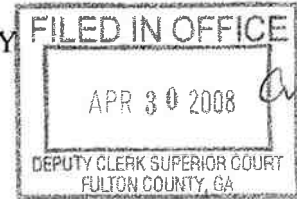


FILE COPY IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA



CHEON PARK and LYNNE PARK,

Plaintiffs,

v.

WELLSTAR HEALTH SYSTEM, INC.,
d/b/a WELLSTAR DOUGLAS HOSPITAL,
ROBERT JEFFREYS WALKER, II, M.D.,
RADIOLOGY ATLANTA GROUP, P.C.,
MICHAEL JOSEPH GILHULY, M.D.,
DAVID MICHAEL COTTER, P.A. and
THE BORTOLAZZO GROUP, LLC,

Defendants.

CIVIL ACTION FILE
NUMBER: 2007CV135208

ORDER

This is an action for medical malpractice that arose after Cheon Park fell from a ladder at his home and was injured on December 9, 2006. Plaintiffs' complaint alleges, with support from affidavits filed pursuant to O.C.G.A. § 9-11-9.1, that Mr. Park was permanently rendered a quadriplegic as a result of subsequent malpractice by defendants. Mr. Park claims he suffered resulting disability, pain and suffering, and economic damages, in addition to Mrs. Park's derivative loss of consortium.

This case is before the court on plaintiffs' Motion for Declaratory Judgment and Motion to Strike, which challenges the constitutionality of Senate Bill 3, 2005. Plaintiffs attack S.B. 3 generally, and they specifically move to strike defendant Walker's fourth and fifth defenses that relate to S.B. 3's (1) cap on non-economic damages and (2) the

gross negligence standard applicable to emergency department medical care.

The first question is whether the court should address the constitutional issues raised by the parties now. Georgia's Declaratory Judgment Act was enacted "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and [the Act] is to be liberally construed and administered." O.C.G.A. § 9-4-1.

. . . [T]he respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for the declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

O.C.G.A. § 9-4-2(b). The issues raised by plaintiffs' motion fall well within the Declaratory Judgment the Act.

Defendants argue that plaintiffs have no standing to challenge "most" of S.B. 3 because a litigant "only has the right to challenge the constitutionality of a statute if the law has an adverse impact on her own rights." Defendants assert that plaintiffs fail to meet that requirement because the provisions of S.B. 3 generally "apply to people other than plaintiffs in medical malpractice actions" – namely, defendants, hospital emergency departments and the like. Response of Defendants Wellstar Health System, Inc., et al. to Plaintiffs' Motion to Strike and Motion for Declaratory Judgment, pp. 4-5. Defendants' argument has no merit. The substantive provisions at issue directly and adversely impact the plaintiffs as they change the substantive legal standard of liability and limit the

damages plaintiffs can recover. "The only prerequisite to attacking the constitutionality of a statute is a showing that it is hurtful to the attacker." *Tennille v. State*, 279 Ga. 884, 885 (2005) (citations omitted). *See also Mason v. Home Depot USA, Inc.*, S07A1486 (Ga. March 10, 2008).

The defendants next argue that the issues are not ripe for adjudication. According to defendants, the constitutionality of the cap on non-economic damages cannot be addressed by a court until after the plaintiffs have received a verdict in their favor and are opposing a motion to write the verdict down. Response of Defendants, *supra*, p. 6.

The court disagrees. Under the circumstances presented by this case, there is a real and ripe controversy regarding the damage caps.¹ First, the issue has been raised by defendant's own answer which pleads the caps as a specific, separately enumerated defense. It is that pleading that gives rise to the motion to strike that is before the court. If the shoe were on the other foot and plaintiffs had pled a claim that defendants contended was barred by the Constitution, no one would question that the legal validity of that claim could be tested now by a motion to dismiss. Defendants would not be required to go to trial and await an adverse judgment for their constitutional argument to be ripe. Similarly, the constitutional issue is squarely joined by the pleadings here, and defendants offer no reason why a different rule of ripeness should apply to testing the constitutionality of their defense.

¹ The court will address in a subsequent order the issues concerning S.B. 3's gross negligence standard for emergency room medical care.

Moreover, given the near certainty that a jury would award non-economic damages well in excess of the statutory cap in this case if the plaintiffs recover a verdict, the caps here have an immediate and present impact on these proceedings. Affidavits of qualified experts have been tendered with plaintiffs' complaint attesting to the defendants' mistakes in their care of Cheon Park. It is the court's experience that the majority of cases of this magnitude are resolved before trial where the parties are represented by counsel of the quality appearing here. The settlement discussions of the parties necessarily depend on the constitutionality of the caps since they substantially affect the potential recovery. The parties' trial preparation and strategy at all stages of a case is also impacted by the potential magnitude of the recovery.

Plaintiffs challenge the constitutionality of S.B. 3 and the damage caps, first, by attacking the act as a whole based on the contention that the bill violated Georgia's "single subject" rule. Ga. Const. Art. III, § V, ¶ III. The court is unpersuaded by plaintiffs' argument. *See Lutz v. Foran*, 262 Ga. 819, 823 (1993); *American Booksellers Ass'n., Inc. v. Webb*, 254 Ga. 399 (1985).

Plaintiffs' other contentions are more meritorious. They contend that the cap on non-economic damages violates the equal protection requirement found in the Georgia Constitution. *See*, Ga. Const. Art. III, § VI, ¶ IV; Art. I, § I, ¶ II. Equal protection is not a straight-jacket on the General Assembly's authority to draw appropriate distinctions. It is permissible, for example, to enact different expert testimony requirements in civil cases

than in criminal cases. *Mason v. Home Depot, USA*, S07A1486 (Ga. March 10, 2008). Equal protection simply prohibits the legislature from making invidious distinctions and enacting classifications that lack a sufficient justification.

The classification the legislature drew with regard to the damage caps is different than the one at issue in *Mason*. Here, the principal distinction the legislature made is between persons suffering personal injuries from tortfeasors generally, and persons who suffer injuries from one specific group of professional defendants. Recovery for non-economic damages as to individual medical providers is limited to \$350,000, and to a total for any number of defendants to \$700,000, no matter how great those damages are in fact and in the judgment of the jury. Persons suffering the exact same personal injuries at the hands of other tortfeasors – including other professionals – are not subject to such caps. Instead, the jury is required by law to award full compensation for the actual injury caused by the defendants' conduct, and that award becomes the judgment of the court.

Unlike other provisions of S.B. 3 that have been challenged, the cap at issue here goes to the heart of the substance of an injured person's tort claim. Other cases have generally involved procedural issues, such as the admissibility of evidence, venue, and the like. See, e.g., *Macon v. Home Depot, supra*; *Airusian v. Shaak*, 289 Ga. App. 540 (2008); *Fowler Properties, Inc. v. Dowland*, 282 Ga. 76 (2007); *Cotten v. Phillips*, 280 Ga. App. 280 (2006); *Scott v. Martin*, 280 Ga. App. 311 (2006). Moreover, there is no doubt that the caps go to the core of a party's right to have a jury determine his or her

claims. While defendants argue that the jury's role is not limited because the jury still has the authority to decide damages within the permitted limits, the fact is the jury's verdict will be written down by operation of the caps whenever the jury concludes that the actual pain and suffering was greater. To that extent, the jury's award is a meaningless exercise.

The nature of the rights involved here leads to one of the disagreements between the parties. What kind of rights are involved determines, in part, the degree of scrutiny required by a court. If the rights are lesser, the legislature has more freedom to act and classify than where more fundamental rights are involved.

When a fundamental right is allegedly infringed by government action, substantive due process requires that the infringement be narrowly tailored to serve a compelling state interest. Where, however, it is not a fundamental right that is infringed and the person complaining is not a member of a suspect class, the government action is examined under the rational basis test, the least rigorous level of constitutional scrutiny.

State v. Old South Amusements, Inc., 275 Ga. 274, 277 (2002). See *Old South Duck Tours v. Mayor & Aldermen of City of Savannah*, 272 Ga. 869, 535 S.E. 2d 751, 754 (2000); *Morgan County Bd. of Comm'rs v. Mealor*, 280 Ga. 241, 243, 626 S.E. 2d 79, 82 (2006); *City of Atlanta v. Watson*, 267 Ga. 185, 190, 475 S.E.2d 896, 899 (1996).

Plaintiffs argue that strict scrutiny is required because a fundamental right, the jury trial right, is involved. Defendants disagree. They contend that the court must first conclude that there is a violation of the right to trial by jury, and only then does strict scrutiny apply. That asks too much. If there is a direct violation of the plaintiffs' right to a trial by jury, that alone would violate the Constitution, regardless of any classifications or equal

protection issues.

The court agrees with plaintiffs that a fundamental right is involved in this case if for no other reason than the fact that the jury's authority to award the amount of damages that it concludes to be appropriate for non-economic injury is limited by the caps. While the court is not completely persuaded that that alone requires "strict scrutiny," which imposes a heavy burden on the legislature that is rarely met, some degree of closer scrutiny is required under these circumstances than what the defendants contend. Defendants in effect advocate complete deference, but that would be an abdication of the court's responsibility.

At a minimum, a superior court deciding the kind of constitutional challenge raised here must make its own determination of "whether a substantial relationship exists between the classification made by [the statute] and the objectives of the legislature." *Smith v. Cobb County-Kennestone Hospital Authority*, 262 Ga. 566, 570 (1992). The court "must reach its own determination, independent of [the legislature's] finding, of whether the classification in question can be sustained." *Id.* Undertaking that analysis, the court finds troubling deficiencies in the statutory classification, and deficiencies that could have been addressed with much less egregious discrimination.

At the outset, the court finds unconvincing the defendants' contention that non-economic damages had to be limited, as they contend, in order to allow the medical profession to function effectively. The statute does not limit *recoveries* against the

specific defendants protected by the statute. Rather, the statute effectively puts substantial limitations on the rights of the poor and middle class to recovery while leaving the right to virtually unlimited recoveries unimpeded for the wealthy. Under the caps enacted by S.B. 3, the disabled manager of a hedge fund, a corporate CEO, an entertainer, or such other person whose income is in the tens of millions of dollars has a claim under Georgia law that would dwarf the amount awarded in any case for pain and suffering.² Those wealthy, high-earning persons – whose right to economic recovery is subject to no limit – would be entitled to recover in excess of \$100 million of lost earnings if they were injured by the kind of wrongful acts that Cheon Park alleges to be the cause of his injuries. If they recovered \$5 million for pain and suffering, that would pale in comparison to their economic recovery. The limitation on non-economic damages falls, instead, on the poor, the unemployed, the elderly, the homemaker who does not work outside the home, and others with little earnings.

The court does not suggest how the General Assembly might undertake to rewrite its tort law in a constitutional fashion if, in fact, there is a necessity to do so to allow the medical profession to function effectively. Rather, the court is simply concluding that the defendants' argument that these recovery limitations were necessary for this one class of professional defendants is an argument that cannot be convincingly or constitutionally maintained given what S.B. 3 actually does. Assuming that an effort to constitutionally

² Excessive pain and suffering awards are always subject to case by case review through motions for new trial or remittitur.

limit awards in medical malpractice cases could be undertaken, the loss of a remedy and the burden of reform must fall less discriminatorily between the rich and the poor.

The caps are unconstitutional for another reason. Someone who receives \$350,000 of non-economic injury (or \$700,000 in a multiple defendant case) will receive complete compensation for his or her injury. Someone who is profoundly injured, as the plaintiff here, will receive, if he prevails, compensation for only a small percentage of his actual non-economic injury. A flat cap on non-economic recovery is a minimally rational way to regulate those damages, if they can be regulated at all for one class of cases consistent with the Constitution.


The classification here is very different than the one upheld in the Supreme Court's recent *Mason* decision, which distinguished between all civil and all criminal cases in addressing expert testimony under S.B. 3. In this case, the substantive issue does not affect all civil cases, nor all persons who suffer personal injuries. Neither does it affect all persons who suffer personal injuries in professional negligence cases. Rather, one category of professional defendants have been singled out for special protection, with the result that their victims have been singled out for special disadvantage and limitations. Such legislative distinctions lack the degree of uniformity and equal protection required when substantial rights such as those involved here. Those rights include the integrity of a jury's verdict. In sum, this court finds that the legislative classifications made here lack the "substantial relationship" to the "objectives of the legislation," *Smith v. Cobb County-*

Kennestone Hosp. Auth., supra, that is necessary to sustain its constitutionality.

Plaintiffs' Motion to Strike defendant Walker's defense based upon the cap on non-economic damages, O.C.G.A. § 51-13-1, is GRANTED. Further, the court hereby ENTERS a DECLARATORY JUDGMENT that O.C.G.A. § 51-13-1 is unconstitutional for the reasons set forth herein.

The parties have not addressed whether the entry of this declaratory judgment would constitute an appealable order in its own right. Regardless, the court hereby CERTIFIES that this order is of such importance to the case that immediate review should be had if defendants desire to do so.

SO ORDERED this 28th day of April, 2008.



Judge, Superior Court of Fulton County