IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ROBERT LLOYD, Individually, and ROBERT LLOYD, as Administrator of the Estate of Margaret Lloyd, Deceased Plaintiff, v. CANYON SUDAR PARTNERS, LLC, SSC ATLANTA OPERATING COMPANY, LLC, SAVASENIORCARE ADMINISTRATIVE SERVICES, LLC and SAVASENIORCARE, LLC, Defendant.	§	Civil Action File No: 2008CV11617-7

DEFENDANTS' MOTION TO STRIKE AFFIDAVITS

COME NOW Defendants Canyon Sudar Partners, LLC, SSC Atlanta Operating Company, LLC, SavaSeniorCare Administrative Services, LLC And SavaSeniorCare, LLC ("Defendants"), through their attorneys, and move the Court to strike the affidavits of Professor Marc Rodwin (Plaintiff's Brief, Exh. C), Professor Thomas Eaton (Plaintiff's Brief, Exh. D), Professor Lucinda Finley (Plaintiff's Brief, Exh. E), David M. Shepherd (Plaintiff's Brief, Exh. F), and Dr. Anthony Robbins (Plaintiff's Brief, Exh. G), attached to Plaintiff's Brief In Support of His Motion for Declaratory Judgment Regarding the Constitutionality of O.C.G.A. §15-13-1.

I. THE COURT MUST RESTRICT ITS ANALYSIS TO THE FACTS ACTUALLY CONSIDERED BY THE GEORGIA GENERAL ASSEMBLY

The solemn acts of the General Assembly are presumed to be valid. Shadrick v. Bledsoe, 186 Ga. 345, 350, 198 S.E. 535, 539 (1938). As 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. Hospital Authority of Douglas County, 233 Ga. 109, 110, 210 S.E.2d 317, 318 (1974). While a court analyzing a statute on equal protection grounds is not bound by the General Assembly's pronouncement that it had a rational basis for a law, this Court is limited to the evidence considered by the General Assembly at the time the bill was presented. Smith v. Cobb County-Kennestone Hospital Authority, 262 Ga. 566, 570, 423 S.E.2d 235, 239 (1992); Craven v. Lowndes County Hospital Auth., 263 Ga. 657, 658, 437 S.E.2d 308, 310 (1993). Otherwise, any disgruntled member of the public could submit their displeasure with a law to the court to reopen the debate.

The affidavits submitted here exemplify the problem posed when the evidence is expanded beyond what was considered by the General Assembly at the time of the debate. None of the affidavits submitted by Plaintiff mention Ms. Lloyd or in any way relate to the facts of the case. Rather, all of the affidavits deal with the larger issue of whether "tort reform" generally or caps on non-economic damages are a good idea for Georgia and whether the affiants have a "better" way of analyzing the public policy issues. In short, the affidavits are nothing more than an attempt to litigate the wisdom of the policy decisions made by the legislature. This is precisely the kind of situation that the Georgia Supreme Court, the United States Supreme Court, and other appellate courts have cautioned against in cases alleging the unconstitutionality of a law. See e.g., Gourley v. Nebraska Methodist Health System, Inc., 663 N.W.2d 43, 68 (Neb. 2003) (listing cases holding that states that will not reexamine the factual basis justifying a statute).

If the Court considers the affidavits here, it will directly usurp the policymaking power of the General Assembly, which conducted hearings, made findings of fact, listened to hours of debate from many interested groups, and weighed the pros and cons before deciding that this law was needed for the State. See Franklin v. Harper, 205 Ga. 779, 55 S.E.2d 221 (1949) (holding

that policy decisions about the "wisdom, policy, or expediency of the law" are matters purely for the elected legislative representatives). While Georgia does not publish legislative history, a summary of a bill's history is part of the "Peach Sheets" published by the Georgia State University School of Law. A copy of the "Peach Sheet" for Senate Bill 3 is attached hereto as Exhibit "A." 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 complete text of Senate Bill 3 is attached as Exhibit "B." 2005 Ga. Laws. 1. The Peach Sheet summarizes the body of "evidence" considered by the General Assembly. In accordance with well-established Georgia law, the Court should restrict its inquiry to these matters only and should strike the "expert" affidavits submitted by Plaintiff.

II. THE COURT SHOULD EXCLUDE THE AFFIDAVITS ON EVIDENTIARY GROUNDS

The affidavits suffer from numerous evidentiary problems, including unsupported conclusions, inappropriate legal conclusions and reliance on hearsay, including many opinions of other people who have not been sworn in. While an expert[1] may base their opinion on facts not in the record, they are limited in the scope and breadth of their opinions by the applicable rules of evidence. See O.C.G.A. §24-9-67.1. This includes limitations on conclusory statements and acting as the mere conduit for the opinions of others. O.C.G.A. § 24-3-1; Stephen W. Brown Radiology Assoc. v. Gowers, 157 Ga, App. 770, 780, 278 S.E.2d 653, 664 (1981). "While an expert may support his opinion by reference to books, statistical sources and other learned sources, his testimony is inadmissible when it is merely a restatement of a textbook opinion rather than an independent expression of his own opinion." Spruell v. Smith, 185 Ga. App. 484, 364 S.E.2d 594, 596 (1988).

[1] By this statement, Defendants are not conceding that the affiants qualify as experts.

A. The Affidavits are Irrelevant

The relevant inquiry is whether the General Assembly had a rational basis for enacting Senate Bill 3. To this end, the issue is what legislative facts they considered during the debate leading up to the passage of Senate Bill 3. Notably, none of the affiants testified that they presented any of their "findings" to the General Assembly. In short, their affidavits are nothing more than post-hoc commentary on the wisdom of Senate Bill 3 from their perspective.

Likewise, some of the affidavits focus on "tort reform" issues in the United States generally, in other states, or, just the concept of "tort reform" without any attempt to focus on the problems unique to Georgia. For example, Professor Finley made no attempt to link any of her testimony to any of the actual problems confronting the citizens of Georgia. (See Plaintiff's Brief, Exh. E). Instead, Professor Finley commented on the alleged unfairness of a $350,000 cap for women and children in obstetrical cases. However, Professor Finley did not consider how many cases in Georgia have historically involved both a provider and a facility, which, under the new scheme, would be eligible for more non-economic damages than other types of cases. Similarly, the affiants repeatedly refer to data and studies published after the General Assembly enacted the law in 2005. For example, at least two of the articles cited by Professor Rodwin were published in 2006 and the affidavits of Professor Thomas Eaton and Dr. Anthony Robbins are replete with references to studies from 2007. (See Plaintiff's Brief, Exhs. C, D, G). Plaintiff fails to make any showing as to why these studies are relevant to policy decisions that were made in 2004.

B. The Affidavits Contain Political Commentary, Bare Conclusions and Unsupported Assertions, Not Admissible Evidence

The affiants offer a lot of commentary about whether "tort reform" is a good idea in the form of bare conclusions, unsupported assertions, or reliance on double, triple, and, in some cases, quadruple hearsay. For example:

- Each of the affiants repeatedly refers to opinion-based documents as if they were fact, including, but not limited to, law review articles, textbooks, and even websites related to partisan groups like "Americans for Insurance Reform."
- Professor Rodwin makes several dubious statements on page 6 of his affidavit, such as "[t]he AMA data is authoritative," "[t]he data collected in the AMA surveys contradict the political position that the AMA takes in its public positions and testimony before Congress," and that "[s]tate affiliates of the AMA, such as the Medical Association of Georgia (MAG), often make similar claims." Professor Rodwin offers no support for these and other conclusory opinions.
- Dr. Robbins' affidavit comments on the "credibility" of various arguments, data, and positions taken by non-parties like the Medical Association of Georgia and the American Medical Association.
- Dr. Robbins bloviates that "[a]lthough it is not known when the data for 2004 first became available or when it was finalized, the fact that the GBPW did not publish this 2004 data until March 2006 is regrettable because it left uncorrected the GBPW's inaccurate statements . . ." (Affidavit of Dr. Anthony Robbins, p. 9). Dr. Robins does not identify when the assertions were supposedly made or to whom they were supposedly made. Moreover, Dr. Robins does not offer any reason why he, as an expert, can pass on the credibility of anyone, let alone a nonparty to this litigation, in violation of the long-standing evidentiary rule against such testimony. See e.g., Patterson v.

State, 278 Ga.App. 168, 628 S.E.2d 618 (2006) (reaffirming the rule that an expert may not pass on the credibility or believability of a witness).

- While Dr. Robbins graciously acknowledges that the rate of General Surgeons declined between 1986 and 2004, he then offers his bare conclusion that, in his opinion, "[t]his decline, however, cannot sensibly be attributed to any malpractice "crisis" in Georgia or to factors unique to Georgia" but instead on a "well-known, long run, nationwide and, indeed, worldwide trend towards" sub-specialization. (Plaintiff's Brief, Exh. G at 12). Again, Dr. Robbins offers absolutely no citation to support this conclusion.
- Professor Finley refers to a "study" about the insurance cycle in 2002 published on the web page for the partisan group Americans for Insurance Reform. That "study," in turn, purports to be a summary of a "comprehensive study," sponsored by the group that published the document, compiled by an actuary whose credentials are not contained anywhere in the document. In short, Professor Finley relies upon conclusions contained within hearsay, within hearsay, within hearsay.
- Professor Finley based her "analysis" on verdict "data" she and others selected from California, Florida, and Maryland.
- Professor Finley concedes that she has not conducted any research specific to Georgia malpractice cases. (Plaintiff's Brief, Exh. E at 45). Nonetheless, she offers her unsupported conclusion that there "is no reason, however, to think that Georgia juries are significantly different from jurors in other states . . . or that Georgia juries would allocate damages in a significantly different way than jurors in other states." Of course, if this were true, then venue would

never matter and the organized plaintiffs' bar would not have opposed or challenged the constitutionality of O.C.G.A. §§9-10-31 and 9-10-31.1.

- Professor Finley's argument is premised on the idea that there is a hard and fast "value" to non-economic damages claims and that the effect of Section 51-13-1 is to cap the damages at less than fair value. Professor Finley does not offer any support about the fair value of non-economic damages claims for any party.
- Professor Finley does not offer any explanation as to why $350,000/$500,000/$1,050,000 in non-economic damages is an insufficient amount of compensation for any particular plaintiff, the Plaintiff in this case, or for any of the groups she contends are "disproportionately" affected by caps on non-economic damages.
- Professor Finley misinterprets the plain language of Section 51-13-1(a)(4)(E) to try to make her point about disparate impact. (Plaintiff's Brief, Exh. E at 46). The General Assembly specifically provided for recovery of the economic value of lost services in the statute.
- Professor Eaton repeatedly refers to law review articles that summarize past "studies" of "tort reform" by authors who did not conduct the underlying study in the first place. (See e.g., Plaintiff's Brief, Exh. E at 6).
- Professor Eaton comments that "[u]nfortunately, there is little reason to believe that self-regulation by the medical profession will adequately address the risk of negligent medical care." (Plaintiff's Brief, Exh. E at 12). While Professor Eaton cites to an article about the survey upon which this comment is supposedly based, he did not cite to any of the raw data, the questions

asked, or make any showing that the survey was conducted in any way that would satisfy a Daubert style challenge under O.C.G.A. §24-9-67.1.

- Professor Eaton comments on a judge's survey he (and others) conducted to draw the conclusion that the "vast majority of Georgia judges in both Superior and State courts" have not observed juries "making excessive damage awards." (Plaintiff's Brief, Exh. E at 18). Again, Professor Eaton did not offer any evidence regarding his definition of "excessive," or the methodology, the validity, the error rate, or any other basis that would satisfy a Daubert challenge.
- On pages 19 and 20 of his affidavit, Professor Eaton talks about his review of Georgia case filings and why he concluded Georgia was not faced with a medical malpractice "crisis." However, Professor Eaton never defined what would constitute a medical malpractice crisis or otherwise explain the yardstick he used to measure the results.

These are but examples of the political commentary that the affiants claim as "evidence." For all of these reasons and more, the Court should strike these affidavits from the record.

CONCLUSION

The affiants should have made these arguments to the General Assembly as part of the public debate before the law was enacted. Regardless of whether the "facts," conclusions, and arguments contained in the affidavits were made available to the General Assembly at the time, the affidavits should not be admitted now in an effort to reopen the debate at the trial court level.

This 13th day of July, 2009.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing *Defendants' Motion To Strike Affidavits* upon all parties to this matter by depositing a copy of same in the U.S. Mail, with sufficient postage thereon, addressed as follows:

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This 13th day of July, 2009.

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