature's right to such resolution. As the court stated in *Verba*, "we note that the parties as well as amici presented copious statistics to this Court to either defend or refute the legislature's findings in support of the medical malpractice cap. However, we 'ordinarily will not reexamine independently the factual basis for the legislative justification for a statute. Instead, the inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based.' Our review of the legislature's findings and declaration of purpose in W.Va.Code § 55-7B-1 (1986) leads us to conclude that the legislature reasonably could conceive to be true the facts on which the Medical Professional Liability Act, including the medical malpractice cap, is based. Further, we resolve any reasonable doubts on this question in favor of the constitutionality of the cap."

CONCLUSION

There is no basis in the Rules of Appellate Procedure for the filing of motions by amicus curiae. The WVAJ's Motion should be denied.

CITY HOSPITAL, INC.,

By Counsel



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Appellant's Reply Brief** was sent by Federal Express Standard Overnight Delivery, this 1st day of November 2010 to the following counsel of record:

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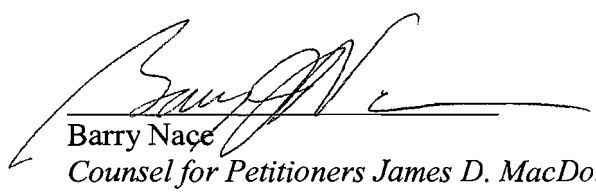

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