No. 35543 - James D. MacDonald and Debbie MacDonald, his wife v. City Hospital, Inc., and Sayeed Ahmed, M.D.

Wilson, Judge, dissenting:

Why should a circuit court judge, honored to be sitting as a temporary justice in the MacDonald case, take the time (and have the effrontery) to dissent?

It is not because of the way I was treated by the Court. The entire Court was most deferential in considering my opinions.

It is not because I seek to carp, cavil, censure, or castigate our Supreme Court of Appeals.

In fact, I cannot allude to this Court without exultation. I have immeasurable respect for our Supreme Court and in particular for Justice Robin Davis, one of the brightest and most dedicated persons who have ever served on our highest state court.

It is not because I want to take issue with the high quality of medical care in West Virginia and the fact that doctors and other medical professionals needed some legislative help to control exorbitant malpractice insurance costs.

I dissent because, by this counterintuitive decision in this decisively important case, the justices capitulated to the West Virginia Legislature's political- and unconstitutional- mistreatment of medical malpractice victims, and by its decision, delivered the coup de grâce to the rights of

thousands of West Virginians to be fully compensated for losses caused by the negligence of medical professionals.

The Supreme Court of Appeals was concerned that if it declared that the Legislature's lowering of the cap was unconstitutional, that would mean that the Court would be substituting its judgment for that of the Legislature. The Court was also reticent to rule in favor of the Plaintiffs because it didn't want to be perceived as sitting as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.

Not affecting fundamental rights? This is the West Virginia Constitution we were interpreting. By hand-wringing about judicial restraint and deferring to the Legislature when considering an issue as serious as the one in this case, the Supreme Court failed to preserve those human rights to which our legal system is committed.

The West Virginia Legislature made a purely political decision and violated the West Virginia Constitution when it drastically reduced the cap on noneconomic damages in medical malpractice cases from $1 million to $250,000, in most cases.

When the Legislature turns against its constituency in favor of pressure groups with selfish interests, it is the peoples' right to seek help from their Supreme Court, and it is the duty of the judicial branch to exercise its proper role in the "separation of powers" to void legislation that violates the constitutional rights of its citizens.

Malpractice victims' damages may be primarily noneconomic with permanent disfigurement, maiming, and even death caused by a medical professional's negligence. The capital

facts of human suffering are hidden from our view. An unknown number of medical negligence victims can no longer use the court system because of the cap and the fact that lawyers are no longer willing to risk huge litigation expenses for a low net return for their clients and themselves. The cap deprives the injured of their right to full compensation for their injuries. But, in the most serious cases, it also deprives the injured person's loved ones-their caretakers-ALL of their damages. Thus, in *Robinson* each of the parents' respective $1,000,000 awards by the jury were taken away, and the $1,500,000 awarded to the child was reduced to $1,000,000, the cap at the time. And, in *MacDonald*, all of the compensation the jury awarded to Mrs. MacDonald was taken by the cap.

Not affecting fundamental rights? The right to a trial by a jury is the most fundamental of our constitutional rights. Query: If a person has a right to a jury trial and the jury award is completely taken away, did that person have a court open to him for an injury done to him? Did he have a remedy? Was justice administered without denial? Did he have his constitutional right to a jury trial?

How could the majority in MacDonald avoid the reverberating "NO" answer to these questions when the answer had been clearly stated in several West Virginia cases and most recently in *Willey v. Bracken, ___ W.Va.___ , ___ S.E.2d___ (No. 35519)* a 2010 case:

> "Pursuant to the Certain Remedy Clause, '[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." W. Va. Const. Art. III, § 17. In other words, 'when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated.' Syl. pt. 6, in part, *Gibson v. West Virginia Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).

> See also Syl. pt. 5, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991) (setting out two-part analysis for determining if legislation implicates Certain Remedy Clause). Thus, the Certain Remedy Clause prevents application of a statute that improperly denies a citizen his or her right to seek redress in the courts of this State for injuries received in West Virginia. See, e.g., *Kyriazis v. University of West Virginia*, 192 W. Va. 60, 450 S.E.2d 649 (1994) (finding anticipatory release that served as absolute bar to injury claims by rugby player violated Certain Remedy Clause). "

The majority in *MacDonald* dismissed the idea that the cap deprived Mrs. MacDonald of her constitutional right to a jury trial despite the fact that all of the damages awarded to her by the jury were taken away by the cap. The Court's justification was that our State Constitution does not state that "the right to trial by jury shall remain inviolate." That is not the law.

The Court's degrading of the right of a jury trial in a civil case in West Virginia is in square conflict with the United States Constitution. The phrases used in the United States Constitution and the West Virginia Constitution for granting the right to a civil jury trial are almost identical. For our Supreme Court to suggest that the right to a jury trial in West Virginia is not as great as that in another state that uses the phrase "the right to trial by jury shall remain inviolate" in its constitution makes no sense. If the Federal right to a jury trial is based upon the phrase "the right of trial by jury, if required by either party, shall be preserved" and West Virginia's constitutional right to a jury trial is based upon the phrase "the right of trial by jury, if required by either party, shall be preserved" is our Supreme Court being a bit iniquitous to even suggest that the right to a jury trial in West Virginia is not as great as it is in, for instance, the state of Georgia?

I take solace in this position because it is consistent with the best legal mind in the State of West Virginia. Franklin D. Cleckley, in 1991, when he was the Arthur B. Hodges Professor of Law at West Virginia University College of Law wrote a law review article with Govind Hariharan,

Ph.D., an Assistant Professor in the Department of Economics at West Virginia University, for the West Virginia Law Review[1] in which he expressed the opinion that the language in *Sargent v. Malcomb*, 150 W.Va. 393, 146 S.E.2d 561 (1966) suggests that the issue of noneconomic damages is a question for the jury:

> "There is no exact formula or standard for placing a money value on such matters as pain, suffering, and mental anguish resulting from personal injuries or embarrassment resulting from bodily disfigurement or scars. The law recognizes that the aggregate judgment of twelve duly selected and properly qualified jurors represents the best method yet devised for fixing the amount of just compensation to the injured plaintiffs in such cases."

Sargent at 566. Justice Cleckley then added this powerful statement:

> "The language in Sargent should be a compelling echo from the past, guiding the present Court when it construes section 55-7B-8. [The statute that places a limit or cap on compensatory damages for noneconomic loss awarded in a medical professional liability action.] This section is a clear indication of the rich and powerful protecting themselves at the expense of the economically disadvantaged and politically powerless. Section 55-7B-8 is a deadly cancer, eating away at the integrity and impartiality of our state legal system. It must be surgically removed by the Court or through the voting capacity of the citizens of this state."

Cleckley 94 W.Va. L.Rev. at 46.

Not affecting fundamental rights? The right of equal treatment is also a very fundamental right. How can a damage cap that blatantly favors a special class of medical professional by limiting or taking away the damages an injured person may recover from a medical professional be constitutional? No other person who negligently injures another person is given that unconstitutional protection. Would any West Virginia legislator suggest that lawyers be given that special protection? I doubt it.

[1] Franklin D. Cleckley and Govind Hariharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live With Inefficient Doctors?*, 94 W. Va. L. Rev. 11 (1991).

The resolution of the high insurance rate problem for medical professionals on the backs of completely innocent victims of medical professional negligence, a problem caused in part by a handful of incompetent medical professionals, is a resolution of one problem for a select group of people along suspect lines. The Legislature may have rationally believed that decreasing the cap on noneconomic damages would reduce medical malpractice premiums and solve the medical professions' problem, but that does not mean that it had a right to solve the problem by stripping victims of medical malpractice of their right to adequate compensation for medical negligence that caused injuries, maiming, and death.

This is what this case is really about:

It's about all of those West Virginians who don't understand what the West Virginia Legislature did to them. They don't understand what being deprived of meaningful "noneconomic" damages means to the seriously injured West Virginian. Those who would mislead the public, disparage noneconomic damages as not being serious damages. That is false.

"Noneconomic damages" are not limited to pain and suffering or loss of consortium. They include damages for the loss of the ability to have children, the loss of a limb, or disfigurement. In many medical negligence cases "economic damages are minuscule." "Economic damages" are those damages that include lost wages, medical bills and other types of economic losses.

If a mother or a father is not earning wages because she or he chooses to stay home with little children, there is no lost wages claim when that person is the victim of medical negligence.

Those medical bills that mom or dad regularly paid a substantial sum to an insurance company to cover in the event they were needed, and when hospital and doctor bills are incurred

because of medical malpractice, the medical expenses will, in most cases, be paid- are paid- by their health insurance company and can be recovered as economic damages. But that's not as promising as it sounds. The rest of the story is that mom and dad now have to reimburse their health insurance company for those medical payments! That's right-mom and dad not only have to pay the insurance premiums for the insurance in the event of a loss, they now have to pay the costs to bring the lawsuit to seek a jury award covering those expenses, pay the attorney for representing them, and then they have to reimburse the health insurance company for the medical bills that were covered by the insurance that mom and dad paid for. It's a wonderful business world for insurance companies.

This case is about what has already happened to the malpractice victims in the three West Virginia cases that challenged the constitutionality of the malpractice cap. These are real people who deserved more when they pursued justice in our West Virginia courts.

Let me introduce them. First it was Mark, just a child, with a normal life expectancy. But that's all that's normal. Mark has total brain damage caused by a medical professional's negligence. Even the child's ability to walk is severely limited. It's also about Mark's mom and dad and all of those superb parents whose lives are drastically changed by permanent injuries caused to their children by a medical professional's negligence. Spend a day in their shoes if you think mental pain and loss of enjoyment of life are frivolous damages. Each day they deal with what a negligent doctor did to their lives--they do their best to live a normal family life--but the quality of their lives is irreparably weakened.

Gone is the ability of the Robinsons to do the happy things they could do before their son was permanently injured. Fortunately the noneconomic damages cap at that time was $1 million.

That covered some of the noneconomic damages the jury awarded Mark- but his mom and dad had all their damages taken away by the cap. See, *Robinson v. Charleston Area Medical Center*, 186 W.Va. 720, 143 S.E. 2d 351(1991).

It's about the Verbas and the children who suffer from the death of a parent whose life was cut short because of a medical professional's negligence. The parent's economic loss was negligible. Therefore, after attorneys' fees, required expert witness fees, costs of litigation, and the medical "cap," the children receive little for their terrible loss. See, *Verba v. Ghaphery*, 210 W.Va 30, 552 S.E.2d 406 (2001).

It's about the MacDonalds, a loving wife and her husband enjoying a good life together until a medical professional's negligence permanently changed that and caused the husband to suffer a severe form of muscle damage that kept him from walking until after an extended period of rehabilitation and physical therapy. Even after treatment he has a limited ability to walk and when he does he has to live with the burden of severe muscle weakness and balance issues with his lower body. If you think that the loss of consortium is an insignificant loss, step in this wife's shoes. Wake up one morning and suddenly it's gone! All of those things we take for granted each day from and with our loved one is gone-- or is drastically changed. See, *MacDonald v City Hospital, Inc., ____ W.Va. ____, ____ SE.2d____ (No. 35543 6/22/2011).*

This is what this case is really about.

It's about constitutional choices. The Supreme Court had a choice to choose to declare this cap legislation unconstitutional. The Court had every right and a duty to do so.

It's about our Supreme Court of Appeals not accepting that it is the principal expositor of our State Constitution; that it is an equal branch of government and not a minion to the Legislature. Our Court now appears to be a court obsessed with the belief that its role is to be the branch of government that always exercises due restraint when there is an issue involving the principle of the separation of powers in government among the judicial, legislative and executive branches. It now appears that the Court has become so concerned with being labeled an "activist court" and accused of not having any concern for business interests that it is now failing to fulfill its constitutional mandate to protect the rights of all West Virginians.

An essential function of the Supreme Court of Appeals is to choose among alternative interpretations of our State Constitution. The Legislature did exactly that when it imposed the previous $1,000,000 cap on noneconomic damages as part of the West Virginia Medical Professional Liability Act of 1986, W. Va.Code §§ 55–7B–1 to –11. It made a choice to favor the medical profession over people who are injured by negligent professionals.

Thomas McHugh, a relatively young Justice in 1991, but already acknowledged as a nonpareil on a great Supreme Court that included Chief Justice Miller and Justice Neely, wrote the Court's opinion in *Robinson*. That opinion recognized that that "cap" legislation, which only protected the negligence of "health care providers" and no other negligent parties, was a close constitutional call. There is nothing in that opinion for anyone to conclude that it is not the role of the Supreme Court Justices to review legislation that infringed on constitutional rights.

The constitutional choice made by the Court in *Robinson* was that the Court could not say that the $1 million cap was not rationally related to a legitimate state interest; that the Court could not say that the Legislature's conclusion that it was in the public interest to attempt to obtain some

cost savings by limiting noneconomic damages violated the Constitution. In reaching that decision the Court appeared to be greatly influenced by the fact that West Virginia's $1,000,000 cap was the largest "cap" on noneconomic damages of which the Court was aware.

However, Justice McHugh, writing for the Court, warned the Legislature in no uncertain words:

> "We emphasize at this point that our holding that the statutory "cap" at issue is reasonable is limited to the particular $1,000,000 "cap" before us. "[A]ny modification the legislature [would] make[ ] is subject to being stricken as unconstitutional. A reduction of non[economic] damages to a lesser cap at some point would be manifestly so insufficient as to become a denial of justice[,]" under, for example, the state constitutional equal protection or "certain remedy" provisions. *Lucas v. United States*, 757 S.W.2d 687, 700 (Tex.1988) (Gonzales, J., dissenting)."

The majority in *MacDonald* called this warning to the Legislature "dicta." Op. at ___. No, it was not dicta-- it was not a comment made in passing. It was a warning to the Legislature that the amount of the cap was very important to the Court's decision; that the amount of the cap was a critical fact in the decision reached in *Robinson*.

Its purpose was to send a message to the Legislature: Don't reduce that cap again!

The Legislature heard that message and did not attempt to go beyond its constitutional limits until 2003 when the political climate in West Virginia was changing and the State was becoming more conservative. A more conservative Legislature decided it had a right to ignore the Court's warning and it lowered the cap on noneconomic losses in medical malpractice cases from the $1 million cap adopted in 1986 to $250,000 per occurrence, or $500,000 if the negligence resulted in wrongful death; permanent and substantial physical deformity; loss of use of a limb or loss of a

bodily organ system; or permanent physical or mental functional injury that permanently prevented the injured person from being able to independently care for himself or herself and from perform life sustaining activities.

The legislature knew about Justice McHugh warning in *Robinson* and that it was pushing the limits of its right to radically lower the cap. But the Legislature succumbed to tremendous pressure from the medical profession, the insurance lobby, and such groups as The American Tort Reform Association (ATRA), a special interest group founded in 1986 by the American Medical Association and American Council of Engineering Companies, and the U.S. Chamber of Commerce's' spin-off organization, the Institute for Legal Reform (ILR). The ILR issues an annual report on each state's "lawsuit climate," ranking states from 1 to 50 on their friendliness to business, based on a survey of general counsel of very large businesses and their outside counsel. West Virginia worked its way to the bottom of the ILR lawsuit climate list (starting at 49th but bottoming out in 2007).

It was at about the time of the 2003 change in the medical malpractice cap that we started to hear about West Virginia being a "judicial hellhole." By 2006 West Virginia was at the top of the hellhole list and by 2007 it was also at the bottom of the ILR list. It is now clear that this anti-business and judicial hellhole public relations attacks on West Virginia and West Virginia Courts have become an unwelcome influence on our Legislature.

Although it has no basis in truth, this public relations campaign by special interest groups is obviously working. In addition to the caps on medical malpractice damages the West Virginia legislature has enacted a number of significant pro-defendant changes in the law. Third-party bad faith claims against insurance companies have been eliminated. There are also limits on joint and

several liability and restrictions on lawsuits by out-of-state residents. And still the hellhole label remains.

These same special interest groups are very active in judicial campaigns. Judges and Justices have to run for their positions in contested elections. Without question, our present Supreme Court is an independent judiciary that is not influenced by these special interest groups. But the message being sent in the *MacDonald* case to the Legislature and those special interest groups is that they now have a green light to proceed with legislation that favors corporations, insurance companies and special interest groups over the needs and interests of people.

Although we wish it were not so, all judges have audiences that they seek to please. With these audiences and with the natural desire to win expensive elections, it is essential for judges and justices to always remember the importance of the protections given to all people in our State and Federal Constitution and to decide disputes based on those cherished documents. In many cases that means a decision that displease a majority of the voters. It may mean that a judge's audience will be unhappy with the decision. But an independent judiciary has to protect the rights of minorities as well as the rights of the majority. And an independent judiciary has to protect the rights of victims of medical negligence as well as the rights of doctors who are overcharged by insurance companies. The Supreme Court of Appeals of West Virginia failed to do so in *MacDonald*.

Thus I respectfully dissent with the hope that our Court will cease to be a Court that is unduly restrained in the exercise of its power, recognizing the foundations of its power, and using that power responsibly for all who come before it.