

ARGUMENT AND CITATION OF AUTHORITY

In 2005, the Georgia legislature enacted O.C.G.A. § 51-13-1, which caps the noneconomic damages that a plaintiff may receive in medical malpractice cases. As to any verdict returned or judgment entered, awards of noneconomic damages against health care providers are capped at \$350,000. O.C.G.A. § 51-13-1(b). The statute caps awards of noneconomic damages against a single medical care facility at \$350,000 and awards against multiple medical care facilities at \$700,000. O.C.G.A. § 51-13-1(d). In any case, an award of noneconomic damages is capped at \$1,050,000. O.C.G.A. § 51-13-1(e).

The solemn acts of the Georgia General Assembly are presumed to be valid. Shadrick v. Bledsoe, 186 Ga. 345, 350, 198 S.E. 535, 539 (1938). The Georgia Supreme Court has stated:

This presumption of validity is more than a pious formula to be sanctimoniously repeated at the opening of an opinion and forgotten at the end. It is fortified by the principle that absent a debilitating constitutional flaw in the Act, this court must effectuate the common will expressed in the purpose of the legislation. To go beyond this and review with a hostile eye or an adverse mind is to usurp a power which our Constitution has lodged in our legislature.

Petty v. Hosp. Auth. of Douglas County, 233 Ga. 109, 110, 210 S.E.2d 317, 318 (1974). The Plaintiff fails to show that O.C.G.A. § 51-13-1 contains a “debilitating constitutional flaw.” For this Court to find such a flaw would usurp the power that the Georgia courts have found lodged in the legislature.

I. THE CAP ON NON-ECONOMIC DAMAGES DOES NOT VIOLATE PLAINTIFF’S RIGHT TO A JURY TRIAL

The Georgia Constitution provides that “[t]he right to trial by jury shall remain inviolate.” Art. I, § I, ¶ XI. This means “that [the right to a jury trial] shall not be taken away, as it existed in 1798, when the [first Georgia Constitution] was adopted, and not that there must be a jury in all cases.” Swails v. State, 263 Ga. 276, 278, 431 S.E.2d 101, 103 (1993) (interior quotations

and emphasis omitted). As Justice Lumpkin explained in an opinion that he wrote for the Georgia Supreme Court in 1848:

An act [of the legislature] which merely authorizes a judgment to be rendered, without the intervention of a jury, is not on that account unconstitutional... it is difficult to prescribe the limits to the power of the Legislature... Cases might arise which would authorize that body to go very far in disregarding the rules and regulations which are ordinarily observed in the enactment of a law for the assertion and defense of rights. *There is no invasion or infringement of the Constitution, so long as trial by jury is not directly or indirectly, abolished.* I repeat, it is impossible to say at what point the Legislature ought to stop; and if undertaken to be said by the Courts, it must be at some point of *great excess*, that such a stand can be made.

Flint River Steamboat Co. v. Foster, 5 Ga. 194, 208 (1848) (superseded by statute on other grounds) (emphasis added).

Plaintiff argues in his brief that one of the essential elements of the jury trial in Georgia has always been the right to have one's economic damages determined by a jury and that, to limit the award of such damages unconstitutionally prohibits a jury from performing its obligations, thus denies Plaintiff to a trial by jury. However, the cap on non-economic damages does not deny Plaintiff his right to a jury trial under the Georgia Constitution. The cap is no different from other legislation passed by the Georgia General Assembly limiting either recoverable damages or parties who can be sued in tort actions.

A comparison of the Georgia Constitution to the U.S. Constitution shows that the cap does not violate Plaintiff's right to a jury trial. The right to a jury trial under the Georgia Constitution is narrower and more limited than the right under the U.S. Constitution. Swails, 263 Ga. at 278, 431 S.E.2d at 102-03 (1993); see Flint River Steamboat Co., 5 Ga. at 205-08. The U.S. Supreme Court held that the U.S. Constitution's right to trial by a jury does not require that a jury determine the amount of a plaintiff's remedy. Tull v. United States, 481 U.S. 412, 425-27, 107 S.Ct. 1831, 1839 (1987).

In Tull the Supreme Court held that the petitioner was entitled to a trial by jury on the issues of liability but refused to extend that right to the remedy phase of the trial. Id. at 426-27, 107 S.Ct. at 1839. The Supreme Court was unaware of any evidence indicating “that the Framers [of the Constitution] meant to extend the right to a jury to the remedy phase of a civil trial.” Id. at 426 n.9, 107 S.Ct. at 1839 n.9; accord Matter of Certified Questions of Law v. Knowles, 544 N.W.2d 183, 201 (S.D. 1996) (“The right to a jury trial ensures that the civil jury itself will not be abolished; the right does not extend the jury’s function to the remedy phase of the trial.”) (superseded by statute on other grounds). Thus Tull¹, along with other federal courts, have found that no inherent constitutional rights are violated if the jury’s involvement is not extended to the remedy phase of the trial.

Because the right to a jury trial is narrower under the Georgia Constitution, and the U.S. Constitution does not guarantee the jury’s involvement in the remedy phase of a trial, a medical malpractice plaintiff is not constitutionally entitled to be awarded 100% of the damages determined by the jury. There is no constitutional right to an unfettered jury, and limiting a plaintiff’s right to recover unlimited non-economic damages is constitutional.

The Georgia legislature can eliminate common law rights of action without interfering with the constitutional right to a trial by jury. If the right to sue can constitutionally be eliminated, then a limit as to the remedy must also be constitutional. The Georgia Constitution does not preclude the legislature from “abrogating or circumscribing common law or statutory rights of action.” State v. Moseley, 263 Ga. 680, 681, 436 S.E.2d 632, 634 (1993); accord Teasley v. Mathis, 243 Ga. 561, 562, 225 S.E.2d 57, 58-59 (1979) (upholding as constitutional the elimination of the right to sue for exemplary damages where there was no serious injury).

¹ Defendants acknowledge that the federal supremacy clause of the U.S. Constitution does not compel states to apply the Seventh Amendment of the Constitution or case law interpreting the Seventh Amendment, however Supreme Court case law certainly can provide an important guide regarding the scope of a trial by jury.

Thus, if it is constitutional for the legislature to eliminate an entire cause of action, the Georgia Constitution cannot not require that a jury determine the amount of a plaintiff's remedy. See e.g., Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) ("it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries . . . it is not the role of the jury to determine the legal consequences of its factual findings. That is a matter for the legislature.")

"[T]he provisions of our State Constitution... '[does] not mean that there must be a jury in all cases. New forums may be erected, and new remedies provided, accommodated to the ever shifting state of society.' " Swails, 263 Ga. at 278, 431 S.E.2d at 103 (quoting Flint River Steamboat Co., 5 Ga. at 207-208). Since 1848, Georgia Supreme Court has upheld statutes that eliminated or modified the recovery of damages in personal injury and tort cases. See e.g., Teasley, 243 Ga. at 561, 255 S.E.2d at 57 (eliminating exemplary damages under a no-fault scheme except in cases involving serious injury); Moseley, 263 Ga. at 680, 436 S.E.2d at 632 (limiting the recovery of punitive damages). In both Teasley and Moseley, the Georgia Supreme Court held that the General Assembly is empowered to modify how much a claimant may ultimately recover in a tort case and that such modifications are compliant with the constitutional right to trial by jury. Statutory changes that have limited a jury's ability to ultimately determine damages and that have been found constitutional include: Georgia's treble damages provision, O.C.G.A. § 20-3-514(c), Georgia's punitive damages statute, O.C.G.A. § 51-12-5.1(g), and Georgia's comparative negligence statute, O.C.G.A. § 51-12-33.

Georgia's punitive damages statute and treble damages provision function in a similar manner to O.C.G.A. § 51-13-1. The jury hears the case, decides the facts, and determines the amount of damages. The court then adjusts the relevant damages according to the statutes, if necessary. Similarly, Georgia's comparative negligence statute allows a jury to find the damages. The court then reduces the damages as needed according to the comparative

negligence statute. The Georgia General Assembly stated that the cap in O.C.G.A. § 51-13-1 is to be applied after a “verdict [is] returned or judgment entered.” This is the same method used in the treble damages and comparative negligence statutes.

The punitive damages statute is particularly similar in nature to O.C.G.A. § 51-13-1. “[T]he right to punitive damages is as old as the right of trial by jury itself, is a well established principle of the common law, and is not, as many suppose, an innovation upon the rules of the common law.” Time Warner Entertainment Co. v. Six Flags over Georgia, LLC, 254 Ga. App. 598, 601, 563 S.E.2d 178, 182 (2002) (internal quotations omitted). Even though juries in 1798 determined the amount of punitive damages in civil cases, Georgia courts have upheld the punitive damage statute as constitutional despite claims that it violates the right to trial by jury.

The Court in Moseley stated:

The Moseleys . . . contend that under the common law it was the function of the jury to determine what amount of punitive damages must be awarded to a plaintiff to punish or deter a defendant and that the legislature [through O.C.G.A. 51-12-5.1(g)] improperly interferes with that award, and thus violates Art. 1, Sec. 1, Par. 11 [of the Georgia Constitution] The Moseleys, in essence, are asking this Court to rule that Art. 1, Sec. 1, Par. 11 prohibits the General Assembly from abrogating or circumscribing common law or statutory rights of action. We have held, however, that that provision of the Constitution has no such effect, and we decline to part from that rule in this case.

Moseley, 263 Ga. at 681, 436 S.E.2d at 633 (citations omitted)

The statutory cap on noneconomic damages does not restrict the jury or the jury’s right to award any more than Georgia’s punitive damages, treble damages, or comparative negligence statutes. To adopt Plaintiff’s conclusion that the cap usurps the fact-finding responsibilities of the jury is contrary to the Georgia Supreme Court’s holdings that the punitive damages, treble damages, or comparative negligence statutes violate the constitutional right to a jury trial. In addressing these three statutes, the Georgia Supreme Court confronted the fact that the statutes had changed the established principles of common law at the time the Georgia Constitution was

adopted in 1798. Even before a jury can make a determination of damages, the facts a jury may consider are severely limited by the rules of evidence. Does Plaintiff contend that the rules of evidence usurp the fact-finding abilities and responsibilities of a jury and are therefore unconstitutional?

The General Assembly has consistently removed common law causes of action by providing immunity for certain actors like government employees, government officials, providing defenses in tort action, or simply abolishing the cause of action all together. For example, the High-Voltage Safety Act requires notice to utility protection centers before work is done on a high-voltage power line. In the absence of such notice, the owner or operator of the high-voltage line has no liability for any resulting damage. O.C.G.A. § 46-3-30 et seq. The Workers' Compensation Act eliminates an employee's right to sue an employer for tort damages. O.C.G.A. § 34-9-11. Such actions are more extreme with respect to the right to a jury trial than simply statutorily limiting an award determined by a jury. “[I]f the legislature can act within its proper sphere of authority and completely eliminate a cause of action for negligence or repeal whole categories of recoverable damages under recognized torts, then it must follow that the legislature has the power to define causes of action and limit categories of recoverable damages for reasonable policy considerations” Kirkland v. Blaine County Med. Ctr., 134 Idaho 464, 468, 4 P.3d 1115, 1119 (2000) (quoting Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D.Md. 1989)).

Plaintiff cites to cases from the Supreme Courts in Alabama, Oregon, Washington, and Florida where the courts have found that noneconomic caps violate a plaintiff's right to trial by jury as guaranteed in those state's constitutions. However, courts in other states that have very similar constitutional rights to trial by jury have found noneconomic caps to be constitutional. See Kirkland, 134 Idaho at 464, 4 P.3d at 1115; Evans v. State, 56 P.3d 1046 (Alaska 2002);

Gourley v. Neb. Methodist Health, 265 Neb. 918, 663 N.W.2d 43 (2003); Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992); Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007); Peters v. Saft, 597 A.2d 50 (Me 1991); English v. New England Med. Ctr., 541 N.E.2d 329 (Mass. 1989); Pulliam v. Coastal Emergency Serv., 509 S.E.2d 307 (Va. 1999). For ease of reference, Defendants are attaching courtesy copies of the out of state referenced decisions for the court.

A statute that limits the damages or remedies determined by a jury can be constitutional. The cap does not violate the right to a jury trial because the statute does not infringe upon the jury's right to decide cases. The jury can still fact find. Section 51-13-1 only limits the legal consequences of the jury's findings. A plaintiff is not prohibited from presenting his case and a jury still determines the facts and damages under O.C.G.A. § 51-13-1. This is enough to satisfy the right to a jury trial in the Georgia Constitution. See Evans, 56 P.3d at 1046; Ethridge v. Med. Ctr. Hosp., 237 Va. 87, 376 S.E.2d 525 (1989); Kirkland, 134 Idaho at 464, 4 P.3d at 1115. The Georgia Supreme Court has held that the legislature may make policy decisions and enact statutes that allow courts to alter the damages awarded by a jury before determining the ultimate remedy. This is what the legislature did in O.C.G.A. § 51-13-1. The cap on noneconomic damages does not inhibit the constitutional right to a trial by jury.

II. THE CAP DOES NOT VIOLATE THE SEPARATION OF POWERS

The cap on non-economic damages in medical malpractice cases also does not violate the separation of powers. "While the separation of powers is fundamental to our constitutional form of government, it does not follow that a complete separation is desirable or was intended. The three departments of government are not kept wholly separate in the Georgia Constitution." Adams v. State, 282 Ga. App. 819, 821, 640 S.E.2d 329, 333 (2006) (citations and internal quotations omitted). The difference between the "legislative and judicial function is that the

former sets up rights or inhibitions, usually general in character; while the latter interprets, applies, and enforces existing law as related to subsequent acts of persons amenable thereto.” South View Cemetery Ass’n v. Haley, 199 Ga. 478, 480, 34 S.E.2d 863, 866 (1945). According to the separation of powers doctrine, “every court has the constitutional obligation to interpret, apply, and enforce the existing law, including those which govern the exercise of its jurisdiction.” Fullwood v. Sivley, 271 Ga. 248, 517 S.E.2d 511, 516 (1999).

Plaintiff contends that O.C.G.A. § 51-13-1 violates the separation of powers and is unconstitutional because it allegedly divests the trial court of its power to grant a new trial or a remittitur. While it is true that the Georgia Constitution vests the judiciary with the power to grant a new trial, Plaintiff’s argument fails for two reasons. First, the statute at issue does not prevent the court from granting a new trial or a remittitur. Second, the authority to grant remittitur was not exclusively granted by the Georgia Constitution. If that were the case, all remedy-altering legislation would be unconstitutional and would violate the separation of powers doctrine.

The non-economic damages cap does not modify the trial court’s authority to grant a new trial or remittitur. The trial court still has this authority under O.C.G.A. § 51-11-12. By enacting O.C.G.A. § 51-13-1, the legislature limited a plaintiff’s rights to recover non-economic damages in medical malpractice cases. The Georgia Supreme Court has held that a statute which merely provides a rule for determining the proper measure of damages in a civil case does not violate the separation of powers. Clay v. Cent. R.R. & Banking Co. of Ga., 84 Ga. 345, 350, 10 S.E. 967, 969 (1890) (“We think the act merely prescribes a different rule for the measurement of damages, and we know of nothing in our constitution which prohibits the legislature from prescribing a rule for the measure of damages”).

Assuming, arguendo, that the cap on noneconomic damages is a form of remittitur, the authority to grant remittitur was not vested in the judiciary by the Georgia Constitution. While the General Assembly cannot divest a Georgia court of the jurisdiction granted to it by the Georgia Constitution, additur and remittitur are legislative creations. Riddle v. Golden Isles Broad., LLC, 292 Ga. App. 888, 889 n.3, 666 S.E.2d 75, 77 n.3 (2008). The concept of remittitur is contrary to the common law, and O.C.G.A. §51-12-12(b) granted this right to the trial courts. Riddle, 292 Ga. App. at 889 n.3, 666 S.E.2d at 77 n.3. Thus the cap on non-economic damages cannot invade the judiciary's constitutional jurisdiction.

Plaintiff also argues that caps on non-economic damages constitute a "legislative remittitur" that violates the doctrine of separation of powers.² In support, he relies on the Illinois case of Best v. Taylor Machine Works, 179 Ill.2d 367, 689 N.E.2d 1057 (1997). The cap on non-economic damages is a limitation on the rights of the plaintiff. It is not a limitation of the powers of the judiciary. See e.g., Kirkland, 134 Idaho at 471, 4 P.3d at 1122 (rejecting the argument that a cap on non-economic damages violated the separation of powers because it limits the plaintiff's rights, not the power of the judiciary). The cap is not even similar to remittitur. It applies equally to all plaintiffs and is not case or fact specific. The General Assembly is not making a post-verdict judgment as to the appropriateness of a jury's finding. Instead, it has limited plaintiff's rights.

This is not unusual. The rights of plaintiffs are constitutionally limited through other means, such as statutes of limitation and statutes of repose. See e.g. Nichols v. Gross, 282 Ga. 811, 813, 653 S.E.2d 747, 748 (2007) (upholding the statute of repose in medical malpractice cases). The cap on non-economic damages is similar to statutes of limitations and statutes of

² Conversely, Plaintiff has attached affidavits to his brief about the evils of "tort reform." Plaintiff apparently does not see the inherent separation of powers problem with asking this Court to reexamine the evidence underlying this

repose in that it limits the rights of the plaintiffs, not the judiciary. Thus, the cap does not violate the separation of powers.

Also, other states have rejected the reasoning that a cap on non-economic damages violates the separation of powers. See e.g., Pulliam, 257 Va. at 1, 509 S.E.2d at 307; Guzman v. St. Francis Hosp., Inc., 240 Wis.2d 559, 623 N.W.2d 776 (2000); Verba v. Ghaphery, 210 W.Va. 30, 552 S.E.2d 406 (2001); Evans, 56 P.3d at 1046; Garhart v. Columbia/Healthone, LLC, 95 P.3d 571 (Colo. 2004); Gourley, 265 Neb. at 918, 663 N.W.2d at 43. The cap on noneconomic damages does not violate the separation of powers and is not a legislative remittitur.

III. THE CAP DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. The Court Should Use a Rational Basis Standard of Review

Under an equal protection challenge, the Court should review O.C.G.A. § 51-13-1 under the rational basis standard. Plaintiff argues that the statute is subject to strict scrutiny because it “affects” a fundamental right – the right to a jury trial. (Plaintiff’s Brief at 13). Plaintiff pulled the word “affected” from a special concurrence authored by Justice Sears-Collins. Grissom v. Gleason, 262 Ga. 374, 383, 418 S.E.2d 27, 33-34 (1992) (Sears-Collins, J., specially concurring).

However, strict scrutiny only applies where the State’s classification disadvantages a suspect class or a fundamental right is infringed or impeded. Ga. Dep’t of Human Res. v. Sweat, 276 Ga. 627, 628, 580 S.E.2d 206, 210 (2003); City of Atlanta v. Watson, 267 Ga. 185, 187, 475 S.E.2d 896, 899 (1996). Plaintiff also argues that strict scrutiny is appropriate because a fundamental rights is “involved.” When the Georgia Supreme Court uses the word “involved,” it is stating that because a fundamental right or suspect class is not involved, a rational basis review applies. See Grissom, 262 Ga. at 377, 418 S.E.2d at 30; Watson, 267 Ga. at 187, 475 S.E.2d at 899. If a fundamental right is not involved, then there is no way for it to be impeded or

public policy issue, which is exclusively reserved for the General Assembly. The Defendants incorporate its Motion

infringed. However, the mere involvement of a fundamental right is not the test for determining whether strict scrutiny applies. The fundamental right must be impeded or infringed. Sweat, 276 Ga. at 628, 580 S.E.2d at 210; Watson, 267 Ga. at 187, 475 S.E.2d at 899. The cap on non-economic damages in O.C.G.A. § 51-13-1 does not infringe or impede a fundamental right.

If Plaintiff were correct that a fundamental right only need be affected or involved in order to trigger strict scrutiny, the result would be absurd. Any law passed by the legislature that dealt with jury trials would necessarily be subject to strict scrutiny. To accept Plaintiff's argument would render the Georgia Supreme Court incorrect in its rational basis review of the statute of repose in medical malpractice cases. See Nichols, 282 Ga. at 813, 653 S.E.2d at 748 (applying a rational basis review to the five-year statute of repose in medical malpractice cases). Surely a statute of repose "affects" or "involves" a person's right to a jury trial. Thus whether a fundamental right is "affected" or "involved" cannot be the proper test to determine whether strict scrutiny applies.

Here, the classification of medical malpractice cases deserves a rational basis review. Since 1979, the Georgia appellate courts have reviewed equal protection challenges in medical malpractice cases using a rational basis standard of review. See e.g., Hamby v. Neurological Assoc., P.C., 243 Ga. 698, 256 S.E.2d 378 (1979). The Georgia Supreme Court last reaffirmed this approach a year ago when it held the five-year statute of repose constitutional under an equal protection challenge. Nichols, 282 Ga. 811, 653 S.E.2d 747.

Additionally, O.C.G.A. § 51-13-1 does not involve a "fundamental right," as Plaintiff contends³. "Fundamental constitutional rights are those that are recognized as having a value so essential to individual liberty in our society that their infringement merits careful scrutiny by the

to Strike into this Brief.

³ Judge Arrington recognized that Section 51-13-1 did not involve a fundamental right. Similarly, Judge Bessen applied the rational basis standard or review.

courts.” Ambles v. State, 259 Ga. 406, 408, 383 S.E.2d 555 (1989) (holding statute that restricts incompetent witnesses from testifying does not violate equal protection). The Plaintiff attempts to characterize O.C.G.A. § 51-13-1 as affecting the right to a jury trial. This characterization is too broad, and the cases relied upon by Plaintiff should not be persuasive as they involve the general right to a jury trial. Balbosa v. State, 275 Ga. 574, 575, 571 S.E.2d 368, 369 (2002) (waiving the right to a jury trial in a criminal proceeding); Kelley v. Ga. Dep’t of Human Res., 269 Ga. 384, 384-85, 498 S.E.2d 741, 743 (1998) (holding no right to a jury trial in an action for child support); Wright v. Davis, 184 Ga. 846, 852-53, 193 S.E.2d 757, 760-61 (1937) (holding that criminal defendant had right to a jury composed entirely of qualified jurors); Salter v. Glenn, Duffield & Co., 42 Ga. 64, 80 (1871) (stating that a judge may not set aside a jury’s verdict purely because he disagrees with it); Craig v. Maltbie, 1 Ga. 544, 546 (1846) (discussing the different ways a statute allows a suit to be commenced in which a jury trial results).

Plaintiff does not cite to any Georgia case holding that tort damages are considered a “fundamental right.” The Defendants have also not identified any cases with this holding. In a dissent authored by Justice Hill regarding an equal protection challenge to an ante-litem requirement, Justice Hill applied the rational basis review, just as the Court had, and noted that such review assumed that recovering compensatory damages was not a fundamental right. Shoemaker v. Almore Mgmt., Inc., 249 Ga. 430, 433 n.1, 291 S.E.2d 549, 555 n1 (1982) (Hill, J., dissenting). In his dissent, Justice Hill does not challenge this assumption or the standard of review used by the Court. See Id. Accordingly, this Court should examine the alleged equal protection issues using a rational basis review. See Sweat, 276 Ga. at 628, 580 S.E.2d at 210.

Under the rational basis analysis in an equal protection challenge, a statute is examined to see “[i]f the legislative purpose is legitimate and the classification drawn has some reasonable relation to furthering that purpose.” Smith v. Cobb County-Kennestone Hosp. Auth., 262 Ga.

566, 570, 423 S.E.2d 235, 238 (1992) (internal quotations omitted). “[T]he court will uphold that statute if , under any conceivable set of facts, the classification bears a rational relationship to a legitimate end of government.” Nichols, 282 Ga. at 813, 653 S.E.2d at 748 (quoting Craven v. Lowndes County Hosp. Auth., 263 Ga. 657, 437 S.E.2d 308 (1993)). The Plaintiff must convince the court that the legislative facts on which the statute is based could not reasonably have been conceived to be true by the legislature at the time the statute was passed. Id. He cannot do so here.

B. The facts relied upon by the legislature in enacting O.C.G.A. § 51-13-1 were reasonably conceived to be true at that time.

The legislative facts on which O.C.G.A. § 51-13-1 is based were reasonably conceived to be true by Georgia’s legislature. Plaintiff asserts that no health care crisis existed that could warrant the caps created by O.C.G.A. § 51-13-1 and that a crisis did not exist merely because the General Assembly said so. (Plaintiff’s Brief at 15). In support, he cites several experts and two judges who reached the same conclusion. (Id. at 14). However, the conclusions of a few people are not sufficient to show that it was not reasonable for the General Assembly to conceive, at the time the statute was passed, that a crisis over malpractice insurance existed.

It was reasonable for the legislature to believe that Georgia faced a crisis due to increasing medical malpractice insurance premiums. The General Assembly heard over twenty hours of testimony before it passed Senate Bill 3 (later codified as O.C.G.A. § 51-13-1). Hanna Yi Crockett, et al., Peach Sheet, Review of Selected Legislation: Civil Practice and Procedure Generally, 22 Ga. State L. Rev. 221, 223 (2005). The Medical Association of Georgia feared that without tort reform, the state would not be able to attract and retain an adequate number of doctors. Id. at 224. In the House, Representative Tom Rice testified that the increase in medical

insurance premiums, the number of insurance companies leaving the state, and the number of medical specialists and facilities leaving the state caused him to support the bill. Id. at 235.

The Supreme Court of the United States has explained:

States are not required to convince the courts of the correctness of their legislative judgments Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 101 S.Ct. 715, 724 (1981). Thus, even if in hind-sight the legislature was mistaken about the medical crisis facing Georgia, that would not render the legislation invalid. Based on the testimony in the General Assembly, our legislature had a reasonable basis to conceive that the State faced a crisis over medical malpractice insurance premiums.

C. The goals behind the passage of O.C.G.A. § 51-13-1 are legitimate.

Here, the legislative purpose of O.C.G.A. § 51-13-1 is legitimate. In the preamble and section 1 of Senate Bill 3, the General Assembly set forth its reasons for enacting the law under its police power. See generally 2005 Ga. Laws 1. The General Assembly found that Georgia needed limits on medical malpractice awards to assist healthcare providers in locating and securing affordable malpractice insurance coverage. Id. The General Assembly also found that the lack of affordable malpractice insurance had the potential to reduce the availability of access to healthcare services, which in turn would result in an adverse impact on the health and well-being of Georgia residents. Id. The General Assembly intended to provide predictability to the resolution of health care liability claims, which would promote the provision of health care liability insurance. Id. These are legitimate interests that the General Assembly can regulate.

The Georgia Supreme Court has recognized that it is a legitimate goal of the state to enact legislation to address the unique issues that arise in medical malpractice cases. See Smith, 262

Ga. at 570-71, 423 S.E.2d at 238-39. In Smith, the Court held that the General Assembly's goals of "providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole" were legitimate. Id. Given the General Assembly's legislative findings in this case, there is no reason to conclude that the similar legislative goals are any less legitimate today.

By enacting O.C.G.A. § 51-13-1, the Georgia legislature sought to promote predictability and improvement in the provision of quality health care services, the provision of health care liability insurance, and to ensure the availability of physicians in Georgia. The Georgia Supreme Court found that these goals are legitimate. Smith, 262 Ga. at 570, 423 S.E.2d at 238.

D. The Caps Created by O.C.G.A. §51-13-1 are Reasonable and Rationally Related to Promoting the Legitimate Goals of the Legislature

The caps created by O.C.G.A. § 51-13-1 are reasonable and rationally related to the goals of the legislature. The General Assembly stated that it intended to provide predictability to the resolution of health care liability claims. 2005 Ga. Laws 1. To do this, the General Assembly capped the most unpredictable part of medical malpractice cases, non-economic damages. The problem with non-economic damages awards is that there is no yardstick against which the damages are measured. See e.g., Arnsdorff v. Fortner, 276 Ga. App. 1, 5, 622 S.E.2d 395, 399 (2005) (citing Smith v. Crump, 223 Ga. App. 52, 476 S.E.2d 817 (1996)). Without any objective criteria in determining a non-economic damage award, there is no guarantee that in similar cases a jury will return similar awards. See e.g., Joseph Sanders, Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad), 55 DePaul L. Rev. 489 (2006).

Because these awards lack predictability, the General Assembly created order by drawing a line. In doing so, the General Assembly rationally chose to define the upper limits of exposure for non-economic damages. Under section 51-13-1, the value of any medical malpractice case - whether the claimant is rich, poor, high wage earner, or low wage earner - can be determined with some degree of certainty by adding up (1) the amount of the past and future medical bills, (2) the amount of the past and future lost wages, and (3) the upper limits of pain and suffering depending on the number and type of medical tortfeasor. In turn, caps on noneconomic damages can help malpractice insurance providers better predict likely recoveries for malpractice claims. Such predictability would take much of the guesswork out of determining insurance premiums and would reduce the possibility that an insurance carrier is subject to an extremely high and unpredicted award, which could drive that insurance carrier out of business or out of the state. While it is likely that any cap on non-economic damages will result in at least one unsatisfied plaintiff somewhere along the way, the General Assembly made a reasonable policy decision when designating the amount of recoverable non-economic damages, which is rationally related to its legitimate goals.

E. The Application of O.C.G.A. § 51-13-1 to Medical Malpractice Plaintiffs Does Not Violate Equal Protection

Plaintiff argues that O.C.G.A. § 51-13-1 violates the equal protection clause because it makes distinctions and classifications resulting in allegedly disparate treatment of individuals in certain situations. Specifically, Plaintiff argues that the statute treats: (1) severely injured malpractice plaintiffs differently from those with less severe injuries; (2) low income malpractice plaintiffs differently from high income plaintiffs; (3) those injured by a different number of medical defendants differently than those injured by one defendant; (4) medical malpractice

plaintiffs differently from plaintiffs in other tort cases; and, (5) married and unmarried plaintiffs differently.

“The equal protection clause does not exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another.” Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 274, 658 S.E.2d 603, 606-07 (2008) (quoting Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299 (1930)). “The person who is asserting the equal protection claim has the burden to establish that he is similarly situated to members of the class who are treated differently from him. If the person asserting the violation cannot make the foregoing showing, there is no need to continue with an equal protection analysis.” Bell v. Austin, 278 Ga. 844, 847, 607 S.E. 2d 569, 573-74 (2005) (citations and interior quotations omitted). Even if disparate treatment exists, it does not render the statute unconstitutional. See Rodriguez v. State, 275 Ga. 283, 286, 565 S.E.2d 458, 461 (2002).

1. Significant versus minimal injuries

Plaintiff argues that the statute should be held unconstitutional because the legislature’s decision to cap non-economic damages at \$350,000 results in disparate treatment among plaintiffs who incur significant non-economic damages versus those who suffer minimal non-economic damages. Is there really disparate treatment among these fictitious plaintiffs? Almost any category of plaintiffs can be sub-divided into additional categories in an attempt to illustrate disparate treatment. Here, there is no disparate treatment because the proper category is plaintiffs with a medical malpractice claim. All such plaintiff’s are limited to the amount of non-economic damages that they can receive. Also, the problem with these fictitious plaintiffs is that no one knows in advance which claimants have sustained more or less than \$350,000 in non-economic damages.

At any rate, Plaintiff's "fairness" argument ignores the relevant constitutional question: was the legislature's decision to cap non-economic damages arbitrary and capricious? The answer is no. In an attempt to accomplish the goals of improving predictability of health care liability claims, the legislature targeted the most unpredictable aspect of medical malpractice cases, the non-economic damages. Thus, the legislature's decision to cap non-economic damages in medical malpractice cases is rationally related to a legitimate state interest.

2. Low-income versus high-income plaintiffs

Similarly, Plaintiff argues that the statute treats high-income medical malpractice plaintiffs differently from low-income plaintiffs. A plain reading of the statute does not demonstrate disparate treatment. The cap on non-economic damages uniformly applies to all Georgia citizens, regardless of financial means. Even if this Court concludes that there is disparate treatment among wealthy and poor individuals, the question then becomes is such treatment rationally related to a legitimate purpose. Again, the answer is yes. In order to provide predictability to medical malpractice claims, the legislature capped the most unpredictable component, the non-economic damages.

3. Injuries cause by a single facility versus multiple facilities and married versus un-married plaintiffs

Plaintiff makes a distinction between injuries caused by multiple medical facilities versus one facility and married plaintiffs versus unmarried plaintiffs. A plain reading of the statute does not demonstrate disparate treatment. Section 51-13-1 applies equally to all Georgia citizens. The Plaintiff is taking a results oriented approach, which has been clearly rejected by the Georgia Supreme Court.

Plaintiff's arguments are based on examples where the result is unfair. In Nichols, the initial misdiagnosis of malignant skin cancer lead to the death of Ronald Nicholas five years

later. Nichols, 282 Ga. at 812, 653 S.E.2d at 748. Suit was not filed until more than five years after the initial misdiagnosis. Id. The Court rejected the notion that the statute of repose was unfair because some patients would not discover their injury until after five years had passed and the statute of repose barred their claim. Id. at 815, 653 S.E.2d 749. This Court should not be swayed by Plaintiff's fairness arguments.

Assuming, arguendo, that Plaintiff's classifications do result in disparate treatment. The question is not, "Is this fair?" The question is whether such treatment is rationally related to the legitimate goal of promoting predictability in medical malpractice claims. As discussed above, the answer is yes.

4. Medical malpractice plaintiffs versus other tort plaintiffs

Plaintiff's distinction between medical malpractice plaintiffs versus general tort plaintiffs, is without merit. Finding that all medical malpractice plaintiffs are similarly situated to all other tort plaintiffs would create equal protection issues with fundamental elements of our system of justice, such as statutes of limitation and repose.

The Georgia Supreme Court has upheld the constitutionality of the separate classification of medical malpractice claims from other tort claims. Nichols, 282 Ga. at 813, 653 S.E.2d at 748; see also Perry v. Atlanta Hosp. & Med. Ctr., Inc., 255 Ga. 431, 431 (1986) (holding that the separate classification of medical malpractice plaintiffs from plaintiffs in other civil cases is reasonable, not arbitrary, and has a fair and substantial relationship to the object of the legislation); Allrid v. Emory Univ., 249 Ga. 35, 38, 285 S.E.2d 521, 524 (1982) (upholding separate classification of medical malpractice actions is a rational exercise of legislative power). The Court has even upheld the constitutionality of distinguishing between a two-year statute of limitations for loss of consortium in medical malpractice claims versus a four-year statute of limitations for loss of consortium in other cases. Hamby, 243 Ga. at 698, 256 S.E.2d at 378.

The distinction here between medical malpractice plaintiffs and other tort plaintiffs is constitutional. As discussed above, it is rationally related to the legitimate goal of providing predictability to medical malpractice claims. The cap on non-economic damages in medical malpractice cases does not violate equal protection.

IV. SENATE BILL 3 AND SECTION 51-13-1 ARE NOT "SPECIAL LAWS"

The Georgia Constitution prohibits general laws that do not apply uniformly across the state and special laws where a provision has been made by a general law. Ga. Const. Art. III, Sec. VI, Par. IV. On its face, O.C.G.A. § 51-13-1 applies to all civil litigants in Georgia and is a general law regarding medical malpractice cases. There is no question that O.C.G.A. §51-13-1, applies equally throughout the state. In fact, the intention of the capping non-economic damages is to create uniform recoveries across the State in order to provide predictability to valuing medical malpractice claims.

Georgia law is clear that the prohibition of "special" laws does not restrict the General Assembly from creating reasonable and legitimate classifications. Matthews v. Macon Water Auth., 273 Ga. 436, 542 S.E.2d 106 (2001) (holding that the General Assembly may exclude certain persons or things from the application of a general law). The Georgia Supreme Court has explained that the reasonableness of a "special law" is essentially an equal protection analysis. Lasseter v. Ga. Pub. Serv. Comm'n, 253 Ga. 227, 319 S.E.2d 824 (1984).

Section 51-13-1 is not pre-empted by the existence of purported "general" laws regarding medical malpractice claims. The General Assembly has enacted a number of separate statutes regarding medical malpractice claims, including, but not limited to, sections 9-3-70, 9-3-71, 51-1-27, 51-1-29, and 51-1-29.1, to name a few. Likewise, the General Assembly has enacted a number of statutes over the years that treat different classes of tort claimants differently: section 51-4-1, et. seq. (wrongful death), sections 51-1-11 and 51-1-11.1 (product liability cases), section

51-1-31 (immunity for donation of bad food), and section 51-1-52 (immunity for landowners who allow wildlife to traverse their property). The Georgia Supreme Court has never invalidated any of these statutes on the grounds that they were “special laws” under the Georgia Constitution, even though they distinguish among classes of tortfeasors and tort claimants.

Finally, Plaintiff’s argument that Sections 51-1-6 and 51-1-9 control is ultimately false. Section 51-1-6 is a general law; however, it does not create a cause of action or define any substantive rights. Instead, it permits the recovery of damages for breach of a legal duty. See e.g., Project Control Serv., Inc. v. Reynolds, 247 Ga. App. 889, 545 S.E.2d 593 (2001). Similarly, section 51-1-9 simply authorizes a recovery by various family members. The General Assembly did not specify in that code section the cause of action or the parameters of the damages award. The cause of action and the damages that can be recovered by the family members are still defined by other tort and substantive laws, such as section 51-1-11.1 for product liability cases and section 51-4-1 for wrongful death cases. Under this analysis, Senate Bill 3 and Section 51-13-1 are not “special laws” under paragraph IV(a) or IV(c) of the Georgia Constitution.

CONCLUSION

The General Assembly enacted a fair, rational, and reasonable law that directly relates to creating predictability in medical malpractice cases, which is a legitimate governmental interest. The cap on non-economic damages does not deprive the Plaintiff of his right to a jury trial. It does not violate the separation of powers, and it is not a “special law.” Accordingly, the Defendants respectfully request that the Court deny Plaintiff’s motion to declare the cap on non-economic damages in O.C.G.A. § 51-13-1 unconstitutional.

This 13th day of July, 2009.

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