Capping Non-Economic Damages: Fulton County Judge Declares the Cap Unconstitutional

There is a health care crisis brewing in Georgia, or so the Georgia legislation thought back in 2005 when it enacted O.C.G.A §51-13-1 as part of Senate Bill 3. The statute in question provides, "In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for non-economic damages in such action shall be limited to an amount not to exceed $350,000.00 regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based." O.C.G.A §51-13-1. As you can imagine, this statute has affected numerous individuals who have been injured by the negligent acts of their health care providers.

One such plaintiff is Betty Nestlenutt whose case against her Plastic Surgeon became the center of a hotly contested debate in Georgia. The case raises issues regarding tort reform generally; more specifically, the case explores the state legislature's ability to enact a statute that caps non-economic damages awarded to injured plaintiffs. Ms. Nestlenutt's case is not particularly unique. As she aged, she began to notice bags under her eyes and lines around her mouth, so she consulted a plastic surgeon to see if he could correct the problem. Oral Argument Summaries, Georgia Supreme Court. She visited Dr. Harvey Cole at Atlanta Oculoplastic and agreed to have elective surgery. Dr. Cole performed a face lift and carbon dioxide laser resurfacing of her face. Initially, she began to heal but gradually she developed wounds on her cheeks from the surgery. Ultimately, she ended up with permanent scars and purple discoloration on her face. Oral Argument Summaries, Georgia Supreme Court.

Betty and her husband filed suit against the plastic surgery practice, alleging that Dr. Cole negligently performed the face lift. Judge Diane Bessen of Fulton County Superior Court heard the case, and a jury returned a verdict in the plaintiff's favor in the amount of $1,265,000.00. *Nestlehutt v. Atlanta Oculoplastic Surgery*, No. 2007EV0022223-J, at 22 (Fulton County Super. Ct., Feb. 9, 2009). Specifically, the amount awarded for non-economic damages was $900,000.00, which violated the recent legislation capping non-economic damages. The plaintiffs moved to lift the caps and declare the state law unconstitutional. In February of 2009, Judge Bessen agreed with the Plaintiffs and granted their motion. The defendant filed for a new trial, which was denied, and have since appealed to the Georgia Supreme Court. The Georgia Supreme Court heard the arguments on September 14, 2009 but has not yet issued a ruling.

State legislation capping non-economic damages is not new. In fact, California was one of the first states to enact legislation that specifically capped non-economic damages at $250,000, and that law is still in effect today. Melissa C. Gregory, *Recent Developments in Health Care Law: Capping Noneconomic Damages in Medical Malpractice Suits is not the Panacea of the "Medical Liability Crisis,"* 31 Wm, Mitchell L.Rev. 1031, 1032-1033 (2005).Twenty-six other states followed suit between 1975 and 1995 and enacted caps; however, only twenty remain intact by the end of 2000 and often face numerous constitutional challenges. Melissa C. Gregory, *Recent Developments in Health Care Law: Capping Noneconomic Damages in Medical Malpractice Suits is not the Panacea of the "Medical Liability Crisis,"* 31 Wm, Mitchell L.Rev. 1031, 1032-1033 (2005). In 2004, the Georgia General Assembly tried to pass a similar bill but it failed in the house as a result of dissention over the noneconomic damages cap. Hannah Y. Crockett, et al, *Torts and Civil Practice*, 2 Ga. St. U.L. Rev. 221, 223 (Fall, 2005).

In 2005, the Senate Bill 3 finally passed and the cap became law. The General Assembly stated the purpose of the bill was to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims". Ga. L. 2005, p.1, §1. The legislature also claimed the bill would "assist in promoting the provision of health care liability insurance by insurance providers and help stop medical providers and facilities leaving the state as a result of the cost of medical malpractice awards." Ga. L. 2005, p.1, §1.

Ms. Nestlehutt's attorneys 'challenged the constitutionality of the statute by asserting three arguments. First, they argued that the statute violates the Georgia Constitution's guarantee of a right to a jury trial. *Nestlehutt v. Atlanta Oculoplastic Surgery*, No. 2007EV0022223-J, at 22 (Fulton County Super. Ct., Feb. 9, 2009). The thrust of this argument is that one's right to have a jury determine the amount of damages awarded in a personal injury case exists within the Georgia Constitution and the ability of the legislature to usurp the power of a jury to make that monetary decision violates that right. In fact, one's right to sue for noneconomic damages and to have a jury determine the amount was first recognized in the English Courts.

The defendant argued that since 1848 the state Supreme Court has upheld statutes limiting the recovery of damages in personal injury cases. They relied on a plethora of appeals court opinions throughout the country that have held that the cap does not violate the right to a jury trial. However, Judge Bessen, in her opinion, points out that the Georgia Supreme Court has upheld similar caps on *punitive* damages and has not considered a cap on noneconomic damages.

Second, the plaintiffs argue that the statute violates the separation of powers doctrine that is also within the Georgia Constitution. The Georgia Constitution states "the legislative, judicial and executive powers shall forever remain separate and distinct, and no person discharging the duties of one, shall, at the same tile exercise the functions of either of the others, except as herein

provided". Ga. Const., Art.I, Sec.II, Part. III. In her opinion, Judge Bessen reviews a wealth of cases that have dealt with this provision and concluded that the Georgia Supreme Court has "zealously protected each of the branches of the government from invasion of its functions by the other branches".

The plaintiffs argue that implementing a cap on noneconomic damages essentially creates a legislative remittitur which violates separation of powers doctrine that is guaranteed by the Georgia Constitution. The right to award a remittitur is exclusively a judicial function under the constitution. Ga. Const. Art VI, Sec. I, Para. IV Judge Bessen contends that the statute entirely disregards the jury's deliberations and findings in determining the amount of damages which, in its sole discretion, fairly compensates the plaintiff. The defendant argue that the statute does not violate the separation of powers doctrine; rather, the statute puts upper limits on the unstructured "pain and suffering" damages that can skyrocket out of control, and it was this unpredictability that led the legislature to draw the line. Oral Argument Summaries, Georgia Supreme Court However, in my opinion, the structure of a trial is such that the Judge should be the only person with the ability to determine if the jury verdict is out of control as the defendant contends and having the legislature impose their views on the matter strips the judge of her judgment and runs counter to the very nature of her job. Judge Bessen goes on to state that at least three other states have overturned the noneconomic damages cap under the "legislative remittitur theory".

Finally, the plaintiff argued that the statute violates equal protection, which is guaranteed under the Georgia Constitution, by distinguishing between those plaintiffs who are fully compensated for their injuries and those that are not because their damages exceed the cap imposed by the legislature. *Nestlehutt v. Atlanta Oculoplastic Surgery*, No. 2007EV0022223-J, at 15 (Fulton County Super. Ct., Feb. 9, 2009) Judge Bessen used the rational relationship test

when scrutinizing the constitutionality of the statute as gleaned from McDaniel v. Thomas 248 Ga. 632 (1981), which states that where no fundamental right or suspect classification is involved, an equal protection challenge to legislative classification is examined under the rational basis test. Under the rational relationship test, a statutory classification is presumed valid and will comply with constitutional standards as long as it bears a rational relationship to a legitimate governmental purpose and that a successful challenge must show that the statute was arbitrary and capricious when created. Georgia D.H.R. v. Sweat, 276 Ga. 627 (2003). In addition, the statute does not have provisions of evidence consideration, review of the facts or other research methods for determining the amount of noneconomic damages and apparently arbitrarily reduces the verdict to a legislatively acceptable amount which is another example of how the legislature violated the equal protection doctrine.

Judge Bessen declared that there was no rational relationship between improving the quality of health care and capping noneconomic damages and, in fact, capping noneconomic damages runs directly counter to the legislature's goal. *Nestlehutt v. Atlanta Oculoplastic Surgery*, No. 2007EV0022223-J, at 17 (Fulton County Super. Ct., Feb. 9, 2009) If a healthcare provider knows that the maximum amount he or she will have to pay for a negligent act is $350,000.00, what incentive is there to guard against malpractice when the healthcare providers know the total amount of money they would have to pay for a malpractice claim? Alternatively, if a healthcare provider does not know the possible amount that could be awarded, it stands that the providers would have the incentive to provide the best quality of care possible so as to not get involved in a malpractice suit.

In addition, Judge Bessen argues in her opinion that the legislature did not base the statue on any empirical data showing that noneconomic damages are the cause of rising healthcare

costs and a decrease of quality of healthcare services. Judge Bessen pointed out that California, Texas, and Missouri have all experienced an increase in insurance rates despite having legislative caps on noneconomic damages, and in fact, recent studies suggest that there is little or no relationship between the level of malpractice insurance premiums and the enactment of tort-reform measures such as damage caps. Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice,* 30 Seattle Univ. L. R. 119, 153 (2006).

In conclusion, Ms. Nestlehutt's claim against her doctor has become the focal point of a serious issue affecting tort reform and striking a balance between fairly compensating an injured plaintiff and ensuring healthcare providers are not paying unfair damages. It stands to point out that the insurance industry is gigantic and highly influential in the political process. They have the money, resources and manpower to influence just about anyone and specifically our legislation. The insurance lobby groups are hard to ignore and often times are able to push through legislation that benefits their constituents' without considering the bigger picture. Be that as it may, it is important for our health care system to work properly and for physicians to be able to provide services without the threat of losing their practice due to insurance premiums. Nevertheless, the Georgia Supreme Court has a tough decision ahead of them that will surely shape the future of tort reform in Georgia.