IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

DONALD M. CLARK and	*	
BEVERLY J. CLARK	*	
	*	
Plaintiffs,	*	
	*	
vs.	*	DOCKET NO. 12C1147
	*	
AIMEE L. CAIN, AT&T CORP., AT&T	*	
MOBILITY, LLC, and ROBERT E.	*	DIVISION IV
COOPER, JR., in his official capacity	*	
as Attorney General for the State of	*	
Tennessee,	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

This matter is before the Court upon the motions for partial summary judgment of Defendants, AT&T Corp., AT&T Mobility, LLC, AT&T Mobility Services, LLC and Amiee L. Cain (hereinafter the "AT&T Defendants"), pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, and the responses thereto of the Plaintiffs and the Attorney General of the State of Tennessee (hereinafter "State"). The motions were argued on January 26, 2015, and taken under advisement.

The Standard of Rule 56

Summary judgment is appropriate if no factual dispute exists, no disputed fact is material to the outcome and a disputed fact does not create a genuine issue for trial. Byrd v. Hall, 847 S.W. 2d 208 (Tenn. 1993). The old rule set forth in Hannan v. Alltel Publishing Co., 270 S.W.3d 1 (Tenn. 2008), has been replaced by T.C.A. § 20-16-101, which adopted a "put up or shut up" standard in deciding motions for summary judgment. Under that rule, not applicable

here, a genuine issue of material fact must be created by papers submitted in opposition to the motion.

The main thrust of AT&T's motion is that partial summary judgment should be granted to dismiss Plaintiff's non-economic damages in excess of the statutory amount of $750,000 set forth in T.C.A. § 29-39-101, et. seq. Although AT&T also seeks the grant of a motion for partial summary judgment on the issue of economic damages with respect to Plaintiff's future care, that claim is more appropriately addressed in a fashion other than under the present motion for partial summary judgment. As to the former claim, there is no genuine issue of material fact with respect to the construction and constitutionality of the Tennessee Civil Justice Act of 2011. The State argues, however, that the constitutionality issue is not ripe and that the Court should defer decision until there is a jury verdict in excess of $750,000.

Background: The Basis of the Suit

This lawsuit arises out of an automobile accident which occurred on or about March 20, 2012. In their complaint, the Plaintiffs seek, *inter alia*, non-economic damages in excess of $750,000. Non-economic damages are damages for pain and suffering and loss of enjoyment of life. That demand is in excess of the statutory caps under the provisions of T.C.A. § 29-39-102. In addition, none of the exceptions to that statutory cap are pled, and none are in issue. Thus, squarely presented for decision is whether the Plaintiffs will be permitted to obtain a jury verdict in excess of $750,000 for non-economic damages.

Overview

Before discussing in detail the legal principles involved in this case, let me give an overview of what the issues are, the illustration of those issues both practically and legally and the results which are mandated. First, and obviously, the issue is whether legislative limits on a jury's determination of pain and suffering damages in a personal injury case are constitutional. Those limits were justified as necessary for economic development in the State of Tennessee. Without those limits, the legislature has found that businesses would not have the economic predictability of jury verdicts for them to move to, or stay in, the State. They further say that these verdicts are widespread and, implicitly, unfounded. The first question to be asked then is "What right does the judiciary have to question this policy?" The answer is there is none. But there is a right, indeed an obligation, of the judiciary to question the legislative assumption that there are widespread, unfounded jury verdicts that are a detriment to economic development.[1] That obligation derives from the Constitution of the State of Tennessee in the very creation of that government with its three coordinate branches of government -- executive, legislative and judicial. That obligation derives from the concept of the separation of powers, that is, that the three branches of government are co-equal, and under that concept the judicial branch must examine, not just accept, actions of the other branches to see if those actions are prohibited by the Constitution.

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[1] More fundamentally, I find no study or data which supports any conclusion that jury verdicts in Tennessee are excessive or not supported by the evidence. I further have found no study or data which shows that economic development is hindered or encouraged by limits on otherwise valid jury verdicts. Nor did I find any study or data which supports the proposition that limits on damages in jury verdicts hinders or encourages economic development.

In making the analysis of constitutionality, therefore, the Court must first apply an appropriate test, and the test to be used depends upon the right which is abridged. If the right to a jury trial is a fundamental constitutional right, then the legislation must be strictly construed. Whether the right here is fundamental involves an analysis of the origins of the right at the time of the adoption of the Tennessee Constitution and whether the right includes both the issues of liability and damages. If the right is fundamental, then it must be determined whether there is a compelling interest greater than the constitutional right for the statute to survive. In applying the strict scrutiny test to see if there is a compelling State interest the basis of the legislation, the legislative history, is examined.

After making this analysis, the Court can only conclude that the right to trial by jury is a fundamental interest, and, when strictly scrutinized, there is no compelling State interest for the statute to trump the constitutional right to a jury trial. The conclusion reached is that since there is no such interest, the Act is unconstitutional.

Let me now show the practicality of why this legislation is unconstitutional, both from a common sense, fairness and a legal standpoint.

Assume an individual is injured in an accident through the fault of another and suffers a broken leg. That person receives treatment and returns to normal life. In a subsequent lawsuit, that person receives an award for pain and suffering and loss of enjoyment of life which will not even be close to the upper limit of $750,000 in damages set by the limit in the statute. Further, assume, then, another young individual who, in a similar accident, receives broken arms and legs and other serious injuries from which he will suffer for the remainder of his or her life.

That person then files after an evaluation of the case by an attorney based on the facts known to the Plaintiff. The Defendant then answers the suit through his or her attorney based on facts known to the Defendant. During preparation of the case for trial, the attorneys exchange information and then attempt to settle the case. If they are not successful, the case may go to mediation. If mediation is not successful, the case goes to a trial before a jury, which is presented the facts of the accident and the medical analysis of the condition of the Plaintiff. The jury may then award damages, and, in this case, assume the award is $2,000,000 for pain and suffering and loss of enjoyment of life. Not liking the verdict, the Defendant asks the Judge to set aside the verdict because it is excessive. The Judge refuses and, unless there is an appeal, the case is over. When the Plaintiff is about to be paid, however, the legislative statute intervenes and says that the Plaintiff may not receive more than $750,000.

In the two situations above, it must be said that the second person does not receive full compensation for his or her injuries. It must also be said that the jury which returns the verdict in the second instance must not be trusted to evaluate the evidence and the law and return a verdict which it believes is a just verdict. With that example and for the legal reasons which will be discussed in detail below, the Act cannot be said to be constitutional because it deprives the second person of the verdict which the jury has rendered and of the right to be treated on an equal basis with the first person in the hypothetical. But, equally as important, that result deprives society of a right to have justice dispensed in a manner on which it has traditionally relied and which it has traditionally demanded.

Let me digress at this point. In this case, we are dealing with the application of the Tennessee Civil Justice Act of 2011 which has routinely been referred to in Tennessee and

elsewhere as the Tort Reform Act. If labels were to apply accurately, however, this legislation should not be denominated "tort reform," because it has nothing to do with reforming tort law in a pure sense. No law either in Tennessee or elsewhere has been introduced to change the system of tort law - the duty of one person to act with reasonable care with respect to another person. Rather, the effort both in Tennessee and elsewhere is to limit the recovery by juries in what have been traditionally known as tort, or personal injury cases. If the legislation were to be named properly, then, it would be "jury reform." The sole thrust of the legislation is not to change the law of responsibility between individuals but to limit, and, therefore, express distrust of, juries and their verdicts.

Another issue of nomenclature exists with respect to this legislation. Statutes in Tennessee and in other states refer to the cap as one on non-economic damage. That sterile term should really be "pain and suffering damages" resulting from what the jury has determined to be wrongdoing on the part of the defendant. Bluntly, pain and suffering is what an injured victim must endure as the result of wrongful conduct of another.

The Statute and Constitutional Provisions in Question

At issue in this motion is the Tennessee Civil Justice Act of 2011, which governs all claims, such as the ones here, accruing after October 1, 2011. That statute provides in Sections 102(a)(2) and (c) as follows:

> "(a) In a civil action, each injured plaintiff may be awarded:
>
> (2) Compensation for any noneconomic damages suffered by each injured plaintiff not to exceed Seven Hundred Fifty Thousand ($750,000) Dollars for all injuries and occurrences that were or could have been asserted, regardless of whether the action is based on a single act or omission or

a series of acts or omissions that allegedly caused the injuries or death."

"(c) If any injury or loss is catastrophic in nature, as defined in subsection (d), the Seven-Hundred-Fifty Thousand Dollar amount limiting noneconomic damages as set forth in subdivision (a)(2) and subdivision (b) is increased to, but the amount of damages awarded as noneconomic damages shall not exceed, One Million Dollars ($1,000,000)."

The amended complaint herein alleges that the Plaintiffs have suffered $22,500,000 in damages for pain and suffering and loss of enjoyment of life in Count 2 and that any limit by the legislature on the amount recoverable by the Plaintiff is unconstitutional. Thus, the following rights are alleged to have been infringed: (1) deprivation of the trial by jury in violation of Article I, Section 6 of the Tennessee Constitution (Amended Complaint, ¶¶ 19-20);[2] denial of substantive due process under Article I, Section 8; (3) denial of equal protection under Article I, Sections 17, 8 (Amended Complaint, ¶ 22); and (4) violation of the separation of powers provision of Article II, Section 2, Article VI and Article VII, Section 2 (Amended Complaint, ¶ 23).

Article I, Section 6 of the Tennessee Constitution provides as follows:

"That the right of trial by a jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

Article XIV, Section 1 provides as follows:

[2]Allegations of infringement of the United States Constitution are also alleged but will only be discussed implicitly; they do not form a basis for the ruling. In addition, the constitutional right to a jury trial is a State interest, not a Federal interest Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989).

> No person "shall be taken or imprisoned or desensitized of his freehold, liberties, privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by judgment of his piers on the law of the land."

Tennessee's guarantee of equal protection is found in Article XI, 8 of the Constitution:

> "The Legislature shall have no power to suspend any general law for the benefit of any particular individual nor to pass any law for the benefit of individual inconsistent with the general laws of the land; nor to impasse any law granting to any individual or individuals, rights, privileges, immunities or exemptions other than as may be by the same law extended to any other member of the community, who may be able to bring himself into the provisions of such law."

These are the provisions of law upon which these motions will be decided.

The Issue of Judicial Restraint

In response to AT&T's motion and the Plaintiffs' contention as to the resolution of the issue of the constitutionality of the Act, the State argues that this Court should decline such a review prior to an actual jury award in excess of the caps under the Act. (St.Br., p.2).[3] The State argues that a consideration of the constitutionality of the Act at this juncture would be predicated upon "uncertain or contingent future events" and that judicial restraint should be exercised to avoid the necessity of embarking upon a journey of constitutional precariousness, citing State v. Taylor, 70 S.W.3d 717 (Tenn.2002). The timing of such a consideration, the State argues, is premature because a jury has not yet awarded a verdict in excess of the statutory cap outside of the exception, implicitly arguing that there is not yet a case or controversy.

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[3] The moving parties, AT&T, opposes the State's position and argues that such a resolution is necessary at this juncture.

The position of the State overlooks two factors, one legal and one practical. The legal factor which demands resolution of the constitutional issue at this juncture is that AT&T has moved for partial summary judgment, and resolution of that motion depends upon an adjudication of the constitutional issue at this point in the proceedings. The second factor is practical. If the jury were to receive the case for its deliberation without being told, as it will not be, of the limit on damages for pain and suffering and if the jury were to deliberate at some length on that issue only to be told its verdict would be disregarded, inherent harm would inure the jury system. In short, the jury would be insulted. This Court has received over two hundred jury verdicts and has had an opportunity to observe juries at work. They are diligent and hard-working, and disregard of a considered jury verdict on damage for pain and suffering would be an affront to them and would be a statement to them that they simply are not needed.

This Court will, therefore, decline the State's invitation to delay a decision on the constitutionality of the Act until after a jury's decision.

The Test to be Applied in Construing Constitutional Issues

In beginning the analysis of the constitutionality of any act of the legislature, this Court, as stated above, starts from the proposition that statutes are presumptively constitutional. Doe v. Norris, 751 S.W.2d 834 (Tenn. 1988); Calaway v. Schucker, 193 S.W.3d 509 (Tenn. 2008).

Although presumptively constitutional, acts of the legislature, nevertheless, may be struck down if the right which is the object of the statute is a fundamental right and if there is no compelling State interest which requires that the fundamental constitutional right yield to the State interest. Planned Parenthood v. Sundquist, 38 S.W.3d 1 (Tenn. 2000). In the context of this

case for the statute to be constitutional, the State's interest in economic development must be shown by compelling argument to trump the right of a person to a trial by jury. The Court in Planned Parenthood v. Sundquist, supra, has so specifically held at 15:

> "It is well settled that where a fundamental right is at issue, in order for a State regulation which interferes with that right to be upheld, the regulation must withstand strict scrutiny. The State's interest must be sufficiently compelling in order to overcome the fundamental nature of the right."

The Act here in question cannot withstand that scrutiny.

In Planned Parenthood v. Sundquist, supra, the Court held that the right to privacy, which is a penumbral inexplicit constitutional right, was a fundamental right. In making the determination that a right is fundamental, the Court found fundamental rights to be "those liberties that are 'deeply rooted in this nation's history and tradition.'" Planned Parenthood, supra, at 11. It also found them to be those rights where "neither liberty nor justice would exist if [they] were sacrificed." Id., at 12. Finally, they are those rights which are "explicitly or implicitly, guaranteed by the Constitution." Id. The Court then proceeded to set forth the test to be applied in determining whether a fundamental right would yield to the State interest contained in a statute. That test is "strict scrutiny." The Court said that there must be a compelling State interest to justify infringement of that right, holding at 17:

> "Subjective judicial opinion has no place, however, in determining the constitutionality of fundamental rights. Accordingly, we conclude that strict scrutiny is the appropriate standard to apply in this case."

I will, proceed, therefore, utilizing that standard.

The Right to a Jury Trial on Liability and Damages is a Fundamental Right

With the above introduction to the analysis of the issues herein, the next issue to be considered is whether a right to a jury trial is a fundamental right and whether it was a right at the time of the adoption of Tennessee's Constitution. The right to trial by jury to which the Constitution speaks is the right of jury trial at common law at that time. Newport Housing Authority v. Ballard, 839 S.W.2d 86 (Tenn. 1992) (a jury trial right "is the right of trial by jury as it existed at common law and was in force and use under the laws of North Carolina at the time of the formation and adoption of the Constitution in 1796.") Memphis and Shelby County Bar Ass'n. v. Vick, 40 Tenn.App. 206, 296 S.W.2d 871, 875 (1955) ("the right of trial by jury . . . refers to that right as it existed at common law"). A background discussion of jury trials and the English Common Law is, therefore, appropriate.

In England under the reign of Henry II, a jury system was established to resolve land disputes. In addition, under the Assize of Clarendon, the grand jury system was also introduced. In 1215, however, when the church banned participation by clergy in jury trials, trial by jury began to collapse, resulting in the Magna Carta, signed by King John, in 1215. Article 39 of the Magna Carta provides as follows.

> "No free man shall be captured or imprisoned or dissolved of his freehold or of his liberties, or of his free customs, or be outlawed or exiled or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers or by the law of the land."

It is interesting that when the star chamber was abolished on July 5, 1641, it provided that no judgment would be entered again except, in the language of the Magna Carta, "by lawful judgment of his peers, or by the law of the land." This evolution of trial by jury

continued and was firmly established when in 1670 two Quakers, one of whom was William Penn, Jr., were criminally charged and the jury found them not guilty. The jury was then fined for contempt of court for its verdict, and one of the members of the jury petitioned the Court of Common Pleas for a *writ of habaes corpus* which resulted in a ruling in Bushel's Case that a jury could not be punished because of its verdict. In the early 1700's, the independence of the jury was again illustrated in the trial of John Peter Zenger. For a detailed description of the history of jury trials, see Dwyer, In the Hands of the People.

When jury trials were again threatened in the British Colonies, there resulted our Declaration of Independence of 1776. The paragraph which recites as its beginning, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness," ends with the following sentences.

> "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world."

* * *

> "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

* * *

> "For depriving us in many cases, of the benefits of Trial by Jury."

* * *

There followed in 1789 the Constitution of the United States. The Constitution, adopted on September 17, 1787, was then sent to the states for ratification, and ratification

depended upon the adoption of the Bill of Rights, and, of course, one of those Amendments in the Bill of Rights was the Seventh Amendment which reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Then, on February 6, 1796, the Tennessee Constitution provided in Article 1, Section 6 as follows:

> "That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

With this progression of insistence on trial by jury for suits at common law, the issue is whether suits for personal injury and damage were suits at common law. The answer is, of course, yes. Memphis and Shelby County Bar Ass'n. v. Vick, supra; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 715 (1989). Since they were and since the right to a jury trial is explicit in our Constitution, the right to a jury trial is a fundamental right.

The next question is, therefore, whether Tennessee's statutory limit on damages survives strict scrutiny when compared with the constitutional right to a jury trial. The Tennessee Constitution provides that the right to a jury trial shall remain, as indicated above, "inviolate." The next question to be answered is whether a jury trial includes a determination of damages, as well as a determination of liability. Historically, as indicated above, damages for pain and suffering have been recognized as an element of recovery in tort cases. Indeed, Chief Justice Marshall, in Marbury v. Madison, 5 U.S.137 (1803), stated:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." 5 U.S. at 163.

Citing 3 Blackstone Commentaries at page 109, he continued:

> "I am next to consider such injuries as are cognizable by the Courts of Common Law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals are, for that very reason, within the cognizance of the Common Law Courts of Justice, for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."

Thus, damages being essential to a cause of action in tort, any attempt to limit the jury's rendition of a damage verdict must be in conflict with the right to jury trial. As the Georgia Supreme Court held in Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 691 S.E.2d 218 (2010) at 222:

> "We next examine whether the noneconomic damages caps . . . unconstitutionally infringe on this right. By requiring the Court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, O.C.G.A. § 51-13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."

For this proposition, the Supreme Court of Georgia cited Lakin v. Senco Prods., Inc., 329 Ore. 62, 987 P.2d 463, 473 (Ore. 1999) that:

> "To the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect."

Finally, the Supreme Court of Georgia held explicitly that:

> "The very existence of the caps, in any amount, is violative of the right to trial by a jury."

This quotation from the decision of the Georgia Supreme Court is in conflict with the latest pronouncement from the Supreme Court of Ohio in Arbino v. Johnson & Johnson, 880 N.E.2d 420 (2007), in which the Supreme Court of Ohio considered whether the Ohio statute limiting damages for pain and suffering was "facially" unconstitutional. The Supreme Court of Ohio held that it was facially constitutional because it contained, as here, an exception for catastrophic injuries in which the cap is excluded. This decision of the Ohio Supreme Court followed four prior decisions in which the Ohio Supreme Court held that a limit on non-economic damages as a general matter imposed by the Legislature of the State of Ohio was unconstitutional. State v. Sheward, 715 N.E.2d 1062 (1999). In Arbino, the Ohio Supreme Court held the statute to be constitutional because it contained the exception and was not, therefore, on its face unconstitutional, since the plaintiff would have to "demonstrate that there is no set of circumstances in which each statute would be valid." (Arbino v. Johnson, supra at 429). This holding is in conflict with the holding of the Georgia Supreme Court which found that the existence of caps "in any amount" violates the right of trial by a jury, and the statute is, therefore, facially unconstitutional. The holding of the Georgia Supreme Court is in accordance with the holding of the Alabama Supreme Court in Moore v. Mobile Infirmary Ass'n., 592 So.2d 156 (1991), the Washington Supreme Court in Sofie v. Fibreboard Corp., supra, and the Florida Supreme Court in Smith Department of Insurance, supra. In Moore, the Alabama Supreme Court specifically rejected an argument that the "jury's factual determinations regarding the value of the plaintiff's injuries are not entitled to constitutional protection." In Smith, the Florida Supreme Court held that it was dealing with a "constitutional right which may not be restricted simply because the legislature deems it rational to do so."

Strict Scrutiny Results in Unconstitutionality

Having found that a right to trial by jury, and more particularly a jury trial on damages, is a fundamental constitutional right, this Court is compelled to find unconstitutionality under strict scrutiny analysis. There can simply be no compelling state interest to which the right to a jury trial may yield, especially if that compelling interest is declared to be merely an economic interest.

As Justice Barker noted in his concurring opinion in Planned Parenthood v. Sundquist, supra, that he could find "no case in this State where application of this standard [strict scrutiny] has resulted in upholding the challenged law." Id., at 42.

What then is the compelling State interest? Many courts have held an examination of the factual basis for the exercise of social policy in legislation to be impermissible, Evans v. State, 56 P.3d 1046 (2002); Guzman v. St. Francis Hospital, Inc., 240 Wisc. 2d 559, 623 N.W.2d 776 (2000), other courts have considered it mandatory. Moore v. Mobile Infirmary Ass'n., 592 S.2d 156 (1991); State v. Sheward, 86 Ohio St. 3d 451, 715 N.E. 2d 1062 (1999). See, especially, Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 880 N.E.2d 420 (2007), which found that after four times before the Ohio Supreme Court, the legislature finally conducted the studies necessary to satisfy the Supreme Court in finding the statute before it facially constitutional.

Under the strict scrutiny test, however, not only must the social justification for the legislation be considered but also the factual basis for that social justification.

Indeed, the Supreme Court of New Hampshire has considered this argument in Carson v. Marurer, 120 N.H. 925, 424(a)2d 825 (1980). In that case, the Court considered a challenge to the limits on recovery in medical malpractice actions. In holding the cap

unconstitutional, the Court first stated that it would "not independently examine the factual basis for the legislative justification for the statute," further stating that its "sole inquiry is whether the legislature could reasonably conceive to be true the facts on which to challenge legislative classifications are based." But then the Court examined the legislature's concern that the size and incidence of medical malpractice claims could pose a threat to the delivery of health care at a reasonable cost, and found "that the necessary relationship between the legislative goal of rate reduction and the means chosen to attain that goal is weak for two reasons." One of those reasons was that it was "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."

Other courts have concluded that the basis for the reason given for the necessity of imposing caps on non-economic damages to be totally insufficient. Moore v. Mobile Infirmary Ass'n., 592 So.2d 156, 168 (S.Ct.Ala. 1991). ("The correlation between the damages cap . . . and the reduction of health care costs . . . is, at best, indirect and remote"); Carson v. Mewer, supra ("The necessary relationship between the legislative goal of rate reduction and the means chosen to attain that goal is weak at best"); State v. Sheward, 715 N.E.2d 1062 (S.Ct.Ohio 1999) ("unable to find. . .any evidence between the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates").

The Court has reviewed the hearings of our legislature with respect to the Act in question and has found no viable support for the conclusion that caps on non-economic damages are needed in Tennessee for economic development. (Hearings, April 12, 19, 26; May 9, 20,

2011). No studies to support that finding were cited, and one Senator cautioned that the members were "legislating by anecdote." (Sen. Berke, May 12, 2011, p. 60; see also, pp. 125-128.)

A review of the hearings shows that only one study was in any way relied upon in the passage of the statute before this Court, and that study was described as "fictitious" by one member. (Hearings, April 26, 2011, page 6). Furthermore, that study did not find that there were numerous excessive verdicts in Tennessee or the cause of, or facts underlying, any of the verdicts referred to. (Hearings, April 19, 2011, pp. 38-51). Next, the study relied upon cites any number of factors "for spending too much on torts." (Hearings, April 11, 2011, pp. 51-68).

But, more telling is the fact that no justification was given for the number itself - $750,000. In fact, the number was never even mentioned as an appropriate number.

Indeed, the various limits themselves on damages for pain and suffering show that the process of limitation is nothing more than guesswork. (Ohio: $200,000, then $200,000 with periodic payment, then $250,000 (with an exception) or three times economic damage with a $350,000 limit; Georgia: $350,000 or $700,000 if multiple defendants with an upper limit of $1,050,000; New Hampshire: $250,000; Alabama: $400,000; Florida: $450,000; Tennessee: $750,000 (with an exception).) The fact that Georgia sets a different cap for multiple defendants for the same injury shows concern for the economic well being of the defendant, not the plaintiff's injury.

Thus, there is no compelling interest of the State which will survive scrutiny in the light of the constitutionally protected right to a jury trial.

Equal Protection and Due Process

In considering the Plaintiffs' arguments that the statute denies them equal protection of the law, stated plainly, they say that denial of their right to receive in excess of $750,000 for their pain and suffering and loss of enjoyment of life treats them differently from those people whose claim is less than $750,000 and who receive no reduction in their jury award. Stated another way, they say that a more severely injured person will receive less than a less severely injured person for personal injury. They also say that females are more likely to suffer and be awarded more, and be more penalized by a reduction in their award than men, citing various studies. I am not persuaded by the latter argument because the Equal Protection Clause protects persons not awards. Millennium Taxi Serv., LLC v. Chattanooga Metro. Airport Auth., 2009 Tenn.App. LEXIS 413 (Tenn.App. 2009). I am, however, persuaded by the former.

The guarantee of due process is, as set forth above, contained in Article XIV, § 1, and this provision and the due process clause of the limited States Constitution are "synonymous." Crespo v. McCullough, 2008 Tenn.App. LEXIS 637 (Tenn.App. 2008). Likewise, that Court stated that the concept of equal protection has similar guarantees. Crespo, supra. Then, as that Court found, the Federal and State guarantees of due process and equal protection are the same. See also, Calaway v. Shucker, 193 S.W.3d 509, 518 (Tenn. 2005). All of those cases utilized the vested rights test for due process. The equal protection cases used either. In Tennessee, as mentioned above, strict scrutiny is used.

In holding unconstitutional the application of the Supreme Court decision in Calaway (which held the plaintiff's action time barred because of that decision) to the plaintiff the Court, applying even the rational basis test, held that it was "simply irrational for the law to

make such a pivotal distinction between these plaintiffs and plaintiffs who may have suffered injury on the same day as these plaintiffs but who happened - by pure luck - to file suit just before Calaway was released." In similar fashion, it is irrational to distinguish between plaintiffs who have suffered more severe injury than plaintiffs who have suffered less.

Judicial Authority in Other States

The issues presented by this motion have been considered for the past thirty years in what the Ohio Supreme Court has called "an ongoing conflict over the necessity and propriety of transforming the civil justice system." State v. Sheward, 86 Ohio St.3d 451, 715 N.E.2d 1062, 1071 (1999). That conflict has been described by that Court as "a power struggle between those who seek to limit their liability and financial exposure for civil wrongs and those who seek compensation for their injuries." Sheward, supra, at 1071. Courts which have upheld the constitutionality of legislation imposing limits on jury determinations of non-economic damage have done so for a variety of reasons. Kirkland v. Blaine County Medical Center, 134 Idaho 464, 4 P.3d 1115 (2000) (statute changes only the law of damages, does not invade fact finding, relying upon Ethridge, infra); Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665 (1985) (due process and equal protection not denied because rational basis for the statute without questioning the basis and no vested right to damages); Kirkland v. Blaine County Med. Cntr., 134 Idaho 464, 4 P.3d 1115 (2000) (jury trial not denied because legislature may abolish common law rights and remedies); Murphy v. Edmonds, 601 A.2d 102 (Ct.App. Md. 1990) (equal protection and right to a jury trial not denied because statute has a rational basis and results from an application of law not finding of fact); Schweich v. Ziegler, Inc., 463 N.W.2d 722 (S.Ct. Minn. 1990) (jury trial waived and limit in a bench trial constitutional); Guzman v. St. Francis Hospital,

Inc., 240 Wis. 2d 559, 623 N.W. 2d 776 (2000)) (jury trial and equal protection not denied where Wisconsin Constitution permitted legislature to be "altered or suspended")' Samsel v. Wheeler Transp. Servs., 246 Kan. 336, 789 P.2d 541 (1990) (right to jury trial and equal protection not denied relying on Tull v. United States, infra, and stating that recovery for non-economic loss is not compensation to make an injured party whole).

Other courts have held various versions of limits on damages for pain and suffering unconstitutional under constitutional guarantees of trial by jury, equal protection and due process. Sofie v. Fibreboard Corp., 112 Wn. 636, 771 P.2d 711 (1989) (statute used a formula board on age) (specifically "protects the jury's role to determine damages"); Moore v. Mobile Infirmary Ass'n., 592 So.2d 1991 (S.Ct. Ala. 1991) (constitutional right to receive "the amount of damages fixed by the jury"); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (arbitrary damage limitation); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 691 S.E.2d 218 (2010); Smith v. Department of Ins., 507 So.2d 1080 (S.Ct. Fla. 1987) (arbitrary cap and not rational); State v. Sheward, 715 N.E.2d 1062 (S.Ct. Ohio 1999).

Courts Which Have Found Constitutionality

As recognized by the Georgia, Florida and Alabama Supreme Courts, the Courts which have justified the constitutionality of non-economic damages have done so under various arguments. First, some have relied upon Tull v. United States, 481 U.S.412 (1987), in which the Supreme Court approved of legislative modification to remedies under the environmental laws without running afoul of the right to jury trials. That decision, however, was limited subsequently by the decision of the Court in Feltner v. Columbia Pictures Television, Inc.. 523 U.S.340, which restricted Tull to the issue of civil penalties, not actual damages.

Second, some authorities have cited to the use of remittitur for the purpose of alteration of jury verdicts without running afoul of the right to jury trial. The distinction, however, in the remittitur situation is that a reduction (or additur in the case of increase) is valid only if accepted by the plaintiff. Otherwise, a new trial is required.

Additionally, a number of authorities have relied upon the decision of the Virginia Supreme Court in Etheridge v. Medical Center Hospitals., 237 Va. 87, 376 S.E.2d 525 (1989). As found by the Supreme Court of Alabama, however, the Virginia Supreme Court was relying upon a different provision of the Constitution which it found to be "materially distinguishable from its Alabama counterpart." Moore v. Mobile Infirmary Ass'n.. supra at 162. It noted that the Virginia Constitution provided that trial by jury is "preferable to any other, and ought to be held sacred." The word "inviolate" is not used in the Virginia Constitution.

Finally, some courts have justified a finding of constitutionality of limits on damages by stating that the legislation alters a jury finding, not as a determination of fact. Arbino, supra. In that case, the Ohio Supreme Court first found that "the right to trial by jury protects a plaintiff's right to have a jury determine all issues of fact in his or her case." Any law that "allows another entity to substitute its own findings of fact is unconstitutional." Arbino, supra. But then the Court found that while findings of fact were protected, jury awards in general were not. It continued by holding that those awards may be altered as a matter of law.

> "Thus, without violating the Constitution, a court may apply the law to the facts determined by a jury."

In effect, the Ohio Court escaped the need to use the strict scrutiny test by holding that the result of the jury process may be altered without damage to the process. Such a conclusion is a matter

of semantics, especially since it relies upon those cases which approve the use by a court of the law of remittitur or an award of treble damages. Finally, the Court approved the legislature making a "policy choice that noneconomic damages exceeding set amounts are not in the best interest of the citizens of Ohio." This analysis was expressly rejected by the Supreme Court of Washington in Sofie v. Fibreboard, supra. That Court held that the "jury's role in determining noneconomic damages is perhaps even more essential." Id. at 648. The determination of damage finding was made in the light of the contentions of the respondents who contended that "The Legislature can determine 'the law of recovery." The Court rejected that argument by holding that the determination of damage "an essential function of the jury." Id. at 648.

None of the cases upholding the constitutionality of this type of statute has done so by considering whether a right to a jury trial on damages is a fundamental constitutional right. First, the history of trial by jury shows that the jury was given a "dispute" for resolution. They conducted the investigation of that dispute and resolved it, which included the jury's finding of what was to be done to resolve it. The remedy issue was inseparable from the fault issue. Harkening back to the logic of Justice Marshall in Marbury v. Madison, a wrong must have a remedy. Otherwise, a dispute is not resolved. Otherwise, a wrong is not vindicated. Otherwise, the jury's verdict is destroyed.

The conclusion of this discussion is that the statute must be declared to be unconstitutional. For these reasons, the motions of AT&T for summary will be denied. Accordingly, it is

ORDERED that the motion of AT&T for summary judgment is hereby denied.

ENTERED this _____ day of March, 2015.

____
W. Neil Thomas, III - Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, via U.S. Post Office, first class, postage pre-paid, or has been hand delivered to:

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This ____ day of March, 2015.

LARRY L. HENRY, CLERK

By:______________________________
Deputy Clerk