

No. 27464 -- The Estate of Marjorie I. Verba, by Sally Jo Nolan, Executrix v. David A. Ghaphery, M.D.

Starcher, J., dissenting:

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OF WEST VIRGINIA

I believe that the \$1,000,000.00 “cap” imposed by *W.Va. Code, 55-7B-8* [1986] is a patent violation of the equal protection and certain remedy provisions of the *West Virginia Constitution*. This discriminatory statute arbitrarily treats similarly situated persons differently and unfairly, and often deprives severely injured plaintiffs a remedy by due course of law. A plaintiff who is injured by the negligence of anyone *other* than a “health care provider” can collect his or her full damages as awarded by a jury -- but a plaintiff who is injured by the negligence of a “health care provider” cannot. Why should health care providers get more protection for their carelessness than others do as a vehicle driver, homeowner, or provider of other professional services?

I would again revisit the constitutionality of *W.Va. Code, 55-7B-8*, and invalidate the statute.

Marjorie I. Verba was, by all accounts, generally of good health for a 68-year-old woman. However, she occasionally had problems with “reflux,” where the stomach contents flow backwards up into the esophagus. Most everyone has experienced this “heartburn” during their lifetime; it was a more routine problem for Ms. Verba.

Ms. Verba consulted with defendant David A. Ghaphery, and was told that surgery might help her problem. She was admitted to a hospital for laproscopic surgery to correct the reflux problem.

During the surgery, the doctor would lift her stomach, and wrap a portion around the esophagus to create a natural valve that would stop the stomach's contents from back-flowing into the esophagus.

Surgery was performed on February 21, 1996, and Ms. Verba remained in the hospital for 4 days to recover. Ms. Verba had nausea and vomiting, a low grade fever, and would not eat. Prior to her discharge, one of her daughters spoke with Dr. Ghaphery by phone to tell the doctor she and her sister did not feel their mother was ready to go home, mainly because she was not holding her food down. Dr. Ghaphery screamed at her, and told her that her mother was okay to go home. Dr. Ghaphery did not return to the hospital to check on Ms. Verba, and she was discharged at 6:00 p.m.

Within 10 hours of her discharge, 5 days after her surgery, Ms. Verba was dead. An autopsy found an 8-millimeter laceration in the stomach caused by a surgical instrument during surgery. The stomach's contents seeped into the peritoneum causing peritonitis and septic shock which killed Ms. Verba.

A mistake happened during surgery; a jury concluded that the mistake constituted medical malpractice, and that Ms. Verba died as a result.

The jury awarded \$300,000.00 for physical pain, mental pain, and loss of enjoyment of life; \$21,000.00 for medical and funeral bills; and \$2,500,000 to the beneficiaries of the estate for those items set forth in the wrongful death statute, *W.Va. Code, 55-7-6*. The trial court reduced the verdict to \$1,020,510.51, because of the medical malpractice cap contained in *W.Va. Code, 55-7B-8*.

An economist, on behalf of the plaintiff-appellants, recently calculated that the \$1,000,000.00 cap established in 1986 has a present day value in the year 2000 of only \$624,898.00, due to the eroding effects of inflation.

This Court ruled in *Robinson v. Charleston Area Med. Ctr.*, 186 W.Va. 720, 414 S.E.2d 877 (1991), that the medical malpractice cap on damages was constitutional. However, the recent trend has been to find medical malpractice caps, and/or tort reform legislation in general, to be unconstitutional.¹ This Court should join that trend and find *W.Va. Code*, 55-7B-8 to be unconstitutional.

The defendants contend that the medical malpractice cap is necessary to keep the costs of medical liability insurance reasonable. When a statute purports to mitigate a certain, perceived problem -- like unreasonably high medical malpractice insurance premiums -- it is not rational for the legislature to impose the burden of fixing that problem on a particular class, when many other factors contribute to the problem. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313, 324 (1985). It is therefore irrational to impose upon people severely injured by one doctor's mistake the burden of reducing, by some immeasurable amount, all doctors' medical malpractice insurance premiums. This is particularly so when -- as detailed below -- many other factors contribute more significantly to higher premium costs.

In *Robinson* this Court concluded that the medical malpractice cap did not violate the Equal Protection Clause of the *West Virginia Constitution*, Article III, section 10. In reaching this

¹See *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989); *Condemarin v. Univ. Hosp.*, 775 P.2d 348 (Utah 1989); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (1991); *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996); *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999); *Lakin v. Senco Prod., Inc.*, 329 Ore. 62, 987 P.2d 463 (1999); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999).

conclusion, we cited to the proposition that economic regulations are entitled “wide judicial deference.” 186 W.Va. at 729, 414 S.E.2d at 886. I disagree with this use of the proposition in the instant case, and believe that the right to recover personal injury damages is a significant substantive right requiring the application of some higher, perhaps intermediate, scrutiny. *See, e.g., Spilker v. City of Lincoln*, 238 Neb. 188, 192, 469 N.W.2d 546, 548 (1991); *Hanson v. Williams County*, 389 N.W.2d 319, 325 (N.D. 1986); *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 524, 464 A.2d 288, 294-95 (1983). The intermediate scrutiny test is utilized when legislation substantially related to the achievement of an important governmental interest has been challenged. *See Payne v. Gundy*, 196 W.Va. 82, 468 S.E.2d 335 (1996).

In the recent opinion of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.W.2d 1062 (1999), the Ohio Supreme Court struck down a group of Ohio statutes limiting damages, finding that it violated the state’s equal protection and due process clauses. The Court stated:

We are unable to find . . . any evidence to buttress the proposition that there is a rational connection between awards over [the cap] and malpractice insurance rates. There is evidence of the converse, however. The Supreme Court of Texas found no relationship between insurance rates and the cap, citing an independent study that showed that less than .6 of all claims brought were for more than \$100,000. *Lucas v. United States*, (Tex. 1988), 757 S.W.2d 687, 691. According to three *amici* arguing against the statute’s constitutionality, a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, found that the savings from various tort reforms, including a \$250,000 cap on non-economic damages, were “marginal to nonexistent.”

86 Ohio St.3d at 486, 715 N.W.2d at 1092 (citations omitted). Relying on this finding, the Ohio Court applied a higher degree of analysis to the cap on damages and found that it was “irrational and arbitrary

to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice,” and that any cap on damages was “unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary.” 86 Ohio. St.3d at 486, 715 N.W.2d at 1092.

Ohio is not the only state to find that it violated equal protection guarantees to impose a “cap” on damages. The Alabama Supreme Court ruled its statute capping medical malpractice damages unconstitutional, citing to a study by the United States General Accounting Office that concluded that the connection between personal injury damage caps and the total cost of health care is remote. *Moore v. Mobile Infirmary Assn.*, 592 So.2d 156 (Ala. 1991). New Hampshire, using an intermediate level of scrutiny, also found its statute unconstitutional. *See Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); and *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (1991).

I believe that by balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society, *W.Va. Code*, 55-7B-8 is an unreasonable exercise of the state’s power. *See Moore v. Mobile Infirmary Assn.*, 592 So.2d at 157. I therefore believe that the malpractice cap violates our the equal protection guarantees of the *West Virginia Constitution*.

I also believe that the malpractice cap violates the “certain remedy” provisions of Article III, Section 17 of the *West Virginia Constitution*, that states:

The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law.

The test announced in *Robinson* for determining whether legislation violates the “certain remedy” clause is a two-step process. First, the proponent of the statute must demonstrate the existence of a “clear social or economic problem” which requires the alteration of some common law right or remedy. Second, the legislative change of the common law right or remedy “must be a reasonable method of eliminating or curtailing the ‘clear social or economic problem[.]’” *Robinson*, 186 W.Va. at 728, 414 S.E.2d at 885.

There is not now, nor has there ever been, a clear “social or economic problem” arising from medical malpractice in West Virginia. An insurance company’s cry that it is losing money is more likely an admission of poor business practices, not a clear social or economic problem. An article by Barry Hill, “Ponzi Rides Again: The PIE Mutual Story,” *WVTLA Advocate* (Fall 1998), details how one medical malpractice insurance company lost money, and subsequently folded, for reasons that had nothing to do with low premium rates or high medical malpractice lawsuit verdicts.

In 1997, PIE Mutual sold medical malpractice insurance to 15,000 policyholders in nine states, including West Virginia. In December 1997, an Ohio judge placed the company in receivership, declaring the company to be hopelessly insolvent with claims exceeding assets by \$275 million. The Ohio Department of Insurance found, during PIE’s liquidation, that PIE had an \$11.6 million payroll for 150 employees, an average of more than \$77,000.00 per employee. Salaries consumed 25% of all premiums paid by PIE’s insured physicians, salaries 4.5 times the national average. Travel expenses were \$2.6 million -- 4.7% of premiums -- an average of \$17,000.00 per employee.

Five months before PIE was liquidated, the company gave \$11.8 million to three of its top executives. Of \$6.1 million received by the CEO, \$92,000.00 went to a cattle purchase from a member

of the CEO's family, \$95,000.00 was paid to MGM Gaming, and \$30,000.00 went to RIO Casino. And the bonuses didn't stop there.

The CEO's son, who was the vice president of marketing, got an \$8,000.00 salary advance from PIE -- an advance that was never repaid. The CEO's secretary got a \$48,000.00 salary bonus; one vice president got a \$264,000.00 bonus, another a \$160,000 bonus. An accountant got an extra \$132,000.00, while the assistant controller got \$67,000.00. Meanwhile, the vice president of claims had a \$350,000.00 loan forgiven.

Not all the money went into the pockets of employees. From 1992 until 1997, PIE paid \$1.4 million to a board member for "consulting." The company also gave money to the Republican Party, nearly \$300,000.00 between 1994 and 1996. It also paid \$50,000.00 toward the cost of remodeling the Ohio Republican Headquarters. PIE executives underwrote the \$35,000.00 cost of the Southern Legislative Conference in Charleston in June 1996, and gave \$13,000.00 to five West Virginia legislative candidates in 1996. It is unclear how much PIE spent on its luxury Skybox at Jacob's Field in Cleveland, home of the Cleveland Indians, but a contingent of politicians from West Virginia were hosted in the box as late as 1997.

In June 1998, the Ohio Department of Insurance auctioned off many of PIE's assets to pay its claims. At PIE's Cleveland headquarters, it auctioned off china and crystal services for 60, as well as a rare Frederick Remington lithograph collection. The Board of Director's conference table alone sold for \$30,000.00. It also auctioned off "TidePoint," an exclusive 63-acre Hilton Head retirement complex, 80% owned by PIE, for \$23.7 million. The facility, with condominiums and villas ranging in price from \$166,000.00 to \$606,000.00, was coincidentally the home of the CEO's parents.

There is not now, nor has there ever been, a “medical malpractice” crisis. The premiums for malpractice insurance are high -- but as the PIE situation demonstrates, often for reasons wholly unrelated to malpractice verdicts. Still, physicians should expect malpractice premiums to be high because of the risk -- Dr. Ghaphery performed “routine” surgery on Ms. Verba, and 5 days later she was dead because of an unnoticed slip of the scalpel. Where the risk is high, and the costs of error high, the price for insuring against that risk should be high -- and certainly does not qualify as a “social or economic problem” such that access to the courtroom should be restricted.

It violates the right of every citizen to arbitrarily eliminate the citizen’s right to a full and complete remedy from a wrongdoer.² A jury is best equipped to determine who is in the right and who is in the wrong, and to decide a “remedy by due course of law.” The *West Virginia Constitution* guarantees this right; the majority opinion gives it short shrift.

I believe that, by any measure, the medical malpractice cap contained in *W.Va. Code, 55-7B-8* is arbitrary, unfair, and unconstitutional. I therefore respectfully dissent.

²For an example of a remedy from a wrongdoer, one need look no further than *Huntington Eye Associates v. LoCascio*, ___ W.Va. ___, ___ S.E.2d ___ (No. 28889 July 6, 2001) (*per curiam*). In that case, the Court returned to a plaintiff a jury’s verdict worth, with interest, nearly a million dollars -- and the plaintiff was a doctor suing another doctor for breach of contract. The plaintiff doctor said he had an agreement that the defendant doctor would either work for him, or in the alternative, would not open an office within 50 miles of the plaintiff’s office for 2 years. The defendant doctor said the plaintiff was routinely committing Medicare fraud by performing unnecessary surgery, and so left the plaintiff’s employ to open an office less than 2 miles away. We held that on these disputed positions, a jury was best equipped to decide which doctor was in the right, and which remedy would best compensate the offended doctor. The circuit court had taken away the plaintiff’s verdict; we gave the verdict back.

It is unsettling to see this Court hold that two doctors can sue one another for millions of dollars in speculative contractual damages -- yet at the same time, hold that an injured plaintiff can constitutionally be restricted from suing a doctor for the same amounts.