

NO. 04-1235

THIRD CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

SUSAN ARRINGTON

VERSUS

ER PHYSICIANS GROUP, APMC, ET AL

EZELL, J. Concur.

I concur with Judge Pickett's opinion but would find that the Louisiana Medical Malpractice Act, La.R.S. 40:1299.41, *et seq.*, is unconstitutional on other grounds as well. Equal Protection is not afforded those who have injuries that exceed the damages cap. The statute creates classes of victims that are not equally compensated for their damages. Those who have damages that fall within the cap are compensated completely. Those who have damages that exceed the cap are not completely compensated, thus creating one of many sub-classes of claimants.

The purpose stated by the legislature for the enactment of this statute was to reduce or hold the line on increases in insurance premiums and rising health care cost in our state. If this was the goal, the legislature has failed to achieve this goal. The best way to deal with the problem of increasing insurance premiums is to correct the acts that cause the negligent acts. We should not shield negligent health care providers from their negligent acts. Capping damages diminishes the deterrent effect of tort law.

In reviewing the record, the statute being attacked as unconstitutional I can find no rational basis for the enactment of this statute other than the protection of a very limited segment of society at the expense of the most grievously injured claimant. The most affected group of claimants are young people. This is due to the fact that they will endure these injuries for a substantial portion of their lives. We recognize the fact that the legislature can regulate our economy, but it is not right to shift the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of injured patients.

There is no recovery set forth in the statute for provable economic damages which are allowed in every tort action other than one filed under this statute. Here again a young claimant is asked to carry the load for the insurance and negligent health care provider, in that, they will not receive what they are due if they have provable economic damages that exceed the cap. This case is an example of this injustice.

There is a false assertion that the tort system is "broken" or in need of repair. If we assume that this assertion is right, the cap imposed to fix the system is at the expense of those most seriously injured. This is neither fair nor equitable.

I can find no rational relationship existing between the classification of victims in the \$500,000 cap on non-economic damages and the legislative objective of compensating victims of medical malpractice fairly. Another objective of the legislature, as we previously stated, was to lower malpractice insurance premiums. The facts as presented in this case, clearly show that the cap adopted by the legislature is arbitrary and unreasonable in that it has no relationship to the lowering of medical malpractice insurance premiums. If there was a crisis when the legislation was passed, which has not been shown by the State, that alone would not render the law valid forever.

I agree with those courts that have found that there is little, if any, correlation between caps on non-economic damages and the redirecting of medical malpractice premiums or overall health care costs. The evidence of studies done in reference to the malpractice caps, which are part of this record, indicate that caps on non-economical damages do not affect doctors' migration. The non-partisan United States General Accounting Office concluded that doctors do not appear to leave or enter states to practice medicine based on caps on non-economic damages in medical malpractice actions.

Studies reviewing the facts of practicing defensive medicine simply show that it is very hard to measure that cost and even harder to measure when trying to determine the effect it would have on insurance premiums. I recognize that it is well-settled law that courts should presuppose that the legislative judgment is sound and try to support the legislative act. This act is so flawed with speculation and void of any quid pro quo that I have difficulty finding a connection between the means and ends.

I cannot find any objective basis for the enactment of this legislation.