**IN THE COURT OF APPEALS OF MARYLAND**

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**September Term, 2009**

**No. 104**

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**DRD POOL SERVICES, INC.,**

Petitioner/Cross-Appellee,

v.

**THOMAS FREED**, *et al.*,

Respondents/Cross-Petitioners.

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On Appeal from the Circuit Court for Anne Arundel County
(Nancy Davis-Loomis, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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# MARYLAND CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, MARYLAND MOTOR TRUCK ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, AMERICAN CHEMISTRY COUNCIL, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN INSURANCE ASSOCIATION'S *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT/CROSS-APPELLEE

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## INTEREST OF *AMICI CURIAE*

As organizations representing a wide range of Maryland businesses and their insurers, *amici* have an interest in ensuring that Maryland's civil litigation environment is fair, predictable, and reflects sound policy. These goals are furthered by Md. Code, Cts. & Jud. Proc. § 11-108, which allows up to $725,000 in noneconomic damages in personal injury cases. *Amici* have a substantial interest in the constitutionality of the statute and would be adversely impacted if it is nullified.

## STATEMENT OF THE CASE

*Amici* adopt Petitioner/Cross-Appellee's Jurisdictional Statement.

## STATEMENT OF FACTS

*Amici* adopt Petitioner/Cross-Appellee's Statement of Facts.

## INTRODUCTION

Noneconomic damages awards are highly subjective and inherently unpredictable. There is "no market for pain and suffering." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 549 (2006). Consequently, legal scholars have long recognized that putting a "monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 Law & Contemp. Probs. 219, 222 (1953). "[J]uries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*,

73 Cal. L. Rev. 772, 778 (1985). One commentator noted the difficulty expressed by jurors in putting a price on pain and suffering:

> Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical[s]. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

Trial lawyers understand these dynamics and suggest juries award extraordinarily large amounts for pain and suffering. That was the situation here, where the jury awarded each of the parents of a child who drowned in a pool, with no witnesses to the accident, $2 million. The wrongful death award was reduced to $1,002,500.00 pursuant to a statutory "cap" on noneconomic damages. The plaintiffs also seek additional noneconomic damages on behalf of their child for conscious pain and suffering before drowning, which the circuit court found unsupported by the evidence, but the Court of Special Appeals reversed. This brief focuses on the sound constitutional, legal and public policy bases underlying the fair outer limit on noneconomic damages in personal injury cases, Md. Code, Cts. & Jud. Proc. § 11-108.

Large pain and suffering awards, such as in the subject appeal, are of fairly recent vintage. Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff's actual pecuniary loss, such as medical expenses. That is not true today. Following World War II, and particularly since the 1960s, a confluence of factors led to a rapid and substantial rise in the size of pain and suffering awards. This

trend continued as Maryland's General Assembly, among other state legislatures, recognized the need for statutory upper limits to guard against excessive and unpredictable outlier awards.

Statutory limits, such as Md. Code, Cts. & Jud. Proc. § 11-108, promote more uniform treatment of individuals with comparable injuries, *see* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995) (unpredictability "undermines the legal system's claim that like cases will be treated alike"), facilitate settlements, address "over- or under precautions by affected industries and insurers," *id.*, and limit arbitrariness that may raise potential due process problems. *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"), *reh'g denied*, 691 N.W.2d 436 (Mich.), *cert. denied*, 546 U.S. 821 (2005); *see also* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1414 (2004) ("The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

Md. Code, Cts. & Jud. Proc. § 11-108 remains constitutional; it was and has proven to be a rational legislative response to rising pain and suffering damages, outlier awards, and concerns about the effects of excessive liability on the state's economy. *See Murphy v. Edmonds*, 601 A.2d 102, 115-16 (Md. 1992); *see also Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (applying the rational basis test to find

that the noneconomic damage limit did not violate either the Maryland or U.S. Constitutions). The noneconomic damage cap does not take away from any economic damage award, such as compensation for medical bills, other expenses, or lost wages. Nor does the state's limit on noneconomic damages preclude courts from imposing an award of punitive damages to deter and punish malicious conduct in appropriate situations.

This Court should follow the doctrine of *stare decisis* with regard to *Murphy*, as it did in to *Oaks v. Connors*, 339 Md. 24, 37, 600 A.2d 423, 429-30 (1995), and respect the Legislature's public policy judgment and the balance it chose to strike. *See generally* Victor E. Schwartz, Mark A. Behrens & Monica Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

## ARGUMENT

## I. THE EVOLUTION AND RISE OF PAIN AND SUFFERING AWARDS

### A. Modest Beginnings

Initially, the common law rarely recognized damages beyond pecuniary harm. Until the mid-nineteenth century, damages that compensated plaintiffs for intangible losses were often referred to as "exemplary damages." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 614-15 (2003). An early law review article recognized, "[t]he difficulty of estimating compensation for intangible injuries, was the cause of the rise of [exemplary damages] . . . [W]hen the early judges allowed the jury discretion to

assess beyond the pecuniary damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment." Edward C. Eliot, *Exemplary Damages*, 29 Am. L. Reg. 570, 572 (1881) (presently entitled U. Pa. L. Rev.); *see also* Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 519 (1957) ("In the 1760's some courts began to explain large verdicts awarded by juries in aggravated cases as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings"). By the mid-1900s, the law firmly established that pain and suffering awards were to compensate for intangible injuries; punitive damages punished a defendant for wrongful conduct.

Prior to the Twentieth Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars, each of which may have included an element of noneconomic damages. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 396 (2007). High noneconomic damage awards were uniformly reversed. *See id.* at 379-87. As recently as the 1930s, pain and suffering awards were generally modest. *See* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

### B. The Turning Point

The size of pain and suffering awards took its first leap after World War II, as trial lawyers such as Melvin Belli began a campaign to increase such awards. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). Trial lawyers soon became adept

at increasing pain and suffering awards. For example, during a nine-month period in 1957, there were fifty-three verdicts of $100,000 or more. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 568 (2006). Scholars began to question the proper role and measurements for such awards. *See* Charles A. Wright, *Damages for Personal Injuries,* 19 Ohio St. L.J. 155 (1958).

Overall, in inflation-adjusted terms, the average pain and suffering award grew from $38,000 in the 1940s and 1950s to $48,000 in the 1960s. *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989). The pace continued. From the 1960s to the 1980s pain and suffering awards in wrongful death cases grew 300%. *See id.* Pain and suffering awards became the most substantial part of tort costs. As the Third Circuit found, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitutes the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

Scholars largely attribute this rise to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that "someone should pay"; and (5) better organization by the plaintiffs' bar. *See* Merkel, *supra*, at 553-66; Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004).

## C. The Recent and Rapid Skyrocketing of Awards

The continuing skyrocketing of pain and suffering awards in recent years, both nationally and in Maryland, shows the foresight of the General Assembly's enactment of an outer limit on such awards. Between 1994 and 2000, jury awards in personal injury cases grew by an alarming 176%. *See There is an Attack on Medical Profession*, Sunday News (Lancaster, Pa.), May 16, 2004, at P3 (citing Jury Verdict Research). Average jury awards rose from $187,000 to $323,000 in automobile cases during that general period. *See* Robert P. Hartwig, *Liability Insurance and Excess Casualty Markets: Trends, Issue & Outlook*, at 51 (Ins. Info. Inst., Oct. 2003) *available at* http://server.iii.org/yy_obj_data/binary/686661_1_0/liability.pdf.

The bulk of this rise can be attributed to pain and suffering awards. In fact, the average pain and suffering award in 1989 was $319,000; just ten years later it was $1,379,000. *See* Kim Brimer, *Has "Pain and Suffering" Priced Itself Out of the Market*, Ins. J., Sept. 8, 2003, *available at* http://www.insurancejournal.com/magazines/southcentral/2003/09/08/partingshots/32172.htm. One study found that pain and suffering awards accounted for sixty to seventy percent of jury verdicts between 1990 and 2000. *See Attack on Medical Profession, supra*, at 1 (citing Jury Verdict Research). Another study reports that pain and suffering awards represent more than half of all tort damages. *See* Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System* 17 (2003), *available at* https://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (pain and suffering awards represent twenty-four percent

of U.S. tort costs; economic damages represent twenty-two percent); *see also* Thomas H. Cohen, *Civil Justice Survey of State Courts*, No. NCJ 228129 (U.S. Dep't of Justice, Bureau of Justice Statistics, Nov. 2009), *available at* http://www.ojp.gov/bjs/pub/pdf/tbjtsc05.pdf (finding that monetary payouts from cases disposed of by bench or jury trial in a national sample of state courts of general jurisdiction in 2005 were distributed as follows: economic damages (47%), noneconomic damages (44%), and punitive damages (9%)).

As Fourth Circuit Judge Paul Niemeyer has recognized, "money for pain and suffering . . . provides the grist for the mill of our tort industry." Niemeyer, 90 Va. L. Rev. at 1401; *see also* Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (pain and suffering awards in the United States are more than ten times those in the most generous of the other nations).

This rise may be due, at least in part, to increasing constitutional, statutory, and common law restrictions on punitive damage awards, which have led lawyers to bolster other forms of recovery. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002). Some attorneys may champion excessively high verdicts as Olympian victories, but they go beyond the plaintiff's needs, distort the civil justice system, and place undue strain on the economy.

## II. THE PUBLIC POLICY BASES UNDERLYING MARYLAND'S LIMIT ON NONECONOMIC DAMAGES

### A. The Litigation and Economic Climate Leading to Enactment of the Reform

In 1985, Maryland Governor Harry Hughes and the General Assembly established two task forces, the Governor's Task Force to Study Liability Insurance and the Joint Executive/Legislative Task Force on Medical Insurance, in response to a crisis in the availability of insurance in Maryland. *See Murphy*, 325 Md. at 369-70, 601 A.2d at 115-116; *Franklin*, 704 F. Supp. at 327-28 (D. Md. 1989). After close consideration, including hearings, meetings, and substantial research, *both* task forces recommended a statutory limit on noneconomic damages. As the Governor's Task Force concluded:

> [T]he civil justice system can no longer afford unlimited awards for pain and suffering.
>
> The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, lead to more settlements, and enable insurance carriers to set more accurate rates because of the greater predictability of the size of judgments. The limitation is designed to lend greater stability to the insurance market and make it more attractive to underwriters.
>
> A substantial portion of the verdicts being returned in liability cases are for noneconomic loss. The translation of these losses into dollar amounts is an extremely subjective process as these claims are not easily amenable to accurate, or even approximate, monetary valuation. There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. They vary substantially from person to person, even when applied to similar cases or similar injuries, and can be fabricated with relative ease.
>
> A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.

*Franklin*, 704 F. Supp. at 1328 (quoting report of the Governor's Task Force to Study Liability Insurance issued Dec. 20, 1985). Soon after issuance of the task forces' reports, the General Assembly enacted legislation that limited any award for noneconomic damages in a personal injury action to $350,000. *See* Md. Cts. & Jud. Proc. § 11-108(b). The maximum was adjusted to $500,000 in 1994 and increased by an additional $15,000 on October 1 of each year beginning in 1995.

As this Court recognized, "[a] cap on noneconomic damages may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services." *Murphy*, 325 Md. at 369-70, 601 A.2d at 115; *see also Oaks*, 339 Md. at 34-35, 660 A.2d at 428 ("One of the primary purposes in enacting this statutory limit was to promote the availability and affordability of liability insurance in Maryland."). The Court recently clarified that the noneconomic damage limit is applicable to all personal injury claims, whether rooted in common law or a statutory claim, in *Green v. N.B.S., Inc.*, 409 Md. 528, 976 A.2d 279 (Md. 2009), and that the noneconomic damage limit applicable in health care malpractice cases applies irrespective of whether claims were subject to arbitration, *Lockshin v. Semsker*, -- A.2d --, No. 78, 2010 WL 88686 (Md. Jan 12, 2010).

It is clear that placing fair upper limits on what has become the largest element of tort expenses makes Maryland a more business-friendly state; Maryland law provides needed predictability and certainty as to liability exposure. This Court should respect the

General Assembly's public policy judgment to rationally balance such predictability and certainty with fair compensation.

### B. The Sound Public Policy Underlying the Limit

#### 1. Controlling Outlier Awards

When the General Assembly initially enacted the noneconomic damage limit and set it at $350,000 in 1986, the legislature considered several studies that showed that most noneconomic damage awards at the time were less than $250,000. *See Murphy*, 325 Md. at 370, 601 A.2d at 115-16. Thus, the General Assembly's goal was to reduce outlier awards and provided for greater consistency and predictability in Maryland's civil justice system. Given the General Assembly's close consideration of this public policy issue, this Court found that it did not act arbitrarily or irrationally in enacting the $350,000 limit. Rather, it found the General Assembly's objective in reducing variability in awards, which, in turn, foster a more favorable insurance market, "obviously a legitimate legislative objective." *See id.* at 369, 601 A.2d. at 115.

Today, the limit stands at $725,000 and, at the time of the plaintiff's death, $665,000. Certainly, no amount of money can eliminate the suffering of parents following the death of a child. This understandable sympathy, however, cannot and should not provide a basis for overturning the rational judgment of the Legislature to curb bankruptcies and other financial hardships of individuals and businesses when accidents occur. Fairness dictates the need for some reasonable bounds. The size of Maryland's noneconomic damage limit, which rises by $15,000 each year, remains among the highest such limit in the country. Moreover, as when the law took effect in 1986, the limit

remains at a level that it does not require a reduction of pain and suffering awards in the vast majority of cases. More serious injuries may result in higher pain and suffering awards, but often an amount still within the statutory limit. *See, e.g.,* Barbara Grzincic, *Baltimore Jury Awards $455K to Child Attacked by Two Rottweilers*, Daily Rec., Apr. 6, 2007, *available at* 2007 WL 26495579 (reporting a $455,000 award, almost entirely for pain and suffering, to a ten-year-old child who was mauled by two dogs and whose injuries required 80 stitches and left him scarred).

There is, however, a continuing need to rein in the occasional excessive noneconomic damage award. For instance, this Court recently affirmed the application of the limit in a case involving exposure to lead paint in which the plaintiff, who brought a claim under the Consumer Protection Act, received a $2.3 million noneconomic damage verdict. *See Green*, 409 Md. at 546-48, 976 A.2d at 289-90 (finding $515,000 limit applied). An earlier example is *Beynon v. Montgomery Cablevision Ltd. P'ship*, 351 Md. 460, 465-66, 718 A.2d 1161, 1164 (1998), where this Court ruled that the parents of a driver who rear-ended a tractor trailer at forty miles per hour could recover noneconomic damages for fear and apprehension of imminent death in the moments before impact, with the $1 million award subject to the $350,000 limit applicable at the time. *See also Kent Village Assoc. Joint Venture v. Smith*, 104 Md. App. 507, 657 A.2d 330 (1995) (reducing $2.3 million noneconomic damages portion of $14.6 million award to $350,000 limit in case where child who was playing on a refuse bin was seriously injured when it overturned); *Brown v. Miller,* 2009 WL 3167242 (Md. Cir. Ct. Baltimore City Aug. 11, 2009) (awarding plaintiff $1 million in noneconomic damages in addition to $63,000 in

past medical expenses – reduced to $729,000 pursuant to statutory limit – for leg and ankle injuries sustained in car accident); *Spencer v. Larkin,* 2006 WL 2389945 (Md. Cir. Ct. Baltimore City Feb. 13, 2006) (awarding $7 million in noneconomic damages to two children who claimed to suffer brain damage, loss of I.Q. points, and behavior problems as a result of living in homes contaminated with lead paint). There are many other examples of noneconomic damage awards outside the norm, some of which make headlines.[1]

For these reasons, the General Assembly's foresight in enacting a reasonable limit on noneconomic damages is an important, rational measure that continues to control outlier awards and provide predictability in Maryland's civil justice system today.

### 2. Treating Plaintiffs Consistently and Fairly

In addition to controlling outlier awards, a limit on noneconomic damages helps ensure that plaintiffs who experience similar injuries are treated with consistency and fairness. As pain and suffering awards are inherently subjective in nature, substantial

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[1] *See, e.g.*, Brendan Kearney, *Baltimore Jury Awards $7.1M to Injured Tugboat Employee*, Daily Rec., Nov. 11, 2008, *available at* 2008 WLNR 25904039 (reporting award of $7 million in noneconomic damages in addition to $100,000 in future medical expenses and $11,280 for lost wages related to a broken jaw); Brendan Kearney, *Baltimore Jury Awards $1.2M for Fall from X-ray Table*, Daily Rec., June 15, 2009, *available at* 2009 WL 1151296 (reporting $750,000 noneconomic damage award, reduced to $635,000 under statutory limit, to an individual who, when seeking treatment for a slip-and-fall on ice, fell while climbing onto an examining table); Barbara Grzincic, *Baltimore Judge Considers Whether to Undo a Jury's $1M Award to a New Jersey Tourist*, Daily Rec., Sept. 17, 2004, *available at* 2004 WLNR 22389651 (reporting $1 million award to a father and his daughter who were hit by a car and experienced relatively minor injuries with $927,500 for pain and suffering to the father and $50,000 in noneconomic damages to the daughter, but only $18,500 in medical damages and lost wages); Brendan Kearney, *Anne Arundel County Jury Awards Driver Struck by Cement Truck $1.95M*, Daily Rec., July 25, 2008, *available at* 2008 WL 25646303 (reporting award of $1.86 million for pain and suffering, even after the plaintiffs' counsel requested only $300,000 in addition to the plaintiff's $66,000 in medical bills and $24,000 in lost wages).

variability among awards is likely to occur. In a system with no limit on noneconomic damages, sympathetic plaintiffs are bound to hit the litigation lottery. Individuals who are less sympathetic, whether based on their age, appearance, demeanor, or actions leading to the injury, may receive substantially less, even if their injury, and resultant pain and suffering, is similar. Maryland's noneconomic damages statute, by reducing the variability in awards for pain and suffering, provides greater fairness for similarly situated plaintiffs.

### 3. Ensuring that Pain and Suffering Awards Serve a Compensatory, Not Punitive, Function

Conversely, plaintiffs' lawyers may improperly influence juries to award noneconomic damages based on a defendant's wrongful conduct or perceived wealth, leading to an award for pain and suffering that is inflated based on a desire to punish the defendant. The resultant noneconomic damage awards are over and above their compensatory purpose. Such awards, which are rooted in animus toward a particular defendant, are meant to punish and may circumvent Maryland's common law standards for an award of punitive damages. These include the need to prove, through clear and convincing evidence, that the defendant acted with malice. *See Owens-Illinois v. Zenobia*, 325 Md. 420, 454-56, 601 A.2d 633, 650-51 (Md. 1992). In addition, inflated noneconomic damage awards that include a punitive element may avoid constitutional standards applicable to punitive damage awards. *See* Schwartz & Lorber, 54 S.C. L. Rev. at 64-66. While it does not appear that that the verdict in the case before this Court resulted from argument that inflamed or otherwise prejudiced the jury, there are

numerous instances around the country in which this has occurred.[2] Maryland's limit on noneconomic damages helps discourage such improper practices, avoids extraordinary and excessive noneconomic damages, and provides more equal treatment to defendants.

## III. MARYLAND'S NONECONOMIC DAMAGES STATUTE REPRESENTS LEGITIMATE, CONSTITUTIONAL LEGISLATIVE POLICY

### A. Numerous Courts Have Enacted and Upheld Limits on Noneconomic Damages

Maryland is not alone in trying to restrain outlier pain and suffering awards. The majority of states have placed bounds on such awards. *See* Nat'l Ass'n of Mut. Ins. Cos., *Noneconomic Damage Reform*, *available at* http://www.namic.org/reports/tortReform/NoneconomicDamage.asp (surveying statutory noneconomic damages limits). When Maryland enacted the statutory limit in 1986, it was a leader in this area. Maryland was the first state to adopt a limit that is generally applicable to personal injury cases. *See Maryland Legislature Puts Ceiling on Personal Injury Awards*, N.Y. Times, Apr. 13, 1986, at 150, *available at* 1986 WL 834801. Several states have followed Maryland's

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[2] *See, e.g., Pellicer v. St. Barnabas Hosp.*, 974 A.2d 1070, 1089 (N.J. 2009) (finding that award of $50 million for pain, suffering, and loss of enjoyment of life, in addition to an award of over $20 million in economic damages, was due, in part, to argument designed to inflame the jury); *Harris v. Mt. Sinai Med. Ctr.*, 876 N.E.2d 1201, 1207-08 (Ohio. 2007) (granting new trial due to plaintiffs' counsel misconduct and improper passion and prejudice resulted in $30 million verdict, including $15 million in noneconomic damages); *Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr.3d 147, 154-55 (Cal. Ct. App. 2006) (remitting award of $105 million for pain and suffering to a woman paralyzed in an SUV rollover case, in addition to $246 million in punitive damages), *vacated and remanded*, 127 S. Ct. 2250 (2007); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004) ("Plaintiffs' counsel was making a punitive damages argument for intentional fraud when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to inflame and prejudice the jury."); *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 585 S.E.2d 557, 559-66 (Va. 2003) (finding that plaintiffs' counsel's arguments improperly appealed to "the economic fears and passions" of the jury, leading to a $60 million compensatory award).

lead, such as Alaska, Colorado, Hawaii, Idaho, Kansas, Mississippi, and Ohio.[3]

Courts that have considered the constitutionality of such measures have upheld the legislature's prerogative to set needed bounds on inherently subjective awards.[4] For example, the Ohio Supreme Court recently recognized that the state's generally applicable limit on noneconomic damages in tort actions –

> bears a real and substantial relation to the general welfare of the public. The General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.

*Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 435-36 (Ohio 2007); *Oliver v. Cleveland Indians Baseball Co., LP*, 915 N.E.2d 1205 (Ohio 2009). The Alaska Supreme Court

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[3] *See, e.g.*, Alaska Stat. § 09.17.010 (limiting noneconomic damages to the greater of $400,000 or injured person's life expectancy multiplied by $8,000, except that in personal injury cases involving severe permanent injuries, the limit is increased to the greater of $1 million or injured person's life expectancy multiplied by $25,000); Colo. Rev. Stat. § 13-21-102.5(3) (limiting noneconomic damages to $250,000, unless justified by clear and convincing evidence, but in no case permitting noneconomic damages in excess of $500,000, adjusted for inflation); Haw. Stat. § 663-8.7 (limiting damages for pain and suffering to $375,000, with certain exceptions); Idaho Code § 6-1603 (limiting noneconomic damages to $400,000, adjusted for inflation, except in cases involving willful or reckless misconduct or acts that would constitute a felony); Kan. Stat. Ann. § 60-19a02(b) (limiting noneconomic damages to $250,000); Miss. Code Ann. § 11-1-60(2) (limiting noneconomic damages in all non-medical liability civil suits to $1 million); Ohio Rev. Code Ann. § 2315.18 (limiting noneconomic damages to the greater of $250,000 or three times the economic loss, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence, except in certain cases involving certain severe permanent injuries).

[4] *See, e.g., C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds, Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *see also Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996) (upholding Kansas's limit on noneconomic damages).

likewise recognized that statutory limits on noneconomic damages "bear[ ] a fair and substantial relationship to a legitimate government objective." *C.J. v. Dep't of Corrections*, 151 P.3d 373, 381 (Alaska 2006). Other states have established limits on noneconomic damages applicable to specific types of claims. Many courts have upheld noneconomic damage limits in medical malpractice actions[5] or other contexts.[6]

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[5] *See Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.) ($250,000 noneconomic damages cap did not violate equal protection or due process), *appeal dismissed*, 474 U.S. 892 (1985); *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004) ($1 million aggregate limit did not violate equal protection, right to jury trial, or separation of powers); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (statute limiting noneconomic damages to $250,000 in medical malpractice claims when party submits to a binding medical arbitration panel did not violate equal protection, due process, takings, right to jury trial, single subject requirement, or nondelegation doctrine); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992) (noneconomic damages cap did not violate state or federal equal protection guarantees or open courts provision of state constitution), *cert. denied*, 508 U.S. 909 (1993); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002) (noneconomic damages limit did not violate equal protection, separation of powers, or the right to have damages determined by a jury); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) ($1.25 million aggregate damages limit did not violate prohibition against special legislation, equal protection, open courts, right to remedy, right to jury trial, takings, or separation of powers); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) ($500,000 general damages limit for health care providers did not violate open courts, right to redress, or equal protection); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) ($500,000 limit on noneconomic damages "remains in full force and effect"); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) ($250,000 noneconomic damages limit did not violate open courts, uniform operation of laws, due process, right to jury trial, or separation of powers); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) ($1 million limit did not violate right to jury trial, prohibition against special legislation, separation of powers, takings, due process, or equal protection); *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989) (limit on recoveries in medical malpractice actions did not violate due process, right to jury trial, separation of powers, prohibition against special legislation, or equal protection); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877 (W. Va. 1991) ($1 million limit on noneconomic damages did not violate equal protection, due process, or right to remedy); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001) (reaffirming *Robinson*); *see also Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (applying Virgin Islands' law) (noneconomic damages limit did not violate Seventh Amendment to U.S. Constitution); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002) (New Mexico's medical liability cap was not arbitrary and capricious).

[6] *See Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. App. 2004) (noneconomic damages limit in product liability actions did not violate equal protection, separation of powers, or the right to have damages determined by a jury); *Oliver v. Cleveland Indians Baseball Co.*, LP, 915 N.E.2d 1205 (Ohio 2009) (limit on noneconomic damages awarded against political subdivisions did not violate right to jury

The clear trend among state courts of last resort evaluating the constitutionality of upper limits on noneconomic damages is to uphold such legislation, as this Court did in 1992 and 1995. *See* Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps."). In fact, more than twice as many state courts of last resort have upheld statutory limits on noneconomic damages awards than have struck them down. These courts have recognized, "It is not this court's place to second-guess the Legislature's reasoning behind passing the act," *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 69 (Neb. 2003); rather, "it is up to the legislature . . . to decide whether its legislation continues to meet the purposes for which it was originally enacted." *Estate of Verba v. Ghaphery*, 552 S.E.2d 406, 412 (W. Va. 2001). On the other hand, Respondents/Cross-Petitioners rely extensively on *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005), which appears to be the only state high court to find a limit on noneconomic damages unconstitutional in the past

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trial or equal protection); *Mizrahi v. North Miami Med. Ctr., Ltd.*, 761 So. 2d 1040 (Fla. 2000) (wrongful death statute precluding adult children from recovering nonpecuniary damages in action for a parent's death due to medical malpractice did not violate equal protection); *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989) ($100,000 limit on noneconomic damages for wrongful death did not violate equal protection, due process, or right to jury trial); *Adams v. Via Christi Reg'l Med. Ctr.*, 19 P.3d 132 (Kan. 2001) (same); *Wright v. Colleton County Sch. Dist.*, 391 S.E.2d 564 (S.C. 1990) ($250,000 aggregate damages cap in Tort Claims Act did not violate right to jury trial, right to remedy, equal protection, or separation of powers); *Peters v. Saft*, 597 A.2d 50 (Me. 1991) ($250,000 limit on nonmedical damages recoverable against servers of liquor did not violate equal protection, due process, right to jury trial, or right to remedy); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) ($400,000 limit on damages for embarrassment, emotional distress, and loss of consortium did not violate right to remedy); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (statute precluding award of noneconomic damages to uninsured motorists in actions arising from automobile accidents did not violate right to jury trial or right to remedy).

decade.[7]

### B. The Role of the Court is Not to Second Guess the General Assembly's Rational Basis for Placing Reasonable Bounds on Tort Liability

At its essence, the Respondents/Cross-Petitioners challenge Maryland's limit on noneconomic damages by arguing that the law is not adequately linked to its desired effect, i.e., to reduce insurance premiums outside the medical malpractice context. To the contrary, members of the business community, including *amici*, know that the limit has fostered a more stable and predictable legal environment with less risk of excessive awards. These factors positively impact insurance rates as well as improve the overall business climate of the state. Which side of this debate has the greatest merit is not an issue for the Court of Appeals, but appropriately lies with the General Assembly.

Moreover, it is inaccurate to suggest that reducing insurance premiums outside of the medical liability context was the sole reason underlying the General Assembly's enactment of Md. Code, Cts. & Jud. Proc. § 11-108. As discussed, there are other benefits that likely contributed to the legislation. A noneconomic damage limit eliminates outlier awards, treats plaintiffs more consistently and fairly by reducing the potential variability of subjective noneconomic damages, and helps ensure that such awards are not based on bias or intent to punish a defendant. Indeed, as the Respondents/Cross-Petitioners acknowledge, the generally applicable noneconomic

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[7] For cases striking down caps, *see Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lakin v. Senco Prods. Inc.*, 987 P.2d 463 (Or. 1999); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).

damage limit was driven not only by a desire to reduce insurance rates, but also by a "common belief that these awards are the primary source of over generous and arbitrary liability claim payments" that "vary substantially from person to person even when applied to similar cases or similar injuries, and can be fabricated with relative ease." Brief of Respondents-Cross Petitioners at 35 (quoting Liability Insurance Report at 10). Developing a more predictable civil justice system by limiting the variability of pain and suffering awards that that do not lend themselves to objective measurement is, *in itself*, a reasonable objective within the constitutional authority of the General Assembly.

For the purposes of the Court's constitutional review, the test is whether the General Assembly had a rational basis for enacting the law, a question that this Court has already closely considered and appropriately answered in the affirmative. *See Murphy*, 325 Md. at 368-70, 601 A.2d at 114-16. As this Court has also properly recognized, the General Assembly may modify common law rights and remedies. 325 Md. at 363, 601 A.2d at 112. That such changes will necessarily favor one party to the detriment of another in litigation is not a classification warranting higher scrutiny. *See id.* The same concept has been expressed by the Supreme Court of the United States, which has stated:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

*Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal citations omitted).

Constitutional law does not demand that the General Assembly craft legislation that is perfectly tailored to accomplish its goals. Nor is a statute's constitutionality to be judged based on its effectiveness in delivering the desired results. As this Court held in upholding a ten-year statute of repose for improvements to real property:

> It is well established, however, that a statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional.

*See Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 357-58, 499 A.2d 178, 187-88 (Md. 1985); *see also* M. Margaret Branham Kimmel, Comment, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

Here, the General Assembly enacted the law at issue in a manner that sought to balance the competing policy considerations. It reached a reasonable result – setting a maximum award that is higher than many states that have adopted similar limits and substantially greater than the median pain and suffering award in Maryland, including an annual increase in the maximum award to reflect inflation. Following this Court's decision in *United States v. Streidel*, 329 Md. 533, 620 A.2d 905 (1993), the General

Assembly amended the limit to explicitly apply to wrongful death cases, setting total recovery for all beneficiaries no higher than 150 percent of the applicable limit. Md. Code Ann., Cts. & Jud. Proc. § 11-108(b)(3)(ii); *see also* Diana M. Schobel, *The Application of the Cap on Noneconomic Damages to Wrongful Death Actions*, 54 Md. L. Rev. 914, 923 (1995) (concluding that "legislative reversal of *Streidel* is a laudable compromise that balances the demands of two powerful interest groups," trial lawyers who objected to the single claim limit and to the extension of the cap to wrongful death altogether and the insurers who were dissatisfied that the limit did not apply to pending cases). More recently, in 2004, the legislature created a separate, *lower* noneconomic damages limit for medical malpractice claims. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-09 (setting a $650,000 limit on noneconomic damages in medical liability claims effective January 1, 2005 and freezing the annual $15,000 inflation adjustment until January 1, 2009). Clearly, the General Assembly, by revisiting the noneconomic damage limit in 1994 and 2004 and keeping it intact, believes the law is fulfilling its intended legislative purpose.

Additional support for the law is found in the separation of powers and the inherent strengths of the legislative process. Tort law impacts go far beyond a particular case. The Legislature can focus more broadly on how tort law, including unbounded and growing pain and suffering awards, impacts consistency and predictability in the civil justice system, insurance rates, and the broader economic climate. The Legislature has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed decisions about the need for broad public policy changes in the law. Through the hearing process, the Legislature is the best body equipped to hold a full discussion of the competing principles and controversial issues of tort liability, because it has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

A similar point was made by Justice Harland Stone, who cautioned that "the only check upon [the Court's ] exercise of power is [the Court's] own sense of self-restraint. For the removal of unwise laws from the statute books *appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*" *United States v. Butler*, 297 U.S. 1, 79 (1936).

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior

accordingly. As the Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added). The Court's statement is particularly applicable here.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

In contrast to this Court's tradition and the greater weight of decisions from other states, the Respondents/Cross-Petitioners here seek to convince this Court to use an expansive view of the Maryland Constitution to sit as a "super legislature." This plea brings to mind a highly discredited period in the Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "*Lochner* era" (after the unsound decision, *Lochner v. New York*, 198 U.S. 45 (1905)), the Court nullified Acts of Congress that it disagreed with as a matter of public policy, using the United States Constitution as a cloak to cover its highly personalized decisions.

*Lochner*-like decisions create unnecessary tension between the legislative and judicial branches and undermine public confidence in the courts. *See* Comment, *State*

*Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative, State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000) (Ohio Supreme Court's decision to strike down a prior tort reform law drove "a deeper wedge between the Ohio judiciary and its legislature" and "may have undermined the Ohio Supreme Court's valued position as a defender of the constitution."); Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001).[8]

## CONCLUSION

For these reasons, this Court should reaffirm *Murphy* and *Oaks* and uphold Md. Code, Cts. & Jud. Proc. § 11-108.

Respectfully submitted,

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[8] *See also* Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 Seton Hall L. Rev. 649, 664 (2001) ("If too many state courts insist on preserving an ahistorical, illegitimate law-making power to frustrate civil justice reform, perhaps it is not too far-fetched to imagine a federal court solution to the problem.").

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