No. 105741
(Consolidated with No. 105745)

IN THE
SUPREME COURT OF ILLINOIS

ABIGAILE LEBRON, a minor, by THE NORTHERN TRUST COMPANY, Guardian of the Estate of ABIGAILE LEBRON, a minor, *et al.*, Plaintiffs-Appellees, vs. GOTTLIEB MEMORIAL HOSPITAL, a Corporation, *et al.*, Defendants-Appellants. LISA MADIGAN, Attorney General of Illinois, Intervenor-Appellant.	On Direct Appeal from the Circuit Court of Cook County Case No. 2006 L 12109 Diane Joan Larsen, Judge Presiding

BRIEF OF AMERICAN MEDICAL ASSOCIATION AND ILLINOIS STATE MEDICAL SOCIETY, *AMICUS CURIAE*, IN SUPPORT OF DEFENDANTS-APPELLANTS

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus the American Medical Association ("AMA"), an Illinois non-profit corporation, is the largest professional association of physicians and medical students in the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in every state, including Illinois, and in every specialty.

Founded in 1840, the Illinois State Medical Society ("ISMS") is a professional organization of over 12,000 members that represents and unifies its physician members as they practice the science and art of medicine in Illinois. The ISMS represents the interests of member physicians, advocates for patients and promotes the patient-physician relationship, the ethical practice of medicine, and the betterment of public health.*

Amici are concerned that medical malpractice liability can inflate the cost of medical care and can distort the practice of medicine through "defensive" measures by physicians and other health care practitioners. They believe that extreme awards of non-economic damages in medical malpractice litigation can result in substantially diminished accessibility to health care, particularly in specific geographic areas and within specific medical specialties. Moreover, they believe that the aggregate social costs of such awards exceed their benefits. For these reasons, *amici* seek, by this brief, to preserve

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* *Amici* file this brief in their own persons and as representatives 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 to represent the views of organized medicine in the courts.

P.A. 94-677, particularly the limitations in 735 ILCS 5/2-1706.5 (West 2006), against a legally unmeritorious attack.

ARGUMENT

I. PUBLIC ACT 94-677 WAS ENACTED TO ADDRESS A SIGNIFICANT PROBLEM FOR THE PEOPLE OF ILLINOIS AND IT WAS CAREFULLY CRAFTED IN A RATIONAL MANNER TO ADDRESS THE PROBLEM AND IN REALITY DOES IN FACT ADDRESS THE PROBLEM.

This case involves exceedingly high stakes for the health, safety and welfare of the people of Illinois. Public Act 94–677 was designed to address a pressing crisis that threatened access to and availability of health care for all Illinois citizens, and these statutory reforms are working. In response to the Act, access to health care is widening, malpractice insurance rates have decreased, competition among insurers has increased, and health care providers are returning to or deciding to remain in Illinois. Any decision to overturn such a rational Public Act which clearly is working would unnecessarily threaten to undo two years of successful reform – which has provided expanded access to health care services and greater availability of life saving care. In essence, invalidating Public Act 94–677 would risk avoidable harm to the people of Illinois.

As official sources attest, the Public Act is working along many different dimensions, increasing access to health care by fostering competition in the insurance market and encouraging doctors to practice in Illinois. For instance, Governor Blagojevich announced a "major reduction in medical malpractice insurance rates" caused by "the medical malpractice reform legislation signed by the Governor." Press Release, Office of the Governor, Gov. Blagojevich Announces Major Reduction in Medical Malpractice Insurance Rates in Illinois (Oct. 13, 2006), *available at*

http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=5414. The Governor explained:

> I signed the medical malpractice reform law to keep doctors in our state and make health care more accessible and more affordable. Just one year later, we are seeing dramatic results. New competition in the malpractice insurance market is resulting in lower premium rates, and it's making Illinois a state where doctors want to practice.

Id. Similarly, the Secretary of the Illinois Department of Financial and Professional Regulation has explained that Public Act 94–677 has "increased competition in Illinois and allowed at least four companies to enter the market or expand their market share in our state." Dean Martinez, Sec'y, Ill. Dep't of Fin. & Prof'l Reg., *Medical Malpractice Reforms Are Working*, State J.-Reg., Jan. 22, 2007, at 5, 2007 WLNR 1400695 (noting that, "[i]n some cases, premiums for doctors have been reduced by more than 30 percent"); *see also* Ryan Keith, *Trial Lawyer Enters Med-Mal Insurance Biz*, Chi. Daily L. Bull., Dec. 8, 2006 (quoting Michael T. McRaith, Director of the Illinois Division of Insurance, who explained that "[t]he marketplace is becoming increasingly competitive, and that competition is going to benefit the physicians and surgeons. It's going to benefit all of us who pay for health care").

Media reports confirm that Public 94–677 is working. One report explains:

> There's no question that the landscape today has changed. The tally of medical malpractice lawsuits around the state has declined. The political rhetoric has subsided. Doctors are not fleeing the area. Some hospitals report finding new physicians is easier. More insurers are doing business in the state. Perhaps most importantly, malpractice insurance premiums have stabilized or even fallen for many doctors, anywhere from 5 to more than 30 percent.

Adam Jadhav, *Illinois' Caps on Malpractice Awards Face Court Test Soon*, St. Louis Post-Dispatch, Sept. 4, 2007, at B5, 2007 WLNR 17265473; *see also*, *e.g.*, Ryan Keith, *Loss of Caps Leaves Docs Uneasy Again*, Chi. Daily L. Bull., Nov. 20, 2007

("State data show 5,000 more doctors are licensed in Illinois now than two years ago, three new insurance companies are providing coverage for doctors and 10 existing insurers have dropped their rates by 5 percent to more than 30 percent."); Bruce Japsen, *Doctor Malpractice Insurance Gets New Player*, Chi. Trib., Aug. 9, 2007, at 3, 2007 WLNR 15328378. These observations are consistent with media reports detailing how similar reforms have succeeded in other jurisdictions. *See* Ralph Blumenthal, *After Texas Caps Malpractice Awards, Doctors Rush to Practice There*, N.Y. Times, Oct. 5, 2007, at A21, 2007 WLNR 19493110; *see also* Mary Ann Roser, *Doctors Clamoring To Come to Texas, Creating Backlog of Applicants*, Austin Am.-Statesman, July 9, 2007.

A. The General Assembly Reasonably Concluded The Increasing Costs Of Medical Malpractice Litigation Had Caused Shortages Of Vital Health Care Services In Illinois.

For the hospitals, patients and physicians of the State of Illinois, the costs of medical malpractice litigation are manifest in hospitals closing or reducing their services, patients not being able to obtain necessary health care services because the resources were just not present. Many of these reductions or eliminations of health care services were the result of the need to divert resources to cover the rising expense of providing liability coverage for the health care services provided. This is typically in the form of self insurance, pooling resources or professional liability insurance -- if these options were even available. Particularly for some physicians and hospitals covering potential liability expense was not possible and insurance was not available. If the resources or liability coverage is not available, then the services posing the risk of liability as a practical matter cannot be provided. Most striking was the increasing cost of insurance premiums which by law are related to the potential risk of the insured.

The legislative record reveals numerous credible conclusions demonstrating that increasing insurance premiums had led to a shortage of doctors in Illinois, particularly in high-risk specialties where the threat of malpractice litigation is most acute. Illinois and other newspapers contained many examples of physicians relocating outside of Illinois or scaling back the performance of health care services. An article in the *Chicago Tribune* noted that "a growing number of Illinois physicians are cutting medical services and closing their doors to certain patients, putting access to health care at risk in some communities," because they had been "[o]verwhelmed by high malpractice premiums." *See* Bruce Japsen, *Doctors Curtail Practices to Fight Insurance Costs*, Chi. Trib., Feb. 16, 2003, at C1. The *Tribune* reported that Joliet's two hospitals were left without full-time coverage for head-trauma cases after two neurosurgeons gave up brain surgery in 2003. *Id.* A similar problem hit southern Illinois in 2004, when the area's last two brain surgeons left because of rising malpractice insurance premiums. *See Brain Surgeons Leaving Southern Illinois*, United Press Int'l, Feb. 25, 2004.

Neurosurgery is not the only specialty that was particularly hard-hit: Three obstetricians left Park Ridge in 2004 after learning that their annual insurance premiums would jump from $345,000 to $510,470. *See* Gayle Worland, *Doctors Flee Insurance Costs, State; Saying Malpractice Insurance Premiums Have Soared, They Relocate to Wisconsin or Indiana*, Chi. Trib., Mar. 12, 2004, at C1. They moved to Kenosha, Wisconsin, where the *combined* insurance for the three doctors cost $50,018. *Id.* The American Medical Association maintains a list of numerous other examples. *See* Am. Med. Ass'n, *Medical Liability Reform—NOW!* 13 (2006), *available at* http://www.ama-assn.org/go/mlrnow. Not surprisingly, the aggregate numbers of physicians lost from

Illinois are staggering. *See, e.g.*, Dorothy Schneider, *State Legislators Look to Limit Doctors' Rising Malpractice Insurance Premiums*, State J.-Reg., Jan. 15, 2004, at 19 (quoting Senator Watson, who explained that "50 physicians have left [Madison and St. Clair Counties] in the last two years").

The members of the General Assembly additionally heard direct testimony that physicians had left Illinois because of rising liability insurance premiums. *See* February 23 Hearing at 9:7–10 (testimony of Kenneth Printen, President, Ill. State Med. Soc'y) ("The primary reason for the exodus of the physicians has been shown to be the rising costs of medical litigation and the resultant increase in liability insurance premiums."); *id.* 9:11–24:14 (providing examples); March 1 Hearing at 48:14–15 (testimony of Jim Tierney) ("[W]e know that there are many physicians who have left Illinois."); *see also id.* at 49:20–50:4 ("[Y]ou should be concerned with . . . not just the physicians who have moved out of this state, even though that's a very, very serious problem, but rather the inability of our hospitals, our group medical practices, clinics and others to attract physicians—new physicians to establish a practice in this state . . . ."). The General Assembly reasonably believed, based on this testimony and the other data available to it, that the increasing cost of malpractice insurance caused shortages of medical care.

In fact in 2003, the American Medical Association recognized precisely what the General Assembly later concluded in adopting Public Act 94–677: "that there is now a shortage of physicians, at least in some regions and specialties, and that evidence exists for additional shortages in the future." Am. Med. Ass'n, Policy No. H–200.953, *The Physician Workforce: Recommendations for Policy Implementation* (2003).

B. The General Assembly Reasonably Concluded That Limiting Non-Economic Damages Is Also An Effective Way To Keep Doctors Practicing In Illinois.

Finally, the General Assembly's conclusion that limiting liability through limitations on non-economic damages would increase the availability of medical care is supported by studies showing that such limits lead to increased numbers of physicians. Two government economists, employing a "multivariate regression model," found that "States with caps on noneconomic damages experienced about 12 percent more physicians per capita than States without such a cap." Fred J. Hellinger & William E. Encinosa, Ctr. for Organ. & Delivery Studies, U.S. Dep't of Health & Human Servs., *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians* 1 (2003), *available at* http://www.ahrq.gov/RESEARCH/tortcaps/tortcaps.pdf. These economists later examined county data from 1985 to 2000 and concluded that "[c]ounties in states with a [non-economic damages] cap had 2.2 percent more physicians per capita because of the cap, and rural counties in states with a cap had 3.2 percent more physicians per capita." William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, Health Affairs Online, May 31, 2005, at 250. A team of professors in different fields—business, economics, and law—similarly concluded that direct tort reforms such as limits on non-economic damages increased physician supply by 2.4% in general and by 11.5% with respect to emergency physicians. *See* Daniel P. Kessler *et al.*, *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 J. Am. Med. Ass'n 2618 (2005).

Public Act 94-677 clearly designed by the members of the General Assembly to protect the health, safety and welfare of the citizens of Illinois has done its job by addressing escalating liability costs incurred during the delivery of life sustaining and

saving health care has done its job. As stated earlier, health care services are more accessible and available than they were before Public Act 94-677 was enacted. Thus, Public Act 94-677 by its very nature is obviously rationally related to the General Assembly's purpose and consequently constitutional.

II. AS THE CASE WAS POSTURED PROCEDURALLY, THE LOWER COURT LACKED AUTHORITY TO DECLARE SECTION 2-1706.5 UNCONSTITUTIONAL.

The lower court declared 735 ILCS 5/2-1706.5 (West 2006) unconstitutional. As there is no common law action for a declaratory judgment in Illinois, its authority to grant such relief was bounded by the declaratory judgment statute, 735 ILCS 5/2-701 (West 2006), whose requirements must be followed strictly. *Beahringer v. Page*, 204 Ill. 2d 363, 789 N.E.2d 1216 (2003), *cert. denied*, 540 U.S. 926 (2003). The declaratory judgment statute sets forth various limitations on its usage – including the need for an "actual controversy" and the requirement that the judgment resolve at least "some part" of that controversy. These limitations were not met in this case and thus precluded the decision below.

A. No "Actual Controversy" Existed Regarding Section 2-1706.5.

The declaratory judgment statute only allows the entry of declaratory judgments in "cases of actual controversy". The requirement that a controversy be "actual" (a term of art) is, in essence, a requirement that the dispute be justiciable, rather than abstract, hypothetical, or moot. Accordingly, the case must admit of an immediate and definitive determination of rights. *Aida v. Time Warner Entertainment Co.*, 332 Ill. App.3d 154, 772 N.E.2d 953 (1st Dist. 2002). Thus, a court will not declare rights on a state of facts

that has not arisen and that may never arise or on a matter that is future, contingent, or uncertain. *People v. Naseef*, 127 Ill. App.3d 70, 468 N.E.2d 466 (3rd Dist. 1984).

Furthermore, the purpose of the declaratory judgment process is to allow a court to address a controversy after a dispute has arisen but before steps have been taken that would give rise to a claim for damages or other relief. The remedy is used to afford security and relief against uncertainty. *Beahringer v. Page*, 204 Ill. 2d 363, 789 N.E.2d 1216 (2003), *cert. denied*, 540 U.S. 926 (2003). Declaratory judgments are intended to avoid litigation, not to aid it. *Lihosit v. State Farm Mutual Automobile Insurance Co.*, 264 Ill. App.3d 576, 636 N.E.2d 625 (1st Dist. 1993).

Here, the declaratory judgment flouted all of these criteria. The limitation on non-economic damages will only come into play *if* the court finds liability and *if* the award of non-economic damages exceeds the statutory maximum. Plaintiffs asserted liability, but that does not make it so. Likewise, plaintiffs alleged grave injury to their persons, but that does not make it so either, and even if it is so it does not mean that the award of their non-economic damages will exceed those maxima.

This is not a situation where the declaratory judgment will avoid litigation or will afford security or relief against uncertainty. To the contrary, the declaratory judgment is intended solely to aid the plaintiffs in their litigation strategy, as they have alleged point blank in paragraph 50 of their First Amended Complaint:

> "In addition, whether the damages cap will apply to a jury trial award affects the overall value of the case should there be any discussion of settlement, the types of experts that PLAINTIFFS will choose to hire to prepare for trial, and the trial strategies and court costs at any future trial of this matter."

This is pure conjecture. A declaratory judgment should not be awarded on account of a speculative infringement of rights. *Shipp v. County of Kankakee*, 345 Ill. App.3d 250, 802 N.E.2d 284 (3rd Dist. 2004). Based on the present record, the likelihood that the plaintiffs will actually be affected by the caps is wholly remote and contingent.

Moreover, if these generalized allegations were sufficient to create an "actual controversy", the concept of justiciablity would have little meaning. Almost all persons confronted with legal questions would like those questions resolved definitively without a lawsuit, so they would be able to negotiate more effectively and would know what resources to commit to their case, should they ultimately become embroiled in litigation. However, the legal system has determined that some legal issues are proper for adjudication and some are not. The plaintiffs here have shown no reason why their question – the validity of § 2-1706.5 – should be deemed ripe for determination.

At least three districts of the Illinois Appellate Court have adjudicated the propriety of declaratory judgment actions by liability insurance companies seeking to determine the applicable policy limits while the underlying lawsuits against their insureds are in progress. The courts have held that no "actual controversy" exists, sufficient to justify a declaratory judgment action, until determinations are made in the underlying cases that (a) the insureds have liability and (b) the measure of that liability exceeds the minimum coverage amount the insurers concede under their insurance policies. Until such determinations are made, the declaratory judgment actions are too speculative. *Stokes v. Pekin Insurance Co.*, 298 Ill. App.3d 278, 698 N.E.2d 252 (5th Dist. 1998); *Weber v. St. Paul Fire & Marine Insurance Co.*, 251 Ill. App.3d 371, 622 N.E.2d 66 (3rd

Dist. 1993); *Batteast v. Argonaut Insurance Co.*, 118 Ill. App.3d 4, 454 N.E.2d 706 (1st Dist. 1983).

Not only is the reasoning behind these insurance coverage cases sound and worthy of this Court's acceptance, but in fact the situation at bar presents a far more compelling basis for denying declaratory judgment than did the circumstances in those suits. An insurance company owes an affirmative obligation to its insureds to pay claims promptly and fairly, 215 ILCS 5/154.6 (West 2006), and the requested declaratory judgments would have facilitated the satisfaction of that responsibility. By contrast, a defendant in a medical malpractice suit owes no such obligation to the person bringing suit. If the declaratory judgments had been granted to the insurance companies, the disputes between themselves and their insureds would have been resolved; here, the plaintiffs' lawsuit will continue regardless of whether or how the declaratory judgment count is resolved.

Moreover, there is no reason why a court should be reticent about deciding which policy limits govern a specific insurance claim. However, the question in the instant plaintiffs' declaratory judgment count is whether P.A. 94-677 passes constitutional muster. On that point there is a pronounced public policy *against* resolving the issue except as a last resort. The public interest in the stability of the legal system outweighs any potential benefit of increased efficiency that may be gained by addressing a constitutional issue before it is necessary to reach it. *People v. Hampton*, 225 Ill.2d 238, 867 N.E.2d 957 (2007). It is highly unlikely that, at trial, the defendants will be adjudged liable and that non-economic damages will be awarded in excess of the § 2-1706.5 limitations. Thus, but for the declaratory judgment action, the constitutional issues would

probably never be reached in this case. The lower court adjudicated constitutionality as a first resort, in an essentially advisory opinion with no purpose other than to facilitate the plaintiffs' trial planning. For that reason alone, the lower court should be reversed.

B. The Declaratory Judgment Did not "Terminate the Controversy or Some Part Thereof, Giving Rise to the Proceeding".

The declaratory judgment statute also incorporates the following limitation:

> "The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding."

The question of whether a declaratory judgment terminates *some part* of the controversy is resolved by considering the significance of the declaratory judgment in relation to the remainder of the case. *In re Marriage of Best*, No. 104002 (Ill. S.Ct., filed March 20, 2008). If the declaratory judgment resolves only an element of a claim, rather than an entire cause of action, it is improper under the "some part thereof" test, *Marlow v. American Suzuki Motor Corp.*, 222 Ill. App.3d 722, 584 N.E.2d 345 (1st Dist. 1991), as it would lead to undesirable, piecemeal litigation. *In re Marriage of Weber*, 182 Ill. App.3d 208, 537 N.E.2d 1022 (1st Dist. 1989).

The "some part thereof" test under the declaratory judgment statute is closely related to the test for finality and appealability under Supreme Court Rule 304(a). In *South Chicago Community Hospital v. Industrial Commission*, 44 Ill.2d 119, 121, 254 N.E.2d 448, 449 (1969), this Court stated:

> "To be final and appealable an order must dispose of the rights of the parties, either upon the entire controversy or upon some definite and separate part of it."

This language closely tracks the language of the declaratory judgment statute. It follows, then, that the jurisprudence under Illinois Supreme Court Rule 304(a) should bear on the "some part thereof" requirement under the declaratory judgment statute.

McGrew v. Heinold Commodities, Inc., 147 Ill. App.3d 104, 497 N.E.2d 424 (1st Dist. 1986), is therefore instructive. There, the court held that the dismissal of a count for punitive damages was not a final order for purposes of Rule 304(a), because a separate count remained pending for compensatory damages. Resolution of the punitive damages count could not be considered a resolution of a sufficiently substantial part of the lawsuit to merit appealability. By the same token, a determination that a portion of the present plaintiffs' non-economic damages is potentially awardable should be considered too insubstantial to merit summary judgment.

Although *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997), held that a dispute over the validity of the damage caps in P.A. 89-7 presented an "actual controversy", it did not address the "some part thereof" requirement. Accordingly, that case does not establish the propriety of a declaratory judgment here. *United States v. Mitchell*, 271 U.S. 9 (1926) (holding that a question not presented to the court for decision and not discussed in the opinion of the court should not be deemed decided merely because it existed in the record and might have been raised and considered); *In re David B.*, 367 Ill. App.3d 1058, 857 N.E.2d 755 (5th Dist. 2006) (also noting that *sub silentio* determinations lack precedential authority). Based on the preponderance of Illinois jurisprudence, the declaratory judgment in this case should be reversed, as the trial court was not empowered to grant it.

III. THE ALLEGATIONS OF COUNT V WERE TOO SPECULATIVE TO JUSTIFY A JUDGMENT FOR THE PLAINTIFFS.

The plaintiffs asserted entitlement to a declaration on the constitutionality of § 2-1706.5 because of their supposed need to evaluate their lawsuit for purposes of settlement discussion, expert witness retention and conjectured trial strategies. No facts were alleged to substantiate these vague assertions. At that, the defendants denied the allegations. Based on these pleadings, the plaintiffs moved for judgment under 735 ILCS 5/2-615(e) (West 2006).

When evaluating the facts for purposes of a motion for judgment on the pleadings, a court must construe the evidence strictly against the movant and liberally in favor of the nonmoving party. *McCall v. Devine*, 334 Ill. App.3d 192, 777 N.E.2d 405 (1st Dist. 2002). Yet, the trial court granted plaintiffs a declaratory judgment, based solely on their motion for judgment on their conclusory, contested pleadings.

It is fundamental that a judgment must be supported by allegations in the complaint as well as by the evidence. *Abbate Bros., Inc. v. City of Chicago*, 11 Ill.2d 337, 142 N.E.2d 691 (1957). Here, neither condition was fulfilled.

IV. SECTION 2-1706.5 MERELY LIMITS LIABILITY OF HOSPITALS AND PHYSICIANS IN MEDICAL MALPRACTICE CASES. IT DOES NOT ASSUME A RIGHT TO DECIDE SPECIFIC CASES, AND IT THEREFORE DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST SEPARATION OF POWERS.

The issue before the General Assembly during the passage of P.A. 94-677 was how the interests of those persons injured as a result of medical malpractice in receiving monetary compensation should be balanced against the interests of society in receiving accessible and affordable health care. As part of its resolution of these competing interests, the General Assembly enacted 735 ILCS 5/2-1706.5 (West 2006), which

limited the liability of hospitals and physicians available in medical malpractice lawsuits. Its decision was a pure policy determination, of a type commonly made in Illinois and in other states around the country. In no way did it intrude on the adjudicatory process; it simply limited the possible results of that process. Nevertheless, the lower court held that § 2-1706.5 is an unconstitutional violation of the prohibition against separation of governmental powers. Following *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997), it found that the statute should be considered "a legislative remittitur" and thus an encroachment on judicial power.

Numerous court decisions have defined the general scope of "judicial power" under the Illinois Constitution. For example, *Witter v. Cook County Commissioners*, 256 Ill. 616, 621, 100 N.E. 148 (1912), stated the following:

> "The judicial power is that which adjudicates upon and protects the rights and interests of individual citizens and to that end construes and applies the law and adjudges in particular cases."

(Although *Witter* was decided under the Constitution of 1870, the 1970 Constitution retained the earlier jurisprudence on separation of powers. "Constitutional Commentary" to 1970 Ill. Const. Art. II, § 1, by Robert A. Helman and Whayne W. Whalen, Smith Hurd Edition of ILCS Annotated) (West 2006). *Accord with Witter, People ex re. Sherman v. Cryns*, 203 Ill.2d 264, 786 N.E.2d 139 (2003).

By contrast, the General Assembly is empowered to enact measures that it deems necessary to enhance the overall public good, even if such enactments might interfere with individual interests (so long as those individual interests have not become fully vested). *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill.2d 357, 483

N.E.2d 1245 (1985). The legislative power includes the right to repeal or change the common law, or do away with all or any part of it. *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 732 N.E.2d 528 (2000).

Section 2-1706.5 is a limitation on the liability of certain defendants, not an encroachment on judicial prerogatives. The General Assembly has neither construed nor applied the law in any specific case. Rather, it has resolved a political question, involving a balance of competing social interests, in a generally defined situation. That question is how the public interest in affordable and accessible health care should be weighed against the public interest in compensating those persons who have been injured as a result of medical malpractice.

There is no reason to infer from its passage of § 2-1706.5 that the General Assembly believes the judicial system incapable of correcting excessive damage awards by juries, through remittitur or otherwise. To the contrary, P.A. 94-677 is rationally grounded on the principle that large awards of non-economic damages in medical malpractice cases, whether by judges or by juries and even when sustained by the evidence, lead to excessive social costs. Those costs, which may be deduced from statistical evidence, from anecdotes, or even from reasonable conjecture, diminish the affordability and availability of health care in Illinois.

Committee for Educational Rights v. Edgar, 174 Ill.2d 1, 672 N.E.2d 1178 (1996), although it involved a fact situation different from the one at bar, employed reasoning that is instructive here. In *Committee for Educational Rights*, the plaintiffs sought an adjudication that the Illinois system of educational funding, which is partially based on the relative property values of the separate school districts, violated various

constitutional provisions, including the requirement that the state provide "an efficient system of high quality public educational institutions and services." Illinois Const., Art. X, § 1. The Court held that the educational funding system is constitutional, in part because the "high quality" requirement is an inherently political issue and therefore one for the legislature. It noted several characteristics of nonjusticiable political questions, including the need for "an initial policy determination of a kind clearly for nonjudicial discretion." 174 Ill.2d at 39. The Court then went on to state the following:

> "To hold the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. ... [A]n open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives." 174 Ill.2d at 40-41.

In the trial setting, the award of non-economic damages is determined by the evidence of the parties. The general public must sit on the sidelines, even though its members may be affected by the outcome. While the most socially desirable measure of such damages assuredly depends on the injury suffered by the victim, it also depends on the consequences to the population at large. The passenger who suffered a spinal injury

in a car crash and had to be helicoptered 100 miles to a hospital in St. Louis, because there were no qualified surgeons available at a closer facility in Illinois, would not be heard. The woman whose ovarian cancer went undiagnosed for months because she was unable to secure an appointment for a routine gynecological examination will not testify. And neither will the newborn baby who must endure a lifetime of debilitating birth defects because her mother was unable to find or unable to afford a specialist in high-risk neonatology.

The members of the General Assembly are as compassionate toward the victims of medical malpractice as are jurors. They are as desirous of seeing that the injured be compensated as is the judiciary. However, on a day to day basis, the General Assembly seeks different answers than does the judicial branch. They are not solely concerned with "Did something go wrong?" They also want to know "What will make things go right?"

The legislative findings in § 101 of P.A. 94-677 articulate the General Assembly's determination that a limitation on liability for non-economic damages in medical malpractice suits is needed to stem "the reduction of the availability of medical care in portions of the State." Empirical research bears out that states with limitations on non-economic damages have a greater number of physicians per capita--in the neighborhood of 5 percent more--than states without. Moreover, the proportionate number of physicians affected by extreme awards of non-economic damages is generally larger for physicians in high legal-risk specialties (such as obstetrics or neurosurgery) than for the medical community as a whole. See C. Kane and D. Emmons, The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent Literature (American Medical Association 2007), available at http://www.ama-

assn.org/ama1/pub/upload/mm/363/prp2007-1.pdf. In fact, the need for limitations on non-economic damages was not only determined by the Illinois General Assembly, but also by numerous Illinois cities with passage of local ordinances establishing caps, including Mascoutah, Carbondale, Marion, Mt. Vernon, Belleville, Murphysboro, Alton, Peoria, Joliet, and Herrin. (See Defendant Roberto Levi-D'Ancona's Appendix of Empirical Sources Volume III, Number 21, pp. 486-515).

Thus, the debate about non-economic damages involves all of society. It is an inherently political question, and it properly has been addressed in the legislature.

Best v. Taylor Machine Works, 179 Ill.2d 367, 689 N.E.2d 1057 (1997), found a damage cap to be unconstitutional for a variety of reasons, one of those being a determination that the cap violated the separation of powers requirement in Ill. Const. Art. II, § 1. According to *Best*, the General Assembly encroached on the judicial power to determine a suitable level of damages through remittitur. Numerous other states, however, have expressly rejected the separation of powers argument and have found damage limitations to be consistent with legislative power. *E.g.*, *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Evans v. State of Alaska*, 56 P.3d 1046 (Alaska 2002); *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115 (Idaho 2000); *Pulliam v. Coastal Emergency Services, Inc.*, 509 S.E.2d 307 (Va. 1999); and *Owens-Corning v. Walatka*, 725 A.2d 579 (Md. App. 1999). In fact, the Nebraska Supreme Court, in rejecting the legislative remittitur theory, observed:

> "Indeed, were a court to ignore the legislatively-determined remedy and enter an award in excess of the permitted amount, the court would invade the province of the legislature."

Gourley v. Nebraska Methodist Health System, 663 N.W.2d 43, 70 (2003).

Moreover, *Best v. Taylor Machine Works* cited the Washington Supreme Court case, *Sofie v. Fireboard Corp.*, 771 P.2d 711 (1989), as a "persuasive" authority on legislative remittitur and discussed that case at length. 179 Ill.2d at 414-415. In fact, though, the *Sofie* court specifically stated that the case would not be decided under a separation of powers theory. It noted that, while there are some parallels between a cap on damages and an order of remittitur, there are also important differences. "Therefore, the legislative damages limit is fundamentally different from the doctrine of remittitur." 771 P.2d at 654.

Further, this Court has recognized the ability of the Illinois General Assembly to limit or even eliminate types or categories of damages, as well as liability itself in order "to promote the general welfare." *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 732 N.E.2d 528 (2000) (upholding liability limitations in the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10) as constitutional); *Mega v. Holy Cross Hospital*, 111 Ill.2d 416, 490 N.E.2d 665 (1986) (upholding statutes of limitations and repose for medical malpractice cases as constitutional); *Bernier v. Burris*, 113 Ill.2d 219, 497 N.E.2d 763 (1986) (upholding prohibition against punitive damages in actions for healing art or legal malpractice as constitutional). Specifically, in eliminating punitive damages this Court reasoned: "The elimination of awards for punitive damages in actions for medical malpractice serves the legislative goals of reducing damages generally against the medical professional." *Bernier*, 113 Ill.2d at 246. Thus, limiting (even eliminating) liability for non-economic

damages and thereby reducing aggregate liability or damages against the medical professional is constitutional.

Justice Bilandic's concurrence in *Best v. Taylor Machine Works* characterized the separation of powers discussion as unnecessary dicta. 179 Ill. 2d at 471. Whether or not he was correct, the lower court's interpretation of the *Best v. Taylor Machine Works* separation of powers analysis is an anomaly within Illinois law and would stand alone nationally. The lower court's approach is flawed or misplaced, resulting in a usurpation of legislative prerogatives. For these reasons, if this Court reaches the separation of powers challenge to P.A. 94-677, it should be rejected.

V. CONCLUSION

The trial court should not have reached the constitutional issues, at least at the present state of the proceedings. Thus, this Court need not address those issues either. If those issues are to be considered, however, this Court should find that the General Assembly was entitled to enact § 2-1706.5 without violation of the separation of powers doctrine. The trial court's declaratory judgment on Count V and on the validity of P.A. 94-677 as a whole should be reversed, and this cause should be remanded for further adjudication.

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I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Certificate of Service, is 29 pages.

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