IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2001 Term

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June 19, 2001
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OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27464

THE ESTATE OF MARJORIE I. VERBA, BY SALLY JO NOLAN, EXECUTRIX,
Appellant

v.

DAVID A. GHAPHERY, M.D.,
Appellee

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

AFFIRMED

Submitted Upon Rehearing: May 9, 2001
Filed: June 19, 2001

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE MCGRAW and JUSTICE STARCHER dissent and reserve the right to file dissenting opinions.
JUSTICE DAVIS concurs and reserves the right to file a concurring 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. 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." Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer,* 149 W.Va. 740, 143 S.E.2d 351 (1965).

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, *Atchinson v. Erwin,* 172 W.Va. 8, 302 S.E.2d 78 (1983) (as modified in Syllabus Point 4, *Gibson v. West Virginia Department of Highways,* 185 W.Va. 214, 406 S.E.2d 440 (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." Syllabus Point 5, *Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. 720, 414 S.E.2d 877 (1991).

4. "By virtue of the authority of Article 8, Section [13] of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the legislature to enact statutes which abrogate the common law." Syllabus, *Perry v. Twentieth St. Bank*, 157 W.Va. 963, 206 S.E.2d 421 (1974).

5. "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." Syllabus Point 9, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991).

6. "Bringing or defending an action to promote or protect one's economic or property interests does not *per se* constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as 'costs' of the action." Syllabus Point 4, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

Per Curiam:

The appellant, the estate of Marjorie I. Verba, appealed from a decision of the Circuit Court of Ohio County which reduced her medical malpractice judgment from $2,821,000 to $1,020,510.51 as required by the medical malpractice cap set forth in W.Va. Code § 55-7B-8 (1986). On appeal, we were asked to revisit *Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. 720, 414 S.E.2d 877 (1991), in which we unanimously upheld the constitutionality of the $1,000,000 cap on noneconomic damages awarded in medical malpractice cases. By opinion dated December 13, 2000, this Court affirmed the judgment of the circuit court and once again found the medical malpractice cap to be constitutional. The appellant subsequently petitioned for a rehearing, and the petition was granted. On reconsideration, we affirm the judgment of the circuit court and uphold the constitutionality of the cap.

I.

FACTS

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 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.

The appellant brought a medical malpractice action against Dr. Ghaphery and a jury found for the appellant, awarding $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 (1992). As noted above, the trial court reduced the award to conform to the medical malpractice cap in W.Va. Code § 55-7B-8 (1986).

II.

STANDARD OF REVIEW

At the outset, we set forth the relevant principles which guide us in determining the constitutionality 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. 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.

Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer,* 149 W.Va. 740, 143 S.E.2d 351

(1965). Concerning the level of scrutiny to be applied to issues affecting economic rights, we have held:

> 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, *Atchinson v. Erwin,* 172 W.Va. 8, 302 S.E.2d 78 (1983) (as modified in Syllabus Point 4, *Gibson v. West Virginia Department of Highways,* 185 W.Va. 214, 406 S.E.2d 440 (1991)). We now discuss the specific issues before us.

III.

DISCUSSION

This Court held in Syllabus Point 5 of *Robinson v. Charleston Area Medical Center, Inc.,* 186 W.Va. 720, 414 S.E.2d 877 (1991):

> *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.

Accordingly, we find no reason to revisit the constitutional issues previously raised in *Robinson*.[1] Rather, we believe that our prior ruling is subject to the judicial doctrine of *stare decisis* which rests on 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.

Booth v. Sims, 193 W.Va. 323, 350 n. 14, 456 S.E.2d 167, 194 n. 14 (1995) (citation omitted). Finding no palpable mistake or error in *Robinson*, we affirm that decision.

In addition, 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." *Robinson*, 186 W.Va. at 730, 414 S.E.2d at 887 (citation omitted). 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

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[1]In the instant case, the appellant 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.

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.

The appellant also avers that the cap violates the "separation of powers" doctrine, *see* W.Va. Const. art. V, § 1, a claim, according to the appellant, not specifically addressed in *Robinson.* The appellant argues that the cap effectively constitutes a legislative remittitur for any verdict that exceeds $1,000,000 in noneconomic damages. We find no merit in the appellant's argument.

It is beyond dispute that the legislature has the power to alter, amend, change, repudiate, or abrogate the common law. This Court has recognized that "[b]y virtue of the authority of Article 8, Section [13][2] of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the legislature to enact statutes which abrogate the common law." Syllabus, *Perry v. Twentieth St. Bank,* 157 W.Va. 963, 206 S.E.2d 421 (1974) (footnote added). "[T]he indisputable fact [is] that the legislature has the power to change the common law of this State." *Gilman v. Choi,* 185 W.Va. 177, 186, 406 S.E.2d 200, 209 (1990), *overruled on other grounds as stated in Mayhorn v. Logan Med. Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994). *See also Robinson, supra; Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991); and *Wallace v. Wallace,* 155 W.Va. 569, 184 S.E.2d 327 (1971), *overruled on other grounds as stated in Belcher v. Goins,* 184 W.Va. 395, 400 S.E.2d 830 (1990).

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[2]This syllabus point originally referenced Article VIII, § 21 of the state constitution which was the relevant section prior to the 1974 Judicial Reorganization Amendment.

In *Edmonds v. Murphy,* 83 Md.App. 133, 149, 573 A.2d 853, 861 (1990), *aff'd,* 325 Md. 342, 601 A.2d 102 (Md. 1992), the Court of Special Appeals of Maryland recognized that the power to alter the common law includes "the power to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize." (Quoting *Franklin v. Mazda Motor Corp.,* 704 F.Supp. 1325, 1336 (1989)). The court reasoned "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[.]" *Id.* We concur with this reasoning and acknowledge the power of the legislature to set reasonable limits on recoverable damages in civil causes of action.

The appellant next urges the Court to hold the cap invalid in order to provide the legislature with the opportunity to increase the cap based on fifteen years of inflation.[3] The appellant says that inflation has decreased the cap since its passage to a value of $648,147 in 1999 dollars, which is a decrease of more than 35 percent. Accordingly, says the appellant, the cap is no longer the $1,000,000 amount which the legislature intended upon its passage.

We do not believe that the mere passage of time has rendered the medical malpractice cap unconstitutional or invalid. "Presumably the legislature was aware of the effects of inflation and could have

[3]The appellant notes that in response to inflationary erosion, some states have included built-in inflation mechanisms in their medical malpractice statutes. These states include Colorado, Idaho, Maryland, Missouri, and Virginia.

opted for some cap indexed to inflation. That the legislature did not index the cap to inflation but set forth an absolute dollar amount does not render the cap unconstitutional." *Griffin v. Southeastern Pennsylvania Transp. Authority*, 757 A.2d 448, 453 (Pa. Commw. Ct. 2000), *appeal denied by Griffin ex rel. Estate of Griffin v. Southeastern Pennsylvania Transp. Authority,* 2001 WL 169571 (Pa. Feb. 21, 2001). It is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted. If the legislature finds that it does not, it is within its power to amend the legislation as it sees fit. This Court "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." *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 692, 408 S.E.2d 634, 642 (1991) (citation omitted). Accordingly, we decline to find the cap invalid based on inflation.

Finally, the appellant asserts that attorney fees and costs should be awarded in medical malpractice actions where the verdict exceeds the cap. The appellant reasons that a successful malpractice plaintiff can never achieve the statutory limit on noneconomic damages of one million dollars because the award is subject to attorney fees and costs.

Our law recognizes that "[a]s 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." Syllabus Point 9, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991). This Court has

permitted an award of attorney fees where public officials deliberately disregarded mandatory statutory provisions, *see Richardson v. Town of Kimball*, 176 W.Va. 24, 340 S.E.2d 582 (1986); in a trespass action where the losing party intentionally encroached and personally removed boundary markers, *see Miller v. Lambert*, 196 W.Va. 24, 467 S.E.2d 165 (1995); where fraud was shown, *see Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992); in an action against a fiduciary for mismanagement, *see Old Nat'l Bank of Martinsburg v. Hendricks*, 181 W.Va. 537, 383 S.E.2d 502 (1989); in an action to enforce an insurance contract, *see Hayseeds v. State Farm & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986); and where an insurer unfairly failed to promptly settle a legitimate claim, *see Jenkins v. J.C. Penney Casualty Insurance Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), *overruled on other grounds as stated in State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994).

The difficulty with the appellant's position is that intentional and wrongful conduct, like that mentioned above, is not necessarily present in every case where a prevailing medical malpractice plaintiff is awarded noneconomic damages in excess of the statutory limit. As a result, many losing defendants in medical malpractice cases could be assessed attorney fees, not because of intentional wrongdoing, but simply because they chose to defend a claim and lost in the end. We have held:

> Bringing or defending an action to promote or protect one's economic or property interests does not *per se* constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as "costs" of the action.

Syllabus Point 4, *Sally-Mike Properties v. Yokum,* 179 W.Va. 48, 365 S.E.2d 246 (1986). This holding is based on the principal that "[e]veryone who has a good faith dispute requiring a decision by an impartial arbiter is entitled to his day in court." *Yost v. Fuscaldo,* 185 W.Va. 493, 500, 408 S.E.2d 72, 79 (1991) (quoting *Nelson v. Public Employees Insurance Board,* 171 W.Va. 445, 454, 300 S.E.2d 86, 95 (1982)). Permitting attorney fee awards as urged by the appellant runs contrary to this principle.

In addition, the legislature was aware when it enacted the cap that damages awarded to prevailing plaintiffs in medical malpractice cases would be reduced by their attorney fees and costs. Nevertheless, the legislature did not enact a provision in the medical malpractice act permitting fees and costs to prevailing plaintiffs.

Finally, we are not convinced that a rule permitting attorney fees and costs is needed. Our research indicates that this state's medical malpractice cap of $1,000,000, is one of the most liberal caps in the country. In fact, no state has a cap set at a higher amount. Accepting the fact that the cap now has only a present value of approximately $648,147, this amount is still greater than many of the states which limit medical malpractice awards.[4] Accordingly, we decline to permit attorney fees and costs in medical

[4]For example, the cap on noneconomic damages in California is $250,000, *see* Cal. Civil Code § 3333.2(b) (1975); Kansas -- $250,000, *see* Kan. Stat. Ann. § 60-19a02(b) (1988); Missouri -- $350,000, *see* Mo. Ann. Stat. § 538.210 (1986); and Idaho -- $400,000 (adjusted for inflation), *see* Idaho Code § 6-1603(1) (1987); In Virginia**,** the cap *on the total amount recoverable for any injury to, or death of, a patient* is 1.5 million dollars, to increase $50,000 a year after July 1, 2000, *see* Va. Code Ann. § 8.01-581.15 (1999). In Louisiana**,** the total amount recoverable for all malpractice

malpractice cases simply because a prevailing plaintiff's award exceeded the statutory cap.

III.

CONCLUSION

Based on the foregoing, we affirm our holding in *Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. 720, 414 S.E.2d 877 (1991) upholding the constitutionality of the $1,000,000 cap imposed by W.Va. Code § 55-7B-8 (1986) on noneconomic damages awarded in medical malpractice cases. Further, we reject the appellant's claims that the cap is invalid because of inflationary erosion and that attorney fees and costs should be awarded in cases where noneconomic damages exceed the statutory cap. Accordingly, the decision of the Circuit Court of Ohio County is affirmed.

Affirmed.

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claims for injuries to or death of a patient, exclusive of future medical care and related benefits, is $500,000 plus interest and cost, *see* La. Rev. Stat. Ann. 40 § 1299.42B (1991). In Maryland**,** the cap on noneconomic damages in *all personal injury actions, not just medical malpractice actions,* was $500,000 on October 1, 1994 to increase by $15,000 on October 1 of each year following October 1, 1995, *see* Md. Code Ann., [Courts and Judicial Proceedings] § 11-108 (2000).