IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SUSAN L. SIEBERT,

Plaintiff-Appellee,

vs. No. S-1-SC-37231

REBECCA C. OKUN, M.D., and
WOMEN'S SPECIALISTS OF
NEW MEXICO, LTD.,

Defendants-Appellants.

On Certification from the Court of Appeals of New Mexico

BRIEF OF NEW MEXICO HOSPITAL ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Edward Ricco
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395

Attorneys for New Mexico Hospital Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

STATUTES, RULES, AND LAWS

OTHER AUTHORITIES

Introduction / Interest of the Amicus[1]

In this medical malpractice action, Plaintiff Susan Siebert obtained a verdict against Defendants Rebecca Okun, M.D., and Women's Specialists of New Mexico, Ltd., awarding her compensatory damages of $2.6 million. Defendants moved to amend the judgment to conform to the damages limitation of $600,000, excluding medical care and related benefits, under the Medical Malpractice Act ("MMA" or "Act"), NMSA 1978, § 41-5-6 (1992). There is no dispute that Defendants are qualified providers under the MMA. See id. § 41-5-5 (1992).

The district court held that the damage cap, and as a consequence the MMA as a whole, is unconstitutional. While basing its decision on its analysis of the right to jury trial guaranteed by Article II, Section 12 of the New Mexico Constitution, the district court noted that Plaintiff had challenged the MMA on other grounds as well and that "[e]qual protection and due process issues may also be implicated." (10 RP 2468) Defendants' appeal from the district court's ruling has been certified to this Court.

The constitutional issue on which the district court ruled is fully addressed in Defendants' principal brief. The New Mexico Hospital Association ("NMHA"), as amicus curiae, submits this brief to dispel any suggestion that the MMA damage

[1] The present brief was not authored in whole or in part by counsel for any party, nor did a party, party counsel, or any other person other than those referenced in Rule 12-320(C) NMRA make a monetary contribution intended to fund the preparation or submission of the brief.

cap is invalid on equal protection grounds. For similar reasons, the damage cap is valid under a substantive due process analysis.

The NMHA is a voluntary trade association whose membership includes forty-six hospitals that span the state. The hospitals are large and small, urban and rural, public and private, general and specialty, investor-owned and not-for-profit. The NMHA represents the hospitals on legal and public policy issues of importance to the hospitals and the patients they serve.

The validity of the MMA is a matter of compelling importance to the NMHA and its member hospitals. The MMA furnishes incentives to insurers to provide, and to health care providers to obtain, malpractice insurance. The availability of insurance coverage encourages physicians and other providers to practice in New Mexico and provides a source of compensation for patients injured by malpractice. A limitation on damages is one incentive provided by the MMA. See Lester v. Hall, 1998-NMSC-047, ¶ 11, 126 N.M. 404.

Hospitals are venues for physicians to practice and, without an adequate supply of practicing physicians, hospitals represent significant community investments that are not fully utilized. Hospitals are part of a broader health care system serving the people of the state and are interested in ensuring that health care services are widely available to New Mexico residents. And hospitals are subject to medical liability claims either directly or, increasingly, as employers of

physicians. NMHA member hospitals that are qualified providers under the MMA directly benefit from the damage cap and increased availability and affordability of insurance coverage under the Act. The NMHA consequently urges that the MMA continue to be recognized as valid and vital legislation.

As required by Rule 12-320(D)(1) NMRA, all parties received timely notice of the intent of the NMHA to file this brief supporting the constitutionality of the Medical Malpractice Act.

Argument

THE MEDICAL MALPRACTICE ACT DAMAGE CAP IS VALID UNDER EQUAL PROTECTION AND DUE PROCESS ANALYSIS.

A. The Court reviews constitutional challenges to legislation de novo and applies a presumption that acts of the legislature are valid.

A challenge to the MMA damage cap on equal protection grounds raises a "question[ ] of constitutional law, which we review de novo." State v. DeGraaf, 2006-NMSC-011, ¶ 6, 139 N.M. 211. "The party contesting the constitutionality of a statute bears the burden of proving the statute is, in fact, unconstitutional." Zhao v. Montoya, 2014-NMSC-025, ¶ 11, 329 P.3d 676. "In scrutinizing the constitutionality of a statute, we presume that the Legislature performed its duty and kept within the bounds fixed by the Constitution." State v. Ball, 1986-NMSC-030, ¶ 24, 104 N.M. 176. "A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside

the constitution in enacting the challenged legislation." Benavides v. E. N.M. Med. Ctr., 2014-NMSC-037, ¶ 43, 338 P.3d 1265 (internal quotation marks & citation omitted).

B. The Court is not bound by a lower court's view of legislative facts and may review legislative facts de novo.

During the three-day evidentiary hearing on the constitutionality of the MMA, the parties presented witnesses who testified about factors potentially bearing on the past and present need for the MMA and its damage cap, such as the extent to which medical malpractice insurance is available to New Mexico providers, the operation of the insurance market, and the availability of physicians in various areas of the state. Plaintiff even presented, over objection, a lawyer-witness they characterized as "an expert in the constitutional law" to discourse on the legal analysis Plaintiff thought should apply to the constitutional issues. (Tr. (5/3/17) 186, 188.) The court not only allowed the witness to testify but actively interrogated him on legal questions. (Id. 190, 254-55.) But see G & G Servs., Inc. v. Agora Syndicate, Inc., 2000-NMCA-003, ¶ 46, 128 N.M. 434 (holding that trial court properly excluded general testimony by attorney about insurance law; "Opinion testimony that seeks to state a legal conclusion is inadmissible." (internal quotation marks & citation omitted)).

In its memorandum opinion invalidating the statute, the district court purported to make factual findings calling into question the need for a damage cap

(10 RP 2467), though these findings have no bearing on the issue the court considered dispositive – the right to a jury trial – and would have arguable relevance only to the equal protection and due process analyses which the court did not perform. The district court's view of the facts is entitled to no weight on appeal. Facts relating to the need for or social impact of legislation are legislative facts which, as distinguished from a factfinder's determination of adjudicative facts, do not receive deference during appellate review.

"[L]egislative facts . . . are determinative of policy questions that affect the common law, statutory construction, and constitutional review." Trujillo v. City of Albuquerque, 1990-NMSC-083, ¶ 36, 110 N.M. 621, overruled in part on other grounds by Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721; see generally id. (Montgomery, J., concurring in part and dissenting in part). "Unlike adjudicative facts, legislative facts do not concern individual parties, such as who did what, when, where, and how." Lee v. Martinez, 2004-NMSC-027, ¶ 13, 136 N.M. 166. "This Court is not bound by the weight or determinative character assigned legislative facts by the trial court." Trujillo, 1990-NMSC-083, ¶ 36.

Thus, the Court "review[s] . . . findings of [legislative] fact de novo." Lee, 2004-NMSC-027, ¶ 13. "In determining legislative facts, we . . . consider both evidentiary and non-evidentiary sources." Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 26, 147 N.M. 583. "[L]egislative facts, in order to be judicially

noticed, need not be certain and indisputable." Trujillo, 1990-NMSC-083, ¶ 53 (Montgomery, J., concurring in part & dissenting in part). The Court "may take judicial notice of legislative facts by resorting to whatever materials it may have at its disposal establishing or tending to establish those facts." Truong, 2010-NMSC-009, ¶ 26 (internal quotation marks & citation omitted). See, e.g., State v. Valdez, 2013-NMCA-016, ¶ 18, 293 P.3d 909 (relying on expert studies to provide rational basis for legislative scheme).

This brief presents legislative facts demonstrating the reasonableness of the legislature's conclusion that a need existed and exists for the MMA damage cap, as well as legal argument in support of the constitutionality of the cap. In its analysis of the constitutionality of the MMA this Court owes no deference to the district court's factual findings, the significance the district court afforded those findings in reaching legal conclusions, or the legal conclusions themselves. The limitation on damages, as well as other benefits to qualified providers under the MMA, operates to stabilize the insurance market and encourage insurers to write and providers to obtain insurance coverage that fits within the legislature's design to assure a means of adequate compensation for patients injured by malpractice. The damage limitation and other measures also encourage physicians to practice in this state for the benefit of persons in need of health care services. The legislature's choice of means to accomplish these aims meets constitutional requirements.

C. The district court erred in suggesting that the damage cap may raise equal protection issues.

1. Under equal protection analysis, the damage cap is subject to rational basis scrutiny.

Among the several levels of scrutiny that may be applied to a statute under equal protection analysis, damage caps, as "social and economic legislation," are subject only to "rational basis" review. Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶¶ 2, 14, 125 N.M. 721. "[T]he sole requirement is that the challenged classification rationally relates to a legitimate state interest." Id. ¶ 28 (internal quotation marks & citation omitted).[2]

In this instance, in order to invalidate the MMA damage cap under rational basis analysis Plaintiff "must demonstrate that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record."

---

[2] The initial step in any equal protection analysis, before determining whether a statutory classification is constitutionally permissible, is to determine whether, in fact, there has been a classification resulting in different treatment of individuals who are similarly situated. Rodriguez v. Brand West Dairy, 2016-NMSC-029, ¶ 9, 378 P.3d 13. If a statute establishes classes that "are not similarly situated . . . we do not reach the second step." State v. Franklin, 2018-NMSC-015, ¶ 17, 413 P.3d 861. As the ensuing discussion will show, plaintiffs who obtain verdicts above the MMA cap are not situated similarly to those who achieve smaller verdicts when the purpose of the MMA is considered. To avoid unduly extending the present brief, however, NMHA's legal analysis will be limited to demonstrating that any classification of similarly situated plaintiffs created by the cap is supported by the requisite rational basis. See Wachocki v. Bernalillo Cty. Sheriff's Dep't, 2010-NMCA-021, ¶ 38, 147 N.M. 720, aff'd, 2011-NMSC-059, 150 N.M. 650.

Rodriguez, 2016-NMSC-029, ¶ 28 (internal quotation marks & citation omitted). The debate may be waged by marshalling "record evidence, legislative facts, judicially noticeable materials, case law, or legal argument." Id. And proponents of the MMA, in seeking to uphold the damage cap, are not required to accept the challenger's characterization of the legislative purpose; they may "set forth additional government purposes that the challengers must then prove are not supported by a firm legal rationale or evidence in the record." Id. "[E]ven a single persuasive rationale may be sufficient to establish the statute's constitutionality." Cummings v. X-Ray Assocs. of N.M., P.C., 1996-NMSC-035, ¶ 21, 121 N.M. 821.

The legislature has declared that the purpose of the MMA is "to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." NMSA 1978, § 41-5-2 (1976). There can be no disagreement that promoting public health and welfare is a legitimate state interest. See Miller v. City of Albuquerque, 1976-NMSC-052, ¶ 10, 89 N.M. 503 (indicating that measure that "promote[s] the public interest" is a "legitimate exercise of the police power"). And, as has already been noted, the availability of professional liability insurance benefits the public both by encouraging health care providers to practice in New Mexico, see Baker v. Hedstrom, 2013-NMSC-043, ¶ 16, 309 P.3d 1047 ("If the practitioner must bear the cost of the patient's injury, there is a powerful disincentive to furnishing

services at all." (internal quotation marks & citation omitted)), and by providing a source of compensation for persons injured by malpractice, see Cummings, 1996-NMSC-035, ¶ 28 ("By establishing minimum levels of insurance and levying a surcharge to sustain the patient's compensation fund, the Medical Malpractice Act achieves the legislative purposes of assuring that health care providers are adequately insured so that patients may be reasonably compensated for their malpractice injuries.").

A "persuasive" rationale, then, to connect legislative means and ends would show how the damage cap and the resulting classification of malpractice plaintiffs (those recovering verdicts over or under the cap) have a reasonable connection to making professional liability insurance available to New Mexico physicians and other health care providers. But in evaluating that rationale, the policy judgments underlying the design of the MMA are not the Court's to second-guess – i.e., the Court "will not question the wisdom, policy, or justness of legislation." Rodriguez, 2016-NMSC-029, ¶ 10 (internal quotation marks & citation omitted). "A determination of what is reasonably necessary for the preservation of the public health, safety and welfare of the general public is a legislative function and should not be interfered with, save in a clear case of abuse." State v. Collins, 1956-NMSC-046, ¶ 8, 61 N.M. 184. The legislature enjoys "[a] large discretion . . . to determine, not only what the interests of the public require, but what measures are

necessary for the protection of such interests." Casillas v. S.W.I.G., 1981-NMCA-045, ¶ 10, 96 N.M. 84 (internal quotation marks & citation omitted).

2. The damage cap is supported by a rational basis.

a. The MMA resulted from a historical malpractice insurance crisis that affected New Mexico.

As has now been recited enough times to become commonplace but no less true, "[t]he New Mexico Medical Malpractice Act was enacted by the legislature in order to meet an insurance crisis." Wilschinsky v. Medina, 1989-NMSC-047, ¶ 21, 108 N.M. 511. The existence of the crisis is a matter of historical fact. "This crisis was triggered by the announced withdrawal of the insurance company underwriting the medical society's professional liability program in which ninety percent of medical practitioners and health care institutions participated." Baker, 2013-NMSC-043, ¶ 16 (internal quotation marks & citation omitted); see Ruth L. Kovnat, Medical Malpractice Legislation in New Mexico, 7 N.M. L. Rev. 5, 7-8 (1976-77).

The existence of the malpractice crisis is undeniable, but there has long been debate about its cause. Presumably for that reason, the Court has sometimes referred to a "perceived" malpractice crisis. E.g., Wilschinsky, 1989-NMSC-047, ¶ 26. "Nevertheless, when employing the rational-basis test, courts will not consider the controversies surrounding the academic examination of legislative policy." Cummings, 1996-NMSC-035, ¶ 40. The district court's brushing aside of

the historical basis for the MMA as merely "a law professor's opinion" (10 RP 2465) thus is both factually erroneous and legally irrelevant. What matters is whether the legislature could rationally determine that a crisis existed and that the measures adopted in the MMA were an appropriate means of addressing it. See Cummings, 1996-NMSC-035, ¶ 40. See also Otero v. Zouhar, 1984-NMCA-054, ¶¶ 16-17, 102 N.M. 493 (stating that answer to attack on "ostensible purpose" of MMA as not rationally based "is that the courts of this state do not review the wisdom of legislation"), rev'd on other grounds, 1985-NMSC-021, 102 N.M. 482, overruled on other grounds by Grantland v. Lea Reg'l Hosp., Inc., 1990-NMSC-076, 110 N.M. 378.

New Mexico's malpractice insurance crisis was part of a national phenomenon affecting hospitals as well as physicians. "[T]he malpractice insurance crisis . . . led to premium increases of several hundred percent and/or withdrawal of carriers from the market in many states[.]" Patricia M. Danzon, The Frequency and Severity of Medical Malpractice Claims, Rand Corp. Report No. R-2870-ICJ-HCFA at 1 (1982) (hereinafter Danzon I). "The crisis which confronted [state] legislatures in the mid-1970's concerned the rapid increase in the premiums for medical malpractice insurance by some companies and the withdrawal of other insurance companies from the medical malpractice insurance field." Anderson v. Wagner, 402 N.E.2d 560, 570 (Ill. 1979). A 1975 survey showed that physicians

in 16 states were having difficulty obtaining malpractice coverage. Patricia M. Danzon, Medical Malpractice: Theory, Evidence and Public Policy 85 (1985) (Danzon II). See also Anderson, 402 N.E.2d at 562 ("The difficulty in obtaining insurance at reasonable rates forced many health care providers to curtail or cease to render their services."). One commentator predicted a consequence of the malpractice crisis that already had materialized in New Mexico: "[D]octors faced with skyrocketing insurance rates may, in the not-too-distant future, be considered comparatively lucky; many doctors may be unable to obtain any insurance coverage at all." Martin H. Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 Tex. L. Rev. 759, 760 (1977).

An unpublished study commissioned by the NMHA showed that New Mexico hospitals experienced a seven-fold increase in malpractice insurance rates between 1971 and 1975. A survey of 27 hospitals in the state revealed an average premium hike of 203 percent for 1975 alone, with seven hospitals reporting an increase of more than 400 percent. One hospital was quoted a premium of $647,000 for $500,000 in coverage. These increases in malpractice costs had a direct impact on the availability of health care services. A study of Michigan hospitals indicated that large increases in premium costs caused hospitals to curtail high-risk services, with obstetrics being particularly affected in both rural and

urban institutions. American Hospital Ass'n, Medical Malpractice Task Force Report on Tort Reform 12 (1986). In addition, one-quarter of responding hospitals reported difficulty recruiting physicians as a result of their inability to obtain affordable and adequate malpractice coverage. Id. NMHA member hospitals have experienced these impacts.

"The Legislature hoped that the limitations on liability [enacted by the MMA] would provide an incentive for insurance companies to continue to provide malpractice insurance." Salopek v. Friedman, 2013-NMCA-087, ¶ 68, 308 P.3d 139. Those limitations also would encourage providers to qualify for coverage under the Act. See Baker, 2013-NMSC-043, ¶ 16. As originally enacted, the MMA placed a limit of $500,000 (now $600,000) on the compensatory damages recoverable by a malpractice plaintiff against a qualified provider. The first $100,000 (now $200,000) of recovery was to be provided by an occurrence-based malpractice insurance policy which the provider was required to obtain in order to qualify for the Act's benefits. The remainder was provided by a patient compensation fund into which providers were required to pay a surcharge sufficient to maintain the solvency of the fund. The fund also would pay, without limit on an as-incurred basis, the injured person's future medical expenses and related benefits. See id. ¶ 18; Cummings, 1996-NMSC-035, ¶ 28; Kovnat, supra, at 19-22.

The Act balances the incentives offered to insurers to underwrite and providers to obtain insurance coverage with benefits to claimants that are unavailable under the common law. With respect to damages, the ongoing obligation of the patient compensation fund to pay all of the claimant's future medical expenses without limit means that claimants do not bear the risk that the fact-finder at trial might underestimate future medical costs or might not accurately predict inflation in discounting those future costs to present value. Additionally, claimants may realize the advantage of expensive new medications, surgical techniques, diagnostic methods, and treatment procedures that become available with the advancement of modern medicine, without cost limitation. As a quid pro quo for limiting compensatory damages, the Act both promotes the availability of malpractice insurance and also provides an unlimited, funded source of compensation unaffected by insurance policy limits for a claimant's lifetime medical needs, thereby furthering the statutory goal of "assuring that . . . patients may be reasonably compensated for their malpractice injuries." Cummings, 1996-NMSC-035, ¶ 28.

b. The legislature could reasonably believe that a damage cap would help alleviate the insurance crisis.

The legislature could reasonably believe that the MMA damage cap would help to encourage malpractice insurers to continue to provide coverage and would thereby contribute to alleviating the malpractice crisis. By its nature, a limitation

on damages moderates the severity of claims that insurers must face. A sharp increase in the frequency, and concurrently in the severity, of malpractice claims was a driving force behind the malpractice crisis.

"Although all of the causes of the malpractice insurance crisis are not identifiable, it is generally agreed that the rapid increase in the number and amount of malpractice claims and awards [was] a substantial . . . factor in the dramatic increase in medical malpractice insurance rates." Redish, supra, at 760-61 (footnotes omitted). "The frequency and severity of medical malpractice claims increased dramatically in the late 1960s and early 1970s. . . . [T]he malpractice insurance crisis . . . was a reflection of a huge increase in the cost of claims." Danzon I, supra, at 1. Hospitals were affected along with physicians. From 1971 to 1978, the average incurred cost per claim against hospitals increased at a rate of 18.9 percent annually. Danzon II, supra, at 62-63.

At the same time, insurers had for years significantly underestimated the premium rates necessary to maintain acceptable loss ratios in the face of these increasing claim costs. Danzon II, supra, at 98-99. In the assessment of a leading expert, "[t]he major cause of the huge 1974-75 premium increases was the rise in claim costs over the preceding five years and the failure of premiums to keep pace." Id. at 112. See also Richard S.L. Roddis & Richard E. Stewart, The Insurance of Medical Losses, 1975 Duke L.J. 1281, 1292 (stating that experience

during decade preceding 1975 "has shown that the pattern of frequency and cost of claims as they emerged were not susceptible to prediction by accepted and systemic actuarial techniques"). Consistently with this view, other observers have found one major cause of steep increases in medical malpractice premiums in later years to be "higher costs for insurers (particularly from increases in the size of malpractice awards)." Congressional Budget Office, Limiting Tort Liability for Medical Malpractice 3 (2004) (P Ex. 99).

Large claims were of particular significance in the malpractice crisis because claim severity was the dominant factor in the increasing losses experienced by insurers. U.S. Dep't of Health, Educ. & Welfare, Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice 511 (1973) (hereinafter HEW Report). A study of malpractice claims closed in 1976 showed that 50 percent of the losses were paid on just 3 percent of the claims. Danzon II, supra, at 90. Although very large awards "are a small fraction of all claims, these few cases account for a very large fraction of the dollars paid. Therefore, they can substantially influence average claim severity." Patricia M. Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 Law & Contemp. Probs. 57, 73-74 (1986) (hereinafter Danzon III).

Compounding the difficulties insurers faced was the unpredictability of malpractice losses, which gave rise to "continuing . . . uncertainty about future

pricing." Roddis & Stewart, supra, at 1297. "Medical malpractice meets none of the ideal conditions of an insurable risk." Danzon II, supra, at 89. The determinants of future premium rates "are substantially less defined and predictable in medical malpractice than in any other line" of insurance. Roddis & Stewart, supra, at 1297. See also HEW Report, supra, at 41-42 (identifying dramatic changes in frequency and severity of malpractice claims, along with small market size and long claim development period, as factors that made pricing of malpractice coverage difficult).

Malpractice claims frequently have a large component of noneconomic damages such as pain and suffering or the lost value of a life, which the jury may set at an amount it deems "fair and just," Baca v. Baca, 1970-NMCA-090, ¶ 25, 81 N.M. 734, and as to which "there cannot be any fixed measure of compensation," Powers v. Campbell, 1968-NMSC-111, ¶ 9, 79 N.M. 302. A large claim, even if rare, can greatly increase total losses. The problem is exacerbated in smaller markets with relatively fewer claims, where year-to-year volatility in claim frequency and severity can be great. Danzon II, supra, at 90; see also HEW Report, supra, at 42 (stating that in the face of an award much in excess of the average cost per claim, "the ratemaker's projections crumble"); cf. The Overload on the Nation's Insurance System, Business Week, Sept. 6, 1976, at 46 (reporting that the CEO of Travelers Insurance Company – the malpractice carrier that

withdrew from New Mexico – characterized medical liability as virtually uninsurable because of unpredictability). As Defendants' expert explained, "it's the extreme losses that tend to be most influenced by damages caps. This decreases the variability of losses and makes it easier to write predictable coverage." (Tr. (5/31/17) 109.)

An analysis offered by Plaintiff as an exhibit rejects the view that market behavior characterized as an insurance "crisis" is the result of "an insurance conspiracy" and argues that a critical feature in explaining periodic tight liability insurance markets "is the substantial uncertainty that insurers face in predicting claims." Ralph A. Winter, The Liability Crisis and the Dynamics of Competitive Insurance Markets, 5 Yale J. Reg. 455, 456-57 (1988) (P Ex. 76).

The legislature was faced with a crisis in availability of medical malpractice insurance that swept the nation in the early 1970s and affected New Mexico acutely in 1975. As the foregoing discussion bears out, the legislature had a sound basis to believe that rapidly increasing claim severity was a substantial factor contributing to the crisis that could be alleviated – with ensuing benefits to the public – by limiting damage awards in the cases that contributed most to destabilizing the insurance market. In enacting the MMA, the legislature adopted a measure that bore a rational relationship to a legitimate state interest.

c. The legislature has good reason to believe that the damage cap remains beneficial today.

At the evidentiary hearing, Plaintiff presented evidence and argument aimed at convincing the district court that it could invalidate the MMA because there is no continuing need for the statute. The court purported to make findings on the subject, see supra p. 4, although it did not base its ruling on them. But it is no more appropriate for a court to second-guess legislative judgment about whether the need for a statute continues as it is for the court to make its own assessment regarding whether the legislation was required in the first place. See supra pp. 9-10. Plaintiff argued that the statute no longer has a rational basis. As was the case at the time of enactment, however, a rational basis supports the legislature's determination that the MMA should remain in force.

Since the 1970s, there have been two other periods in which market conditions for medical malpractice insurance have reflected a "hard" market or a market "crisis," as indicated by decreased availability of coverage or substantial increases in premiums. These periods occurred in the mid-1980s (affecting the liability insurance market generally) and early 2000s. See Leonard J. Nelson III et al., Damages Caps in Medical Malpractice Cases, 85 Milbank Quarterly 259, 261-63 (2007) (P Ex. 97). New Mexico did not experience these market disruptions. At the evidentiary hearing on constitutionality, Plaintiff's expert attributed the

continued stability of the malpractice insurance market in this state to the MMA. (Tr. (5/30/17) 150-53.) A rational basis review need go no further.

But addition to the expert's concession, studies – many of them introduced into the evidentiary record – confirm that damage caps have lessened the deleterious effects of rising claim costs. So does other testimony presented at the evidentiary hearing.

In New Mexico, a legislative study committee in 1986 identified the medical malpractice area as one in which tort reform measures (the MMA) resulted in relief from high premium rates. Report of the Interim Legislative Workmen's Compensation Committee on Liability Insurance and Tort Law Reform, at 6 (1986) (P Ex. 77).

More generally, Defendants' expert witness characterized damage limitations as "far and away . . . the most consistently influential reform in terms of affecting losses." (Tr. (5/31/17) 57.) Plaintiff's expert concurred: "[C]aps definitely limit the size of claims." (Tr. (5/30/17) 67.) Early studies of malpractice liability limits adopted by states in the 1970s and 1980s concluded that damage caps "consistently reduced the size of claims and, in turn, premium rates for malpractice insurance." Congressional Budget Office, supra, at 5. States that enacted a damage cap effective in January 1975 had 19 percent lower awards, on average, within two years. Danzon I, supra, at 30. A synthesis of studies issued in

2006 by the Robert Wood Johnson Foundation concludes that damage caps in medical malpractice cases "have a significant effect on claims payouts," reducing average awards by 23 to 31 percent. Michelle M. Mello, Medical malpractice: Impact of the crisis and effect of state tort reforms 11 (2006) (P Ex. 96); see also Danzon III, supra, at 76-77.

Additionally, "caps appear to be associated with a small but statistically significant increase in physician supply." Mello, supra, at 11; see also Daniel P. Kessler et al., Impact of Malpractice Reforms on the Supply of Physician Services, 293 J. Am. Med. Ass'n 2618, 2621 (2005) (D Ex. I) (finding that during period 1985-2001, "physician supply in direct-reform [including damage cap] states expanded by approximately 2.4% more . . . than did supply in nonreform states, all else being held constant"); Jonathan Klick & Thomas Stratmann, Medical Malpractice Reform and Physicians in High-Risk Specialties, 36 J. Legal Stud. 5121, 5139 (2007) (D Ex. M) (reporting on study concluding that, for years 1980-2001, "the adoption of caps on noneconomic damages has a statistically significant positive effect on the location decisions of doctors in high-risk specialties" – an effect that "is robust and appears to be causal"). Outside of urban areas, New Mexico generally exhibits a shortage of physicians as compared with national benchmarks. See New Mexico Healthcare Workforce Committee, Annual Report (2016) (D Ex. N). In New Mexico, 40.5% of the population lives in a primary care

health professional shortage area. Approximately 26.6% of the population is underserved for health care. New Mexico Department of Health, New Mexico State Health Assessment 2014-2016, at 9. One study found damage caps increase physician supply in the most rural areas in specialty fields. David A. Matsa, Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps, 36 J. Legal Stud. 5143, 5161, 5165 (2007) (D Ex. N). The author believes the result is attributable in part to the larger number of Medicaid patients typically found in rural areas. Id. at 5174-75. That conclusion is significant given New Mexico's large population of Medicaid beneficiaries. See Louise Radnofsky, How Health Law's Medicaid Enrolees Strain the System, Wall Street Journal, Nov. 13, 2014, http://www.wsj.com/articles/how-health-laws-medicaid-enrollees-strain-the-system-1415935981 (reporting that New Mexico has the highest proportion of Medicaid recipients in the country at nearly one-third of the state's residents). Plaintiff's expert agreed that damage caps have a positive effect on the supply of doctors. (Tr. (5/30/17) 148-49.)

Another review of various studies concludes that "[n]early all the rigorous empirical analyses conducted since 1990 found that malpractice premiums are lower in the presence of damages caps." Leonard J. Nelson III, supra, at 280. See also David A. Hyman et al., Does tort reform affect physician supply? Evidence from Texas, 42 Int'l Rev. Law & Econ. 203, 217 (2015) (P Ex. 100) ("There is no

doubt that damages caps can affect the frequency and cost of malpractice claims and, in the long run, malpractice premiums.").

A detailed study of the effect of tort reform measures adopted after the liability insurance crisis or the 1980s found that "the liability reforms on average and the damages cap provisions in particular contributed to a substantial downward shift in . . . loss ratios," with a comparable effect seen in losses and a more modest effect on premiums. The reforms "diminish[ed] uncertainty" about excessive losses "that is the primary concern of [insurers]." W. Kip Viscusi & Patricia Born, Medical Malpractice Insurance in the Wake of Liability Reform, 24 J. Legal Stud. 463, 489-90 (1995) (D Ex. D); see also W. Kip Viscusi et al., The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses, 76 J. Risk & Ins. 197, 216 (2009) (D Ex. G) (extending study to later years and concluding that "[t]he most consistently influential tort reform of consequence is the cap on noneconomic damages"); Seth A. Seabury et al., Medical Malpractice Reform: Noneconomic Damages Caps Reduced Payments by 15 Percent, With Varied Effects by Specialty, 33 Health Affairs 2048 (2014) (analyzing effects by size of cap and for various medical specialties).

A 2016 report on the efficacy of various medical malpractice reform measures that relied in part on extant empirical research from "academic, government, and foundation reports that meet accepted standards of scientific

rigor" – comprising, in the authors' view, an evidence base that is "substantial and mature" – finds that caps on noneconomic damages "are associated with a statistically significant decrease in the frequency of claims." Michelle M. Mello & Allen Kachalia, Medical Malpractice: Evidence on Reform Alternatives and Claims Involving Elderly Patients 2, 12, 33 (2016) (D Ex. H). It concludes from "strong, recent studies . . . that caps moderately constrain the growth of premiums over time," on the average of 6 to 13 percent in a given year, id. at 34, and that caps bring about "statistically significant increases in the supply of physicians in a state," perhaps especially among high-risk specialists, in rural areas, and for the most stringent caps, id. at 36. Still another recent systematic review of studies found support for the conclusion that physician supply increases and physician outmigration decreases in states that have adopted malpractice damage caps, claim frequency and severity decreases in such states, and there is a statistically significant moderating effect on malpractice insurance premiums in those states. Jacob R. Lepard et al., Damage capitation in the modern liability climate: a primer for neurosurgeons and systematic review of the literature, 28 J. Neurosurg. Spine 446 (2018).

Plaintiff's principal point in attempting to invalidate the MMA based on allegedly changed circumstances has been to argue that there is no longer an insurance "crisis" because medical malpractice insurance now is available from

many carriers in New Mexico. But that fact alone says nothing about what the situation would be in the absence of damage limits. Defendants' expert explained that an insurance crisis "creates the impetus . . . to enact these caps. But the caps have a continuing influence whether there's a so-called crisis or not, because they serve to stabilize the insurance market. So even now, . . . there's still the effect of the caps in terms of restraining losses and decreasing the variability of losses." (Tr. (5/31/17) 111.) This continuing effect is independent of the cyclical market behavior that Plaintiff contends is the sole cause of hard insurance markets. (See id. 114-15.) Plaintiff's approach is akin to arguing that the MMA should be invalidated because it is effective. See Otero, 1984-NMCA-054, ¶ 18 (stating that showing that six insurers were writing coverage under the MMA "indicates a rational relationship between the legislative purpose and the accomplishment of that purpose").

What is more, Plaintiff's argument exaggerates the situation that actually exists. Between five and seven carriers write occurrence-based insurance under the MMA. (Tr. (5/31/17) 256.) The great majority of insurers writing malpractice coverage in New Mexico – around eight times as many – write claims-made policies. (Tr. (5/31/17) 250-51.) Claims-made policies fall outside the MMA because they provide less coverage than occurrence policies; unless the insured obtains additional "tail" coverage, they do not cover acts of malpractice that occur

within the policy period but do not become manifest until later. The legislature has determined that only occurrence policies provide adequate protection to persons injured by malpractice. See NMSA 1978, § 41-5-5(A)(1). And because policies falling outside the MMA need not provide a minimum coverage amount to dovetail with the patient compensation fund, claims-made coverage issued outside the Act may be wholly insufficient to protect injured patients. See Charles Silver et al., Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003, 33 The Geneva Papers 177, 184-85 (2008) (D Ex. J) (determining, based on fact that most malpractice claim payments appear to cluster near policy limits, that 32 percent of physicians in study had coverage limits of $200,000 or less); see also Charles Silver et al., Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance, 5 U.C. Irvine L. Rev. 559, 562, 585 (2015) (expanded study, stating that malpractice claimants "rarely recover more than the amount of insurance that is available to satisfy claims" and that "one can argue with considerable force that many physicians underinsure against the losses that medical errors impose on patients"). The availability of malpractice policies in the New Mexico insurance market that provide less protection for doctors and patients outside the Act merely underscores the rationality of the legislative design in providing benefits to qualified providers

as an incentive to bring themselves within the MMA. See Roberts v. Sw. Cmty. Health Servs., 1992-NMSC-042, ¶ 13, 114 N.M. 248.

Plaintiff also argued that the damage limit should be invalidated because it has not kept up with inflation. The limit was raised from $500,000 to $600,000 effective in 1995, see 1992 N.M. Laws ch. 33, § 4, indicating that the amount is the subject of continued legislative oversight, see Wagner v. AGW Consultants, 2005-NMSC-016, ¶ 29, 137 N.M. 734 (stating that fact that statutory cap on attorney fees in workers' compensation cases was increased "suggests to us that rather than setting the fee limitation arbitrarily, the Legislature continues to consider" the matter). Exercising that oversight, the legislature raised the malpractice cap to $1 million in 2011, but the bill was vetoed. H.B. 267 Substitute, 50th Leg., 1st Sess. (N.M. 2011) (P Ex. 52.) The prospects for such an increase may have improved with the advent of a new administration. And in any event, the legislature's decision not to index the damage limit for inflation satisfies rational basis review. See Wachocki, 2010-NMCA-021, ¶¶ 42-43 (holding that "imposition of a fixed cap [on Tort Claims Act damages], as opposed to one that fluctuates as a percentage of damages, bears a rational relationship to the governmental need to protect against the danger of a catastrophic judgment and also provides a basis for rational fiscal planning"; that is so "[e]ven if a better system of accomplishing these goals could be formulated," because "it is not the function of the courts to

rewrite legislation; the power to change the present scheme rests with the legislature" (internal quotation marks & citation omitted) (alterations omitted)). Any statutory classification necessarily involves line-drawing. "That exercise of discretion, however, is a legislative, not a judicial function." Trujillo, 1998-NMSC-031, ¶ 28 (internal quotation marks & citation omitted).

NMHA's experience is that New Mexico hospitals continue to have among the highest average loss costs and highest malpractice insurance rates in the country. In recent years, hospitals have begun to realize the benefits of the MMA by bringing themselves within its coverage. But only a single traditional insurance company and one risk retention group provide malpractice insurance to hospitals in the state. A return to an unlimited liability regime could require hospitals to cover their malpractice risk with large self-insured retentions, holding back and potentially disbursing funds that otherwise could be used to improve facilities and expand patient care.

The MMA is valid under rational basis review, which is the appropriate level of constitutional scrutiny for legislation imposing limitations on damages. Salopek v. Friedman, 2013-NMCA-087, 308 P.3d 139. The evidence of record and judicially noticeable legislative facts demonstrate that the carefully balanced measures adopted by the legislature in the MMA are rationally based and that there is "sufficient reason to justify the disparate treatment" of the largest malpractice

damage awards as compared to smaller awards. Rodriguez, 2016-NMSC-029, ¶ 9 (internal quotation marks & citation omitted). Unlike legislation that unjustifiably affords extraordinary protection to a particular industry with no discernable public benefit, cf. Richardson v. Carnegie Library Restaurant, Inc., 1988-NMSC-084, ¶ 39, 107 N.M. 688, overruled on other grounds by Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, the MMA has a broadly beneficial purpose and effect: it operates to assure reasonable compensation plus unlimited, ongoing medical care and related benefits for the victims of medical malpractice, while increasing the availability of health care services to the people of the state. The statute is constitutional under equal protection standards.

D. The district court erred in suggesting that the damage cap implicates due process concerns.

A statute satisfies substantive due process requirements if it is rationally related to a legitimate governmental interest. Marrujo v. State Hwy. & Transp. Dep't, 1994-NMSC-116, ¶ 22, 118 N.M. 753; see also Wagner, 2005-NMSC-016, ¶ 30. For the reasons already discussed in the foregoing equal protection analysis, the MMA meets the constitutional requirements of due process as well.

Conclusion

The MMA limits the individual liability of health care providers for medical malpractice to $200,000 and the total recovery by successful malpractice plaintiffs to $600,000, except for ongoing medical expenses and related benefits, which are

provided without limit under the district court's continuing jurisdiction. There was substantial reason to believe that legislative action in the nature of the MMA was necessary in the face of a historical malpractice insurance crisis that threatened the delivery of health care services to New Mexico residents and the ability of patients injured by malpractice to obtain compensation for their injuries. There is substantial reason to believe that the damage limitation adopted by the MMA has been instrumental in stabilizing the malpractice insurance market in New Mexico and averting further crises that affected markets elsewhere and that maintaining the limitation continues to benefit the state's citizens.

Any limitation on damages works to redistribute losses in some instances. "The social desirability of the reform efforts" embodied in the MMA "hinges not only on their efficacy in affecting liability costs but also on their effect on incentives to provide the efficient quality and quantity of healthcare and to provide appropriate levels of insurance to accident victims." Viscusi & Born, supra, at 465. "Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government." Redish, supra, at 763 (footnote omitted).

Under the appropriate constitutional analysis, the district court exceeded its proper role by questioning the policy judgments made by the legislature in adopting and maintaining the MMA. The district court's suggestion that the damage limitations of the Act may violate equal protection or substantive due process mandates is ill considered and should be rejected.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/Edward Ricco
By _____
Edward Ricco
P.O. Box 1888
Albuquerque, N.M. 87103
Telephone: (505) 765-5900
Facsimile: (505) 765-7395

Attorneys for New Mexico Hospital Association

CERTIFICATE OF SERVICE

We certify that the foregoing brief was filed through the Odyssey File-and-Serve electronic filing system, which caused a copy of the brief to be served automatically on all counsel of record this 1st day of March, 2019.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/Edward Ricco
By _____
Edward Ricco