

IN THE SUPREME COURT OF THE STATE OF UTAH

HEIDI J. JUDD, personally and as the
natural parent and guardian of ATHAN
MONTGOMERY for and on behalf of
ATHAN MONTGOMERY,

Plaintiffs/Appellants,

vs.

GREGORY DREZGA, MD,

Defendant/Appellee.

: **BRIEF OF AMICI CURIAE**
: **INTERMOUNTAIN HEALTH**
: **CARE, INC.; UHA, UTAH**
: **HOSPITALS AND HEALTH**
: **SYSTEMS ASSOCIATION; AND**
: **UTAH MEDICAL ASSOCIATION**

:
: Case No. 20010646-SC

:
: Priority No. 15

:
:

Appeal from a Final Judgment of the Third District Court
Salt Lake County, State of Utah
Judge Roger A. Livingston

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INTRODUCTION

Amici curiae Intermountain Health Care, Inc. (“IHC”); UHA, Utah Hospitals and Health Systems Association (“UHA”); and the Utah Medical Association (“UMA”) (collectively “Health Care Amici”) represent the major institutional and individual health care providers in the State of Utah. IHC owns and operates 122 hospitals and medical clinics throughout the state, employing hundreds of nurses and physicians. IHC also administers one of the largest group health insurance plans in Utah. UHA is the trade association for 48 acute and specialty hospitals and 11 health systems operating in Utah. UMA represents some 3,100 individual members, including physicians, medical students, and non-physician affiliates throughout Utah. These Health Care Amici are familiar with the adoption, application, and effects of the Utah Health Care Malpractice Act (“Act”), and specifically the non-economic damage cap (“Damage Cap”) at issue in this case. The Health Care Amici appreciate and welcome this opportunity to provide helpful information and analysis to the Court on this issue of vital importance to the health care industry and to all residents of the State of Utah. (*See* Order granting Joint Motion For Leave to File Amicus Curiae Brief, Addendum, hereafter “Add.,” at 1.)

This nation is on the verge of a health care crisis. Health care costs have increased sharply in recent years, attributable in large part to soaring medical malpractice premiums. Over the past year, insurance premiums have increased by more than 30 percent in eight states, including Utah, and by up to 25 percent in twelve other states.

Price increases are highest for higher-risk practices, such as obstetrics, gynecology, and surgery. These specialists may pay over \$200,000 a year for \$1 million of coverage.¹

At its annual meeting in June of this year, the American Medical Association released a study showing that twelve states are already in a medical liability crisis, with physicians leaving the state or discontinuing their practice because they cannot afford or cannot obtain liability insurance. The result is reduced access to health care for those in need. Another thirty states, including Utah, show warning signs of similar problems.²

In Utah, malpractice insurance rates have remained somewhat stable since 1986, following passage of the statutory limit on noneconomic damages. However, in recent years, rates have begun to climb, with a 21.5 percent increase in 1999 and a 35 percent increase this year, the largest increase since 1985. Increases are largely the result of rising verdict and settlement costs. As in other states, obstetricians are hardest hit, now paying an average annual premium of \$60,000. A recent survey reveals that half of Utah's family practitioners no longer provide obstetrical services. Of those who do, one-third expect to discontinue obstetrics within the next few years because of liability risks and rising insurance costs. Of 106 Utah members of the American College of Obstetricians and Gynecologists surveyed, 15 have already stopped practicing obstetrics, and another 23 plan to do so within five years. Again liability and insurance costs are the

¹ N.Y. Times, "*Malpractice Rates Are Rising Sharply*," Sep. 10, 2001, Add. 2; American Medical News, July 8/15, 2002, Add. 5.

² American Medical News, "AMA Readies for Battle on Tort Reform" "How Much Did it Hurt? St. Paul Exits the Medical Liability Market," (July 8/15, 2002), Add. 5.

cited reasons. Thus, many women in Utah, with one of the highest birthrates in the nation, will face a shortage of needed medical care.³

While several causes contribute to the drastic surge in liability insurance premiums, one of the major causes is skyrocketing malpractice jury verdicts and settlements (which follow verdicts). Nationally, the average jury verdict has jumped nearly 80 percent in recent years, from \$1.9 million in 1993 to \$3.5 million in 1999. The percentage of jury awards over \$1 million increased from 34 percent in 1996 to 52 percent in 2000. Over half of all jury awards today exceed \$1 million.⁴ In Utah as well, malpractice attorneys tout their multi-million dollar jury verdicts in the monthly Bar Journal. (Add. 57.) Over the past ten years, the percentage of all malpractice claims paid in excess of \$100,000 increased from 40 percent to 65 percent. During that same period, the percentage of all paid claims over \$1 million increased from 2 percent to 8 percent.⁵

The specter of unlimited and unpredictable jury verdicts forces liability insurers to maintain higher reserves to cover the risk of increasing potential losses; hence, the steep increases in premiums assessed to medical providers. However, those increases do not solve the problem. The continued trend of higher claims paid, exhausted loss reserves,

³ Utah Medical Insurance Association (“UMIA”), Summary of Rate Changes by Year (Add. 15); Standard-Examiner, *“Insurance Costs Driving Utah Physicians Out of the Baby Business,”* July 12, 2002 (Add. 13).

⁴ American Medical Association (“AMA”) Statement to the U.S. House of Representatives, June 12, 2002, p. 2 (“The primary cause of this emerging crisis is the unrestrained escalation in jury awards [in] . . . a legal system that in many states is simply out of control.”), Add. 28; N.Y. Times, *supra*, Add. 2.

⁵ Physician Insurers Association of America (“PIAA”) Statement to the U.S. House of Representatives, June 12, 2002, p. 14, Add. 39.

declining market rates for investments, and excessively low premiums due to competition have combined to create “the perfect storm” for medical malpractice insurers. A survey of twenty-nine medical liability insurers reveals a 10 percent net operating loss for the year 2001. These dire conditions have forced several liability insurers out of the business, including national carrier Phico, which was taken over by regulators in Pennsylvania last August, and long-time market share leader St. Paul Companies, which announced its withdrawal from the medical malpractice market last December.⁶

The ripple effect of the malpractice insurance crisis has been felt far and near, seriously jeopardizing patient care. In Utah, St. Paul’s exit from the industry left nearly 1,900 physicians (38 percent of the total) scrambling for new liability coverage. Physicians faced with loss of coverage must either (1) find new insurance (while paying for costly “tail coverage” for claims that arise from prior care); (2) relocate to a state with more affordable insurance; or (3) retire.⁷

Our neighboring State of Nevada has been hardest hit over the past several months. Nevada has the fifth highest average physician liability premiums in the country (\$95,000). In March 2002, the Nevada Medical Association reported that nearly 100 physicians had left the state to practice elsewhere, and that more than 10 percent of all its physicians were expected to relocate or retire because of the malpractice insurance crisis. Six of ten obstetricians and many emergency physicians stopped practicing for lack of

⁶ PIAA Statement, *supra*, pp. 6-8, Add. 43-45; U.S. News & World Report, “*Healthcare’s Perfect Storm,*” July 1, 2002, pp. 39-40, Add. 55.

⁷ American Medical News, “*St. Paul Exits the Medical Liability Market,*” July 8/15, 2002, Add. 7.

affordable insurance.⁸ On July 4, 2002, amid calls for emergency relief, the University of Nevada Medical Center in Las Vegas announced that it was closing its Trauma Center because of the mass resignation of dozens of physicians driven from the practice by the soaring cost of malpractice insurance and risks of litigation. The physicians are demanding legal protections, while the Nevada Trial Lawyers Association accused the physicians of “terroriz[ing] the community” and “holding this community hostage.”⁹ Meanwhile, because the Las Vegas Trauma Center, which has treated 11,000 patients a year, is the only one of its kind for nearly 200 miles, trauma patients will be transported to Salt Lake City, Phoenix, or Loma Linda, California, seriously jeopardizing chances for patient survival. (*Id.*)

Given that the major causes of the liability crisis include spectacular and uncontrolled jury verdicts and escalated settlement demands that follow them, the one common remedy advanced by nearly all concerned parties (except trial lawyer associations) is a statutory limit on noneconomic damages. A majority of states have adopted some form of damage limitation, and most courts have found them constitutional.¹⁰ In recent Congressional hearings, the AMA strongly endorsed a proposed federal statute that provides, among other features, a limit of \$250,000 on

⁸ AMA Statement, *supra*, pp. 2-3, Add. 29-30.

⁹ Washington Post, “*Las Vegas Trauma Center Closes as Doctors Quit*,” July 4, 2002, p. A02, Add. 58.

¹⁰ See generally Annot., “*Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery In Medical Malpractice Claims*,” 26 A.L.R.5th 245 (1995); American Tort Reform Association, Listing of States With Damage Limitations, Add. 60.

noneconomic damages (such as for pain and suffering), while allowing unlimited damages for past and future medical expenses. The AMA cited empirical support for the effectiveness of a damage cap, including evidence that malpractice insurance rates in California, which has a noneconomic damage cap, are 93 percent lower than in neighboring Nevada, which has no cap.¹¹ This federal legislation was also supported by the Physician Insurers Association of America.¹² Nevada officials also now seek to implement a damage cap, along with other state reforms.¹³ Additionally, recent public surveys show a high level of concern for rising health care costs and liability lawsuits; 73 percent of the public support reasonable limits on jury awards for pain and suffering.¹⁴

Accordingly, the liability insurance crisis is not speculative or “anecdotal”; it is real; it is current and it is present. As demonstrated below, Utah’s noneconomic malpractice damage cap, which plaintiffs seek to invalidate, is an essential and effective means of controlling health care costs and maintaining the quality of health care in Utah.

SUMMARY OF ARGUMENT

Heightened open courts analysis does not apply to the Damage Cap because the Cap neither prevents access to the courts nor abrogates an existing remedy. The Cap merely modifies one component of the remedy, limiting noneconomic damages to a

¹¹ AMA Statement, *supra*, pp. 6-7.

¹² PIAA Statement, *supra*, pp. 16-17.

¹³ Las Vegas Sun, “*Medical Malpractice: The Costs of Coverage*,” June 21, 2002, Add. 70; Washington Post, *supra*, Add. 58.

¹⁴ Statement of AMA, *supra*, p. 7.

quarter-million dollars. Plaintiffs went to court and received an “adequate” and “effective” remedy for their injury; the constitution requires no more. Plaintiffs have no constitutional right to unlimited damages for pain and suffering.

The Damage Cap is a classic form of economic regulation, implicating no fundamental right or suspect classification. Therefore, the Cap should be analyzed under the rational basis test applicable to traditional due process or equal protection standards. Under those standards, this Court should accord due deference to the constitutional role of the Legislature to determine public policy. This Court should uphold the Cap if it reasonably furthers a legitimate state interest, even though the Court may disagree with the objective or the means selected to achieve it. Under that standard, most courts have upheld damage caps as valid efforts to control health care costs and ensure available health care.

This Court’s prior cases addressing the governmental immunity damage cap do not require heightened scrutiny or invalidation of the malpractice Damage Cap. The Damage Cap is distinguishable because it limits only noneconomic damages over a quarter-million dollars, and is thus a reasonable and valid modification of the existing remedy.

The Damage Cap is a reasoned legislative response to escalating malpractice claims and resulting liability insurance costs that jeopardize access to affordable health care in Utah. National and local studies, as well as actual conditions in surrounding states, demonstrate clearly and sufficiently the effectiveness of damage caps in controlling malpractice claims and insurance costs. The Utah Damage Cap has

effectively controlled insurance and health care costs in Utah, and will be even more effective as upheld by Court.

ARGUMENT

UTAH'S NONECONOMIC DAMAGE CAP IS VALID AND ESSENTIAL TO MAINTAIN QUALITY AND AFFORDABLE HEALTH CARE IN UTAH.

A. Legal Framework to Analyze Validity of Damage Cap.

The Health Care Amici defer to defendant a point-by-point response to plaintiffs' legal arguments on the malpractice Damage Cap. Amici here set forth the legal framework for analysis of public policy and economic data related to adoption and implementation of the Cap.

1. No Heightened Open Courts Analysis Is Required.

Plaintiffs challenge the Damage Cap primarily under Article I, Section 11 of the Utah Constitution, the so-called "open courts provision," which states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Plaintiffs argue that the Damage Cap violates this provision, as determined under the two-part test of *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985), which struck down a six-year product liability statute of repose. Under the *Berry* test, a statute may abrogate an existing remedy only if it provides "an effective and reasonable alternative remedy" or "substantially equal . . . benefit to the remedy abrogated." *Id.* at 680. Absent such alternative remedy or benefit, "abrogation of the remedy may be justified only if

there is a clear social or economic evil to be eliminated and the elimination of a remedy is not an arbitrary or unreasonable means for achieving the objective.” *Id.* Plaintiffs argue that the Damage Cap abrogates their right to a “full remedy,” with no alternative remedy; that there is no real social or economic problem; and that the Cap is an arbitrary and impermissible way to address the perceived problem. (Br. of App. 17-26.) However, plaintiffs’ reliance on *Berry* is misplaced.

To begin with, the Damage Cap does not, in *Berry*’s words, “abrogate” or “eliminate” an existing remedy; it merely limits one segment of the damages available under that remedy. It leaves unaffected the plaintiffs’ ability to recover actual out-of-pocket losses, as well as punitive damages. Therefore, no heightened scrutiny of the Cap is required. As explained in *Berry*, the intent of Section 11 is to preserve “*effective* remedies designed to protect basic individual rights”; “to secure *adequate* remedies for violated rights.” 717 P.2d at 675 (emp. added). As *Berry* acknowledges, “no one has a vested right in any rule of law,” including any particular measure of damages, and the Legislature is free to “modify the law . . . as society evolves and conditions require.” *Id.* at 675-76 (citation omitted); *see also* *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, 972 P.2d 1194, ¶¶ 69-81 (Stewart, J., concurring) (detailed history of Section 11; “The *Berry* two-part test allows the Legislature considerable latitude to modify and even eliminate judicial remedies where appropriate.”).

Neither were plaintiffs denied access to the courts. Plaintiffs went to court and obtained a remedy for the injury. The Cap merely *limited* the speculative and uncertain damages for pain and suffering. By receiving a full recovery for all past and future

economic loss, plus a quarter-million dollars for pain and suffering, plaintiffs received an “effective” and “adequate” remedy for the personal injury. Section 11 requires no more. Section 11 does not guarantee “full” or unlimited damages for pain and suffering, which, by definition, are uncertain in amount, making it impossible to determine whether any such remedy is ever “full.” See *Fein v. Permanente Medical Group*, 695 P.2d 665, 680-81 (Cal. 1985) (discussing the inherent difficulties of, and absence of constitutional entitlement to, pain and suffering damages). Accordingly, the Damage Cap, in limiting one aspect of plaintiffs’ recovery, is distinguishable from a statute of repose, such as addressed in *Berry and Lee v. Gaufin*, 867 P.2d 572 (Utah 1993), which completely eliminates any remedy for the claimed injury. See *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, *supra*, at ¶ 78 (Stewart, J., concurring) (“statute of repose at issue in *Berry* totally abrogated all legal remedies,” leaving “no alternative remedy”). Thus, because the partial damage limitation at issue here neither totally “abrogates” the remedy nor denies access to the courts, the heightened open courts analysis established in *Berry* has no application.¹⁵

¹⁵ Courts in other jurisdictions have recognized this distinction in upholding damage caps under open courts provisions similar to Utah’s. See, e.g., *Murphy v. Edmonds*, 601 A.2d 102, 113-14 (Md. 1992) (damage cap does not restrict access to the courts; “There is a distinction between restricting access to the courts and modifying the substantive law to be applied by the courts.”); *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 905-06 (Mo. 1992) (damage cap does not “deny plaintiffs a lawful remedy for a wrong done; it simply redefines the substantive law by limiting the amount of noneconomic damages plaintiffs can recover”). See also *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 (1978) (upholding damage cap under due process; a plaintiff has no vested interest “in any rule of the common law”; “statutes limiting liability are relatively commonplace and have consistently been enforced by the courts”); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (if the legislature may completely abolish a cause of action, it may also limit damages recoverable for a cause of action); *Fein v. Permanente Medical Group*, 695 P.2d 665, 679 (Cal. 1985) (upholding damage

Rather, the damage limitation is more appropriately analyzed under traditional theories of due process and equal protection. As the author of *Berry* recently acknowledged, the *Berry* test “is essentially the same test” as for a due process violation, “similar to the due process and equal protection of the laws tests that this Court has historically applied.” *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, *supra*, at ¶¶ 76-77 (Stewart, J., concurring). “[T]he *Berry* test is the same test that the United States Supreme Court has applied under the Due Process Clause of the Fourteenth Amendment in deciding whether one has been denied life, liberty, or property.” *Id.*, ¶ 82, citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (a damage limitation case discussed below). Justice Russon, in drafting the main opinion in *Craftsman*, agreed with Justice Stewart’s interpretation of *Berry*. *Id.*, ¶ 15 n.5. *See also Condemarin v. University Hosp.*, 775 P.2d 348, 357 (Utah 1989) (“two-part test articulated in *Berry* . . . requires a classic due process analysis”). As discussed next,

under traditional due process and equal protection analysis, no heightened scrutiny is justified where no fundamental right is infringed and no suspect classification is created.

2. Standard for Judicial Review of the Damage Cap.

cap under due process; “a plaintiff has no vested property right in a particular measure of damages, and . . . the Legislature possesses broad authority to modify the scope and nature of such damages”).

One of the valid criticisms of the *Berry* test is that it “has distorted [this Court’s] constitutional relationship to the legislature and placed [the Court] in the position of having to review legislative policy judgments on a de novo basis and with a skepticism [the Court] employ[s] nowhere else.” *Lyon v. Burton*, 2000 UT 19, 5 P.3d 616, ¶ 89 (Zimmerman, J., concurring) (upholding cap on total damages recoverable under Governmental Immunity Act). This “second-guessing” of legislative policy judgments is reminiscent of the discredited *Lochner v. New York*, 198 U.S. 45, 53 (1905), and its progeny, cases in which so-called “substantive due process” was applied to overturn economic legislation. Such strict judicial scrutiny of economic legislation breaches the established separation of constitutional powers.¹⁶

However, even if applied, the second prong of the *Berry* test, by its terms, requires only that legislation not be “an *arbitrary or unreasonable* means for achieving the objective” (emp. add.), which actually tracks traditional rational basis review. Under that traditional test, this Court originally upheld other provisions of the Utah Health Care Malpractice Act against an equal protection challenge in *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30, 32 (Utah 1981):

¹⁶ See V. Schwartz, “*Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers; How to Restore the Right Balance*,” 32 Rutgers L.J. 907, 917-20, 949-50 (2001) (nationwide case study that refers to *Berry* and its progeny in Appendix 1). Since the *Lochner* era, the Supreme Court standard of review presumes facts supporting legislative judgments, and legislation on economic matters is upheld unless it lacks a rational basis. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938). See also Light, “*Who’s the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*,” 58 Wash. & Lee L. Rev. 315, 344-54 (2001). Even Justice Stewart later repudiated substantive due process analysis as an “illegitimate exercise of judicial power in the realm of legislative power.” *Condemarin v. University Hosp.*, *supra*, at 369 (Stewart, J., separate opinion).

It is therefore seen that the Act was premised upon the need to protect and insure the continued availability of health care services to the public The legislature exercised its discretionary prerogative in determining that the [statutes] would insure the continued availability of adequate health care services. . . . [W]e conclude that the legislature’s determination is *not so arbitrary or unreasonable* as to exceed constitutional prohibitions. [Emp. added.]

Accordingly, both *Allen* and *Berry* employ the *same language* of traditional rational basis review. That same language should yield the same degree of judicial review; the same language should not result in different levels of judicial scrutiny, depending on whether members of this appointed Court agree with the policy judgments of elected legislators. As this Court recently observed in *Spackman v. Board of Educ.*, 2000 UT 87, 16 P.3d 533, ¶ 24, in addressing damage remedies:

[W]e urge deference to existing remedies out of respect for separation of powers principles. In general, the *legislative branch has the authority, and in many cases is better suited, to establish appropriate remedies for individual injuries*. By requiring courts to defer to relevant legislative determinations of appropriate remedies, we respect the legislature’s important role in our constitutional system of government. [Emp. added.]

Thus, in the end, all that is required is that this Court examine whether the Damage Cap is a reasonable, nonarbitrary method of accomplishing its avowed purpose.¹⁷

¹⁷ See, e.g., *Mansell v. Mansell*, 490 U.S. 581, 592 (1989) (“Congress is not required to build a record in the legislative history to defend its policy choices.”); *State v. Rio Vista Oil*, 786 P.2d 1343, 1349-50 (Utah 1990) (economic legislation that does not burden a fundamental right is presumed valid, and the burden is on the party challenging the statute to prove otherwise); *Blue Cross and Blue Shield v. State*, 779 P.2d 634, 641 (Utah 1989) (economic enactments are upheld if they are reasonably related to a legitimate legislative purpose; “we do not require any exact proof of those purposes”); *Baker v. Matheson*, 607 P.2d 233, 236, 244 (Utah 1979) (“[t]he wisdom of the legislative enactment is not a legitimate concern of this Court”; rationality of legislation is determined by “whether facts can reasonably be conceived which would justify the distinctions or differences in state policy as between different persons, . . . even without actual evidence demonstrating a rational basis for the distinctions made”).

Cases from other jurisdictions illustrate this proper judicial deference in reviewing statutory damage limitations, such as the one at issue. The leading federal case is *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), which addressed a damage limitation on liability for nuclear accidents resulting from operation of private nuclear power plants. The stated purpose of the enactment was to protect the public and encourage development of the atomic energy industry. Plaintiffs challenged the damage limit under due process and equal protection, asserting that it “tends to encourage irresponsibility” and “places the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe.” *Id.* at 82. Plaintiffs called for a heightened standard of judicial review because “the interests jeopardized . . . are far more important than those in the economic” realm. *Id.* at 83. The Supreme Court rejected any heightened level of review:

The liability-limitation provision thus emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate “the burdens and benefits of economic life.” “It is by now well established that [such] legislative Acts . . . come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” That the accommodation struck may have profound and far-reaching consequences, . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational. [*Id.* at 83-84, citations omitted.]

The Court upheld the damage limitation because it “bears a rational relationship to Congress’ concern for stimulating” development of atomic power, even though the limit set by Congress would be insufficient to guarantee “full compensation” to all injured in an accident. *Id.* at 84-85.

In the leading state case of *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985), the California Supreme Court applied a rational basis standard to uphold the constitutionality of a \$250,000 cap on noneconomic damages in medical malpractice actions:

[T]he constitutionality of measures affecting such economic rights . . . does not depend on a judicial assessment of the justifications for the legislation or of the wisdom or fairness of the enactment So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature. [*Id.* at 679.]

The court observed that the Legislature was responding to the rising cost of medical malpractice insurance and its effect on the costs and availability of health care. The court concluded that the damage cap “is rationally related to the objective of reducing the costs of malpractice defendants and their insurers.” *Id.* at 680.

Under rational basis review, courts are not expected to resolve conflicting evidence on whether a medical malpractice crisis exists. In *Adams v. Children’s Hosp.*, 832 S.W.2d 898 (Mo. 1992), upholding a noneconomic malpractice damage cap, the court found no implication of a fundamental right or suspect classification to justify heightened scrutiny. *Id.* at 903. Considering the array of evidence supporting and refuting the existence of a “crisis” in medial malpractice premiums, the court found at least “a debatable proposition that such a crisis does in fact exist.” *Id.* at 904. Under rational basis review, any “doubt must be resolved in favor of the General Assembly,” whose province it is to decide public policy and “to determine whether a medical malpractice crisis exists.” *Id.* The court concluded that the damage cap, which does not

limit recovery of economic losses or punitive damages, “is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians.” *Id.*¹⁸

3. Utah Cases On Governmental Immunity Damage Cap.

Plaintiffs rely on *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989), and other cases analyzing the governmental immunity damage cap to support invalidation of the malpractice Damage Cap. (Br. of App. 12-19.) However, those cases are distinguishable and do not alter the foregoing principles governing proper analysis of the malpractice Damage Cap.

In *Condemarin*, the Court issued a highly splintered decision, with three members agreeing on the narrow holding that the \$100,000 cap on *total damages* is unconstitutional as applied to a state-owned hospital. Two of those three have since left the Court. As no two members of the Court agreed on the proper analysis, the case is of limited precedential value. *See Parks v. Utah Transit Authority*, 449 U.A.R. 12, *8-9 (Utah 2002) (upholding constitutionality of the immunity damage cap; “there is limited precedential value to that [*Condemarin*] opinion”).

¹⁸ *See also Pulliam v. Coastal Emergency Services*, 509 S.E.2d 307, 318 (Va. 1999) (damage cap implicates no fundamental right or suspect classification; “the rational basis test continues to provide the proper standard for determining whether there has been a denial of due process or equal protection in a case involving the medical malpractice cap”); *Robinson v. Charleston Area Medical Center*, 414 S.E.2d 877, 887 (W. Va. 1991) (“courts ordinarily will not reexamine independently the factual basis for the legislative justification for a statute”; “in addressing complicated social and economic problems, the Legislature must be free to attempt a remedy, even when the results are uncertain”); *Guzman v. St. Francis Hosp.*, 623 N.W.2d 776, 782 (Wis. App. 2000) (assessment of whether a “health-care crisis” justified the noneconomic damage cap “is for the legislature and not for us”).

In any event, the immunity cap is materially different from the malpractice Damage Cap because the immunity cap limits *total* damages. As Justice Durham observed in *Condemarin*, a claimant with more serious injuries may not only be precluded from recovering all out-of-pocket losses, but may also be barred from recovering any future medical expenses or any noneconomic damages at all. 775 P.2d at 353. Justice Durham concluded that such a drastic limitation is unjustified and arbitrary. *Id.* at 366. Justices Durham and Zimmerman agreed that while the damage cap did not implicate a “fundamental right,” as that term is used in traditional due process and equal protection analysis, heightened scrutiny was justified because the cap did not ensure recovery of out-of-pocket losses. *Id.* at 354, 359, 366. Justice Zimmerman explained:

[W]hen the people are deprived of a right to recover actual out-of-pocket expenditures . . . the infringement upon the right to recover for harm to the person is far more severe and requires far more justification than when general damages for pain and suffering or punitive damages are restricted. [*Id.* at 369, Zimmerman, J., concurring in part.]

Accordingly, the members of the *Condemarin* majority were concerned that the remedy afforded by the immunity damage cap was inadequate to reimburse even out-of-pocket losses. By contrast, because the malpractice Damage Cap allows *full recovery* of past and future medical expenses, as well as noneconomic damages up to a quarter-million dollars, and even punitive damages when appropriate, no heightened scrutiny is justified, and the Cap withstands analysis.¹⁹

¹⁹ Plaintiffs repeatedly assert that their recovery was cut by 80 percent (*e.g.*, Br. of App. 7); however, they fail to include the more than one million dollars awarded for past and future medical expenses, ensuring that plaintiffs will be fully compensated for all out-of-pocket loss.

The limited application of *Condemarin* becomes even more apparent when viewed in the context of subsequent cases on the immunity cap. In *McCorvey v. Utah State Dept. of Transportation*, 868 P.2d 41 (Utah 1993), the Court upheld the cap as applied to a state agency engaged in road maintenance. “There is no fundamental right to recover unlimited damages from government entities performing governmental functions.” *Id.* at 47. No resort was made to open courts or heightened scrutiny analysis. Similarly, in *Bott v. DeLand*, 922 P.2d 732 (Utah 1996), this Court did not apply open courts or heightened scrutiny analysis in holding the immunity cap inapplicable to an inmate injured at the state prison. The Court simply held that the cap posed an “unreasonable regulation” of the plaintiff’s independent constitutional right “to be free of ‘unnecessary rigor.’” *Id.* at 736; *see id.* at 743-44. By contrast, plaintiffs in the present case have no independent constitutional right to unlimited noneconomic damages.

More recently, this Court held in *Lyon v. Burton*, 2000 UT 19, 5 P.3d 616, that the amended \$250,000 immunity cap *is an effective and adequate remedy* for personal injury. After an auto accident caused by the fire chief, plaintiffs sued the chief and the fire district. The chief was dismissed based on total statutory immunity for government employees, and the jury verdict awarded against the district was reduced consistent with the damage cap. The Court followed *McCorvey* to unanimously uphold the damage limitation as applied to the district, because fire fighting is a governmental function. *Id.*, ¶¶ 42-43. Because the immunity statute *completely abrogated* the common law remedy against the chief, precluding any recovery at all against him, the Court properly applied the *Berry* open courts analysis to that abrogation. *Id.*, ¶¶ 44, 48, 52. Justices Stewart and

Durham held the immunity statute unconstitutional because the alternative remedy provided against the district was artificially capped at \$250,000. *Id.*, ¶ 54. However, the majority of the Court upheld the provision of total immunity, with Justices Howe and Russon concluding that the \$250,000 judgment against the district “is an effective and reasonable substitution for a possibly greater judgment against a state employee” that may be uncollectible. *Id.*, ¶¶ 82-83 (Howe, J., concurring). They acknowledged that “the legislature may modify the remedy . . . without violating the open courts provision . . . [and] should be accorded broad discretion in providing an alternative remedy.” *Id.*, ¶ 83. Justice Zimmerman voted with the majority on other grounds, reasoning that *Berry* “should be abandoned,” and noting that “a majority of the court is no longer willing to use *Berry* as a standard by which to judge legislative limitations on civil damage remedies.” *Id.*, ¶¶ 89, 91. *See also Parks v. Utah Transit Authority*, 449 U.A.R. 12 (Utah 2002) (upholding immunity damage cap, distinguishing *Condemarin*, and finding the *Berry* analysis unnecessary).

In summary, open courts analysis has no application to the Damage Cap at issue because the Cap neither denies access to the court nor abrogates a remedy. Plaintiffs received an adequate and effective remedy for the injury. The Cap should be analyzed under traditional due process and equal protection tests requiring a rational basis for the Cap, with due deference to the legislature’s constitutional role to determine public policy. This Court’s evolving decisions under the governmental immunity cap support the conclusion that plaintiffs have no constitutional right to unlimited damages for pain and suffering, and that the Cap affords them an adequate and effective remedy.

B. The Damage Cap Is An Effective Means to Control Health Care Costs and Maintain Access to Quality Health Care in Utah.

1. Legislative Purpose of the Malpractice Damage Cap.

The Utah Health Care Malpractice Act was passed in 1976 in response to a liability insurance crisis that threatened the affordability and availability of health care in Utah and around the nation.²⁰ The Utah Legislature expressly found that the increasing number of medical malpractice lawsuits and skyrocketing damage verdicts “substantially increased the cost of medical malpractice insurance.” U.C.A. § 78-14-2. Higher insurance costs resulted in dramatic increases in the cost of health care, as premium costs were passed through to patients. Costs also increased as a result of some providers practicing defensive medicine, sometimes prescribing multiple diagnostic measures out of concern for risk of litigation. Other providers, unable to afford liability insurance, were forced to practice without coverage or discontinue their practice. This resulted in reduced availability of health care or injured patients with no insurance fund from which to collect their judgments. *Id.* Because malpractice insurance is a national industry, health care in Utah was also affected by similar trends in other states. To alleviate these conditions and trends, the Legislature enacted various provisions over time “to encourage private insurance companies to continue to provide health-related malpractice insurance . . . and to provide other procedural changes to expedite early evaluation and settlement of claims.” *Id.*

²⁰ See generally Chupkovich, “Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or A Reasonable Mechanism for Obtaining Affordable Health Care?” 9 J. Contemp. Health L. & Pol’y 337, 338-42 (1993).

Following a period of relative stability, malpractice insurance rates began to spike up again in the early 1980's. The annual number of claims per 100 physicians increased from 3.2 prior to 1981 to 10.1 in 1985. St. Paul Insurance Company, which handled up to 20 percent of the malpractice insurance market, reported a 70 percent increase in claim frequency between 1980 and 1986. The average amount paid per claim increased 54 percent from 1982 to 1985. From 1979 to 1985, the total compensation paid by malpractice insurers increased at an annual rate of 25 percent. To reduce growing losses, St. Paul increased its rates by 25 to 35 percent annually from 1984 to 1986. In 1986, “insurance premiums were the fastest growing component of physicians’ practice expenses and a primary cause of the continuing escalation of health care costs.”²¹

In Utah during the 1970's and early 1980's, Aetna Life and Casualty Insurance Company provided medical malpractice insurance to the majority of physicians and hospitals. From 1977 to 1979, insurance costs and rates were relatively stable. However, in 1980, the situation deteriorated rapidly. Costs doubled from the prior year and doubled again the following year. Aetna increased its rates by 25 percent in 1980, by 20 percent in 1981, and by another 50 percent in 1982. Faced with continuing losses, Aetna discontinued writing malpractice insurance in Utah in 1983. Thereafter, UMIA became the predominant insurer of physicians and surgeons in Utah, and IHC assumed the role of insuring most of the hospitals in Utah. However, conditions did not improve. UMIA

²¹ Tillinghast Report of Actuarial Study Commissioned by UMIA, UMA, and IHC, pp. 5-7, August 8, 1994 (hereafter “Tillinghast Report”), Add. 75.

was forced to increase its rates by 25 percent in 1982, 15 percent in 1983, 42 percent in 1984, 67 percent in 1985, and 31 percent in 1986. *Id.* at 7-10.

In 1986, in this climate of spiraling malpractice claims and rate increases, the Utah Legislature added the Damage Cap to the Health Care Malpractice Act, limiting noneconomic damages to \$250,000. As noted, the statute imposes no limit on recovery of actual economic losses or punitive damages. U.C.A. § 78-14-7.1. In 2001, the limit on noneconomic damages was increased to \$400,000, with annual adjustments for inflation thereafter.²² The intent of the Damage Cap, like similar limitations in a majority of other states, is to stabilize malpractice insurance rates by reducing the largest verdicts that account for a disproportionate share of total malpractice payments.²³ Stabilizing insurance rates for the purpose of reducing costs and improving the availability of health care is an important and legitimate government purpose. *See, e.g., Fein v. Permanente Medical Group, supra*, 695 P.2d at 680; *Adams v. Children's Mercy Hosp., supra*, 832 S.W.2d at 904. Even if economic conditions in 1986 could not be termed a "crisis," the Legislature's effort to stabilize the malpractice market and *avoid* a crisis is still a

²² Plaintiffs suggest that medical malpractice claimants lack sufficient political power to influence the legislative process. This claim turns a blind eye to the well-funded activities of the plaintiffs' bar. Recent changes in Utah law, including the increase in the Damage Cap to \$400,000 indexed to inflation, and the adoption of a statutory cause of action for loss of consortium, demonstrate the political clout of those representing injured persons. Although the Amici are not aware of Utah data, elsewhere around the country, plaintiffs lawyers have outspent and out-lobbied doctors and insurance companies in attempts to influence the political process. *See e.g., Oregonian, "Foes of Limiting Jury Awards Lead Fundraising Race,"* April 18, 2000, Add. 163; *The Washington Times, Huge Settlements Draw Litigators to Mississippi,* July 8-14, 2002, Add. 181.

²³ Tillinghast Report, *supra*, at 12-15; *see also* Chumpkovich, *supra*, at 341.

permissible government objective. *See Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 91 (N.C. App. 2002) (upholding cap on punitive damages; “[t]here does not have to be a present crisis”; whenever reasonable, “the legislature may, and should, be proactive”).

2. Impact of the Damage Cap on Health Care.

As noted in the Introduction, concern with the costs and availability of health care has also reached the United States Congress. In the course of evaluating proposed federal tort reform law, Congress requested its Office of Technology Assessment (“OTA”) to prepare a report on whether various state medical malpractice reforms, including damage caps, actually reduced malpractice costs. The OTA assembled data from the results of six different scientific studies on the effectiveness of sixteen different malpractice reforms, including damage caps. All six empirical studies measured the impact of the various reforms on three malpractice cost indicators: frequency of claims, payment per paid claim, and malpractice insurance premiums or losses. OTA assessed the impact of each reform on the malpractice cost indicators. The OTA report concluded that damage caps have a significant impact in reducing paid claims and insurance premiums, while having uncertain impact on the number of claims:

Overall, caps on damage awards were the only type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators. The most consistently observed effects of damage caps were in reducing payment per paid claim

Even though caps on damages directly affect only a small minority of cases, this minority often accounts for a disproportionate share of total malpractice payments. In addition, it is the large, unexpected claim that makes it difficult for insurers to plan reserves. Minimizing these large awards may allow insurers to better match premiums to risk.

. . . [A]mong the many State reforms . . . examined, *caps on damage awards—whether for total damages or only for noneconomic damages—had the greatest impact on reducing payment per paid claim.* [Emp. added.]²⁴

Most of the studies also found that noneconomic damage caps “significantly reduced malpractice premiums as well as insurers’ losses.” *Id.* at 65. The studies suggest that “caps on damages are effective in lowering payment per paid claim and, hence, malpractice insurance premiums.” *Id.* The OTA Impact Report concludes:

Based on the six empirical studies reviewed in this chapter, only caps on damage awards and collateral source offsets appear to consistently reduce one or more of the malpractice cost indicators. As predicted, both reforms reduce payment per paid claim, and *caps on damages also lead to lower insurance premiums.* [*Id.* at 73, emp. add.]²⁵

The Tillinghast Report confirms the effectiveness of the Utah Damage Cap.

UMIA’s insurance rates decreased by 17 percent between 1986 and 1994. UMIA’s loss ratio (percentage of premiums paid toward claims) decreased from a six-year average of 157 percent before the Damage Cap to a six-year average of 66 percent after the Cap.

Utah’s percentage of loss payments, relative to the United States, dropped from a six-year

²⁴ U.S. Congress, Office of Technology Assessment, “*Impact of Legal Reforms on Medical Malpractice Costs*,” OTA-BP-H-119, p. 64 (Washington, DC: U.S. Gov’t Printing Office, October 1993) (hereafter “OTA Impact Report”) (Add. 111).

²⁵ Other scientific studies also demonstrate the effectiveness of damage caps. *See, e.g.*, Pogarsky and Babcock, “*Damage Caps, Motivated Anchoring, and Bargaining Impasse*,” 30 J. Legal Stud. 143 (Jan. 2001) (discussing how caps encourage settlement of claims, with the rate of settlement determined by the cap level and claim severity); Bovbjerg, “*Lessons for Tort Reform from Indiana*,” 16 J. Health, Politics, Policy and Law 465, 467 (Fall 1991) (damage caps reduce claims paid by 40 percent and reduce liability premiums by one third); Barker, “*The Effects of Tort Reform on Medical Malpractice Insurance Markets: An Empirical Analysis*,” 17 J. Health, Politics, Policy and Law 143, 144 (Spring 1992) (“empirical evidence suggests that the imposition of statutory ceilings on recoveries both decreased risk and improved relative profitability”; “ceilings on awards significantly reduced the amount of payment and increased the speed with which a claim is resolved”); NORCAL Mutual Insurance Co., “*Economic Impact of Medical Tort Reform in California—1975-1998*” (Add. 137).

average of 0.6 percent prior to the Cap to a six-year average of 0.4 percent after the Cap, even when Utah's percentage of physicians was increasing from 0.6 percent to 0.7 percent.²⁶ Accordingly, the original effect of the Damage Cap in Utah was just as intended by the Legislature, with insurance rates reduced and holding relatively stable. The impact of the Damage Cap will become even more pronounced if the Court upholds validity of the Cap, as settlements have crept higher with the Cap's legal uncertainty. (*Id.* at 16-17.)

Malpractice insurance rates are also directly affected by court decisions enforcing or invalidating a damage cap. For example, California's damage cap was passed in 1975, but was not upheld by the California Supreme Court in *Fein* until 1985. In the ten-year period of uncertainty prior to *Fein*, malpractice premiums remained at 1975 levels, but the market was stable. Following *Fein*, large loss payments decreased by 31 percent, and average loss payments decreased by 43 percent. NORCAL, a major malpractice carrier, did not raise premiums for eight years following *Fein*. The percentage of cases settling has increased, and average claim resolution time has been cut in half. By contrast, when Ohio's cap was ruled invalid in 1985, malpractice insurance costs rose dramatically and have remained high.²⁷

3. Elimination Of The Damage Cap Would Dramatically Increase Medical And Insurance Costs And Adversely Affect Health Care In Utah.

²⁶ Tillinghast Report, *supra*, at 18-19.

²⁷ NORCAL Mutual Insurance Company, "Economic Impact of Medical Tort Reform in California-1975-1998", pp. 3-5, Add. 137.

Even despite the salutary effects of the Damage Cap, Utah has recently experienced a dramatic increase in the size ("severity") of medical malpractice judgments and settlements. In nine out of the last ten years, UMIA, which insures a majority of Utah's physicians, has annually paid out more in settlement and judgments than it has collected in premiums. In the last few years, UMIA's loss ratio has become even worse. In 2001, for instance, UMIA paid out \$1.61 in settlements or judgments for every single dollar it collected in premiums. In 2000, UMIA paid almost two dollars (\$1.92) for every premium dollar earned.²⁸ The frequency of claims made over this period has remained relatively constant. *Id.* Accordingly, this increase is largely attributable to the increasing severity of the claims made.

The estimated value of future costs forms the basis of the rate-setting process.²⁹ The recent history of increasing severity of claims necessarily changes the expected cost of future claims. Thus, since 1999, UMIA has had to raise the rates it charges physicians over 50 percent. It is axiomatic that elimination of the Damage Cap would lead to further dramatic rate increases because the amount of the insurable risk would also necessarily increase.³⁰

²⁸ UMIA Annual Statement, December 31, 2001, Schedule P, Add. 23.

²⁹ Casualty Actuarial Society, "*Statement of Principles Regarding Property and Casualty Insurance Ratemaking*," (1998), (Add. 184).

³⁰ LECG, Inc., "*California's MICRA Reforms: How Would A Higher Cap on Non-Economic Damages Affect the Cost of and Access to Health Care?*" pp. 2, 11 (Fall 1998) ("MICRA Reforms"), Add. 188.

This principle is confirmed by the recent experience of the State of Oregon. In Oregon, the cap on noneconomic damages adopted in 1987 kept insurance and medical costs stable until 1999 when the Oregon Supreme Court overturned it. Since that ruling, amounts paid in settlements and verdicts have tripled. One major insurer paid just two claims over \$1 million from 1983 to 1999, but has paid fourteen such claims since the court ruling. Insurers incurred heavy losses, paying out over \$25 million more in claims and expenses than collected in premiums. As a result, physician premiums have increased by over 30 percent annually and some hospital premiums have increased by 500 percent. As in Nevada, doctors and medical centers are being forced out of business, especially in rural areas of the state.³¹

In response to increased liability premiums, some health care providers will either relocate, stop providing high-risk services, or retire. In these cases, patients in dire need of medical care may find themselves without any convenient provider.

As shown above, Nevada has been hardest hit by the malpractice insurance crisis primarily because it has failed to enact a damage cap and other reform measures. Its malpractice rates are fifth highest in the nation, literally driving its physicians out of the

³¹ Northwest Physicians Mutual Insurance Co., Notices of Rate Increases, 2001-02; Five-Year Historical Data, Add. 172; Oregonian, “*Doctors Take Big Cuts As Insurance Costs Rise*,” June 26, 2002, Add. 167. Oregon medical providers and insurers responded to the court decision by joining forces to support a constitutional amendment authorizing a damage cap. However, they were outspent 2-to-1 in a media blitz by the trial lawyers association, and the measure was defeated. *Id.*; Oregonian, “*Foes of Limiting Jury Awards Lead Fundraising Race*,” April 18, 2000, Add. 163. So much for the notion urged by plaintiffs (Br. of App. 11) that malpractice claimants are an isolated and unrepresented minority who need special constitutional protection. In truth, they are actively represented by vocal and well-funded trial lawyers who reap their living from malpractice claims.

state or into retirement, causing the largest trauma center in the state to close, and leaving its residents without high-quality emergency medical care. (Add. 58, 63-70.) By contrast, the damage cap in neighboring California has kept insurance costs down because carriers know how much to charge doctors for coverage. As explained by an officer of the Medical Insurance Exchange of California, “The law hasn’t stopped malpractice [claims], but it put predictability in the system. The problem in Nevada is there is no predictability, and jury verdicts come out of the clear blue sky.”³² The carrier charges an obstetrician in Las Vegas \$142,000 for coverage, while the same coverage in Los Angeles costs \$53,000. (*Id.*) Insurance rates average 40 to 90 percent higher in Nevada than California because Nevada has no damage cap.³³

This threat is not limited to "other" states. Recent data suggests that increasing malpractice rates are already having a dramatic effect in high-risk specialties like obstetrics. As shown above, recent surveys show that family practitioners and obstetricians in Utah are being forced from the practice of obstetrics in high numbers due to increasing liability risks and insurance premiums. Those providers who can afford to continue to practice will initially bear the burden of increased premiums themselves. However, over time, rising malpractice premiums will lead to increased physician and hospital fees which will be passed on to Utah patients, businesses, and governments. “Hospitals and physicians incur and pass on to consumers additional expenses that directly or indirectly relate to medical liability. Therefore, estimates of higher

³² Las Vegas Sun, “*Medical Malpractice: The Costs of Coverage*,” June 21, 2002, Add. 70.

³³ AMA Board of Trustees Report at 2002 Annual Meeting, pp. 6-7, Add. 149.

malpractice premiums -- taken by themselves -- understate the full effect of medical liability on national health expenditures.”³⁴

The increased cost of medical services resulting from an abandonment of the Cap will have numerous undesirable effects. As the cost of health insurance rises to accommodate the cost of medical malpractice liability insurance, more businesses will reduce medical coverage for employees, pass on higher costs to the employee, or abandon coverage altogether. Even modest changes in the price of health insurance has been shown to decrease participation in insurance programs, particularly for low income workers.” Uninsured or underinsured citizens will either go without needed medical care or rely on government funding.³⁵

In summary, damage caps have a real and direct impact on malpractice claim payments, insurance rates, medical costs, and resulting availability of health care to all residents. This conclusion has been confirmed by independent empirical studies, both nationally and locally, and dramatically demonstrated by real-life events in surrounding states. This evidence is more than sufficient to uphold the Damage Cap at issue here under any level of scrutiny.³⁶ Utah residents have benefitted from the stabilizing effects of the Damage Cap at issue here, and those benefits will increase and endure as the Cap is upheld by this Court.

CONCLUSION

³⁴ MICRA Reforms, *supra*, p. 15.

³⁵ *Id.* at 20-21.

³⁶ *See Light, supra*, 58 Wash. & Lee L. Rev. at 344-54.

Preserving the Damage Cap is the most important issue facing the health care industry in Utah. Malpractice claims and settlements are not the sole cause of rising insurance and health care costs, and damage caps alone are not the complete solution. However, the Damage Cap at issue here is a valid and *essential* means of reducing those costs. Without the Cap, costs would rise dramatically and the quality of care would suffer over time. This Court's decision will have marked and lasting consequences for all residents of this state. Based on the foregoing, the Health Care Amici strongly urge this Court to affirm the judgment of the district court upholding the constitutionality of the Damage Cap.

Respectfully submitted this _____ day of July, 2002.

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I hereby certify that I caused two true and correct copies of the foregoing

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