SUPREME COURT
OF THE STATE OF NEW MEXICO

No. S-1-SC-37231

SUSAN L. SIEBERT,
Plaintiff-Appellee
vs.
REBECCA C. OKUN, M.D., AND
WOMEN'S SPECIALISTS OF NEW MEXICO, LTD.
Defendants-Appellants.

On Appeal from the Second Judicial District Court, Bernalillo County
No. D-202-CV-2013-05878, Hon. Victor S. Lopez, Presiding

PLAINTIFF-APPELLEE'S ANSWER BRIEF

Oral Argument Requested

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TABLE OF CONTENTS

Table of Authorities

CASES

FEDERAL CASES

OTHER STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

SUMMARY OF PROCEEDINGS

A. Nature of the Case.

Defendant-Appellant Dr. Rebecca Okun, a gynecologist working for Defendant-Appellant Women's Specialists, LLC [collectively, "Defendants"], performed a hysteroscopy, a procedure using a viewing scope to examine the uterus with the insertion of a tool to biopsy 8-13 times into Plaintiff-Appellee Susan Siebert at Lovelace Women's Hospital in February 2011. In the course of this procedure, Dr. Okun made multiple holes through Ms. Siebert's uterus and intestines, failing to recognize her errors and the injury she caused. Ms. Siebert was then sent home.

Due to the leaking bowel perforations caused by Dr. Okun, Ms. Siebert became systemically infected, required emergency surgery to remove her perforated uterus, bowel and other effected organs. She spent 105 days in-patient at hospitals and rehabilitation centers to survive, then to learn to walk, talk, breathe and eat again. Ms. Siebert endured five surgeries, spent months on a ventilator, eventually going home with required home care, a feeding tube and portable oxygen. Ms. Siebert lost her career as a master's degree, national expert in Montessori education and has permanent psychological and physical damage, including ICU-related brain damage, from the error made by Dr. Okun.

B. Proceedings Below.

The complaint was filed against Defendants on July 18, 2013, the Honorable Alan Malott of the Second Judicial District Court presiding. **[1 RP 1-9]** A jury trial was set for May 4, 2015. Defendants never made any offer or counter-offer to settle the case.

Judge Malott conducted a six-day jury trial beginning March 7, 2016. The jury returned a verdict against Defendants, finding them liable for negligence on March 14, 2016 with a compensatory award of $2,600,000.00. **[5 RP 1116.]** Judge Malott entered judgment on the verdict April 11, 2016. RP1157. No appeal was taken of the trial or verdict.

On April 27, 2016 Defendants filed a motion to conform the damages to the limits in the Medical Malpractice Act **[6 RP 1419].** On June 3, 2016, the trial court set an evidentiary hearing on Defendants' Motion **[7 RP 1546]**. On July 5, 2016, Defendants filed a motion to vacate the evidentiary hearing **[7 RP 1595]** and a separate motion for recusal of Judge Malott based on "pre-disposed bias" **[7 RP 1574]**. Judge Malott voluntarily recused **[7 RP 1665].** The Honorable Victor Lopez was assigned to this case on July 27, 2016 **[7 RP 1624].**

Judge Lopez denied Defendants' motion to vacate the evidentiary hearing on October 4, 2016 **[8 RP 1786].** Extensive discovery occurred pre-evidentiary hearing which began May 30, 2017 and continued until June 1, 2017. The Memorandum Opinion and Order that is the subject of appeal was entered March 23, 2018.

C. Statute at Issue.

The Medical Malpractice Act (MMA) limits compensation to a medical-malpractice victim or their Estate to an aggregate of $600,000, excluding punitive damages, as well as the value of accrued medical care and related benefits. NMSA 1978, § 41-5-6(A) & (B) (1992). It prohibits the awarding of money for future medical expenses.[1] *Id.* at § 41-5-6(C) (1992). It limits a qualified health care provider's personal liability to $200,000, with additional assessed damages recoverable from a patient's compensation fund. *Id.* at § 41-5-6(D) (1992). "Qualified" health care providers are those that have malpractice insurance of at least $200,000 per occurrence and pay a surcharge that funds the patient compensation fund. *Id.* at §§ 41-5-5(A) & (B), 41-5-25(B). Health care providers who choose not to "qualify" do not receive the "benefit" of the liability limits. *Id.* at § 41-5-5(C).

The MMA also sets up a state medical review commission of health care providers and attorneys to review medical malpractice claims against only qualified providers as a prerequisite to filing court action. *Id.* at §§ 41-5-14, 41-5-15. The commission's decision regarding malpractice is "without judicial or administrative authority", is non-binding and inadmissible in any subsequent legal action. *Id.* at § 41-5-20. A decision favorable to the patient requires the commission "cooperate

[1] A special interrogatory asks juries whether the patient needs future medical care but the statute prohibits evidence of future care and prohibits the jury from assessing such damages, even though such care is otherwise to be paid as incurred. NMSA 1978, § 41-5-7(A) & (D) (1992).

fully with the patient in retaining a physician qualified in the field of medicine involved" to assist with trial preparation and to testify, upon payment of a reasonable fee." *Id.* at § 41-5-23. The MMA also imposes a statute of repose on malpractice victims to bring action within three (3) years of the "occurrence" of the act of malpractice, rather than the three (3) years from the discovery of the medical malpractice that caused harm to the patient. *Id.* at § 41-5-5, *Roberts v. Southwest Cmty. Health Servs.*, 1992-NMSC-042 ¶¶ 8 – 27.

ARGUMENT

I. THE MMA CAP VIOLATES NEW MEXICO'S "INVIOLATE" RIGHT TO TRIAL BY JURY.

The New Mexico Constitution guarantees the "right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." N.M. Const. Art. II, § 12. The term "inviolate" is a unique superlative of unmatched force that only appears elsewhere in the Constitution where it guarantees provisions of the Treaty of Guadalupe Hidalgo. *See id.* at § 5. The mandate is of transcendent import. *See Evans Fin. Corp. v. Strasser*, 1983-NMSC-053, ¶ 11, 99 N.M. 788, 790-91. Unlike other constitutional rights, the jury-trial right is categorical in nature and not subject to balancing tests that weigh state interests that may justify or override its constitutional mandate. Where the Constitution entrusts authority to the jury, "it cannot be denied by the legislature." *State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶ 15, 63 N.M. 156.

Defendants resist application of the jury-trial right to invalidate the damage cap on two grounds: (1) that the right to jury-assessed damages can be abridged through legislation that redefines the "legal consequences" of the jury's verdict; and (2) that the legislature abrogated the common law cause of action for medical malpractice in favor of a statutory one. Both grounds are unavailing.

A. The New Mexico Constitution Preserves the Jury-Trial Right as It Previously Existed at Common Law.

As the inclusion of as "heretofore existed" makes apparent, a "litigant has the right to a jury trial in civil cases if 'the right existed either at common law or by statute at the time of the adoption of our constitution.'" *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, ¶ 33, 118 N.M. 470, 481. *See also Lisanti v. Alamo Title Ins. of Texas,* 2002-NMSC-032, ¶ 13, 132 N.M. 750, 753. Three fundamental reasons support application of the jury right to this cause of action.

First, "common law jury trial existed in the Territory of New Mexico prior to adoption of the Constitution." *Strasser*, 1983-NMSC-053, ¶ 5. Second, medical negligence or malpractice cases existed at common law long before the nation was founded, and these cases were tried before juries. *See, e.g., Wright v. Central DuPage Hosp. Ass'n*, 347 N.E.2d 736, 742 (1976) (recognizing actions for medical malpractice are rooted in Anglo-American common-law); *Weidrick v. Arnold*, 835 S.W.2d 843, 846 (Ark. 1992) (citing Prosser, Law of Torts,§ 32, p.161,fn. 32 (4th Ed. 1971) and recognizing that medical malpractice "had its origins at common law"

and that the first recorded case dates back to the year 1374). *See also* Jerrald J. Roehl, *The Law of Medical Malpractice in New Mexico*, 3 N.M. L. Rev. 294, fn. 2 (1973). As this Court recently stated in *Brice v. Toyota Motor Corp.*, 2016-NMSC-018, ¶ 9, "In 1876…the New Mexico Territorial Legislature adopted "the common law as recognized in the United States of America" as the law of New Mexico. NMSA 1978, § 38-1-3 (1876); see *Lopez v. Maez*, 1982-NMSC-103, ¶ 6, 98 N.M. 625." The District Court properly concluded that New Mexico recognized actions for medical malpractice at common law. Slip Op. at 10-11.

Finally, this Court has held the "question of a common-law right to a jury rests essentially on a determination of whether the type of case calls for equitable or legal relief." *State ex rel. Children, Youth & Families Dep't v. T.J.*, 1997-NMCA-021, ¶ 9, 123 N.M. 99, 103 (citing *Strasser*, 1983-NMSC-053). *Strasser* teaches "[i]f the remedy sought is legal, parties are entitled to a jury trial; if the remedy sought is equitable, there is no jury trial as of right." 1983-NMSC-053, ¶ 5. Money damages, as sought here, are indisputably a legal remedy. See *Lewis v. Baca*, 5 N.M. 289, 21 P.2d 343 (1889). For these reasons, there can be no legitimate dispute that the jury-trial right applies to medical-malpractice actions.

B. The Jury-Trial Right Includes Jury-Assessed Damages.

Both the federal Constitution's Seventh Amendment and New Mexico Constitution's jury-trial provisions in Art. II, Section 12 "preserved the existing

common law right to have the facts of a case 'tried by a jury.'" *New Mexico Law Grp., P.C. v. Byers*, 2018-NMCA-023, ¶ 3, 413 P.3d 875, 876, *cert. denied* (Mar. 9, 2018). This Court has recognized that U.S. Supreme Court decisions "interpreting the Seventh Amendment [are] relevant to our discussion of [the] right to a jury trial under the New Mexico Constitution" because "the Seventh Amendment, like our state constitutional provision, 'merely "preserves" the common law right to jury trial.'" *Harrell*, 1994-NMSC-096, ¶ 34. In addition, the Seventh Amendment applied to the Territory of New Mexico, so that it provides a basis for understanding the scope of the jury-trial right that existed in New Mexico prior to statehood. *See Walker v. New Mexico & S.P.R.Co.*, 165 U.S. 593, 595.

1. *Federal Precedent Establishes that Juries Assess Damages.*

Jury responsibilities under the Seventh Amendment, as the judges of the facts, indisputably includes the assessment of damages. Longstanding precedent establishes that the determination of compensatory damages, including "damages for pain and suffering," "involves only a question of fact." *St. Louis, I.M & S.R. Co. v. Craft*, 237 U.S. 648, 661 (1915).

The United States Supreme Court has further recognized that a plaintiff "remain[s] entitled ... to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). *See also Kennon v. Gilmer*, 131 U.S.

22, 29-30 (1889) (a "court has no authority ... in a case in which damages for a tort have been assessed by a jury at an entire sum, ... to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages").

A jury's incontrovertible authority to set damages was settled at least as far back as the time of Sir Edward Coke. Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 675 (1918). Coke defined tort "Dammages" as "the recompence that is given by the jury to the plaintife ... for the wrong the defendant hath done unto him." 2 E. Coke, The First Part of the Inst. of the Laws of England § 257a (1628; 19th ed., 1832).[2]

If any English scholar rivaled Coke for his influence on the American understanding of the common law, it was Sir William Blackstone who stressed that it is solely the jury's province to "assess the damages ... sustained by the plaintiff in consequence of the injury." 3 W. Blackstone, Commentaries on the Laws of England 376 (1766). Thus, if "damages are to be recovered, a jury must … assess them." *Id.* Summarizing this history, the U.S. Supreme Court recognized:

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[2] Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York,* 445 U.S. 573, 594 (1980). *See also Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 29 (1991) (Scalia, J., concurring) (recognizing Coke's unrivaled influence on American constitution writers). Coke's gloss on Magna Carta, from which the jury right is derived, "was widely accepted and imported by early American colonists who incorporated it into state constitutions." Jennifer Friesen, State Constitutional Law §6.2(a), at 349 n.16 (1996).

> that "by the law the jury are judges of the damages." *Lord Townshend v. Hughes*, 86 Eng. Rep. 994, 994-995 (C.P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Id.*, at 480. And there is overwhelming evidence that the consistent practice at common law was for juries to award damages.

Feltner v. Columbia Pictures Television, 523 U.S. 340, 353 (1998).

In sum, "from the beginning of trial by jury," damages and juries were regarded as inseparable, with "[t]he amount of damages ... a 'fact' to be found by the jurors." Charles T. McCormick, Handbook on the Law of Damages 24 (1935). Thus, courts routinely hold it "a fundamental legal principle that the determination of the quantum of damages in civil cases is a fact-finder's function." *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985).

2. *New Mexico Precedent also Establishes Juries Set Damages.*

New Mexico's Constitution and caselaw unambiguously agree with the conclusions reached through this history and under the U.S. Constitution. Where true issues of fact have been presented, "it is a party's right to have such issues decided by the judgment of his peers under provisions of state and federal constitution." *Sanchez v. Gomez*, 1953-NMSC-053, ¶ 8, 57 N.M. 383, 387.

Unambiguously, this Court held that "[i]t is also within the *exclusive province* of the jury to determine the proper amount for damages." *Hood v. Fulkerson*, 1985-

NMSC-048, ¶ 10, 102 N.M. 677, 679 (emphasis added; citation omitted). *See also Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 16, 127 N.M. 1, 8, ("It is a 'fundamental function of a jury to determine damages.'") (citation omitted). For that reason, a court may not *require* a remittitur, but instead may only suggest it, provided that the plaintiff is also offered the option of a new jury trial, in order "to serve the purposes of art. II, § 12." *Id.* at ¶ 14, 127 N.M. at 8.

C. A Legislated Change to the Jury's Damage Determination Impairs the Jury-Trial Right.

Defendants urge this Court adopt a conceit to permit the MMA cap to override the jury's damage assessment. They concede the jury must determine damages, however they assert the legislative damage limitation merely applies a legal conclusion to the facts. Appellants' Br. 18. Normally, where the law properly restricts jury decision-making, the jury is instructed on the law. *See, e.g., Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶ 8, 118 N.M. 203, 206. Here, the statute specifically precludes informing the jury about the cap, N.M. Stat. Ann. § 41-5-6(A), proving something other than the application of law to facts is occurring.

To Defendants, it is no violation of the jury-trial right if a court reduces both an $800,000 verdict or a $3 million verdict to $600,000. This one-size-fits-all approach is conflicts directly with the concept that tort damages are intended to make the plaintiff whole. *Faber v. King*, 2015-NMSC-015, ¶ 20, 348 P.3d 173, 179.

More importantly, capping damages amounts to a partial abrogation of the jury-trial right as it substitutes a legislative decision on compensation for one that *Hood* held was "within the exclusive province of the jury." 1985-NMSC-048, ¶ 10. The MMA renders superfluous all evidence of injury above the capped amount, while specifically forbidding the jury to assess future medical damages. These results render an "inviolate" right violated.

While Defendants have cited courts that have adopted the same conceit, the U.S. Supreme Court has unanimously rejected the argument. One case relied upon by Defendants and many of the courts they cite is *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989),[3] which tracks Defendant's assertion that a jury has completed its job at the rendering of a verdict and the legislature may impose inconsistent legal consequences to the jury's factual findings. *Boyd*, devoted a scant two paragraphs to this constitutional issue to conclude the jury trial right does not extend to the remedy stage relying on *Tull v. United States*, 481 U.S. 412 (1987). *Boyd*, 877 F.2d at 1196 n.5. This is important because *Tull* upheld provisions of a *statutory* cause of action, the Clean Water Act, that allowed judges to affix the civil penalty after the jury's determination of liability. This statutory cause of action is not analogous to any at

[3] Defendants also cite *Schmidt v. Ramsey*, 860 F.3d 1038, 1045-46 (8th Cir. 2017), for that proposition, but *Schmidt* merely relied upon *Boyd*. In fact, the language Defendants' quote from *Schmidt* is a direct quotation of *Boyd*. Appellants' Br. 21.

common law. The distinction between *unique* statutory and traditional common-law causes of action is critical to proper analysis.

Later in *Feltner*, the defendant invoked *Tull,* as *Boyd* did, to argue, as Defendants do, that the jury's job was completed when they reached their verdict and that the constitutional jury-trial guarantee "does not provide a right to a jury determination of the amount of the award," which instead should be the product of application of the law to the jury's factual findings. *Feltner*, 523 U.S. at 354. The Supreme Court rejected, emphasizing the need to maintain the distinction between common-law actions and new statutory ones, and labeling *Tull's* holding "inapposite" to claims covered by the jury-trial right's historic test. 523 U.S. at 355.

Unlike the ruling in *Tull*, *Feltner* emphatically held that "if a party so demands, a jury must determine the actual amount of ... damages." and that the right established by the Seventh Amendment "includes the right to have a jury determine the amount of . . . damages." *Id.* at 354-55, 353 (emphasis added).

Defendants argue the jury did determine the amount of damages; it is just that the jury's determination is being given different legal consequences so that its verdict must be reduced to the legislature's choice, rather than the evidence of compensation due in the case. Defendants' approach devalues the consequences of the jury's finding and a key prerogative of the jury, thereby impairing the constitutional right. As a result, rather than serve as "judges of damages," the jury is

transformed into a mere advisory body,[4] and the right to jury-assessed damages becomes little more than a right to have an audience at trial with respect to the evidence of injury. Discounting the authority of the jury to an audience plainly impairs its constitutional function. If the legislature could take a jury's factual finding of the amount of damages in a common law action, then there is no limit on how the legislature can interfere with the jury's constitutionally consecrated role and make any factual determination mean either more or less than it actually signifies.

Under *Feltner's* teachings, for a common-law cause of action, like the instant case, the jury's determination of damages is sacrosanct and not subject to legislative revision under the guise of applying the jury's factual determinations to the law. When the legislature caps damages found to exist by the jury, it is playing the role of a super-jury, essentially vetoing the jury's determination and substituting one of its own. This fails "'to preserve the substance of the common-law right of trial by jury,'" as required by the Seventh Amendment, *id.* at 355 (citation omitted), and by Art. II, Section 12's "inviolate" jury-trial right. *See Byers*, 2018-NMCA-023, ¶ 3.

Notably, Defendants' cited case, *Boyd*, also followed and "paraphrase[d]" a Virginia decision, *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989), to hold that "once the jury has made its findings of fact with respect to damages, it has

[4] The Alabama Supreme Court held its damage cap unconstitutional because it reduced the jury's function to "*less* than an advisory status." *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 164 (Ala. 1991) (emphasis in original).

fulfilled its constitutional function." *Id.* at 1196 (footnote omitted). However, *Etheridge* relied on Virginia's weak state jury-trial right, which merely states trial by jury to be "preferable to any other." Va. Const. art. I, § 11. Several state supreme courts criticized the Virginia decision relied upon by *Boyd*, as "poorly reasoned," reflecting an anemic constitutional jury-trial guarantee, and allowing the right "to exist in form but letting it have no effect in function." *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 724 (Wash. 1989). *See also Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 224 n.8 (Ga. 2010); *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 644 (Mo. 2012). The Virginia Supreme Court, in response, later justified its decision by acknowledging its constitutional language provides a weaker jury-trial protection than other states. *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 314 (Va. 1999). Defendants cite *Pulliam* as support. Appellants' Br. 21 n.5, 24 n.7. Virginia's acknowledgement its jury-trial right is feeble advises against following it – and all cases that rely on either *Etheridge* or *Pulliam,* such as *Boyd.*

D. Other State Supreme Courts Have Interpreted their "Inviolate" Jury Right Guarantee Consistently with the Trial Court.

Several sister states, whose constitutions guarantee an "inviolate" jury-trial right, have invalidated similar damage caps,[5] while rejecting the *Boyd* conceit. In

[5] Several states have constitutional provisions explicitly barring damage caps. Many others have invalidated such statutes on a variety of grounds. *See* Appendix I.

2010, the Georgia Supreme Court unanimously held that the state constitution preserved the jury trial right "*in all its essential elements*," including "an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury." *Nestlehutt*, 691 S.E.2d 218, 223 (emphasis in original; citation omitted). The cap, it held, "nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." *Id.*

Similarly, in 2012, Missouri, which also guarantees an inviolate right to a jury trial "as heretofore enjoyed," Mo. Const. art. I, § 22(a), held that "[s]tatutory caps on damages in cases in which the right to trial by jury applies necessarily changes and impairs the right of trial by jury." *Watts*, 376 S.W.3d at 640. The Missouri Supreme Court overruled a prior precedent that had accepted Defendants' formulation of a legal overlay on the jury's factual findings. It found "four flaws" in that rationale. *Id.* at 642. First, it misconstrues the nature of the constitutional right by impairing "one of the most significant constitutional roles performed by the jury—the determination of damages." *Id.* Second, it "permits legislative limitation of an individual constitutional right." *Id.* Third, it mistakenly relied on *Tull* and *Etheridge*. *Id.* at 643, 644. Finally, fourth the conclusion was not based on state precedent. *Id.* at 644.

Recently, the U.S. Court of Appeals for the Sixth Circuit invalidated a punitive damage cap based on Tennessee's "inviolate" state constitutional jury-trial right. *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 369 (6th Cir. 2018). Because in Tennessee assessment of punitive damages is factfinding, it held interference with that determination through a legislative cap was unconstitutional and undercuts the jury's constitutionally preserved assessment of damages, rather than respecting it. *Id.* at 369.

The inescapable truth, as the Florida Supreme Court put it in invalidating a similar cap, is: "Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. "*Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088–89 (Fla. 1987).

E. Government Immunity Cases Provide No Relevant Guidance on the Jury-Trial Issue.

Defendants rely upon *Wachocki v. Bernalillo Cty. Sheriff's Dep't*, 2010-NMCA-021, 147 N.M. 720, *aff'd*, 2011-NMSC-039, 150 N.M. 650, and similar cases from other states that upheld tort claim act caps. Tort claims acts constitute partial waivers of sovereign or governmental immunity. *See id.* at ¶¶ 1, 18. Because there was no common-law or pre-constitutional right to sue a sovereign entity the state is entitled to waive its immunity either entirely or in part, thereby allowing it to set a limit on its own liability to protect the public fisc. *Id.* at ¶ 43. *Wachocki* held plaintiffs had waived their jury-trial right. *Id.* at ¶ 44. As the right was unimplicated

under the historical test and was waived, any further discussion of the jury-trial right was inessential to its holding and constitutes *dicta*. *See Phoenix Indem. Ins. Co. v. Pulis*, 2000-NMSC-023, ¶ 18, 129 N.M. 395.

Even if considered, Defendants' reference to *Wachocki's* statement that "right of access to the courts or the right to a jury [do not] incorporate a right to maximum recovery", 2010-NMCA-021, ¶ 45, fails to refer to the next sentence referencing *Trujillo III*, stating there is no right of "unlimited recovery against the government." *Id.* Moreover, *Wachocki* has no analysis of the jury's role, preserved in the Constitution. It does rely upon *Sandoval v. Chrysler Corp.*, 1998–NMCA–085, ¶¶ 10, 12, 125 N.M. 292 (recognizing that an excessive jury award may be reduced at the discretion of the district court). *Id.* Consistent with the jury-trial right, *Sandoval* recognized any suggestion of a remittitur must be accompanied by the offer of a new jury trial. *Sandoval*, 1998-NMCA-085, ¶ 15. A cap in a common-law case that does not incorporate that alternative and is thus inconsistent with the constitutional right.

Defendants also cite a host of sister states' government immunity cases, which are inapposite for the same reasons. For example, *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 908 N.W.2d 442 (N.D. 2018), involved a statute that gave a limited waiver of governmental immunity for torts committed by a political subdivision. The Court stated that "courts have generally held that statutory caps on damages in actions against political subdivisions do not violate the right to a jury trial." *Id.* at

454. For that proposition it cited *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1043-44 (Or. 2016); *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1130-33 (Pa. 2014) also relied upon by Defendants. Appellants' Br. 22. Lawsuits against government entities covered by immunity did not permit a jury trial before the Constitution's ratification, so a legislative waiver of that immunity can be limited without offending the jury-trial right. *See, e.g., Archibeque v. Moya*, 1993-NMSC-079, ¶ 5, 116 N.M. 616, 618 (acknowledging the limits on waived liability in the Tort Claims Act). The states North Dakota's *Aamodt* decision listed as not applying the jury-trial right to immunity waiver cases, still have constitutional provisions or precedents that prohibit caps in medical malpractice cases, including North Dakota itself. *See Arneson v. Olson*, 270 N.W.2d 125, 135 (N.D. 1978) (relying on equal protection); *Smith*, 507 So. 2d 1080 (Fla.) (access to courts and jury trial); *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 56 (Fla. 2017) (equal protection); Pa. Const. art. 3, §18 (prohibiting legislation that "limit[s] the amount to be recovered for injuries resulting in death, or for injuries to persons or property"). The immunity waiver cases do not aid analysis in this case.

F. Other Cases Relied upon by Defendants Are Readily Distinguishable.

Defendants' cases, often listed in string citations, fail to come to grips with other critical distinctions that render them irrelevant to the inquiry before this Court. For example, Defendants proffer *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989),

Appellants' Br. 21, which solely addressed whether a legislative cap violated the Reexamination Clause of the Seventh Amendment, which "speaks exclusively of the role of the court." *Id.* at 1162. The decision did not address whether a cap on damages violates the right to trial by jury, guaranteed in the *first* clause (the Preservation Clause), which directs the legislative branch to "preserve[]" the right to trial by jury, *Id.*, and which is at issue here.

Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1202 (9th Cir. 2002), upheld Title VII's cap, which has no common-law analogue to which the jury-trial applied. Other cases cited where caps were upheld did not involve challenges based on a jury-trial right or involved its waiver. *See* Appellant's Br. 22-23 n.6 (citing *Aamodt*, 908 N.W.2d 442 (government immunity); *Zauflik*, 104 A.3d 1096 (government immunity); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (upholding arbitration requirement with cap that is inconsistent with *Lisanti*, while non-arbitration caps in Florida have been invalidated); and *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 681 (Cal. 1985) (equal protection). Although some courts have adopted Defendants' reasoning on medical malpractice caps, it is not close to the number Defendants' assert, while many others have ruled consistently with the District Court here.

G. The MMA's Statutory Cause of Action Remains a Medical Malpractice Action Subject to the Constitutional Jury-Trial Right.

As an alternative argument to its "legal consequences" dodge of the jury-trial right, Defendants ignore the Supreme Court precedent cited by the trial court and adopt the view of the Court of Appeals in *Salopek v. Friedman*, 2013-NMCA-087, 308 P.3d 139 (N.M. Ct. App. 2013), arguing the legislature through the MMA "created an entirely new statutory cause of action that was not recognized under the common law." *Id.* at ¶ 50. The argument misapprehends when a statutory cause of action constitutes a sufficiently new basis for liability that it supplants the preexisting one and the applicability of the constitutional jury right. After all, in *Greenwood*, this Court construed the right to jury to cover the "class of cases in which it existed either at common law or by statute at the time of the adoption of the Constitution." *Greenwood*, 63 N.M. at 161 (citation omitted). Medical malpractice cases existed before and do still now during the enactment of the MMA. No change the class of case has occurred and the right to jury trial applies.

1. *The Jury-Trial Right Applies to Analogous Common Law Causes of Action Enforced by Statute.*

When answering the same question about a statutory replacement for a preexisting common-law cause of action for Seventh Amendment questions, in a case this Court has cited with approval, the U.S. Supreme Court held that:

> Although "the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791," the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts

> in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42 (1989) (citing *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).[6]

Similarly, relying on *Granfinanciera* and *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442 (1977), this Court has declared that "the relevant question is whether the *more generally described cause of action*, such as breach of contract or breach of fiduciary duty, was triable to a jury in 1912. *Lisanti*, 2002-NMSC-032, ¶ 13.

The *Granfinanciera* Court further explained that "Congress' power to block application of the Seventh Amendment to a cause of action has limits." 492 U.S. at 51. Those limits allow a legislature to deny trials by jury in actions at law only "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights." *Id.* (internal quotation marks and citation omitted). On the other hand, "[w]holly private tort, contract, and property

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[6] The requisite federal analysis requires a court first to "'compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.'" *Id.* (quoting *Tull*, 481 U.S. at 417). Then, a court "examine[s] the remedy sought and determine[s] whether it is legal or equitable in nature." *Id.* (quoting *Tull*, 481 U.S. at 417-18). Noting that the second inquiry is more weighty than the first, the Court then held that "[i]f, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder." *Id.* (footnote omitted). Thus, a historically based *cause of action* retains the litigant's Seventh Amendment "right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.'" *Id.* at 42 n.4.

cases, as well as a vast range of other cases, are not at all implicated" by the "public rights" authority to impair the jury-trial right. *Id.*

Critically, the Court held that while "Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders, … it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Id.* at 51-52. Simply put, the jury-trial right means that Congress may not "conjure away the Seventh Amendment" by designating the cause of action as equitable or moving it to a different venue. *Id.*

This does not mean that legislatures unequivocally may not "fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." *Id.* at 52. However, when "the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Id.* Thus, in *Granfinanciera*, the fact that the action was brought by a bankruptcy trustee to recover a fraudulent conveyance under a statute did not deprive the litigants of their jury-trial rights, as the statutory cause of action remained a private one and analogous to common-law causes of action that predated promulgation of the Seventh Amendment. *Id.* at 57.

2. *The MMA Does Not Change the Underlying Cause of Action.*

Salopek did not cite *Granfinanciera* to hold that the MMA "creates a statutory cause of action that did not exist at common law." 2013 -NMCA- 087, at ¶ 51, 308 P.3d at 155. To reach its conclusion, *Salopek* notes that some defendants under the MMA may include "individuals or entities with which the plaintiff may not have a physician-patient relationship." *Id.* at ¶ 53, 308 P.3d at 155, citing *Baer v. Regents of Univ. of Cal.*, 1994-NMCA-124, 118 N.M. 685-689. Baer actually states immediately thereafter…

> …*As further support for our decision we note numerous medical malpractices cases decided by New Mexico court* is which defendants other than only physicians are parties. See Roberts… Blauwkamp… Lopez… Lovelace Medical Ctr… These decisions clearly reveal that New Mexico courts recognize that a legal duty exists in medical malpractice actions against defendants other than physicians.

Id. None of these are MMA cases. *Salopek* appears to assert ONLY the MMA creates a change to the physician-patient relationship. This is not the holding of *Baer* and is not accurate.

It also requires a prefiling presentation to a medical claims commission, which, if it finds in favor of the plaintiff, must assist in retaining a physician-expert to testify in favor of the plaintiff. *Id.* at ¶ 51, 308 P.3d at 156. To the *Salopek* Court, this provision of the MMA was decisive, as it noted that "[t]here is no similar statutory precondition to bringing a common law action, and the common law has no requirement for a plaintiff to be provided assistance in securing a medical expert."

Id. at ¶ 54, 308 P.3d at 156. It also credited, as a transformative difference, the MMA's three-year statute of limitations, which lacks the discovery rule available in common-law causes of action, as well as the existence of the cap on damages. *Id.* at ¶¶ 54, 55, 308 P.3d at 156.

For those reasons, the rationale behind the MMA, and "how the Act as a whole accomplishes its purposes," *Salopek* determined that the "Act created a new statutory cause of action not recognized under the common law," and the jury-trial right does not apply. *Id.* at ¶ 58, 308 P.3d at 157. Yet, even if true, those features do not create an entirely new cause of action as required, and *Salopek* is not binding on this Court, *see State v. Wilson*, 1994-NMSC-009, ¶ 6, 116 N.M. 793, 796 (lower court is bound by decisions of the Supreme Court, not the other way around). Its holding is flawed. The test for whether the constitutional jury-trial right applies is historical and based on the legal or equitable nature of the remedy.

The purposes of legislation or the balancing of policy objectives plays no role in determining the Constitutional right to jury. The Constitution's framers made the only policy choice this Court should recognize when they constitutionalized the role of the jury as enjoyed "heretofore" as "inviolate." No doubt, the framers were familiar with the federal constitutional debates, where Federalist and Anti-Federalist alike understood the critical importance of preserving the jury's station and authority as a "security" intended "to preserve the purity [of the judiciary]," The Federalist

No. 83, at 499-501 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and as "the democratic branch of the judiciary power." Essays by a Farmer No. IV (Mar. 21, 1788), *reprinted in* 5 The Complete Anti-Federalist, at 36, 38 (Herbert J. Storing ed., 1981). Trust in the jury system was so great that Thomas Jefferson "stressed that the civil jury should be constitutionalized because the legislature should not be able to alter this institution that had helped secure the freedom to think and act, freedom with which the government had interfered." Suja A. Thomas, *The Missing Branch of the Jury*, 77 Ohio St. L.J. 1261, 1280 (2016). Policy "considerations are insufficient to overcome the clear command of the Seventh Amendment." *Curtis*, 415 U.S. at 198.

Moreover, as established earlier, actions to recover damages for medical malpractice were brought at law in late 14th-century England, 18th-century America and in 19th-century New Mexico. The underlying elements of a medical malpractice claim and the burden a plaintiff must meet remain unchanged under the MMA. Compare *Diaz v. Feil*, 1994-NMCA-108, ¶ 5, 118 N.M. 385, 388 (duty recognized by law; breach from community standard for medical practice; and proximate cause. Changing peripheral aspects of the cause of action but maintaining the core elements of it fails to create a new statutory cause of action that did not exist at the common law. *Granfinanciera* held "analogous actions" were still subject to the constitutional jury-trial right. Actions brought under the MMA are more than analogous; the

burden of proof, the conduct at issue, the standard involved, the duty, the breach, the causation requirement and the damage are all identical.

To permit the legislature to make changes to the statute of limitations or pre-filing requirements does not establish a new statutory cause of action but maintains an existing one. The changes made are the same a legislature may make to any common-law cause of action without transforming it into a new one. To permit changes like these, even with an illusory benefit, is to give the Legislature dominion over the constitutional right to trial by jury. To borrow *Lisanti's* language, approval would "allow the evisceration of the right to a jury trial on traditional common law claims" when a statute adds mere decoration to the proceeding and falsely labels it as something new. *See* 2002-NMSC-032, ¶ 13. No canon of constitutional construction permits such a legislative override of a constitutional command. The MMA remains indistinguishable from a common-law medical malpractice action and thus must comport with the right to a jury trial. It does not.

II. THE MMA VIOLATES EQUAL PROTECTION AND DUE PROCESS.

New Mexico's Constitution guarantees that "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." N.M. Const. art. II, § 18. Equal protection requires "similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment." *Wagner v. AGW Consultants*, 2005–NMSC–016, ¶ 21, 137

N.M. 734. Substantive due process requires any deprivation of a protected interest "bear a reasonable and valid relationship to public morals, health, or safety." *Mills v. New Mexico State Bd. of Psychologist Examiners*, 1997-NMSC-028, ¶ 14, 123 N.M. 421, 426. This Court utilizes the "same standards of review" for both equal protection and due process. *Marrujo v. New Mexico State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 9, 118 N.M. 753, 757.

A. Ms. Siebert Plainly Has Standing to Raise Equal Protection and Due Process.

Defendants bizarrely assert Ms. Siebert lacks standing to raise the equal-protection and due-process violations she suffers under the MMA. The equal-protection analysis requires a determination "whether the legislation creates a class of similarly situated individuals and treats them differently" and then an application of the appropriate level of scrutiny to "determine whether the legislative classification is constitutional." *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 9, 378 P.3d 13, 19.

The MMA clearly treats medical malpractice plaintiffs differently. First, it differentiates whether the malpractice they suffered was at the hands of a "qualified" or "non-qualified" health care provider. This is unknown to a patient. Compensatory damages against the former are capped, but not against the latter, even when both have committed the same exact act of malpractice causing the same exact damage to

their patient. The "qualified" vs. "non-qualified" status of the defendant does not transform injured patients into people differently situated.

Even within the class of patient suing qualified providers, medical-malpractice plaintiffs are treated differently depending on whether their damages fall within or exceed the $600,000 aggregate cap. Those with lesser injuries will receive full compensation in their jury verdict, while those catastrophically injured, perversely, are denied the full compensation in their jury verdict. This inverse relationship for a malpractice victim's very serious injury, like permanent brain damage or death violates equal protection. *Cf. Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (1991) (holding the effect of the noneconomic damage cap "'preclude[d] only the most seriously injured victims of medical negligence from receiving full compensation for their injuries,'" and recognized an equal protection violation for the dissimilar treatment.) Ms. Siebert falls within both classes of similarly situated plaintiffs treated differently (those who sue qualified providers and those whose damages are large enough they are reduced by the cap). Her standing is clear.

B. The MMA Cap Fails Any Level of Constitutional Scrutiny.

Under *Rodriguez*, the next question is the requisite level of scrutiny. A challenge to a statute must meet the compelling interest test under "strict scrutiny if it affects the exercise of a fundamental right or a suspect classification." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 16, 125 N.M. 721, 726. However, if a

statute "impacts important but not fundamental rights, or sensitive but not suspect classifications, intermediate scrutiny is warranted, and we require the State to demonstrate that the law is substantially related to an important government purpose." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 739. Finally, at the lowest level of scrutiny, a statute must be rationally related to a legitimate government purpose." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734.

The right to a jury trial is definitely affected here and is unquestionably a fundamental right, requiring the application of strict scrutiny. If it were somehow lesser, then it would be an important right, meriting intermediate scrutiny. Defendants' claim otherwise, noting *Trujillo*, applied the rational-basis test after "conclud[ing] that the right of access to the courts does not create a right to unlimited government tort liability." 1998-NMSC-031, ¶¶ 23, 26.

Defendants' reliance on *Cummings v. X-Ray Assocs. of New Mexico, P.C.*, 1996-NMSC-035, ¶ 20, 121 N.M. 821, 828, is also misplaced. *Cummings* applied rational scrutiny because state courts always apply it to statutes of limitation and repose and the only constitutional right raised was access to the courts. *Id.* at ¶ 20.

Nor can the cap correctly be characterized as mere economic legislation, which "must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a

different rule" for the class that suffers the discrimination. *Rodriguez*, 2016-NMSC-029, ¶ 1. The discrimination here is between more seriously and less seriously injured malpractice victims, but that provides no just and proper class distinction. There is no "marketplace" for the serious injuries Ms. Siebert suffered, such that the cap regulates economic policy concerning that discriminated class. To claim the cap is economic regulation of money judgments against tortfeasors misdirects the inquiry and would justify the imposition of any cost, like a poll tax on voters, to be transformed into economic regulation. Such an analysis is untenable. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating poll tax).

If rationale basis, even the rational-basis test is not "toothless," *Trujillo*, 1998-NMSC-031, ¶31, and the cap fails any level of scrutiny that might be applied. The MMA declares that its purpose is to make professional liability insurance for health care providers available in New Mexico. N.M.S.A. § 41-5-2. It was enacted based on the "widely-held perception that a medical malpractice crisis existed in the state" and triggered by the withdrawal of Travelers Insurance as underwriter of the medical society's professional liability program. Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L. Rev. 5, 7 (1977).[7] The legislation was enacted

[7] The same article opines that the MMA "encroaches on traditional judicial powers" in violation of separation of powers (Kovnat, *Id.* at 24), and that experience of insurance premiums could show it violates equal protection (*Id.* at 26-27). The right to jury trial is not analyzed.

even though experience showed that malpractice losses did not exceed what the premium rates being charged doctors would bear. *Id.* at 26.

Defendants suggest that a perceived "crisis" forty-three years ago used to diminish the force of the constitutional objections at the time of the MMA's enactment somehow justifies the cap's extraordinary invasion of constitutional rights on a permanent basis. A crisis is a temporary condition and, as Justice Holmes wrote, a "law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924). The evidentiary trial proved there is no malpractice crisis.

Today, the MMA is plainly not needed to secure malpractice insurance for health-care providers. An entire analysis of the New Mexico medical malpractice insurance landscape was performed prior to the evidentiary hearing and testified to by an acknowledged expert in insurance, J. Robert Hunter. **[Plaintiff's Ex. 10]** (Full Report, CV and Appendices) This analysis had never been done by the New Mexico Office of the Superintendent of Insurance. **[1 Tr. 283:5] [Plaintiff's Ex. 41]** "New Mexico has higher medical malpractice insurance rates that states without caps…" Ten carriers "write medical malpractice coverage under the MMA," and "most doctors opt out of the MMA's protective scheme … [and] buy medical malpractice insurance on the open market to cover potential liability for medical negligence." *Id.*

It is less-expensive, and physicians are choosing to be "non-qualified" under the MMA and practice with no cap. "The change to a much higher cap or no cap at all can be done for little or no increase in physician medical malpractice costs." The District Court found, based on the evidence, that professional liability New Mexico now boasts more than 100 insurance carriers available to healthcare providers, that they remain profitable, and that premium rates are stable. Slip Op. 5. Plainly, no crisis exists today justifying discrimination against patients. As was testified to by expert J. Robert Hunter, in New Mexico the only beneficiaries of the MMA are the insurance companies who make more profit for paying out less in damages. See **[TR 5-30-17; pp.46:22 – 166:16], [Plaintiff's Exs. 10 - 12], [Plaintiff's Ex. 30], [Plaintiff's Ex. 40], [Plaintiff's Ex. 57], [Plaintiff's Ex. 61], [Plaintiff's Ex. 63], [Plaintiff's Ex. 126].**

Moreover, evidence established that "perceived"[8] crises, like the one that impelled enactment of the MMA, are the product of a prior well-known insurance cycle. Robert B. McKay, *Rethinking the Tort Liability System: A Report From the ABA Action Commission*, 32 Vill. L. Rev. 1219, 1219-21, 1221 (1987). *See***[Plaintiff's Ex. 13], [Plaintiff's Ex. 17], [Plaintiff's Ex. 31], [Plaintiff's Ex.**

[8] See the analysis of the MMA and the "perceived" crisis by Justices Baca, Ransom and Montgomery in *Roberts v. S.W. Cmty Health Servs*, 1992-NMSC-042, ¶6, 114 N.M. 248, 249.

75], [Plaintiff's Ex. 80], [Plaintiff's Ex. 82], [Plaintiff's Ex. 84], [Plaintiff's Ex. 96], [Plaintiff's Ex. 100], [Plaintiff's Ex. 107], [Plaintiff's Ex. 121]

On physician supply; the preeminent study from the International Review of Law and Economics, by Hyman, Silver, Black and Paik examined the pre and post-tort reform impacts of the Texas cap based on data from the Texas Department of State Health Services, not the Texas Medical Board data which fails to show actual working physicians. Texas was compared to itself, both pre and post-cap and compared to other states. Entitled "*Does tort reform affect physician supply? Evidence from Texas*", International Review of Law and Economics, 42 (2015) 203-218, **[Plaintiff's Ex. 100]** the research showed:

> In Texas, tort reform proponents blamed the absence of a damages cap for Texas's failure to attract physicians and credited adoption of a cap for an extraordinary increase in the number of physicians. We find no evidence to support either claim. Physician supply was not stunted prior to reform, and it did not measurably improve after reform. This is true whether one looks at the number of patient care physicians in Texas, the number of Texas physicians in high malpractice-risk specialties and in rural areas, or the number of physicians per capita in Texas relative to other states.

Id. at 217.

Further, caps interfere not just with compensation of the severely injured malpractice victim but the overall purpose of tort law to make society safer, by deterring wrongful behavior. In a recent Johns Hopkins study, medical malpractice was recently found to be the third leading cause of death in the United States. **[Plaintiff's Ex. 1]**. A Harvard Public Health study found that the malpractice cases

get it right in holding wrongdoers responsible. **[Plaintiff's Ex. 4]**. The New England Journal of Medicine found patient safety is improved through malpractice cases. **[Plaintiff's Ex. 3 and 7]** And in death cases, this Court has spoken loudly and often, the *Brice* court recently stated:

> …New Mexico's WDA was intended to replace the common-law rule barring recovery in cases of wrongful death so as to allow recovery and to discourage and punish negligent behavior by corporations. This Court has articulated a two-fold purpose behind the WDA: (1) "to compensate the statutory beneficiaries and to deter negligent conduct" (*Romero v. Byers*, 1994–NMSC–031, ¶ 17, 117 N.M. 422, 872 P.2d 840), and (2) to "promote safety of life and limb by making negligence that causes death costly to the wrongdoer." Stang v. Hertz, 1970–NMSC–048, ¶ 9, 81 N.M. 348, 467 P.2d 14; see also Trujillo v. Prince, 1938–NMSC–024, ¶ 17, 42 N.M. 337, 78 P.2d 145 ("[The WDA] has to some degree an objective of public punishment and was designed in part at least to act as a deterrent to the negligent conduct of others and thereby promote the public safety and welfare.").

Brice v. Toyota Motor Corp., 2016-NMSC-018, ¶20. The MMA is supplanting the express public policy of New Mexico and giving a special class of wrong-doers a contrary exception. This should not stand.

The extensive record below shows caps do not reduce premiums or otherwise improve the availability and affordability of health care, and that states with and without cap statutes experience a similar malpractice environment, *see also Estate of McCall v. United States*, 134 So. 3d 894, 906-15 (Fla. 2014) (invalidating cap on rational-basis review and reciting empirical data), the record is compelling. As one supreme court stated, "[i]t is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most

severely injured and therefore most in need of compensation." *Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980), overruled on other grounds by *Comty. Res. for Justice, Inc. v. City of Manchester*, 917 A.2d 707 (N.H. 2007). As the Florida Supreme Court found in 2017,

> "We conclude that the caps on non-economic damages … arbitrarily reduce damage awards for plaintiffs who suffer the most drastic injuries. We further conclude that because there is no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination between medical malpractice victims, there is no rational relationship between person injury noneconomic damage caps in section 766.118 and alleviating this purported crisis. Therefore, we hold that the caps on personal injury noneconomic damages provided in section 766.118 violate the Equal Protection Clause of the Florida Constitution.

N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017). New Mexico should do the same.

III. ORDER AWARDING COSTS [8 RP 1819]

Defendants waived the appeal and argument regarding the Order Awarding Costs by failing to raise it in the Brief in Chief. *See State v. Triggs*, 2012, NMCA-68 ¶¶13-14 (Stating the general rule that this Court will not address arguments not raised in the brief in chief); See also, *State v. Castillo-Sanchez*, 1999 NMCA 85, ¶ 20, 984 P.2d 787. (Appellate courts will refuse to entertain a new issue raised in a reply brief). Plaintiff has also filed a Motion to Strike of the issues for completeness.

CONCLUSION

The decision below should be affirmed.

REQUEST FOR ORAL ARGUMENT

The "inviolate" right to jury trial in a civil case, along with the constitutional rights of a severely injured malpractice victim's right to equal protection and due process under the New Mexico Medical Malpractice Act raises issues of substantial public interest and impact on the Plaintiff-Appellee. As such she respectfully requests this Court permit oral argument.

CERTIFICATE OF SERVICE

Plaintiff-Appellee, by and through her counsel of record, hereby certifies that the foregoing pleading was filed through the Odyssey File and Serve electronic filing system, which caused a copy to be served automatically on all counsel of record this 8th day of April, 2019.

/s/ Lisa K. Curtis, Esq.
Lisa K. Curtis, Esq., (Bar No. 7659)