IN THE SUPREME COURT
STATE OF GEORGIA

WELLSTAR HEALTH SYSTEM, INC. d/b/a WELLSTAR DOUGLAS HOSPITAL, ROBERT JEFFREYS WALKER, II, MD., RADIOLOGY ATLANTA GROUP, P.C., MICHAEL JOSEPH GILHULY, M.D., DAVID MICHAEL COTTER, P.A., and THE BORTOLAZZO GROUP, L.L.C.,	)	**CASE NO. S08A1936**
Appellants,	)	
v.	)	
CHEON PARK and LYNNE PARK,	)	
Appellees.	)	

AMICUS CURIAE BRIEF ON BEHALF OF THE GEORGIA HOSPITAL ASSOCIATION AND THE AMERICAN HOSPITAL ASSOCIATION

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Pursuant to Georgia Supreme Court Rule 23, The Georgia Hospital Association and the American Hospital Association respectfully submit an Amicus Curiae Brief in support of the position urged by Appellants.

I. STATEMENT OF INTEREST

The Georgia Hospital Association ("GHA") is a nonprofit trade association composed of approximately 170 hospitals and health systems throughout the State. GHA thus represents the interests of the very "medical facilities" expressly

provided the protections of O.C.G.A. § 51-13-1.

GHA is committed to improving the delivery of care and citizens' access to quality hospital care, which will be damaged if O.C.G.A § 51-13-1 is not upheld. In the absence of Georgia's cap on non-economic damages, unlimited awards for pain and suffering could limit access to high risk services such as obstetrics, impede a hospital's ability to provide indigent care, and, in a worse case scenario, result in a hospital's closure. From 1995-2005, 19 hospitals in Georgia closed, and as of April 2008, 48 different Georgia counties have no hospital.[1] Without Georgia's cap on non-economic damages, a large pain and suffering award could shut the doors of additional hospitals in Georgia, leaving even more Georgia citizens without needed health care services in their home communities.

GHA represents its members in legislative matters, as well as in filing amicus curiae briefs on matters of great gravity and importance to both the public and to health care providers serving Georgia citizens. This case presents issues of critical importance to hospitals throughout Georgia. Because of the broad implications of the trial court's decision, GHA has particular interest in assisting the Court with the issues presented.

The American Hospital Association ("AHA") is a national not-for-profit

[1] *See Hospital Closures in Georgia (1980-2008)* (map and list) and *Georgia Counties with No Hospitals* (Ga. Hosp. Ass'n, Apr. 2008), available at http://www.gha.org/Publications/Factbook.html. For this Court's convenience, these materials are attached as Exhibits A and B, respectively.

association that represents the interests of nearly 5,000 hospitals, health care systems, networks and other care providers, as well as 37,000 individual members, all of whom are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in state and federal legislative, regulatory, and judicial fora to ensure that its members' perspectives and needs are understood and taken into account in the formulation of health care policy. Because of their commitment to advancing the health of communities they serve, the AHA and its members have a great interest in the outcome of this case. The AHA has been in the forefront of advocating for meaningful medical liability reform to assure access to health care services for communities across this country.

As evidenced by the parties' briefs, this case involves the hotly debated issue of Georgia's cap on non-economic damages, O.C.G.A. §51-13-1. Courts in other states have split regarding whether to uphold such legislative caps, and those decisions are adequately cited in briefs filed by others.[2] GHA and AHA wish to bring to the Court's attention three specific points in filing this brief, all of which result in upholding the caps imposed by O.C.G.A. § 51-13-1 and reversing the decision of the trial court.

[2] As of January 2008, 14 states have upheld caps on non-economic damages, and 10 states have overturned such caps. *Medical Liability Reform – NOW!*, p. 27 (Am. Med. Ass'n, Feb. 5, 2008), available at http://www.ama-assn.org/go/mlrnow.

First, the Georgia Legislature responded appropriately to a health care crisis in Georgia in 2005, which had already resulted in reduced access to essential health care services in parts of the state, hospitals experiencing 200-300% increases in insurance premiums for significantly less coverage, hospitals attempting to obtain bank loans to pay insurance premiums, and hospitals forced to choose between staying open or going without insurance coverage altogether.[3] Rather than merely "declaring" a health care crisis, as Appellees contend, the Georgia Legislature engaged in a detailed fact-finding process regarding the status of health care in Georgia. The Legislature engaged in lengthy hours of debate and heard testimony from 34 witnesses, including from GHA, who testified how medical liability reform was needed to ensure public access to health care. The Legislature's fact-finding process was further supported by Federal Government reports, which in 2002 had recognized Georgia as a state in a "health care crisis."

Second, the Georgia Legislature is the proper body to determine whether a health care crisis exists, and upon such a determination, craft a remedy to address it. Neither the trial court, nor this Honorable Court, is empowered to substitute its judgment for that of the legislature on policy decisions that have a *rational relationship* to a legitimate objective of government.

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[3] *See GHA: Medical Liability Insurance Crisis,* Jan. 12, 2004 ("GHA White Paper"), which was distributed to Georgia Legislators in 2004 and in 2005. For this Court's convenience, a copy of this White Paper is attached as Exhibit C.

Third, Georgia's cap on *non-economic* damages applies equally to all. There is no distinction as relates to race, nationality, gender or any other classification. Even plaintiffs of disparate economic status are treated similarly by the statute. The statute not only satisfies equal protection guarantees of our Constitution, but it in fact *promotes* equal protection guarantees.

For these reasons, GHA and AHA respectfully submit that this Court should reverse the trial court and uphold the constitutionality of O.C.G.A. § 51-13-1.

II. STATEMENT OF RELEVANT FACTS

GHA and AHA adopt the Statement of Facts submitted by Appellant WellStar Health System, Inc.

III. ARGUMENT AND CITATION OF AUTHORITY

A. THE GEORGIA LEGISLATURE ENGAGED IN A DETAILED FACT-FINDING PROCESS AND DETERMINED A HEALTH CARE CRISIS EXISTED.

Rather than summarily "pronouncing" a health care crisis in a preamble, as Appellees suggest, the Georgia Legislature engaged in over 20 hours of testimony and debate regarding whether a health care crisis existed and possible solutions.[4] One way the crisis evidenced itself was in malpractice insurance rates charged to

[4] Hannah Yi Crockett et al., *Torts and Civil Practice*, 22 Ga. St. U. L. Rev. 221 (2005) (also known as "The Peach Sheets"), n. 11 (referring to Audio Recordings of Senate and House proceedings).

providers across the State. During the fact-finding process, the Legislature heard about the following: 1) a small hospital in Alma, which included a nursing home, which had to take out a bank loan to cover a malpractice insurance premium that had tripled in one year (ten insurance companies had refused to quote the hospital because of the nursing home); 2) a hospital with a nursing home in Bainbridge which had a 600% increase in its policy premium; 3) an Atlanta hospital which was required to take a policy with a $15 million deductible (only one insurance company bid on this hospital's business); 4) a 49-bed hospital in Claxton which decided to go without insurance coverage, due to an insurance premium that more than doubled in one year; and 5) physicians who gave up their obstetrical practices because of high insurance premiums.[5] Georgia legislators debated numerous reasons necessitating tort reform in Georgia, including the need to: improve access to health care for all Georgians, especially poor women; address rising medical malpractice premiums due to large jury awards and settlements; remedy the departure of insurers from the State by creating more predictability in malpractice awards; retain medical facilities and specialist physicians who were leaving the State; and retain a sufficient number of physicians in Georgia to serve her citizens.[6]

[5] *See GHA White Paper,* p. 8 ("Examples From Around Georgia").
[6] *See* 22 Ga. St. U. L. Rev. at nn. 12-13, 133, 134.

(1) The Senate's Process Regarding The Damages Cap

Senate Bill 3 ("SB 3"), Georgia's tort reform bill, was first read in the Georgia Senate on January 11, 2005.[7] Testimony and vigorous debate ensued on the Senate floor regarding whether a health care crisis existed, whether physicians practiced "defensive medicine," the need to reduce frivolous lawsuits, and whether a cap would lower insurance premiums.[8] Legislators' comments included "focusing on what is best for the patient" and supporting the bill "in an effort to increase overall access to quality health care."[9] After considerable debate, the Senate passed SB 3, which included a cap on non-economic damages.[10]

(2) The House's Process Regarding The Damages Cap

In the Georgia House of Representatives, SB 3 was read on February 3, 2005 and assigned to a Special Committee on Civil Justice Reform.[11] The House considered amendments to SB 3's non-economic damages cap, including a catastrophic injury exception and appropriate cap amounts.[12] Georgia Representatives discussed whether a cap would ensure better access to health care for Georgians and alleviate the negative effect that large and unpredictable jury

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[7] *Id.* at n. 21 (referring to State of Georgia Final Composite Status Sheet).
[8] *Id.* at nn. 92, 95, 96, 99.
[9] *Id.* at nn. 93, 95.
[10] *Id.* at n. 106 (referring to Georgia Senate Voting Record, SB 3 (Feb. 1, 2005)).
[11] *Id.* at nn.107-108 (referring to State of Ga. Final Status Sheet, SB 3, Feb. 3, 2005)).
[12] *See, e.g., id.* at n. 121.

verdicts were having, including insurance premiums increasing and insurers, medical practitioners, and facilities leaving Georgia.[13] The House Committee also evaluated the appropriate level of a cap, and decided in so doing to raise the damages cap in the Senate version of the bill to $350,000 for a single medical facility, $700,000 for multiple medical facilities, and a maximum cap of $1,050,000. The House Committee's substitute bill passed in the House.[14]

(3) The Senate reviews House's Amended Substitute

On February 10, 2005, the Senate reviewed the House's substitute to SB 3, including the cap on non-economic damages, and after initially rejecting the House amendments, further debate occurred.[15] Four days later, after additional consideration and debate, the Senate voted to accept the House substitute by a vote of 38-15 because a vote to accept the House substitute was "the best vote for the people."[16]

(4) Georgia Legislators Considered Arguments Opposing the Damages Cap Before Voting to Enact O.C.G.A. § 51-13-1; the Legislature Determined The Cap's Substantiated Benefits Could Be Realized In Georgia.

The Georgia Senate and House considered testimony, debated and ultimately determined that a cap on non-economic damages was best for the State. The

[13] *Id.* at nn. 128, 131-132.
[14] *Id.* at n. 148 (referring to Audio of House Proceedings).
[15] *Id.* at nn. 149-156.
[16] *Id.* at nn. 169, 170 (referring to Audio of Senate Proceedings).

arguments advanced against the cap and debated in the Legislature at that time are basically the same arguments posited now by Appellees.[17] The Georgia Legislature considered but rejected these arguments.

In 2004, various studies estimated that non-economic damages account for 50 percent or more of the amounts paid in settlements and judgments and benefit trial lawyers, who commonly retain at least 50 percent of the awards.[18] While economic damages are objectively proven, damages for pain and suffering are wholly subjective, and a jury may award such damages without considering the impact on the rest of the community.[19] The Georgia Legislature concurred that the State could no longer afford to ignore the connection between unpredictable non-economic damages and the ability of health care providers to continue providing Georgia's citizens with essential health care services. The Legislature thus enacted a cap on non-economic damages as a rational solution to the health care crisis in Georgia and in order to safeguard access to care for Georgia citizens.

The issue of tort reform is a topic about which many disagree. However, the fact that there are differing views about the efficacy of Georgia's cap on non-economic damages does not render it unconstitutional. By enacting O.C.G.A. § 51-13-1, the Georgia Legislature exercised and fulfilled its unique responsibility

[17] *Id.* at nn. 17, 18, 92, 99-103, 138, 145.
[18] *GHA White Paper*, p. 4.
[19] *Id.*

of listening to differing views, deliberating policy issues, and balancing competing interests. The Legislature's findings and the resulting damages cap are thus entitled to deference by this Court. *See, e.g., Nichols v. Gross*, 282 Ga. 811, 653 S.E.2d 747 (2007); *see also Bravo v. United States*, 532 F.3d 1154, 1169 n.9 (11th Cir. 2008) ($60 million jury award of non-economic damages in a medical malpractice case; reduced by the trial judge to $30 million and later vacated as excessive by the Eleventh Circuit, which noted a damages cap had been enacted in Florida after the suit's filing).

In 2002, the U.S. Department of Health & Human Services, Office of Disability, Aging and Long-Term Care Policy ("HHS") issued a report entitled *Special Update on Medical Liability Crisis*.[20] In its report, HHS noted rapid increases in the cost of malpractice insurance coverage across the nation from 2000-2002 and concluded such information "further demonstrates that the litigation system is threatening health care quality for all Americans as well as raising the costs of health care for all Americans."[21] In the HHS report, Georgia is listed as a "non-reform state" which had experienced a 40% malpractice premium increase in 2002 and was among 10 non-reform states with the "average highest premium increases" for "three key physician specialties" (internal medicine,

[20] Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., *Special Update on Medical Liability Crisis* (Sept. 25, 2002), available at http://aspe.hhs.gov/daltcp/reports/mlupd1.htm.
[21] *Id.* at 1.

general surgery and OB-Gyn).[22] The HHS report expressly recognized Georgia as being one of nine states deemed by the American Medical Association ("AMA") to be in a health care crisis.[23] Another report from the Federal Government predating Georgia's 2005 tort reform also supports the Georgia Legislature's enactment of a cap on non-economic damages. In a 1998 Congressional Budget Office ("CBO") report, the CBO determined that caps on non-economic damages were one of two types of reform that "have been found extremely effective in reducing the amount of claims paid and medical liability premiums" (the other tort reform measure involved collateral source offsetting).[24]

In February 2008, the AMA issued a national report examining medical liability crises and tort reform efforts since the 1970s, including caps on non-economic damages.[25] As reported by the AMA, "[d]irect tort reform, including but not limited to reasonable limits on non-economic damages … would reduce national health care costs…" and would benefit the citizens of States which have enacted such damages caps.[26]

The AMA reported that the number of physicians in rural counties actually *increases* in states which have caps on non-economic or total damages; Medicare

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[22] *Id.* at 2-3 and at Tables 2 and 3.
[23] *Id.* at 4 and Table 6.
[24] Cong. Budget Office, *Preliminary Cost Estimate, H.R. 4250, Patient Protection Act of 1998*, p. 5, available at http://www.cbo.gov/ftpdocs/7xx/doc701/hr4250.pdf.
[25] http://www.ama-assn.org/go/mlrnow.
[26] *Id.* at 8.

spending for hospitals is "five percent lower in states where non-economic damages are capped"; "direct tort reforms increased physician supply by 2.4 percent relative to non-reform states"; and claims can now be settled in California "in one-third less time than in states without caps on non-economic damages," which decreases litigation costs and "also means injured patients receive payment much faster …."[27]

The Georgia Legislature concluded that those substantiated benefits could be realized in Georgia with the enactment of a cap on non-economic damages. The Legislature sought to protect Georgia citizens from the fate of citizens in other states without such caps: physicians closing their practices, retiring early or leaving their state; physicians declining to treat higher-risk patients; physicians declining to take call in hospitals' emergency departments; resident physicians choosing other states in which to train and serve patients; hospitals closing their higher-risk units; and the increasing prevalence of "defensive medicine" (substantially increasing Medicaid and Medicare costs which are ultimately borne by taxpayers).

[27] *Id.* at 11, 12, 15, 30.

B. THE GEORGIA LEGISLATURE IS THE PROPER BODY TO ADDRESS THE HEALTH CARE CRISIS AND CRAFT A REMEDY.

"It is a fundamental principle that 'the legislature, and not the courts, is empowered by the Constitution to decide public policy and to implement that policy by enacting laws, and the courts are bound to follow such laws if constitutional.'" *Housing Auth. of Macon v. Ellis*, 288 Ga. App. 834, 836, 655 S.E.2d 621, 623 (2007), citing *Commonwealth Inv. Co. v. Frye*, 219 Ga. 498, 499, 134 S.E.2d 40 (1963). The issue of health policy is "more properly suited to legislative action as the legislature offers a forum wherein all the issues, policy considerations and long range consequences involved …. can be thoroughly and openly debated and ultimately decided." *Atlanta Obstetrics and Gynecology Group v. Abelson*, 260 Ga. 711, 718-19, 398 S.E.2d 557, 563 (1990) (holding the concept of a wrongful birth cause of action is a decision best suited for the legislature). *See also C. W. Matthews Contracting Co. v. Gover*, 263 Ga 108, 428 S.E.2d 796 (1993) (upholding the legislatively established public policy that automobile travelers ought to wear seat belts as an exercise of health policy; the court ruled that the legislature had weighed the positive benefits of the policy against the severity of the penalty for non-compliance in a rational and non-discriminatory manner).

The legislature, which includes representatives chosen from all areas of our state and who are accountable to its citizens through the electoral process, is best suited to hear the issues and make the policy decisions. While the judiciary must ensure constitutional protections remain in place during that process, the constitutional inquiry is begun with a presumption of validity. *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 570, 423 S.E.2d 235, 238 (1992). Any doubt by the judiciary is resolved in favor of finding a statute constitutional.

Appellees' offer of affidavits to disagree with the findings of the Georgia Legislature does not change the legal analysis. A disagreement with the legislature is not enough. "Those challenging the statute bear the responsibility to 'convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Craven v. Lowndes County Hosp. Auth.*, 263 Ga. 657, 659, 437 S.E.2d 308, 310 (1993) (upholding five year statute of repose on medical malpractice claims as rationally related to legitimate end of government). Most recently, in *Nichols v. Gross*, 282 Ga. 811, 813, 653 S.E.2d 747 (2007) this Court reaffirmed prior holdings that medical malpractice tort claims can be distinguished from other tort claims by the legislature and survive constitutional scrutiny (holding the five year statute of repose governing medical malpractice actions did not violate equal protection). The caps enacted by the Georgia Legislature were thoroughly debated

and are reasonably related to the legitimate state interest in assuring health care access to all Georgia citizens.

C. GEORGIA'S CAP ON NON-ECONOMIC DAMAGES PROMOTES EQUAL PROTECTION GUARANTEES TO ALL.

Georgia's cap on pain and suffering awards makes absolutely no distinction based on a person's race, nationality, gender or economic status. In fact, it assures equal protection in an area which is otherwise quite disparate. The amount of such awards was previously left only to the enlightened conscience of a panel of jurors, without further guidance. The Georgia Legislature has now created guidelines that apply to all such injured parties, period. Georgia's cap on non-economic damages does not differentiate based on a plaintiff's wages or economic loss, as does Ohio's cap on non-economic damages. *See* Ohio Rev. Code Ann. §2323.43 (cap is the greater of $250,000 or three times the plaintiff's economic loss up to a maximum of $350,000 per each plaintiff or $500,000 per occurrence, with some exceptions). Under Georgia's statute, all medical malpractice plaintiffs are treated exactly the same.

While Georgia's cap may result in lower "total" awards for plaintiffs who earn lower wages than others, as the trial court noted in its Order, the cause is due to an economic difference which ***preceded*** any injury to a plaintiff; it is not because of O.C.G.A. § 51-13-1. An award of lost wages is not even within the scope of the statute under review. Amici respectfully submit that it is not proper

for an award of non-economic damages to equalize lower economic damages incurred by plaintiffs, as suggested by the trial court. That is neither the intent nor a permissible purpose of a non-economic damages award.

O.C.G.A. § 51-13-1 provides needed certainty to health care providers and insurers in Georgia. It promotes consistency and fairness to plaintiffs and, as explained earlier, safeguards community access to health care for Georgians, especially the poor and women. Just because a properly enacted statute imposes limits in some situations does not render the statute unconstitutional. With the application of laws such as damages caps, statutes of limitation and statutes of repose, there will necessarily be instances in which limits are placed on a plaintiff's potential recovery, even in the face of otherwise compelling or sympathetic facts. *See Kaminer v. Canas***,** 282 Ga. 830, 653 S.E.2d 691 (2007) (patient became infected with HIV as an infant, but was not diagnosed with AIDS until he was a teenager; while recognizing the "harsh" results, this Court held the statute of repose and the statute of limitations barred his malpractice suit), *cert. denied* 128 S. Ct. 2503 (2008); *Nichols v. Gross*, 282 Ga. at 814-815, 653 S.E.2d at 749 (while the patient's estate contended the statute of repose produced "harsh results," this Court held the statute of repose did not violate equal protection).

Particular facts of a malpractice suit, no matter how compelling, including the Parks' suit, do not warrant invalidation of a damages cap properly enacted by

the Legislature. O.C.G.A. § 51-13-1 was within the Georgia Legislature's power to enact, the Legislature balanced the competing interests and policy issues, and its purpose in so enacting O.C.G.A. § 51-13-1 was a rational exercise of its authority to address the health care crisis in our State. *See Nichols*, 282 Ga. at 815, 653 S.E.2d at 749 (holding statute of repose was "within the General Assembly's legislative power to enact"); *Craven*, 263 Ga. at 659-660, 437 S.E.2d at 310 (noting uncertainty in cases "makes it difficult for [malpractice] insurers to adequately assess premiums based on known risks" and therefore this Court could not say the Georgia Legislature "acted irrationally").

IV. CONCLUSION

O.C.G.A. § 51-13-1 resulted from the Georgia Legislature's detailed fact-finding process, including consideration of issues now advanced by the trial court and Appellees. O.C.G.A. § 51-13-1 is a constitutional and rational solution to Georgia's health care crisis, which was within the Georgia Legislature's authority to enact, and which will improve access to health care in Georgia. GHA and AHA respectfully urge the Court to uphold the constitutionality of O.C.G.A. § 51-13-1 and reverse the trial court's decision.

This ____ day of October, 2008.

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a true and correct copy of the within and foregoing **AMICUS CURIAE BRIEF ON BEHALF OF THE GEORGIA HOSPITAL ASSOCIATION AND AMERICAN HOSPITAL ASSOCIATION** by First Class United States Mail, postage prepaid, properly addressed as follows:

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