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INTRODUCTION

The Cross-Appeal challenges the constitutionality of the statutory cap, enacted by amendment in 2004, on all cases. The cap on medical malpractice awards is not challenged. In 2002, the Legislature enacted Section 11-1-60, which capped non-economic damages in medical malpractice cases. This Statute was enacted in response to a medical malpractice insurance crisis. Two years later, the Legislature – apparently distrusting judges, juries, and the Court to determine and review non-economic damages awards based on the evidence – amended the Statute and limited non-economic damages in all cases to $1 million, with no exceptions. Said amendment, applying caps to all non-medical malpractice cases, is the subject of this Cross-Appeal.[1]

On August 3, 2006, sixteen year old Ethan Bryant was rendered quadriplegic by injuries sustained in an automobile crash caused by a gravel truck that was unsafe and overloaded in violation of numerous laws. The evidence at trial established that Ethan, as a result of his catastrophic injuries, will be permanently disabled for the rest of his life. The DeSoto County jury weighed the evidence and rendered their verdict, awarding non-economic damages based on the evidence, as has been the duty of juries since the genesis of our legal system.

The 2004 legislative cap on damages violates the Mississippi Constitution and the United States Constitution on several bases. The arbitrary cap violates separation of powers, usurping

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[1] The Mississippi statutory cap on non-economic damages – found in Mississippi Code Annotated Section 11-1-60, enacted in 2002 and revised in 2004 – first establishes a statutory cap on non-economic damages for medical malpractice actions, for the purpose of solving a medical malpractice insurance crisis that was perceived prior to enactment of the "tort reform" legislation at issue in this Cross-Appeal. The Statute, after the 2004 amendment, also caps non-economic damages for all other cases: "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." MISS. CODE ANN. § 11-1-60(2)(b). The Statute orders that "the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation." MISS. CODE ANN. § 11-1-60(2)(c).

the authority of this Court and the Judicial Branch. Under common law and at all times prior to enactment of the cap, it has been the province of the jury to find the facts and determine damages based on the evidence. Through the court's discretion and remititur, and appellate review, the Judiciary retains the power to oversee jury verdicts and to reduce any awards that are excessive or do not comport with the evidence. Stripping the authority of the jury to determine damages and requiring courts to automatically remit awards without the consent of the parties, the arbitrary cap violates the right to a trial by jury, which the Mississippi Constitution provides shall remain inviolate, as well as due process and the right to access an open court system.

The arbitrary cap violates the Equal Protection Clause of the United States Constitution, under any test of constitutional scrutiny, because said Statute: 1) discriminates against certain classes of individuals, while the uniform cap is not reasonably related to the governmental interest for the Statute, and 2) interferes with the fundamental rights to a trial by jury, open courts and due process. The limitation on non-economic damages also violates the Due Process Clauses of the Mississippi and U.S. Constitutions because said cap is an unconstitutional taking and bears no reasonable relation to a governmental interest or benefit.

APAC's Response provides no justification or authority to redeem the constitutional infringements inherent in the caps on non-medical cases. In amending the Statute in 2004, the Legislature failed to rely on any credible justification or interest. Supportable evidence of an alleged benefit or interest is also completely absent in the *amicus* briefs filed herein.

The statutory cap disproportionately affects young and permanently disabled Mississippians, like Ethan. Unlike numerous states that have exceptions to caps in special circumstances, the Mississippi cap fails to make any exception in extreme cases, such as

Ethan's.[2] The absence of exceptions for such rare circumstances illustrates the arbitrary nature of the Statute as amended. It is for this reason that our constitutional system places the authority to oversee jury trials with a Judicial Branch, where judges and appellate courts may review evidence and damage awards on a case-by-case basis. Absent a legitimate showing of a compelling governmental interest, which was not made for the 2004 amendment requiring application of the cap to non-medical malpractice cases, a legislatively-dictated mandatory application of a before the fact, "one-size-fits-all," cap to every case, as required by Section 11-1-60 as amended, is unconstitutional. The present case illustrates vividly why this is the case.

I. THE STATUTORY CAP VIOLATES SEPARATION OF POWERS

Capping non-economic damages in all cases by action of the Legislature, rather than by Constitutional Amendment, violates the separation of powers under the Mississippi Constitution, which separates governmental powers among the three co-equal branches of government.[3] It strikes the independence of the Judicial Branch, which is a fundamental bedrock of our system of

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[2] Many states have passed statutes making exceptions to caps in extreme cases. *See, e.g.,* ALASKA STAT. § 09.55.549 (creating exception to medical malpractice caps for reckless and intentional conduct); COLO. REV. STAT. § 13-21-102.5(3)(a) (increasing caps for clear and convincing evidence); IDAHO CODE § 6-1603 (prohibiting application of caps for willful or reckless conduct or felonious acts); MASS. ANN. LAWS. ch. 231, § 60H (eliminating caps if jury determines special circumstances warrant more relief); MICH. COMP. LAWS § 600.1483 (increasing limit in severe cases); OHIO REV. CODE. ANN. § 2315.18 (applying no limit in special circumstances); 23 OKLA. STAT. § 61.2 (applying no limit in special circumstances); S.C. CODE ANN. § 15-32-220 (applying no limit for medical malpractice caps in special circumstances); TENN. CODE. ANN. § 29-39-102 (applying no limit in special circumstances); W. VA. CODE § 55-7B-8 (raising limit of medical malpractice caps in special circumstances).

[3] "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, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another." Miss. Const. art. 1, § 2. One branch is not allowed to encroach on the powers of another, as the Constitution establishes that "**No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others**. Miss. Const. art. 1, § 2 (emphasis added).

government. An independent Judiciary is a constitutionally guaranteed right of the people of Mississippi, designed to insulate citizens from flames of public opinion. Such flames can be fanned *naturally* by the rapidly-shifting winds of current events, or *artificially* by well-funded special interests. It is for this reason that the independent authority of the Judicial Branch is not "entirely subject to *legislative grace*," as APAC argues in its Brief. APAC Response, at 38 (citations omitted). An independent Judicial Branch is a right granted by the Constitution of this State, which this Court should zealously guard for benefit of the citizens of today – and those of tomorrow against whom different winds will blow.

"[T]his Court has held that '[t]he rule is well settled that the judicial power cannot be taken away by legislative action. Nor may the Legislature regulate the judicial discretion or judgment that is vested in the courts. Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.'" *Jones v. City of Ridgeland*, 48 So.3d 530, 536 (Miss. 2010) (citing *City of Belmont v. Miss. State Tax Comm'n*, 860 So.2d 289, 297 (Miss. 2003) (citing 16A AM.JUR.2D CONSTITUTIONAL LAW § 286, at 209-10 (1998))) (emphasis added). This Court recently held the "three-court rule" in Section 11-51-81 unconstitutional because it infringes on the inherent powers of the Court to make procedural rules.[4] The Court noted that "'**[t]he rule is well settled that the judicial power cannot be taken away by legislative action. Nor may the Legislature regulate the judicial discretion or judgment that is vested in the courts**.'" *Jones*, 48 So.3d at 537 (quoting 16A AM.JUR.2D

[4] "The 'fundamental constitutional concept of separation of powers' gives this Court the 'inherent power ... to promulgate procedural rules.'" *Jones*, 48 So.3d at 536 (quoting *Newell v. State*, 308 So.2d 71, 76 (Miss. 1975) (citing *Matthews v. State*, 288 So.2d 714, 715 (Miss. 1974); *Gulf Coast Drilling & Exploration Co. v. Permenter*, 214 So.2d 601, 603 (Miss. 1968); *S. Pac. Lumber Co. v. Reynolds*, 206 So.2d 334, 335 (Miss.1968))).

CONSTITUTIONAL LAW § 286, at 209-10 (1998)) (emphasis added).[5]

APAC, in its Response, cites *Wells by Wells v. Panola County Bd. of Educ.*, 645 So.2d 883 (Miss. 1994), for its proposition that there are no vested rights in remedies for torts. *See* APAC's Response, at 37. APAC attempts to stretch the *Wells* holding to inapplicable circumstances. APAC is incorrect when it asserts that the constitutional challenge by Ethan Bryant "cannot be reconciled" with the Legislature's enactment of workers' compensation laws. APAC's Response, at 40. *Wells* applied to the new cause of action created by legislative enactment (the Accident Contingent Fund, which concerns claims against the government for which it has waived sovereign immunity). It did not allow the Legislature to limit damages recoverable in relation to all causes of action. The Court specifically noted "since the injured party had no right at common law to recover from the State for injury, due to sovereign immunity, damage limitation statutes deprive the party of no remedy or property right." *Wells*, 645 So.2d at 891.[6] Unlike *Wells*, the subject Statute deprives Ethan Bryant, and similarly situated young people, of property rights and remedies available at common law.

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[5] *See also Magyar v. State*, 18 So. 3d 807, 810 (Miss. 2009) ("A basic tenet of American government is judicial independence, and every state has a judicial branch of government separate from its legislative branch. We hold firm to the principle that Mississippi's legislative branch of government may not, through procedural legislation, control the function of the judiciary.").

[6] The other cases cited for these propositions by APAC involve statutes of limitation or repose. *See* APAC's Response, at 37-38 (citing *Smith v. Fluor Corp.*, 514 So.2d 1227, 1232-32 (Miss. 1987) (quoting *Anderson v. Fred Wagner & Roy Anderson Jr., Inc.*, 402 So.2d 320, 324 (Miss. 1981)); *Phipps v. Irby Const. Co.*, 636 So.2d 353, 356 (Miss. 1993) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (U.S. 1945)); *Presley v. Mississippi State Highway Com'n*, 608 So. 2d 1288, 1294 (Miss. 1992); *Veith v. Jubelirer*, 541 U.S. 267, 278 (2004)). Statutes of limitation do not infringe on the power of the jury to award damages, or the court to oversee said award, according to the evidence of the case. This Court has recognized the power of the Legislature to set pre-suit requirements, and statutes of limitation and repose are codifications of the common law defense of latches. Statutes of limitation in no way interfere with the court's power to oversee trials and review jury awards, and APAC's discussion of cases involving said statutes have no relevance or benefit to any analysis regarding the statutory caps.

As the Court indicated in *Wells*, the Legislature is not allowed to remove a right without providing some type of benefit or *quid pro quo*, such as was the case with the Workers Compensation Act. *Wells*, 645 So.2d at 894 (citing *Walters v. Blackledge*, 71 So. 2d 433, 443 (Miss. 1954)) (noting that Act provides remedy and compensation, deemed to be sufficient substitute for doubtful common law right). Unlike the Workers Compensation Act, the cap Statute here provides no benefit to Ethan or other catastrophically-injured Mississippi youths. It strips their rights to judicial oversight of a remedy available at common law, with no compensation or benefit for the loss of that right.

APAC's Response correctly notes the Legislature has the power to "make laws." APAC'S Response, at 33. The Legislature's power to make laws, however, does not protect statutes that infringe on the Judiciary's authority over trials. Section 11-1-60, as amended in 2004, in the present case infringes on the Judiciary's power and obligation to oversee trials and review damages.[7]

The Supreme Court of Illinois in two cases, *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997), and *Lebron v. Gottlieb Memorial Hosp.*, 930 N.E.2d 895 (Ill. 2010), held that

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[7] Separation of powers between the legislative branch and the judiciary, the branch charged with the power to oversee trials, stretches back to the beginning of our system of government. For example, this Court, in striking down a legislative provision granting new trials, has noted as follows:

> If a legislative body may grant a new trial, it may order a continuance, annul a judgment, suspend a trial, direct the judgment to be entered, and otherwise interfere with the discretion and independence of the judiciary. **The evils that would flow from such an assertion of legislative power are too apparent to be enumerated** and need not be here undertaken.

Lawson v. Jeffries, 47 Miss. 686, 704 (Miss. 1873) (emphasis added). Such a usurpation of judicial authority is precisely the result of the cap, which commands the courts to remit any awards over the limit, regardless of the evidence, with no judicial discretion in extreme cases. The Constitution provides "**no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose**." *Newell*, 308 So.2d at 77 (emphasis added).

limitations on non-economic damages violate constitutional separation of powers.[8] On February 4, 2010, the Illinois Supreme Court held that a statutory cap on non-economic damages "violates the separation of powers clause because it 'unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.'"*Lebron*, 930 N.E.2d at 908 (quoting *Best*, 689 N.E.2d at 1080).[9]

The damages cap usurps the discretion of the court to review awards.[10] The Statute orders the Judge to "appropriately reduce any award of noneconomic damages that exceeds the applicable limitation." MISS. CODE ANN. § 11-1-60(2)(c). There is no flexibility or discretion

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[8] As in Mississippi, the Illinois Constitution has a Separation of Powers Clause that prohibits one branch of government from exercising powers belonging to another branch. A separation of powers analysis focuses on "whether the legislature, through its adoption of the damages cap, is exercising powers properly belonging to the judiciary. In other words, does the statute unduly encroach on the judiciary's 'sphere of authority'. . . or 'impede the courts in the performance of their functions.'" *Lebron*, 930 N.E.2d at 908 (quoting *Allegis Realty Investors v. Novak*, 860 N.E.2d 246 (Ill. 2006); *Best*, 689 N.E.2d at 1093)).

[9] The purpose of the statute in Illinois – to solve a health care crisis – did not absolve the statute from infringing on the power of the judiciary:

> Here, too, we necessarily consider what the statute purports to do - limit noneconomic damages in medical malpractice actions - and the legislature's goal in enacting the statute - responding to a health-care crisis. Our separation of powers analysis, however, does not stop there. The crux of our analysis is whether the statute unduly infringes upon the inherent power of the judiciary. That such an infringement was unintended, based on the language and stated purpose of the statute, does not resolve the constitutional infirmity.

Lebron, 930 N.E.2d at 911-912.

[10] Section 11-1-55 of the Mississippi Code grants the courts the authority to order "remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." MISS. CODE ANN. § 11-1-55. It continues to be the province of the jury to weigh the evidence and determine damages. *See Lewis v. Hiatt*, 683 So. 2d 937, 940 (Miss. 1996); *Moore v. Kroger Co.*, 800 F. Supp. 429 (N.D. Miss. 1992). The remittitur gives the courts discretion, in very limited circumstances where a jury's verdict is unreasonable, to remit said award to a reasonable amount. *See Green v. Grant*, 641 So. 2d 1203, 1208 (Miss. 1994); *Rodgers v. Pascagoula Public School Dist.*, 611 So. 2d 942, 945 (Miss. 1992). The cap at issue here intrudes on the courts' discretion, substituting the Legislatures' uniform judgment for the court's case-by-case discretion.

retained by the Court. Where principles of justice would be violated by the imposition of an arbitrary cap in special situations, the Judiciary should retain the discretion to allow a jury to return a damages award that comports with the suffering of the victim and the evidence in that case.[11] APAC cites not one case where the Mississippi Judiciary failed to strike down excessive jury awards not supported by the evidence. Indeed, the Legislature failed to cite such a case in enacting this Statute. There is, likewise, no credible evidence presented by either the Legislature or APAC that the statutory caps have actually prevented unfounded jury awards.

The Statute as amended in 2004 constitutes a legislative usurpation of the powers of the Judicial Branch over a jury trial system established at common law and guaranteed by the Separation of Powers Provision of the Constitution.[12] Under the system entrusted to the Judicial

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[11] Mississippi law is also clear that statutory enactments violating Rules of Civil Procedure are unconstitutional in violation of constitutional separation of powers. *See In Wimley v. Reid*, 991 So. 2d 135, 137 (Miss. 2008) (quoting *Hall v. State*, 539 So.2d 1338, 1345 (Miss. 1975)) ("In addressing a clash between a statutory rule of evidence and the Mississippi Rules of Evidence, this Court stated, 'What is important to remember is that this Court's rule-making power is a function of our Constitution's command that the three governmental powers be separate.'"); s*ee also State of Mississippi v. Blenden*, 748 So.2d 77, 89 (Miss. 1999) ("The Court may invoke this inherent authority through the adjudication of cases, the promulgation of rules, or the development of internal management practices."); *see also Forest Hill Nursing Ctr. & Long Term Care Mgmt., LLC v. Brister*, 992 So. 2d 1179 (Miss. 2008) (holding that legislature has no authority to promulgate procedural statutes that dictate procedural matters to judiciary). Section 11-1-60 mandates abandonment of the procedures outlined in the Mississippi Rules of Civil Procedure and other discretionary functions of the courts under Mississippi law, and instead demands automatic remititur without regard to judicial procedures. The mandated cap also violates Rule 49(c) of the Mississippi Rules of Civil Procedure by requiring an arbitrary amendment to the verdict in all cases where the verdict exceeds the cap, with no exceptions or discretion for the court. Rule 49(c) provides that "[w]hen the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered." MISS. R. CIV. P. 49(c). Under § 11-1-60, however, the court may not enter the appropriate judgment when the general verdict and answers are harmonious, as instructed by Rule 49, but rather, the court "shall" enter the legislatively mandated, pre-determined cap. The Rules of Civil Procedure do not permit the Legislature to force courts to automatically enter remittiturs for an arbitrary amount, even where the verdict is consistent with the evidence, as statutory enactments that violate Rules of Civil Procedure, such as Section 11-1-60, are unconstitutional in violation of separation of powers. *See, e.g., Wimley*, 991 So. 2d at 137 (quoting *Hall*, 539 So.2d at 1345).

[12] In the Orwellian analysis at page 43 of its Brief, APAC argues that the Court asserting its constitutional power over jury trials and damages is a "Judicial Usurpation of Core Legislative Power."

Branch, a jury of citizens weighs damages based on the evidence, the trial court orders remittitur or new trial, if necessary, and the appellate courts review awards based on the evidence. The separation of powers "doctrine ensures that the coequal branches do not encroach on the power of the others." *Jones*, 48 So.3d at 536 (citation omitted). The Statute as amended by the Legislature in 2004, is an unconstitutional abrogation of the authority and responsibility of the Judicial Branch. It violates the three-branch system of government established by the Mississippi and United States Constitutions, which this Court is charged to protect for the citizens of today and of tomorrow.

II. THE CAP VIOLATES THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY

The Mississippi Constitution guarantees a right to trial by jury. Miss. Const. art. 3, § 31. This fundamental right is a foundation of our court system and our system of government stretching back to the genesis of this country.[13] Indeed, the Mississippi Constitution provides "**[t]he right of trial by jury shall remain inviolate**." Miss. Const. art. 3, § 31 (emphasis added).[14] The provision that the right "**shall remain**" inviolate has been held to mean that the

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APAC's Response, at 43.

[13] *See, e.g.*, The Federalist No. 83, at 456 (Scott ed. 1894) (Hamilton) (discussing constitutional framers: "if they agree in nothing else, concur at least in the value they set upon the trial by jury," said right regarded as "a valuable safeguard to liberty,"or "as the very palladium of free government").

[14] The states have the authority to grant additional constitutional rights that are not provided in the United States Constitution's minimum rights, which is apparent in the Mississippi Constitution. In addition, the Mississippi Constitution is to "be liberally construed in favor of the citizen." *State v. Bates*, 192 So. 832, 836 (Miss. 1940) (quoted with approval in *Moore v. State*, 242 So. 2d 414, 417 (Miss. 1970)). The U.S. Supreme Court specifically recognizes the authority of a state to construe its constitution more favorably to the individual than the federal judiciary construes identical or similar federal constitutional provisions. *Michigan v. Long*, 463 U.S. 1032 (1983); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). The Mississippi Supreme Court has, on occasion, embraced the right of the State to construe similar or identical constitutional provisions more favorably to the individual than

right is available for civil actions where the right to a trial by jury was available at common law.[15]

Mississippi law has long recognized non-economic damages as an element of damages in tort cases. The right to recover non-economic damages, awarded by a jury, existed at common law and at the time our Constitution was enacted. "The right of trial by jury, as it exists here, is derived from the common law ..... and must extend as far as it did at common law." *Isom v. Mississippi C. R. Co.*, 36 Miss. 300, 309 (Miss. Err. App. 1858) (citations omitted). It is this framework that our Constitution mandates to be "inviolate." Black's Law Dictionary defines "inviolate" as "(f)ree from violation; not broken, infringed, or impaired." BLACK'S LAW DICTIONARY (9th ed. 2009). The jury trial right at common law and at the time the Constitution was framed – where the jury determined damages according to the evidence – is what shall not be infringed, impaired, broken or violated. The recently-enacted cap limits the jury's fact finding role in a way that was unrecognized at common law and when the Constitution was framed.

Nowhere in the Constitution is the Legislature given any other authority over jury trials, particularly with regard to pre-determining damages.[16] Determining damages rests "'peculiarly within the province of the jury.'" *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935) (citations omitted). "The right to a jury trial includes the right to have a jury determine the amount of ... damages, if

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its federal constitutional equivalent. *See, e.g., Killingsworth v. State*, 490 So. 2d 849, 851 (Miss. 1986); *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123, 127 (Miss. 1976); *Graves v. State*, 708 So. 2d 858, 861 (Miss. 1997); *Wilson Banking Co. Liquidating Corp. v. Colvard*, 161 So. 123, 127-128 (1935). If the Legislature wants to abridge those rights, it can only be done by formally amending the Constitution.

[15] *See Wells*, 645 So. 2d at 897-899; *see also Isaac v. McMorris*, 461 So. 2d 714, 715 (Miss. 1984); *see also In re Extension of Boundaries of City of Meridian*, 115 So. 2d 323, 326 (Miss. 1959).

[16] The Legislature is, in fact, only granted one power with regard to the right to trial by jury, wherein the Mississippi Constitution provides that "the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury." Miss. Const. art. 3, § 31.

any, awarded." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998).

A court's authority to oversee verdicts for reasonableness or to grant a remittitur is completely distinguishable from the across-the-board cap. A remittitur is a reduction by the Court in extreme cases of unreasonable awards.[17] "[R]emittitur shall take effect only if accepted by all the parties." *Dedeaux v. Pellerin Laundry, Inc.*, 947 So.2d 900, 908 (Miss. 2007). Remittitur does not violate constitutional rights because it is only effective if the parties waive the right to a jury through consent. Without said consent, parties can obtain a new jury. Remittiturs are based on the evidence.[18] The cap mandates reduction regardless of the evidence.

Other courts have held similar cap statutes unconstitutional in violation of the right to a jury trial. The Georgia Supreme Court held a similar statute to violate the Georgia Constitution's right to trial by jury: "By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, (the statutory cap) clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010) (citing *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (Or. 1999) ("to the extent that the jury's award exceeds the statutory cap, the

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[17] *See, e.g., Lewis v. Hiatt*, 683 So.2d 937, 941 (Miss. 1996) (quoting *Harvey v. Wall*, 649 So.2d 184, 187 (Miss.1995)) ("It is primarily the province of the jury to determine the amount of damages to be awarded and the award will normally not 'be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.'"); *see also Kern v. Gulf Coast Nursing Home of Moss Point, Inc.*, 502 So.2d 1198, 1201 (Miss. 1987) (quoting *City of Jackson v. Locklar*, 431 So.2d 475, 481 (Miss. 1983)) (holding remittiturs appropriate only for verdicts "so out of line as to shock the conscience of the Court").

[18] The remittitur is a valid exercise of the court's discretion and authority, pursuant to the court's general powers to grant a new trial when a verdict is not supported by the evidence and pursuant to Section 11-1-55 of the Mississippi Code. **Remittiturs "'promote a suggested award which is fairly responsive to the evidence rather than one targeted to a minimum [or maximum] sustainable verdict.'"** *Dedeaux*, 947 So.2d at 908 (quoting *Odom v. Roberts*, 606 So.2d 114, 122 (Miss. 1992) (Banks, J., dissenting)) (emphasis added).

statute prevents the jury's award from having its full and intended effect")). The Georgia cap was held unconstitutional under a provision providing "[t]he right to trial by jury shall remain inviolate," identical to the provision found in Mississippi's Constitution. *Nestlehutt*, 691 S.E.2d at 221 (citing Ga. Const. of 1983, art. I, § I, ¶ XI(a)).[19] The fact that the Legislature chose to allow a plaintiff to recover up to an arbitrary amount of the Legislature's choosing, even if said amount could be considered substantial, does not redeem the Statute, as the Georgia court held:

> The fact that OCGA § 51-13-1 permits full recovery of noneconomic damages up to the significant amount of $350,000 cannot save the statute from constitutional attack. "[I]f the legislature may constitutionally cap recovery at [$350,000], there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1." *Smith*, supra, 507 So.2d at 1089. **The very existence of the caps, in any amount, is violative of the right to trial by jury**.

Nestlehutt, 691 S.E.2d at 223 (emphasis added).[20]

Recently, the West Virginia Supreme Court applied prior rulings in upholding medical malpractice caps and noted the "inviolate" distinction: "'[T]he Georgia Constitution states

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[19] The Georgia Supreme Court was "compelled to conclude that the caps infringe on a party's constitutional right . . . to a jury determination as to noneconomic damages," joining courts in numerous other states. *Nestlehutt*, 691 S.E.2d at 223 (citing *Lakin*, 987 P.2d at 475 (noneconomic damages caps violate right to trial by jury)); *see also Moore v. Mobile Infirmary Assn.*, 592 So.2d 156 (Ala. 1991) (same); *see also Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (same); *see also Mahones-Vinson v. United States*, 751 F. Supp. 913 (D. Kan. 1990) (same); *see also Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987) (holding that plaintiff does not receive constitutional benefit of jury trial where jury verdict arbitrarily capped).

[20] Allowing the jury to return a verdict for all damages similarly does not shield the Statute, as the Ohio Supreme Court noted:

> "The right to a trial by jury is a fundamental constitutional right which derives from the Magna Carta." **The right belongs to the litigant**, not the jury, and a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance.

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091 (Ohio 1999) (citations omitted) (emphasis added).

plainly that 'the right to trial by jury shall remain inviolate.'" . . . Our state constitutional provision regarding the right to trial by jury differs substantially . . . " *MacDonald v. City Hospital, Inc.*, No. 35543, 2011 WL 2517201, at * 14 (W.Va. June 22, 2011) (quoting *Nestlehutt*, 691 S.E.2d at 221 (quoting Ga. Const. of 1983, Art. 1, Sec. 1, Par. XI(a))). The Virginia Supreme Court reached a similar holding, where the Virginia Constitution provides that a trial by jury should be "preferable," with no provision that it should remain inviolate. *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 509 S.E.2d 307, 312 (Va. 1999) (quoting Va. Const., Art. I, Sec. 11)) (emphasis added). The statutes in both of those cases capped damages on medical malpractice awards, unlike this case, which does not challenge the state interest underlying medical malpractice caps, and only challenges the lack of a state interest or benefit in capping all other cases. Clearly distinguishable from the constitutional provisions of these states, Mississippi's Constitution requires the right shall remain inviolate.

The rigidity of the cap at issue here, and the usurpation of judicial discretion, creates a clear violation of the jury trial right guaranteed by the Constitution. In certain cases – as here – legitimate "non-economic" damages will greatly exceed the cap. The cap nullifies the jury's constitutional fact finding role and illustrates the Legislature's distrust of both juries and the Judicial System. The usurpation and assumption of the roles of the judge and jury, particularly where there is no flexibility for extreme cases, violates the inviolate constitutional right of Ethan Bryant to a jury trial.

III. THE CAP VIOLATES THE OPEN COURTS PROVISION

The cap violates the Open Courts Provision of the Mississippi Bill of Rights.[21] In *Lucas v. U.S.*, the Texas Supreme Court struck down a statute violating a similar provision, and held "that the liability limits . . . are unconstitutional as applied to catastrophically damaged malpractice victims seeking a 'remedy by due course of law.'" *Lucas v. U.S.*, 757 S.W.2d 687, 690 (Tex. 1988) (quoting Tex. Const. art. I, § 13).[22] The Florida Supreme Court, invalidating a cap statute, held arbitrary caps would empower the legislature to cap damages at $1 if it desired, a position furthered by proponents of the cap.[23] The cap here is similarly unconstitutional.

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[21] As provided in the Mississippi Constitution's Bill of Rights, art. 3, § 24, entitled "Open courts; remedy for injury," "[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 of law, and right and justice shall be administered without sale, denial, or delay." Miss. Const. art. 3, § 24. This is a second due process provision, guaranteeing an open court system for injured parties.

[22] The *Lucas* court took "note that there is no provision in the federal constitution corresponding to (the Texas) constitution's 'open courts' guarantee. Indeed, that guarantee is embodied in Magna Carta and has been a part of our constitutional law since our republic." *Lucas*, 757 S.W.2d at 690. The court recognized the "importance and uniqueness of state constitutional rights," wherein state constitutions can grant additional rights not provided in the United States Constitution. *Id.* at 692 (citing *LeCroy v. Hanlon*, 713 S.W.2d 335, 338-339 (Tex.1986)). Since the open courts provision "guarantees meaningful access to the courts whether or not liability rates are high," the Texas Supreme Court found "in the context of persons catastrophically injured by medical negligence, . . . **it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease**." *Id.* at 690 (quoting Tex. Const. art. I, § 13) (emphasis added). The *Lucas* court concluded "that the restriction is unreasonable and arbitrary and that (the caps) unconstitutionally limit (a plaintiff's) right of access to the courts for a 'remedy by due course of law.'" *Id.* at 690 (quoting Tex. Const. art. I, § 13). The Mississippi Supreme Court, in *Wells*, held the *Lucas* holding inapplicable to Accident Contingent Fund statutes, which provide a right to recovery from the State for school bus accidents, because a remedy was created by statute that did not exist at common law, whereas the medical malpractice caps in *Lucas* took away a remedy available under common law. *Wells*, 645 So.2d at 892 (citing *Lucas*, 757 S.W.2d at 690).

[23] The Florida Supreme Court addressed this issue as follows:

> A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, **if the legislature may constitutionally cap recovery at $450,000, there is**

IV. THE CAP VIOLATES CONSTITUTIONAL EQUAL PROTECTION

The cap violates the Equal Protection Clause of the United States Constitution, by: (1) discriminating against certain classes of individuals – young, permanently disabled Mississippians – while not being reasonably related to the governmental interest behind said Statute, and (2) interfering with the fundamental rights to a trial by jury, open courts and due process guaranteed to these citizens as well as to those of us who are healthy.[24] APAC's Response is void of any legal equal protection analysis, asserting merely that the equal protection argument has been previously rejected.[25] There is no benefit provided by the cap to the class of severely injured, permanently-disabled individuals such as Ethan Bryan at whose expense the 2004 Legislative Amendment purportedly promotes "the Preservation of Jobs and Stability of

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> **no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1**. None of these caps, under the reasoning of appellees, would "totally" abolish the right of access to the courts. At least one of the appellees candidly argues that there is no constitutional bar to completely abolishing noneconomic damages by requiring potential injured victims to buy insurance protecting themselves against economic loss due to injury as an alternative remedy. That particular issue is not before us but we note that if it were permissible to restrict the constitutional right by legislative action, without meeting the conditions set forth in Kluger, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, as Mr. Smith puts it, "majoritarian whim." **There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system**.

Smith, 507 So.2d at 1088-1089 (holding statutory limit on non-economic damages violated constitutional open courts provision) (emphasis added).

[24] The Equal Protection Clause prohibits the state from treating similarly situated persons differently without proper justification, and it specifically provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[25] Even there, APAC cites only one inapplicable case, *Walters v. Blackledge*, which concerned a challenge to the Workers Compensation Act. *Walters* found the Workers Compensation Act constitutional because it provided the *quid pro quo* of benefits to injured employees. *Walters*, 71 So.2d at 441 (finding benefit to be sufficient substitute for doubtful right).

Continued Economic Opportunity" in Mississippi. *See* Amicus Brief of Governor Haley Barbour, at 8, *et seq*. The Statute here violates the Equal Protection Clause under rational, intermediate and strict scrutiny.

A. There Is No Legitimate State Interest or Benefit for the 2004 Amendment

The stated intent by the Legislature for the cap reads merely: "It is the intent of this section to limit all noneconomic damages to the above." MISS.CODE ANN. § 11-1-60. The stated interest of the Legislature in originally enacting this Statute in 2002 was a medical malpractice insurance crisis.[26] The Legislature failed to cite any credible interest or benefit for its action in 2004, expanding application of caps to all cases. That action, in practice, affects only the small class of individual Mississippians who suffer catastrophic injures so great as to support an award of non-economic damages exceeding $1 million.

A state benefit or interest discussion is completely missing from APAC's Response. APAC merely cites to "Commentators" opining that damages have allegedly "expanded out of all proportion." APAC's Response, at 42 (emphasis added). The *after-the-fact* efforts at justification for the amendment argued by *amici*, contending that Mississippi's pre-"tort reform" system caused the loss of manufacturing or other jobs, are unsupported by any independent, empirical data. The self-serving "authorities" cited by the *amici* are either self-authored, or anecdotal, at best.[27]

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[26] *See* E. Farish Percy, *Checking Up on the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Reforms the Cure?*, 73 Miss. L.J. 1001, 1001-1003, 1034-37 (2004).

[27] The *Amicus* Brief filed on behalf of the Governor's office, for instance, cites as "authorities" four annual "Judicial Hellhole" releases authored and distributed between 2002 and 2005 by the American Tort Reform Association, and three press releases from the Governor's office. Other "authorities" cited are from "Mississippians for Economic Progress" and the American Medical Association. Filled with political buzzwords, but devoid of independent data, the *Amicus* Briefs use citations of medical malpractice cases and premiums – not at issue here – and merely re-hash canned

APAC and its *amici* argue that the interests promoted by the caps in the amended Statute are "the preservation of jobs," "stability of continued economic opportunity," and "the overall economic health of Mississippi." *See, e.g.,* Governor's Amicus Brief, at 5 and 8. The 2004 mandatory Legislative cap, however, improperly seeks to promote these interests at the expense of a constitutionally-protected class of catastrophically, permanently injured young Mississippians, such as Ethan Bryant, for whom this Court is the only protector.

B. The Statute Discriminates Against Young & Disabled Individuals

To survive constitutional review, a statute that disfavors certain classes must be, at least, rationally related to the governmental interest sought to be furthered through the statute's enactment. Multiple states have stricken down statutory caps as violative of equal protection.[28] The Wisconsin Supreme Court, in *Ferdon v. Wisconsin Patient Compensation Fund*, struck down a statutory cap even where the rational relationship test, not strict scrutiny, is applied.

"Strict scrutiny applies if a statute challenged on equal protection grounds 'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" *Ferdon*, 701 N.W.2d at 456 (citing *State v. Annala*, 484 N.W.2d 138 (Wis. 1992) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976))). "Several state courts have applied an intermediate level of scrutiny to caps in medical

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public relations arguments that the "Pre-Tort Reform Climate Hampered Economic Progress and Created a Litigation Crisis."

[28] The Supreme Courts of North Dakota and Alabama have held statutory caps to be unconstitutional in violation of the Equal Protection Clause. *See Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978); *see also Moore*, 592 So.2d at 166-67. On November 17, 2010, the Court of Appeal of Louisiana, Third Circuit, struck down non-economic damages caps in medical malpractice actions because said caps violate equal protection by allowing less-severely injured individuals to fully recover, while limiting recovery to severely injured individuals. *Oliver v. Magnolia Clinic*, 51 So.3d 874, 881-882 (La.App. 3 Cir. 2010).

malpractice cases. Under intermediate scrutiny, the classification 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 456 (citations omitted).[29] The court in *Ferdon* chose not to apply strict or intermediate scrutiny, but even under the rational relationship test, "any distinctions must be relevant to the purpose motivating the classification. Similarly situated individuals should be treated similarly. In essence, the rational basis standard asks 'whether there are any real differences to distinguish the favored class ... from other classes ... who are ignored by the statute....'" *Id.* at 459 (citations omitted). Similar to Mississippi's cap, the "main classification" at issue in *Ferdon* "is the distinction between . . . victims who suffer over (the statutory limit) in noneconomic damages, and . . . victims who suffer less than (the statutory limit) in noneconomic damages. That is, the cap divides the universe of injured . . . victims into a class of severely injured victims and less severely injured victims." *Id.* at 462.[30]

The mandatory cap enacted by the Mississippi Legislature discriminates against the

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[29] Other states have applied intermediate scrutiny in holding similar statutory caps to be unconstitutional. In *Brannigan v. Usitalo*, the New Hampshire Supreme Court applied intermediate scrutiny, requiring a "fair and substantial relation" test, and held the statute unconstitutional on equal protection grounds. In response to the erroneous argument that statutory caps are somehow shielded from the Equal Protection Clause if they are in high enough amounts to include most injured victims, the New Hampshire Supreme Court noted that "we fail to understand how a cap of (a higher amount) could meet the test, simply because even fewer individuals would be affected by the higher cap. Finally, we note that **society, through the courts, has developed a remedy to secure itself from the ills of a 'run-away' jury that has imposed a disproportionally high award. That remedy is remittitur**, to be exercised in the sound discretion of the trial court." *Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (N.H. 1991) (emphasis added).

[30] "Severely injured victims with more than (the statutory limit) in noneconomic damages receive only part of their damages; less severely injured victims with (the statutory limit) or less in noneconomic damages receive their full damages. In other words, the statutory cap creates a **class of fully compensated victims and partially compensated victims**. Thus, the cap's **greatest impact falls on the most severely injured victims**," such as Ethan Bryant in the present case. *Id.* (emphasis added). As in Mississippi, "[t]he greater the injury, the smaller the fraction of noneconomic damages the victim will receive." *Id.* at 465

young Mississippians who are rendered permanently disabled. An infant, or a sixteen (16) year old like Ethan, is limited to the same $1 million recovery as a person ninety (90) years old. The cap allows full compensation to individuals whose injuries are economic in nature. For individuals who suffered primarily non-economic damages, however, the cap automatically cuts off damages. Ironically, the cap allows full recovery for those who suffer little or no physical injuries for a short period of time, whereas those enduring severe trauma and great suffering – sometimes over a lifetime – are forced to recover only the amount the Legislature sees fit.[31] The cap discriminates against a small minority of individuals who are most in need, and who have suffered the most painful, often lifelong disabilities.

Disabled persons, a protected class, are discriminated against by the cap. The statutory cap mandates that persons left disabled by tortious conduct of others can never recover more than $1 million in non-economic damages, regardless of the fact that disabled persons will have to suffer with disability every day for the rest of their lives. This statutory mandate impacts

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[31] Equal protection concerns regarding the Mississippi caps were discussed in a Dissenting Opinion by Justice Diaz (Joined by Justice Graves) in *Estate of Klaus ex rel. Klaus v. Vicksburg Healthcare, LLC*, as follows:

> I not only have equal protection concerns about the application of the noneconomic damages cap on medical malpractice actions to wrongful death cases, but I also have equal protection concerns about the cap itself. Several courts have held that such a cap violates their state's equal protection clause. The Alabama Supreme Court held that placing a cap on noneconomic damages in medical malpractice cases "creates a favored class of tort-feasors, based solely upon their connection with health care [.]" *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 166-67 (Ala.1991); *see also Carson v. Maurer*, 120 N.H. 925, 940-41, 424 A.2d 825, 835-36 (1980), *overruled on other grounds by Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 917 A.2d 707, 721 (2007). Because this issue was not raised on appeal, I will not address it.

Estate of Klaus ex rel. Klaus v. Vicksburg Healthcare, LLC, 972 So.2d 555, 564 n. 10 (Miss. 2007) (Diaz, P.J., diseenting).

disabled persons in a disproportionate fashion.[32]

The subject Statute, as addressed herein, fails under any level of equal protection scrutiny. The Court need not reach, in this case, the issue of constitutionality of the cap as to medical malpractice cases. As to the 2004 extension of the cap to non-medical malpractice cases, such as Ethan Bryant's, there is no rational relation to a government interest.

C. The Statute Interferes with Fundamental Rights

Laws that interfere with fundamental rights must satisfy strict scrutiny.[33] The cap interferes with fundamental rights to a jury trial and access to the courts, both of which are granted by the Mississippi Constitution.[34] As discussed *infra*, the Statute also interferes with due process of law, a fundamental right granted by the Mississippi and U.S. Constitutions. The cap is an arbitrary exercise of power, completely revoking the court's discretion with no exceptions. The cap also deprived Ethan of property rights without any due process of law, stripping him of the right to recover his losses and damages that exceed the arbitrary amount. The cap imposes an

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[32] The Americans With Disabilities Act ("ADA"), Title II, requires that state governments provide equal access to state services and programs, including the courts. Any state law discriminating against the disabled in accessing the court system, such as the subject law, is not only prohibited by the ADA, but would also have to satisfy strict scrutiny. Catastrophically injured, disabled people such as Ethan Bryant receive justice outside of the courthouse – in the form of ramps and public accommodations – but the 2004 statutory cap mandates that the Court discriminate against them in the halls of justice when they seek recompense.

[33] *See, e.g., Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1011 (Miss. 2004); *Associated Press v. Bost*, 656 So.2d 113, 117 (Miss. 1995); *Doe v. Doe*, 644 So.2d 1199, 1210 (Miss. 1994); *Miss. H.S. Activities Ass'n, Inc. v. Coleman By and on Behalf of Laymon*, 631 So.2d 768, 774 (Miss. 1994).

[34] The right to a trial by jury is a fundamental right, granted by our Constitution to remain "inviolate." *See, e.g., B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483 (Miss. 2005) (discussing intent to waive "fundamental right to a jury trial"); *see also Williams v. Travenol Laboratories, Inc.*, 344 F.Supp. 163, 165 (D.C.Miss. 1972) (citation omitted) (holding "the fundamental right of a jury trial cannot be impaired by a blending of legal and equitable claims"); *see* Miss. Const. art. 3, § 31 ("The right of trial by jury shall remain inviolate").

extra burden on young and disabled people, like Ethan, who are forced to live with their disabilities for an entire lifetime.[35] The cap fails under any standard, since it is not rationally related to a state interest.[36]

V. THE STATUTORY CAP VIOLATES DUE PROCESS

Section 11-1-60 deprived Ethan of property and fundamental rights without due process.[37] The State may not deprive an individual "of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power." *Albritton v. City of Winona*, 181 Miss. 75, 96, 178 So. 799, 804 (1938) (emphasis added).[38]

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[35] "The cap discriminates against the most severely injured plaintiffs because they are the plaintiffs who will not fully recover their noneconomic damages. Plaintiffs who sustain minimal noneconomic damages will be fully compensated. In addition, plaintiffs who sustain noneconomic damages exceeding the cap and relatively minimal economic damages will recover a lower percentage of their total compensatory damages than plaintiffs who sustain substantial economic damages but relatively low noneconomic damages. Thus, the cap discriminates not only against the most severely injured, but also, to some extent, against plaintiffs who are low wage earners." Percy, *supra* note 26, at n. 127.

[36] As set out herein, the Statute is unconstitutional under the strict scrutiny test because it discriminates against classes of individuals, namely those severely injured and disabled like Ethan Bryant. The cap would also fail under moderate scrutiny because the claimed interest of medical malpractice and/or tort reform simply can not absolve the stripping by the Statute of the right to a jury trial and all provable damages, i.e., the Statute does not have a fair and substantial relationship to the legislative interest. And has been observed by other courts, as set out above, the Statute fails even under the rational relationship test, as the interest in solving the medical insurance crisis has no rational relationship to the removal of the right to prove damages at a jury trial.

[37] Courts in other states have held statutory caps to violate due process. *See Sheward*, 715 N.E. 2d at 1092 (holding caps to violate due process); *see also Knowles ex rel. Knowles v. United States*, 544 N.W.2d 183 (SD 1996) (holding statutory cap violates due process, "[t]his legislation does not bear a real and substantial relation to the objects sought to be attained and it violates many rights in the process. The fact that certain fringe benefits may result to the public in general is insufficient to save this statute."); *see also Arneson*, 270 N.W.2d at 135-136 (violations of due process and equal protection).

[38] The Mississippi Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." Miss. Const. art. 3, § 14. Under the Fourteenth Amendment to

The statutory cap at issue violates due process because: (1) said cap is an arbitrary exercise of government power, (2) the cap bears no *reasonable relation* to a governmental purpose, and (3) the cap deprives Ethan Bryant of property rights without any compensation or due process of law. All damages above the statutory ceiling are arbitrarily placed on the victim of wrongdoing, not the tortfeasor. The Statute takes a property right of individuals to recover damages in a lawsuit – as well as a fundamental right to a trial by jury – in an arbitrary, before-the-fact manner without any due process of law.[39]

Unlike legislative enactments in numerous other states, the cap imposed by the Mississippi Legislature makes no exception for special circumstances.[40] The cap requires no consent of, and gives no options to, the parties, which is how remittitur satisfies due process. The Statute, unlike workers' compensation, fails to provide any compensation or *quid pro quo*. Instead, the pre-determined, mandatory cap strips Ethan and similarly situated, catastrophically-injured Mississippians of their right to recover actual damages awarded by the jury according to

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the U.S. Constitution, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The Due Process Clause in Section 14 of the Mississippi Constitution is construed the same as the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Secretary of State v. Wiesenberg*, 633 So. 2d 983, 996 (Miss. 1994); *Mississippi Power Co. v. Goudy*, 459 So. 2d 257, 261-262 (Miss. 1984); *N.C.A.A. v. Gillard*, 352 So. 2d 1072, 1081 (Miss. 1977); *Walters*, 71 So. 2d at 444. **The Mississippi Due Process Clause, however, can grant greater protections than those afforded by the federal Constitution.** *Michigan v. Long*, 463 U.S. 1032, 1037, 1040 (1983); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

[39] Procedurally, the State may not deprive a person of property without reasonable notice and an opportunity for a hearing. *See Mississippi Gaming Comm'n v. Freeman*, 747 So. 2d 231, 246 (Miss. 1999); *Herrington v. Herrington*, 660 So. 2d 215, 220 (Miss. 1994); *Booth v. Mississippi Employment Sec. Comm'n*, 588 So. 2d 422, 428 (Miss. 1991); *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985).

[40] **Multiple states have enacted statutes that completely invalidate caps and apply no limit in special circumstances**. *See* MASS. ANN. LAWS. ch. 231, § 60H; OHIO REV. CODE. ANN. § 2315.18; 23 OKLA. STAT. § 61.2; S.C. CODE ANN. § 15-32-220; TENN. CODE. ANN. § 29-39-102. **Other states raise the limit in special circumstances**. *See* COLO. REV. STAT. § 13-21-102.5(3)(a); MICH. COMP. LAWS § 600.1483; W. VA. CODE § 55-7B-8.

the evidence, with no compensation or due process.

As it stands now, under the 2004 Amendment, all persons are not equal before the law. The arbitrary limits, frozen in time and amount absent Legislative amendment, preclude plaintiffs from proving and recovering damages at trial, for a purported state interest of decreasing jury awards paid by wrongdoers and their insurance companies to promote state "economic development." Such limitation on constitutionally mandated access to the court system violates due process. The statutory limitations bear no reasonable relation to any illustrated state interest.[41] In the case of Ethan Bryant and other non-medical malpractice cases, the cap should be stricken as unconstitutional.

CONCLUSION

For the foregoing reasons, the statutory cap on non-economic damages – in non-medical malpractice cases – should be declared unconstitutional. Judgment should be entered in favor of the Plaintiffs in the full of amount of the economic and non-economic damages determined by the DeSoto County jury in their verdict, plus interest and costs as provided by law.

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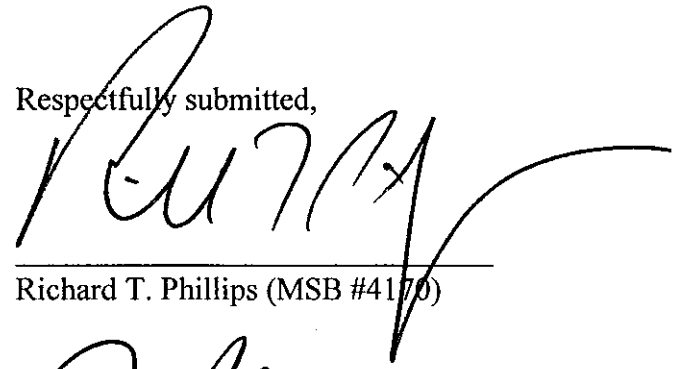
[41] Several courts have pointed out that there is little, if any, evidence that the caps on damages actually decrease malpractice insurance rates. *See Ferdon*, 701 N.W.2d at 465-468; *Sheward*, 715 N.E. 2d at 1092; *Lucas v. U.S.*, 757 S.W.2d at 691. There is no credible evidence establishing any supportable benefit to Mississippi or its citizens resulting from the caps in non-medical cases.

Dated: July 5, 2011.

Respectfully submitted,



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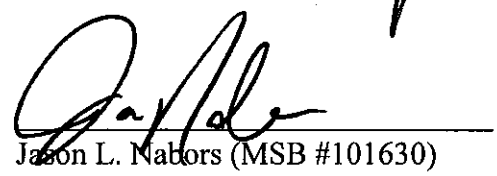

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