

**IN THE COURT OF APPEALS OF MARYLAND**

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**September Term, 2008**

**No. 94**

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**KELLY GREEN, *et al.***

**Appellants,**

**v.**

**N.B.S., INC., *et al.*,**

**Appellee.**

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**On Writ of Certiorari to the Court of Special Appeals of Maryland**

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***AMICI CURIAE* BRIEF OF MARYLAND CHAMBER OF COMMERCE,  
AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA,  
NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN  
INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS  
ASSOCIATION OF AMERICA, AMERICAN CHEMISTRY COUNCIL,  
AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE  
COMPANIES SUPPORTING APPELLEES AND AFFIRMANCE**

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## **INTEREST OF AMICI CURIAE**

As organizations that represent Maryland companies and their insurers, *amici* have an interest in supporting laws that foster a system of predictability and limit outlier damage verdicts. *Amici's* members also have an interest in ensuring that the civil litigation environment in Maryland is fair and balanced, and reflects sound policy. Application of the statute placing a finite limit on noneconomic damages in all cases, and ensuring that the Maryland Consumer Protection Act is not misused as a universal tort claim in order to circumvent otherwise applicable law, furthers these goals.

It is the *amici's* position that the Court of Special Appeals decision below applying the statutory cap on non-economic damages to all claims for personal injury should be affirmed. In addition, *amici* urge this Court to clarify that noneconomic damages are not available for violations of the Maryland Consumer Protection Act and, therefore, any noneconomic damages awarded by the trial court in the case at bar are related to Plaintiffs-Appellants' cause of action for negligence.

## **STATEMENT OF THE QUESTION PRESENTED**

Whether the statutory cap on non-economic damages, Md. Code, Cts. & Jud. Proc. § 11-108(b), applies to all civil personal injury actions, including common law, statutory, and constitutional tort claims, and specifically including actions brought under Maryland's Consumer Protection Act, Md. Code, Com. Law § 13-408(a).

## **STATEMENT OF CASE**

*Amici curiae* adopt Defendants-Appellees' statement of the case.

## **STATEMENT OF FACTS**

*Amici curiae* adopt Defendants-Appellees' statement of facts.

## **SUMMARY OF ARGUMENT**

The Court of Special Appeals reached the correct conclusion that Maryland's statutory limit on noneconomic damages applies to all civil personal injury claims. As the court below recognized, neither the text of the statute nor the legislative history remotely indicate any intent to apply the cap to damages for personal injuries sounding in common law torts, but not statutory or constitutional tort actions. Given the concern of the General Assembly and Governor with unpredictable awards and rising insurance premiums, such a distinction would be contrary to the purpose of the statute.

There is, however, a broader, underlying issue that the courts below appear to have overlooked. The source of the confusion in this case, and why it reaches this Court, stems from a fundamental misunderstanding of the purpose and relief provided by the Maryland Consumer Protection Act (CPA), Md. Code, Com. Law §§ 13-101 *et seq.* Maryland, like many other states, enacted the CPA to provide a means for consumers to recover their costs or losses when misled into purchasing a good or service. The statute permits consumers to recover damages without meeting each of the traditional elements of a common law fraud action, such as an intent to deceive, and to allow recovery even when there is no binding contract. In addition, CPA claims provide consumers with the ability to recover attorneys' fees in what might otherwise be a prohibitively small claim.

A CPA claim is not a "catch all" tort and it is not intended as an alternative basis to recover for personal injuries. Maryland's negligence and product liability laws already

provide adequate means, subject to appropriate proof requirements, for those who become ill or develop a medical condition as a result of exposure to a dangerous product. Nevertheless, in recent years, lawsuits have increasingly included CPA claims in what are personal injury actions in an attempt to circumvent longstanding elements of tort law, such as causation, and qualify for an award of attorneys' fees

Longstanding Maryland jurisprudence consistently recognizes that the appropriate measure of damages in CPA actions is the consumer's out-of-pocket costs or the lost benefit of the bargain, not an award to remedy a personal injury. At its essence, the CPA action in this case is that the plaintiff paid rent for a habitable apartment that was, in fact, not fit for habitation. In cases involving rental of uninhabitable or substandard apartments, Maryland courts recognize that CPA relief consists of recovery of rent paid during the tenancy, moving expenses, and the difference in cost between substitute housing of similar quality and the rent provided for the remainder of the term of the lease. Moreover, noneconomic damages are not an available form of relief under the consumer protection statutes of the vast majority of states.

Here, the trial court inappropriately merged causes of action for common law negligence and a violation of the CPA into a single action. After the court granted summary judgment in favor of the plaintiff on both counts, the sole question submitted to the jury was whether the plaintiff's child was injured due to the defendant's alleged wrongful conduct and, if so, the amount of the noneconomic damages she suffered. While that instruction may have been appropriate on a negligence count, for which it is undisputed that the statutory limit on noneconomic damages applies, it does not

accurately instruct the jury on the measure of damages for a CPA violation. Damages for past or future pain and suffering are grounded in a negligence, not a CPA, action. As stemming from negligence, these damages are subject to the noneconomic damage limit irrespective of whether the cap would apply to damages under the CPA.

Therefore, this Court should affirm the decision of the court below, finding that the noneconomic damage limit applies to any action awarding damages for personal injury, whether arising under common law or otherwise. The Court should also clarify that damages for pain and suffering stemming from personal injury are not available under the CPA. Since the plaintiff did not offer evidence of loss resulting from the lost value of the rental agreement at trial, this Court should construe the entire award as based in negligence and subject to the noneconomic damage cap.

### **ARGUMENT**

#### **I. THE COURT OF SPECIAL APPEALS PROPERLY RULED THAT THE LIMIT ON NONECONOMIC DAMAGES APPLIES TO ALL CASES INVOLVING PERSONAL INJURIES**

In 1985, the Governor and General Assembly established two task forces, the Governor's Task Force to Study Liability Insurance and the Joint Executive/Legislative Task Force on Medical Insurance, in response to a crisis in the availability of insurance in Maryland. *See Murphy v. Edmonds*, 325 Md. 342, 369-70, 601 A.2d 102, 115-16 (1992); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1327-28 (D. Md. 1989). After close consideration, including hearings, meetings, and substantial research, both task forces recommended a statutory limit on noneconomic damages. *See id.* As the Governor's Task Force concluded:

[T]he civil justice system can no longer afford unlimited awards for pain and suffering.

The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, lead to more settlements, and enable insurance carriers to set more accurate rates because of the greater predictability of the size of judgments. The limitation is designed to lend greater stability to the insurance market and make it more attractive to underwriters.

A substantial portion of the verdicts being returned in liability cases are for noneconomic loss. The translation of these losses into dollar amounts is an extremely subjective process as these claims are not easily amenable to accurate, or even approximate, monetary valuation. There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. They vary substantially from person to person, even when applied to similar cases or similar injuries, and can be fabricated with relative ease.

A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.

*Franklin*, 704 F. Supp. at 1328 (quoting report of the Governor's Task Force to Study Liability Insurance issued Dec. 20, 1985). Soon after issuance of the task forces' reports, the General Assembly enacted legislation that limited any award for noneconomic damages in a personal injury action to \$350,000. *See* Md. Cts. & Jud. Proc. § 11-108(b).<sup>1</sup>

The Governor's Task Force report speaks in broad terms. The concern of its members was the "civil justice system" and "liability cases"; the report did not distinguish between common law and statutory-based claims. *See id.* As this Court recognized, "[a] cap on noneconomic damages may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to

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<sup>1</sup> The maximum was adjusted to \$500,000 in 1994 and increased by an additional \$15,000 on October 1 of each year beginning in 1995. *See id.*

reduced premiums, making insurance more affordable for individuals and organizations performing needed services.” *Murphy*, 325 Md. at 369-70, 601 A.2d at 115. The lack of predictability, outlier awards, greater liability exposure, and higher settlement values that the legislature sought to address through a noneconomic damages cap would all be lost if the limit applied to some types of claims, but not others. Insurance premiums would increase to reflect higher liability and variability, frustrating the legislative purpose. *See Oaks v. Connors*, 339 Md. 24, 34-35, 660 A.2d 423, 428 (1995) (“One of the primary purposes in enacting this statutory limit was to promote the availability and affordability of liability insurance in Maryland.”).

This Court’s decision in *Oaks v. Connor*, 339 Md. at 36, 660 A.2d at 429, also indicates that the noneconomic damages cap was intended to apply to all damages arising from a personal injury. In *Oaks*, the question before the Court was whether the cap should be separately applied to noneconomic damages awarded for a wife’s injuries and a separate count for damage to their marital relationship through a loss of consortium claim stemming from a single car accident. The Court concluded that the cap applied to all claims stemming from the personal injury, finding that the phrase “[i]n any action” in Section 11-108(b) means “that in each personal injury action, which include the injured individual’s underlying claims arising therefrom, a single award (“an award”) of noneconomic damages should be made and should be subject to the statutory cap.” *Id.* (emphasis in original). The noneconomic damages claim must apply to “the whole action” because allowing noneconomic damages in excess of the cap “would circumvent the legislative intent.” 339 Md. at 38, 660 A.2d at 430; *see also University of Md. Med.*

