STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE ESTATE OF JUDIANNA KATHERINE FREUNDL, DECEASED, by LYNDA S. FREUNDL, Pers. Rep.

Plaintiff,

v

File No. 96-15342-NH
HON. PHILIP E. RODGERS, JR.

DR. LAURA DANZ and DR. DON GOOD, jointly and severally,

Defendants.
/

Kevin J. Cox (P36925)
Carlene Kinzel-Reynolds (P55561)
Co-Counsel for Plaintiff

R. Jay Hardin (P35458)
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Joanne Geha Swanson (P33594)
Co-Counsel for Defendants Danz and Good

DECISION AND ORDER

Facts

The issue presently before this Court involves the applicability and constitutionality of the statutory cap on noneconomic damages imposed upon medical malpractice litigants by MCL 600.1483; MSA 27A.1483 and MCL 600.6304; MSA 27A.6304. Lynda Freundl, individually and as Personal Representative of the Estate of Judianna Freundl, Deceased, first commenced an action[1] against Defendants Dr. Laura Danz and Dr. Don Good on March 26, 1996 without giving the

[1]The action, brought under the wrongful death act, MCL 600.2922; MSA 27A.2922, alleged obstetrical malpractice, specifically, alleged failure to timely diagnose chorioamnionitis, an intrauterine infection, and failure to timely deliver Judianna Freundl prior to her death on August 11, 1994.

requisite 182 days' notice of intent to sue. MCL 600.2912b; MSA 27A.2912b. Defendants moved for summary disposition and the action was dismissed without prejudice. Rather than appeal, Plaintiff waited for the requisite notice period to expire after which a second action, the present action, was commenced on September 30, 1996. The case was tried and submitted to the jury as an action for wrongful death. Prior to deliberations, Defendants requested a ruling that the statutory cap on noneconomic damages pursuant to MCL 600.1483; MSA 27A.1483 and MCL 600.6304; MSA 27A.6304 applied. Deferring decision, this Court took the issue under advisement. The jury subsequently returned a verdict for the Plaintiff Estate in the amount of $1.5 million.

Counsel for the parties thereafter submitted briefs raising a plethora of issues regarding the applicability and constitutionality of the cap on noneconomic damages and oral argument was entertained on these matters. The Court then took the matter under advisement. This Court is now called upon to render its opinion regarding the nonconstitutional and constitutional challenges to the statutes in question. MCR 2.517.

The Statutes

The legislation in focus is certain provisions of the Tort Reform Act of 1993, 1993 PA 78, and the Tort Reform Act of 1995, 1995 PA 161 and 1995 PA 249, which cap damages for noneconomic loss in medical malpractice cases at $280,000. The statutory damages cap was first enacted in 1986, 1986 PA 178, and amended in 1993. It is but one facet of a comprehensive reform plan devised and implemented by the Legislature over an approximate ten-year period to address the increase in lawsuit filings and concomitant judgments being awarded in medical malpractice litigation. As originally enacted in 1986, MCL 600.1483; MSA 27A.1483 provided:

> (1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000 shall not be awarded unless 1 or more of the following circumstances exist:
>
> (a) There has been a death.
>
> (b) There has been an intentional tort.
>
> (c) A foreign object was wrongfully left in the body of the patient.

(d) The injury involves the reproductive system of the patient.

(e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.

(f) A limb or organ of the patient was wrongfully removed.

(g) The patient has lost a vital bodily function.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into economic and noneconomic damages.

(3) "Noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The limitation on noneconomic damages set forth in subsection (1) shall be increased by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage increase in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

In 1993, the statute was amended. 1993 PA 78. While the dollar amount of the cap was increased from $225,000 to $280,000, only three exceptions were created and those exceptions, although not subject to the $280,000 cap, were subject to a $500,000 cap. The statute now provides:

Sec. 1483. (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as a result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable or making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

1993 PA 78 went into effect on April 1, 1994. The § 1483 caps provision has remained unchanged. However, the other statute relevant to this case, MCL 600.6304; MSA 27A.6304, was significantly amended in 1995. The caps described in the amended § 1483 are restated in § 6304, which sets forth the allocation of liability among joint and several tortfeasors. In 1993, as part of 1993 PA 78, the Legislature amended § 6304 and added the following pertinent subsection:

(6) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of one of the limitations set forth in § 1483 to the amount of the appropriate limitation set forth in § 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in § 1483 or any other provision of § 1483.

This "new" subsection must be read in conjunction with other subsections of § 6304 enacted in 1986 and unchanged by the 1993 amendment, one of which dealt with comparative fault:

(3) If it is determined under subsections (1) and (2) that a plaintiff is not at fault, subsections (5) and (6) do not apply.

Hence, under the wording of §§ 6304 (3) and (6) as they existed in 1993, it would seemingly appear that if a plaintiff is not found to be at fault, then subsection (6) implementing the § 1483 cap reduction does not apply.[2] However, relevant to the case at hand, § 6304 was *twice* amended in 1995 -- in significant fashion. 1995 PA 161; 1995 PA 249, both effective March 28, 1996.[3] In the sum total of these revisions, subsection (6) still remains intact and unchanged as subsection (5). The comparative fault wording contained in subsection (3) was *eliminated entirely*, new subsections (6) and (7) were added, and the allocation of fault was redefined in subsections (3) and (4). Section 6304, as ultimately amended, now states in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings . . . .
>
> * * *
>
> (3) *The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5)*. . . and shall enter judgment against each party, including a third-party defendant. . . .
>
> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found in subsection (1). . . .
>
> (5) *In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by*

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[2]Plaintiff in the instant case so argues. Defendants, on the other hand, maintain that the juxtaposition of the language in subsections (3) and (6) of § 6304 was an inadvertent drafting error (misnumbering of the subsections) by the Legislature and does not reflect the true intent of the Legislature. In light of this Court's conclusion regarding the applicability of the 1995 amendments, see discussion *infra*, it will not speculate as to the meaning of § 6304 as it existed prior to the 1995 amendments.

[3]While Defendants' brief properly sets forth the changes made in § 6304 by 1995 PA 161, it does not accurately reflect the additional changes made in the statute by 1995 PA 249.

the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

> (a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in 5838a(1).

With this review of the pertinent statutes as a backdrop for consideration of the issues raised in this case, and in light of the well-recognized principle that "[c]onstitutional questions will not be passed upon when other decisive questions are raised by the record which dispose of the case," *Lisee v Secretary of State*, 388 Mich 32, 40; 199 NW2d 188 (1972), quoting *People v Quider*, 172 Mich 28, 288-289; 137 NW 546 (1912), the nonconstitutional issues raised by Plaintiff regarding the applicability of 1995 PA 161 and 1995 PA 249 will be addressed first.

The Applicability of 1995 PA 161 and 1995 PA 249

A.

Plaintiff contends that the Tort Reform Act of 1993, 1993 PA 78, is the statute that should be applied herein and conversely, that the more stringent limitations on recovery; i.e., the elimination of the 1986 comparative fault provision contained in § 6304(3), established by the Tort Reform Act of 1995, 1995 PA 161 and 249, should only be applied prospectively to causes of action which accrue after the effective date of the new statutory provisions. The medical malpractice that is the basis of this suit occurred on August 11, 1994, well before March 28, 1996, the effective date for all the 1995 amendments. Plaintiff maintains that retrospective application of the 1995 Act to her lawsuit would substantially impair her vested rights acquired under the 1993 Act.

As a preliminary matter, it is important to note that Plaintiff did not comply with the procedural requirements of the *1993 Act* and therefore refiled this lawsuit after the effective date of the 1995 Act. As previously stated, the alleged malpractice occurred on August 11, 1994. Plaintiff originally filed this action on March 26, 1996, two days before the 1995 Act became effective (presumably to avoid the changes in the law brought about by the 1995 amendments), without giving

the requisite notice.[4] The action was consequently dismissed without prejudice for failure to comply with the notice provision.[5] *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997). Plaintiff was then free to refile the action once the notice provision had been satisfied, *id.*, and in fact did so on September 30, 1996. Consequently, the present lawsuit was commenced six months after the effective date of the 1995 Act. The Legislature specifically provided that 1995 PA 161 and 1995 PA 249 applied "to actions filed on or after the effective date of this amendatory act." See 1995 PA 161, § 3; 1995 PA 249, § 3. This Court therefore concludes that the 1995 Act applies to this case.

Even assuming that Plaintiff's cause of action accrued[6] before the effective date of the 1995 Tort Reform Act, the rules of retrospectivity favor application of the 1995 statutes. In *In re Certified Questions*, 416 Mich 558, 570-571; 331 NW2d 456 (1982), the Supreme Court explained the four rules of retrospectivity to be used in determining whether a new act applies to a pre-enactment cause of action:

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[4]MCL 600.2912b; MSA 27A.2912b provides that "a person shall not commence an action alleging medical malpractice. . .unless the person has given. . .written notice under this section not less than 182 days before the action is commenced." This notice requirement was enacted as part of 1993 PA 78, effective April 1, 1994. See, *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 704; 575 NW2d 68 (1997). Thus, this Court is puzzled by Plaintiff's argument, set forth at pp 7-8 of Plaintiff's Memorandum of Law Regarding Application of the Cap on Non-Economic Damages, that the notice requirement operated retroactively to strip Plaintiff of her legal rights:

> Governor Engler did not sign the Bill for MCLA 600.2912b into law until December 25, 1995. The Bill became law 90 days after the Legislature had adjourned - December 25, 1995 - which created an effective date of March 29, 1996.
>
> Despite the fact that there were now only 3 months (December 28, 1995 - March 28, 1996) to file a Complaint before the new laws took effect, Plaintiff was required by the literal meaning of the statute to wait 6 months (182) days for the notice period to expire, before filing a Complaint. MCLA 600.2912(b) . . . . [Emphasis in original.]

[5]No appeal was taken on this dismissal.

[6]"[O]nce a cause of action accrues, -- i.e., all the facts become operative and are known - it becomes a "vested right." *In re Certified Questions*, 416 Mich 558, 573; 331 NW2d 456 (1982).

> First, is there specific language in the new act which states that it should be given retrospective or prospective application. . . . Second, a "[a] statute is not regarded as operating retrospectively [solely] because it relates to an antecedent event" . . . . Third, "[a] retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past". . . Fourth, a remedial or procedural act which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute. . . . [Citations omitted.]

Rules one and two do not apply to the present circumstances. *Id.* at 571. Rules three and four both relate to retrospective application of a new law to prior facts: "The third rule and the cases thereunder define those retrospective situations that are not legally acceptable, whereas the fourth rule defines those that are acceptable." *Id.* at 572. Rule three has been applied where a new statute abolishes a cause of action. *Id.* at 573-574. However, under rule four, a remedial or procedural statute may operate retrospectively if it does not take away vested rights. *Id.* at 575-576. The present facts fall under rule four.

Unlike *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996), cited by Plaintiff, and the other examples of rule three cases given in *In re Certified Questions, supra* at 573-574, Plaintiff herein has not been completely deprived of her vested cause of action by application of the 1995 Tort Reform Act. The present facts bear greater resemblance to the rule four cases, *id.* at 575-576, and, in particular, to the facts of *In re Certified Questions*. In that case, the doctrine of comparative negligence in products liability actions was adopted between the time the plaintiff's negligence and breach of warranty case against the defendants accrued and the time the case was tried. The doctrine was applied at trial. On appeal, the plaintiff complained about the retrospective application of the doctrine of comparative negligence. However, the Supreme Court held that its application was appropriate:

> Comparison of "rule three cases" to the instant case indicates that application of the products liability statute did not trigger the proscription found in rule three. First, the statute did not interfere with plaintiff's "contractual cause of action" since an implied warranty action for personal injuries caused by a defective product is different from an express contract. Second, this rule is also triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act. While the total damages which plaintiff could have received were significantly reduced by § 2949, plaintiff's cause of action was not legally barred or taken way.

> In short, we hold that the applicability of the products liability statute in the instant case did not offend Michigan's general rule against the retrospective application of a statute which "take[s] away vested rights". . . .
>
> Notwithstanding the general proscription of rule three, this Court has recognized that new remedial or procedural statutes which do not destroy vested rights should be given retrospective application. The plaintiff does not contend that his cause of action was destroyed by the application of §2949. Thus, the key factor is to determine whether the new act concerns remedies or modes of procedure.
>
> The tenor of the products liability statute and the legislative history referred to in the briefs indicate that the Legislature was responding to complaints about the cost of products liability insurance and the operation of products liability law prior to its enactment. . . . Since the Legislature has adopted comparative negligence as a principle which reduces plaintiff's damages in proportion to the amount of his negligence, such legislation operates to improve and further a remedy. As *Rookledge* [v *Garwood*, 340 Mich 444; 65 NW2d 785 (1954)], *Hansen-Snyder [Co v General Motors Corp,* 371 Mich 480; 124 NW2d 286 (1963)], and *Ballog* [v *Knight Newspapers, Inc,* 381 Mich 527; 164 NW2d 19 (1969)] make explicitly clear, legislation with such a purpose is remedial in nature.

In re Certified Questions, supra at 577-578.

See also, *Romein v General Motors Corp*, 436 Mich 515, 531-532; 462 NW2d 555 (1990), aff'd 503 US 181 (1992); *Moore v Austin,* 73 Mich App 299, 305; 251 NW2d 564 (1977).

Similarly, in the instant case, the 1995 Tort Reform Act "is not a legal bar, but is a principle established by the Legislature which mitigates damages. . ." *Id.* at 577. Plaintiff has refiled her cause of action; it has not been taken away. Moreover, as in *In re Certified Questions*, the legislation in question, 1995 PA 161 and 249, is "remedial" in nature - an effort on the part of the Legislature to address the perceived medical malpractice crisis.[7] This Court therefore concludes that 1995 PA 161 and 1995 PA 249 are applicable to the present circumstances.

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[7]"Legislation which has been regarded as remedial in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof implying an intention to reform or extend existing rights, and having for their purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects, such as the protection of the health, morals, and safety of society, or of the public generally." *Rookledge, supra* at 453, quoting 50 Am Jur, pp 33, 34, Statutes, § 15.

B.

Plaintiff's cause of action was filed under the wrongful death act, MCL 600.2922; MSA 27A.2922. Plaintiff contends that the wrongful death act provides the exclusive measure of damages and accordingly, the cap on noneconomic damages set forth in MCL 600.1483; MSA 27A.1483 does not apply. Plaintiff supports this argument by pointing out that the original 1986 version of § 1483 expressly excepted death cases from the applicability of the noneconomic damages caps, but that after the 1993 amendments, § 1483 did not mention death cases. Plaintiff therefore surmises that § 1483 no longer applies in cases where death results from medical malpractice.

This Court, however, finds the caps provision of § 1483 to be applicable herein, for several reasons. First, the 1985 amendment to the wrongful death act, 1985 PA 93, eliminated the language in the act, relied upon by Plaintiff, making it the exclusive remedy in cases of death.[8] Omissions in the language of a statute or court rule are deemed to be intentional. *Davidson v Bugbee*, 227 Mich App 264, 267; 575 NW2d 574 (1997); *Johnson v Marks*, 224 Mich App 356, 358; 568 NW2d 689 (1997). Moreover, in construing an amendment of a statute, a court must presume that a change in a statutory phrasing reflects a change in meaning as well. *Gorte v Dep't of Transportation*, 202 Mich App 161, 167; 507 NW2d 797 (1993); *In re Childress Estate*, 194 Mich App 319, 326; 486 NW2d 141 (1992). Thus, although the wrongful death act at one time might have been the exclusive remedy when injury resulted in death, the change in phraseology, or in this case the complete omission of language from the amended statute, implies a legislative intent that this is not longer the case. *Gorte, supra.*

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[8]The wrongful death act allows recovery for such damages:

> . . . as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

However, the last sentence in section (1) of the wrongful death act, which provided that "All actions for such death, or injuries resulting in death, shall be brought only under this section," was eliminated by 1985 PA 93.

Second, § 1483 broadly applies to actions "alleging medical malpractice by or against a person or party." The wrongful death act provides for a remedy "[w]henever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the *act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages. . . .*" MCL 600.2922(1); MSA 27A.2922(1) [Emphasis added.] This statutory language indicates that the occurrence of death, in and of itself, is not sufficient to establish liability under the act. Rather, a plaintiff must prove an underlying actionable wrong to support a wrongful death cause of action. *Cf., Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 437; 329 NW2d 729 (1982) (actions brought pursuant to the wrongful death act accrue as provided by the statutory provisions governing the underlying liability theory and not the date of death); *Thompson v Peters*, 386 Mich 532, 534; 194 NW2d 301 (1972) (plaintiff in wrongful death action arising out of death of guest passenger must show gross negligence as then required under guest passenger statute); *Lindsey v Harper*, 213 Mich App 422; 540 NW2d 477 (1995), aff'd 455 Mich 56 (1997) (the period of limitations in a wrongful death action is determined by provisions applicable to the liability theory involved); and *Wilson v Dep't of Mental Health*, 19 Mich App 558; 172 NW2d 891 (1969) (statutory notice requirement under MCL 600.6431(3); MSA 27A.6431(3) applied to wrongful death action against state for death of plaintiff's daughter while she was a patient at a state hospital). See also, *Grimm v Ford Motor Co*, 157 Mich App 633; 403 NW2d 482 (1986) (cause of action under wrongful death statute accrues as provided by statutory provisions governing underlying liability theory, not at date of death). Plaintiff herein alleged medical malpractice and had to prove the underlying elements in order to sustain her cause of action and preclude dismissal, notwithstanding the statutory wrongful death basis for her lawsuit. In other words, a wrongful death action is merely an extension of the underlying cause of action, statutorily expanded to encompass recovery in those cases in which death has resulted.

Third, § 1483(1) is by its terms to be applied in conjunction with §6304. Section 6304(1), in turn, applies to "[a]n action based on tort or another legal theory seeking damages for personal injury, property damage, *or wrongful death. . . .*" [Emphasis added.] These two statutes, read together, certainly indicate that § 1483 applies to wrongful death cases grounded in medical

malpractice. The caps provision was very clearly designed to encompass all claims for medical malpractice irrespective of form.

Plaintiff hypothesizes that because cases involving death were expressly exempted from the cap under the previous version of § 1483, and such specific reference was eliminated from the current version by the 1993 amendments, the logical explanation is "that the Legislature excluded any reference to death claims from § 1483 because it did not intend that such claims be subject to either the $280,000.00 cap or the $500,000.00 cap." [Plaintiff's brief, p 13.] Plaintiff's interpretation, however, is not compatible with the statutory language set forth above (see preceding paragraph, *supra*) and defies the established rules of statutory construction.

Plaintiff's rendition of legislative intent would render meaningless the amendment to § 1483, since death cases would be exempt from the caps provision both *before* and *after* the amendment in 1993. In other words, the amendment would serve no meaningful purpose. Plaintiff's theory thus violates the rules of statutory construction set forth in *Davidson* and *Gorte, supra*. Furthermore, under the maxim "expressio unius est exclusio alterius," the express mention of one thing in a statute implies the exclusion of other similar things. *Saginaw General Hospital v City of Saginaw*, 208 Mich App 595, 601; 528 NW2d 805 (1995). "Where '[e]xceptions to [a statute's] sweeping language are carefully enumerated. . . [t]he express enumeration indicates that other exceptions should not be implied.'" *Kaufman v Carter*, 952 F Supp 520, 529 (W.D. Mich 1996), quoting *In re Gerwer*, 898 F2d 730, 732 (9th Cir 1990). In § 1483, the Legislature has precisely delineated the exceptions to the $280,000 caps provision (and to which the $500,000 ceiling still applies). Since death is not expressly mentioned in this category of three exceptions, its exclusion from the category is implied and the statute must be construed to mean that cases of death are indeed subject to the $280,000 caps.

This conclusion is supported by the legislative history of the 1993 amendment. Other proposed amendments that would not have placed a cap on recovery in death cases were rejected in favor of the present version. This Court therefore concludes that in amending the statute, the Legislature intended to eliminate the prior exemption for death cases and impose the $280,000 caps provision in exactly the present situation, where death has resulted.

Likewise, this Court finds without merit Plaintiff's assertion that, by the application of the doctrine of *ejusdem generis*, the caps provision does not apply because the derivative claims brought in the instant case, loss of consortium, society and companionship, are not the type of "other non-economic loss" referred to in § 1483. Section 1483(3) provides that:

> (3) As used in this section, "non-economic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other non-economic loss.

Plaintiff acknowledges the broad phrasing of "*other* non-economic loss," and indeed, this all-inclusive phrase belies Plaintiff's contention that the definition is limited and therefore does not pertain to the damages sought herein. The rule of *ejusdem generis* "can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of a statute within narrower limits than was intended by the law-maker." *People v Gould*, 237 Mich 156, 160; 211 NW 346 (1926). See also, *In re Mosby*, 360 Mich 186, 192; 103 NW2d 462 (1960). Nothing in the legislative history of § 1483 indicates that the Legislature intended the caps provision to distinguish between those damages sought by actual victims and third-party derivative claims. The limitation on noneconomic damages is sweeping and does not discriminate, except as narrowly prescribed in the three enumerated exceptions to the cap.

For the reasons set forth above, this Court concludes that the instant matter therefore falls within the ambit of the medical malpractice statute and that the caps provision of § 1483 is applicable.

C.

Plaintiff further contends that the language of the Tort Reform Act, as it existed in 1993, states that the cap on noneconomic damages does not apply when the plaintiff in the action is free of comparative negligence. The statutory language relied upon by Plaintiff in this regard was contained in the 1993 version of the Tort Reform Act but eliminated by the 1995 amendments. See discussion, pp 4-5, *supra*. Having already decided that the 1995 Tort Reform Act applies to this 1994 incident, Plaintiff's arguments on this point are moot.

Constitutional Challenges

A.

In assessing Plaintiff's constitutional challenges, the starting point is the presumption of constitutionality that is accorded to challenged legislation. *Caterpillar, Inc v Dep't of Treasury,* 440 Mich 400, 413; 488 NW2d 182 (1992). A party challenging the facial constitutionality of an act must establish that no set of circumstances exists under which the act would be valid. *Council of Organizations v Governor*, 455 Mich 557, 568, 602; 566 NW2d 208 (1997). See also, *Judicial Attorneys Ass'n v State of Michigan*, ___ Mich ___; 586 NW2d 894, 899 (1998). The fact that legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient; if any state of facts reasonably can be conceived that would sustain an act, the existence of the state of facts at the time the law was enacted must be assumed. *Id.* Consequently, a court's inquiry is restricted to whether any state of facts either known or which could reasonably be assumed affords support for it. *Shavers v Attorney General*, 402 Mich 554, 613-614; 267 NW2d 72 (1978); *Roy v Rau Tavern, Inc*, 167 Mich App 664, 669; 423 NW2d 54 (1988).[9]

B.

Plaintiff first contends that MCL 600.1483; MSA 27A.1483 is unconstitutional because it denies the right to trial by jury as guaranteed by the Michigan Constitution. Const 1963, art 1, § 14, provides in pertinent part:

> The right of trial by jury shall *remain*, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. (Emphasis added.)

This right has been interpreted to mean that the right of trial by jury shall remain what it was at common law, before the adoption of the State Constitution in 1963. *Smith v University of Detroit*,

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[9]This Court is aware that the majority of states have enacted statutes designed to deal with the perceived medical malpractice crisis. Some of these states, like Michigan, have implemented caps on noneconomic losses. These statutory caps vary considerably in content and scope, and the success of legal challenges has varied widely, depending on the issues raised and the constitutional provisions unique to each jurisdiction. See generally, "Validity, Construction, and Application of State Statutory Provisions Limited Recovery in Medical Malpractice Claims," 26 ALR 5th 245. Although instructive, these cases are of limited value in assessing Michigan's constitutional provisions.

145 Mich App 468, 475; 378 NW2d 511 (1985). Although the issue has been tacitly addressed but never directly discussed by the Michigan courts, this Court will assume for purposes of argument that a statutory wrongful death action, albeit unknown to the common law, is triable by jury under the Michigan constitution since the nature of the underlying suit is one for damages for personal injuries -- a type of action that was indeed triable by jury at common law. *Smith, supra. Cf., French v Mitchell*, 377 Mich 364; 140 NW2d 426 (1966); *Waisanen v Gaspardo*, 30 Mich App 292, 293; 186 NW2d 75 (1971).

The crux of the matter, and the precise question that remains to be answered, is whether the Legislature can limit the jury's award of damages regardless of the jury's assessment of the value of Plaintiff's injuries. Section 1483 precludes the trial court from informing the jury of the statutorily mandated cap. Thus, the jury renders its damages award unaware of the legislatively imposed ceiling. Plaintiff claims that by its nature, § 1483 usurps the function of the jury.

This Court acknowledges that "one of the necessary incidents of the trial of cases. . . by jury is that the jury shall fix the amount of damages." *Leary v Fisher*, 248 Mich 574, 578; 227 NW 767 (1929). See also, *Rouse v Gross*, 357 Mich 475, 481; 98 NW2d 562 (1959).[10] However, "at no time has the right to a jury trial in any fashion been understood to displace the authority and duty of the judiciary to determine legal issues." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 607; 513 NW2d 773 (1994). A remedy is a matter of law, not a factual matter, and once the jury has assessed damages, its constitutional function and mandate have been fulfilled. As one court has reasoned, "The limitation on medical malpractice recoveries. . . does nothing more than establish the outer limits of a remedy provided by the General Assembly. . . A trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function. Thus, . . . [the caps provision]. . . does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process." *Etheridge v Medical Center Hospitals*, 376 SE2d 525, 529 (Va. 1989).

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[10]There is, however, no substantive right under the common law to a jury determination of damages under the Seventh Amendment of the United States Constitution. The determination of a civil penalty is not one of the "fundamental elements" preserved by the common law right to a jury trial. *Duke Power Co v Carolina Environmental Study Group, Inc,* 438 US 59, 88-89; 98 S Ct 2620; 57 L Ed 2d 595 (1978).

Modifications of the remedy in malpractice cases brought under the wrongful death act are within the broad purview of the plenary powers of the Legislature. "The legislative power under the Michigan Constitution is as broad, comprehensive, absolute, and unlimited as that of England's Parliament, subject only to the United States Constitution and the restraints and limitations imposed by the people upon such power by the Michigan Constitution. . ." *Southeastern Michigan Fair Budget Coalition v Killeen*, 153 Mich App 370, 380; 395 NW2d 325 (1986). Article 3, § 7 of the Const 1963 states that "the common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended, or repealed." Thus, it is well-established in the courts of this state that the Legislature may not only change the common law, it may completely extinguish common law rights of action. *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980); *Shavers, supra*, 612, n 36. Therefore,

> [A] legislature adopting a prospective rule of law that limits all claims for pain and suffering in all cases is not acting as a fact finder in a legal controversy. It is acting permissibly within its legislative powers that entitle it to create and repeal causes of action. The right of jury trials in cases at law is not impacted. Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function. . .
>
> The power of the legislature [reasonably] to define, augment, or even abolish complete causes of action must necessarily include the power to define [reasonably] by statute what damages may be recovered by a litigant with a particular cause of action. . .
>
> Particularly in the area of damages for pain and suffering, [which are, otherwise, open-ended,] the legislature acts within its power in creating reasonable limits on the causes of action and recoverable damages it chooses to allow in the courts of law. [*Robinson v Charleston Area Medical Center Inc*, 414 SE2d 877, 888 (W. Va. 1991), quoting *Franklin v Mazda Motor Corp*, 704 F Supp 1325, 1331-1332 (D. Md 1989).] See also, *Etheridge, supra; Adams v Children's Mercy Hospital*, 832 SW2d 898, 907 (Mo. 1992).

In other words, it would be illogical to conclude that the Legislature can abrogate a cause of action but cannot limit a remedy, i.e., impose a cap on damages. As articulated by Judge (now

Justice) Taylor in his dissenting opinion in *McDougall v Eliuk*[11], 218 Mich App 501, 517-518; 554 NW2d 56 (1997), lv gtd 456 Mich 903 (1997).

> Incontestably, the power of abolition must contain within it the lesser power to modify. Where the grant of a substantive right is inextricably intertwined with the limitations on the procedures that are employed in determining the right, a litigant such as plaintiff "must take the bitter with the sweet." *Arnett v Kennedy*, 416 US 134, 153-154; 94 S Ct 1633; 40 L Ed 2d 15 (1974). Accordingly, where, as here, the Legislature is addressing a statutory cause of action that originated from the common law, it must have the ability to change anything within it. . . .

Other instances in which the Legislature has modified the effect of a jury's determination of damages abound, such as the prohibition of exemplary damages, regardless of whether the jury might have been persuaded that the facts dictated otherwise, under the Elliot-Larsen Civil Rights Act, MCLA 37.2801(1), MSA 3.548(801)(1); the Dramshop Act, MCLA 436.22; MSA 18.993 or in certain cases of unlawful arrest or false imprisonment, MCLA 600.2917, MSA 27A.2917; authorization of treble damages for cutting timber without authorization, MCLA 600.2919; MSA 27A.2919 or for malicious prosecution, MCLA 600.2907, MSA 27A.2907; or in certain mobile home warranty violation cases, MCLA 125.996, MSA 19.410(36); or antitrust cases, MCLA 445.778, MSA 28.70(8); the statute of repose for architects, engineers and contractors, MCL 600.5839(1), MSA 27A.5839(1); and the numerous immunities from suit that are granted by statute; e.g., governmental, MCLA 691.1407; MSA 3.996 (107); Recreational Users Act, MCLA 300.201; MSA 13.1485; Emergency Medical Services Act, MCLA 333.20901; MSA 14.15(20901); and Worker's Disability Compensation Act, MCLA 418.131; MSA 17.237(131). The caps provisions of § 1483, like these legally acceptable legislative means of altering or eliminating causes of action, does not unduly divest the jury of its fact finding role.

This Court therefore concludes that § 1483 does not violate Plaintiff's right to trial by jury as guaranteed by Article 1, Section 14 of the 1963 Michigan Constitution.

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[11]Coincidentally, *McDougall* addressed another aspect of the medical malpractice tort reform acts, the qualification of expert witnesses under MCL 600.2169; MSA 27A.2169. See also, *Golden v Baghdoian*, 222 Mich App 220, 224; 222 Mich App 801; 564 NW2d 505 (1997).

C.

In a related argument, Plaintiff asserts that the cap on noneconomic damages contained in § 1483 constitutes, in effect, "legislative remittitur" that violates the separation of powers doctrine set forth in Article 3, Section 2 of the Michigan Constitution. Plaintiff contends that § 1483 stands in conflict with the court rules pertaining to remittitur and new trial, MCR 2.611, depriving the court of its discretionary authority and the boundaries of the authority to determine whether the verdict was supported by the facts on the record and requiring the Court, irrespective of the facts, to remit any award of damages in excess of the legislative edict. Plaintiff further argues that § 1483 conflicts with the responsibility of the Court under MCR 2.516 to instruct the jury on the law, because the jury is not told about the cap in advance of their deliberations.

Article 3, Section 2 of the Michigan Constitution states that "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Article 6, Section 5 provides that the Supreme Court shall have authority over "the rules of practice and procedure in the courts of the state." MCR 1.104 provides that "[r]ules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court."

In *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co.*, 423 Mich 705, 717; 378 NW2d 744 (1985), the Michigan Supreme Court explained:

> Each branch of government has inherent power to preserve its constitutional authority.
>
> > It was certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department from fulfilling its responsibilities to the people under the Constitution. [*O'Coin's Inc v Worcester Co Treasurer,* 362 Mass 507, 511; 287 NE2d 608 (1972).]
>
> However, an indispensable ingredient of the concept of coequal branches of government is that "each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches." *United States v Will,* 449 US 200, 228; 101 S Ct 471; 66 L Ed 2d 392 (1980).

In *Neal, supra* at 722, the Court of Appeals reviewed the test for determining whether a statute violates the separation of powers doctrine, stating:

> The Supreme Court's rule-making power in matters of practice and procedure is superior to that of the Legislature . . . . "Rules of practice set forth in any statute, if not in conflict with any of these rules [the court rules], are effective until superseded by rules adopted by the Supreme Court." MCR 1.104. . . . In determining whether there is a real conflict between a statute and a court rule, both should be read according to their plain meaning. . . . The common-sense meaning of the words should be given the effect most likely understood by those who adopted them. . . . Moreover, as explained in *Council of Organizations & Others For Education About Parochiaid v Governor,* 455 Mich 557; 566 NW2d 208 (1997):
>
> > The power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict. . . . "Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." [*Id.* at 570, quoting *Cady v Detroit,* 289 Mich 499, 505; 286 NW 805 (1939) (citations omitted).]" [*Neal, supra* at 722-723.] [Citations omitted.]

The corollary to the principle of the court's supremacy in matters of practice and procedure is that:

> [T]he Supreme Court's rule-making power is constitutionally supreme in matters of practice and procedure *only* when the conflicting statute embodying putative procedural rules reflects no legislative policy consideration other than the judicial dispatch of litigation. 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 404; *Kirby v Larson,* 400 Mich 585, 598; 256 NW2d 400 (1977) (Williams, J.). Thus, while purely procedural matters are constitutionally delegated to the Supreme Court, a court rule promulgated by that Court cannot intrude upon substantive legislative policy matters. . . . [*In re Gordon Estate,* 222 Mich App 148, 153-154; 564 NW2d 497 (1997).]

See also, *Golden v Baghdoian*, 222 Mich App 220, 224; 564 NW2d 505 (1997).

In *Smith v Smith,* 433 Mich 606, 619-620; 447 NW2d 715 (1989), the Supreme Court addressed a conflict between a court rule, MCR 3.209(B)(1)(b), that permitted postmajority child support payments in exceptional circumstances, and the amended Age of Majority Act, MCL 552.17a; MSA 25.97(1), which limited support payments to the age of majority. The Court concluded that the legislation was substantive in nature and therefore superseded the court rule, stating in pertinent part:

> The Legislature has taken affirmative action to amend the child support laws, the Child Custody Act, and the Emancipation of Minors Act. All of the amendments evidence a legislative intent to retain the longstanding rule that support payments are to be limited by the age of majority.
>
> * * *
>
> We acknowledge that this conclusion is contrary to MCR 3.209(B)(1)(b) . . . . However, this Court has said that court rules may take precedence over statutory language only in matters involving judicial rules of practice and procedure. See *Perin v Peuler*, 373 Mich 531; 130 NW2d 4 (1964). The child support provision of § 17a is a matter of *substantive* law and, as such, supersedes MCR 3.209(B)(1)(b).
>
> * * *
>
> [I]nsofar as this court rule may interfere with any legislative act governing substantive law, the court rule is without legal effect.[23]
>
> [23]See Levin & Amsterman, *Legislative control over judicial rule-making: A problem in constitutional revision, 107 U Pa L R 1, 14 (1958)*, where the authors declare: "Nothing could be clearer than the fact that courts in the exercise of the rule-making power have no competence to promulgate rules governing substantive law." [*Smith, supra* at 618-620.] [Emphasis in original.]

The cap on noneconomic damages in § 1483 is likewise a matter of substantive law that clearly reflects considerations other than the "judicial dispatch of litigation. " It is but one facet of complex socio-economic legislation designed to address a perceived medical malpractice crisis by placing the insured risks of medical practitioners, and the premiums required to cover those risks, within reasonable parameters to stem the tide of physicians leaving the state and insure that health care will remain affordable and available. As such, it falls comfortably within the sphere of the Legislature. Compare, *In re 1976 PA 267*, 400 Mich 660; 255 NW2d 635 (1977); *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 292 (1971); *Perin Peuler (On Rehearing)*, 373 Mich 531; 130 NW2d 4 (1964); *Sepanian v Moskovitz*, 232 Mich 630; 206 NW 359 (1925); *Clemens v City of Detroit*, 120 Mich App 363; 227 NW2d 480 (1982).

Section 1483 does not, in any event, unconstitutionally conflict with the court rules governing remittitur and jury instruction. The caps provision neither nullifies remittitur nor forecloses the option to argue that a verdict is excessive. Moreover, MCR 2.516 is unaffected by § 1483. As

Defendants note, "That the jury is not to be told about, or to itself apply, the cap does not conflict with a rule which requires that the jury be instructed on the law *it is to apply* in a given case." [Defendants' brief, p 46.] [Emphasis in original.] Even assuming arguendo that a conflict does exist, § 1483, as substantive legislation, would prevail over the court rules. *Smith, supra.*

This Court therefore concludes that the cap on noneconomic damages contained in § 1483 does not violate the separation of powers doctrine.

D.

Plaintiff next alleges that § 1483 violates the Michigan Constitution's guarantee of equal protection of the law. 1963 Const, art 1, sec 2. Plaintiff asserts that the victims of negligence are not being treated equally; malpractice victims, unlike victims of premises negligence, defective highway design, drunk drivers and automobile negligence, are treated differently since their claims are subject to a cap on noneconomic damages for pain and suffering. Plaintiff further maintains that § 1483 has no impact on plaintiffs who suffer less significant injuries. Rather, only those who are the most seriously injured as a consequence of malpractice face an arbitrary ceiling imposed upon recovery of damages.

In general terms, equal protection requires that persons in similar circumstances be treated similarly. *Neal, supra*, at 716; *Thompson v Merritt,* 192 Mich App 412, 424; 481 NW2d 735 (1991). When a statute is challenged on equal protection grounds, a court should consider the provisions of the whole law, as well as its underlying policy and objectives. *Neal, supra* at 717. The validity of a legislative classification challenged on equal protection grounds is measured by one of three tests, depending on the type of classification and the nature of the affected interest:

> When the legislation at issue creates an inherently suspect classification, such as race, alienage, ethnicity, and national origin or affects a fundamental interest, the "strict scrutiny" test applies. *People v Perlos,* 436 Mich 305, 331; 462 NW2d 310 (1990). Other classifications that are suspect, but not inherently suspect, such as gender and mental capacity, have been held subject to the middle-level "substantial relationship" test. *Doe v Dep't of Social Services*, 439 Mich 650, 662-663, n 19; 487 NW2d 166 (1992); [*Dep't of Civil Rights ex rel*] *Forton* [*v Waterford Twp*, 425 Mich 173; 387 NW2d 821 (1986)], *supra* at 191, n 8. Social or economic legislation. . . is reviewed under the "rational basis" test. *Perlos, supra* at 331. [*People v Pitts,* 222 Mich App 260, 272-273; 564 NW2d 93 (1997).]

See also, *O'Brien, supra* at 13; *O'Donnell v State Farm*, 404 Mich 524, 541; 273 NW2d 829 (1979); *Neal, supra* at 716-717; *American States Ins v Dep't of Treasury*, 220 Mich App 586, 592-594; 560 NW2d 644 (1996).

Plaintiff urges application of the strict scrutiny test of equal protection. However, no fundamental rights are implicated in the present case. The right to recovery of tort damages is not a fundamental right. *American States, supra* at 596; *Etheridge, supra* at 531. Thus, application of such a heightened standard is not appropriate in these circumstances.

Plaintiff alternatively suggests that the intermediate "substantial relationship" test should be applied to her equal protection claim. However, the scope of this test is narrow and requires that the legislative classification fall within the following category:

> Judicial deference to the Legislature is premised in part upon the perceived need for experimentation, especially in social and economic matters.
>
> * * *
>
> Where a classification scheme creates a discrete exception to a general rule and has been enforced for a sufficiently long period of time that all the rationales likely to be advanced in its support have been developed, a court should fully examine those rationales and determine whether they are sound.
>
> It is understandable that a court reviewing what may be "experimental" legislation would say, as did this Court in *Naudzius* [*v Lahr*], 253 Mich 216; 234 NW 581 (1931), "[p]erhaps the legislature also had other reasons for the law." Where, however, it can no longer be claimed that the legislation is experimental, where all possible rationales have been developed, a court should not dismiss a constitutional challenge on that hypothesis." [*Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 672; 232 NW2d 636 (1975).]

Numerous appellate decisions have recognized that "the trend has been away from the substantial relationship test for cases that do not involve fundamental rights or suspect classifications," *Neal, supra* at 718, and have thus rejected the intermediate test in favor of the rational basis test. See, e.g., *O'Brien, supra; Deepdale Memorial Gardens v Admin Secretary of Cemetery Regulations*, 169 Mich App 705; 426 NW2d 785 (1988); *Roy v Rau Tavern, supra*; *Michigan Manufacturers Ass'n v Director, Workers' Disability Schools*, 89 Mich App 199; 280 NW2d 483 (1979); *Shwary v Cranetrol Corp,* 88 Mich App 264; 276 NW2d 882 (1979); *Renne v*

Twp of Waterford, 73 Mich App 685; 252 NW2d 842 (1977). Of particular significance herein is the fact that in other appellate cases in which certain aspects of the medical malpractice tort reform legislation have been challenged on equal protection grounds, the courts have expressly rejected the intermediate substantial relationship test and analyzed such a claim using the rational basis test. See, i.e., *Neal, supra; Bissell v Kommareddi*, 292 Mich App 578; 509 NW2d 542 (1993); and *Sills v Oakland General Hospital*, 220 Mich App 303; 559 NW2d 348 (1996).

The rationale justifying rejection of the intermediate test in these latter cases has been uniform: "even if . . . [the medical malpractice legislation act] 'carves out a discrete exception to a general rule' in common-law negligence cases, this statute is also clearly experimental social and economic legislation that is, therefore entitled to deference." *Neal, supra* at 718. Certainly this statement applies to the instant case, which involves a different segment of the same legislative act. The portion of the tort reform act in question, § 1483, is but six years old and can thus be comfortably classified as experimental. In *Shavers, supra,* the Supreme Court deemed Michigan's no-fault automobile insurance act, which had been in effect for five years, still experimental, and upheld its constitutionality using the rational basis test. See also, *Shwary, supra* at 268. Compare *Manistee Bank, supra* (substantial relation test used to evaluation and hold unconstitutional, the 45-year-old guest passenger statute.) This Court therefore concludes that the rational basis test is the appropriate standard of equal protection review that should be applied to the present circumstances.

The rational basis test was explained in *Pitts, supra* at 273-274 as follows:

> Under the rational basis test, the legislation is presumed to be constitutional and the party challenging the statute has the burden of proving that the legislation is arbitrary and thus irrational. *People v Sleet,* 193 Mich App 604, 607; 484 NW2d 757 (1992). Under this test, a statute will be upheld if the classification scheme it has created is rationally related to a legitimate governmental purpose. *Doe, supra* at 662. A rational basis exists when it is supported by "any state of facts either known or which could reasonably be assumed." *Martinez, supra* at 150 (citation omitted). A classification that has a rational basis is not invalid because it results in some inequity. *Weeks v Bd of Trustees, City of Detroit General Retirement System*, 160 Mich App 81, 86: 408 NW2d 109 (1987). Further, this test does not measure the wisdom, need, or appropriateness of the legislation. *Sleet, supra* at 607.
>
> The burden of proof is on the person attacking the legislation to show that the classification is arbitrary and irrational. *Martinez, supra* at 150.

In applying the test, the courts have been particularly careful not to intrude into the sphere of the Legislature:

> The responsibility for drawing lines in a society as complex as ours -- of identifying priorities, weighing the relevant considerations and choosing between competing alternatives -- is the Legislature's, not the judiciary's. Perfection is not required. . .
>
> * * *
>
> Nor is it necessary that the Legislature deal with every aspect of a problem at the same time:
>
> > [W]e are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," * * * that a legislature need not "strike at all evils at the same time," * * * and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" . . . .
>
> *In short, we do not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations." We sit as a court to determine whether there is a rational basis for the Legislature's judgment. If there is, then that judgment must be sustained . . . .*

[*O'Donnell, supra* at 542-543] [Footnotes omitted.] [Emphasis added.]

Turning now to the statute at issue in the present case, § 1483 is part of legislation enacted "for the general purpose of addressing the problems of, and widespread dissatisfaction with, Michigan's medical liability system, specifically, the availability and affordability of medical care in the face of spiraling costs." *Neal, supra* at 719. See, House Legislative Analysis of SB 270 and HB 4033, 4403 and 4404 (4/20/93). As the Court of Appeals recognized in *Bissell, supra* at 581, the "state unquestionably has a legitimate interest in securing adequate and affordable health care for its residents" and that "it is reasonable to assume that a lessening of exposure to malpractice claims would encourage health-care providers to remain in this state." See also, *Sills, supra* at 313. The specific question raised in this case is whether the caps provision of § 1483 is rationally related to these interests.

By placing limits on the award of noneconomic damages, the Legislature intended that such a measure would:

> further help to reduce insurance costs by addressing the uncertainties and long period of exposure in this highly volatile area of insurance. Without such measures and controls on the costs of litigation, there is little to be done to reduce premiums, for neither they nor profits are inflated: the major malpractice insurers are customer-owned (that is owned by physicians or hospitals), and the insurance bureau reports a healthy degree of competition in the marketplace. [House Legislative Analysis, *supra* at 5.]

The perceived justification for the caps on noneconomic damages is found in the Report of the Senate Select Committee on Civil Justice Reform (6/26/85), p 18, in which it was reported that "[a] 1982 Rand Institute for Civil Justice report found that states which have adopted caps have experienced an average drop of 19 percent in the severity of awards within two years of enactment." The report further noted that there is "data suggesting that juries are compensating medical malpractice injuries at a higher level than the same injury caused under different circumstances" and that a "study indicated that malpractice awards for a comparable injury were larger than judgments for dramshop and automobile accidents." *Id.*

The actual existence of a medical malpractice crisis has been the subject of ongoing debate and, except to acknowledge the existence of these conflicting viewpoints, it is not the role of this Court to express its opinion on either the effectiveness of the legislation or the merits of the criticism leveled at it. It is the Legislature that has the means of collecting data upon which to base its public policy decisions and it is solely within the Legislature's province to make judgments about the viability of social and economic policy.

This Court does, however, conclude that the caps on non-economic damages contained in § 1483 are rationally related to a legitimate state interest. It is important to note that economic damages are neither eliminated nor diminished by §1483 and that such damages are preserved to provide recompense for the victims of malpractice. The limit on noneconomic damages still permits compensation up to $280,000, or $500,000 if one of the three exceptions to the caps applies. The original $225,000 cap was raised to $280,000 by the amendments to § 1483 in 1993, and this amount is adjusted upwards annually to reflect inflation.

Plaintiff has not carried her burden of demonstrating that either the amount of the caps on noneconomic damages or the classifications of physical conditions to which the caps apply are arbitrary or without rational basis. The legislative history of § 1483 indicates that the Legislature

has taken a cautious approach to the medical malpractice problem and decided upon the cap amounts only after studied consideration. The categorization of injuries within § 1483 reflects, logically, greater compensation for those conditions that are life-altering and permanent and that may require long-term care.

The reality is that some gravely injured patients who require continual care will never be fully compensated in damages. However, this fact must be considered in the overall context of the perceived medical malpractice crisis. If the fears of the Legislature come to fruition and malpractice insurance becomes unaffordable or completely unavailable to health care practitioners, then injured patients would be precluded from any recovery at all, and those patients requiring further treatment for recovery, obviously dependent upon the health care profession, might not have access to the necessary care.

Only the test of time will reveal whether the cap on noneconomic damages is accomplishing the Legislature's goals. As stated by the Supreme Court in *Shavers, supra* at 628-629, with respect to the No-Fault Act, "[t]he fact that these effects [supposed benefits of the act] are not yet evident does not diminish the legitimacy of the goals sought to be achieved or the reasonableness of the means adopted. . . it is precisely because regulation in the economic field often deals with long-term developments that the Court treats such legislation with great deference."

Returning to the cornerstone by which Plaintiff's claims must be evaluated, the presumption of constitutionality, this Court's inquiry is restricted to determining whether any state of facts either known or which could reasonably be assumed affords support for limiting noneconomic damages. *Shavers, supra.* Having found such support, although the existence of a malpractice crisis is debatable, this Court concludes that the Legislature's judgment must be accepted.

Therefore, this Court finds that the noneconomic caps found in § 1483 bear a rational relationship to the public purpose of the tort reform act. The equal protection clause of the Michigan Constitution is not violated.

E.

"Judicial review of substantive due process challenges to socioeconomic legislation is essentially the same as that used under equal protection challenges." *Grieb v Alpine Valley Ski Area,*

155 Mich App 484, 489; 400 NW2d 653 (1986). See also, *Neal, supra* at 720-721; *Michigan Manufacturers, supra* at 734. The pertinent inquiry "is whether the legislation bears a reasonable relation to a permissible legislative objective." *Grieb, supra* at 489.

For the same reasons that this Court has found § 1483 to be constitutionally sound in its equal protection analysis, the conclusion is likewise compelled that § 1483 bears a reasonable relation to a permissible legislative objective. This Court therefore holds that Plaintiff's substantive due process challenge is without merit.

Conclusion

A Grand Traverse County jury returned a verdict in Plaintiff Estate's favor for $1.5 million. The entire sum represented noneconomic damages. 1995 PA 161 and 1995 PA 249 apply to this verdict irrespective of Plaintiff's lack of fault or the cause of action being filed under the wrongful death act.

Application of the noneconomic damage cap does not deny Plaintiff's right to trial by jury or violate the separation of powers. Further, application of the noneconomic damage cap does not violate the equal protection or due process guarantees of the Michigan Constitution.

Accordingly, and concurrently with the entry of this Decision and Order, the Court will enter a judgment for the Plaintiff Estate and against both Defendants, jointly and severally, in the inflation-adjusted amount of $313,600[12] exclusive of interest, taxable costs or applicable mediation sanctions.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/12/99

[12]See, Department of Treasury Memorandum, Limitation on Noneconomic Damages, dated January 20, 1998, ". . . for causes of action arising after September 30, 1993, this results in a . . . limitation of $313,600 . . ."; and MCLA 600.1483(1) and (4); MSA 27A.1483(1) and (4).

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE ESTATE OF JUDIANNA KATHERINE FREUNDL, DECEASED, by LYNDA S. FREUNDL, Pers. Rep.

Plaintiff,

v

File No. 96-15342-NH
HON. PHILIP E. RODGERS, JR.

DR. LAURA DANZ and DR. DON GOOD, jointly and severally,

Defendants.
_____/

Kevin J. Cox (P36925)
Carlene Kinzel-Reynolds (P55561)
Co-Counsel for Plaintiff

R. Jay Hardin (P35458)
Erin E. Gerrity (P51942)
Joanne Geha Swanson (P33594)
Co-Counsel for Defendants Danz and Good

JUDGMENT AGAINST DR. LAURA DANZ AND DR. DON GOOD, JOINTLY AND SEVERALLY

At a session of said Court held in the City of Traverse City, County of Grand Traverse, State of Michigan, on March 12, 1999.

PRESENT: HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

This matter having been brought before this Court by trial by jury and the jury having found in favor of the Plaintiff Estate of Judianna Katherine Freundl, deceased, by Lynda S. Freundl, Personal Representative and against Defendants Dr. Laura Danz and Dr. Don Good, jointly and

severally, in the amount of $500,000 for past noneconomic damages and an additional $1,000,000 in future noneconomic damages, and the Court otherwise being fully advised in the premises;

NOW, THEREFORE, pursuant to MCLA 600.1483; MSA 27A.1483, this Court orders that the Defendants Dr. Laura Danz and Dr. Don Good, jointly and severally, shall pay to the Plaintiff, the Estate of Judianna Katherine Freundl, deceased, by Lynda S. Freundl, Personal Representative, the sum of $313,600[1] for all noneconomic damages, exclusive of interest, costs and mediation sanctions which may be taxed supplementary to the entry of this Judgment.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/12/99

[1]See this Court's Decision and Order of March 12, 1999 and Department of Treasury Memorandum, Limitation on Noneconomic Damages, dated January 20, 1998, ". . . for causes of action arising after September 30, 1993, this results in a . . . limitation of $313,600 . . ."; and MCLA 600.1483(1) and (4); MSA 27A.1483(1) and (4).