

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2009

No. 104

DRD POOL SERVICES, INC.,

Petitioner/Cross-Appellee,

v.

THOMAS FREED, et al.,

Respondents/Cross-Petitioners.

On Appeal from the Circuit Court for Anne Arundel County
(Nancy Davis-Loomis, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

**MARYLAND CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL
CENTER, AMERICAN TORT REFORM ASSOCIATION, MARYLAND MOTOR
TRUCK ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS,
AMERICAN CHEMISTRY COUNCIL, PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL
INSURANCE COMPANIES, AND AMERICAN INSURANCE ASSOCIATION'S
AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT/CROSS-APPELLEE**

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INTEREST OF AMICI CURIAE

As organizations representing a wide range of Maryland businesses and their insurers, *amici* have an interest in ensuring that Maryland's civil litigation environment is fair, predictable, and reflects sound policy. These goals are furthered by Md. Code, Cts. & Jud. Proc. § 11-108, which allows up to \$725,000 in noneconomic damages in personal injury cases. *Amici* have a substantial interest in the constitutionality of the statute and would be adversely impacted if it is nullified.

STATEMENT OF THE CASE

Amici adopt Petitioner/Cross-Appellee's Jurisdictional Statement.

STATEMENT OF FACTS

Amici adopt Petitioner/Cross-Appellee's Statement of Facts.

INTRODUCTION

Noneconomic damages awards are highly subjective and inherently unpredictable. There is "no market for pain and suffering." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 *Cap. U. L. Rev.* 545, 549 (2006). Consequently, legal scholars have long recognized that putting a "monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *Law & Contemp. Probs.* 219, 222 (1953). "[J]uries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*,

73 Cal. L. Rev. 772, 778 (1985). One commentator noted the difficulty expressed by jurors in putting a price on pain and suffering:

Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical[s]. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

Trial lawyers understand these dynamics and suggest juries award extraordinarily large amounts for pain and suffering. That was the situation here, where the jury awarded each of the parents of a child who drowned in a pool, with no witnesses to the accident, \$2 million. The wrongful death award was reduced to \$1,002,500.00 pursuant to a statutory "cap" on noneconomic damages. The plaintiffs also seek additional noneconomic damages on behalf of their child for conscious pain and suffering before drowning, which the circuit court found unsupported by the evidence, but the Court of Special Appeals reversed. This brief focuses on the sound constitutional, legal and public policy bases underlying the fair outer limit on noneconomic damages in personal injury cases, Md. Code, Cts. & Jud. Proc. § 11-108.

Large pain and suffering awards, such as in the subject appeal, are of fairly recent vintage. Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff's actual pecuniary loss, such as medical expenses. That is not true today. Following World War II, and particularly since the 1960s, a confluence of factors led to a rapid and substantial rise in the size of pain and suffering awards. This

trend continued as Maryland's General Assembly, among other state legislatures, recognized the need for statutory upper limits to guard against excessive and unpredictable outlier awards.

Statutory limits, such as Md. Code, Cts. & Jud. Proc. § 11-108, promote more uniform treatment of individuals with comparable injuries, *see* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995) (unpredictability “undermines the legal system’s claim that like cases will be treated alike”), facilitate settlements, address “over- or under precautions by affected industries and insurers,” *id.*, and limit arbitrariness that may raise potential due process problems. *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) (“A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled ‘punitive.’”), *reh’g denied*, 691 N.W.2d 436 (Mich.), *cert. denied*, 546 U.S. 821 (2005); *see also* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1414 (2004) (“The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.”).

Md. Code, Cts. & Jud. Proc. § 11-108 remains constitutional; it was and has proven to be a rational legislative response to rising pain and suffering damages, outlier awards, and concerns about the effects of excessive liability on the state’s economy. *See Murphy v. Edmonds*, 601 A.2d 102, 115-16 (Md. 1992); *see also Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (applying the rational basis test to find

