IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 21-0031

KAYLA MOSS and MICHAEL MOSS, as Father and as next friend of A.M., an infant,

Plaintiffs/Petitioners,

v.

THE UNITED STATES OF AMERICA,

Defendant/Respondent.

On Certified Questions from the United States District Court
for the Northern District of West Virginia

RESPONDENT UNITED STATES OF AMERICA'S BRIEF

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ASSIGNMENTS OF ERROR

On June 30, 2020, Petitioners filed a Motion for Summary Judgment as [sic] the Constitutionality of West Virginia Code § 55-7B-9a, and §55-7B-9d in the matter of *Kayla Moss and Michael Moss, as Father and as next friend of A.M., an infant, v. United States of America*, Civil Action No. 3:19cv187, presently pending in United States District Court for the Northern District of West Virginia. On December 1, 2020, the Honorable Gina M. Groh, Chief United States District Court Judge for the Northern District of West Virginia entered a Memorandum Opinion and Certification Order denying Petitioners' Motion for Summary Judgment without prejudice and certifying the following two questions to this Court:

1. Does West Virginia Code § 55-7B-9(a) or §55-7B-9(d)[1] violate Article V, Section 1 of the West Virginia Constitution because of the Rulemaking clause of Article VIII, 3 provides the Supreme Court of Appeals of West Virginia solely possesses authority to promulgate rules of evidence and procedure?

and

2. Does West Virginia Code § 55-7B-9(a) or § 55-7B-9(d) violate West Virginia's Equal Protection Clause because all medical malpractice claimants are not treated equally under its provisions?

(JA 61-64). Respondent now respectfully submits that this Court answer these Certified Questions in the negative for the reasons more fully set forth herein.

STATEMENT OF THE CASE

On November 4, 2019, Plaintiffs filed a civil Complaint in the United States District Court for the Northern District of West Virginia, pursuant to the Federal Tort Claims Act ("FTCA"),

[1] Although the district court refers to the sections of the West Virginia Code in question as 55-7B-9(a) and 55-7B-9(d), it is the Respondent's understanding that Petitioner in fact argues the constitutionality of Sections 55-7B-9a and 55-7B-9d.

naming City Hospital, Inc.; Theresa Triggs; and the United States of America as defendants. (JA 1-21). Plaintiffs' Complaint sets forth medical negligence claims against defendants, which Plaintiffs further allege proximately caused permanent and severe injuries to Plaintiff Kayla Moss. Plaintiffs also claim that because of defendants' acts or omissions, A.M., the infant daughter of Plaintiff Kayla Moss, suffered a loss of consortium as a result of the injuries sustained by her mother. Generally the United States is immune from suit; however, the FTCA waives the United States' sovereign immunity in tort actions, making the United States liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Thus, the courts determine liability of the United States by applying the substantive tort law of the state where the alleged negligence occurred. *Raplee v. United States*, 842 F.3d 328, 331 (4th Cir. 2016); 28 U.S.C. § 1346(b)(1). Therefore, in FTCA cases brought in Federal court in West Virginia, such as the one at hand, West Virginia's Medical Professional Liability Act ("MPLA"), W.Va. Code § 55-7B-3, *et seq.*, applies. Included in the MPLA are West Virginia Code §§ 55-7B-9a and 55-7B-9d, which provide post-verdict limits on the compensatory damages recoverable in medical negligence cases.

In its Answer to Plaintiffs' Complaint, Respondent United States stated that any damages awarded would be subject to the limits established by the MPLA. (JA49-60). Defendants City Hospital, Inc. and Theresa Triggs did the same. (JA26-48). On June 30, 2020, Petitioners filed a Motion for Summary Judgment as [sic] the Constitutionality of West Virginia Code § 55-7B-9a, and §55-7B-9d. On December 1, 2020, the district court entered its Memorandum Opinion and Certification Order denying Petitioners' Motion for Summary Judgment without prejudice and certifying the instant questions to this Court. (JA 61-64). In issuing its Memorandum Opinion and Certification Order, the district court vacated several dates in the Scheduling Order issued in the case, including the final pre-trial conference and trial dates. (JA62-63). On February 5, 2021, the

district court entered an Order dismissing Plaintiffs' claims against City Hospital, Inc. and Theresa Triggs, as the result of a settlement reached between those parties. On February 8, 2021, this court entered its Order setting a briefing schedule and scheduling the matter for oral argument. Following the dismissal of City Hospital, Inc., and Theresa Triggs from the district court matter, this Court dismissed those defendants as parties from this appeal as well.

SUMMARY OF ARGUMENT

West Virginia Code §§ 55-7B-9a and 55-7B-9d of the Medical Professional Liability Act ("MPLA") provide that certain collateral source payments may be used to offset a verdict in civil medical negligence actions. These statutory provisions do not come into play until after a verdict is returned against a medical provider. In establishing rules about what damages may be recovered in a tort action, the West Virginia legislature performed a classic legislative function. Petitioners' contention that these statutes violate the Separation of Powers Clause fails because the code sections at issue are not rules of evidence, but rather are substantive rules of damages subject to modification by the Legislature. This Court has repeatedly held that the Legislature has the power to enact statutes that abrogate the common law, and that is what the Legislature did here.

Petitioners' contention that the provisions violate Equal Protection Clause of the West Virginia Constitution fares no better. The statutory damages reduction provisions do not treat different classes of medical negligence plaintiffs differently as Petitioners allege, but instead make all medical negligence plaintiffs whole, regardless of whether they hold private insurance or not. And even if the argument could be made that the statutes treat members of the class differently, the West Virginia Legislature enacted these provisions in an attempt to balance various state interests involving vital economic health care issues. For these reasons, Respondent respectfully requests that the certified questions now before this Court be answered in the negative.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court has set oral argument in this matter for September 1, 2021 at 10:00am pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

Three times between 1991 and 2011 this Court has considered the constitutionality of the MPLA's non-economic damages caps as established by West Virginia Code § 55-7B-8, and each time this Court has upheld the statute in question. *See Robinson v. Charleston Area Medical Ctr.*, 414 S.E.2d 877, 186 W. Va. 720 (1991); *Verba v. Ghaphery*, 552 S.E.2d 406, 210 W.Va. 30 (2001); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 227 W.Va. 707 (2011). In each of these three cases, this Court began its analysis with the premise that in reviewing the constitutionality of a legislative provision, separation of powers principles require courts to exercise "due restraint":

> '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).

Robinson, 414 S.E.2d at 883, 186 W. Va. at 726; *Verba,* 552 S.E.2d at 410, 210 W.Va. at 34; *MacDonald,* 715 S.E.2d at 412, 227 W.Va. at 714. Petitioners now ask this Court to once again undertake a constitutionality determination of statutory limits placed on the damages recoverable by plaintiffs in medical negligence actions, this time challenging the post-verdict limits on compensatory damages as provided by West Virginia Code §§ 55-7B-9a and 55-7B-9d.

Respondent respectfully requests this Court exercise the requisite due restraint in making such a determination, as it has done previously, and find that the statutes in question are indeed constitutional under both the Separation of Powers Clause and the Equal Protection Clause of the West Virginia Constitution.

I. West Virginia Code §§ 55-7B-9a and 55-7B-9d Do Not Violate the Separation of Powers Clause of the West Virginia Constitution Because as Common Law Substantive Damages Rules They Are Subject to Legislative Abrogation

The Separation of Powers Clause of the West Virginia Constitution states, "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature." W. Va. Const. Art. V, § 1. Furthermore, Article VIII, § 3 of the West Virginia Constitution provides that only this Court has the authority to promulgate rules of evidence and procedure. Petitioners claim that West Virginia Code §§ 55-7B-9a and 55-7B-9d are unconstitutional because they are rules of evidence which have been created by the Legislature, thus encroaching on this Court's authority.

While Article VIII, § 3 of the West Virginia Constitution grants sole authority to promulgate evidentiary rules to this Court, this Court has recognized "It is beyond dispute that the legislature has the power to alter, amend, change, repudiate, or abrogate *the common law." Verba*, 552 S.E.2d at 411, 210 W.Va. at 35 (W.Va. 2001) (emphasis added), citing W.Va. Const. art VIII, § 13 and W.Va. Code § 2-1-1. Thus, Petitioners' argument fails because although the collateral source rule may be utilized as a rule of evidence, at its heart, the collateral source rule is a substantive rule of damages derived from common law and is thus susceptible to statutory change. *The Propeller Monticello*, 58 U.S. 152, 155 (1854) (the collateral source rule is a "doctrine well established at common law"); *State Farm Mutual Auto Insurance Co. v. Schatken*, 737 S.E.2d 229,

237n.5 (W.Va. 2012) (the collateral source rule "is a substantive rule of damages"). *See Restatement (Second) of Torts §920*, Comment d (2014) ("The collateral-source rule is of common law origin and can be changed by statute.") Indeed, this Court has recognized that the collateral source rule "is both a rule of evidence and a rule of damages." *Kenney v. Liston*, 760 S.E.2d 434, 441, 233 W. Va. 620, 627 (2014). Furthermore, the fact that the collateral source rule carries an evidentiary impact – as many substantive provisions of law inevitably do - does not insulate the substantive aspect of the rule from legislative action. The legislature retains its authority "to set reasonable limits on recoverable damages in civil causes of action." *Verba*, 552 S.E.2d at 411, 210 W.Va. at 35.

In any event, the legislative provisions at issue cannot fairly be categorized as evidentiary rules: they do not address the admissibility of collateral source evidence prior to the return of a verdict. Instead, the statutes provide the mechanism by which damages are adjusted *after* a verdict has been returned under the MPLA. West Virginia Code § 55-7B-9a outlines the process for offsetting a verdict by those payments a plaintiff has received or will receive from collateral sources for the same injury. In addition, the section provides a means for the plaintiff with private insurance to show the court how much he or she has paid in premiums in exchange for the benefits received from said collateral source. Following the post-verdict collateral source hearing, the Court, not the jury, adjusts the verdict and enters judgment pursuant to West Virginia Code § 55-7B-9. *See* W. Va. Code § 55-7B-9a(h). Likewise, West Virginia Code § 55-7B-9d provides,

> A verdict for past medical expenses is limited to: (1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.

W. Va. Code § 55-7B-9d. Furthermore, the fact that the court, not the jury, makes the adjustment pursuant to these statutes also alleviates the concern the collateral source rule was created to

prevent, which is that admission of evidence of collateral source payments at trial will confuse or mislead the jury, causing them to reduce a plaintiff's rightful damages by the amount of payments made or benefits received from collateral sources.

Moreover, in upholding the limits the MPLA places on noneconomic damages this Court held that the Legislature has the power to limit the amount of damages recoverable in a civil case without running afoul of the Constitution:

> As this Court concluded in *Verba*, establishing the amount of damages recoverable in a civil case is within the Legislature's authority to abrogate the common law. We 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[.]"

MacDonald, 715 S.E.2d at 415, 227 W.Va. at 718. Numerous other jurisdictions have reached the same conclusion. *See Carillo v. Boise Tire Co., Inc.*, 274 P.3d 1256, 1268 (Idaho 2012) (noting several jurisdictions, including Idaho, have enacted statutes that abrogate the common law rule, and requiring collateral source payments to be deducted from damage awards); *Wills v. Foster*, 892 N.E.2d 1018 (Ill. Sup. Ct. 2008) (noting that Comment d to section 920A of the Restatement states that the collateral source rule is of common law origin and may be altered by statute and further noting that the Illinois legislature has modified the collateral source rule by statute.); *Law v. Griffith*, 930 N.E.2d 126, 134-35 (Mass.Sup.Jud.Ct. 2010) (holding the court "should leave any further modifications of the collateral source rule's application to the Legislature.").

In conclusion, this Court has held that the West Virginia Legislature has full power under the West Virginia Constitution to alter, amend, change, repudiate, or abrogate the common law and to set reasonable limits on recoverable damages in civil causes of action. *Verba,* 552 S.E.2d at 411, 210 W.Va. at 35. Thus, the Legislature's promulgation of statutes, such as those which

Petitioners now call into question, which set limits on the damages recoverable by a plaintiff does not violate the Separation of Powers Clause. Petitioners' claim should be denied.

II. West Virginia Code §§ 55-7B-9a and 55-7B-9d Do Not Violate the Equal Protection Clause of the West Virginia Constitution Because They Bear a Reasonable Relationship to a Proper Governmental Purpose

Petitioners next allege that §§55-7B-9a and 55-7B-9d violate the Equal Protection Clause of the West Virginia Constitution because the statutes do not treat all members of the class, that is, plaintiffs with medical negligence claims, equally. More specifically, Petitioners argue that these code sections differentiate between class members based upon whether the plaintiffs have private insurance, upon varying differences in the issuance or provisions of their insurance policy, upon the location of where the medical care was provided, and upon whether or not the plaintiffs qualify for Medicare or Medicaid. For the reasons set forth below, Petitioners' claims should be denied.

First of all, Petitioners' claim that the statutes in questions treat members of the class differently is incorrect. Petitioners set forth nine (9) hypotheticals at pages 20 through 23 of their Brief in an attempt to substantiate this assertion. However, in actuality, the statutes place all members of the class, that is medical negligence plaintiffs, on equal footing, because the end result after completion of the collateral hearing process is that all of the members of the class, regardless of whether they had private insurance or not, are made whole. In fact, should the statutes at issue be deemed unconstitutional, an insured plaintiff would recover twice – first via the judgment awarded by the court and then again via the benefit of medical expenses previously paid by his insurer. Likewise, an uninsured plaintiff would only receive those damages awarded as a result of the civil judgment. Instead, the post-verdict offsets place all plaintiffs on an even playing field.

Second, contrary to Petitioners' assertion, the simple question of whether persons within the class are treated equally is not the end of the query. This Court has found "'the right to bring

a tort action for damages, even though there is court involvement, is economically based and is not a 'fundamental right' for ... state constitutional equal protection purposes.'" *O'Dell v. Town of Gauley Bridge*, 425 S.E.2d 551, 557, 188 W. Va. 596, 602 (1992) (quoting *Robinson,* 414 S.E.2d at 885-86, 186 W. Va. at 728-29). Since the statutes in question do not involve a fundamental, constitutional right or a suspect classification such as a gender-based classification, the proper level of analysis is the "rational basis" test, not "strict scrutiny" or an "intermediate" level of scrutiny. The rational basis test asks whether a classification is (1) rational and based on social, economic, historic or geographic factors; (2) bears a reasonable relationship to a proper governmental purpose; and (3) whether all persons within the class are treated equally. If the classification is rational and bears the requisite reasonable relationship, then the statute does not violate the equal protection clause of the West Virginia Constitution. This Court has determined that an equal protection analysis involving the provisions of the MPLA is to be based on the rational basis test since plaintiffs with a potential medical negligence claim are not members of a suspect class. *MacDonald*, 715 S.E.2d at 416, 227 W.Va. at 718; *Robinson*, 414 S.E.2d at 887, 186 W.Va. 730. *See also Gibson v. W. Virginia Dep't of Highways,* 406 S.E.2d 440, 442, 185 W. Va. 214, 216 (1991) *holding modified by Neal v. Marion*, 664 S.E.2d 721, 222 W. Va. 380, (2008).

The statutes in question pass the rational test, because, despite Petitioners' claims, the laws apply to all members of the class, that is, medical negligence plaintiffs equally. There are no provisions within the MPLA which exclude certain members of the class in question. The fact that the code sections may impact members of the class differently is of no consequence when an economic right is at issue. *See Bookman v. Hampshire County Commission*, 455 S.E.2d 814 1995, 193 W.Va. 255 (1995) (statute permitting only property owners whose real property had assessed value of $50,000 could appeal to the Supreme Court of Appeals did not violate equal protection because the statute involved an economic right, the class was not suspect as it encompassed all

property owners, and the Legislature's determination to limit appeals of property owners with assessed value of less than $50,000 was rational because it saved funds and expenses involved in litigation and appellate review); *McDonald v. Cline*, 455 S.E.2d 558, 193 W.Va. 189 (1995) (DUI revocation statute did not violate equal protection even though it had greater adverse impact on working individuals than those who were unemployed).

Clearly West Virginia Code §§ 55-7B-9a and 55-7B-9d meet the rational basis test under the equal protection provision of the West Virginia Constitution. The Legislature's abrogation of the collateral source rule as contained in these sections is (1) rational and based on social and economic factors; (2) bears a reasonable relationship to a proper governmental purpose, that is, to reduce medical malpractice insurance costs and to increase the quality and access to healthcare; and (3) applies equally to all persons within the class (malpractice plaintiffs). West Virginia Code § 55-7B-1 sets forth the Legislative Findings and Declaration of Purpose regarding the MPLA. The Legislature concluded as follows:

> 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 and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage;
>
> ***
>
> The unpredictable nature of traumatic injury health care services often results in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and patient family dissatisfaction and frequent malpractice claims, creating a financial strain on the trauma care system of our state, increasing costs for all users of the trauma care system and impacting the availability of these services, requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers, this balance must guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available;
>
> The cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together

> with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers;
>
> ***
>
> The modernization and structure of the health care delivery system necessitate an update of provisions of this article in order to facilitate and continue the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens.
>
> Therefore, the purpose of this article is to provide a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to:
>
> (1) Compensation for injury and death...
>
> ***

W. Va. Code § 55-7B-1. In enacting the post-verdict collateral source procedure as part of West Virginia's MPLA, the Legislature recognized that "[t]he unpredictable nature of traumatic injury health care services.... requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers . . . [to] guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available." Thus the Legislature sought to achieve the rational goal of "facilitat[ing] and continu[ing] the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens." *Id.* The Legislature sought to balance state interests involving important economic health care issues including adequate and proper compensation to patients injured by medical malpractice, medical care costs, medical

malpractice insurance costs, medical insurance costs, and the necessity of maintaining access to trauma health care and other medical care.

Furthermore, this Court has held previously that when fundamental rights are not implicated, as in the case at hand, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *MacDonald*, 715 S.E.2d at 416, 227 W.Va. at 718; *Robinson*, 414 S.E.2d at 887, 186 W.Va. 730. That is, "it is not [the Court's] prerogative to substitute [its] judgment for that of the Legislature, so long as the classification is rational and bears a reasonable relationship to a proper governmental purpose" it will withstand the equal protection analysis. *MacDonald,* 715 S.E.2d at 418, 227 W. Va. at 720. Clearly, as this Court has recognized, "it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists." *MacDonald,* 715 S.E.2d at 420, 227 W. Va. at 722. The Legislature clearly had a rational basis for enacting the statutes at issue, which bears a reasonable relationship to the purpose of the statute, *i.e.*, to control the increase of both insurance and healthcare costs.

Significantly, Petitioners cite to only one case, a 1985 case out of Kansas, *Wentling v. Medical Anesthesia Services*, 701 P.2d 939, 237 Kan. 503 (1985), to support its equal protection argument. However, Petitioners' reliance on *Wentling* is misplaced, and the case is simply not on point to the issue at hand. The statute at issue in *Wentling*, K.S.A. 60-471, did not apply post-verdict as the provisions now under consideration by this Court do. Instead, K.S.A. 60–471, governed whether evidence of reimbursement or indemnification received by an injured party was admissible as evidence to be considered by the jury. Completely different from the Kansas statute, the West Virginia provisions now under consideration by this Court establish a process by which *the court*, as opposed to a jury of laypeople, post-judgment, reduces the compensatory damages to avoid a double recovery and to ensure the plaintiff is made whole. The Kansas provisions held to

be unconstitutional in the *Wentling* matter governed the admissibility of evidence to be considered by the jury in reaching its decision as to the proper damages to be awarded. The concerns the *Wentling* Court had about the Kansas statute, that is, of the factfinder not fully compensating the plaintiff for his damages because of confusion caused by evidence of collateral source payments already received, simply do not come into play regarding West Virginia's post-verdict statutory limits on compensatory damages.

This Court previously found the MPLA and its 2003 amendments to be "an integral part of the comprehensive resolution of the clear social and economic problem perceived by the Legislature" as to medical malpractice cases, the insurance industry, and the health care industry. W.Va. Code § 55-7B-1. *MacDonald*, 715 S.E.2d at 415-418; *Robinson*, 414 S.E.2d at 886. Respondent now submits that such finding still applies to the MPLA and its amendments today.

CONCLUSION

West Virginia Code §§ 55-7B-9a and 55-7B-9d do not violate either the Separation of Powers Clause or the Equal Protection Clause of the West Virginia Constitution for the reasons set forth herein. As such, the Respondent United States of America respectfully requests that this Honorable Court answer the questions certified to it by the United States District Court for the Northern District of West Virginia in the negative.

Respectfully submitted,

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KAYLA MOSS and MICHAEL MOSS, as Father and as next friend of A.M., an infant,

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v.

THE UNITED STATES OF AMERICA,

Defendant/Respondent.

CERTIFICATE OF SERVICE

I, Erin K. Reisenweber, attorney for Respondent, do hereby certify that on May 24, 2021, I filed the foregoing Respondent's Brief upon the parties by mailing the same via the United States mail, postage prepaid, to the parties at the following addresses:

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