

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

BETTY NESTLEHUTT and BRUCE	)	
NESTLEHUTT,	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION FILE
	)	NO. 2007EV002223-J
ATLANTA OCULOPLASTIC SURGERY,	)	
P.C., d/b/a OCULUS,	)	
Defendant.	)	
_____	)	

ORDER DECLARING O.C.G.A. § 51-13-1 UNCONSTITUTIONAL

This medical malpractice action arose out of the negligent care and treatment of Plaintiff Betty Nestlehutt during certain elective procedures. Plaintiff Bruce Nestlehutt also sought damages for loss of consortium. After hearing the testimony and considering the evidence, the jury returned a verdict in favor of Plaintiffs. Under their verdict, the jury awarded Plaintiff Betty Nestlehutt \$115,000.00 for past and future medical expenses and \$900,000.00 in noneconomic damages, and awarded Bruce Nestlehutt \$250,000.00 for loss of consortium. (See, Jury Verdict, filed 10/20/2008). Plaintiffs then moved for entry of the judgment, as rendered, and for this Court to declare the noneconomic caps statute, codified at O.C.G.A. §51-13-1, unconstitutional. Defendant responded and objected to the motion. Defendant also moved to strike various affidavits submitted with the Plaintiffs' motion. This Court set the matter for a hearing, and counsel for all parties appeared and argued the motion. The matter is now ripe for decision.

(1) Motion to Strike Affidavits

In support of their motion to declare the statute unconstitutional, Plaintiffs filed several affidavits from various "experts" expressing opinions regarding the existence of a medical crisis and the need for tort reform, in general. The affidavits also express opinions regarding the

impact of the noneconomic damages cap on the medical profession and Georgia residents. As part of its response to the motion, Defendant moves to strike these affidavits as improperly filed. Plaintiffs responded and objected to the motion to strike. Because the affidavits potentially bear on the Court's decision regarding constitutionality of the statute, this motion will be addressed first.

In ruling on this motion, this Court notes that it is well established under both the Georgia and federal Constitutions that a successful equal protection challenge requires a showing from the movant that the statute was undertaken with an unreasonable purpose or was arbitrary and capricious. City of Atlanta v. Watson, 267 Ga. 185 (1996). In other words, the party who challenges legislation on equal protection grounds bears the burden of establishing that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker." Craven v. Lowndes County Hosp. Auth., 263 Ga. 657, 659 (1993); see also, Vance v. Bradley, 440 U.S. 93, 111 (1979); Cherokee County v. Greater Atlanta Homebuilders Ass'n, 255 Ga. App. 764, 767 (2002). What this Court is not permitted to do, however, is go behind the legislative findings or reject the legislature's viewpoint or judgment. Vance, supra; 440 U.S. 93, 111 (1979). "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." FCC v. Beach Communications, 508 U.S. 307, 313 (1993).

Therefore, in light of the above law, this Court finds that Plaintiffs are permitted to file additional evidence in the record. At a minimum, Plaintiffs must be given the opportunity to meet their burden of proof, and whether such evidence is in the form of affidavits, or citation to other legal authorities, the law contemplates such evidence. For these reasons, the affidavits are

properly filed, and the motion to strike them should be and hereby is **DENIED**. However, such evidence cannot be used to impeach the legislature's findings. Because the affidavits submitted in this case attempt to challenge the legislature's findings regarding the existence and scope of a medical malpractice "crisis" in this state, they will not be considered by this Court in ruling on the equal protection challenge.¹ Moreover, this Court notes that the affidavits filed by Plaintiffs are not originals; rather, they appear to be copies of affidavits previously filed in another malpractice action in Fulton County Superior Court. For this reason, as well, they will not be considered.

In sum, the affidavits will not be stricken; however, this Court will not consider them in ruling on the pending motion.

(2) Motion to Declare O.C.G.A. § 51-13-1 Unconstitutional

In their motion, Plaintiffs contend that the cap on noneconomic damages is unconstitutional because the cap violates the Georgia Constitution's guarantee of a right to a jury trial, violates the separation of powers, violates equal protection under the Georgia Constitution, and is a "special law" which unconstitutionally favors one group over another. In contrast, Defendant argues that the General Assembly did not unconstitutionally restrict plaintiffs' right to a jury trial, did not interfere with the trial court's authority to grant remittitur or new trial, and the enactment of this statute was a reasonable and rational exercise of the legislature's authority.

Initially, this Court recognizes that the issue before it is one that is charged with significant ramifications. It is an unfortunate reality that a medical malpractice lawsuit pits the former patient against the previously trusted health care provider(s). The question before this

¹ These affidavits are not relevant or pertinent to the other constitutional challenges raised by Plaintiffs in this case,

court is a narrow one: Is the cap on noneconomic damages in medical malpractice cases, as set forth in O.C.G.A. §51-13-1, constitutional? That Code section provides,

In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed \$350,000.00 regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

O.C.G.A. § 51-13-1(b). Subsections (c) and (d) go on to provide for this same cap on economic damages in actions against a single medical facility, and a cap of \$700,000.00 if the action is against multiple medical facilities. Under subsection (e), the aggregate amount of noneconomic damages recoverable by a plaintiff “shall in no event exceed” \$1,050,000.00. *Id.*

This Code section was enacted by the General Assembly in 2005 as part of an effort at tort reform, introduced in Senate Bill 3 (SB 3).² The stated purposes of the bill are to “promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims ...” Ga. L. 2005, p.1, § 1. The legislature also found that the passage of SB 3 would “assist in promoting the provision of health care liability insurance by insurance providers.” *Id.* Also cited as a concern was the number of medical providers and facilities leaving the state as a result of the cost of medical malpractice awards. Hannah Y. Crockett, et al, *Torts and Civil Practice*, 22 Ga. St. U. L. Rev. 221, 235 (Fall, 2005).

and will not be considered in regard to those arguments, either.

² A similar tort reform bill, HB 1028, failed to pass in the 2004 session – apparently as a result of dissention over the noneconomic damages cap. Hannah Y. Crockett, et al, *Torts and Civil Practice*, 22 Ga. St. U. L. Rev. 221, 223 (Fall, 2005).

Complaints about a “crisis” in the medical field are far from new.³ Current attention on this issue centers around issues involving caps on damages.⁴ In modern tort actions, there are four types of recoverable damages in most medical malpractice lawsuits: economic, noneconomic, punitive and total damages. As compared to economic damages, noneconomic damages are difficult to quantify, and they are typically left to the discretion of the jury. As a result, medical malpractice insurers and health care providers have generally blamed unlimited noneconomic damages for the rising costs of medical malpractice liability insurance. Melissa C. Gregory, *Recent Developments in Health Care Law: Capping Noneconomic Damages in Medical Malpractice Suits is not the Panacea of the “Medical Liability Crisis,”* 31 Wm. Mitchell L. Rev. 1031, 1032-1033 (2005); U.S. General Accounting Office (GAO), *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* (June, 2003) (hereinafter “GAO-03-702”). In response, many states have enacted caps or limits on noneconomic damages in an attempt to minimize the potential cost of malpractice claims and ease the evaluation of the potential risks and losses from claims. Kevin J. Gfell, *The Constitutional and Economic Implications of a National Cap on Non- Economic Damages in*

3 Medical providers have contended since the early- to mid-Nineteenth Century that there has been a medical malpractice crisis pitting physicians against injured patients and their attorneys. See, Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 Fordham L. Rev. 943 (2004); see also, *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 447 (Wis. 2005) (citing, Struve). As noted by Struve, the frequency of medical malpractice actions shot upward in the 1830s and 1840s, resulting in some physicians refusing to treat patients for fear of subsequent lawsuits. Id. (citing, James C. Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America*, note 23, at 111 (1993)).

4 California was one of the first states to enact legislation that specifically limited noneconomic damages. California's Medical Injury Compensation Reform Act (MICRA) of 1975 limited noneconomic damages to \$250,000 and is still in place today. Twenty-six states followed California's example and enacted caps on noneconomic damages between the years 1975 and 1995. Melissa C. Gregory, *Recent Developments in Health Care Law: Capping Noneconomic Damages in Medical Malpractice Suits is not the Panacea of the “Medical Liability Crisis,”* 31 Wm. Mitchell L. Rev. 1031, 1036-1037 (2005). However, these statutes faced numerous constitutional challenges, of which many were successful, and by the end of 2000 only twenty states had noneconomic damages caps in place. Id.

Medical Malpractice Actions, 37 Ind. L. Rev. 773 (2004).⁵ Georgia enacted the present cap on noneconomic damages in 2005, and although other courts in this country have dealt with this issue, the Georgia Supreme Court has not yet addressed the validity of O.C.G.A. §51-13-1.⁶

After review of the record in this case, the argument of counsel, and after a thorough review of the applicable case law and commentary on this issue, this Court finds that the noneconomic damages cap contained in O.C.G.A. § 51-13-1 is unconstitutional. In so holding, it is important to recognize that any right of action existing at common law may be modified or abrogated by the legislature. Teasley v. Mathis, 243 Ga. 561 (1979). This right and power of the legislature, however, is not absolute, and it is bounded by constitutional limitations. Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60 (1985). It is within this framework that this Court makes its holding.

(a) O.C.G.A. § 51-13-1 Violates the Right to a Jury Trial

First, this Court finds that this Code section violates the right to a jury trial guaranteed by the Georgia Constitution. In making this finding, some historical perspective is necessary. The right to a jury trial is contained of the Seventh Amendment of the U.S. Constitution, but it is the individual state's own constitution which determines the scope of that right. State courts regularly frame this constitutional inquiry in terms of whether the right to a jury trial applied to common and statutory law existing at the time the state's own constitutional guarantee was adopted. Robert S. Peck, *Violating the Inviolable: Caps on Damages and the Right to Trial by*

⁵ The rationale is this: the more calculable the value of potential risk is, the better an insurance company can set premiums to fairly reflect their actual potential loss. If the risks of loss are set at a lower amount through damage caps then, some theorize, the premium should be lower. Proponents of the caps argue that a noneconomic damage cap attempts to both ensure better calculability and minimization of risk. Gfell, supra at 801.

⁶ Another trial court previously declared this statute unconstitutional. Fulton County Superior Court Civil Action File No. 2007CV135208. However, the appeal from that decision was resolved and withdrawn prior to any opinion

Jury, 31 Dayton L. Rev. 307, 313 (2006). Georgia is no exception. See, Tift v. Griffin, 5 Ga. 185 (1848) (right to trial by jury is “inviolable” and subject only to those exceptions which existed prior to the adoption of the Georgia Constitution). The right to a jury trial is one of the oldest and most revered principles of law, dating back to the Magna Carta; therefore, interference with this right is inherently suspect.⁷

The applicable Georgia constitutional provision states: “The right to a trial by jury **shall remain inviolate**, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party.” (Emphasis added). Ga. Const. Art. I, Sec. I, Para. XI.⁸ In interpreting this constitutional provision, the Georgia Supreme Court has consistently held that “the right to trial by jury exists only where the right existed prior to the adoption of the first Georgia Constitution.” Hill v. Levenson, 259 Ga. 395 (1989); see also, Beasley v. Burt, 201 Ga. 144 (1946); Metropolitan Casualty Ins. Co. v. Huhn, 165 Ga. 667 (1928); Flint River Steamboat Co. v. Foster, 5 Ga. 194 (1848); Tift, supra. In cases where a right to a jury trial exists, Georgia courts narrowly view any infringement on the right. The Georgia Supreme Court has consistently stated that, where the legislature so clogs the right to jury trial with restrictions that it is directly or indirectly abolished, then that act is unconstitutional. Flint River Steamboat Co., supra at 208; see also, Pelham Mfg. Co. v. Powell, 8 Ga. App. 38, 40 (1910) (where statute “totally prostrates the right [to a jury trial] or renders it wholly unavailing” it is

by the Georgia Supreme Court.

⁷ See Peck’s article, *supra*, for an excellent discussion on the history of the right to jury trial.

⁸ The right to a jury trial under our State Constitution is not as broad as that afforded under the Federal Constitution, because the Georgia Constitution does not track the broad language of the Seventh Amendment to the Federal Constitution preserving the right to jury trial “[i]n Suits at common law. ...” Thus, the Georgia Constitution permits some infringement on the right to jury trial for “new” remedies which did not pre-date 1777. Swails v. State, 263

unconstitutional); Tippins v. Winn-Dixie Atlanta, 192 Ga. App. 172 (1989); Fleming v. State, 139 Ga. App. 849 (1976).

In contrast, if the cause of action did not exist at the time the Georgia Constitution was adopted, then the right to jury trial is not constitutionally mandated. Reheis v. Baxley Creosoting & Osmose Wood Preserving Co., 268 Ga. App. 256 (2004). Equally importantly, prior to the adoption of the Constitution, certain classes of cases were triable without a jury, and the legislature may continue to provide for a trial without a jury in cases similar to those in which such a trial was in use prior to the adoption of the Constitution. Tift, *supra*; Beasley, *supra*.

The right to sue for one's personal injuries, as well as the right to have a jury trial on the amount of damages, existed at the time the Georgia Constitution was enacted. In fact, the U.S. Supreme Court has recently reaffirmed the rule of law that it is within the sole province of the jury to determine damages, in order "to preserve the substance of the common-law right of trial by jury." Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (citing to decisions from the 1700s).⁹ Georgia, as most states, follows this same rule. In the early 20th Century, the Georgia Supreme Court stated: "it is very dangerous for the judges to intermeddle in damages for torts ..." and cautioned that in order to avoid interfering with the jury's right to

Ga. 276 (1993) (statute authorizing drug forfeiture is a "new remedy" which did not exist at common law).

9 In making this finding, the Supreme Court also stated:

It has long been recognized that "by the law the jury are judges of the damages." Lord Townshend v. Hughes, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C. P. 1677). Thus in Dimick v. Schiedt, 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935), the Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Id.*, at 480 (internal quotation marks and citations omitted). And there is overwhelming evidence that the consistent practice at common law was for juries to award damages. [Cits.]

Feltner at 353-354.

determine damages, “no new trials should ever be granted for damages, [unless they] manifestly show the jury to have been actuated by passion, partiality, or prejudice.” Seaboard A. L. Ry. v. Miller, 5 Ga. App. 402, 404 (1908) (citing, Huckle v. Money, 2 Wils. 205 (1763)). Today, the jury’s unique right to determine damages is codified, as well as the trial court’s *limited* ability to interfere with the damage awards made by juries. O.C.G.A. § 51-12-12(a); see also, Time Warner Entm’t Co. v. Six Flags Over Ga., 254 Ga. App. 598 (2002).

A limit or cap on noneconomic damages, however, invades the right to a jury trial by usurping one of the fact-finding responsibilities of the jury. If the amount of noneconomic damages awarded by the jury exceeds the statutory cap, this Code section automatically and arbitrarily reduces the verdict, without consideration of the evidence, the record, or any other fact produced at trial and found by the jury.¹⁰ The limitations imposed by O.C.G.A. § 51-13-1 render the right of the jury to assess damages meaningless when, as here, their determination and award is altered by a legislative determination of what constitutes a “proper” award.¹¹ The cap so interferes with the determination of the jury that it renders the right of a jury trial wholly unavailable.¹²

For these reasons, this Court finds O.C.G.A. § 51-13-1 to be unconstitutional.

10 This is not a unique comment. Other states similarly overturned caps on damages on this same rationale. E.g., Moore v. Mobile Infirmary Ass’n, 592 So.2d 156, 163 (Ala. 1991) (“[t]o the extent that the assessment exceeds the predesignated ceiling, the statute allows no consideration for exigencies presented by each case. Such a requirement has no parallel in the jurisprudence of this state and is patently inconsistent with the doctrines of remittitur or new trial as we have applied them.”); Sofie v. Fibreboard Corp., 771 P.2d 711, 720 (Wash. 1989) (“[t]he statute operates by taking a jury’s finding of fact and altering it to conform to a predetermined formula.”).

11 Rep. Tom Rice stated during the legislative debate on SB 3 that the cap was “reasonable” because the average jury award for pain and suffering was approximately \$250,000.00. Hannah Y. Crockett, et al, *Torts and Civil Practice*, 22 Ga. St. U. L. Rev. 221, 235 (Fall, 2005).

12 See also, Lakin v. Senco Prods., Inc., 329 Ore. 62, 79 (1999) (“[l]imiting the effect of a jury’s noneconomic damages verdict eviscerates “Trial by Jury” ... and, therefore, does not allow the common-law right of jury trial to

remain inviolate.”).

(b) O.C.G.A. § 51-13-1 Violates the Separation of Powers Doctrine

Similarly, this Court finds that the noneconomic damages cap imposed by O.C.G.A. § 51-13-1 violates the separation of powers.¹³ The Georgia Constitution provides: “[t]he legislative, judicial and executive powers shall forever remain separate and distinct, and no person discharging the duties of one, shall, at the same time, exercise the functions of either of the others, except as herein provided.” Ga. Const., Art. I, Sec. II, Par. III.¹⁴ Moreover, a review of the cases dealing with this provision of the Constitution shows that the Georgia Supreme Court has zealously protected each of the branches of the government from invasion of its functions by the other branches. For example, in Calhoun v. McLendon, 42 Ga. 405 (1871), the Georgia Supreme Court declared that “construction [of laws] belongs to Courts, legislation to the Legislature.” Id. at 408. Just 30 years later, at the turn of the 20th Century, the Supreme Court noted that the three branches of the government are “separate, distinct and independent of each other. No one of them has any right or power to infringe upon the power or jurisdiction of the other, without an express constitutional provision granting this right or power.” Bradley v. State, 111 Ga. 168, 170 (1900). Again, in McCutcheon v. Smith, 199 Ga. 685, 690-691 (1945), the Court stated:

While the line of demarcation separating the legislative, judicial, and executive powers may sometimes be difficult to establish, and for this reason each of the three co-ordinate branches of government frequently invades the province of the others, it is nevertheless **essential to the very foundation of our system of government** that the mandate of the constitution be strictly enforced. ...[I]t is the duty of each to zealously protect its function from invasion of the others. The legislature has ample power to prevent attempted judicial legislation. Likewise

¹³ These two grounds, right to trial by jury and separation of powers, are to a certain extent intertwined and related. Thus, there is some overlap to this analysis from above.

¹⁴ Interestingly, this provision distinguishes our state Constitution from the federal Constitution, which has no such express prohibition. Sentence Review Panel v. Moseley, 284 Ga. 128 (2008). As a result, Georgia’s protection against any violation of the separation of powers is greater than that afforded under the federal Constitution.

the judiciary has the power to prevent judicial functions by the legislature, and the welfare of the State demands that it exercise this power when necessary. (Emphasis added).

As recently as last year, the Georgia Supreme Court reaffirmed the strong separation of powers doctrine in this state. Sentence Review Panel v. Moseley, *supra* at 130 (“[a]s a general proposition, ... the legislature cannot ... diminish the jurisdiction of courts established by the constitution of this [s]tate.”).

Plaintiffs contend that this statute violates the separation of powers by impermissibly interfering with the right of the judiciary to grant a remittitur or new trial. In particular, they contend that because the statute mandates a reduction of the jury’s damage award if the amount is over the statutory limit, this constitutes a legislative remittitur. As such, it invades the province of the trial court to impose a remittitur, and does so without the protection of a new trial. After consideration, this Court agrees.

First, it is beyond dispute that the right to award a new trial or a remittitur is an exclusively judicial function under the Georgia Constitution. Ga. Const. Art VI, Sec. I, Para. IV provides, *inter alia*, “[e]ach superior court, state court, and other courts of record may grant new trials on legal grounds.” See also, CTC Finance Corp. v. Holden, 221 Ga. 809 (1966) (the Georgia Constitution (of 1945) confers “unqualified power upon superior and city courts, not the legislature, to grant new trials.”). Additionally, Georgia law is absolutely clear that “an excessive or inadequate verdict constitutes a mistake of fact rather than of law. It addresses itself to the discretion of the trial judge who saw the witnesses and heard the testimony.” Atlanta Transit System, Inc. v. Robinson, 134 Ga. App. 170, 171 (1975).

Moreover, the power to grant a remittitur is vested solely in the judiciary, and must be exercised *in conjunction with* the power to grant a new trial. O.C.G.A. § 51-12-12. That Code section provides:

[i]f the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties, or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court.

O.C.G.A. § 51-12-12(b). Under the plain language of this statute, when the jury returns a verdict which is either inadequate or excessive, the judiciary is vested with the authority to: (1) grant a motion for new trial; (2) grant a motion for new trial as to damages only; or (3) conditionally grant a motion for new trial. This third option is the power of remittitur, which is vested solely in the judiciary. Importantly, even where the power to grant a remittitur is exercised, the trial judge *still* must give the litigants a second opportunity to present their claims to a jury by way of a new trial. This statute does not authorize a trial judge to reduce a damage award without a grant of a new trial as an option. Spence v. Hilliard, 260 Ga. 107 (1990); see also, Columbus Reg'l Healthcare Sys. v. Henderson, 282 Ga. 598 (2007) (applying same rule to additur); Lisle v. Willis, 265 Ga. 861 (1995); First Southern Bank v. C & F Servs., 290 Ga. App. 304, 308 at n.18 (2008). To do otherwise would violate a litigant's right to a jury trial. Spence, supra at 108.

In stark contrast to O.C.G.A. § 51-12-12, and in violation of the constitutional authority of the judiciary to grant new trials and remittiturs, the noneconomic damages cap operates as a *legislative* remittitur. In effect, the statute completely disregards the jury's deliberations and findings in determining the amount of damages which, in their sole discretion, fairly compensates the plaintiff. Instead, in all cases to which it applies, the cap substitutes a pre-

determined amount of noneconomic damages which the *legislature* has deemed appropriate. Moreover, it does so arbitrarily, without *any* consideration of the specific facts and circumstances of the case. Equally importantly, it does so without the option of a new trial for the injured plaintiff. As such, it unduly encroaches upon the judiciary's constitutional right and prerogative to determine whether a jury's assessment of damages is either too excessive or too inadequate within the meaning of the law.

This Court also notes that at least three other states have overturned noneconomic damage caps under this theory, and this Court finds their reasoning persuasive. The Supreme Court of Washington noted that the judiciary's power of remittitur "functions very differently from the tort reform act." Sofie v. Fibreboard Corp., 771 P.2d 711, 721 (Wash. 1989). Under that state's laws, as in Georgia, the trial judge could not exercise the power of remittitur without a legal finding under "well developed constitutional guidelines" that the jury's verdict was unsupported by the evidence produced at trial,¹⁵ and even where remittitur was proposed the trial court is required to also give the opposing party the option of a new trial. Id. Similarly, the Supreme Court of Oregon has found that a statutory cap is "fundamentally" different from judicial remittitur for essentially these same reasons. Lakin v. Senco Prods., Inc., 329 Ore. 62, 76 (Or. 1999). Likewise, the Illinois Supreme Court declared caps on noneconomic damages unconstitutional because it functioned as a "legislative remittitur" without regard to the particular facts of the case, the inherent power of the judiciary to reduce verdicts, or the rights of the parties

¹⁵ As in Georgia, the trial judge in Washington may only reduce a jury's damages verdict "when it is ... wholly unsupported by the evidence, obviously motivated by passion or prejudice, or shocking to the court's conscience." Sophie, *supra*.

to decline the remittitur and seek a new trial. Best v. Taylor Mach. Works, 179 Ill. 2d 367, 411-414 (1997).¹⁶

For these reasons, as well, this Court finds O.C.G.A. § 51-13-1 to be unconstitutional.

(c) O.C.G.A. § 51-13-1 Violates Equal Protection

Finally, this Court finds that O.C.G.A. § 51-13-1 also violates the Equal Protection provisions under the Georgia Constitution. The Georgia Constitution provides: “No person shall be denied the equal protection of the laws.” Ga. Const. Art. I, Sec. I, Para. II. There are three levels of scrutiny applied to determine constitutionality under the Equal Protection provisions of both the U.S. and Georgia Constitutions: (1) the rational relationship test; (2) the intermediate level of scrutiny; and (3) strict scrutiny.¹⁷ E.g., McDaniel v. Thomas, 248 Ga. 632 (1981); Sisson v. State, 232 Ga. App. 61 (1998).

Where no fundamental right or suspect classification is involved, an equal protection challenge to legislative classification is examined under the rational basis test. Craven v. Lowndes County Hosp. Auth., 263 Ga. 657 (1993). Under the rational relationship test, a statutory classification is presumed valid and will comply with constitutional standards as long as it bears a rational relationship to a legitimate governmental purpose. Georgia D.H.R. v. Sweat, 276 Ga. 627 (2003). A successful Equal Protection challenge requires a showing that state action was undertaken with an unreasonable purpose or was arbitrary and capricious. See, Washington v. Davis, 426 U.S. 229 (1976). Accordingly, the party who challenges legislation

¹⁶ At least one commentator has also opined that caps on noneconomic damages constitute, among other things, an improper use and expansion of remittitur, and consequently a violation of separation of powers and an infringement on the right to a jury trial. P. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment*, 38 Cath. U.L. Rev. 737, 757 (1989).

¹⁷ The Equal Protection provisions of the Georgia and U.S. Constitutions are substantially the same. McDaniel v. Thomas, 248 Ga. 632 (1981). Therefore, this Court’s analysis is essentially the same under both Constitutions.

on Equal Protection grounds bears the burden of establishing that “the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision-maker. [Cit.]” City of Atlanta v. Watson, 267 Ga. 185, 188 (1996); see also, Cross v. Stokes, 275 Ga. 872 (2002). In contrast, strict scrutiny applies only if the classification “operates to the disadvantage of a suspect class or impedes the exercise of a fundamental right ...” Watson, supra at 187. Under the strict scrutiny standard, there is no presumption of validity, and the classification will fail unless the government demonstrates that the classification is necessarily related to a “compelling” governmental objective. Watson, supra; McDaniel, supra.

In addressing other challenges to statutes which classify medical malpractice actions differently from other tort claims, the Georgia Supreme Court has generally applied the rational relation test. E.g., Nichols v. Gross, 282 Ga. 811, 813 (2007). Therefore, this Court will also apply the rational relationship test.

First, the Georgia legislature clearly defined its objectives in passing this statute. As noted at the outset in this opinion, O.C.G.A. § 51-13-1 was enacted by the General Assembly in 2005 as part of SB 3. The stated purposes of the bill are to “promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims ...” Ga. L. 2005, p.1, § 1. The legislature also found that the passage of SB 3 would “assist in promoting the provision of health care liability insurance by insurance providers.” Id. Also of concern to the legislators during the debate on SB 3 were the number of medical providers and facilities leaving the state and the cost of medical malpractice awards. Hannah Y. Crockett, et al, *Torts and Civil Practice*, 22 Ga. St. U. L. Rev. 221, 235 (Fall, 2005).

After review, this Court finds that there is no rational relationship between statute and the expressed government interest. Most obviously, it is a complete contradiction to state that the overall quality of healthcare would be improved by *shielding* negligent health care providers from liability. In fact, as recognized by other courts, a cap on noneconomic damages actually diminishes tort liability for health care providers and *diminishes the deterrent effect* of tort law. Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 447 (Wis. 2005). Therefore, this stated legislative purpose is completely unrelated to a cap on noneconomic damages.

The remaining stated purposes – resolution of claims, cost of tort awards, helping insurance providers and encouraging medical providers to stay in Georgia – are all generally related to the theory that malpractice lawsuits raise the cost of medical malpractice insurance for providers, and the increased cost, in turn, causes the flight of doctors, hospitals and insurance companies from the state. While reduction of costs for its constituents is a legitimate legislative objective, there is absolutely no evidence that these objectives are achieved by imposing a financial burden on the most victimized of plaintiffs.

Even assuming, *arguendo*, that caps on noneconomic damages will reduce the cost of medical malpractice insurance, there is no evidence that this will have any effect on the total health care costs in the industry. Malpractice premiums constitute approximately 1% of total health care costs, and any effect on insurance premiums are not likely to affect overall healthcare costs. Kevin J. Gfell, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 Ind. L. Rev. 773, 800 (2004).

More importantly, a number of commentators and other studies have criticized the often publicized theory that a cap on noneconomic damages actually results in lower premiums. The

U.S. General Accounting Office in 2003 performed a detailed study on the causes of insurance increases and found that there were four basic causes of rate increases in medical malpractice insurance: (1) increased number of losses on medical malpractice claims, (2) a decrease in investment returns for insurance companies, (3) bad pricing policies by insurance companies, and (4) an increase in the cost of reinsurance rates. GAO-03-702. The GAO further cautioned in its report that the data which would enable it to analyze the severity of medical malpractice claims, as well as data showing how losses were divided (settlement vs. verdict, economic vs. noneconomic damages), *did not exist*. *Id.*¹⁸ Similarly, a 1986 report by the National Association of Attorney Generals concluded that the rise in insurance premiums was caused in large part by the insurance industry's own mismanagement. Gfell, *supra* at 803-804. Yet another author has stated that "[t]he empirical data simply does not support this hypothesis. Recent studies suggest that there is little or no relationship between the level of malpractice insurance premiums and the enactment of tort-reform measures such as damage caps, and state-level tort reform does little to avert local physician shortages. [Cits.]" Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 Seattle Univ. L. R. 119, 153 (2006). Past history of other states also shows that the relation between damage caps and insurance rates is, at best, tangential. California, Texas and Missouri have all experienced increases in insurance rates, despite the enactment of damage caps. Zisk at 142-143. Conversely, Minnesota had very low increases in insurance rates, despite eliminating limits on noneconomic damages. *Id.*¹⁹

18 This report was available to the public in 2005, when the Georgia legislature enacted SB-3.

19 One reason for the lack of effect of noneconomic caps on insurance rates may be the fact that 70-86% of all verdicts in medical malpractice trials are actually in favor of the defendant medical provider. GAO-03-702. The American Medical Association similarly states that 74% of medical liability claims are resolved without any

Based on current statistics, limiting noneconomic damage caps is not rationally related to the stated purpose of reducing medical malpractice insurance rates. Moreover, given the wealth of information available on this issue prior to the enactment of SB 3, it appears that this statute was enacted arbitrarily, based upon speculation and conjecture rather than any empirical data.

Additionally, this Court finds that there is no reasonable relation between the classifications created and the proffered governmental purpose. There are two general classifications of plaintiffs created by this statute: those injured by the medical malpractice of health care providers, and those injured by tortious conduct of non-health care providers who are not subject to the \$350,000 cap on noneconomic damages. Of those injured by health care providers, there are two classification of victims – those who are most severely injured and, consequently, suffer the most pain and suffering, and those who are less severely injured.

The cap's greatest impact falls on those who are most severely injured, and creates classes of fully compensated victims and those only partially compensated. Moreover, because loss of consortium claims are specifically included in the noneconomic damages subject to the cap, married victims of medical malpractice, or victims with children, are the most burdened by the cap. O.C.G.A. § 51-13-1(a)(4).²⁰ Similarly, the noneconomic damages cap discriminates against low-income individuals who are unable to prove large economic damages but nonetheless may sustain large noneconomic damages. In effect, the legislature has shifted the

payment to the plaintiff. AMA, *Medical Liability Reform –NOW!* (February 5, 2008). Yet, the noneconomic damages cap does nothing to affect the cost of defending these meritless claims. The AMA reports that average defense costs in cases where the defendant prevails at trial are approximately \$94,000.00, and costs where the claim is dropped or dismissed approximate \$20,000.00. AMA, *Medical Liability Reform – NOW!* (2/5/08). Another reason may be that noneconomic damages actually only comprise one-third of malpractice awards in cases which do result in a verdict for plaintiff. Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J. L. Med. & Ethics 515 (2005).

²⁰ All of the plaintiffs in a lawsuit must share a single cap. If there are multiple plaintiffs to which the cap applies, such as in this case, the amount of damages reduced by operation of statute is proportionally much higher.

economic burden of medical malpractice insurance costs from the insurance companies and health care providers, including those negligent providers, to a small group of injured patients. “There is no logically supportable reason why the most severely injured malpractice victims should be singled out to pay for special relief to medical tortfeasors and their insurers.” Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 169 (Ala. 1991). To treat these most severely injured plaintiffs differently than other tort victims, and from other victims of medical malpractice, appears to be arbitrary and capricious.

For these further reasons, this Court finds O.C.G.A. § 51-13-1 to be unconstitutional.

On a final note, this Court is aware that the Georgia Supreme Court has upheld other caps against similar constitutional challenges. Most notably, the Georgia Supreme Court has upheld similar caps on punitive damages. Defendant’s argument that this Court should likewise hold these caps to be constitutional, however, mistakes the substantive difference between caps on noneconomic damages and caps on punitive damages. Punitive damages are distinct from the noneconomic damages at issue because punitive damages are *not* awarded as “compensation” to the plaintiff for his or her injury. Rather, the clearly stated purpose of the statute is to punish and deter the defendant in a tort action. Mack Trucks v. Conkle, 263 Ga. 539, 542 (1993) (finding no violation of equal protection in punitive damage caps). Moreover, punitive damages have always been statutorily limited to certain types of actions which the legislature determined warranted punishment for a defendant’s conduct. As a result, Georgia courts have long acknowledged that there is no vested right to sue for punitive damages, and they have looked favorably on them when the legislature has imposed these type of restrictions. See, e.g., Teasley v. Mathis, 243 Ga. 561 (1979); Kelly v. Hall, 191 Ga. 470 (1941). Perhaps equally importantly,

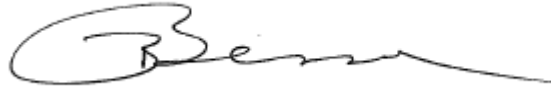
the *amount* of punitive damages awarded by the jury is not impermissibly modified; rather, it is the amount received by the plaintiff that is limited. In stark contrast, noneconomic damages *are* awarded to a plaintiff as compensation, these types of damages are permitted in every type of tort action, and the right to sue for these damages, and have a jury determine their value based upon the evidence presented, pre-dates the origin of American jurisprudence.²¹ Additionally, the caps challenged herein physically limit, by a pre-determined and arbitrary formula, the total amount of noneconomic damages which can ever be awarded to any number of plaintiffs in an action. As such, the Georgia Supreme Court's prior approval of caps on punitive damages in the face of similar constitutional challenges is not dispositive of this case.

In conclusion, for all of the reasons set forth above, this Court finds that O.C.G.A. § 51-13-1 violates a plaintiff's right to trial by jury, violates the doctrine of separation of powers, and violates equal protection. Therefore, the motion to declare this Code section unconstitutional should be and hereby is **GRANTED**. As written, O.C.G.A. § 51-13-1 is unconstitutional. There being no just reason for delay, final judgment is hereby entered in favor of the Plaintiffs and against Defendant in the amount of \$115,000.00 for past and future medical expenses,

21 For a good discussion on the history of a jury's right to determine damages, *see* Peck, *supra* at 320-326.

\$900,000.00 in noneconomic damages, and \$250,000.00 for loss of consortium, for a **TOTAL JUDGMENT** of \$1,265,000.00.

SO ORDERED, this 9th day of February, 2009.

A handwritten signature in black ink, appearing to read "Bessen", written over a horizontal line.

Judge Diane E. Bessen
State Court of Fulton County

Copies to all counsel by efile

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