

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2000 Term

FILED

December 13, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27464

RELEASED

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE ESTATE OF MARJORIE I. VERBA,
by SALLY JO NOLAN, Executrix,
Plaintiff Below, Appellant

v.

DAVID A. GHAPHERY, M.D.,
Defendant Below, Appellee

Appeal from the Circuit Court of Ohio County
Honorable Arthur M. Recht, Judge
Civil Action No. 97-C-466

AFFIRMED

Submitted: September 6, 2000
Filed: December 13, 2000

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE MAYNARD concurs in part and dissents in part and reserves the right to file a concurring/dissenting Opinion.

JUSTICE DAVIS concurs in part and dissents in part and reserves the right to file a concurring/dissenting Opinion.

JUSTICE STARCHER dissents and reserves the right to file a dissenting Opinion.

JUSTICE MCGRAW dissents and reserves the right to file a dissenting Opinion.

SYLLABUS BY THE COURT

1. “““In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W.Va. Const. art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature the negation of legislative power must appear beyond reasonable doubt.” Syl. pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965).’ Syl. pt. 2, West Virginia Public Employees Retirement System v. Dodd, 183 W.Va. 544, 396 S.E.2d 725 (1990).” Syl. Pt. 1, Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. 720, 414 S.E.2d 877 (1991).

2. ““““Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.” Syllabus Point 7, [as modified,] Atchinson v. Erwin, [172] W.Va. [8], 302 S.E.2d

78 (1983).’ Syllabus Point 4, as modified, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., [174] W.Va. [538], 328 S.E.2d 144 (1984).” Syl. pt. 4, Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991).’ Syl. Pt. 2, Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. 720, 414 S.E.2d 877 (1991).

3. “W.Va.Code, 55-7B-8, as amended, which provides a \$1,000,000 limit or ‘cap’ on the amount recoverable for a noneconomic loss in a medical professional liability action is constitutional. It does not violate the state constitutional equal protection, special legislation, state constitutional substantive due process, ‘certain remedy,’ or right to jury trial provisions. W.Va. Const art. III, § 10; W.Va. Const. art. VI, § 39; W.Va. Const. art. III, § 10; W.Va. Const. art. III, § 17; and W.Va. Const. art. III, § 13, respectively.” Syl. Pt. 5, Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. at 720, 414 S.E.2d 877 (1991).

Per Curiam:

Appellant, the estate of Marjorie I. Verba, asks this Court to revisit its previous decision in Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. 720, 414 S.E.2d 877 (1991), in which we, acting unanimously, upheld the constitutionality of the \$1,000,000 cap imposed by West Virginia Code § 55-7B-8 (2000) on noneconomic damages that are awarded in medical malpractice cases. Asserting that the cap violates multiple constitutional provisions, Appellant seeks a reversal of the Jun

24, 1999, order of the Circuit Court of Ohio County, granting Appellee David A. Ghaphery's motion to alter or amend the judgment, through which the jury's award of noneconomic damages was reduced to \$1,000,000. After thoroughly considering the arguments raised, we find no basis for altering our prior ruling in Robinson, and accordingly, we affirm the decision of the lower court.

I. Factual Background

Dr. Ghaphery performed anti-reflux surgery on sixty-eight-year-old Marjorie Verba on February 21, 1996. Ms. Verba remained in the hospital for four days following surgery. The parties dispute whether Ms. Verba was continuing to have medical problems at the time of her release on February 25, 1996. Within ten to twelve hours of discharge, Ms. Verba had died. The results of an autopsy indicated that a surgical nick resulted in a laceration to the stomach, which in turn caused Ms. Verba to contract peritonitis and to die as a result.

Appellant initiated a medical malpractice action against Dr. Ghaphery and after hearing the evidence and arguments regarding the issue of whether Dr. Ghaphery deviated from the accepted standards of care, the jury found for Appellant. The jury awarded \$300,000 for physical pain, mental pain, and loss of enjoyment of life; \$21,000 for medical and funeral bills; and \$2,500,000 to the beneficiaries of Ms. Verba's estate under the wrongful death statute. See W.Va. Code § 55-7-6 (2000). By order entered on July 24, 1999, the trial court reduced the judgment to \$1,020,510.51, as required by the medical malpractice cap set forth in West Virginia Code § 55-7B-8. Based upon its

position that the statutory cap at issue is unconstitutional,¹ Appellant seeks a ruling from this Court that the reduction of the jury verdict was improper.

II. Discussion

In addressing this same issue in Robinson, we first articulated the relevant principles which undergird this Court's consideration of legislative acts:

“In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W.Va. Const. art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.’ Syl. pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965).” Syl. pt. 2, West Virginia Public Employees Retirement System v. Dodd, 183 W.Va. 544, 396 S.E.2d 725 (1990).

Syl. Pt. 1, Robinson, 186 W.Va. at 722, 414 S.E.2d at 879.

We then identified the level of constitutional scrutiny which is applied to issues affecting economic rights:

¹Appellant contends that the medical malpractice cap on noneconomic damages violates the equal protection clause, the separation of powers clause, the right to a trial by jury, the open court and certain remedy clauses, the due process clause, and the special act clause.

““Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.” Syllabus Point 7, [as modified,] Atchinson v. Erwin, [172] W.Va. [8], 302 S.E.2d 78 (1983).’ Syllabus Point 4, as modified, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., [174] W.Va. [538], 328 S.E.2d 144 (1984).” Syl. pt. 4, Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991).

Syl. Pt. 2, Robinson, 186 W.Va. at 722-23, 414 S.E.2d at 879-80.

After considering essentially the same constitutional challenges as Appellant raises in this case,² we held that:

W.Va.Code, 55-7B-8, as amended, which provides a \$1,000,000 limit or “cap” on the amount recoverable for a noneconomic loss in a medical professional liability action is constitutional. It does not violate the state constitutional equal protection, special legislation, state constitutional substantive due process, “certain remedy,” or right to jury trial provisions. W.Va.

²Appellant argues that in Robinson this Court did not consider the constitutionality of the statute on separation of powers grounds. In refutation of this assertion, Appellee cites to the language of syllabus point one of Robinson. See 186 W.Va. at 722, 414 S.E.2d at 879. Appellee also observes that other courts have rejected a “separation of powers” argument when assessing the constitutional validity of statutory damage caps. See Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 531-32 (Va. 1989); accord Pulliam v. Coastal Emergency Servs., 509 S.E.2d 307, 319 (Va. 1999); see also Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature, 28 Loy. U. Chi. L.J. 745, 761 (1997) (recognizing legislature’s “historic right and public responsibility to formulate tort or liability legislation”); but see Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (finding separation of powers violation with Illinois medical malpractice cap on noneconomic damages).

Const. art. III, § 10; W.Va. Const. art. VI, § 39; W.Va. Const. art. III, § 10; W.Va. Const. art. III, § 17; and W.Va. Const. art. III, § 13, respectively.

Syl. Pt. 5, Robinson, 186 W.Va. at 723, 414 S.E.2d at 880.

Appellant urges this Court to reverse its prior determination in Robinson that the medical malpractice cap is constitutional. See id. The only new arguments, which were not considered by this Court when Robinson was issued, concern the effects of inflation on the \$1,000,000 cap, the lack of evidence indicating that medical malpractice reform has lessened either health care costs or malpractice premiums, and an alleged “separation of powers” problem. We address these new arguments in turn.

Appellant looks to dicta in Robinson which suggested that, if the legislature decided to lower the \$1,000,000 cap, the Court might reconsider its position on the reasonableness of the cap. See id. at 730, 414 S.E.2d at 887. In making her argument that inflation has sufficiently affected the reasonableness of the cap,³ Appellant overlooks a critical aspect of this Court’s language in Robinson. We did not invite a reconsideration of the reasonableness of the cap based on inflationary effects; what we did was to state that if the **legislature** were to modify (i.e. reduce) the cap, we might find the reduced amount not to be reasonable. Id. Our analysis of the statutory cap in Robinson was founded

³Appellant asserts that \$1,000,000, as contrasted to its worth in 1986 when the cap was first established, is only worth \$648,147 today. Appellee asserts that no other courts have relied upon this inflationary argument as a basis for finding their statutory caps unconstitutional.

on whether the act of the legislature was constitutional. Just as it was within the legislature's proper exercise of its authority in initially setting the cap, it is similarly up to the legislature to make any amendments to that legislation. As we observed in Robinson, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Id. at 726, 414 S.E.2d at 883 (quoting Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 692, 408 S.E.2d 634, 642 (1991)); see Pulliam v. Coastal Emergency Servs., 509 S.E.2d 307, 318 (Va. 1999) (upholding statutory medical malpractice cap and finding that "no fundamental right or suspect class is affected by application of the medical malpractice cap").

For essentially the same reasons that this Court cannot decide to effectively raise the amount of the cap,⁴ we similarly are not the body that should examine whether medical malpractice reform is meeting the objectives cited by the legislature in enacting the West Virginia Medical Professional Liability Act,⁵ West Virginia Code §§ 55-7B-1 to

⁴We note that West Virginia's medical malpractice cap, at \$1,000,000, is one of the most liberal caps in the country. No state has a cap set at a higher amount.

⁵The Legislature set forth an extensive listing of its purposes in enacting the legislation at issue:

The Legislature hereby finds and declares that the citizens of this state are entitled to the best medical care and facilities available and that health care providers offer an essential and basic service which requires that the public policy of this state encourage and facilitate the provision of such service to our citizens:

That as in every human endeavor the possibility of injury or death from negligent conduct commands that protection of the public served by

(continued...)

⁵(...continued)

health care providers be recognized as an important state interest;

That our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence;

That liability insurance is a key part of our system of litigation, affording compensation to the injured while fulfilling the need and fairness of spreading the cost of the risks of injury;

That a further important component of these protections is the capacity and willingness of health care providers to monitor and effectively control their professional competency, so as to protect the public and ensure to the extent possible the highest quality of care;

That it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers who can themselves obtain the protection of reasonably priced and extensive liability coverage;

That in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers and the injured without the full benefit of professional liability insurance coverage;

That many of the factors and reasons contributing to the increased cost and diminished availability of professional liability insurance arise from the historic inability of this state to effectively and fairly regulate the insurance industry so as to guarantee our citizens that rates are appropriate, that purchasers of insurance coverage are not treated arbitrarily, and that rates reflect the competency and experience of the insured health care providers.

Therefore, the purpose of this enactment is to provide for a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth above. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens to compensation for injury and death, in the regulation of rate making and other practices by the liability insurance industry, and in the authority of medical licensing boards to effectively regulate and discipline the health care providers under such board must be enacted together as necessary and mutual ingredients of the appropriate

(continued...)

-11 (2000). Appellant relies on a seemingly outdated 1987 GAO study to support its position that this type of reform does not have a major effect on the cost of malpractice insurance. Conversely, Appellee cites to a more recent law review article which suggests that there is empirical evidence demonstrating that such reform does have an effect on malpractice costs. See W. Kip Viscusi and Patricia Born, Medical Malpractice Insurance in the Wake of Liability Reform, 24 J.Legal Stud. 463 (1995). Notwithstanding the apparent conflict of positions on this issue of whether the objectives sought to be achieved through the enactment of the Medical Professional Liability Act can be met, it is up to the Legislature, and not this Court, to consider and resolve these arguments which concern the wisdom of medical malpractice reform. As we stated in Robinson, “W.Va. Code, 55-7B-8, as amended, . . . is an integral part of the comprehensive resolution of the clear social and economic problem reasonably perceived by the legislature in enacting the Act.” 186 W.Va. at 729, 414 S.E.2d at 886.

Finally, Appellant suggests that the medical malpractice cap violates the “separation of powers” doctrine. See W.Va. Const. art. V, § 1. With little discussion, Appellant argues that the cap effectively constitutes a legislative remittitur for any verdict that exceeds \$1,000,000 in noneconomic damages. As in Robinson, this Court has on many occasions acknowledged the constitutional basis for legislative alteration of the common law. 186 W.Va. at 727, 414 S.E.2d at 884 (stating “that the

⁵(...continued)
legislative response.

W.Va. Code § 55-7B-1.

general authority of the legislature to alter or repeal the common law is expressly conferred by article VIII, section 13 of the Constitution of West Virginia) (quoting Lewis, 185 W.Va. at 694, 408 S.E.2d at 644); accord Gilman v. Choi, 185 W.Va. 177, 185-86, 406 S.E.2d 200, 208-09 (1990) (stating “[c]ertainly the Legislature can change the common law” and “the indisputable fact [is] that the legislature has the power to change the common law of this State”), overruled on other grounds as stated in Mayhorn v. Logan Med. Found., 193 W.Va. 42, 454 S.E.2d 87 (1994); Wallace v. Wallace, 155 W.Va. 569, 580, 184 S.E.2d 327, 333-34 (1971) (recognizing that “Article VIII, Section 21 . . . provides in part that ‘Such parts of the common law . . . shall be and continue the law of the State until altered or repealed by the legislature’”), overruled on other grounds as stated in Belcher v. Goins, 184 W.Va. 395, 406 S.E.2d 830 (1990). This power to alter the common law has been recognized to “‘necessarily include[] the power to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize.’” Edmonds v. Murphy, 573 A.2d 853, 861 (Md. Ct. Spec. App. 1990) (quoting Franklin v. Mazda Motor Corp., 704 F.Supp. 1325, 1336 (D. Md. 1989)), aff’d, 601 A.2d 102 (Md. 1992). The Maryland court reasoned, and we agree, “‘that if the legislature can, without violating separation of powers principles, establish statutes of limitation, establish statutes of repose, create presumptions, create new causes of action and abolish old ones, then it also can limit noneconomic damages without violating the separations of powers doctrine. . . .’” 573 A.2d at 861 (quoting Franklin, 704 F.Supp. at 1336).

Having addressed those issues which were not raised at the time of Robinson, and finding no basis for holding the cap unconstitutional on those novel grounds, we must determine wheth

there is any merit to reconsidering the constitutional arguments previously discussed in Robinson. Rather than offering any basis for declaring this Court's decision in Robinson to be in error, Appellant simply urges this Court to adopt the conclusion reached by other courts that caps, such as those at issue here, violate particular constitutional provisions. See, e.g. Smith v. Schulte, 671 So.2d 1334 (Ala. 1995), cert. denied, 517 U.S. 1220 (1996); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999); State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999). Critically, however, each of those cases cited by Appellant involved constitutional challenges raised in the first instance. Because this Court has previously ruled on the multiple constitutional challenges raised here by Appellant, and found no constitutional impediment to enforcement of the provisions of the medical malpractice cap, this Court's prior ruling is subject to the judicial doctrine of stare decisis. In Booth v. Sims, 193 W.Va. 323, 456 S.E.2d 167 (1995), we discussed this doctrine:

“The doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.”

Id. at 350 n.14, 456 S.E.2d at 194 n.14 (Miller, J., dissenting and concurring) (quoting In re Proposal to Incorporate Town of Chesapeake, 130 W.Va. 527, 536, 45 S.E.2d 113, 118 (1947)). Like the Virginia Supreme Court in Pulliam, we find that the doctrine of stare decisis prevents this Court from overturning our initial decision in Robinson upholding West Virginia Code § 55-7B-8 on constitutional grounds. 186 W.Va. at 723, 414 S.E.2d at 880, syl. pt. 5; Pulliam, 509 S.E.2d at 321 (refusing to find statutory cap on medical malpractice damages unconstitutional under doctrine of stare decisis).

Based on the foregoing, the decision of the Circuit Court of Ohio County is hereby affirmed.

Affirmed.