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

**FILED**
**December 15, 2000**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**RELEASED**
**December 15, 2000**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
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Davis, J., concurring, in part, and dissenting, in part:

Three basic issues were presented to the Court in this case. First, we were asked to find that the State's medical malpractice damage cap statute, W. Va. Code § 55-7B-8 (1986) (Repl. Vol. 2000), was per se unconstitutional.[1] As to this issue, I understand the per curiam opinion of the Court as simply reaffirming the unanimous decision by the then sitting Court[2] in *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991), which held that the statute is per se constitutional. I concur with this conclusion.[3] Second, we were asked to find the medical malpractice statute unconstitutional on the basis that the present-day value of the one million dollar cap is actually less than it was when the cap was originally imposed. The per curiam opinion has determined that the statute is valid and constitutional notwithstanding the inflationary erosion of the present-day value of one million dollars. For the reasons that are forthcoming, I dissent from the Court's decision in this regard. Third, we were asked to permit plaintiffs to recover attorney's fees and costs in medical malpractice cases. The per curiam opinion, however, has resolutely failed to address this issue. Despite this conspicuous omission, I

[1]This argument was premised on several alternative constitutional grounds, which are listed in note 1 of the per curiam opinion.

[2]At the time of the *Robinson* decision, the members of the Court were Chief Justice Miller, and Justices Neely, McHugh, Brotherton, and Workman.

[3]I also concur with the majority's determination that the question of whether or not the damage cap statute is meeting its objectives is a matter for legislative determination.

nevertheless feel that the merits of awarding attorney's fees and costs in such cases should have been addressed. Therefore, I also dissent also from the Court's effective dismissal of this matter.

## I.

## LEGISLATIVE AUTHORITY TO IMPOSE MEDICAL MALPRACTICE DAMAGE CAP

This case presents the second occasion that the Court has been asked to determine whether the State's constitution permits the Legislature to impose a cap on noneconomic damages in medical malpractice cases. In *Robinson*, we held that there was no constitutional impediment to the Legislature's authority to impose a limit on a plaintiff's recovery from a jury for noneconomic damages in medical malpractice cases. In the instant case, a majority of the Court has reaffirmed *Robinson*.

I believe the majority correctly found that the Legislature did not offend our constitution by exercising its authority to impose a one million dollar cap on noneconomic damages in medical malpractice cases. Furthermore, I adhere to the principle that it is the Legislature's "right and public responsibility to formulate tort or liability legislation."[4] Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of*

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[4]It should be noted, though, that the Legislature's creation of a damage cap statute began long before it enacted the medical malpractice statute. In 1957, the Legislature imposed a cap on the amount of recovery that could be obtained against a parent for the willful, malicious, or criminal act of the parent's child. *See* W. Va. Code § 55-7A-2 (1995) (Repl. Vol. 2000). For other examples of limits imposed on liability for conduct of a tortious nature see W. Va. Code § 16-5G-6 (1999) (Supp. 2000) (limiting liability for violation of open hospital proceedings); W. Va. Code § 21-9-12 (1996) (Supp. 2000) (imposing limit on liability for violating housing construction standards); W. Va. Code § 22-10-9 (1994) (Repl. Vol. 1998) (limiting liability for failing to plug an abandoned well); W. Va. Code § 22-17-16 (1999)

(continued...)

*Cooperation and Respect Between the Courts and the Legislature*, 28 Loy. U. Chi. L.J. 745, 761 (1997). I do not believe that it is within the province of this Court to engage in judicial nullification to achieve a result that clearly lacks a basis in constitutional law.[5] Nor is it the role of this Court to find the damage cap statute "unconstitutional merely because we 'consider it born of unwise, undesirable, or ineffectual policies.'" *Ledbetter v. Hunter*, 652 N.E.2d 543, 545 (Ind. Ct. App. 1995) (quoting *Johnson v. St. Vincent Hosp., Inc*., 273 Ind. 374, 382, 404 N.E.2d 585, 591 (1980) (citations omitted)).

In the final analysis, this Court is restricted to a determination of whether there is a rational basis for the damage cap statute and whether the statute bears a reasonable relationship to a proper

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[4](...continued)
(Supp. 2000) (imposing limit on liability for violation of underground tank laws); W. Va. Code § 46-4A-205 (1990) (Repl. Vol. 1993) (limiting liability for sending erroneous payment order); W. Va. Code § 55-7-15 (1985) (Repl. Vol. 2000) (imposing limit on liability for injury caused in helping another); W. Va. Code § 55-7-18 (1996) (Repl. Vol. 2000) (limiting liability of home care providers); W. Va. Code § 55-7-20 (2000) (Repl. Vol. 2000) (imposing limit on liability of certain nonprofit organizations); W. Va. Code § 55-7C-3 (1988) (Repl. Vol. 2000) (limiting liability of officers of nonprofit organizations); W. Va. Code § 55-7D-3 (1998) (Repl. Vol. 2000) (imposing limit on liability for persons who donate food); W. Va. Code § 55-7D-4 (1998) (Repl. Vol. 2000) (limiting liability of landowners who allow certain charitable work on their property).

[5]It has been stated:

> Judicial nullification takes place when state courts use state constitutional provisions to overturn legislative decisions about civil justice reform in situations where there was a clear, rational public policy basis for the legislation. This practice hampers past tort reform efforts by undoing the good that legislators have worked to accomplish[.]

Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 246 (2000).

governmental purpose. *See* Syl. pt. 4, *Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831 (1999). Other courts have observed that "[r]ational basis review is minimal in nature." *Adams ex rel. Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 902 (Mo. 1992). Therefore, it is our duty to uphold W. Va. Code § 55-7B-8 "if the purpose of the act is not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law." Syl. pt. 29, in part, *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910). In the instant case, the per curiam opinion has correctly applied these principles in finding that creation of the damage cap statute did not offend our constitution.[6]

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[6]A slim majority of courts considering the issue have similarly affirmed the authority of legislatures to create damage cap statutes. *See Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Fein v. Permanente Med. Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1997); *Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 4 P.3d 1115 (2000); *Bova v. Roig*, 604 N.E.2d 1 (Ind. Ct. App. 1992); *Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 789 P.2d 541 (1990), *overruled on other grounds by Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Adams ex rel. Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992); *Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989); *Martin ex rel. Scoptur v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995). By contrast, a minority of courts have invalidated damage cap statutes. *See Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995); *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 288 Ill. Dec. 636 (1997); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999); *Lakin v. Senco Prods., Inc.*, 329 Or. 62, 987 P.2d 463 (1999); *In re Certification of Questions of Law from United States Court of Appeals for Eighth Circuit (Knowles v. United States)*, 544 N.W.2d 183 (S.D. 1996); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711, *amended on other grounds by* 780 P.2d 260 (Wash. 1989).

## II.

## INFLATIONARY EROSION OF LEGISLATIVE INTENT

The plaintiff in this case attacked the damage cap statute on the grounds that the present-day value of one million dollars is less than it was in 1986 when the Legislature imposed the one million dollar cap on noneconomic damages. Specifically, the plaintiff argued that the actual present-day value of one million dollars is only $648,147. The per curiam opinion found that the damage cap statute was constitutional despite the inflationary erosion of the actual value of one million dollars. While I agree with the per curiam opinion's conclusion as to the question of the constitutionality of the amount of the cap, I firmly disagree with the ultimate disposition of this issue. As I explain below, the cap of one million dollars is nevertheless invalid because it does not fulfill the legislative intent that plaintiffs receive one million dollars as it was valued in 1986.

Illustrative of my point on the impact of inflation is the legislative history attending W. Va. Code § 55-7A-2 (1995) (Repl. Vol. 2000), which imposes a damage cap on a plaintiff's recovery against a parent for his or her child's tortious conduct. By Chapter 1 of the 1957 Acts of the Legislature, the Legislature imposed a cap of $300 in civil actions brought against a parent for tortious conduct by the parent's child. *See* 1957 Acts of the Legislature of West Virginia, Regular Session, Ch. 1, at 2. This legislation remained dormant until 1981. At that time, the Legislature increased the liability cap on parents for tortious conduct of their children to $2,500. *See* 1981 Acts of the Legislature of West Virginia, Regular Session, Ch. 3, at 4. The new cap was left undisturbed until 1995. Then, by Chapter 56 of the

1995 Acts of the Legislature, the Legislature again raised the cap on the recovery from a parent for tortious conduct of the parent's child to the presently recoverable amount of $5,000. *See* 1995 Acts of the Legislature of West Virginia, Regular Session, Ch. 56, at 326.

Thus, the legislative history of W. Va. Code § 55-7A-2 suggests that the Legislature has been alerted on several occasions that inflation has eroded its intent to provide a meaningful maximum recovery under the statute. When so reminded, the Legislature has responded by increasing the cap to compensate for the effects of inflationary pressures.[7]

With respect to the present case, the Legislature created the medical malpractice damage cap statute in question in 1986. W. Va. Code § 55-7B-8 provides that "[i]n any medical professional liability action brought against a health care provider, the maximum amount recoverable as damages for noneconomic loss shall not exceed one million dollars and the jury may be so instructed." "In order to safeguard the expressed legislative intention, it is imperative to view the precise language and terms employed in the statute at issue." *Webster County Comm'n v. Clayton*, 206 W. Va. 107, 112, 522 S.E.2d 201, 206 (1999). The precise language of W. Va. Code § 55-7B-8 provides that noneconomic damages "shall not exceed one million dollars." There is no ambiguity in this statute. Therefore, we must apply, rather than construe its terms. *See* Syl. pt. 1, *VanKirk v. Young*, 180 W. Va. 18, 375 S.E.2d

[7]To date, this Court has not had an opportunity to address W. Va. Code § 55-7A-2. *But see State v. M. D. J.*, 169 W. Va. 568, 573, 289 S.E.2d 191, 194 (1982) (alluding to § 55-7A-2 in passing).

196 (1988).

A strict application of W. Va. Code § 55-7B-8 in the year 2000 is problematic, though, because the legislative intent of allowing a maximum recovery of one million dollars cannot be achieved. Applying the statute's one million dollar damages limit in conjunction with the present-day value of one million dollars means that a plaintiff may only receive a maximum noneconomic award of $648,147. As I view the matter, the per curiam opinion's holding on this issue serves as a de facto legislative reduction in the maximum amount recoverable under the statute. Because the reduction is de facto and not de jure,[8] I believe this Court should have invalidated the statute on the grounds that it no longer fulfills the legislative intent of allowing a maximum recovery of one million dollars in real value.[9] Had the Court invalidated this statute, because of the de facto reduction in the maximum amount recoverable thereunder, I do not feel that

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[8]I agree with the per curiam opinion's interpretation of *Robinson* as requiring a significant de jure reduction in the cap before constitutional implications may be invoked.

[9]The problem imposed by inflation on damage cap statutes has been addressed by several states through the imposition of built-in inflation mechanisms. *See* Colo. Rev. Stat. § 13-21-102.5(c)(I) (1997) (Main Vol. 1998) ("The limitations on damages . . . shall be adjusted for inflation as of January 1, 1998. . . ."); Idaho Code § 6-1603(1) (1987) (Main Vol. 1988) ("[B]eginning on July 1, 1988, and each July 1 thereafter, the cap on noneconomic damages established in this section shall increase or decrease in accordance with the percentage amount of increase or decrease by which the Idaho industrial commission adjusts the average annual wage as computed pursuant to [law]."); Md. Code Ann., Cts. & Jud. Proc. § 11-108(b)(2)(ii) (2000) (Supp. 2000) ("The limitation on noneconomic damages provided . . . shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. . . ."); Mo. Ann. Stat. § 538.210(4) (1986) (West Main Vol. 2000) ("The limitation on awards for noneconomic damages provided for in this section shall be increased or decreased on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. . . ."); Va. Code Ann. § 8.01-581.15 (1999) (Michie Repl. Vol. 2000) ("The maximum recovery limit of $1.5 million shall increase on July 1, 2000, and each July 1 thereafter by $50,000 per year; however, the annual increase on July 1, 2007, and the annual increase on July 1, 2008, shall be $75,000 per year. . . .").

any crisis would have resulted. This is so because the Legislature could easily respond to such a decision by making an upward adjustment of the statute to compensate for the erosion caused by inflation as other state legislatures have done.

## III.

## ATTORNEY'S FEES AND COSTS IN MEDICAL MALPRACTICE CASES

The final issue I must address concerns the request made of this Court that we permit plaintiffs in medical malpractice actions to be awarded "their attorneys fees and costs reasonably expended in pursuing recovery against 'healthcare providers,' should they ultimately prevail at trial, in recognition of the fact that in certain situations, W. Va. Code § 55-7B-8 otherwise deprives them of a reasonable remedy in relation to the severity of the injuries they suffer." The per curiam opinion has rejected this request through silence. For the reasons discussed below, I believe, under certain circumstances, attorney's fees and costs should be awarded in medical malpractice cases.

This Court has long held that "as a general rule each litigant bears his or her own attorney's fees[.]" Syl. pt. 2, in part, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 50, 365 S.E.2d 246, 248 (1986). "This rule, however, known as the 'American rule,' is subject to a number of judicially created exceptions." *Daily Gazette Co., Inc. v. Canady*, 175 W. Va. 249, 250, 332 S.E.2d 262, 263

(1985).[10] Consequently, this issue should be addressed in the context of the limitations imposed by the American rule in authorizing the award of attorney's fees.[11]

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[10]"With certain exceptions, West Virginia has adopted the American rule[.]" *State ex rel. Division of Human Servs. v. Benjamin P.B.*, 190 W. Va. 81, 84, 436 S.E.2d 627, 630 (1993). "The general rule denying awards of attorney fees has developed primarily in the context of civil litigation dealing with controversies between private parties." *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982). More specifically, the rationale behind the American rule has been stated as follows:

> The American Rule, which has been law since the eighteenth century, has four traditional policy justifications: first, that shifting fees would have a "penalizing" effect on losing participants in litigation, which is, after all, inherently uncertain; second, that awarding prevailing parties their attorney's fees would tend to discourage litigants of small means from "seeking to vindicate their rights in court"; third, that it would overburden the judicial system to have to determine reasonable attorney's fees in each case; and fourth, that lawyers might subordinate client interests to avoid irritating judges who later would be determining the lawyers' fees.

John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 Minn. L. Rev. 505, 549 (2000).

[11]The general pronouncement on awarding costs is set out in Rule 54(d) of the West Virginia Rules of Civil Procedure as follows:

> (d) *Cost*. -- Except when express provision therefor is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law. The clerk shall tax the costs within 10 days after judgment is entered, and shall send a copy of the bill of costs to each party affected thereby. On motion by any party served within 10 days after receipt of the bill of costs, the action of the clerk may be reviewed by the court.

We have interpreted the costs provision of this rule to require that, "[w]hen a trial court assesses costs by relying on the provisions of West Virginia Rules of Civil Procedure 54(d), the record must contain specific predicate findings for that decision when the costs are assessed against a prevailing

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This Court succinctly stated the contours of the American rule in Syllabus point 9 of *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991), as follows: "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement except when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons."[12] *See also* Syl. pt. 2, *Sally-Mike* ("As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement."); *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982) ("As a general rule awards of costs and attorney fees are not recoverable in the absence of a provision for their allowance in a statute or court rule.").

*Helmick* makes clear that an exception to the American rule may be created by "rule of court."[13] This exception articulates recognition of the inherent authority of courts[14] to do all things

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[11](...continued)
party." Syl. pt. 1, *Perdomo v. Stevens*, 197 W. Va. 552, 476 S.E.2d 223 (1996). It is also noteworthy that "costs never make the successful party whole because they do not include counsel fees[.]" 3 *Stein on Personal Injury Damages* § 17:49, at 17-63 (3d ed. 1997).

[12]There are seven generally recognized exceptions to the American rule: (1) contracts, (2) common fund doctrine, (3) substantial benefit doctrine, (4) contempt, (5) bad faith, (6) statutes, and (7) rules of court. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1578-1590 (1993).

[13]The *Helmick* formulation of the American rule clarifies loose language contained in some opinions of this Court that seemingly remove the authority of courts to use their inherent powers to award attorney's fees. For example, in *Daily Gazette Co., Inc. v. Canady*, 175 W. Va. 249, 250, 332 S.E.2d 262, 263 (1985), we said that under the American rule "each litigant bears his or her own attorney fees absent express statutory, regulatory, or contractual authority for reimbursement." *Accord Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W. Va. 613, 619, 486 S.E.2d 782,
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necessary in the administration of justice.[15] Nevertheless, this Court has sparingly exercised its inherent

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788 (1997); *Benjamin P.B.*, 190 W. Va. at 84, 436 S.E.2d at 630. This formulation omitted language referring to the power of courts to use their inherent authority to award attorney's fees. Obviously, courts may, in limited situations, use their inherent powers to award attorney's fees when no other authority provides for such. Otherwise, the generally recognized exceptions to the American rule that have been created by courts could not have arisen. *See* 3 *Stein on Personal Injury Damages* § 17:53, at 17-66 (recognizing that exceptions to the American rule "have been developed, generally arising out of a court's equity jurisdiction.").

[14]*See Hall v. Cole*, 412 U.S. 1, 4-5, 93 S. Ct. 1943, 1945-46, 36 L. Ed. 2d 702, 707 (1973) ("Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require."); *Memco, Inc. v. Chronister*, 27 S.W.3d 871, 877 (Mo. Ct. App. 2000) ("The generally recognized exception[] to [the American] rule [is] . . . fees awarded when a court of equity finds it necessary to award them in order to balance benefits."); *City Nat'l Bank & Trust Co. v. Owens*, 565 P.2d 4, 8 (Okla. 1977) ("[O]ne of the exceptions to the general rule recognized at common law and in modern practice, is the court's inherent equitable power to award attorney fees regardless of the fact that an award is not authorized by statute or contract[.]"), *superseded by statute on other grounds as stated in Gorst v. Wagner*, 865 P.2d 1227 (Okla. 1993); *Mehlenbacher v. Demont*, 11 P.3d 871, 874 (Wash. Ct. App. 2000) ("Washington follows the American rule that attorney fees are only recoverable in a suit when authorized by statute, contract, or equity.").

[15]In Syllabus point 3 of *Shields v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940), this Court noted the general rule that, "[a] court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' 14 Am. Juris., Courts, section 171." *Accord* Syl. pt. 2, *Frazee Lumber Co. v. Haden*, 156 W. Va. 844, 197 S.E.2d 634 (1973). Moreover, this Court has recognized inherent judicial powers in a variety of contexts. *See, e.g.*, *Gum v. Dudley*, 202 W. Va. 477, 505 S.E.2d 391 (1997) (imposing sanction for violation of duty of candor); *In re Pauley*, 173 W. Va. 228, 314 S.E.2d 391 (1984) (providing court personnel and allowing for the supervision thereof); *Prager v. Meckling*, 172 W. Va. 785, 310 S.E.2d 852 (1983) (imposing sanctions to maintain a fair and orderly trial); *In re L.E.C.*, 171 W. Va. 670, 301 S.E.2d 627 (1983) (supervising, regulating, defining, and controlling the practice of law); *Perlick & Co. v. Lakeview Creditor's Trustee Comm.*, 171 W. Va. 195, 298 S.E.2d 228 (1982) (eliminating dormant cases from judicial dockets); *E.H. v. Matin*, 168 W. Va. 248, 284 S.E.2d 232 (1981) (transferring actions to lower tribunals for further proceedings); *Sparks v. Sparks*, 165 W. Va. 484, 269 S.E.2d 847 (1980) (granting custody of a child to a person outside jurisdiction of court or permission to one who has custody to take child to another state or foreign jurisdiction); *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 248
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authority to permit attorney's fees to be awarded in specific types of litigation in the absence of a statute or contract by the parties. Following are examples of the limited occasions we have exercised such authority.

In *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc*., 188 W. Va. 468, 425 S.E.2d 144 (1992), we were asked to determine whether attorney's fees could be awarded to a plaintiff who prevailed in a fraud action. In order to answer the question affirmatively, this Court found that "fraud conduct" fell under the judicially adopted "bad faith" exception to the American rule. We further held "that where it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney's fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct." *Bowling*, 188 W. Va. at 475, 425 S.E.2d at 151.

We were similarly requested, in *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986), to decide whether attorney's fees could be recovered by an insured against his or her insurer when the insurer had wrongfully refused to pay a claim filed by the insured. We held in Syllabus point 1 of *Hayseeds* that "[w]henever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured's reasonable attorneys' fees in

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[15](...continued)
S.E.2d 602 (1978) (appointing special prosecutor). For further examples, see authorities cited in *Daily Gazette Co., Inc. v. Canady*, 175 W. Va. at 251-52, 332 S.E.2d at 331-32.

vindicating its claim; (2) the insured's damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience."

In the case of *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), we were asked to determine whether attorney's fees may be awarded to an insured in a declaratory judgment proceeding against an insurer. We held in Syllabus point 2 of that case: "Where a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees arising from the declaratory judgment litigation."

In *Daily Gazette Co., Inc. v. Canady*, 175 W. Va. 249, 332 S.E.2d 262 (1985), this Court was called upon to resolve the question of whether attorney's fees could be directly assessed against an attorney for egregious type trial conduct. We held in the single Syllabus point of that case:

> A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law.

This Court created an additional exception to the American rule in *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86. In that case we were asked to determine whether attorney's fees may be awarded in a mandamus action when no express statutory authority provided for such fees. Utilizing its inherent authority, this Court ruled that, under limited

circumstances, attorney's fees could be awarded. We specifically stated that "[i]n mandamus proceedings where a public officer willfully fails to obey the law, attorney fees will be awarded." *Nelson*, 171 W. Va. at 451, 300 S.E.2d at 92.

In the decision of *Jenkins v. J. C. Penney Casualty Insurance Co*., 167 W. Va. 597, 280 S.E.2d 252 (1981), we were requested to ascertain whether there was an implied private cause of action by a third party against an insurer for violation of the unfair insurance settlement practice statute. In finding that such an action did exist, this Court, *sua sponte*, addressed the issue of attorney's fees in such a cause of action. We acknowledged that "[c]ertainly, increased costs and expenses including the increase in attorney's fees resulting from the failure to offer a prompt fair settlement could be recovered." *Jenkins*, 167 W. Va. at 609 n.12, 280 S.E.2d at 259 n.12.

The foregoing cases illustrate the willingness of this Court to use its inherent authority to depart from the American rule. While we have acknowledged that the "American rule on fee-shifting makes sense in most cases . . ., the fact that the general rule concerning fees works well most of the time does not necessarily imply that the rule works well all of the time." *Garnes v. Fleming Landfill, Inc*., 186 W. Va. 656, 662, 413 S.E.2d 897, 903 (1991). The point I am stressing was aptly stated as follows: "On what principle of justice can a plaintiff[,] wrongfully run down on a public highway[,] recover his doctor's bill but not his lawyer's bill." Judicial Council of Massachusetts, *First Report*, 11 Mass. L.Q. 1, 64 (1925). *See also Rodulfa v. United States*, 295 F. Supp. 28, 29 (D.D.C. 1969) ("In fact, under our system of law, a person who is successful in the litigation is a part loser because he has to pay

his own expenses and counsel fees, except a few minor items that are taxable as costs."). It is because of the recognized potential negative consequences of the American Rule that this Court has, though sparingly, exercised our inherent authority to craft rules that provide remedies in situations where the American rule worked an injustice.[16]

I believe that, as a practical matter, the medical malpractice damage cap statute can be used in an unfair manner to cause injured plaintiffs to incur unnecessarily large litigation expenses. This is true because defendants, who know that their noneconomic damages exposure is statutorily limited in such actions and that the American rule will preclude the imposition of attorney's fees, will act to increase litigation costs in an effort to compel plaintiffs to drop their law suits or prematurely settle their claims because of the huge costs incidental to a trial. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1619 (1993)

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[16]Some commentators have argued that the negative impact of the American rule outweighs its benefits and it should, therefore, be totally abandoned. *See generally* W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 Ariz. J. Int'l & Comp. L. 361, 399 (1999) ("America is . . . the only major nation that denies the winner of a lawsuit the right to collect legal fees from the loser."); Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 Hous. L. Rev. 1915, 1919 (1994) ("The American system of allocating attorney's fees is not necessary to the administration of justice. In fact, it is in many ways an international oddity."); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792, 797 (1966) ("[T]he prospect of recovery of counsel fees on meritorious claims would probably greatly increase the number of clients seeking lawyer's assistance."). At least one jurisdiction, Alaska, has abandoned the American rule altogether. *See* Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 Alaska L. Rev. 33, 34 (1996) ("Alaska Civil Rule 82 entitles the prevailing party in a civil lawsuit to partial compensation of his or her attorney's fees from the losing party.").

(noting a California study showing one effect of the American rule is that defendants use it to "force injured plaintiffs to drop actions by driving up litigation costs"); Bradley L. Smith, *Three Attorney Fee-shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 Mich. L. Rev. 2154, 2155 (1992) ("The American rule has been attacked on grounds of inefficiency and unfairness. Opponents claim the rule promotes wasteful litigation expenditures, implausible claims, strike suits, onerous discovery demands, and spurious defenses. Moreover, the American rule violates the equitable principle that a party who suffers injury should be made whole.").

While I am not prepared to suggest that prevailing plaintiffs should recover attorney's fees in all medical malpractice cases, I do believe that the denial of attorney's fees in medical malpractice cases resulting in a plaintiff's verdict of one million dollars or more in noneconomic damages demonstrates "one of the prominent instances where the American rule concerning attorneys' fees works badly." *Miller v. Fluharty*, 201 W. Va. 685, 693, 500 S.E.2d 310, 318 (1997) (quoting *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 328, 352 S.E.2d 73, 78 (1986)). Plaintiffs in such cases usually will have been forced to incur large litigation expenses that can be traced back to the artificial ceiling imposed by the damage cap statute and the preclusion of attorney's fees by the American rule. For the prevailing plaintiff, the logical result of these artificially imposed limits on his or her recovery is a substantial reduction in his or her ultimate recover due to unnecessarily large litigation expenses. In this regard, it has been correctly observed that "[p]ayment for pain and suffering has, for years, served substantially to pay claimants' lawyers." Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. Ill. L. Rev. 333, 351

(1981). Consequently, I believe it was the duty of this Court to hold that in a medical malpractice action where a plaintiff obtains a verdict awarding the maximum amount (or more) allowable under the damage cap statute, the plaintiff is entitled to a recovery of costs and reasonable attorney's fees.

For the foregoing reasons, I respectfully concur, in part, with and dissent, in part, from the Court's per curiam opinion in this case. I am authorized to state that Chief Justice Maynard joins me in this separate opinion.