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Caps Off to Juries: Noneconomic Damage Caps in Medical Malpractice Cases Ruled Unconstitutional

I. INTRODUCTION

In 2005 the Georgia General Assembly (General Assembly) passed a controversial tort reform bill in an effort to reduce the cost of medical liability insurance for health care providers.[1] In this bill, the legislature put a cap of $350,000 on noneconomic damages (pain and suffering) for medical malpractice cases.[2] On March 22, 2010, the Georgia Supreme Court in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*[3] held these caps unconstitutional on grounds that they violate the state constitutional right to jury trial.[4] By ruling on these grounds, the court was able to avoid weighing in on the competing interests of the medical industry and medical malpractice plaintiffs, which would have required an equal

1. Ga. S. Bill 3, Reg. Sess., 2005 Ga. Laws 1 (codified in scattered sections of titles 9, 24, 33, 43, and 51 of the O.C.G.A.).
2. *Id.* § 13, 2005 Ga. Laws at 16-17.
3. 286 Ga. 731, 691 S.E.2d 218 (2010).
4. *Id.* at 731, 691 S.E.2d at 220.

protection or due process analysis. The court, therefore, circumvented the politics of tort reform by way of a right to jury trial analysis.

II. FACTUAL BACKGROUND

In 2005 Betty Nestlehutt became a patient of Atlanta Oculoplastic Surgery, P.C. d/b/a Oculus (Oculus) and, in January 2006, underwent a facelift and full face CO_2 laser resurfacing, performed by Dr. Harvey P. Cole III.[5] The procedure unintentionally cut off blood flow to Mrs. Nestlehutt's face, causing wounds to form from her temple to chin.[6] As a result of the surgery, Mrs. Nestlehutt became permanently disabled and disfigured. In April 2007, Mrs. Nestlehutt and her husband filed a medical malpractice action in Fulton County State Court against Oculus and Dr. Cole, alleging damages for medical expenses, pain and suffering, and loss of consortium.[7]

After a mistrial, the case was re-tried in 2008, resulting in a jury verdict of $1,265,000, consisting of $115,000 for medical expenses, $250,000 for loss of consortium, and $900,000 in noneconomic damages for pain and suffering.[8] After the jury returned a verdict, the Nestlehutts moved the trial court to hold the Georgia statute placing caps on noneconomic damages, section 51-13-1 of the Official Code of Georgia Annotated (O.C.G.A.),[9] unconstitutional.[10] In February 2009 the trial court granted the motion, finding O.C.G.A. § 51-13-1 violated the right to jury trial, the separation of powers doctrine, and equal protection, and ruled the statute unconstitutional on all three grounds.[11] The trial court subsequently entered judgment in the full amount awarded by the jury: $1,265,000.[12]

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5. Complaint for Damages at para. 6, Nestlehutt v. Atlanta Ocoluplastic Surgery, P.C., No. 2007EV002223J (Ga. State Ct. 2007), 2007 WL 5720583.

6. Bill Rankin, *Georgia High Court Considers Tort Reform Law*, ATLANTA J. CONST., Sept. 15, 2009, www.ajc.com/news/georgia-high-court-considers-139073.html.

7. Complaint for Damages, *supra* note 5, at paras. 1, 8, 13.

8. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 731, 691 S.E.2d 218, 220 (2010).

9. O.C.G.A. § 51-13-1 (Supp. 2010).

10. Brief in Support of Plaintiff's Motion for Entry of Judgment on the Verdict and for a Declaration of Unconstitutionality for O.C.G.A. § 15-13-1, Nestlehutt v. Atlanta Oculoplastic Surgery, P.C., No. 2007ev002223j (Ga. State Ct. 2008), 2008 WL 4888267.

11. Order Declaring O.C.G.A. § 51-13-1 Unconstitutional, Nestlehutt v. Atlanta Oculoplastic Surgery, P.C., No. 2007EV002223-J (Ga. State Ct. 2009), 2009 WL 348361.

12. *Id.*

In June 2009, after a motion for a new trial was denied, the defendant, Oculus, appealed.[13] Numerous briefs were filed independently and collaboratively in support of Oculus, including briefs by Emory Healthcare;[14] the Georgia and American Hospital Associations;[15] the Medical Association of Georgia, the American Medical Association, and the American Tort Reform Association;[16] and the Medical Association of Georgia Mutual Insurance Company (MAG Mutual) and the Physician Insurers Association of America.[17] Mrs. Nestlehutt responded,[18] and briefs were also filed in her support, including briefs by the AARP[19] and briefs filed on behalf of individuals and former medical malpractice plaintiffs.[20]

On March 22, 2010, the Georgia Supreme Court affirmed the trial court's ruling that O.C.G.A. § 51-13-1 was unconstitutional.[21] The court held that the caps, by limiting awards of noneconomic damages in medical malpractice cases, violated the state constitutional right to a jury trial.[22] The court also held that the decision would apply retroactively.[23]

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13. Appellant's Brief at 3, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 2954781.

14. Brief of Emory Healthcare, Inc., as Amicus Curiae, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 2954780.

15. Amicus Curiae Brief on Behalf of the Georgia Hospital Ass'n and the American Hospital Ass'n, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 6690445.

16. Amici Curiae Brief of the Medical Ass'n of Georgia et al., *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 6690449.

17. Brief on Behalf of Amici Curiae MAG Mutual Insurance Co. and the Physician Insurers Ass'n of America, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 6690452.

18. Brief of Appellees, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 2954779.

19. Brief Amici Curiae of AARP et al. in Support of Appellees, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 6690447.

20. *See, e.g.*, Brief of Amici Curiae Hugh D. Broome, Jr. and Brenda Broome, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 6690450; Brief of Amicus Curiae Jesse Outland et al. in Support of Appellees, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 6690455; Brief of Appellee Amicus Curiae Robin Frazer Clark, *Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (No. S09A1432), 2009 WL 6690456.

21. *Nestlehutt*, 286 Ga. at 740, 691 S.E.2d at 226.

22. *Id.* at 731, 691 S.E.2d at 220.

23. *Id.* at 740, 691 S.E.2d at 226.

III. LEGAL BACKGROUND

Effective February 16, 2005, the noneconomic damage caps set forth in O.C.G.A. § 51-13-1(b) to (e)[24] were the result of a heated legislative debate. Given the legislative history and frequency of constitutional challenges to noneconomic damage caps nationwide, it was not surprising when the caps began to be challenged in Georgia.

A. Legislative History of O.C.G.A. § 51-13-1

The capping of noneconomic damages was a part of a larger tort reform act passed by the General Assembly in 2005 in Senate Bill 3 (SB 3),[25] also known as the Georgia Tort Reform Act of 2005.[26] The Georgia Tort Reform Act was purposed on a finding by the legislature that a health care "crisis" exists in Georgia and that medical malpractice actions have caused the crisis by creating increased difficulty and expense for doctors and hospitals in obtaining liability insurance.[27] The legislature found the difficulty in obtaining insurance caused a decrease in the availability of health care services in Georgia.[28] The

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24. O.C.G.A. § 51-13-1(b) to (e) (Supp. 2010). In pertinent part, the statute reads as follows:

> (b) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.
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> (c) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against a single medical facility, . . . the total amount recoverable by claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00 . . . .
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> (d) In any verdict returned or judgment entered in a medical malpractice action, . . . the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00 from any single medical facility and $700,000.00 from all medical facilities, regardless of the number of defendant medical facilities against whom the claim is asserted or the number of separate causes of action on which the claim is based.
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> (e) In applying subsections (b), (c), and (d) of this Code section, the aggregate amount of noneconomic damages recoverable under such subsections shall in no event exceed $1,050,000.00.

Id.

25. Ga. S. Bill 3, Reg. Sess., 2005 Ga. Laws 1 (codified in scattered sections of titles 9, 24, 33, 43, and 51 of the O.C.G.A.).

26. *Id.*

27. *Id.* § 1, 2005 Ga. Laws at 1.

28. *Id.* § 1, 2005 Ga. Laws at 1-2.

legislature posited that creating stricter limitations on medical malpractice claims and awards would increase "predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and [would] thereby assist in promoting the provision of health care liability insurance by insurance providers."[29] One of the arguments made by the bill's sponsor, Senator Preston Smith, was that MAG Mutual, Georgia's largest physician insurer, agreed to continue to honor a 10% rollback of insurance premiums if the bill were enacted.[30]

Capping noneconomic damages in medical malpractice lawsuits was one controversial reform measure that the legislature adopted in SB 3.[31] The history of the noneconomic damage caps in the Georgia Tort Reform Act can be traced back to a failed tort reform effort in 2004: House Bill 1028 (HB 1028).[32] The failure of HB 1028 was largely due to concern about an amendment capping noneconomic damages much like the provision at issue.[33] The amendment was initially rejected by the Georgia Senate but later resurfaced in conference committee, creating an impasse in negotiations and ultimately causing the entire tort reform bill to fail.[34] Many senators believed that the noneconomic damages cap was introduced in the amendment by those opposed to tort reform because it was a "poison-pill," unlikely to pass at all.[35] Other senators believed that MAG Mutual pushed "unrealistically" for the damage caps.[36]

Tort reform efforts continued in 2005, and noneconomic damage caps returned in SB 3.[37] In response to the failure of HB 1028, Senator Smith encouraged engrossing the 2005 bill because it was "not well perfected on the floor of the Senate" in 2004.[38] The engrossment of SB

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29. *Id.* § 1, 2005 Ga. Laws at 2.

30. Hannah Yi Crockett et al., *Torts and Civil Practice*, 22 GA. ST. U. L. REV. 221, 237 (2005). MAG Mutual is also an advocate for tort reform. *See* Brief on Behalf of Amici Curiae MAG Mutual Insurance Co. and the Physician Insurers Ass'n of America, *supra* note 17, at 1-2.

31. Ga. S. Bill 3 § 13, 2005 Ga. Laws at 16-17.

32. Ga. H.R. Bill 1028, Reg. Sess. (2004) (unenacted).

33. David Boohaker et al., *Health, Torts, and Civil Practice*, 21 GA. ST. U. L. REV. 178, 179, 193 (2004). Amendment 23C of H.R. Bill 1028 proposed a limit of $250,000 in noneconomic damages towards a single defendant and a limit of $750,000 for multiple defendants. *Id*. at 193.

34. *Id.* at 193-94.

35. *Id.* at 184-85 (internal quotation marks omitted).

36. *Id.* at 194-95.

37. Ga. S. Bill 3 § 13, 2005 Ga. Laws at 16-17.

38. Hannah Yi Crockett et al., *supra* note 30, at 231 (internal quotation marks omitted).

3 ensured that the bill–and the noneconomic damage caps therein–would not be debated and amended in conference committee.[39] Georgia senators voted, 29 to 25, to engross the bill and passed it on a vote of 38 to 15.[40] The Senate's willingness to pass tort reform in 2005, as opposed to 2004, may be attributed to the November 2004 elections, which changed the makeup of the legislature.[41] Ultimately, SB 3 was passed by both houses and signed into law on February 16, 2005.[42]

B. Challenges to the Constitutionality of Noneconomic Damage Caps in Georgia

After the caps were in place, medical malpractice plaintiffs began challenging the constitutionality of the caps in Georgia courts. In April 2008, in *Park v. Wellstar Health System, Inc.,*[43] the Fulton County Superior Court issued a declaratory judgment holding that the noneconomic damage caps in O.C.G.A. § 51-13-1[44] were unconstitutional.[45] In *Park* the plaintiff fell off a ladder and was taken to the emergency room, had surgery, and was rendered a paraplegic. The plaintiff filed a medical malpractice suit against the defendants and filed a motion for declaratory judgment challenging the constitutionality of SB 3.[46]

The court found that the damage caps violated the equal protection requirement in the Georgia State Constitution[47] by making a distinction between tortfeasors generally and medical malpractice defendants in particular.[48] The court further found that the cap applied "to the heart of the substance of an injured person's tort claim," which is directly tied to a party's right to jury trial, distinguishing the cap from other tort reform efforts that applied to procedural issues.[49] The court reasoned that "the jury's verdict will be written down by operation of the caps whenever the jury concludes that the actual pain and suffering was

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39. *Id.*
40. *Id.* at 231, 233.
41. *Compare* Georgia General Assembly Voting Records, Senate Voting Record HB 1028 (adoption of Amendment 23(c)), *available at* http://www.legis.state.ga.us/legis/2003_04/votes/sv1095.htm, *with* Georgia General Assembly Voting Records, Senate Voting Record SB 3, *available at* http://www.legis.state.ga.us/legis/2005_06/votes/sv0023.htm.
42. Ga. S. Bill 3 § 16, 2005 Ga. Laws at 18.
43. No. 2007CV135208, 2008 WL 2068203 (Ga. Super. Ct. Apr. 30, 2008).
44. O.C.G.A. § 51-13-1 (Supp. 2010).
45. *Park*, 2008 WL 2068203.
46. *Id.*
47. GA. CONST. art. I, § 1, para. 2; GA. CONST. art. III, § 6, para. 4.
48. *Park*, 2008 WL 2068203.
49. *Id.*

greater [and] [t]o that extent, the jury's award is a meaningless exercise"; therefore, the caps interfered with the jury's role.[50]

Rather than deciding the caps violated the right to jury trial, which the court conceded would be enough to render the caps unconstitutional, the court used the jury trial right as a basis for its equal protection analysis, holding the jury's authority to award the amount of damages to be a fundamental right.[51] In applying a mid-level scrutiny test, the court determined there was not a substantial relationship between the classification of noneconomic damage caps[52] and the legislative objective to remedy the health care crisis.[53] The court was not convinced that noneconomic damages had to be limited "to allow the medical profession to function effectively."[54]

Although the court, in dicta, addressed the caps' infringement on a jury's determination,[55] the right to jury trial was not addressed in *Park*. Further, after this order was entered, the parties in *Park* settled, and the 2008 ruling of the Fulton County Superior Court was never appealed.[56] Therefore, in *Nestlehutt*,[57] the constitutionality of noneconomic damage caps was an issue of first impression for the Georgia Supreme Court.[58]

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50. *Id.*

51. *Id.*

52. The court held that the caps had the effect of treating rich and poor plaintiffs differently and treating those who were seriously injured versus those who were moderately injured differently as well. *Id*. First, by only capping noneconomic damages, the wealthy would continue to be able recover a large amount of money based in economic damages due to their high projected future incomes. *Id*. Meanwhile, the poor and middle class would be able to recover only a very limited amount of money due to their low future projected earnings, resulting in low economic damages and would be limited by the caps in noneconomic damages as well. *Id*. Second, the court held that the caps were unconstitutional in treating persons with different degrees of injury differently by fully compensating persons with noneconomic injuries under $350,000 and limiting noneconomic recovery to persons who suffer the most with noneconomic injuries greater than $350,000. *Id*.

53. *Id*.

54. *Id.*

55. *Id*.

56. *See Statutory Ceiling on Damages in Medical Malpractice Actions is Unconstitutional* (Georgia 2009), MED. LIABILITY REP., http://www.medical-liability-reporter.com/MLR_Damages_2.html (last visited Apr. 17, 2011); *Tort Reform Challenge–Park v. Wellstar et al. MAG Mutual's Official Statement*, MAG MUTUAL, http://www.magmutual.com/pr_marketing/MM-TortReform-Statement.html (last visited Apr. 17, 2011).

57. 286 Ga. 731, 691 S.E.2d 218 (2010).

58. *Id.* at 738-39, 691 S.E.2d at 225.

C. Challenges to Constitutionality of Noneconomic Damage Caps in Other States

The constitutionality of noneconomic damage caps has been addressed by courts in other states with mixed results. In states with constitutions that have similar inviolate-right-to-jury-trial language, the issue of whether damage caps unconstitutionally violate this right has created an ideological split about the scope of the jury trial right. Challenges to caps have generally resulted in two types of rulings: courts have found that either (1) the caps infringe on an inviolate right to jury trial by interfering with the jury's fact-finding role in determining damages (by potentially altering what the jury found was proper)[59] or (2) the caps do not infringe on any right to jury trial, as they are applied as a matter of law after the jury has reached its verdict.[60] Courts on both sides are highly persuaded by opinions in other states and cite them often.[61]

In the last twenty years, beginning with the Washington Supreme Court in *Sofie v. Fibreboard Corp.*[62] and later refined by the Oregon Supreme Court in *Lakin v. Senco Products, Inc.,*[63] states taking the position that caps violate the right to jury trial have developed an historical methodology with increasing depth.[64] This method involves four components, beginning with an analysis of the state's constitutional provision regarding the inviolate right to jury trial, construed as a guarantee immune from modification.[65] Second, courts make an historical inquiry into the causes of action for which a right to jury trial existed at the time of the adoption of their state constitutions, finding that a right to jury trial existed for medical malpractice claims.[66]

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59. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 162 (Ala. 1991); Lakin v. Senco Prods., Inc., 987 P.2d 463, 472-73 (Or. 1999); Sofie v. Fibreboard Corp., 771 P.2d 711, 720 (Wash. 1989).

60. *See, e.g.*, Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1120 (Idaho 2000); Murphy v. Edmonds, 601 A.2d 102, 116-17 (Md. 1992); Arbino v. Johnson & Johnson, 880 N.E.2d 420, 431 (Ohio 2007).

61. *See, e.g.*, *Sofie*, 771 P.2d at 723 (noting similar "inviolate" language in the other states' constitutions that was "highly persuasive").

62. 771 P.2d 711 (Wash. 1989).

63. 987 P.2d 463 (Or. 1999).

64. *See generally Lakin*, 987 P.2d 463; *Sofie*, 771 P.2d 711. *But cf. Moore*, 592 So. 2d 156 (departing from an in-depth historical analysis but reaching the same conclusion, holding caps on noneconomic damages unconstitutional in violation of the right to jury trial).

65. *Lakin*, 987 P.2d at 467-68; *Sofie*, 771 P.2d at 716.

66. *Lakin*, 987 P.2d at 468-70 (examining the history of the guarantee of trial by jury beginning with the Magna Carta, starting with English common law by using Blackstone's commentaries and early American state constitutional provisions guaranteeing the right

Third, courts determine the scope of the jury's role, which includes the finding of damages as an issue of fact.[67] This determination of damages includes noneconomic damages.[68] Fourth, these courts reason that, although the caps are in effect after the jury verdict is issued, the effect of the caps interferes with the function of the jury and is therefore unconstitutional.[69]

Further, courts holding the caps unconstitutional explain their position by distinguishing remittitur, the process allowing a judge to reduce a damage award in cases of excess, from damage caps.[70] The courts reason that judicial remittitur is "fundamentally different" from caps because remittitur is a legal finding that the jury's damage amount is unsupported by the evidence, made on a case-by-case basis, with a constitutional presumption in favor of the jury, and with the plaintiff having the option of accepting the reduction or having a new trial.[71] Courts reason that caps, on the other hand, are mandatory, leaving the plaintiff with no option for a new trial and leaving no room for judicial discretion.[72] These courts also argue that the state legislatures have the ability to modify laws but are always limited by state constitutions.[73]

This methodology is also mirrored by states that uphold caps as constitutional, to a point. States upholding the caps (1) consult their constitutions, (2) find that the right to a jury trial applies only for actions existing at the time of adoption of their constitutions, (3) concede that medical malpractice actions are in the class of actions guaranteeing a right to jury trial, and (4) hold that the jury's fact-finding function includes the determination of all damages.[74] These courts, however, define the function and role of the jury differently. They hold that modification of a jury verdict through statutory caps does not infringe on the jury's role because the legislature has power to modify causes of

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to jury trial); *Sofie*, 771 P.2d at 718.

67. *Lakin*, 987 P.2d at 470; *Sofie*, 771 P.2d at 716-17 (quoting James v. Robeck, 490 P.2d 878, 881 (Wash. 1971)).

68. *Sofie*, 771 P.2d at 717.

69. *Id.* at 721.

70. *Lakin*, 987 P.2d at 471; *Sofie*, 771 P.2d at 720-21.

71. *Sofie*, 771 P.2d at 721.

72. *Lakin*, 987 P.2d at 472.

73. *Id.* at 473; *Sofie*, 771 P.2d at 719.

74. *See generally Kirkland*, 4 P.3d 1115; *Murphy*, 601 A.2d 102; *Arbino*, 880 N.E.2d 420.

action[75] and applying the caps is a matter of law after the jury has reached its verdict.[76]

Whether damage caps unconstitutionally violate the right to jury trial has created a split amongst courts regarding the power of juries. In this area of law, state courts are strongly persuaded by decisions of other states, adopting similar methodology and reasoning nationwide on both sides. The approach to right-to-jury-trial challenges, with respect to noneconomic damage caps, has developed in the last twenty years and provides a basis for the Georgia Supreme Court's analysis in *Nestlehutt*.[77]

IV. COURT'S RATIONALE

In *Nestlehutt*[78] Chief Justice Hunstein of the Georgia Supreme Court addressed the constitutionality of O.C.G.A. § 51-13-1,[79] which set forth noneconomic damage caps for medical malpractice awards.[80]

A. A Unanimous Majority: Noneconomic Damage Caps Unconstitutional

The court held that noneconomic damage caps are unconstitutional, in violation of the right to jury trial guaranteed by the Georgia State Constitution,[81] and did not address the separation of powers or equal protection challenges.[82] Chief Justice Hunstein conducted the right to jury trial analysis using the same historic methodology set forth by *Lakin v. Senco Products, Inc.*,[83] making four key points: (1) the Georgia Constitution guarantees the right to jury trial; (2) medical malpractice cases are of the class of cases for which a jury trial was guaranteed; (3) the right to jury trial includes the jury's responsibility to determine

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75. *Murphy*, 601 A.2d at 116 (holding that the caps do not infringe on the jury's role because they are a matter of law, not fact, and that the legislature simply "abrogat[ed] or modif[ied] a cause of action" by putting the caps in place).

76. *Kirkland*, 4 P.3d at 1120 (holding that juries have the duty to assess damages but cannot "dictate through an award the legal consequences of" the verdict); *Arbino*, 880 N.E. 2d at 431 (holding that modifications to verdicts after the fact-finding process do not intrude upon the findings of the jury because caps are applied as a matter of law outside of the jury's function and reasoning that remittitur and double/treble damage awards are examples of the court's willingness to apply law and change a jury's verdict).

77. *See* 286 Ga. 731, 691 S.E.2d 218.

78. 286 Ga. 731, 691 S.E.2d 218 (2010).

79. O.C.G.A. § 51-13-1 (Supp. 2010).

80. *Id*. § 51-13-1(b) to (e).

81. GA. CONST. art I, § 1, para. 11(a).

82. *Nestlehutt,* 286 Ga. at 738, 691 S.E.2d at 224.

83. 987 P.2d 463 (Or. 1999).

damages, including both economic and noneconomic damages; and (4) by requiring the court to reduce a noneconomic damages award, O.C.G.A. § 51-13-1 interferes with the jury's role and therefore violates the right to jury trial.[84] The court then addressed and rejected the appellant's arguments by distinguishing noneconomic damages from other types of damages and by distinguishing remittitur from damage caps.[85] The court concluded by holding that its decision applies retroactivly.[86]

Chief Justice Hunstein began by turning to the jury trial provision in the Georgia Constitution that states, "The right to trial by jury shall remain inviolate."[87] The court explained that this right is guaranteed "only with respect to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798."[88] The court, per *Lakin,* examined the common law of England prior to 1798 and relied on Blackstone, "whose commentaries constituted the law of [Georgia], before and since the Revolution," noting that medical malpractice claims existed in England in the eighteenth century.[89] The court noted that medical malpractice actions existed in early American common law and also pointed out that medical malpractice claims were some of the first types of cases reported in Georgia case law.[90] Based on this historical analysis, the court held that medical malpractice claims existed when the Georgia Constitution was adopted in 1798; therefore, a right to jury trial was guaranteed.[91]

Chief Justice Hunstein then examined the scope of the right to jury trial and considered it well established that damages are an issue of fact for the jury to determine.[92] After holding that damages fall within the scope of the right to jury trial guaranteed by the Georgia Constitution, the Georgia Supreme Court held that noneconomic damages in particular are within this scope as well, as an element of total damages.[93] The court concluded that, because the right to jury trial for medical malpractice claims existed at the adoption of the Georgia

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84. *Nestlehutt,* 286 Ga. at 733-36, 691 S.E.2d at 221-23.
85. *Id.* at 736-38, 691 S.E.2d at 223-24.
86. *Id.* at 740, 691 S.E.2d at 226.
87. *Id.* at 733, 691 S.E.2d at 221 (internal quotation marks omitted); *see also* GA. CONST. art. I, § 1, para. 11(a).
88. *Nestlehutt*, 286 Ga. at 733, 691 S.E.2d at 221 (quoting Benton v. Ga. Marble Co., 258 Ga. 58, 66, 365 S.E.2d 413, 420 (1988)) (internal quotation marks omitted).
89. *Id.* at 733-34, 691 S.E.2d at 221-22 (quoting Rouse v. State, 4 Ga. 136, 145 (1848)).
90. *Id.* at 734, 691 S.E.2d at 222.
91. *Id.* at 735, 691 S.E.2d at 223.
92. *Id.* at 734, 691 S.E.2d at 222 (quoting Dimick v. Schiedt, 293 U.S. 474, 480 (1935)).
93. *Id.* at 735, 691 S.E.2d at 222.

Constitution, this right included the determination of all damages, including noneconomic damages.[94]

Once the court established that there is a right to jury trial in medical malpractice claims, the court held that noneconomic damage caps infringed on the inviolate right to jury trial pursuant to the analysis in other states.[95] The court expressly held that "caps, in any amount, [are] violative of the right to trial by jury"[96] and O.C.G.A. § 51-13-1 is unconstitutional.[97]

Chief Justice Hunstein then addressed and systematically rejected the appellant's arguments on appeal.[98] First, the court distinguished noneconomic damages from punitive damages, caps on which the court has upheld as constitutional.[99] Punitive damages, the court reasoned, are not within the scope of the right to jury trial because they are generally not part of fact finding.[100] Instead, punitive damages are purposed to punish or deter a defendant, not to compensate a plaintiff.[101] Thus, caps on punitive damages do not interfere with the jury trial right.[102] The court also noted that the cases involving punitive damages, relied on by the appellant, were not resolved on grounds of right to jury trial, but rather on equal protection or due process grounds.[103]

Second, Chief Justice Hunstein opined that the legislature has the ability to modify common law and "define, limit, and modify available legal remedies," but the legislature cannot do so by infringing on the right to jury trial in existing causes of action for which jury trials are guaranteed.[104] The court reasoned that, if the legislature wants to get rid of medical malpractice claims, they must do so openly by abrogating the entire claim, not by limiting a constitutional right tied to the claim.[105] Further, while the legislature may create statutes increasing damages found by a jury via double or treble damages, these increases

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94. *Id.* at 735, 691 S.E.2d at 223.
95. *Id.* at 735-36, 691 S.E.2d at 223.
96. *Id.* at 736, 691 S.E.2d at 223.
97. *Id.* at 738, 691 S.E.2d at 224.
98. *Id.* at 736-38, 691 S.E.2d at 223-24.
99. *Id.* at 736, 691 S.E.2d at 223 (citing State v. Moseley, 263 Ga. 680, 436 S.E.2d 632 (1993); Teasley v. Mathis, 243 Ga. 561, 255 S.E.2d 57 (1979)).
100. *Id*.
101. *See id.* (quoting Cooper Indus. Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 (2001)).
102. *Id.*
103. *Id.*
104. *Id.* at 737, 691 S.E.2d at 224.
105. *Id.* at 736, 691 S.E.2d at 223.

are unlikely to attach in cases in which the right to jury trial is guaranteed, and, even if they did, these increases do not limit the jury's findings, but "affirm the integrity" of those findings.[106]

Chief Justice Hunstein also distinguished caps on noneconomic damages from judicial remittitur, which allows a judge to reduce an excesive damage award under the judge's constitutional authority to grant new trials.[107] The court reasoned that judicial remittitur is "carefully circumscribed" and is applied only when the damages are so "excessive as to any party as to be inconsistent with the preponderance of the evidence."[108] Further, remittitur is not automatically triggered if the judge finds the award to be excessive because the plaintiff has a choice to agree to the new award or have a new trial.[109]

Finally, the court addressed the holdings of other jurisdictions raised by the appellant that have found noneconomic damage caps constitutional.[110] The court found contrary holdings in other jurisdictions to be unpersuasive either because the language in the other states' constitutions is different from the "inviolate" language in the Georgia Constitution[111] or because the reasoning set forth by those courts was unpersuasive generally.[112]

B. Retroactivity

After holding the O.C.G.A. § 51-13-1 noneconomic damage caps unconstitutional, the court ruled that this holding applies retroactively.[113] Generally, when a statute is held unconstitutional the ruling applies retroactively.[114] To determine if there was reason to deviate from the default rule of retroactivity, the court applied the three-part test adopted in *City of Atlanta v. Barnes*[115] by the Georgia Supreme Court.[116]

The test is comprised of the following factors:

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106. *Id.* at 737, 691 S.E.2d at 224.

107. *Id.*; *see also* O.C.G.A. § 51-12-12(b) (2009).

108. *Nestlehutt*, 286 Ga. at 737-38, 691 S.E.2d at 224 (internal quotation marks omitted); *see also* O.C.G.A. § 51-12-12(b).

109. *Nestlehutt*, 286 Ga. at 737, 691 S.E.2d at 224.

110. *See id.* at 738 n.8, 691 S.E.2d at 224 n.8.

111. *Id.*

112. *Id.*

113. *Id.* at 740, 691 S.E.2d at 226.

114. *See id.* at 738, 691 S.E.2d at 225 (quoting City of Atlanta v. Barnes, 276 Ga. 449, 452, 578 S.E.2d 110, 114 (2003)).

115. 276 Ga. 449, 578 S.E.2d 110 (2003).

116. *Nestlehutt*, 286 Ga. at 738, 691 S.E.2d at 225; *see also* Barnes, 276 Ga. at 452, 578 S.E.2d at 114.

> (1) whether the decision in question established a new principle of law either by overruling past precedent or deciding an issue of first impression, the resolution of which was not clearly foreshadowed; (2) whether retroactive application would further or retard the operation of the rule in question; and (3) whether retroactive application would result in substantial inequitable results.[117]

In applying the test, the court held that it was not unexpected that the caps would be struck down because they had been in place for only five years and the constitutionality of noneconomic damage caps had been litigated nationwide.[118] Second, the court determined that the retroactive application of the decision would further the holding that the right to jury trial includes the right to uncapped noneconomic damages.[119] Third, the court held that the result of retroactive application would not cause substantially inequitable results because there was no proof that appellant's litigation strategy would have been different had it known the caps were invalid.[120] Lastly, the court noted that this decision did not entitle the appellant to a new trial because the trial court did not err: the trial court correctly ruled that the statute was unconstitutional.[121]

C. Concurrence: Retroactivity Application

Justice Nahmias, joined by Presiding Justice Carley and Justice Hines, specially concurred.[122] While Justice Nahmias agreed that retroactive application is proper, he disagreed with the court's use of the three-part test.[123] Instead, Justice Nahmias argued that the Supreme Court of the United States, which had originally devised the three-part test in *Chevron Oil Co. v. Huson*,[124] had abandoned the *Chevron* test in *Harper v. Virginia Department of Taxation*[125] in 1993.[126] Justice Nahmias reasoned that Georgia has generally followed federal law in the area of retroactivity and should continue to do so by avoiding the three-part test.[127] Justice Nahmias argued the court wrongly disregarded

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117. *Nestlehutt*, 286 Ga. at 738, 691 S.E.2d at 225.
118. *Id.* at 738-39, 691 S.E.2d at 225.
119. *Id.* at 739, 691 S.E.2d at 225.
120. *Id.*
121. *Id.* at 740 n.10, 691 S.E.2d at 226 n.10.
122. *Id.* at 740, 691 S.E.2d at 226 (Nahmias, J., concurring).
123. *Id.* at 741, 691 S.E.2d at 226.
124. 404 U.S. 97, 106-07 (1971).
125. 509 U.S. 86 (1993).
126. *Nestlehutt*, 286 Ga. at 741, 691 S.E.2d at 226 (Nahmias, J., concurring).
127. *See id*. at 742, 691 S.E.2d at 227.

the principles of *Harper* by unanimously endorsing the *Chevron* test again in *Findley v. Findley*[128] in 2006, arguing that once a law is unconstitutional, that law is forbidden by the constitution, not by the court via the *Chevron* test.[129]

V. IMPLICATIONS

The Georgia Supreme Court ruling that noneconomic damage caps are unconstitutional[130] has practical implications for Georgians and citizens of other states nationwide. This decision also has implications for proponents of tort reform in Georgia, making it difficult, if not impossible, for noneconomic caps to return in any form via the General Assembly.

A. Practical Implications for Georgians

At its most basic level, the removal of noneconomic damage caps means that medical malpractice plaintiffs can recover more money for noneconomic losses, should the jury so find. This will have a direct impact on medical malpractice plaintiffs and plaintiffs' attorneys. Medical malpractice cases are expensive to try for plaintiffs because, in addition to their complex nature, plaintiffs' attorneys must conduct extensive medical research, go through a lengthy discovery process, and consult with medical professionals.[131] If the case proceeds to trial, the plaintiff must produce expert testimony for the court[132] with an additional hearing prior to trial regarding the expert's qualifications.[133] These stringent expert requirements have been set forth by law as another component of tort reform.[134] For these reasons, and because most plaintiffs' attorneys work on a contingency fee basis, plaintiffs' expenses often meet or exceed five figures, and only cases that could yield major damages justify the expense.[135]

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128. 280 Ga. 454, 629 S.E.2d 222 (2006).

129. *Nestlehutt,* 286 Ga. at 742-43, 691 S.E.2d at 227-28 (Nahmias, J., concurring).

130. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 738, 691 S.E.2d 218, 224 (2010).

131. RICHARD E. SHANDELL ET AL., THE PREPARATION AND TRIAL OF MEDICAL MALPRACTICE CASES § 2.02 (2010), *available at* 2003 WL 23519014.

132. *See* CHARLES R. ADAMS III, GEORGIA LAW OF TORTS § 5-1.1(a)(1), at 215 (2010-2011 ed. 2010).

133. *See id.* § 5-1.1(b)(1), at 218.

134. *See id.* § 5-1.1(b)(2), at 219.

135. SHANDELL ET AL., *supra* note 131, § 2.02 (stating "[n]o case without significant permanent injury can possibly support the work necessarily involved in the successful prosecution of a medical malpractice claim").

The 2005 caps on noneconomic damages created a further disincentive for plaintiffs' attorneys to take on medical malpractice cases. This was particularly true for complex cases that would have been more expensive to try, even if the negligence involved was egregious and would likely have resulted in a large award. Now that the caps have been lifted, the cost-benefit analysis has changed, and plaintiffs' attorneys may now be willing to shoulder more expenses up front, knowing that the ultimate judgment could justify the expense. As the Fulton County Superior Court predicted in *Park v. Wellstar Health System, Inc.*[136] in 2008, lifting the caps will allow greater access to the courts for those who are the most seriously injured and for those whose damages are mostly noneconomic, generally the poor and middle class.[137] Also, although the number of medical malpractice suits may increase as a result of this ruling, there is no evidence or indication that this will cause an increase in frivolous lawsuits. Plaintiffs' attorneys will remain reluctant to take on medical malpractice cases that are frivolous or have little chance of succeeding because out-of-pocket expenses can already be so high, with or without caps.

The impact of more medical malpractice suits on insurance costs and health care in Georgia is difficult to assess and predict, although parties on both sides are willing to do so. Opponents of tort reform, including the State Bar of Georgia, argue that "'tort reform' will not solve or greatly affect the insurance premium crisis" in Georgia[138] and reference other states where caps did not impact the costs of malpractice insurance premiums.[139] On the other hand, proponents of tort reform, including MAG Mutual, argue that medical malpractice claims have decreased since the 2005 tort reform effort and that insurance premiums for Georgia physicians have not increased since 2005.[140] Parties on both sides of the tort reform debate offer various studies and statistics in support of their positions.[141] However, these findings are unpersua-

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136. No. 2007CV135208, 2008 WL 2068203 (Ga. Super. Ct. Apr. 30, 2008) (granting motion to strike and entering declaratory judgment that O.C.G.A. § 51-13-1 (Supp. 2010) is unconstitutional).

137. *See id.*

138. State Bar of Georgia Position Regarding Amending the Tort System in Georgia (publication date uncertain) (copy on file with the Author).

139. State Bar of Georgia Position on Caps on Damages and Emergency Room Immunity (publication date uncertain) (copy on file with the Author).

140. MAG Mutual, *Tort Reform Update*, THE MAGNET (Vol. 28, No. 1, 2010), http://www.magmutual.com/mmic/articles/JanFeb_2010_GA_MAGnet.pdf.

141. *Compare* State Bar of Georgia Position on Caps on Damages and Emergency Room Immunity, *supra* note 139 (discussing Weiss Ratings that show that states with caps on noneconomic damages saw premiums increase), *with* MAG Mutual, *supra* note 140 (noting

sive because, while all parties agree that the cost of healthcare is rising, there is no empirical proof that this is caused by medical malpractice lawsuits, as many variables affect health care costs.

By holding the caps unconstitutional based on the right to jury trial, the court avoids the quagmire of conflicting statistics and competing interests that it would have needed to consider and balance under an equal protection or due process analysis. Unlike equal protection analysis, as conducted in *Park*, a right to jury trial challenge does not require the court to subject the caps to strict or mid-level scrutiny to determine if the caps were necessary or legitimately related to reducing health care costs and improving health care for Georgians. Thus, the court was able to avoid the politics of tort reform and focus on the individual citizen's rights.

B. Nationwide Effect

When addressing the constitutionality of noneconomic damage caps, state courts are highly persuaded by holdings in other states. Georgia, by becoming another state court holding noneconomic damage caps unconstitutional in violation of the right to jury trial, adds further weight to this position, and this could affect pending litigation across the nation. There are signs that courts in other jurisdictions are taking notice. One day after the *Nestlehutt* opinion was issued, *Nestlehutt* was cited in a concurring opinion by the Missouri Supreme Court,[142] noting that the "inviolate" language in the Missouri Constitution[143] is the same as that of the Georgia Constitution[144] and stating in dicta that the Missouri caps violate the right to jury trial.[145]

Further, by joining the Alabama Supreme Court, which also held noneconomic damage caps unconstitutional,[146] the outcome of *Nestlehutt* could have particular impact on other states in the Southeast. For instance, a brief filed in May 2010 in the United States Court of Appeals for the Eleventh Circuit challenged the constitutionality of noneconomic damage caps in Florida on various grounds, one of which was the right

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a University of Georgia study that found that 1000 more physicians practice in the state than prior to the 2005 caps).

142. Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752, 771 (Mo. 2010) (Wolff, J., concurring).

143. *See* MO. CONST. art. I, § 22(a).

144. *See* GA. CONST. art. I, § I, para. 11.

145. *Klotz*, 311 S.W.3d at 780 (Wolff, J., concurring).

146. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 163 (Ala. 1992) (departing from historical analysis but still holding noneconomic damage caps unconstitutional in violation of right to jury trial).

to jury trial.[147] The *Nestlehutt* opinion was cited as an example of a "sister state[] with similar constitutional protections and histories."[148] Whether this challenge will be effective is yet to be seen, but appellants across the country will surely use *Nestlehutt* as another example of a state that ruled noneconomic damage caps violate the right to jury trial.

C. Georgia Legislative Response

Because the Georgia Supreme Court expressly found that "[t]he very existence of the caps, in any amount, is violative of the right to trial by jury,"[149] the only way that the legislature could reapply the caps is to amend the Georgia Constitution.[150] A constitutional amendment would require a two-thirds approval in the House and Senate, rather than a simple majority, which many legislators concede is not likely.[151] While the amendment would be difficult, it is not impossible considering the political power of the tort reform lobby.[152] The Georgia judiciary has not been immune to political pressure by tort reform groups either. In her 2006 re-election, Chief Justice Hunstein, author of the *Nestlehutt* opinion, was challenged by a group of tort reform supporters.[153] The power of the tort reform lobby is evidenced nationally as well, with a recent campaign to oust a chief justice in Illinois after removing caps on malpractice liability.[154]

Even if the Georgia Constitution is amended and the caps returned, they would continue to be subject to constitutional challenges on the grounds of equal protection and separation of powers—challenges that were made by the appellee in this case but not addressed by the court in its opinion.[155] Instead of amending the constitution, the legislature

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147. Brief for Plaintiffs-Appellants at 4, McCall v. United States, No. 09-16375-J (11th Cir. 2010), 2010 WL 2648070.

148. *Id.* at 48.

149. *Nestlehutt*, 286 Ga. at 736, 691 S.E.2d at 223.

150. Andy Peters, *Legislators are Left with Few Options*, FULTON COUNTY DAILY REPORT, Mar. 23, 2010, *available at* Westlaw FULTONDAILY.

151. *Id.*

152. *See* Aaron Gould Sheinin, *Candidates for Governor Talk Health Care at Debate*, ATLANTA J. CONST., Aug. 28, 2010, http://www.ajc.com/news/georgia-politics-elections/candidates-for-governor-talk-601632.html. Governor Nathan Deal–then-gubernatorial candidate–stated, in response to this case, that if elected he would seek to further tort reform and the damage caps by amending the state constitution. *Id.*

153. Alyson M. Palmer, *Court Kills Caps on Med-mal Awards*, FULTON COUNTY DAILY REPORT, Mar. 23, 2010, *available at* Westlaw FULTONDAILY.

154. A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, Sept. 24, 2010, http://www.nytimes.com/2010/09/25/us/politics/25judges.html.

155. *Nestlehutt*, 286 Ga. at 738, 691 S.E.2d at 224.

is more likely to continue advancing tort reform in other ways outside of automatically triggered damage caps.

Although the future of tort reform in Georgia is uncertain, the *Nestlehutt* opinion will undoubtedly have an impact on plaintiffs' medical malpractice claims and may have an impact on plaintiffs' claims nationwide. By ruling on the basis of a right to jury trial violation, the court was able to avoid weighing in on the polarizing debate over the cause of rising health care costs and focus on the individual citizens of Georgia and their constitutional right to jury trial, making the competing interests and statistics on both sides of the debate a non-issue.

JENNIFER W. TERRY