

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2009-CA-02009**

**APAC-TENNESSEE, INC**

**DEFENDANT-APPELLANT/  
CROSS-APPELLEE**

**v.**

**ETHAN BRYANT, ET AL.**

**PLAINTIFFS-APPELLEES/  
CROSS-APPELLANTS**

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**Cross Appeal from the Circuit Court of Desoto County**

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**BRIEF OF AMICUS CURIAE STATE OF MISSISSIPPI**

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**ORAL ARGUMENT IS NOT REQUESTED**

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## ORAL ARGUMENT NOT REQUESTED

### Statement of the *Amici*'s Interest

The State of Mississippi's involvement and interest in this litigation is limited to Plaintiffs' constitutional challenge to Mississippi Code Section 11-1-60(2)(b). Mississippi Code Section 7-5-1 tasks the Attorney General to intervene and defend the constitutionality of any state statute when notified of a constitutional challenge. Pursuant to Rule 29 of the Mississippi Rules of Appellate Procedure, the Attorney General files this *amicus curiae* brief on behalf of the State of Mississippi to defend the constitutionality of Section 11-1-60(2)(b).<sup>1</sup> The State of Mississippi's brief is filed in response to the constitutional arguments raised in the brief of Plaintiffs-Appellees/Cross-Appellants Ethan Bryant, et al.

The Attorney General and the State of Mississippi express no opinion and take no position regarding factual or legal arguments raised by the parties unrelated to the purely legal question regarding the constitutionality of Section 11-1-60(2)(b).

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<sup>1</sup> Mississippi Code Annotated § 11-1-60(2)(b) provides as follows: "In any civil action filed on or after September 1, 2004, other than those actions described in paragraph (a) of this subsection, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than One Million Dollars (\$1,000,000.00) for noneconomic damages."

## **Summary of the Argument**

Mississippi courts may strike down an act of the legislature only where it appears beyond all reasonable doubt that the statute violates the clear language of the constitution. Plaintiffs have failed to satisfy this heavy burden imposed on their contention that Section 11-1-60(2)(b) is unconstitutional. The weight of authority available to this Court strongly supports the conclusion that Section 11-1-60 violates no constitutional provision, including the right to a jury trial. Although a party has the right to have a jury assess his damages, he has no right to have a jury dictate the legal consequences of its assessment through an award. The distinction between the power of a jury to determine facts and the authority of the Mississippi Legislature to set policy and pass laws is well established. In this respect, Section 11-1-60(2)(b)'s operation is consistent with established constitutional law.

## Argument

### **I. This Court Employs a *De Novo* Standard in Reviewing the Legal Arguments Concerning the Constitutionality of Section 11-1-60(2)(b).**

This Court reviews *de novo* the legal contentions regarding the constitutionality of Mississippi statutes. *Gilmer v. State*, 955 So.2d 829, 837 (Miss. 2007); *Thoms v. Thoms*, 928 So.2d 852, 855 (Miss. 2006).

### **II. Plaintiffs Have not Satisfied Their Heavy Burden When Questioning the Constitutionality of a State Statute.**

Plaintiffs face a very heavy burden in assailing the constitutionality of a duly enacted state statute. Plaintiffs must “overcome the strong presumption” that the legislature – this Court’s co-equal branch of government – acted within its constitutional authority in adopting Section 11-1-60(b). *Cities of Oxford, Carthage, Starkville and Tupelo v. Northeast Elec. Power Ass’n*, 704 So.2d 59, 65 (Miss. 1997); *James v. State*, 731 So.2d 1135, 1136 (Miss. 1999). Plaintiffs must demonstrate that Section 11-1-60(b) is in direct conflict with “the clear language of the constitution.” *PHE, Inc. v. State*, 877 So.2d 1244, 1247 (Miss. 2004). The judiciary’s respect for the legislature’s constitutional judgment and plenary authority to establish state public policy is well documented.

In determining whether an act of the Legislature violates the Constitution, the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution. Nor are the courts at liberty to declare an Act void, because in their opinion it is opposed to a spirit supposed to prevail the Constitution, but not the expressed words.



*Pathfinder Coach Division of Superior Coach Corp. v. Cottrell*, 62 So.2d 383, 385 (Miss. 1953) (citation omitted). Indeed, this Court has previously cautioned that “[w]hen a party invokes our power of judicial review, it behooves us to recall that the challenged act has been passed by legislators and approved by a governor sworn to uphold the selfsame constitution as are we.” *State v. Roderick*, 704 So.2d 49, 52 (Miss. 1997).

This Court has recognized that a “Mississippi court may strike down an act of the legislature only where it appears **beyond all reasonable doubt** that the statute violated the clear language of the constitution.” *PHE, Inc.*, 877 So.2d at 1247 (emphasis supplied, internal quotation omitted). “All doubts must be resolved in favor of validity of a statute, and any challenge will fail if the statute does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity.” *Id.* (internal quotation omitted). In fact, even where there exists a conflict between a statute and the Constitution, the conflict must be “palpable before the courts of this State will declare a statute unconstitutional.” *Quitman County v. State of Mississippi*, 910 So.2d 1032, 1036 (Miss. 2005). In the final analysis, “to state that there is doubt regarding the constitutionality of an act is to essentially declare it constitutionally valid.” *Moore v. Board of Supervisors of Hinds County*, 658 So.2d 883, 887 (Miss. 1995).

The non-economic damages cap contained in § 11-1-60 is presumed constitutional and can only be overturned if “found in palpable conflict with some plain provision of the constitution.” *State v. Mississippi Ass’n of Supervisors, Inc.*,

699 So. 2d 1221, 1223 (Miss. 1997). Plaintiffs primarily rest their challenge on Section 31 of the Mississippi Constitution which provides, in relevant part, that “[t]he right of trial by jury shall remain inviolate.” MISS. CONST., art. III, § 31. Section 11-1-60 operates after the jury has determined the facts of liability and damages, returned a verdict in favor of a plaintiff, and awarded an amount that exceeded the noneconomic damages cap. Section 11-1-60 requires the trial court, as a matter of law, to reduce the award of noneconomic damages to \$1 million. The statute does not deprive the jury of its fact-finding duty or a plaintiff of his trial by jury. Section 11-1-60 is not in “palpable conflict” with Section 31’s preservation of the right to a trial by jury.

The United States District Court for the Northern District of Mississippi provides an insightful case, *Rieger v. Group Health Ass’n*, 851 F. Supp. 788 (N.D. Miss. 1994). In *Rieger*, the plaintiff, a Mississippi resident, sued a Maryland healthcare provider for medical malpractice associated with the treatment and misdiagnosis of the plaintiff by the defendant while the plaintiff was a Maryland resident. *Id.* at 789-90. After a trial, the jury returned a verdict for the plaintiff and awarded her \$28,000 in economic damages and \$1.5 million in non-economic damages, which were reduced to \$975,000 under Mississippi’s comparative negligence principles. *Id.* at 790. The defendant then argued for a further reduction based, *inter alia*, on the application of Maryland’s cap on noneconomic damages. *Id.* at 790-91.

The district court observed that Mississippi's choice of law principles required the application of Maryland's noneconomic damages cap unless applying the cap would be "repugnant and offensive to the public policy" of Mississippi. *Id.* at 791. The district court phrased the issue as follows: "In the case at bar, the plaintiff is asking this court to *Erie* guess, or declare, that Mississippi would find statutory caps on damages offensive to the deeply ingrained and strongly felt public and social policy of this state." *Id.* at 792. To support her position, the plaintiff argued 1) that the Mississippi Legislature repeatedly rejected passing a damages cap; and 2) that a damages cap violated Section 31's protection of the right to a jury trial. *Id.*

In reviewing the plaintiff's points, the district court noted that Mississippi courts had never had the opportunity to review the constitutional or public policy questions associated with a statutory cap on noneconomic damages. *Id.* Rejecting the plaintiff's contentions, the district court found as follows:

As the court perceives this question, the burden is upon plaintiff to come forward with some tangible support that Mississippi would regard statutory caps on noneconomic damages offensive to our fundamental public policy priorities. In support of plaintiff's invitation for the court to find a fundamental public policy disdain for statutory caps on noneconomic damages, plaintiff offers the absence of a statutory cap in the Mississippi Code and a speculative conclusion that such inaction by the state legislature must indicate public repudiation for capping recovery. The plaintiff has not cited the court to any Mississippi case nor could the court find any commentary in the reported body of Mississippi case law which would suggest that statutory limits on noneconomic recovery collide with public policy priorities which we deem fundamental. Furthermore, as all are aware, no legislative history exists in this state which could shed some light on the subject.

At best, the means by which plaintiff reaches her conclusion is tenuous and highly speculative. She uses the absence of a statutory cap on noneconomic damages in Mississippi to prove an express, affirmative

policy position of “fundamental” importance. The support which is offered provides too shaky a foundation to support a major pronouncement of public policy as “fundamental”. Without more, this court is unwilling to conclude that Mississippi courts would find limits on noneconomic recovery in personal injury cases offensive and repugnant to fundamental public policy priorities.

*Id.* at 793. Although the district court did not spend much time on Section 31, it clearly rejected the right to a jury trial as a reason not to apply the damages cap. At least by reasonable inference, if not directly, the district court determined that a damages cap did not run afoul of the right to a jury trial.

In this matter, Plaintiffs face a more difficult task than that faced by the plaintiff in *Rieger*. The Mississippi Legislature has now passed a noneconomic damages cap that is afforded a presumption of constitutionality. Moreover, the weight of authority available to this Court strongly supports the conclusion that Section 11-1-60 violates no provision of the Mississippi or United States constitution, including the right to a jury trial.

**III. Section 11-1-60 does not Violate Plaintiffs’ Right to Trial by Jury, does not Infringe on the Doctrine of Separation of Powers and does not Violate the “Open Courts” Provision, the Equal Protection Clause, nor the Due Process Guarantee.**

Section 31 of the Mississippi Constitution provides, in pertinent part, that “[t]he right of trial by jury shall remain inviolate . . . .” MISS. CONST., art. III, § 31. Plaintiffs argue that the language of Section 31, along with the separation of powers provision in Section 1 and the “open court” language in Section 24, protects not only the right to have a jury determine the factual issues but the right to actually award

damages.<sup>2</sup> There is, however, a distinction between the power of a jury to determine facts and the authority of the Mississippi Legislature to set policy and pass laws. Considering these same two positions, the Supreme Court of Utah presented the matter as follows:

There are essentially two lines of cases addressing whether a cap on damages deprives a victim of the right to a jury trial. Both lines of thinking are analytically simple and reasonable. One position is that the jury's right to determine damages extends not only to a factual assessment of their amount, but also to an actual award of those damages. *See, e.g., Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711, 720-23 (1989) (holding damage cap unconstitutional because it invaded jury's right to determine damages). The other position is well-embodied in the case of *Etheridge v. Med. Ctr. Hosp.*, which notes that "although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." 237 Va. 87, 376 S.E.2d 525, 529 (1989). We subscribe to the latter view.

*Judd v. Drezga*, 103 P.3d 135, 144 (Utah 2004).

Plaintiffs' position is best expressed by the reasoning of the Supreme Court of Alabama in *Moore v. Mobile Infirmary Ass'n*:

It is not relevant, under a § 11<sup>3</sup> analysis, that the statute has not entirely abrogated the right to empanel a jury in this type of case. The relevant inquiry is whether the function of the jury has been impaired. Because the right to a jury trial "as it existed at the time the Constitution of 1901 was adopted must continue 'inviolable,'" the pertinent question "is not whether [the right] still exists under the

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<sup>2</sup> Section 24 states in part that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course or law . . . ." MISS. CONST., art. III, § 24. Section 1, of course, provides in part that the "powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy . . . ." MISS. CONST., art. I, § 1.

<sup>3</sup> "That the right of trial by jury shall remain inviolate." ALA. CONST., art. I, § 11.

statute, but whether it still remains inviolate.” *Alford v. State ex rel. Attorney General*, 170 Ala. 178, 197, 54 So. 213, 218 (1910) (Mayfield, Sayre, and Evans, JJ., dissenting). “For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties.” *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 722 (1989).

Because the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes less than an advisory status. This, as our cases illustrate, is insufficient to satisfy the mandates of § 11. See *Thompson v. Southern Ry.*, 17 Ala.App. 406, 408, 85 So. 591, 592-93 (1920). A “constitution deals with substance, not shadows. Its inhibition [is] leveled at the thing, not the name.” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1866). Consequently, we hold that the portion of § 6-5-544(b), imposing a \$400,000 limitation on damages for noneconomic loss represents an impermissible burden on the right to a trial by jury as guaranteed by § 11 of the Constitution of Alabama.

*Moore*, 592 So. 2d 156, 163-64 (Ala. 1991) (footnote added). The Alabama Supreme Court reasoned that failing to give the jury's verdict effect, to the extent a damages award exceeded the cap, would essentially relegate the jury's role to less than an advisory function thus raising form (the appearance of a right to a jury trial) over substance (executing the jury's will and protecting, inviolate, the right to a jury trial). *Id.* at 164. In its reasoning, the Court placed a heavy emphasis on the meaning of the word “inviolate.” *Id.* at 159.

The position of the State is accurately represented in the Virginia Supreme Court's decision of *Etheridge v. Med. Ctr. Hosp.*:

Without question, the jury's fact-finding function extends to the assessment of damages. *Stanardsville Vol. Fire Co. v. Berry*, 229 Va. 578, 583, 331 S.E.2d 466, 469-70 (1985); *O'Brien v. Snow*, 215 Va. 403, 405, 210 S.E.2d 165, 167 (1974). Once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied. *Forbes*, 130 Va. at 260-61, 108 S.E. at 20. Thereafter, it is the

duty of the court to apply the law to the facts. *Id.* at 265-67, 108 S.E. at 22.

The limitation on medical malpractice recoveries contained in Code § 8.01-581.15 does nothing more than establish the outer limits of a remedy provided by the General Assembly. A remedy is a matter of law, not a matter of fact. *See Phipps, Adm'r v. Sutherland*, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1959); *Duffy v. Hartsock*, 187 Va. 406, 416, 46 S.E.2d 570, 574 (1948). A trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function. Thus, Code § 8.01-581.15 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.

More importantly, as previously stated, the jury trial guarantee secures no rights other than those that existed at common law. Significantly, the common law never recognized a right to a full recovery in tort. *See Phipps*, 201 Va. at 452, 111 S.E.2d at 425; *see also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88-89 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978) (compiling cases). Thus, although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment. For this reason, too, the limited recovery set forth in Code § 8.01-581.15 effects no impingement upon the right to a jury trial.

*Etheridge*, 376 S.E.2d 525, 529 (Va. 1989).<sup>4</sup> The United States Court of Appeals for the Fourth Circuit subsequently followed the logic of the *Etheridge* Court in

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<sup>4</sup> Article I, § 11, of the Constitution of Virginia provides, *inter alia*, “[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.” That Virginia’s Constitution does not hold the right to a jury trial inviolate does not affect the distinction between a jury’s assessment of damages and the legal consequences of that assessment. *See, e.g., Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 75 (Neb. 2003) (applying reasoning in *Etheridge* even though Nebraska Constitution provided that the right to a trial by jury shall remain inviolate). Indeed, any attempt to premise constitutional rights on a distinction between the meanings of “sacred” and “inviolate” would be arbitrary, at best.

upholding Virginia's damages cap when confronted with a challenge under the Seventh Amendment's right to a jury trial:

We disagree with the district court's conclusion that § 8.01-581.15 violates the right of trial by jury under the seventh amendment. True, it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries. As the *Etheridge* court pointed out, however, it is not the role of the jury to determine the legal consequences of its factual findings. See 376 S.E.2d at 529. [FN4] That is a matter for the legislature, and here, the Virginia legislature has decided that as matter of law damages in excess of \$750,000 are not relevant. In so doing it has not violated the seventh amendment. To paraphrase *Etheridge*, once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law.

*Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); see *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005) (applying the Fourth Circuit's reasoning in *Boyd*); *Davis v. Omitowoju*, 877 F.2d 1155, 1159-62 (3rd Cir. 1989) (discussing and ultimately agreeing with the Fourth Circuit's conclusion in *Boyd*).

This Court *is not* confronted with a neutral choice between two valid paths of reason. Rather, Mississippi law supports the reasoned distinction drawn by the *Etheridge* Court between the jury's fact-finding duty and the legislature's authority to set the legal consequences of facts found. While the Mississippi Supreme Court has long respected the "province of the jury, and the jury alone, to measure in dollars and cents the amount due" a plaintiff for his suffering, *Mississippi Cent. R.R. Co. v. Hardy*, 41 So. 505, 510 (Miss. 1906), the Court has done so with the understanding that "trial by jury" meant in court under the forms of law, with a judge presiding to direct the proceedings in conformity with it." *Yazoo & Mississippi Valley R.R. Co. v. Wallace*, 43 So. 469, 470-71 (Miss. 1907). "And the common-law jury, guaranteed by



section 31, is a jury with power alone to try issues of fact, and not of law.” *Natchez & S. R.R. Co. v. Crawford*, 55 So. 596, 598 (Miss. 1911).

At least as early as 1841, Mississippi’s high court was placing the jury’s fact-finding role in its proper place relative to the law, observing that “[f]or whether the court pronounces the judgment of the law upon facts found by the jury in cases where a trial by jury is required, or upon facts ascertained in other modes when they are permitted, the judgment is still the award of the law[.]” *Lewis v. Garrett’s Adm’rs*, 6 Miss. 434, 1861 WL 1864 at \*15 (Miss. Err. & App. 1841) (on rearguing) (finding that summary process against sheriff and his sureties without a jury did not violate right to trial by jury). In *Yazoo & Mississippi Valley R.R. Co. v. Scott*, the Mississippi Supreme Court further emphasized the fact-finding role of the jury when the Court rejected the common-law notion of the “indivisibility of a verdict” and “entirety of a judgment.” 67 So. 491 (Miss. 1915). Specifically, the Court found that the common-law and the statutes at issue conferred on the courts the authority to order a new trial on a specific matter, i.e. damages, rather than ordering a new trial of the entire action. *Id.* at 497. In so ruling, the Court also noted that such a finding did not violate Section 31 because the courts’ authority to order a new trial on a specific issue and to order remittitur was encapsulated within the right to a trial by jury. *Id.* (citing and discussing *Yazoo & Mississippi Valley R.R. Co. v. Wallace*, 90 Miss. 609, 43 So. 469).

Further, and with respect to the argument regarding the separation of powers, the right to a jury trial is affected not only by the power of the judiciary but

also by the power of the legislature. In *Walters v. Blackledge*, the Mississippi Supreme Court found that the Workmen's Compensation Act, which replaced traditional tort actions with a statutory scheme of indemnity, did not violate Mississippi's Constitution, including the right to a jury trial. *Walters*, 71 So. 2d 433 (Miss. 1954). Although the decision is cumbersome, the Court clearly recognized the legislature's primacy over policy choices. The Court noted with approval decisions in other jurisdictions that held as follows:

We need not, therefore, elaborate the rule that the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies.

*Id.* at 441 (internal quotations and citations omitted).

On Section 31's protection of the right to trial by jury, the Court noted that the constitution "guarantees a trial only in those cases where a jury was necessary according to the principles of common law." *Id.* at 444 (citing *Lewis supra* at 9). The Court went on to reiterate that "[i]t is well settled that there is no vested right in any remedy for torts yet to happen, and except as to vested rights a state legislature has full power to change or to abolish existing common law remedies or methods of procedure." *Id.* at 446; see *Boyd*, 877 F.2d at 1196 ("If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well."). The Mississippi Legislature's authority to alter or abolish common-law remedies was

central to the Court's determination that the Workmen's Compensation Act was constitutional.

Forty years after *Walters*, the Mississippi Supreme Court decided *Wells* by *Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883 (Miss. 1994). In *Wells*, the plaintiff challenged the constitutionality of the Accident Contingency Act, which limited damages that could be awarded against offending school districts. *Wells*, 645 So. 2d at 888. Relying on the finding in *Walters* that the legislature had the authority to alter or abolish common-law remedies, the *Wells* Court concluded that "[b]y analogy, the mere fact that the Accident Contingent Fund limits the amount of damages recoverable does not render it constitutionally suspect."<sup>5</sup> *Id.* at 890, 892. Additionally, the Court noted that "a constitutional guarantee of a remedy does not mean that recovery must be absolute or that it may be unlimited." *Id.* at 891, 892. The Court's findings in *Wells* and *Walters* perfectly illustrates the authority of the legislature to dictate the legal consequences of a jury's assessment of damages.<sup>6</sup>

Plaintiffs further contend that Section 11-1-60(2)(b) violates the constitutional guarantee of due process. The due process clauses of the Federal and Mississippi Constitutions provide that no person shall be deprived of life, liberty, or property

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<sup>5</sup> Although the Court was specifically considering Section 24's "open courts" provision, MISS. CONST., art. III, § 24, the reasoning is equally applicable to the legislature's authority to limit damages in relation to the right to trial by jury.

<sup>6</sup> The State would also point out that doctrines such as contributory negligence and joint and several liability each affect the jury's alleged authority to dictate damages, yet each of these doctrines co-existed with the right to a jury trial at common-law.

without due process of law. U.S. Const. amend. XIV, Miss. Const., art. III, § 14.

Both procedural and substantive rights are protected by the due process clauses. *See Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158 (Miss. Ct. App. 2007) (discussing procedural and substantive due process).

Substantive due process prohibits infringement of “fundamental interests” unless the governmental action or statute is narrowly tailored to serve a compelling state purpose; whereas if the interest infringed upon is not fundamental, it requires only that the statute be reasonably related to a legitimate state purpose. *See Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 984 (Miss. 2004). Courts in other jurisdictions that have addressed substantive due process challenges to statutory limits on noneconomic damages have classified the interest as non-fundamental. *See Dewey v. Hardy*, 917 P.2d 305, 309 (Col. App. Div. III 1995); *City of Los Angeles v. Superior Court*, 176 Cal. App. 3d 856, 866 (Cal. App. 2nd Dist. 1986); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 434-36 (Ohio 2007). Moreover, a plaintiff “has no vested property right in a particular measure of damages,” the California Supreme Court has stated, recognizing “the Legislature possesses broad authority to modify the scope and nature of such damages.” *City of Los Angeles*, 176 Cal. App.3d at 866 (quoting *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) (citations omitted)). Similarly, this Court recognized with approval decisions in other jurisdictions that held as follows:

It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies.

*Walters v. Blackledge*, 71 So. 2d 433, 441 (Miss. 1954) (citations omitted).

In order to prevail on their due process challenge, Plaintiffs must show that the government's purported deprivation of her property interest was either arbitrary or not reasonably related to a legitimate government purpose. *Harris*, 873 So.2d at 985. As discussed *supra*, Plaintiffs have no "property interest" in a particular form of remedy or measure of damages. However, even if such a property interest exists, Plaintiffs cannot meet their burden of showing that §11-1-60 represents an arbitrary or unreasonable infringement of that interest. Section 11-1-60(2)(b) was passed by the Mississippi legislature in 2004. These measures addressed what national studies called Mississippi's legal climate. The statute's purpose was to provide relief to liability insurance in the state by ending allegedly excessive damage awards for noneconomic damages, which would help lower the cost of liability insurance. See generally Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C. L. Rev. 393 (2005). Thus the statutory cap on noneconomic damages is not arbitrary and is reasonably and rationally related to a legitimate government purpose as determined by the legislature.

Plaintiffs also contend that Section 11-1-60(2) violates the Fourteenth Amendment to the United States Constitution, which prohibits states from denying citizens equal protection under the law. Plaintiffs take the erroneous position that the one million dollar limitation on non-economic damages constitutes unequal treatment of by depriving some of the full measure of their non-economic damages.

They assert that the statute divides plaintiffs into two groups, allowing those whose injuries are valued below the cap to collect their full damages, while barring those with damages in excess of the cap from recovering a portion of their losses.

The Equal Protection Clause of the Fourteenth Amendment protects individuals against intentional and arbitrary discrimination by the State. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Strict scrutiny is applied when involving a “suspect classification,” i.e. race, ancestry, and alienage, or “categorization impinging upon a fundamental right,” i.e. privacy, marriage, voting, travel, and freedom of association. *Hoffman v. United States*, 767 F.2d 1431, 1434-35 (9th Cir. 1985) (citations omitted). “To withstand strict scrutiny a statute must be precisely tailored to serve a compelling state interest.” *Id.* (citation omitted).

However, where the plaintiff is not a member of a protected or suspect class, and there is no infringement of a fundamental right, “the government action is subjected ‘only to the most minimal scrutiny.’” *Suddith*, 977 So.2d at 1158 (citing *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 149 (5th Cir. 1991)). This lower level of scrutiny requires that the court “determine only whether the government action is a rational means of advancing a legitimate governmental purpose.” *Id.* (citing *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973)). A majority of courts have recognized that a statutory damages cap does not merit heightened equal protection scrutiny, and can and does serve a legitimate government purpose. *See, e.g., Gourley ex rel Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 73 (Neb. 2003); *Murphy v. Edmonds*, 601 A.2d 102, 111-12 (Md. 1992); *Ferdon ex rel.*

*Petrucelli v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 457 (Wis. 2005); *Reid v. Williams*, 964 P.2d 453, 460 (Alaska 1998).

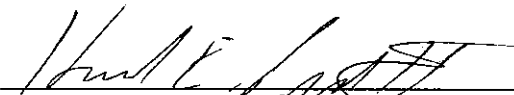
Section 11-1-60, at issue here, does not involve a recognized suspect class or fundamental right; therefore, it is subject to the rational basis standard. Plaintiffs have offered no reason or authority for this court to depart from the majority of courts that have found statutory damages caps only subject to rational basis review. As previously discussed, the statute advances a legitimate governmental purpose. In light of these reasonable expressions of a legitimate governmental purpose, Plaintiffs have not met and cannot meet their burden of establishing that Section 11-1-60 serves no "legitimate governmental purpose." The passing of tort reform legislation falls within the province of the Legislature to pass legislation it determines to be in accordance with the public policy of this State.

### CONCLUSION

Based on the preceding arguments, the State respectfully requests that this Court find that Plaintiffs have failed to satisfy their heavy burden of establishing that Section 11-1-60(2)(b) is unconstitutional.

Respectfully submitted, this the 12 day of March, 2011.

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## **CERTIFICATE OF SERVICE**

This is to certify that I, Harold E. Pizzetta, III, Special Assistant Attorney General for the State of Mississippi, have this date mailed via United States mail, postage fully prepaid, a true and correct copy of the foregoing *Brief of Amicus Curiae State of Mississippi* to the following:

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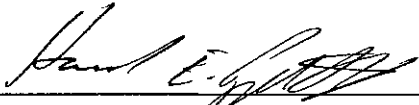
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This the 10<sup>th</sup> day of March, 2011.

  
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