IN THE SUPREME COURT
STATE OF GEORGIA

ATLANTA OCULOPLASTIC SURGERY, P.C. D/B/A OCULUS,	:	
	:	CASE NO. S09A1432
Appellant	:	
vs.	:	
BETTY NESTLEHUTT AND BRUCE NESTLEHUTT	:	
Appellees.	:	

AMICI CURIAE BRIEF OF THE MEDICAL ASSOCIATION OF GEORGIA, THE AMERICAN MEDICAL ASSOCIATION, AND THE AMERICAN TORT REFORM ASSOCIATION

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The Medical Association of Georgia ("MAG"), The American Medical Association ("AMA"), and The American Tort Reform Association ("ATRA") hereby respectfully submit this Amici Curiae brief, urging this Court to reverse the decision of the trial court.

Introduction

The trial court erroneously concluded (1) that Georgia's statutory non-economic damages cap for medical malpractice actions violates a plaintiff's fundamental right to a trial by jury, (2) that Georgia's statutory non-economic damages cap for medical malpractice actions violates the equal protection clause

under the rational basis analysis, and (3) that Georgia's statutory non-economic damages cap for medical malpractice actions violates the separation of powers provision of the Georgia Constitution.

The trial court's ruling was erroneous because: (1) Georgia cases show that the right to trial by jury guaranteed under the Georgia Constitution does not extend to the remedy phase of a civil trial, (2) the Georgia legislature's implementation of a non-economic damages cap in medical malpractice cases is rationally related to the legislature's legitimate goals of promoting the availability and quality of health care services in Georgia, and (3) the non-economic damages cap found in O.C.G.A. § 51-13-1 does not divest the trial court of any authority or jurisdiction vested in it by the Georgia Constitution.

Additionally, the trial court's analysis was fundamentally flawed in that it presumed the statute unconstitutional, rather than correctly presuming its constitutionality. Lastly, in their brief, Appellees urge this Court to adopt an incorrect standard of review—rather than the correct de novo standard applicable to determining constitutionality of a statute.

Statement of Interest of Amici Curiae

The Medical Association of Georgia. MAG is a non-profit, voluntary professional association of Georgia physicians. Founded in 1849, MAG is part of

the American Medical Association Federation, and is the largest physicians' association in Georgia. MAG has over 6,000 members and the majority of these members actively practice medicine.

MAG was founded in order to promote the improvement of public health in Georgia and advance the art and science of medicine. To achieve these goals, MAG actively advocates the positions of physicians and patients in the United States Congress, the Georgia General Assembly, state and federal courts throughout the United States, and in the private sector through large health plans, hospitals, and other entities that significantly affect patient care. Additionally, MAG publishes a widely disseminated medical journal (the "Journal of the Medical Association of Georgia"), organizes and conducts continuing medical education programs in the State of Georgia, and provides accreditation for healthcare professionals working in the Georgia prison system.

The American Medical Association. The AMA, an Illinois non-profit corporation, is an association of approximately 240,000 physicians, residents, and medical students and is the largest medical society in the United States. Its members practice in every state, including Georgia, and in every field of medical specialization. The AMA was founded in 1847 to promote the science and art of

medicine and the betterment of public health, and these remain its core purposes.[1]

The American Tort Reform Association. Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed amicus curiae briefs in cases before state and federal courts that have addressed important liability issues.

Interest of Amici Curiae. MAG, AMA, and ATRA are justifiably concerned with issues related to medical malpractice cases. MAG, AMA, and ATRA support efforts to continue to improve the quality of and access to affordable health care services in Georgia.

Recent studies suggest that damages caps on medical malpractice liability lead to lower medical malpractice insurance premiums and an increased supply of physicians in the state. Carol Kane and David Emmons, *The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent*

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[1] The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies, including MAG, to represent the views of organized medicine in the courts.

Literature, (American Medical Association Chicago, Ill.), 2007, at 1. A number of states across the country that have enacted tort reform legislation are already witnessing a noticeable drop in medical malpractice insurance rates. *Liability Insurer announces first dividends for doctors in a decade*, 50 American Medical News, April 2, 2007 at 15. A 2007 article—summarizing numerous studies—published by the American Medical Association reveals that, on average, medical malpractice premiums are 17% lower in states which have enacted non-economic damages caps than in states without non-economic damages caps. Kane and Emmons, *supra*, at 6. The American Medical Association recently concluded that on average 1.4 billion dollars in insurance premiums per state could be saved simply by enacting a $250,000 non-economic damages cap for medical malpractice actions. *Id.* at 3.

For example, in 2003 the Texas legislature enacted tort reform legislation which included a $250,000 non-economic damages cap. Joseph Nixon, *Why Doctors are Heading for Texas*, The Wall Street Journal, May 17, 2008. Within the last four years, Texas Medical Liability Trust, one of the largest malpractice insurance companies in the state, has already lowered its medical malpractice insurance premiums by 35%, representing a savings of over $217 million. *Id.* Texas' tort reform legislation has led to the resurgence of a competitive

malpractice insurance industry in the state which in turn has led to lower medical malpractice premiums. *Id.* As one former Texas House of Representative member observed, the availability of lower medical malpractice premiums has "allowed doctors and hospitals to cut costs and even increase the resources devoted to charity care." Joseph Nixon, *Why Doctors are Heading for Texas*, The Wall Street Journal, May 17, 2008.

Although O.C.G.A. § 51-13-1 has only been in effect since 2005, Georgia is already starting to experience a more competitive medical malpractice insurance industry and a greater supply of physicians according to MAG Mutual Insurance Company. The American Medical Association reports that the cost of medical insurance premiums in Georgia has stabilized since the enactment of O.C.G.A. § 51-13-1. *Liability Insurer Announces First Dividends For Doctors in a Decade*, AMERICAN MEDICAL NEWS, April 2, 2007 (Vol. 50 No. 13). The medical insurance industry in Georgia has become more competitive since 2005 with medical professional liability insurers actively competing for physicians' business in Georgia.

According to another MAG Mutual report, the number of medical malpractice lawsuits filed in the state has been on the decline since the enactment of Georgia's non-economic damages cap legislation. The number of medical

malpractice claims opened in Georgia by MAG Mutual Insurance Company has decreased by 39% since 2004. (Letter from Darrell Grimes, President of MAG Mutual Insurance Co., to David Cook, Executive Director of Medical Ass'n. of Ga., (May 29, 2009)). And a recent study conducted by the Carl Vinson Institute reveals that the number of physicians in Georgia has increased by 1,000 since the year 2004. Wes Clark & Adam Jones, *The Economic Impact of Private Practice Physicians' Officers in Georgia*, Carl Vinson Institute of Government (Sept. 2008). In summary, caps on non-economic damages have a proven track record for lowering medical malpractice insurance premiums and therefore increasing the availability of physicians. This results in greater access to health care for all Georgians.

Standard of Review

A trial court's determination as to the constitutionality of a statute is a question of law which is subject to a de novo standard of review. *Rhodes v. State*, 283 Ga. 361, 362 (2008). Appellees incorrectly argue that the standard of review should be "clearly erroneous" or "abuse of discretion" or "any evidence." (Appellees' Br. at 3-4.)

Argument and Citation of Authority

1. O.C.G.A. § 51-13-1 DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY BECAUSE THE GEORGIA CONSTITUTION DOES NOT REQUIRE THAT A JURY DETERMINE THE AMOUNT OF A PLAINTIFF'S REMEDY.

The Georgia Constitution provides that "[t]he right to trial by jury shall remain inviolate." Art. I, Sec. I, Par. XI (a). But this provision of our State Constitution "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 (1993). Moreover, as Justice Lumpkin explained 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 . . . And it is difficult to prescribe the limits to the power of the Legislature in this respect. 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 defence 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).

A. The right to a trial by jury guaranteed by the Georgia Constitution is not as broad as the right to a trial by jury guaranteed by the Seventh Amendment of the U.S. Constitution.

As shown below, the U.S. Constitution's right to a trial by jury does not require that a jury determine the amount of a plaintiff's remedy, and the Georgia Constitution's right to a jury trial is narrower than the U.S. Constitution's right. Consequently, the Georgia Constitution does not require that a jury determine the amount of a plaintiff's remedy. Appellees have presented no authority to the contrary, and Amici are not aware of any such authority.

The Seventh Amendment of the United States Constitution provides that "the right of trial by jury shall be preserved." U.S. CONST. amend. VII. The U.S. Supreme Court has interpreted this amendment as creating a broad right to a jury trial in all suits, other than those brought under equity or admiralty jurisdiction, in which legal rights are ascertained or determined. *Parsons v. Bedford, Breedlove, & Roberson,* 28 U.S. 433, 446-47 (1836); *Swails v. State*, 263 Ga. 276, 277, 431 S.E.2d 101 (1993).

Similarly, the Georgia Constitution provides that "the right to trial by jury shall remain inviolate." GA. CONST. art. I, § I, ¶ XI. But the Georgia courts have long held that the right to a jury trial guaranteed by the Georgia Constitution "is not as broad as that afforded under the Federal Constitution. The provision of our

State Constitution regarding the right to jury trial '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*, 263 Ga. at 278. The Georgia Constitution preserves the "essential elements"—not all elements—of the right to trial by jury as it existed at common law as of the date the first Georgia Constitution was adopted. *Pollard v. State*, 148 Ga. 447 (1918). It does not, however, preclude the legislature from "abrogating or circumscribing common law or statutory rights of action." *State v. Moseley*, 263 Ga. 680, 681 (1993) (citing *Benton v. Georgia Marble Co.*, 258 Ga. 58, 66 (1988)). As shown below, the Federal Constitution does not require that a jury determine the amount of the remedy recoverable by plaintiff; therefore, the narrower right afforded by the Georgia Constitution does not either.

B. The Seventh Amendment of the Federal Constitution does not require that a jury determine the amount of a plaintiff's remedy.

In *Tull v. United States*, the U.S. Supreme Court stated that "nothing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial." *Tull,* 412, 426 n. 9 (1987). In *Tull*, the Government brought an action against the petitioner under a statute which provided that violators "shall be subject to a civil penalty not to exceed $10,000

Tull v. U. States
481 U.S 412
107 S.Ct. 1831
95 L.Ed.2nd 365 (1987

per day." *Id.* at 414-15. The trial court denied petitioner's request for a jury trial and entered damages against him. *Id.* at 415-16.

The two issues on appeal were: (1) was petitioner entitled to a jury trial under the Seventh Amendment, and (2) if petitioner was entitled to a jury trial, does that right require that a jury determine the amount of penalty to be imposed against the petitioner. *Id.* at 414. While the Supreme Court held that the petitioner was entitled to a trial by jury on the issue of liability, the Court refused to extend that right to the remedy phase of the trial. *Id.* at 427.

The Court then went on to state that "the Seventh Amendment is silent on the question [of] whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury. . . . Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.'" *Tull*, 481 U.S. at 425-26 (quoting *Colgrove v. Battin*, 413 U.S. 149 (1973)). The Supreme Court explained that it was not aware 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; *accord Matter of Cert. 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 a civil trial."); *superseded by statute* SDCL § 3-21-2 on other grounds.

The right to trial by jury guaranteed by the Georgia Constitution is not as broad as the Seventh Amendment right to a trial by jury. *Swails*, 263 Ga. at 278. Rather, the Georgia Constitution preserves the essential elements of the right to trial by jury. *Pollard*, 148 Ga. at 447. But, as discussed above, the United States Supreme Court has refused to interpret the Seventh Amendment right to trial by jury as requiring a jury to always determine the amount of a remedy during a civil trial. *Tull*, 481 U.S. at 425-26, 426 n. 9 (quoting *Colgrove v. Battin*, 413 U.S. 149 (1973)) ("'Only those incidents which are regarded as *fundamental*, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.' . . . Nothing in the Amendment's language suggests . . . [and] we have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." (emphasis added)).

C. The Georgia Constitution does not require that the trial court award a plaintiff the exact amount of damages found by the jury without limitation or modification.

The conclusion that Appellees urge this Court to reach—that O.C.G.A. § 51-13-1 violates the Georgia Constitution by not allowing juries to determine the

remedy amount actually awarded to a plaintiff in medical malpractice actions—is wrong for at least two reasons: (1) Appellees incorrectly rely upon a historical analysis of the right to trial by jury in Georgia that confuses the issue by focusing on when the right to trial by jury attaches to a cause of action, as opposed to the proper scope of the right to trial by jury, and (2) Appellees focus on the jury's historical role, which ignores the real question here—whether the jury's fact-finding function to measure damages extends to the remedy phase of the trial.

(1) Georgia courts do not apply a strict historical analysis in determining the scope of the right to trial by jury.

Appellees' reliance upon the historical role performed by the jury—to support their contention that the right to a trial by jury includes the right to have a jury determine the amount of damages actually awarded by the court—is misplaced. While historical analysis may be useful in determining whether the right to a trial by jury *attaches* to a particular cause of action, it offers little support in defining the *scope* of that right. Appellees have cited no authority showing that Georgia courts have ever used a strict historical analysis standard for determining the *scope* of the right to a trial by jury.

To the contrary, for example, in *Swails* this Court took a flexible approach to determining both whether the right to a trial by jury attaches and the scope of that right, stating "the provision 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." 263 Ga. at 278; *State v. Moseley*, 263 Ga. at 681 (holding that Georgia's punitive damages statute, under which the plaintiff is only entitled to receive 25% of the amount of punitive damages found by the jury, did not violate the right to trial by jury) (citing *Teasley v. Mathis*, 243 Ga. 561 (1979)).

(2) The jury's fact-finding function does not extend to the remedy phase of a civil trial.

By focusing on the jury's historical role, Appellees ignore the real question: Does the scope of the right to a trial by jury extend to the remedy phase of a civil trial? In other words, must the court actually award the plaintiff the exact measure of damages found by the jury without limitation or modification? That question has already been answered in the negative in Georgia, because the legislature has previously made a number of policy decisions and enacted a number of statutes that allow courts to make changes to the amount of damages found by the jury before determining the ultimate remedy—just as the legislature has done in O.C.G.A. § 51-13-1. Four such examples include Georgia's statutory 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)), Georgia's comparative negligence statute (O.C.G.A. § 51-12-33), and Georgia's remittitur statute (O.C.G.A. § 51-12-12).

O.C.G.A. § 20-3-514(c). When the State Medical Educational Board of Georgia brings a breach-of-contract action against a medical student who has entered into a loan or scholarship contract with the State Medical Education Board, the jury hears the case, decides the facts, and determines the amount of damages that they believe will fully compensate the State Medical Education Board under the terms of the contract. Then, pursuant to O.C.G.A. § 20-3-514(c)'s treble-damages clause, the trial court statutorily increases the jury's determination of damages and ultimately awards the State Medical Education Board a remedy three times the amount of damages that the jury found that it was entitled to.

O.C.G.A. § 51-12-5.1(g). Georgia's punitive damages statute works much the same way. In Georgia, "the 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 seem to suppose, an innovation upon the rules of the common law." *Time Warner Entertainment Co. v. Six Flags Over Ga., LLC*, 254 Ga. App. 598, 601 (2002) (quoting *K-Mart Corp. v. Hackett*, 237 Ga. App. 127 (1999)). But pursuant to O.C.G.A. § 51-12-5.1(g), the jury first determines the amount of punitive damages which it believes a plaintiff is entitled to, and then the court statutorily reduces the amount of punitive damages which are ultimately awarded to a plaintiff in a civil action.

Despite that fact that juries in 1798 determined the amount of punitive damages in civil cases, this Court has upheld the constitutionality of O.C.G.A. § 51- 12-5.1(g) against claims that the statute violates the Georgia Constitution's right to trial by jury by improperly interfering with "the function of the jury to determine what amount of punitive damages must be awarded to a Appellees." *Time Warner,* 263 Ga. 680 (stating that the plaintiffs, "in essence, are asking this Court to rule that [the right to trial by jury in the Georgia Constitution] 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.").

O.C.G.A. § 51-12-33. Additionally, under Georgia's comparative negligence statute, O.C.G.A. § 51-12-33, the finding of damages "otherwise awarded to the plaintiff" by the jury may statutorily be reduced by the percentage of the plaintiff's negligence so that the plaintiff's ultimate recovery is less than the jury's initial findings as to the amount of damages suffered by the plaintiff.

O.C.G.A. § 51-12-12. Historically, trial judges in Georgia did not have the authority to condition a grant of new trial upon the judicial remittitur of the amount of damages awarded to a plaintiff by the jury in a civil lawsuit. *Central of Georgia Ry. Co. v. Perkerson,* 112 Ga. 923 (1901); *see also George Lang v.*

Elizabeth H. Hopkins, 10 Ga. 37 (1851) ("this power will never be exercised where there are no grounds by which the excess might be fairly measured"). But after the legislature's enactment of O.C.G.A. § 51-12-12, the amount of damages awarded to a plaintiff in a civil suit can be judicially remitted by the trial judge. And this Court has held "that the remittitur permitted under O.C.G.A. § 51-12-12(b) does not violate the State Constitution's guarantee of a jury trial." *Lisle v. Willis*, 265 Ga. 861, 863 (1995). The damages-cap statute at issue here would not restrict the jury's role to any greater extent than Georgia's long-existing treble-damages, punitive damages, comparative negligence, and remittitur statutes do.

Appellees have failed to provide any authority for their conclusion that the jury's fact-finding function must extend to the remedy phase. And, as shown above, this Court has held that the legislature may make policy decisions and enact statutes that allow courts to make changes to the amount of damages found by the jury before awarding the ultimate remedy—just as the legislature has done in O.C.G.A. § 51-13-1.[2]

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[2] Other appellate court decisions holding that statutory damage-caps do not violate the right to trial by jury include: *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Gourley v. Nebraska Methodist Health System*, 663 N.W.2d 43 (Neb. 2003); *Evans v. Alaska*, 56 P.3d 1046 (Alaska 2002); *Kirland v. Blaine County Medical Center*, 4 P.3d 1115 (Idaho 2000); *Pulliam v. Coastal Emergency Services of Richmond*, 509 S.E.2d 307 (Va. 1999); *Peters v. Saft*, 597 A.2d 50 (Me 1991); *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. 1992); *English*

D. Striking O.C.G.A. § 51-13-1 could lead to inconsistent results in the state versus federal courts of Georgia.

An additional problem arises if this Court declares that the caps violate Georgia's right to a trial by jury. In light of the Supreme Court's holding in *Tull*, striking down O.C.G.A. § 51-13-1 as violating the right to jury trial guaranteed by the Georgia Constitution would lead to inconsistent results in the state versus federal courts of Georgia.[3] If this Court holds that the state right to trial by jury includes the right to have a jury determine the amount of the remedy in a civil trial, then (1) the Georgia Constitution's right to trial by jury provision will provide wider protection than the Seventh Amendment, in contravention of Georgia law, *Swails*, 263 Ga. at 278, and (2) the applicability of the non-economic damages cap in O.C.G.A. § 51-13-1 will depend upon the forum in which the action is heard, *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005)

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v. New England Medical Center, 541 N.E.2d 329 (Mass. 1989).

[3] This inconsistency would occur because the federal Constitution's Seventh Amendment controls in federal court diversity cases. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). Because the Seventh Amendment does not require a jury to determine the amount of the remedy, the non-economic damages cap in O.C.G.A. § 51-13-1 cannot violate the federal right to trial by jury. Consequently, even if the statute is declared unconstitutional under the Georgia Constitution, the non-economic damages cap in O.C.G.A. § 51-13-1 may still be applied in medical malpractice actions brought in federal court under diversity jurisdiction but not in medical malpractice actions brought in state court. This result would lead to undesirable forum shopping and unpredictability.

(upholding the constitutionality of a state statutory damages-cap under a Seventh Amendment right to a jury trial challenge); *see Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (stating that 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.").

2. O.C.G.A. § 51-13-1 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The standard for analyzing statutes that are challenged under the Equal Protection Clause is the rational basis test.

When assessing equal protection challenges, this Court has "consistently applied the analysis established by the Supreme Court of the United States." *Stephens v. State*, 265 Ga. 356, 360 (1995) (J. Carley concurring). "[W]here . . . a statute does not infringe upon a fundamental right and the complaining party is not a member of a suspect class" equal protection analysis must be performed under the "rational basis" test. *Sweat*, 276 Ga. at 629 n. 6. Under that analysis, "'the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Columbus-*

Muscogee County Consol. Gov't. v. CM Tax Equalization, 276 Ga. 332, 334-35 (2003) (quoting *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992)). Put another way, under the rational basis test, a Georgia court must uphold a statute if, "under any conceivable set of facts, the classifications drawn in the statute bear a rational relationship to a legitimate end of government." *Sweat* 276 Ga. at 630.

In determining whether the legislature had a rational basis for enacting a statute, the court "is not authorized to go behind and reweigh the evidence utilized by Congress to support its actions." *U.S. of America v. Baloney*, No. 1:91-CR-353 RLV, 1992 WL 1477108, at * 7 (N.D. Ga. Nov. 5, 1992). Instead, the Court must presume that the laws enacted by our legislature are constitutional. *Dept. of Transp. v. Ga. Mining Ass'n*, 252 Ga. 128, 130 (1984).

B. The burden is on the party challenging a statute.

The statute must be upheld unless the party challenging the constitutionality of the statute establishes that "the legislative facts on which the classification is apparently based *could not reasonably be conceived to be true*" by the legislature. *Old South Duck Tours v. Mayor & Alderman of City of Sav.*, 272 Ga. 869, 873 (2000) (emphasis added). The Supreme Court of the United States has explained the rational basis analysis in this way:

> The Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of

> the State's objective. Social and economic legislation, like the statute at issue in this case, moreover, carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. We will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. In performing this analysis, we are not bound by the explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Kadrmas v. Dickinson Public Sch., 487 U.S. 450, 463 (1988) (internal citations omitted).

Here, Appellees have failed to meet the requisite burden of establishing that the legislative facts on which the non-economic damages cap in O.C.G.A. § 51-13-1 is based could not have reasonably been conceived to be true by the Georgia legislature when it enacted the statute. Instead of meeting their burden by focusing on the record before the legislature, Appellees obfuscate the real issue by focusing on empirical data—which was not considered by the Georgia legislature—to support their *public-policy argument* that the non-economic damages cap is not effective in lowering medical insurance premiums in Georgia. Whether Appellees' contention has any merit is irrelevant to the equal protection analysis required of this Court.

By focusing on empirical data outside of the legislative record to support their contention that the non-economic damages cap was not an effective means of lowering insurance premiums, Appellees are in essence asking this Court to do the very thing which it is not permitted to do under the rational basis analysis: question the wisdom of the legislature's enactment and reweigh the evidence utilized by the legislature to support its actions[4]. *See R.M. Gainer v. W.C. Ellis*, 226 Ga. 79, 81 (1970) ("the wisdom, policy, or expediency of such legislation . . . are questions for decision by the Legislative Branch of the government, with which this court has nothing to do"), *Kadrmas v. Dickinson Public Schools*, 487 U.S. 469 ("it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation"), *Baloney*, No. 1:91-CR-353 RLV, 1992 WL 1477108, at *7 (under rational basis analysis, this Court "is not authorized to go behind and reweigh the evidence utilized by Congress to support its actions."), *see also City of Roswell v. Fellowship Christian School, Inc*, 281 Ga. 767, 768 (2007).

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[4] "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).

C. The Georgia legislature's legitimate goal was to ensure quality and availability of health care in Georgia.

Appellees' contention that "no medical malpractice crisis" ever existed in Georgia is irrelevant to whether the non-economic damages cap enacted by the Georgia legislature could be conceived as having a reasonable relation to furthering the legislature's legitimate goal of ensuring the availability of physicians and health care services in Georgia. Moreover, this Court has already determined—when it held that the legislature's decision to shorten the statute of repose for medical malpractice lawsuits did not violate the Equal Protection Clause—that the legislature may reasonably have perceived the onset of a crisis in the health care industry in Georgia. *Smith v. Cobb County-Kennestone Hospital Authority*, 262 Ga: 566, 571 (1992).

As long as the legislative purpose is legitimate and the classification drawn, under any conceivable set of facts, has some reasonable relation to furthering that purpose, the legislature's enactment is constitutional. *Smith*, 262 Ga. at 570. This Court previously recognized that it is a legitimate goal of the State to enact legislation to address the unique issues that arise in medical malpractice cases. *Id.* In *Smith*, the Court held that the "state['s] objectives of providing quality health care [to Georgia residents], assuring the availability of physicians, preventing the curtailment of medical services, [and] stabilizing medical and insurance costs"

were legitimate goals which promoted the public safety, health, and welfare of the state as a whole. *Id.* Appellees have cited to no authority or public policy to the contrary.

Here, in enacting O.C.G.A. § 51-13-1, the Georgia legislature sought to further legitimate state goals: (1) promote the predictability and improvement in the provision of quality health care services to Georgia residents, (2) promote the provision of health care liability insurance, and (3) ensure the availability of physicians and health care services in Georgia. (J. Bessen's Order p.16.) This Court has previously determined that all of these goals are "legitimate" state goals. *Smith*, 262 at 570.

D. Caps on non-economic damages in medical malpractice lawsuits are rationally related to legitimate state goals.

The classifications contained in O.C.G.A. § 51-13-1—the caps on the amount of non-economic damages recoverable in medical malpractice lawsuits—is reasonably related to furthering the legislature's legitimate goal of ensuring the availability of physicians and health care services in Georgia. Prior to enacting O.C.G.A. § 51-13-1, the legislative record contains evidence that Georgia physicians were closing their practices and moving to other states because of the extraordinarily high cost of medical liability insurance in Georgia. Hannah Yi Crockett, *Torts and Civil Practice*, 22 Ga. St. U. L. Rev. 221 (Fall 2005) (citing

Audio Recording of House Proceedings, Feb. 10, 2005, remarks by Rep. Ron Dodson).

By limiting the amount of non-economic damages recoverable by a medical malpractice plaintiff—the most speculative aspect of damages in a medical malpractice lawsuit—it is reasonable to believe that medical malpractice awards would decrease, which would limit medical liability insurance companies exposure, thereby decreasing the cost of medical liability insurance premiums. The availability of lower medical insurance premiums in turn would create an incentive for more physicians and health care services to operate in Georgia. The Appellees have fallen well short of their burden of establishing that the legislative facts on which O.C.G.A. § 51-13-1 is based "could not reasonably be conceived to be true" by the Georgia legislature at the time they enacted the statute.

3. THE NON-ECONOMIC DAMAGES CAP CONTAINED IN O.C.G.A. § 51-13-1 DOES NOT DIVEST THE JUDICIARY OF ANY POWER OR JURISDICTION VESTED IN IT BY THE GEORGIA CONSTITUTION.

"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 (2006). The difference between the legislative and judicial functions 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 Assn. v. Haley*, 199 Ga. 478, 480 (1945). Under the separation of powers doctrine, "every court has the constitutional obligation to interpret, apply and enforce the existing laws, *including those which govern the exercise of its jurisdiction.*" *Fullwood v. Sivley*, 271 Ga 248, 254 (1999) (emphasis added). This Court has explained the proper role of the judiciary in this way:

> There is nothing artificial in judicial deference to the constitutional authority of the General Assembly to enact legislation. The constitutional principle of separation of powers is intended to protect the citizens of this state from the tyranny of the judiciary, insuring that the authority to enact laws will be exercised only by those representatives duly elected to serve as legislators. The General Assembly "being the sovereign power in the State, while acting within the pale of its constitutional competency, it is the province of the Courts to interpret its mandates, and their duty to obey them, however absurd and unreasonable they may appear."

Id. at 254 (quoting *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848)).

Appellees contend that O.C.G.A. § 51-13-1 violates the separation of powers and is therefore unconstitutional because it allegedly divests the trial court of its power to grant a new trial or a remittitur. (J. Bessen's Order p. 12.) While it is true that the Georgia Constitution vests the judiciary with the power to grant a new trial, Appellees' argument that O.C.G.A. § 51-13-1 violates the separation of

powers still fails for at least two reasons. First, the statute at issue does not divest the trial court of its authority to grant a new trial. Secondly, the authority to grant a remittitur was not exclusively granted to the judiciary by the Georgia Constitution. If that were the case, all now-existing remedy-altering legislation would unconstitutionally violate the separation of powers doctrine, but history has shown that it does not.

A. O.C.G.A. § 51-13-1 legitimately limits the recovery of non-economic damages, it does not divest the trial court of its authority to grant a new trial or remittitur.

The non-economic damages cap in O.C.G.A. § 51-13-1 does not modify or alter the trial court's authority to grant a new trial or remittitur. The trial court still has the authority to do so pursuant to O.C.G.A. § 51-11-12. In enacting O.C.G.A. § 51-13-1, the legislature simply provided a guideline for the measurement of non-economic damages in medical malpractice cases. And this 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. Central R.R. & Banking Co. of Ga.*, 84 Ga. 345 (1890) (stating "we think the act merely prescribes a different rule for the measure of damages, and we know of nothing in our constitution which prohibits the legislature from prescribing a rule for the measure of damages").

B. Remittitur is a power granted to the judiciary by the legislature, not a right vested in the judiciary by the Georgia Constitution.

While it is true that the General Assembly cannot divest a Georgia court of the jurisdiction *granted to it by the Georgia Constitution*, Appellees have cited absolutely no authority in support of their contention that Judge Bessen was correct when she held that "the power of remittitur [was] vested solely in the judiciary" by the Constitution. (*See* J. Bessen's Order p. 12.) To the contrary, the concepts of additur and remittitur are a legislative creation, codified into Georgia law as part of an earlier comprehensive tort reform legislative package. *Riddle v. Golden Isles Broadcasting, LLC*, 292 Ga. App. 888, 889 (2008). Moreover, the very idea of remittitur is contrary to the common law and is a power that was granted to the trial courts by the legislature—not by the constitution—under O.C.G.A. § 51-12-12(b). *Id., see also Central of Ga. Ry. Co. v. Perkerson,* 112 Ga. 923 (1901) (holding that where general damages are awarded by a jury to a plaintiff in a civil action, "neither the venerable sages of the common law nor the wisdom of the legislature deemed it prudent or safe to confide the [power of remittitur] to the judge.").

Because the trial court's authority to grant a remittitur was not "vested" in the judiciary by the Georgia Constitution, the legislature's creation of a non-economic damages cap in O.C.G.A. § 51-13-1 does not invade upon the

jurisdiction vested in the judiciary by the Georgia Constitution. As the court in *Riddle* explained:

> In complete derogation of common law [the Worker's Compensation Act] derives its own authority and power, as well as the authority and power it confers upon others, solely from the provisions the legislature has crafted. Thus, reflective of the constitutionally mandated separation of powers, beyond the Act's specific legislative provisions, it has no independent judicial existence so as to impart jurisdiction, cause of action, or remedy upon any entity.

Id. at 33.

If Appellees were correct that O.C.G.A. § 51-13-1 is an unconstitutional "legislative remittitur," then it would follow logically that all remedy-altering legislation unconstitutionally violates the separation of powers. But this is simply not the case, as is made clear from the Georgia statutes discussed *supra*,[5] and from the decisions of numerous other states.[6] O.C.G.A. § 51-13-1 does not interfere with the trial court's authority to grant a new trial or a remittitur, and does not

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[5] *See* Part 1.C.*(2)* of this Brief.

[6] *See Pulliam v. Coastal Emergency Serv.*, 257 Va. 1, 509 S.E.2d (Va. 1999) (holding legislation creating damage caps in medical malpractice cases does not unconstitutionally violate the separation of powers doctrine); *Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 4 P.3d 1115 (Idaho 2000) (same); *Verba v. Ghaphery*, 210 W.Va. 30, 552 S.E.2d 406 (W. Va. 2001) (same); *Evans v. State*, 56 P.3d 1046 (Alaska 2002) (same); *Garhart v. Columbia/Healthone, LLC*, 95 P.3d 571 (Colo. 2004) (same); *Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 663 N.W.2d 43 (Neb. 2003) (same).

otherwise unconstitutionally divest the judiciary of the jurisdiction or authority granted to it by the Georgia Constitution.

4. CONCLUSION

Because O.C.G.A. § 51-13-1 does not violate Appellees' right to a trial by jury as guaranteed by the Georgia Constitution, does not violate Appellees' equal protection rights, and does not violate the separation of powers provision of the Georgia Constitution, Amici respectfully request that this Court uphold the constitutionality of O.C.G.A. § 51-13-1, resulting in a reversal of the trial court.

Respectfully submitted this 3rd day of September, 2009.

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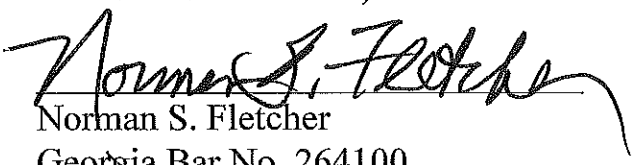
By: 

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