

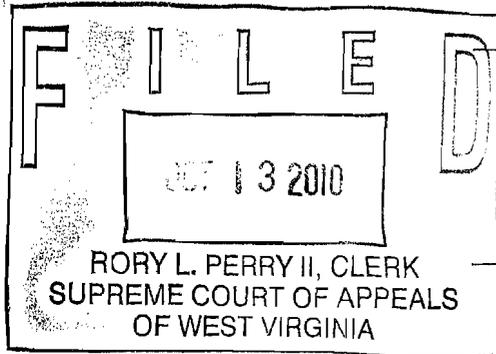
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543

JAMES D. MacDONALD and DEBBIE MacDONALD,  
Plaintiff Below, Appellants,

vs.

CITY HOSPITAL, INC., and SAYEED AHMED, M.D.,  
Defendants Below, Appellees



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The Honorable Gray Silver, III, Judge  
Circuit Court of Berkeley County  
Civil Action No. 07-C-150

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**BRIEF OF THE *AMICI CURIAE***  
**WEST VIRGINIA CHAMBER OF COMMERCE**

**WEST VIRGINIA CHAMBER  
OF COMMERCE** as *Amicus  
Curiae*

By Counsel

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## I. INTRODUCTION

This is an amicus curiae brief by the West Virginia Chamber of Commerce (“Chamber”), in support of the appellees, City Hospital, Inc., and Sayeed Ahmed, M.D., in their defense of a challenge to the constitutionality of the caps on noneconomic damages in the Medical Professional Liability Act.

The Chamber, with a 5,000 member reach, is the recognized voice of business in West Virginia. In that role, it strives to (1) study matters of general interest to its members, (2) promote its members' interests, as well as the interests of the general public, in the proper administration of the laws relating to its members, and (3) otherwise promote the general business and economic welfare of West Virginia. An important part of the Chamber's activities is representing the interests of its members in matters of importance before the courts, the West Virginia Legislature, and state agencies.

In representing West Virginia businesses, the Chamber has a particularly strong interest in ensuring that the provisions of the Medical Professional Liability Act are applied in the manner intended by the Legislature because most Americans, about 162 million, get health insurance through their employers. Sixty percent of employers offer health benefits, which are generally subsidized by employers with employees sharing the expense through a variety of payments, including premiums, co-payments, and deductibles.<sup>1</sup>

Ninety-five percent of employers with more than 50 workers and almost three-quarters of companies with 10 to 24 workers provide insurance, but fewer than half of

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<sup>1</sup> Andrew Villegas, *Employer-Based Insurance Explained*, Kaiser Health News (Sept. 18, 2009), at <http://www.kaiserhealthnews.org/Stories/2009/September/28/NPR-employer-explainer.aspx>.

employers with 3 to 9 workers give their employees health benefits. In 2009, one study calculated the average cost of employer-based health insurance at \$13,375 for a family, with employees contributing only \$3,515 for that family coverage.<sup>2</sup> Thus, on average, an employer pays nearly \$10,000 per year in family coverage for every employee insured through an employer-based health insurance plan.

In 1986 and 2003, our Legislature acted to address problems in providing health care to West Virginia citizens that was being jeopardized by increased medical malpractice insurance premiums. Of course, when the cost of health care providers increase, in the form of increased medical malpractice insurance premiums, those costs are inevitably passed down to consumers, which are primarily either employees insured by employer-based health insurance plans or citizens insured by governmental-based health insurance plans, such as Medicare and Medicaid. Those increased costs then have to be paid through those plans, which in turn raise premiums or taxes to cover the increased costs.

In order to balance the interests of the consumers and providers of health care, our Legislature enacted the MPLA finding “That it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage.” W. Va. Code § 55-7B-1. Obviously, if medical malpractice insurance becomes too expensive to afford, providers may reduce coverage, forego coverage, or leave West Virginia to practice where

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<sup>2</sup> Id.

coverage is more affordable. Even for those providers who are able to afford increased medical malpractice premiums, moreover, those costs are simply passed along to the consumers, with a disproportionate impact on employers and government.

Obviously, the MLPA was enacted as comprehensive legislation addressing a number of interrelated issues to make health care more affordable and available, while protecting the victims of medical negligence. One of the key aspects of the MPLA, however, are the caps on noneconomic damages, generally known as “pain and suffering” damages.

Initially, the cap on noneconomic damages was \$1 million. See W. Va. Acts, ch. 106; W. Va. Acts 1986, 1<sup>st</sup> Ex. Sess., ch. 17. In 2003, however, the Legislature amended the statute to reduce the caps to \$250,000 for most cases and \$500,000 for cases involving death or more serious injuries. W. Va. Acts, ch. 147. Moreover, the Legislature subjected both of these caps to annual adjustment for inflation. *Id.* As the statistics in plaintiffs’ own brief demonstrate, the effect of these caps has been to increase the number of physicians as a percentage of population in West Virginia compared to other states. Of course, one of the reasons for this increase has been improvement in the availability and affordability of medical malpractice insurance, which has likewise had a beneficial effect on the availability and affordability of employer-based health insurance plans.

The Chamber respectfully submits that this Court properly rejected previous constitutional challenges to damages caps in *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991), and *Verba v. Ghaphery*, 210 W.

Va. 30, 552 S.E.2d 406 (2001), and none of the arguments or authorities relied upon by plaintiffs in this case are any different than those previously rejected in those cases.

In Syllabus Point 2 *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974), this Court held, “An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law.”

Moreover, in Syllabus Point 1 of *State ex rel. Appalachian Power Company v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965), this Court held, “In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.”

Finally, in Syllabus Point 5 of *Robinson*, this Court held, “W. Va. Code, 55-7B-8, as amended, which provides a \$1,000,000 limit or ‘cap’ on the amount recoverable for a noneconomic loss in a medical professional liability action is constitutional. It does not violate the state constitutional equal protection, special legislation, state constitutional substantive due process, ‘certain remedy,’ or right to jury trial provisions. W. Va. Const.

art. III, § 10; W. Va. Const. art. VI, § 39; W. Va. Const. art. III, § 10; W. Va. Const. art. III, § 17; and W. Va. Const. art. III, § 13, respectively.”

None of these constitutional provisions have changed in almost twenty years since *Robinson* or in the almost ten years since *Verba*. Consequently, the Chamber perceives no justification for a different result in this case and, like other courts which have recently rejected similar attempts to secure reconsideration of previous decisions upholding the constitutionality of such caps, this Court should likewise reject this attempt.

Reversing this Court’s holdings in *Robinson* and *Verba* would be detrimental to West Virginia businesses that have benefitted from lower health insurance costs for their employees and the increased availability of physicians as a result of limitations on noneconomic damages.

The amici curiae, Public Justice, P.C., and the West Virginia Labor Federation, AFL-CO, claim that these caps unfairly discriminate against women, children, the elderly, the disabled, and workers, but their arguments are predicated upon lower economic damages being available to these groups, in general, but the Legislature has enacted no cap on economic damages nor are such damages an issue in this case. The noneconomic damages of a woman, child, elderly person, disabled person, hourly worker, or the underemployed/unemployed are the same as for a man, adult, young person, able-bodied person, management employee, or fully employed person. The former are not entitled to more noneconomic damages because they are entitled to less economic damages to the latter. Frankly, this argument appears to be more about the claimants’ legal fees as a percentage of total recovery on a contingency basis than about claimants.

Moreover, the idea that health care providers are consciously more careless with women, children, elderly persons, or disabled persons, which is advocated by Public Justice, is not only unsupported by any empirical evidence,<sup>3</sup> but is offensive and repugnant.

Likewise, the idea that hourly workers are more adversely affected than management workers by the existence of a cap on noneconomic damages because they have a more difficult task in resuming employment, which is advocated by the AFL-CIO, is misguided because an hourly work with less transferrable skills would be entitled to greater economic damages as a percentage of income through the award of lost future earnings or diminished earning capacity. Moreover, the Chamber obviously does not oppose the AFL-CIO's argument that similar caps on other tort claims would benefit both workers and their employers, but as this Court has held, legislation is not unconstitutional because the Legislature chooses to address some issues, but not others.

As noted in Dr. Ahmed's brief, the majority of states have enacted some form of restrictions noneconomic damages, almost all of which are in the range of \$250,000 to \$500,000. Likewise, the clear majority of courts have rejected the same constitutional changes being advanced in this case and those cases or their progeny which have invalidated caps on constitutional grounds were considered and rejected in *Robinson* and *Verba* and/or have constitutional provisions substantially different from those in the West Virginia Constitution.

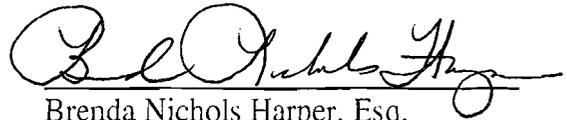
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<sup>3</sup> Public Justice's reference to an AARP study in which patients over the age of 65 experience medical injury two to four times those patients under 45 is meaningless unless one accepts the illogical premise that those 45 and under access health care at the same rate as those 65 and older.

WHEREFORE, the West Virginia Chamber of Commerce respectfully requests that this Court reaffirm its holdings in *Robinson* and *Verba*, and affirm the constitutionality of the caps on noneconomic damages in the Medical Professional Liability Act.

**WEST VIRGINIA CHAMBER  
OF COMMERCE** as *Amicus  
Curiae*

By Counsel

A handwritten signature in cursive script, appearing to read "Brenda Nichols Harper", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Brenda N. Harper, do hereby certify that on October 13, 2010, I served a copy of the foregoing "BRIEF OF THE *AMICI CURIAE* WEST VIRGINIA CHAMBER OF COMMERCE" upon counsel of record by depositing a true copy of the same in the United States mail, postage prepaid, addressed as follows:

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