IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Chenille Condon, Plaintiff-Appellee, v. St. Alexius Medical Center; and Allen Michael Booth, M.D., Defendants-Appellants.	)	Supreme Court No. 20180297 District Court No. 08-2014-CV-1904

Appeal from Judgment Entered June 5, 2018, in the
District Court, South Central Judicial District, Burleigh County,
The Honorable Cynthia M. Feland, Presiding

AMICI CURIAE BRIEF OF NORTH DAKOTA MEDICAL ASSOCIATION, NORTH DAKOTA HOSPITAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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STATEMENT OF THE ISSUE

[¶1] *Amici* address whether North Dakota's statutory limit on noneconomic damages in health care liability actions, N.D.C.C. § 33-42-02, is constitutional.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

[¶2] *Amici* are the leading associations representing North Dakota physicians and hospitals. We have a substantial interest in the constitutionality of N.D.C.C. § 33-42-02. The cap is critical to making available affordable professional liability insurance for North Dakota healthcare providers. Without it, liability insurance costs would rise, making healthcare less affordable and available for North Dakotans. The challenges that North Dakota faces with respect to attracting and retaining physicians would worsen.

STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶3] No party's counsel authored this brief in whole or part. No party or its counsel contributed money intended to fund the brief. No person, other than the *amici*, their members, or counsel, contributed money intended to fund the brief.

LAW AND ARGUMENT

I. REASONABLE LIMITS ON MEDICAL LIABILITY IMPROVE THE HEALTH CARE SYSTEM FOR DOCTORS AND PATIENTS

[¶4] Every citizen in North Dakota needs access to affordable health care. N.D.C.C.§ 33-42-02 furthers that goal while providing a substantial recovery to the minority of patients who may be injured due to medical negligence and suffer extraordinary noneconomic loss. Overall, the cap is pro-consumer.

[¶5] Damages limits are important for controlling outlier awards. They reduce and stabilize medical liability insurance rates, improve access to critical specialists, lessen the incentive to engage in defensive medicine, and facilitate settlements.

A. Lower Insurance Premiums, Losses, and Settlement Payments

[¶6] Damages caps reduce losses on medical malpractice claims, *see* Patricia Born et al., *The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses*, 76 J. Risk & Ins. 197 (2009); W. Kip Viscusi & Patricia Born, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. Risk & Ins. 23 (2005),[1] and stabilize or lower medical liability insurance premiums. *See* Am. Med. Ass'n, *Medical Liability Reform NOW!*, at 11-13 (2018 ed) [hereinafter AMA Rep.]; Mark Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 Obstetrics & Gynecology 335 (Aug. 2011).

[¶7] On average, internal medicine premiums are 17.3% less in states with limits on noneconomic damages than in states without limits. AMA Rep. at 11. Limits on damages have an even greater impact on doctors practicing in other specialties. Physicians in general surgery and obstetrics/gynecology experience 20.7% and 25.5% lower premiums, respectively, in states with damage caps compared to states without limits. *See id.*

[¶8] As a 2006 Robert Wood Johnson literature review concludes, "the most recent controlled studies show that caps moderately constrain the *growth* of premiums." Michelle Mello, *Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms*, Research Synthesis Rep. No. 10, at 12 (Robert Wood Johnson Found. 2006)

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[1] *See also* Ronald Stewart, *Malpractice Risk and Cost are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011).

(emphasis added). A significant body of literature also shows that caps are associated with lower premiums and settlement payments.[2]

B. Increased Access to Care

[¶9] "Many studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state." Robert Barbieri, *Professional Liability Payments in Obstetrics and Gynecology,* 107 Obstetrics & Gynecology 578, 578 (Mar. 2006); *see also* AMA Rep. at 2-4 (discussing studies).

[¶10] States that limit noneconomic damages generally experience increases in physician supply per capita compared to states without caps. *See* William Encinosa & Fred Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005); Ronald Stewart et al, *Tort Reform is Associated With Significant Increases in Texas Physicians Relative to the Texas Population*, 17 J. Gastrointest. Surg. 168 (2013).

[¶11] North Dakota is not isolated in the economy; it must compete with other states. If the state's medical liability climate is not stable and competitive, doctors will practice elsewhere. *See* Chiu-Fang Chou & Anthony Lo Sasso, *Practice Location Choice by New*

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[2] *See also* Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomed. L. 69, 84 (2008) ("It is clear . . . across a number of rigorous studies using a variety of data periods, measures and methods, damage caps have been shown to be effective in reducing medical malpractice insurance premiums."); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. Legal Stud. S183, S221 (June 2007) (study of more than 100,000 settled cases showed that caps on noneconomic damages "do in fact have an impact on settlement payments"); U.S. Dep't of Health & Human Servs., *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 15 (2002) ("[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps . . . and states without meaningful caps.").

Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation, 44 Health Serv. Res. 1271 (2009); Daniel Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (2005). Indeed, the legislature considered the challenge North Dakota faces in recruiting and retaining qualified healthcare professionals and serving geographically dispersed communities when it enacted the statutory limit. *See* Slip Op. at ¶40.

C. Less Defensive Medicine

[¶12] "[T]he fear of being sued . . . leads to an increase in the quantity of care rather than an increase in the efficiency or quality of care." Scott Spear, *Some Thoughts on Medical Tort Reform,* 112 Plastic & Reconstructive Surgery 1159 (Sept. 2003); *see also* AMA Rep. at 4-7 (discussing studies); Timothy Smith et al., *Defensive Medicine in Neurosurgery: Does State-Level Liability Risk Matter?*, 76 Neurosurgery 105 (Feb. 2015) (neurosurgeons are 50% more likely to practice defensive medicine in high-risk states); Brandon Roberts & Irving Hoch, *Malpractice Litigation and Medical Costs in Mississippi*, 61 Health Econ. 841 (2007) (finding Mississippi's more litigious counties had higher per beneficiary Medicare Part B expenditures).

[¶13] Defensive medicine also manifests itself in physicians eliminating high-risk procedures and turning away high-risk patients. *See* Brian Nahed et al., *Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons*, PLOS ONE, Vol. 7, at 6 (2012) ("Reductions in offering 'high-risk' cranial procedures have decreased access to care for potentially life-saving neurological procedures.").

[¶14] A survey of high-risk specialists in Pennsylvania found that 93% of them practice defensive medicine. *See* David Studdert et al., *Defensive Medicine Among High-Risk*

Specialist Physicians in a Volatile Malpractice Environment, 293 JAMA 2609, 2609 (June 2005); *see also* Manish K. Sethi et al., *Incidence and Costs of Defensive Medicine Among Orthopedic Surgeons in the United States: A National Survey Study*, 41 Am. J. Orthop. 69 (2012) (96% of orthopedic surgeons surveyed reported having practiced defensive medicine to avoid liability).

[¶15] In Massachusetts, 83% of physicians reported practicing defensive medicine. 28% of all CT scans, 27% of MRI studies, and 24% of ultrasound studies were ordered for defensive reasons. 38% of physicians in the sample reduced the number of high-risk services or procedures they performed; 28% reduced the number of high-risk patients they saw. *See* Mass. Med. Soc'y, *Investigation of Defensive Medicine in Massachusetts*, at 3-5 (Nov. 2008).

[¶16] Most recently, a peer-reviewed study examined the effect of damage caps on specific testing and treatment decisions for coronary artery disease, the leading cause of death in the United States. *See* Steven Farmer et al., *Association of Medical Liability Reform with Clinician Approach to Coronary Artery Disease Management*, 10 JAMA Cardiology E1, E2 (June 2018). After adoption of caps, "testing became less invasive (fewer initial angiographies and less progression from initial stress test to angiography), and revascularization through [percutaneous coronary intervention following initial testing declined." *Id.* at E8; *see also* Daniel Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, 25 J. Econ. Perspectives 93, 106 (2011) ("reforms such as caps on damages . . . that have a direct effect on awards reduce malpractice pressure and, in turn, defensive medicine.").

[¶17] "[M]alpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9 percent in hospital expenditures without substantial effects on mortality or medical complications." Donald Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y, L. & Ethics 371, 377 (2005) (citing Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. of Econ. 353 (1996)); Leonard Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomed. L. 69, 84 (2008) (a link exists "between the adoption of malpractice reforms and the reduction in defensive medical practices").

II. LIMITING LIABILITY IS SOUND POLICY

[¶18] North Dakota is not alone in placing a reasonable limit on medical liability that fairly compensates persons with injuries caused by medical negligence while promoting access to affordable healthcare for all citizens. About half of the states have limited noneconomic damages in medical liability actions.[3] Several more limit noneconomic damages in all personal injury claims.[4] A few states cap a plaintiff's total damages.[5]

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[3] *See* Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Iowa Code § 147.136A; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H; Mich. Comp. Laws § 600.1483; Miss. Code Ann. § 11-1-60(2)(a); Mo. Rev. Stat. § 538.210; Mont. Code Ann. § 25-9-411; Nev. Rev. Stat. § 41A.035; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code § 2323.43; S.C. Code Ann. § 15-32-220; S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code § 74.301; Utah Code § 78B-3-410; W. Va. Code Ann. § 55-7B-8.

[4] *See* Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5; Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. Ann. §§ 60-19a01, 60-19a02; Md. Cts. & Jud. Proc. Code § 11-108; Miss. Code Ann. § 11-1-60(2)(b); Ohio Rev. Code Ann. § 2315.18; Okla. Stat. tit. 23, § 61.2; Tenn. Code Ann. § 29-39-102.

[5] *See* Ind. Code § 34-18-14-3; La. Rev. Stat. § 40:1299.42; Neb. Rev. Stat. § 44-2825; Va. Code Ann. § 8.01-581.15.

[¶19] The vast majority of state courts have upheld limits on damages in medical liability cases, including limits on noneconomic damages[6] and total recoveries.[7] In addition, many courts have upheld limits on noneconomic damages that apply to personal injury,[8] product liability,[9] and other claims.[10] Courts have also upheld other restrictions on damages.[11]

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[6] *See, e.g., Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Chan v. Curran*, 237 Cal. App. 4th 601 (2015); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Miller v. Johnson,* 289 P.3d 1098 (Kan. 2012); *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Estate of Needham ex rel. May v. Mercy Mem. Nursing Ctr.*, 2013 WL 5495551 (Mich. App. 2013); *Johnson v. Henry Ford Hosp.*, 2005 WL 658820 (Mich. App. 2005); *Jenkins v. Patel*, 688 N.W.2d 543 (Mich. App. 2004); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002); *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234 (Nev. 2015); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996), *superseded by statute*; *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *MacDonald v. City Hosp., Inc.,* 715 S.E.2d 405 (W. Va. 2011); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678 (Wis. 2018).

[7] Medical liability total caps: *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.,* 509 S.E.2d 307 (Va. 1999); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989); *Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989). Alternative medical liability remedies: *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912 (Fla. 2013); *Indiana Patient's Comp. Fund v. Wolfe*, 735 N.E.2d 1187 (Ind. App. 2000); *Bova v. Roig*, 604 N.E.2d 1 (Ind. App. 1992); *St. Anthony Med. Ctr. v. Smith*, 592 N.E.2d 732 (Ind. App. 1992); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007); *King v. Va. Birth-Related Neurological Injury Comp. Program*, 410 S.E.2d 656 (Va. 1991).

[8] *See C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. App. 1998); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Samsel v. Wheeler Transp. Servs., Inc.,* 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *McGinnes v. Wesley Med. Ctr.*, 224 P.3d 581 (Kan. App. 2010); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Green v. N.B.S., Inc.*, 976 A.2d 279 (Md. 2009); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990); *Simpkins v. Grace Brethren*

[¶20] Federal courts have consistently upheld caps on noneconomic damages in medical liability[12] and civil actions generally,[13] as well as caps on total damages.[14] The U.S. Supreme Court has said:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Church of Del., 75 N.E.3d 122 (Ohio 2016); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

[9] *See Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. App. 2004); *Kenkel v. Stanley Works*, 665 N.W.2d 490 (Mich. App. 2003).

[10] *See, e.g., Peters v. Saft*, 597 A.2d 50 (Me. 1991) (actions against alcohol servers).

[11] *See, e.g., Quackenbush v. Super. Ct. (Congress of Cal. Seniors),* 60 Cal. App. 4th 454 (1997) (actions by uninsured motorists and drunk drivers); *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972 (1997); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004) (vicarious liability of automobile lessors); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (uninsured motorists).

[12] *See Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267, 1271 (D. N.M. 2002).

[13] *See Learmonth v. Sears, Roebuck & Co.,* 710 F.3d 249 (5th Cir. 2013); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996); *Clarendon Nat'l Ins. v. Phillips*, 2005 WL 1041479 (D. Idaho 2005); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989).

[14] *See Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017) (Nebraska cap); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (Virginia cap).

Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (citations omitted).

[¶21] Applying this principle, the Tenth Circuit has observed, "When a legislature strikes a balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life." *Patton v. TIC United Corp.*, 77 F.3d 1235, 1246-47 (10th Cir. 1996) (internal quotations and alterations omitted).

[¶22] The Fifth Circuit held that Mississippi's noneconomic damages cap did not violate the right to jury trial by interfering with jury's fact-finding role or the separation of powers. *See Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013).

[¶23] A few state courts have nullified noneconomic damage limits,[15] but the clear trend is to uphold such legislation. "Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps." Carly Kelly & Michelle Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005).

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[15] *See, e.g., Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Lebron v Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012); *Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49 (Fla. 2017); *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), *superseded by constitutional amendment*, Tex. Const. art III, § 66 (amended 2003); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Rains v. Stayton Builders Mart, Inc.*, 410 P.3d 336 (Or. Ct. App. 2018); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989), *amended*, 780 P.2d 260 (Wash. 1989).

[¶24] More than twice as many state courts of last resort have upheld damages caps than have struck them down, including with respect to jury trial,[16] separation of powers,[17] or equal protection[18] challenges.

[¶25] For example, when West Virginia's highest court upheld a $500,000 medical liability noneconomic damages cap, the court observed that its decision was "consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice or in any personal injury action." *MacDonald v. City Hosp., Inc.,* 715 S.E.2d 405, 421 (W. Va. 2011).

[¶26] With regard to the right to a jury trial, the Virginia Supreme Court has explained, "although a party has a right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." *Etheridge v. Medical Center Hosps.*, 376 S.E.2d 525, 529 (Va. 1989).[19] The Fifth Circuit has similarly reasoned that a limit on damages "comports with a judge's role of applying the

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[16] Courts have upheld caps on damages in right to jury trial challenges notwithstanding state guarantees that the right to jury trial shall remain "inviolate," as Article I, § 12, of the North Dakota Constitution. *See L.D.G., Inc. v. Brown,* 211 P.3d 1110, 1131 (Alaska 2009); *Fein*, 695 P.2d at 680; *Kirkland*, 4 P.3d at 1120; *Johnson*, 404 N.E.2d at 602; *Samsel*, 789 P.2d at 555; *DRD Pool Serv.*, 5 A.3d at 57; *Wessels*, 689 N.W.2d at 595; *Arbino*, 880 N.E.2d at 432; *Pulliam,* 509 S.E.2d at 315.

[17] *See Miller,* 289 P.3d at 670-75; *MacDonald,* 715 S.E.2d at 415; *Arbino,* 880 N.E.2d at 484; *Garhart*, 95 P.3d at 581; *Gourley*, 663 N.W.2d at 956; *Evans*, 56 P.3d at 1055-56; *Judd*, 103 P.3d at 145; *Kirkland*, 4 P.3d at 1122; *Etheridge*, 376 S.E.2d at 532; *Pulliam,* 509 S.E.2d at 319; *McGinnes*, 224 P.3d at 592; *Wessels*, 689 N.W.2d at 533; *Zdrojewski*, 657 N.W.2d at 739.

[18] *See, e.g., MacDonald*, 715 S.E.2d at 418; *DRD Pool Serv.*, 5 A.3d at 57; *Arbino*, 880 N.E.2d at 424; *Butler*, 607 So. 2d at 521; *Fein*, 695 P.2d at 683; *Rose*, 801 S.W.2d at 846; *Mayo*, 914 N.W.2d at 692.

[19] *See also Davis*, 883 F.2d at 1161 (it is not the jury's role to "determine the legal consequences of its factual findings").

law to the jury's factual findings—that is, converting the jury's award into 'the award of the law.'" *Learmonth*, 710 F.3d at 260 (citation omitted).

[¶27] Courts have repeatedly rejected the argument that a statutory limit on damages unconstitutionally intrudes on the judiciary's power to order remittitur. "[A] statutory damages cap is not judicial-type remittitur; instead, such a limitation is a legitimate exercise of legislative power." *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004). The "trial court retains its authority to reduce by remittitur an award it determines to be excessive" and "the cap applies equally to all . . . plaintiffs, whereas remittitur operates on a case-by-case basis." *Id.* at 582; *see also Learmonth*, 710 F.3d at 264-65 (recognizing Mississippi's general noneconomic damages cap sets a non-discretionary limit on the permissible legal remedy; it does not impact remittitur, which permits a judge to suggest that the plaintiff accept a lower award if a verdict was influenced by "bias, passion, or prejudice," or is "contrary to the overwhelming weight of credible evidence"); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 77 (Neb. 2003) ("[T]he damages cap does not act as a legislative remitter" because "[t]he cap does not ask the Legislature to review a specific dispute and determine the amount of damages.").

[¶28] As discussed above, the legislature's rational basis for enacting the law to help ensure that North Dakota's doctors could obtain professional liability insurance coverage precludes an equal protection challenge. *See also* North Dakota Health Task Force, *Final Recommendations on Health Care Reform* 17 (June 27, 1994) (capping noneconomic damages with unlimited damages for economic loss "will provide adequate compensation

to persons injured as a result of negligent medical treatment, but will avoid excessive claims for intangible losses.").

[¶29] Courts upholding laws similar to N.D.C.C. § 32-42-02 have rejected invitations to "second-guess the Legislature's reasoning behind passing the act." *Gourley*, 663 N.W.2d at 69; *accord C.J. v. Dep't of Corrections*, 151 P.3d 373, 381 (Alaska 2006); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 434 (Ohio 2007); *Murphy v. Edmonds*, 601 A.2d 102, 115 (Md. 1992). Most recently, the Wisconsin Supreme Court held that it "will not reweigh the policy choices of the legislature, because rational basis review does not allow us to substitute our personal notions of good public policy for those of' the legislature." *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 698 (Wis. 2018) (internal citations and alterations omitted).

[¶30] Only one state high court in recent years has reweighed legislative findings to invalidate a noneconomic damage cap as lacking a rational basis. *See N. Broward Hosp. Dist. v. Kalitan,* 219 So.3d 49, 56-59 (Fla. 2017) (extending *Estate of McCall v. United States*, 134 So. 3d 894, 905-12 (Fla. 2014) (plurality opinion)). The Florida ruling is an extreme outlier. It departs from federal constitutional law[20] and other state courts find it unpersuasive.[21]

[¶31] Because of the inherent strengths of the legislative process, this Court should respect the legislature's authority to decide policy for North Dakota.[22] North Dakota's noneconomic damages cap carefully balances the interests of medical injury plaintiffs

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[20] *See Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011).

[21] *See, e.g., Chan v. Curran*, 237 Cal. App. 601, 620 (Cal. Ct. App. 2015).

[22] *See* Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688 (2001).

having extraordinary noneconomic loss with the interests of all citizens to access affordable health care.

CONCLUSION

[¶32] For these reasons, *amici* urge the Court to reverse the decision below and declare N.D.C.C. § 33-42-02 to be constitutional.

Respectfully submitted,

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Dated: November 30, 2018

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Chenille Condon, Plaintiff-Appellee, v. St. Alexius Medical Center; and Allen Michael Booth, M.D., Defendants-Appellants.	)))))))))))	Supreme Court No. 20180297 District Court No. 08-2014-CV-1904

AFFIDAVIT OF SERVICE

[¶1] I, Courtney Koebele, being duly sworn on oath, deposes and states that she is of legal age and that on November 30, 2018, she served the foregoing electronically on:

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500 N. Ninth Street
Bismarck, ND 58501-4509

[¶2] And, being duly sworn on oath, deposes and states that on November 30, 2018, she served the foregoing Motion by placing true and correct copies in an envelope addressed as follows:

Shawn Gates
P.O. Box 364
Fort Yates, ND 58538

[¶3] And depositing the same, with postage prepaid, in the U.S. Mail at Bismarck.

Dated this 30th day of November, 2018.

Courtney M. Koebele

[¶4] Subscribed and sworn to before me this 30th day of November, 2018.

Notary Public

My Commission Expires:

KATHLEEN E. VOGELPOHL
Notary Public
State of North Dakota
My Commission Expires Feb. 10, 2020