COA 24-454 28TH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

ALLISON SWEENEY MOHEBALI, Plaintiff-Appellant, v. JOHN DAVID HAYES, MD and HARVEST MOON WOMEN'S HEALTH, PLLC, Defendant-Appellees.	)	From Buncombe County

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COURT-ASSIGNED AMICUS CURIAE'S BRIEF

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INTRODUCTION

The care that Plaintiff received from Defendant Hayes was, as it turned out, indefensible. Neither Hayes nor his practice offered a defense that the care provided to Plaintiff was within the standard of care. Plaintiff pled a medical malpractice claim and, following liability being certain, reduced the scope of recovery on that claim to just noneconomic damages. Plaintiff's case, therefore, takes aim at the constitutionality of this state's thirteen-year-old law limiting the noneconomic portion of damages in a judgment for medical malpractice. Plaintiff's case falls short of its mark, however, and this Court should affirm the trial court's judgment.

Plaintiff makes a facial challenge to N.C. Gen. Stat. § 90-21.19, despite statements to the contrary, and she cannot show that the statute is unconstitutional in all circumstances. But even as an as-applied challenge, Plaintiff's arguments are not based on clear and unequivocal case law that Article I, Section 25's right to a jury trial expresses a recognized property right to damages completely beyond legislative reach. Juries have always determined factual disputes. North Carolina's noneconomic damages cap addresses judgments—the application of the law to the case—after the jury has completed its role. The Legislature can define the law on remedies without infringing on the rights of the jury to decide facts, and that appropriate constitutional division between a jury and a legislature is the balance that the plain text of N.C. Gen. Stat. § 90-21.19 strikes. Most courts in other jurisdictions that have reviewed the constitutionality of noneconomic damages caps against their own state's rights to a trial by jury have upheld the laws primarily on this distinction. North Carolina should too.

STATEMENT OF THE CASE

Amicus has no basis to disagree with Plaintiff's statement of the case. Nonetheless, it is worth highlighting that to make her case here, Plaintiff relied on several acts of the General Assembly that remove issues from jury determination: an entry of default, pursuant to North Carolina Civil Procedure Rule 55(a), as well as Defendant's failure to respond to discovery pursuant to Rule 36. These were the basis for creating a lack of fact on Defendant's liability for negligence and that negligence was the proximate cause of Plaintiff's injuries. (*See* R pp 148-49, 152-55, 158-59, 164-

67). Plaintiff moved for summary judgment on liability and causation—further removing those traditional factual inquiries from the jury as a matter of law. (*Id.* at 179-88). N.C. Gen. Stat. § 1A-1, Rule 56(c). And economic compensatory damages based on medical expenses, diagnosed mental health disorders, and ongoing physical care, which were deemed admitted through these same mechanisms, (*see, e.g.*, R pp 334-336), were presented to the jury. (*See* R p 343) ("The sole issue to be decided by the jury is the dollar amount *damages* the Plaintiff is entitled to recover.") (emphasis added). Yet, Plaintiff sought the recovery of only noneconomic damages from the jury.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Amicus does not take any issue with Plaintiff's basis for appellate review and jurisdiction.

STATEMENT OF THE FACTS

Posture of the Case at Trial

Plaintiff made correct use of three statutory rules of civil procedure to lock up liability and proximate cause before the jury received the case. First, following proper service, two days after Defendant Hayes's response was due, on 20 August 2021, Plaintiff filed for entry of default pursuant to Rule 5 of the North Carolina Rules of Civil Procedure. Entry of Default was entered that same day. Plaintiff took the same timely path for the defendant-practice. Second, because Plaintiff served ninety plus Requests for Admission with the Complaint, (R p 148), these Requests were all deemed admitted when Defendants did not respond to them consistent with N.C. Gen. Stat. § 1A-1, Rule 36. Third, based on the admissions consistent with Rules 5 and 36,

as well as an expert affidavit, Defendants moved for and achieved an unopposed summary judgment order regarding liability and proximate cause. (R p 343).

Plaintiff's counsel's argument at trial, in closing, was that "the amount of medical bills pales in comparison to the magnitude of the human body and mind damages in this case. That's why it's not about medical bills. That's why we haven't even tried to make it about that or talk about that in any way." (T vol 2, p 282) (herein (T 2, p #). Instead, Plaintiff's case was about noneconomic damages for her loss against "the person who's not even here and who has chosen not even to come into this court and see you all or see this Court: Dr. Hayes." (*Id.* at 284).

The jury was instructed that Defendants were liable and that Defendants' conduct "proximately caused plaintiff to experience permanent injury or damages." (T 2 p 318).

Plaintiff and the Court amended the pattern jury instructions for actual damages in a medical malpractice case from referencing both economic and noneconomic damages to just referencing noneconomic damages in this case. *Compare* N.C.P.I. § 809.100 *with* (T 2 p 319). The jury was instructed consistent with N.C.P.I. § 809.115 regarding noneconomic damages associated with permanent injury, as well as other forms of noneconomic damages. (T 2 pp 320-22). Based on not instructing on actual damages, the jury was only to pull together "one lump sum on the line of [its] verdict sheet under Issue No. 1 that reads "Noneconomic Damages." (*Id.* at 322).

The jury was not instructed, consistent with N.C. Gen. Stat. § 90-21.19(b), about permanent injury and gross negligence as found in N.C.P.I. § 809-160. That instruction asks the jury whether there is (a) permanent injury, which here there was as Plaintiff put on unchallenged testimony of permanent injury to her uterus, (T 2 p 268); (R p 318, 340), and (b) whether there was gross negligence. If both factors are proven, then pursuant to N.C. Gen. Stat. § 90-21.19(b), there is no cap on noneconomic damages.

Facts about Defendant Hayes suggest a pattern (not just a single incident) of falling below the standard of care. Before Defendants began caring for Plaintiff, Defendant Hayes was sanctioned by the North Carolina Medical Board via a September 2015 Consent Order that, among other things, put severe guardrails on Defendant Hayes's ability to practice obstetrics. (R pp 39-43). The Board required him to "refer all high-risk pregnancy patients to a maternal fetal medicine specialist for a consultation." (R p 39). The Board did not leave the definition of high risk to challenge, instead specifically defining it to include "gestational age . . . greater than 42 weeks[.]" (R p 40). Beyond that clear rule, designed for patient safety, Defendant Hayes could only provide care to mothers requesting a home birth delivery, like Plaintiff, if he had them *sign* an informed consent statement that included a statement of risks. (*Id.*)

Defendant Hayes violated the Board's restrictions of practice with Plaintiff. (*See* R pp 310-313). But even before that, the Medical Board took additional actions against Defendant Hayes for other documented violations of the 2015 Order. (R p

46). Documented in the Medical Board's 19 July 2019 Order that puts Defendant Hayes into retirement are two cases that appear to track like Plaintiff's troubling pregnancy, but end with timely, emergency cesarean deliveries chosen by the patients against the counseled advice of Defendant Hayes. (R pp 48-50). On 14 June 2019 Defendant Hayes signed the order acknowledging he would cease the practice of medicine as of 1 September 2019. (R pp 54-57). He further acknowledged that he would "provide the signed informed consent forms for any current patients prior to the execution of this order." (*Id.* at 54). This consent requirement was a specific, objective requirement of the Medical Board and a condition of Defendant Hayes's limited license. Yet, despite then seeing Plaintiff for clinical care, Defendant Hayes never discussed the Consent Order, its circumstances, or Plaintiff's need to sign a consent form *at all*. (*See* R pp 310-313).

Plaintiff's Argument at Trial

Plaintiff objected to the application of Section 90-21.19(a) prior to the entry of the judgment here arguing she was raising an as applied challenge. (T Judgment p 5). Plaintiff argued that her "right to bring a negligence claim for compensatory damages arising from improper medical care is a claim" that was established at common law, and therefore an "arbitrary limit" on the amount of damages is unconstitutional. (*Id.*) In an effort to qualify her argument as an as applied constitutional challenge, Plaintiff argues that she is only challenging the "statutes application to claims that existed at common law" and her challenge does not encompass later statutorily-contrived claims like wrongful death. (*Id.*) Plaintiff also

argued that the statute was unconstitutional considering the specific facts of this case. (T Judgment p 6). The only constitutional provision allegedly argued against the statute is the right to a jury trial under Article I, Section 25 of the North Carolina Constitution. (T Judgment p 7). Plaintiff also references Article 4, Section 13 and Rule of Civil Procedure 38(a) as supporting Article I, Section 25's right to a jury trial. (T Judgment p 8).

The trial court overruled Plaintiff's objection and applied the amount required by law for noneconomic damages in a judgment for medical malpractice.

ARGUMENT

While this Court reviews a constitutional challenge *de novo*, the review is not conducted in a vacuum. Our appellate courts have established the standard of review on any decision of constitutionality that "every presumption is to be indulged in favor of the validity of an Act of the General Assembly." *City of Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416 (1958). And "the courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution." *Fox v. Bd. of Comm'rs of Durham Cnty.*, 244 N.C. 497, 500–01, 94 S.E.2d 482, 485 (1956) (quotations omitted). Justice Mitchell described the deferential manner of constitutional review of a law as one whereby the Court works under "every reasonable presumption that the legislature as the lawmaking agent of the people has not violated the people's Constitution[.]" *State ex rel. Martin v.*

Preston, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

The presumption of constitutionality of an act of the General Assembly is more than just a standard of review; it is rooted in a recognition of the actual power embraced by the right and ability to make law. *State v. Revis*, 193 N.C. 192, 195, 136 S.E. 346, 348 (1927) ("It is only when the General Assembly undertakes to exceed the grant of legislative authority, made to it in the organic law, that the courts are directed to restrain its action."). "Our Constitution, as has been so frequently pointed out, is a constitution of limitations, where powers not surrendered expressly or by necessary implication are reserved to the people, to be exercised through their representatives in the General Assembly." *Wells v. Hous. Auth. of City of Wilmington*, 213 N.C. 744, 749, 197 S.E. 693, 696 (1938); *Preston*, 325 N.C. at 448, 385 S.E.2d at 478 (1989) ("[I]t is firmly established that our State Constitution is not a grant of power.").

The presumption of valid enactment means that a court looks to the Constitution not to determine what the General Assembly *can* do but only what it *cannot* do.

> The Constitution of North Carolina is not a grant of power; rather, the power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*.

Pope v. Easley, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (emphasis in original) (citation omitted). In other words, the limitations on the General Assembly's

authority are only those expressly stated in the Constitution. *Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 415 (2023); *Crump v. Snead*, 134 N.C. App. 353, 355, 517 S.E.2d 384, 386 (1999).

The presumption that the laws enacted by the General Assembly are constitutional is fortified by the standard of review courts apply in finding an act unconstitutional: beyond a reasonable doubt. *Morris v. Holshouser*, 220 N.C. 293, 295, 17 S.E.2d 115, 117 (1941); *Turner v. City of Reidsville*, 224 N.C. 42, 46, 29 S.E.2d 211, 214 (1944) ("The presumption is that an Act of the Legislature does not violate a constitutional prohibition. The contrary must appear beyond a reasonable doubt."). Protection of the presumption of constitutionality and the requirement of proof beyond a reasonable doubt necessitate a *clear* violation, apparent on its face. *Harper* 384 N.C. at 325, 886 S.E.2d at 415 (courts "only declares an act of the General Assembly void when it directly conflicts with an express provision of the constitution."). Plaintiff lacks that clarity here.

I. PLAINTIFF'S PRIMARY ARGUMENT CARRIES HER CHALLENGE FAR BEYOND HER OWN CIRCUMSTANCES AND CONSTITUTES A FACIAL CONSTITUTIONAL CHALLENGE TO THE NONECONOMIC DAMAGES CAP.

Plaintiff's case based on Article I, Section 25: that for any controversy "respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." Plaintiff argues that her challenge that Section 90-21.19(a) violates Article I, Section 25 is not a facial challenge to the statute, but rather two methods of an as-applied challenge. That is a close call. While Plaintiff argues that the specific facts of her case (i.e. the

application of the statute to her circumstance) is unconstitutional as her second argument, (Plaintiff's Brief pp 37-38), most of her argument is directed toward the unconstitutionality of noneconomic damages in medical negligence actions, generally. That has the potential to be a facial challenge.[1] However, whether a facial challenge or an as-applied challenge, the challenge falls short of being successful here.

Plaintiff references that she is raising two particular "as-applied" constitutional claims: one "[a]s applied to Plaintiff," (Pl Br p 19), and "[s]econd and alternatively, the cap is unconstitutional as applied to the compelling and exceptional facts of this case," (*Id.* at 20). Only the latter is particularly geared toward defendants' circumstances, as opposed to the first argument, which is geared toward countless other physicians who may be sued for medical malpractice. (*See, e.g.*, Pl Br p 27) ("pre-1868 common law recognized the cause of action of medical malpractice," therefore the cause of action is subject to trial by jury). Plaintiff argues plainly that the Constitution protects the common law right to a jury trial for "compensatory damages in medical malpractice actions": damages for these claims are "protected from statutory infringement within the 'inviolable' constitutional right to trial by jury under Article I, § 25." (*Id.* at 32).

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[1] Although a facial challenge, Plaintiff's argument does not appear to implicate the subject matter jurisdiction of the trial court, *see Cryan v. Nat'l Council of Young Men's Christian Associations of United States*, 280 N.C. App. 309, 314, 867 S.E.2d 354, 358 (2021), because the challenge was not indicated until after the jury's verdict in this case and therefore outside the complaint and the guardrails of a three-judge superior court panel set up by N.C. Gen. Stat. §§ 1-267.1 and 1A-1, Rule 42, *see Holdstock v. Duke Univ. Health Sys., Inc.*, 270 N.C. App. 267, 277, 841 S.E.2d 307, 314 (2020).

"There is no clear-cut test to distinguish facial challenges from as-applied challenges." *Kelly v. State*, 286 N.C. App. 23, 31–32, 878 S.E.2d 841, 848 (2022). "As such, a court is not restricted per se by a party's categorization of its challenge as facial or as-applied and may conduct its own review to determine whether the party's challenge is facial or as-applied." *Id.* "When determining whether a challenge is as-applied or facial, the court must look to the breadth of the remedy requested." *Id.* at 32, 878 S.E.2d at 849. "A claim is properly classified as a facial challenge if the relief that would accompany it 'reach[es] beyond the particular circumstances of these plaintiffs.'" *Id.* at 32, 878 S.E.2d at 849. (quoting *Doe v. Reed*, 561 U.S. 186, 194, 130 S. Ct. 2811, 2817, 177 L. Ed. 2d 493, 501 (2010). A claim is properly classified as an as-applied challenge if the remedy "is limited to a plaintiff's particular case." *Kelly*, 286 N.C. App. at 32, 878 S.E.2d at 849 (citation omitted).

Application of that test here reveals that Plaintiff's second argument, about *her* facts, *her* circumstances, *her* procedural posture is certainly in the nature of an as-applied challenge, but the bulk of her argument probes well beyond her own circumstances and embraces any claims for "medical negligence." Plaintiff argues that she is seeking to strike down the type of claims the constitution protects but not strike down, as unconstitutional, those claims the constitution does not protect. (Pl Br p 20) ("[T]he statutory cap on noneconomic damages is unconstitutional as applied to causes of action protected under the constitutional right to trial by jury. As applicable here, this includes claims for compensatory damages in medical negligence actions historically recognized under common law."). When the challenge is much

more about the fullest extent of the constitution and less about the circumstances of the plaintiff, the challenge is an attempt to take the statute down beyond the particulars of this case. Because the relief Plaintiff seeks would invalidate the statute beyond just her circumstances, Plaintiff is raising a facial challenge.

"A facial challenge to the constitutionality of an act is the most difficult challenge to mount successfully." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (cleaned up). Because "it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them" facial challenges are rarely successful. *Id.* The courts require a plaintiff "to meet the high bar of showing 'that there are no circumstances under which the statute might be constitutional.'" *Id.* (quoting *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009).

Plaintiff cannot meet that high bar here attacking medical negligence claims. Although focused on section 90-21.19(a), that portion of the statute is a part of an article of the General Statutes (Article 1B) on medical malpractice actions. A medical malpractice action is defined as a "civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider."[2] N.C. Gen. Stat. § 90-21.11(2)(a). Because the statute touches any civil action for damages that arises from a health care provider, the statute embraces more than just

[2] There is no question that Defendant Hayes was a health care provider here, as defined in N.C. Gen. Stat. § 90-21.11(1).

negligence claims. It encompasses various layers of liability from negligence to those acts of injury "committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice." *Id.* at § 90-21.19(b)(2).

Plaintiff argues that injurious acts of a health care provider for wrongful death are an example of an act Plaintiff is not seeking to strike down as unconstitutional, but this has more to do with the interpretation of the Constitution than Plaintiff's circumstances. "The right to trial by jury under article I has long been interpreted by [the Supreme Court] to be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted." *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989). "Conversely, where the prerogative did not exist by statute or at common law upon the adoption of the Constitution of 1868, the right to trial by jury is not constitutionally protected today." *Id.* at 508, 385 S.E.2d at 490. Because "there is no right of action for wrongful death under the common law," *Cole v. Duke Power Co.*, 81 N.C. App. 213, 217, 344 S.E.2d 130, 132 (citing *Willis v. Power Co.*, 42 N.C. App. 582, 257 S.E. 2d 471 (1979)), "[t]he right to recover damages for wrongful death is purely statutory and exists only by virtue of the wrongful death statute. *Cole*, 81 N.C. App. at 217, 344 S.E.2d at 132. Accordingly, a right to a jury trial in a wrongful death case is simply not a constitutional right.

But gross negligence, on the other hand, was a claim in existence at common law, and according to Plaintiff's logic, would be subject to being protected by the constitutional right to a jury trial. *See, e.g. Bashford v. N.C. Licensing Bd. for Gen. Contractors*, 107 N.C. App. 462, 466, 420 S.E.2d 466, 469 (1992) (recognizing the

common law definition of gross negligence); *Cole v. Duke Power Co.*, 81 N.C. App. 213, 218, 344 S.E.2d 130, 133 (1986) (noting gross negligence is not defined by a statute); *FDIC v. Rippy*, 799 F.3d 301, 315 (4th Cir. 2015) (to the extent that the enactment of N.C.G.S. § 1D—5(7) signaled the abrogation of the common law definition of gross negligence, it did so only in the context of cases where a plaintiff seeks punitive damages.). Common law gross negligence is still a viable claim and one that may have even been present on this record. *See, e.g., Bashford*, 107 N.C. App. at 467, 420 S.E.2d at 469 ("The term implies a thoughtless disregard of consequences without exerting any effort to avoid it."); *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) ("Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages.").

The first words of N.C. Gen. Stat. § 90-21.19(a) are "except as otherwise provided in subsection (b) of this section." which incorporates the conditions in subsection (b) as part and parcel with subsection (a). Subsection (b) has no cap on a judgment for noneconomic damages where gross negligence is present and there is "disfigurement, loss of use of part of the body, permanent injury or death." *Id.* Thus, a medical negligence claim resulting in permanent injury based on gross negligence of a health care provider is a circumstance that would not infringe on the constitutional right of jury trial because in that scenario there is no applicable cap to the judgment amount of noneconomic damages. Accordingly, a facial challenge to N.C. Gen. Stat. § 90-21.19(a) should fail because Plaintiff cannot prove

unconstitutionality in all circumstances. *See State v. Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 554 (2019) ("A party making a facial challenge must establish that a law is unconstitutional in all of its applications," but "the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case.") (cleaned up).

II. SECTION 90-21.19 IS NOT UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT BECAUSE IT ADDRESSES THE COURT'S JUDGMENT ON THE JURY'S FINDING AND DOES NOT INFRINGE ON THE JURY'S RESOLUTION OF FACTS.

Article I, § 25 of our Constitution states that "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

> Our Supreme Court has held that the right to a jury trial under Art. I, § 25 of the North Carolina Constitution applies only: (1) where the right to a jury trial existed at common law or by statute at the time of the adoption of the 1868 Constitution; and (2) when the cause of action 'respects property.' For a cause of action originating after 1868, the right to a jury trial is contingent upon statutory authority.

Rhyne v. K-Mart Corp., 149 N.C. App. 672, 677–78, 562 S.E.2d 82, 88 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004). There does not appear to be disagreement on the issue that medical malpractice—suing a physician for injuring you—was a common law claim that indeed was tried by juries. Further, that compensatory damages were adjudicated by fact finders at common law and could and did include awards for pain and suffering and other noneconomic suffering seems inherently true. Plaintiff's argument on unconstitutionality really centers on the alleged scope of the right to

compensatory damages imbedded in the Constitution and whether it is true, as Plaintiff argues, that the scope of that right is to receive a jury's damage verdict as a judgment, unabridged by any statutory regulation. North Carolina has not yet held as such and the majority of states to examine the issue do not support this sweeping conclusion.

A. There is a constitutional difference in judgments and verdicts and N.C. Gen. Stat. § 90-21.19 respects that distinction.

Consistent with the right to a jury trial in Article I, Section 25, our Constitution states that in all civil actions, "there shall be a right to have issues of fact tried before a jury." Article IV, Section 13(1). These provisions "must be read in conjunction with one another[:] Article IV, section 13 merely establishes the form and procedure for the trial of all civil actions, including the p*rocedure of having issues of fact decided by a jury* in what were formerly equity proceedings. *Kiser v. Kiser*, 325 N.C. 502, 510, 385 S.E.2d 487, 491 (1989).

"It [is] the role of the jury to weigh the evidence, determine the credibility of the witnesses, the probative force to be given to their testimony and determine what the evidence proved or did not prove." *Daniels v. Hetrick*, 164 N.C. App. 197, 204, 595 S.E.2d 700, 704–05 (2004). Juries, even at common law, decide facts—particularly facts about damages. *See Dimick v. Schiedt*, 293 U.S. 474, 480, 55 S. Ct. 296, 298, 79 L. Ed. 603 (1935). Indeed, the existence of a genuine, material factual dispute is condition precedent to the constitutional right of a jury trial at all. *N. Carolina Nat. Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979) (Article I, Section 25 "is not absolute; rather, it is premised upon a preliminary determination by the trial

judge that there indeed exist genuine issues of fact and credibility which require submission to the jury.").

A jury verdict, however, is not a judgment. *See Gibson v. Cent. Mfrs. Mut. Ins. Co.*, 232 N.C. 712, 716, 62 S.E.2d 320, 322 (1950). "The rendering of a judgment, is a judicial act to be done by the Court only." *Eborn v. Ellis*, 225 N.C. 386, 389, 35 S.E.2d 238, 240 (1945). "In its ordinary acceptation, a judgment is the conclusion of the law upon facts admitted or in some way established, and, without this essential fact, the court is not in a position to make final decision on the rights of the parties." *Sedbury v. S. Express Co.*, 164 N.C. 363, 79 S.E. 286, 286 (1913). *Hardy v. Crawford*, 62 N.C. App. 689, 693, 303 S.E.2d 388, 390 (1983) ("The law in North Carolina is that a judgment is a conclusion of law based upon facts that have been admitted or established.").

Subpart (a) of section 90-21.19 actually addresses *judgments* not verdicts, as Plaintiff argues. (See Pl Br p. 33). The "judgment [ ] entered against all defendants" for noneconomic damages shall not exceed a certain amount. N.C. Gen. Stat. § 90-21.19(a). The statute addresses judgments and verdicts differently by noting that if "any verdict or award of noneconomic damages . . . exceeds these limits, the court shall modify the judgment as necessary to conform to the requirements of this subsection." *Id.* In subpart (b) the Legislature again draws the distinction between verdict and judgment by noting that "there shall be no limit on the amount of noneconomic damages for which judgment may be entered against a defendant if the trier of fact finds" two elements to be true. *Id.* at § 90-21.19(b). There are also

references as to instructing the jury on findings of injuries and gross negligence, as well as how any limitation or exception should not be discussed as such with the jury. *See* N.C. Gen. Stat. § 90-21.19(d) ("If a jury is determining the facts, the court shall not instruct the jury with respect to the limit of noneconomic damages under subsection (a) of this section, and neither the attorney for any party nor a witness shall inform the jury or potential members of the jury panel of that limit."); *see also* § 90-21.19(b) ("In any malpractice action, any verdict or award of damages, if supported by the evidence, shall indicate specifically what amount, if any, is awarded for noneconomic damages. If applicable, the court shall instruct the jury on the definition of noneconomic damages under G.S. 90-21.19(b)."). It is highly unlikely that our Legislature, in developing section 90-21.19 was not aware of a "health care provider's patient's" constitutional right to a jury trial on issues of fact, but it is quite likely that in drawing upon the distinction between verdicts and judgments, the General Assembly was respecting the right to a jury trial—not infringing on it.

B. Most courts that have analyzed whether the constitutional right to a trial by jury prohibits a legislative cap on noneconomic damages have found that it does not.

"Once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied. *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 96, 376 S.E.2d 525, 529 (1989). "Thereafter, it is the duty of the court to apply the law to the facts." *Id.* Therein lies the critical constitutional distinction between a verdict and judgment.

That there is a right to have a jury determine damages in a medical malpractice case does not mean that an injured plaintiff is entitled to recover a judgment of liability against the offender in the amount determined by the jury. Legislatures have, within their plenary power, passed statutes of limitation, statutes of repose, and rules of procedure, each of which could arguably infringe upon an absolute right to a jury determination of damages. *See, e.g., Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 442, 302 S.E.2d 868, 881 (1983) (determining North Carolina's statute of repose is not unconstitutional and noting that "[o]ur jurisprudence has recognized the validity of legislative regulation of causes of action, including replacement and even abolition, that one person may have against another for personal injuries."). A Rule 59 or 60 motion—acts of a legislature—can impact a jury verdict and there appears to be no constitutional challenge to these types of regulation.

> The Legislature may terminate an entire valid and provable claim through a statute of limitation. It may validly cause the loss of the right to trial by jury through failure to comply with the requirement to assert the right by procedural rule. It is the policy of this Act that recoveries be limited to $500,000, and to this extent the right to have the jury assess the damages is available.

Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 401, 404 N.E.2d 585, 602 (1980), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007). Nothing about Section 90-21.19(a) stops the jury from making a full determination about damages. Indeed, Plaintiff could have, but chose not to, have the jury instructed on the exemptions in N.C. Gen. Stat. § 90-21.19(b). But there is nothing about the right

to a jury trial that would foreclose the Legislature from addressing the remedy and judgment—the legal impact of the jury's determination as trier of fact.

> Based on this analysis, we conclude that the right to trial by jury is satisfied when evidence is presented to a jury, which then deliberates and returns a verdict based on its factual findings. The legal consequence of that verdict is a matter of law, which the Legislature has the authority to shape.

Siebert v. Okun, 485 P.3d 1265, 1277 (N.M. 2021). "The great weight of persuasive authority on the question whether statutory damages caps violate the constitutional jury right supports our conclusion in this case." *Id.* at 1277. The Supreme Court of New Mexico noted that "[o]f the thirty jurisdictions to consider whether a statutory cap on damages violates the constitutional right to trial by jury, twenty-four have upheld such caps, reasoning that a statutory limit on recovery is a matter of law within the purview of the state legislature. *Id.* at 1278 n.3 (citing cases); *Murphy v. Edmonds*, 325 Md. 342, 373, 601 A.2d 102, 117 (1992) ("The majority of courts which have considered the issue agree that legislative caps upon recoverable tort damages do not violate the constitutional right to a jury trial.")

In Maryland, a cap on pain and suffering in medical negligence cases has been upheld on a challenge that the legislation violates the plaintiff's right to have a jury determine damages. *See Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989). The Court's analysis of the divided roles of fact-finder within a case and a legislature as to public policy is instructive.

> In this Court's judgment, a legislature adopting a prospective rule of law that limits all claims for pain and suffering in all cases is not acting as a fact finder in a legal

> controversy. It is acting permissibly within its legislative powers that entitle it to create and repeal causes of action. The right of jury trials in cases at law is not impacted. Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function . . . .
>
> There can be little doubt that were a legislative body to review a dispute between two parties and resolve the compensation to be awarded, the activity would be a judicial one reserved to courts and juries. On the other hand, when a legislative body, without regard to facts of a particular case, dispute or incident, but rather as a matter of policy and rule determines for all citizens in all incidents that may occur thereafter that recovery will be limited, the function is legislative, completely analogous to the adoption or repeal of causes of action and remedies therefor. Juries function as parts of the dispute resolution apparatus between parties; a legislature functions to make rules in advance of disputes to be applied to the disputes. The Court here can discern no blurring of the lines separating these functions in this case where Maryland adopted a prospective law limiting awards for pain and suffering.

Id. at 1331; *see also Murphy*, 325 Md. At 373, 601 A.2d at 117 ("If the General Assembly had provided in § 11–108 of the Courts and Judicial Proceedings Article that the trial judge, rather than the jury, should determine the amount of noneconomic damages or the amount of noneconomic damages in excess of $350,000, a substantial issue concerning the validity of the statute would be presented. The General Assembly, however, did not attempt to transfer what is traditionally a jury function to the trial judge.").

In Nebraska, the result is the same. There, "the Legislature was concerned about a perceived insurance crisis that could affect the ability of the state to recruit

and retain physicians and increase the costs of medical care." *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 949, 663 N.W.2d 43, 72 (2003). "Reducing health care costs and encouraging the provision of medical services are legitimate goals which can reasonably be thought to be furthered by lowering the amount of medical malpractice judgments." *Id.* That legislative priority of capping noneconomic damages was not held to violation Nebraska's constitutional right to a jury trial, which as North Carolina's, was designed to "preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted." *Id.* at 953, 663 N.W.2d at 75. But like the majority of other states to take this up, the Supreme Court of Nebraska decidedly similarly:

> The primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. The court, however, applies the law to the facts. Section 44–2825 provides the remedy in a medical malpractice action. The remedy is a question of law, not fact, and is not a matter to be decided by the jury.

Id. at 953–54, 663 N.W.2d at 75; *see also Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002) ("The decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury."); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525, 529 (1989) ("Once the jury has ascertained the facts and assessed the damages . . . the constitutional mandate is satisfied, [and] it is the duty of the court to apply the law to the facts.").

Generally speaking, the majority of courts that have examined the role of the jury—and a litigant's right to have facts determined by it—have not used that constitutional right to upend legislation impacting caps on noneconomic damages.

C. Plaintiff's citations to North Carolina law discussing a right to a jury trial do not support explicitly excluding legislative modification to damage awards.

Plaintiff relies on two cases to make her argument and, unfortunately for her, pushes each too far trying to create an inviolable property right to personal injury damages. (*See* Pl Br p 30). The first is *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811, 812 (1904).

In *Osborn*, the plaintiff brought a libel action against the News & Observer ("N&O") and one of its employees. The employee, Leach, defaulted. Yet, the trial court entertained a directed verdict motion and compromised the default by "instruct[ing] the jury, on account of the judgment by default and inquiry, to return a verdict of one penny as to Leach, and thereupon rendered a judgment against him for one penny damages and one penny costs." *Id.* at 629; 47 S.E. at 812. The trial court also dismissed the case against the N&O because the plaintiff could not, in part, prove special damages. Our Supreme Court reversed, holding that the libel statute in question did not limit damages to special damages and the trial court erred in restricting the scope of damages at law in such a way. *Id.* at 639–640, 47 S.E. 811 at 815 ("It was therefore error in the Court below to sustain the third ground of the motion, which construed the statute as restricting the recovery to special damages.").

The Court does discuss a party's right to damages for their injury as a "species of property."

> The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are *actual* damages, and these are *property*. The right to recover damages for an injury is a species of property and vests in the injured party immediately on the commission of the wrong.

Id. at 633, 47 S.E. at 813. The concern for the Supreme Court and the error of the trial court was that the trial court (not following North Carolina's law) truncated the plaintiff's entitlement to damages to just special damages, entering a penny and dismissing a case where those special damages were not proven, and failed to recognize other damages despite evidence of those other damages. Here, the trial court did not instruct the jury to disregard a portion of damages; and the jury as the trier of fact found for damages in Plaintiff's favor. Plaintiff elected on her own to pursue *only* noneconomic damages.

What Plaintiff appears to try and establish through *Osborne*'s discussion of two other states' statutes that unconstitutionally restricted damages in a libel case to only special damages is that the injured have a property right in damages, and that right cannot be infringed at all by way of statute. (*See* Pl Br pp 31-32).

But the *Osborne* court, even in lauding that damages could be property rights did not hold that those rights were subject to no legislative regulation. In *Osborne*, the trial court—not the Legislature—eliminated categories of damages that the plaintiff may have been able to recover. The Court remarked, *in dicta*, that had the libel statute in question actually extinguished certain types of damages then that

statute—which then would have looked like the statutes in other states—would have been unconstitutional (under the Open Courts provision). Thus, *Osborne*, while at least noting that as of 1904 pain and suffering and reputational harm are part and parcel of compensatory damages and that damages are a "species of property," does not establish that simply establishing that historical marker creates a bar to *any* regulation.

In Plaintiff's second case, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004), the plaintiff challenged the constitutionality of legislative regulation of punitive damages through the enactment of Article 1D. As to Article I, Section 25, the Court rejected that the phrase "respecting property" was surplusage and that the sole question for a right to a jury trial was whether juries at common law resolved similar disputes. *Id.* at 173–75, 594 S.E.2d at 10–12.

But "[t]he word 'property' is not such a technical one that if properly used it has everywhere the same precise and definite meaning. *Id.* at 175, 594 S.E.2d at 12. "Its meaning varies according to the subject treated and according to the context." *Id.* (cleaned up). And the scope of property rights has certainly changed since 1868. For instance, it is relatively straightforward today that an at-will, government employee "does not have a constitutionally protected right to continued employment and does not have the benefit of the protections of procedural due process." *Horne v. Cumberland Cnty. Hosp. Sys.*, 228 N.C. App. 142, 142, 746 S.E.2d 13, 15 (2013); *see also Pressman v. Univ. of N.C.*, 78 N.C. App. 296, 302, 337 S.E.2d 644, 648 (1985). But that is in sharp contrast to what was considered well-established in 1899: "that

an [public] office is *property* and the incumbent has the same right in it as he has to any other property except that he cannot sell or assign it." *State's Prison of N.C. v. Day*, 124 N.C. 362, 366, 32 S.E. 748, 749, (1899) (emphasis added).

And again, drawing a distinction between punitive damages and compensatory damages, the *Rhyne* court noted that whatever property interest existed in damages for injury, it was not a property right to punitive damages, which are not designed to compensate injury.[3] 358 N.C. at 176, 594 S.E.2d at 12. The Court then discussed the Osborne case, but noted there that its prior discussion of legislative action with respect to compensatory damages was dicta. *Id.* at 176–77, 594 S.E.2d at 13 ("The Court noted, in dicta, that had the act restricted the recovery of actual or compensatory damages, it would have been unconstitutional.").

Thus, Plaintiff's answer to the question of whether a monetary cap on an aspect of compensatory damages would be constitutional legislation is not a conclusion based on a holding in *Osborne* and *Rhyne*, (Pl Br p 34); rather, it is *dicta* in *Osborne* and citation to *dicta* in *Rhyne*. Neither case holding goes so far as Plaintiff would prefer, and "are not only dicta but double dicta." *Hayes v. City of Wilmington*, 243 N.C. 525, 539, 91 S.E.2d 673, 684 (1956). In fact, for the point that "[n]o statute can modify a

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[3] When our Supreme Court in *Rhyne* was weighing the constitutionality of punitive damage caps it noted that in the absence of North Carolina cases on point, that it was "persuaded by cases from other jurisdictions holding that if the legislative branch can abolish plaintiffs' right to recover punitive damages altogether, a right which has not vested and is not guaranteed by the state Constitution, it can surely place limitations on the recovery of punitive damages." 358 N.C. at 170–71, 594 S.E.2d at 9. The Court cited to Nebraska and Maryland decisions on point. Both Nebraska and Maryland, as pointed out above, have rejected right-to-jury-trial challenges to noneconomic damages caps.

constitutionally protected right," (Pl Br p 33), a bold statement, Plaintiff cites only our state's first case of judicial review: *Bayard v. Singleton*, 1 N.C. (Mart) 5 (1787). While certainly a fundamental case, it does not foreclose legislative regulation of rights—even constitutional ones.[4] Plaintiff's case citations do not explicitly establish that section 90-21.19 infringes on the right to a jury trial beyond a reasonable doubt. That is in large part due to the legislative design of the statute respecting the right to have a jury settle factual issues surrounding damages.

D. Plaintiff's citation to a minority of jurisdictions upholding challenges to damages caps are distinguishable and unpersuasive authority.

Plaintiff points to a handful of cases from other jurisdictions where caps on noneconomic damages have been struck down in hopes of persuading this Court to adopt similar reasoning and a similar outcome. (Pl Br pp 35–36). However, the greater weight of authority is against striking down a statute like North Carolina's, and each of Plaintiff's cases may be readily distinguished from the matter at hand.

For instance, whereas some courts have struck down malpractice damages caps for including caps on disfigurement, *see, e.g., Atlanta Oculplastic Surgery, P.C. v. Nestelhutt*, 691 S.E.2d 218 (Ga. 2010); *Moore v. Mobile Infirmary Association*, 592

[4] That is particularly true when the scope of the right to jury trial deals with common law. "When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State." *News & Observer Pub. Co. v. State*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984); *see also McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956). The issue is to what scope the right is imbedded in the Constitution, which is part of the common law not subject to modification or repeal by the Legislature. *State v. Mitchell*, 202 N.C. 439, 444, 163 S.E. 581, 583 (1932); *Gwathmey v. State ex rel. Dep't of Env't, Health, & Nat. Res.*, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995) (same).

S.E.2d 156 (Ala. 1991); or permanent injury, *see, e.g. Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W. 3d 633, 636 (Mo. 2012), North Carolina's section 90-21.19 permits recovery for these types of injuries.

In *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999), the court based its conclusion that the cap statute violated the right to a jury trial on the premise that "Article I, section 17 [of the Oregon Constitution] guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted . . ." *Id.* at 475. What Plaintiff overlooks is that the legal premise relied upon by the *Lakin* court was expressly overruled in an ensuing case decided in 2016. *See Horton v. Oregon Health and Science University*, 376 P.3d 998, 1044 (Or. 2016) ("Given those circumstances, we conclude that *Lakin* should be overruled . . . [H]istory does not demonstrate that Article I, section 17, imposes a substantive limit on the legislature's authority to define the elements of a claim or the extent of damages available for a claim.").[5]

Plaintiff's reliance on *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) misses the mark as well. In *Olson*, the statute in question was one that regulating the insurance industry, and the court held that it was a violation of the right to a jury trial "insofar as it provides that if the insurer under the basic policy of insurance pays its policy limit of $100,000 and the claimant is dissatisfied, he must sue, naming the fund as defendant, *and have his case tried without a jury*." 270 N.W.2d at 137 (emphasis

[5] The Oregon Supreme Court later struck down the noneconomic damages cap on other constitutional grounds in the Oregon Constitution, but not the right to a jury trial. *See Busch v. McInnis Waste Sys., Inc.*, 468 P.3d 419 (Or. 2020).

added). The statute at hand nowhere sets out a scenario in which malpractice claims would require a case tried without a jury.

In sum, this Court can find good reason to eschew the reasoning and conclusions of the courts presented by plaintiff and, instead rely on the same analysis as of the majority of states to affirm the sound policy decision made by the General Assembly when it passed N.C. Gen. Stat. § 90-21.19.

III. PLAINTIFF'S CHALLENGE TO SECTION 90-21.19 BASED ON HER PERSONAL CIRCUMSTANCES AND THE CIRCUMSTANCES OF HER CASE IS NOT DEVELOPED ENOUGH TO FIND THE STATUTE UNCONSTITUTIONAL.

As an alternative argument Plaintiff challenges the application of the statute to the facts of her specific case. There is no doubt that the facts of this case are troubling and tragic. But in the two pages that Plaintiff devotes to this argument there is no law cited that would support a determination that this Court could reverse the trial court's judgment based on Plaintiff's situation. Plaintiff had the opportunity, within the statute to argue that Defendant Hayes objective failure to follow the Medical Board's determinations and requirements is reckless conduct or gross negligence that, with Plaintiff's permanent injuries, would have likely entitled Plaintiff to a judgment of the full jury determination. But Plaintiff does not develop a constitutional theory—such as a due process concern—for an exception to the otherwise applicable statute. Instead, Plaintiff's case rises or falls on constitutional provision of Article I, Section 25 and this Court does not go in search of other grounds to hold a statute unconstitutional. Quite the opposite actually, the Court works under "every reasonable presumption that the legislature as the lawmaking agent of the

people has not violated the people's Constitution[.]" State *ex rel. Martin v. Preston*, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989).

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the trial court that overruled Plaintiff's objections to the constitutionality of N.C. Gen. Stat. § 90-21.19.

Respectfully submitted, this the 1st day of October 2024.

By: /s/ Electronically Submitted
D. Martin Warf
N.C. State Bar No. 32982
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
martin.warf@nelsonmullins.com

Court-Assigned Amicus Curiae Counsel

CERTIFICATE OF WORD COURT

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, and the 13 June 2024 order of this Court, counsel certifies that the foregoing brief, which was prepared using a 12-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

This, the 1st day of October, 2024.

By: /s/ Electronically Submitted

D. Martin Warf
N.C. State Bar No. 32982
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
martin.warf@nelsonmullins.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Brief via email to the address identified below:

Matthew D. Ballew, Esq.
Zachary R. Kaplan
mballew@ballewlaw.com
zkaplan@ballewlaw.com
Attorneys for Plaintiff-Appellant

Jeremy M. Wilson
Joseph T. Knott, III
William Ellis Boyle
jw@wardandsmith.com
jtknott@wardandsmith.com
weboyle@wardandsmith.com
Attorneys for Plaintiff-Appellant

Matthew W. Sawchak
msawchak@rbh.com
Attorneys for Amicus

Previous attempts at service of Dr. John Hayes and the corporate defendant via mail and email have been returned as non-deliverable. Therefore, service of this motion will not be made on Dr. Hayes or the corporate entity until a new address is available.

By: /s/ Electronically Submitted

D. Martin Warf
N.C. State Bar No. 32982
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
martin.warf@nelsonmullins.com