

2001

Heidi J. Judd, personally and as the natural parent
and guardian of Athan Montgomery for and on
behalf of Athan Montgomery v. Gregory Drezga,
M.D. : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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

Plaintiffs and Appellants,

vs.

GREGORY DREZGA, M.D.,

Defendant and Appellee.

Supreme Court No. 20010646-SC

Priority No. 15

BRIEF OF THE APPELLEE

Appeal From A Final Judgment of the Third District Court,
Salt Lake County, State of Utah,
The Honorable Roger A. Livingston, Presiding

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JURISDICTION

This case is within the jurisdiction of this court pursuant to Utah Code Ann. § 78-2-2(3)(j) (Supp. 2001).

ISSUE

Whether the Utah Health Care Malpractice Act's \$250,000 limitation on non-economic damages (raised to \$400,000 in 2001) recoverable in a medical malpractice action, Utah Code Ann. § 78-14-7.1 (1996 & Supp. 2001), violates various provisions of the Utah Constitution. Specifically,

1. Does the Act's limitation on non-economic damages violate the Utah Constitution's open courts guarantee, article I, section 11?
2. Does the Act's limitation on non-economic damages violate the Utah Constitution's uniform operation of laws clause, article I, section 24?
3. Does the Act's limitation on non-economic damages violate the Utah Constitution's guarantee of the right to a jury trial, article I, section 10?
4. Does the Act's limitation on non-economic damages violate the Utah Constitution's due process guarantee, article I, section 7, and can this argument now be raised by plaintiff even though it was not preserved below?
5. Does the Act's limitation on non-economic damages violate the Utah Constitution's separation-of-powers provision, article V, section 1, and can this argument now be raised by plaintiff even though it was not preserved below?

STANDARD OF REVIEW

The constitutionality of a statute is a question of law which the court independently reviews for correctness. See Parks v. Utah Transit Auth., 2002 UT 55, ¶ 4, 449 Utah Adv. Rep. 12.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Constitution, article I, sections 7, 10, 11 and 25, and article V, section 1; and Utah Code Ann. § 78-14-7.1.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

The court found that Dr. Gregory Drezga was negligent in his treatment of plaintiff (R. 809 at 761), and the jury returned a \$2,272,735.30 damage verdict. (R. 360.) Non-economic damages made up \$1,250,000 of the total. (R. 360.) Accordingly, Dr. Drezga moved to reduce damages pursuant to Utah Code Ann. § 78-14-7.1, which caps recoverable non-economic damages at \$250,000. (R. 364-69.) Plaintiff argued that the cap violated various provisions of the Utah Constitution. (R. 447-74.)

After briefing and a hearing (R. 810), the court ruled for defendant and reduced the general damage award to the \$250,000 maximum then allowed by state law, and entered judgment for plaintiff in the amount of \$1,181,829.40 plus costs and interest. (R. 782-88.)

Plaintiff appealed. (R. 792-94.)

B. Statement of the Facts.

While defendant does not agree with the plaintiff's characterization of the evidence, the facts are not determinative of this appeal and therefore defendant accedes generally to the facts as presented by the plaintiff. (See App. Br. at 4-7.)

SUMMARY OF ARGUMENT

Utah's statutory cap of \$250,000 (now \$400,000) on non-economic damages in medical malpractice actions, enacted in 1986 as an amendment to the Health Care Malpractice Act (the "Act"), is constitutional. See Utah Code Ann. § 78-14-7.1. Plaintiff attacks the statute through various constitutional provisions, requesting under each that

this court apply a heightened standard of scrutiny to the statute and take a skeptical view of both the empirical facts the legislature thought warranted this legislation and the appropriateness of the means the legislature used to accomplish its ends. Defendant's response is two-fold.

First, the present statute is one to which the heightened scrutiny standard should not be applied. It is appropriate for this court, in deciding the level of scrutiny to apply to the cap, to view it in the broader context of the statutory scheme of which it is a part. The restriction on the remedy available to a plaintiff is mild, and is more than balanced by the benefits to the class of which potential plaintiffs are members.

The Act, Utah Code Ann. §§ 78-14-1 *et seq.*, was first passed in 1976 and has been amended several times since, including in 1986 when the cap on non-economic damages was added. The Act is designed to assure that medical services are available to the members of the public, some of whom will be malpractice victims, at a reasonable cost. The Act is also designed to assure that insurance is available to health care providers to cover losses that may be suffered by some members of the public as a result of malpractice. Choosing where to strike the balance between the interests of the public in affordable, insured health care, and the interests of particular members of that public in not having their tort rights against health care providers restricted in any manner, is a matter of judgment. The legislature is given that charge by the constitution, and its judgment should be given deference.

Second, even if a heightened standard were to be applied to the cap alone, and the rest of the Act not considered, the current statute is distinguishable from those challenged and struck down in the cases upon which plaintiff relies. The statute is more analogous to those that have survived scrutiny. The cap is narrow in its application and mild in its limit on non-economic damages, and it permits complete recovery of non-economic and

punitive damages. Additionally, the empirical justifications for the cap are much stronger than those offered for provisions the court has found faulty in the past. Not only did the 1986 legislature have a reasonable basis to believe that a cap on non-economic damages would serve to keep Utah's medical malpractice insurance rates within reach of more health care providers, but recent studies on a national and local level have shown that this type of cap actually has had the anticipated effect.

Nationwide, medical malpractice insurance is becoming less available and, if available, is priced out of the reach of many providers. The causes for this situation may be complex, but undeniably, one cause is the rapid increase in the level of awards for non-economic damages and the unpredictability of such awards. In this climate, it would be inappropriate for this court to substitute its judgment as to the reasonableness of the balance struck by the legislature between the interests of individual plaintiffs in recovering unlimited "soft" damages and the interests of the Utah public in having insured medical services readily and affordably available. This court should follow the majority of courts across the country and hold that the cap on non-economic damages is constitutional.¹

ARGUMENT

I. THE STATUTORY CEILING ON NON-ECONOMIC DAMAGES AND ITS HISTORY.

Utah's non-economic damages "cap" on medical malpractice claims was enacted in 1986 and, at the time relevant to this appeal, read as follows:

¹ As of 1997, twenty-three states had statutory limitations on tort damages for pain and suffering, including sixteen states that have limited awards specifically in medical malpractice cases. See Heidi Li Feldman, W. Page Keeton Symposium on Tort Law: Harm and Money: Against the Insurance Theory of Tort Compensation, 75 Tex. L. Rev. 1567, 1567-68 (1997). The article only cites to four states in which a statutory-damage limitation on non-economic damages was found unconstitutional. See *id.* at n. 4.

In a malpractice action against a health care provider, an injured plaintiff may recover non-economic losses to compensate for pain, suffering, and inconvenience. In no case shall the amount of damages awarded for such non-economic loss exceed \$250,000. This limitation does not affect awards of punitive damages.

Utah Code Ann. §78-14-7.1.² When enacted, it was made part of the original 1976 Health Care Malpractice Act, “with the intent that the findings and purpose statement of the . . . Act would apply to the . . . cap.”³ Because the cap was enacted after the initial legislation, however, § 78-14-7.1 also has its own legislative history. That history demonstrates that the purpose of the non-economic damage ceiling, like the original Act, is to keep down malpractice insurance rates within Utah in order to ensure the availability and affordability of insurance coverage for health care providers. Empirical studies on a national and local level show that the damage cap has had the effect anticipated by the legislature.

A. History of the 1976 Health Care Malpractice Act

The legislative findings of the 1976 Health Care Malpractice Act (the “Act”) have been summarized as follows:

The Act takes specific note of the continually increasing number of malpractice claims and actions being brought as well as the continuing escalation in the amounts received in settlements and from judgments. It recognizes that these trends are costly and affect the health care provider through higher insurance premiums, the cost of which is passed on to the patient through more expensive health care. The Act also refers to the often overlooked effect of the practice of defensive medicine and to the loss of patient services from health care providers who are discouraged from practice

² In 2001, the limit was increased to \$400,000, with annual adjustments for inflation thereafter.

³ James E. Magleby, The Constitutionality of Utah’s Medical Malpractice Damages Cap Under the Utah Constitution, 21 J. Contemp. L. 217, 247 (1995).

because of the high cost and possible unavailability of malpractice insurance.⁴

In enacting both the Act and later the cap on non-economic damages, the legislature adopted the position taken by the Governor's Report⁵ which "disapproved the 'crisis type' legislation enacted in other states and recommended . . . only simple, relatively non-controversial legislation."⁶ In 1976, this consisted of two principal methods to protect the public interest. One was to establish "a mechanism to ensure the availability of insurance in the event that it bec[a]me unavailable from private companies." Utah Code Ann. § 78-14-2. This was accomplished by giving the insurance commissioner provisional authority to implement a joint underwriting effort involving all insurers if liability insurance coverage became unavailable in the voluntary market. See id. at § 78-14-9.

The second approach adopted in 1976 to protect the public interest was to enact provisions "designed to encourage private insurance companies to provide health-related malpractice insurance." Id. at § 78-14-2. These measures included shortening and tightening the statute of limitations for malpractice actions, clarifying the doctrine of informed consent, and establishing procedures for prosecuting malpractice suits. The 1976 Act also included a requirement that the complaint contain a prayer for reasonable damages, not a specific dollar amount, and that the plaintiff give the defendant a ninety-day notice of intent to sue.

While these initial measures resulted in a period of relative stability in malpractice insurance rates, rates again begin to rise dramatically in the early 1980's, prompting the

⁴ Comment, Developments in Utah Law-Medical Malpractice, 1976 Utah L. Rev. 475, 476 (1976).

⁵ Report of the Governor's Malpractice Evaluation Committee, State of Utah (Nov. 28, 1975) ("Governor's Report").

⁶ Developments in Utah Law, supra, 1976 Utah L. Rev. at 477 (citing Governor's Report).

legislature to take further steps. In 1985, the legislature added provisions requiring a prelitigation panel hearing for all medical malpractice actions, limiting to one-third the percentage of any award that a contingent fee attorney could receive, and allowing the amount of awarded damages to be decreased by collateral resources. See Utah Code Ann. §§ 78-14-4.5, -7.5, & -12. This was followed in 1986 by a provision allowing periodic payments of future damages, and the cap of \$250,000 on pain and suffering damages which is at issue here. See id. at §§ 78-14-7.1 & 9.5.

B. History and Impact of the 1986 Non-Economic Damages Ceiling.

The legislature enacted post-1976 provisions, including the statutory cap for non-economic damages, in response to evidence that the original Act did not sufficiently arrest the growth in frequency and severity of malpractice claims. As one Utah commentator wrote in 1984, before the passage of the cap on non-economic damages,

The Malpractice Act's inadequacy is further demonstrated by the experience of Utah hospitals. From 1978 to 1983 the average resolution and payment costs for claims that were settled by hospitals rose from about \$8,000 to almost \$44,000 per claim. Costs rose fastest in the latter years of that period when the average costs in 1981 and 1983 increased approximately 180 percent. These figures dramatically show that malpractice claim resolution and patient compensation become more expensive every year. The hospitals also report a growth in the number of claims asserted. About thirty-five percent more claims were asserted in 1983 than in 1978, although over that same period the amount of service provided by hospitals only increased ten percent. These figures indicate an increase in the frequency with which claims are asserted.⁷

The amicus brief filed by Intermountain Health Care, Inc.; UHA, Utah Hospitals and Health Systems Association; and Utah Medical Association ("Health Care Amicus

⁷ Comment, Medical Malpractice Legislation: Rx for Utah, 11 J. Contemp. L. 287, 293-294 (1984) (citations omitted).

Brief”), details the rise in the early 1980s of the number and the dollar value of medical malpractice claims in Utah and the resulting increase in medical malpractice insurance rates. From 1982 to 1985 the average amount paid per malpractice claim increased 54 percent and from 1979 to 1985 the total compensation paid by malpractice insurers increased at an annual rate of 25 percent. See Health Care Amicus Brief at pp. 20-23. Utah insurance companies responded by dramatically raising their rates: St. Paul Insurance Co. increased its rates by 25 to 35 percent annually from 1984-86; UMIA increased its rates from 15 to 67 percent annually from 1982-86; and Aetna increased its rates by 20 to 50 percent annually from 1980-82 and, faced with losses, discontinued writing malpractice insurance in 1983. The growth in the cost of insurance had the effect of limiting the availability of affordable health care because the costs are passed on to consumers. Ceilings on non-economic damages were seen as an efficacious means of keeping malpractice rates from rising too fast.⁸

When the Utah legislature enacted the non-economic damage ceiling in 1986, it was clear from other states’ experiences that non-economic damage ceilings had the prospect of curbing the growth in costs for liability insurance and health care.⁹ Subsequent studies across the country have confirmed the reasonableness of the

⁸ “In support of the [damage cap], it was argued that the passage of the bill would result in a 20 percent reduction in medical malpractice insurance rates, which were blamed for costing the consumer an additional \$45 a day during a hospital stay.” Magleby, supra, 21 J. Contemp. L. at 251 (citing Representatives Holt and Barlow, Floor Debate, Utah House of Representatives, February 12, 1986).

⁹ Specifically, California’s ceiling on non-economic damages, which became effective in 1975, became a model for other states after it was held to be constitutional by the California Supreme Court. See Fein v. Permanente Medical Group, 38 Cal. 3d 137, 157-164 (Cal. 1985). Thomas W. Farrell, Virginia’s Medical Malpractice Cap and the Doctrine of Substantive Due Process, Tort & Ins. L.J. 684, 688 (1988) (noting that fourteen states had passed damage caps which limited recovery in medical malpractice actions by 1986).

legislature's judgment as to the relationship between such a ceiling and the objective of slowing the rise in health care costs. As one commentator observed:

The weight of empirical evidence suggests that . . . some of the legal reforms had the intended effect of stabilizing liability insurance markets and reducing the overall level of medical malpractice payments. The largest reductions in payments and premiums were attributable to a few provisions, notably caps on awards and modifications of the collateral source rule¹⁰

In 1995, acting at the request of the United States Congress, its Office of Technology Assessment issued a report confirming that "caps on damage awards were the only type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators." (Emphasis added.)¹¹

A review of Utah's medical malpractice rates since the passage of the cap on non-economic damages confirms the legislature's judgment. The cap has had its intended effect in holding medical malpractice rates relatively stable. See Health Care Amicus Brief at pp. 25-26 (citing the Tillinghast Report of Actuarial Study Commissioned by UMIA, UMA, and IHC, August 8, 1994). In Utah, UMIA's medical malpractice insurance rates decreased by 17 percent from 1986 to 1994. See id. at 25 (citing Tillinghast Report at 18-19). UMIA's loss ratio, which is the percentage of the malpractice premiums which are paid toward malpractice claims, decreased from a six-

¹⁰ Bovbjerg & Sloan, No-Fault for Medical Injury: Theory and Evidence, 67 U. Cin. L. Rev. 53, 62 (1998) (*italics added*). For empirical evidence on the impact of tort reforms. See Danzon, The Frequency and Severity of Medical Malpractice Claims, 27 J.L. & Econ. 115 (1984); Hamilton, Rabinowitz, & Alschuler, Inc., Claim Evaluation Project (1987); Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 Law & Contemp. Probs. 57 (1986); Sloan et al., Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis, 14 J. Health Pol. Pol'y & L. 663 (1989).

¹¹ U.S. Congress, Office of Technology Assessment, Impact of Legal Reforms on Medical Malpractice Costs, OTA-BP-H-119, p. 64 (Washington D.C.: U.S. Gov't Printing Office, October 1993).

year average of 157 percent before the damage cap to a six-year average of 66 percent after the cap. See id. Utah's percentage of loss payments of the nation's total declined from a six-year average of 0.6 before the cap to a six-year average of 0.4 after the cap, even though Utah's percentage of physicians increased during the period from 0.6 to 0.7 percent of the nation's total. See id.

In sum, addition of the cap on non-economic damages to the 1976 Act has had precisely the desired effect: insurance rates have not risen in Utah dramatically and coverage has remained available. In the context of the current nationwide medical malpractice insurance crunch,¹² this court should not substitute its judgment for the legislature's as to the reasonableness of a statute that has successfully achieved its desired and legitimate result.¹³

II. APPELLANTS' VARIOUS CONSTITUTIONAL CHALLENGES TO THE CEILING ON NON-ECONOMIC DAMAGES ARE ALL FOUNDED ON ESSENTIALLY THE SAME PREMISES AND SEEK THE APPLICATION OF THE SAME NON-DEFERENTIAL STANDARD.

A. Heightened and Deferential Approaches to Statutes Challenged as Unconstitutional.

¹² In response to the nationwide health care crisis, President George W. Bush has called for, among other things, federal legislation capping non-economic damages at \$250,000 in medical malpractice actions. See, e.g., Mike Allen and Amy Goldstein, *Bush Urges Malpractice Damage Limits*, Washington Post, July 26, 2002, at A04.

¹³ See Health Care Amicus Brief at pp. 26-30 (detailing, among other things, the health care crisis in Nevada which drove physicians out of state or into retirement and caused the largest trauma center in the state to close). On August 1, 2002, in reaction to the health care crisis, the Nevada legislature passed medical malpractice reform which, among other things, capped non-economic damages at \$350,000. See A. B. 1, 2002 Legislative Session, 18th Special Session (Nevada 2002). The bill was signed by the governor on August 7, 2002 and it appears to have had immediate effect. See Joelle Babula, *Medical Crisis: Obstetric Patients Find Relief*, Las Vegas Review-Journal, August 9, 2002, at 1A (noting that after a three month hiatus, many doctors opened their doors to new patients after the damage cap was passed and one insurance company has promised to lower premiums).

Courts, both state and federal, have long been inclined to review constitutional challenges to legislation with one of two attitudes. The first is deferential to the legislature and accords its enactments an operative presumption of constitutionality. The second is skeptical of legislative action and closely scrutinizes the means chosen by the legislature and its ability to achieve the legislative ends, the legitimacy of the ends to be accomplished, and the narrowness of the mechanism selected to achieve the ends. These two approaches are discussed here in broad terms as a prelude to addressing each of the plaintiff's constitutional arguments because both the deferential and the heightened scrutiny approach to reviewing legislative enactments appear in the Utah case law pertaining to most of the provisions upon which plaintiff relies.

Utah case law indicates that the level of scrutiny appropriate to a particular piece of legislation—strict or deferential—under one of the constitutional provisions relied upon by plaintiff is also generally appropriate under the others. See, e.g., Condemarin v. University Hosp., 775 P.2d 348, 356-60 (Utah 1989) (recognizing that the overlap between the equal protection analysis and due process analysis is “considerable” and that the open courts provision is an “extension” of due process). Similarly, if a piece of legislation can withstand the applicable analysis under one provision, it likely will withstand that same scrutiny under another provision.¹⁴ For these reasons, it makes sense to consider the facts relevant to these two approaches generically, and to address their overall similarities before addressing each under the various constitutional provisions.

Plaintiff argues for a heightened standard of scrutiny under each of five constitutional provisions and contends that the \$250,000 cap on non-economic damages

¹⁴ See, e.g., Parks, 2002 UT 55 at ¶18 (not applying “heightened” scrutiny and summarily holding damage cap constitutional under article I, sections 7, 10, 24 of the Utah Constitution); McCorvey v. Utah State Dep’t of Transp., 868 P.2d 41, 48 (Utah 1993) (summarily holding damage cap constitutional under article I, sections 7, 10, 11, and 24 of the Utah Constitution).

in medical malpractice cases cannot withstand that level of scrutiny. Although plaintiff addresses the statute under a separate analytical model for each constitutional provision, the decisions relied upon under each are largely the same,¹⁵ because when the court has struck down a statute, the court members have seldom found that the particular constitutional provision under which the statute was analyzed made a difference in the result.¹⁶ The standard of scrutiny seems to be the primary determinant of the validity of a statute. If a deferential standard is applied, the statute will be upheld. If a heightened standard is applied, the statute may be upheld, but has a fair chance of being struck down.¹⁷

¹⁵ (See, e.g., App. Br. 12-18, 25-26, 28-30, 35-36, 39, 44, 44-45 (plaintiff cites Condemarin in each of his five argument sections to support the claim that the damage cap is unconstitutional under article I, sections 7, 10, 11, and 24, and article V, section 1 of the Utah Constitution).)

¹⁶ See, e.g., Condemarin, 775 P.2d 348 (while all applying a level of “heightened” scrutiny to find the statute unconstitutional, Justice Durham struck it under article I, sections 7, 10, 11, and 24; Justice Zimmerman under article I, sections 7 and 11; and Justice Stewart under article I, section 24); Lee v. Gaufin, 867 P.2d 572, 589-90 (Utah 1993) (applying a heightened standard of review, three members of the court struck down the statute under uniform operation of the law provision while the remaining two found it invalid under the open courts provision); see also, supra at fn. 14.

¹⁷ Although the strict scrutiny and deferential standards are worded as though they were polar opposites, occasionally this court has expressly recognized that middle ground exists between the two dichotomous approaches to analyzing challenged statutes, a middle ground that avoids leading the court into an analytical “straightjacket.” See Condemarin at 366-67 (per Zimmerman, J.) (noting that the court avoided being bound by the rigid application of the strict and loose approaches to the Utah Constitution’s uniform-operation-of-the-law provision and that it could likewise avoid that rigidity in analyzing Utah constitutional open courts provision). Such a review may be more scrupulous than under the “rational basis” test, yet not so exacting as is required under the “strict scrutiny” test. See Mountain Fuel Supply Co. v. Salt Lake City, Corp., 752 P.2d 884, 888-90 (Utah 1988). See also Condemarin, 775 P.2d at 357-59 (per Durham, J.) (stating that “a number of courts have incorporated an intermediate or realistic level of scrutiny into their equal protection framework in order to achieve the flexibility needed to balance state interests against individual rights”). There are few Utah cases that actually say that they are applying this approach.

However, several of this court’s recent decisions applying the “open courts” provision of the Utah Constitution, article I, section 11, evidence this more middling

B. Utah Case Law Addressing Tort Limiting Legislation.

When addressing the damage cap, it is important to recognize the larger pattern of which it is a part. For 25 years the Utah legislature has attempted to cabin the exposure of various parts of the economy to tort actions in direct response to a notable judicial expansion of the reach of tort theories and to the increased willingness of juries to award large amounts of damages. As a consequence of these judicial developments, the legislature concluded that certain areas of the economy have been severely impacted, with consequences for both the industries and the public they serve, including increased costs and decreased availability of services. Some of the areas the legislature has addressed include: governmental entities and employees,¹⁸ dram shops,¹⁹ pharmaceutical manufacturers,²⁰ participants in the construction industry,²¹ the ski industry,²² and health care providers.²³ The Utah legislature has enacted various mechanisms in its attempts to contain liability exposure, including statutes of repose,²⁴ shortened statutes of limitation,²⁵ prelitigation panels,²⁶ ceilings on total damages,²⁷ ceilings on non-economic

approach. See, e.g., Craftsman Builder's Supply, Inc. v. Butler Manufacturing Co., 1999 UT 18, ¶¶ 16-23, 974 P.2d 1194 (holding that the builders' statute of repose did not violate the open courts clause of the Utah Constitution and was justified by the legislature's findings of undue economic and other burdens); Lyon v. Burton, 2000 UT 19, ¶¶ 82-83 5 P.3d 616 (Howe, J., concurring) (finding that the \$250,000 immunity cap was a "reasonable substitution" and that the legislature should be "accorded broad discretion in providing an alternative remedy"). See also Hirpa v. IHC Hosp., Inc., 948 P.2d 785, 792-94 (Utah 1997) (recognizing that individual's rights "must be balanced against the legislature's need to enact laws to meet changing societal needs" and holding that Utah's Good Samaritan Act does not violate Utah's open courts provision because it was justified by the greater protection injured persons would receive).

¹⁸ See Utah Code Ann. §§ 63-30-3 & -4.

¹⁹ See id. at § 32A-14-102 (6).

²⁰ See id. at § 78-18-2.

²¹ See id. at § 78-12-21.5.

²² See id. at §§ 78-27-51 & -53.

²³ See id. at §§ 78-14-1 *et seq.*

²⁴ See id. at § 78-12-21.5 (4).

²⁵ See id. at §§ 78-14-4 (1) and § 78-12-21.5 (3)(b).

damages,²⁸ heightened standards for punitive damages,²⁹ damages sharing with the state,³⁰ and various alternative remedies, such as substituting governmental liability for employees liability and then capping the governmental liability.³¹

Litigants have challenged a number of these mechanisms as unconstitutional. Invariably, a contention is made that the legislation has impaired some individual right, warranting application of the heightened standard of scrutiny, which is often a predictor of invalidity. See Condemarin, 775 P.2d at 357 (per Durham, J.) (noting that “the selection of the standard of review virtually determines the outcome” under an equal protection analysis). While attacks on these legislative efforts have included all the provisions relied upon by plaintiff, the most successful have been made under article I, section 11, the open courts provision.

Prior to 1985, the open courts provision had been largely dormant. But with the decision in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), which struck down a statute of repose in the Utah Products Liability Act, the open courts provision became among the most favored vehicles for attacks on tort-limiting measures in Utah. The court in Berry held that the open courts provision gives substantive protection for the tort rights of individuals and adopted a two-pronged test to protect those rights. If the first prong is not satisfied, the enactment qualifies for heightened scrutiny. All the Berry court required for an enactment to run afoul of the first prong is a showing that the provision in question has imposed a new restriction on a then-preexisting right of some individual to sue or to recover damages for a tort. See id. at 680.

Four members of the court decided Berry without dissent. Over time, however,

²⁶ See id. at §§ 78-14-12 (2)(a).

²⁷ See id. at § 63-30-34.

²⁸ See id. at §§ 78-14-12 (2)(a).

²⁹ See id. at § 78-18-2.

³⁰ See id. at § 78-18-1 (3).

³¹ See id. at § 63-30-4(4) & -34.

there has been a growing disharmony among members of the court when addressing challenges to legislative efforts to cabin tort exposure. At times, the dispute has concerned which constitutional provision should be relied upon; at others, the analytical model to apply under a provision, particularly under the open courts provision; and at still others, whether a heightened or deferential approach should be taken. Finally, there have been disputes as to whether a particular legislative measure withstands challenge under the standard in question.³² Over the course of the years, similar mechanisms have met different fates.³³

This dissention persists today. As recently as August 2002, the court split 3 to 2 over whether Berry itself should be overruled. In Lancy v. Fairview City, 2002 UT 79 (August 6, 2002), the majority struck down the legislature's attempt to extend governmental immunity to a proprietary function—the generation and distribution of electricity. The two dissenters argued that Berry's imposition of stiff substantive hurdles to any legislative limitation of tort rights has distorted the relationship between the legislature and the courts by giving this court the right to decide when and how the legislature may modify prior tort common law. See at ¶¶ 89-93 (Wilkins, J., concurring and dissenting, joined by Durrant, A.C.J.). The dissent would find article I, section 11 to

³² See, e.g., Condemarin, 775 P.2d at 369-70 (per Stewart, J.) (rejecting Justice Durham's and Justice Zimmerman's application of the open courts provision and due process and analyzing the statute under the equal protection clause) (dissenting, Hall, C.J.) (rejects majority departure from rational basis standard of review); Lyon, 2000 UT 19 (Justices Stewart and Durham found that the statute violated the Berry test; Chief Justice Howe and Justice Russon found the first prong of Berry is met and thus did not proceed to the heightened standard of the second prong; and Justice Zimmerman rejected the application of Berry altogether); Craftsman, 1999 UT 18 at ¶¶ 32-155.

³³ Compare Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc., 782 P.2d 188 (Utah 1989) and Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989) (striking down builder's statute of repose) with Craftsman, 1999 UT 18 (upholding similar statute of repose) and Parks, 2002 UT 55 at ¶19 (substituting capped state remedy for unlimited remedy against state employee) and Lyon with Condemarin, 775 P.2d 350-66 (per, Durham, J.) (one judge would strike down nearly identical provision).

protect procedural interests only, and would retreat entirely from Berry's two prong test. See id. That position has been echoed by the Attorney General in its amicus brief supporting the defendant in this case. (See State of Utah Amicus Brief at pp. 5, 14, 17, 24-26.)

Over the past twenty years of this court's decisions addressing tort-limiting legislation, there are two discernable trends relevant to the present case. First, the court has tended to defer to legislative enactments to limit liability for governmental entities and employees performing governmental, as opposed to proprietary, functions. This is reflected in the court's decisions upholding the cap on total damages for governmental entities performing traditional governmental functions.³⁴

The second apparent trend is that when reviewing tort-limiting legislation applicable to private parties or governments performing non-governmental functions, the court recently appears to have taken a less skeptical approach to legislative justifications for enactments than it did in the years immediately following Berry. See, e.g., Hirpa, 948

³⁴ See McCorvey v. Utah State Dep't of Transp., 868 P.2d 41, 48 (Utah 1993) (holding damage cap constitutional under article I, sections 7, 10, 11, and 24 for injuries arising from negligence in the performance of governmental functions); Bott v. DeLand, 922 P.2d 732, 743 (Utah 1996) (noting that the damage cap is constitutional under article I, sections 7, 10, 11, and 24 as applied to judgments for injuries from performance of governmental functions). The only damage cap pertaining to a governmental entity that has been struck down was a cap for total damages that was very low (\$100,000) and applied solely to the University of Utah Hospital. See Condemarin, 775 P.2d at 366. Yet that case involved a governmental entity that was performing essentially proprietary functions. See Parks, 2002 UT 55 at ¶¶ 11-13; Laney, 2002 UT 79 at ¶¶ 74-83 (Russon, J., concurring) (finding that Farview city's operation of a power plant was proprietary and thus was not subject to immunity under the statute). Moreover, that decision was by a very divided court and has since been distinguished as having "limited precedential value" because it did not involve an entity acting in a governmental capacity. Id. at ¶ 11. But see Day v. State, 1999 UT 46, 980 P.2d 1171 (The court, relying on Berry, struck down a short-lived and by then repealed statute immunizing government employees driving emergency vehicles negligently. Because the legislature had already repealed the statute, and because a total cap on damages from such conduct was upheld in Lyon, it is hard to tell what enduring proposition, if any, Day stands for.).

P.2d at 793-94; Lyon, 2000 UT 19 at ¶ 83 (Howe, C.J., concurring); and Parks, 2002 UT 55 at ¶ 8. For example, this court recently upheld as satisfying the second prong of Berry a lengthened version of a statute of repose that had been struck down earlier. In the more recent case, the court found that the statute of repose reasonably eliminated a clear social or economic evil, even though legislative justifications for the statute were largely indistinguishable from those found inadequate in the earlier cases. Compare Sun Valley Water Beds, 782 P.2d at 192-94 and Horton, 785 P.2d at 1094-95 with Craftsman, 1999 UT 18 at ¶¶ 18-23. In addition, the majority of the court no longer appears compelled to search outside the legislative record for data that contradicts legislative facts found to support a given statute. Compare Berry, 717 P.2d at 681-83 and Lee, 867 P.2d at 583-89 with Craftsman, 1999 UT 18 at ¶¶ 18-23 (looking only at legislative objectives and requiring the party challenging the statute to submit evidence that the objectives were not met); see also Hirpa, 948 P.2d at 793-94.

The court's recent decision in Laney v. Fairview City, 2002 UT 79, is consistent with this observation. There, the court refused to permit the legislature to cloak with governmental immunity the proprietary function of generating, transporting, and selling electricity for profit. The lead opinion for two members of the court reasoned that the legislative justification for the immunity was very general, that the scope of immunity granted was very broad, and that there was little to link the particular activity under scrutiny with the supposed justification for the immunity. See id. at ¶¶ 66-71. This reasoning is consistent with a de facto more deferential approach to article I, section 11. The two dissenters would overrule Berry, while Justice Russon, who joined in the result, would hold that the legislature may not under any circumstances extend governmental immunity to non-traditional proprietary governmental functions. See id. at ¶¶ 74-83 (Russon, J., concurring), and ¶ 85 (Wilkins, J., concurring and dissenting). Given the

split in the court, and the divergent reasoning of the majority, Laney cannot be said to demonstrate the court's return to the very skeptical approach toward legislative action and justifications that was evidenced by Berry, Lee, Horton and Sun Valley Water Beds.

The court should consider plaintiff's challenge to the cap on non-economic damages in medical malpractice cases against this backdrop. Analysis under a proper interpretation of Berry's first prong will show that the present statute is one to which the heightened scrutiny standard should not be applied. But if a heightened standard were applied, the current statute is distinguishable from those challenged and struck down in the cases appellant relies upon and is more analogous to those statutes that have survived scrutiny.

III. THE STATUTORY CEILING ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS DOES NOT VIOLATE THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION, ARTICLE I, SECTION 11.

Appellant's primary challenge to the ceiling on non-economic damages in medical malpractice cases is under the open courts provision, article I, section 11.³⁵ The critical standard for determining whether legislation runs afoul of article I, section 11 is Berry's two pronged test:

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different. . . .

³⁵ Article I, section 11 of the Utah Constitution provides in relevant part that "[a]ll 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"

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

717 P.2d at 680.

Plaintiff contends that the non-economic damages cap of \$250,000 restricts or abrogates a person's fundamental right to recover non-economic damages and does not provide "an effective and reasonable alternative remedy . . . for vindication of his constitutional interest" in such recovery. (See App. Br. at 18-19.) This, he contends, is enough to assure that the cap cannot pass the first prong of the Berry test and will therefore be subject to heightened scrutiny. As for the second prong, plaintiff argues that the cap must fail that review because the restriction on the appellant's right to recover non-economic damages is not justified by the need to address a "clear social or economic evil." See id.

Defendant asserts that the cap can pass the first Berry test, if that test is construed in a manner consistent with the case upon which Berry grounded its substantive reading of article I, section 11, Masich v. United States Smelting, Refining & Mining Co., 191 P.2d 612 (Utah 1948), appeal dismissed, 335 U.S. 866 (1948). Alternatively, defendant contends that even if the cap and the Act of which it is a part cannot pass the first Berry test and the analysis required by the second prong is performed, the court should uphold the non-economic damage cap.

A. The Statutory Ceiling on Non-Economic Damages Provides an Effective and Reasonable Alternative Remedy that Satisfies the First Prong of Berry.

The first question under Berry is whether a statute abrogates or diminishes an important tort right without providing a substantially equivalent alternate remedy. If it does not, the court need not address Berry's second prong. In applying the first prong of

Berry, a majority of this court has not looked at tort- limiting statutes in the larger context of the statutory scheme of which they may be a part. Rather, the court has focused on whether a particular plaintiff has had his or her tort rights diminished or abrogated by a particular provision within a larger statutory scheme. If so, the first prong of Berry has not been satisfied and the statute is then analyzed under the second prong.³⁶ The result is a very low operative threshold for the application of heightened scrutiny to legislative enactments, which is a prime reason that Berry has been criticized by members of this court as upsetting the appropriate relationship between the court and the legislature. See Laney, 2002 UT 79 at ¶¶ 89-93 (Wilkins, J., concurring and dissenting) (citing Lyon, 2000 UT 19 at ¶¶ 85-92 (Zimmerman, J., concurring in the result); and Craftsman, 1999 UT 18 at ¶¶ 108-55 (Zimmerman, J., concurring in the result)); see also Day, 1999 UT 46 at ¶¶ 52-55 (Zimmerman, J., dissenting). It is also the basis for the Attorney General's vigorous call to overrule Berry. See State of Utah Amicus Brief at pp. 5, 14, 17, 24-26.

When the court takes this narrow approach to analyzing components of a broad statutory scheme, it is acting contrary to the very case upon which Berry and its progeny, including Laney, rely for the legitimacy of their substantive approach to article I, section 11. That case is Masich v. United States Smelting, Refining & Mining Co., 191 P.2d 612.³⁷ If Masich were followed, the court would examine a legislative scheme in its entirety in light of the whole class of persons it affects, not just by reference to any one person who may have lost tort rights. The detriment to some class members that may

³⁶ See, e.g., Condemarin, 775 P.2d at 366 (per Durham, J.) (the majority found the recovery limits of the Governmental Immunity Act unconstitutional as applied to the University Hospital without looking at the Act as a whole); Lee, 867 P.2d at 589 (holding that the limitations periods applicable to claims of minors under the Utah Health Care Malpractice Act were unconstitutional without looking at the provisions within the scope of the entire Act).

³⁷ See Berry, 717 P.2d at 675-77, 679-80; Laney, 2002 UT 79 at ¶¶ 43-44; Craftsman, 1999 UT 18 at ¶¶ 64, 83-86 (Stewart, J., concurring).

result from limitation or abrogation of tort rights would be considered in light of the benefits to the entire class from the legislation. Furthermore, the court would give broad deference to the legislature to determine the necessity for, and wisdom of, the trade-off.

In Masich, the plaintiff attacked the constitutionality of the Utah Occupational Disease Disability Law, 42 U.C.A. 1943, Ch. 1a (Utah Code Ann. §§ 34A-3-101 *et seq.*), as amended. See 191 P.2d at 623-25. That statute provided, among other things, that a person who contracted silicosis on the job could not resort to the common law right to sue the employer for the creation of the conditions producing the disease, but had as an exclusive remedy the right to file a claim with the Industrial Commission. See id. at 614. The statute further provided, however, that no amount could be paid upon a claim for silicosis “unless total disability results within two years” from the date of last employment. Id. The plaintiff had been an employee of the defendant mine and had contracted silicosis, but he was not totally disabled and therefore did not fall within the class of persons eligible for silicosis compensation under the act. See id. at 613. The plaintiff asserted that the act violated article I, section 11 because it took from him his common law right to sue for negligence and did not replace it with a right to compensation. See id. at 623.

The court phrased the question before it in words that sound quite familiar under the Berry line of cases: “The contention is made that if a partially disabled employee is not granted compensation and, further, is denied his common law right to action then he has been deprived of his remedy by due course of law for an injury done to his person, contrary to” article I, section 11. Id. The court answered this question, however, quite differently than the two-prong Berry test would suggest. By a four to one vote, the Masich court held that while the plaintiff’s common law remedies had been abrogated and he could not recover for his injuries, under the alternative remedies available from

the Commission, article I, section 11 was not offended. See id. at 623-25. The court reasoned that the act as a whole was designed to provide remedies for workers suffering from job-related diseases as a class: “The fact that under the act certain of the employees are denied their common law right, and at the same time only given compensation on reaching a stage of total disability, does not offend against the Constitution as certain individual rights and remedies can be made to yield to the public good.” Id. at 624. “[T]he act should not be discarded because some members of the class have rights, which may be adversely affected.” Id.

The dissenting justice would have found a way to construe the statute as permitting a person who was ineligible for compensation under the act to retain their common law rights. His contention was that such a construction is appropriate to avoid denying the plaintiff an important common law right. See id. at 629-30 (Wade, J., dissenting). The majority, however, said that it was not for the court to privilege its view over that of the legislature as to the wisdom of the trade-off made by the statute: “This court cannot ignore or strike down an act because it is either wise or unwise. The wisdom or lack of wisdom is for the legislature to determine. If the act is unjust, amendments to correct the inequities should be made by the legislature and not by judicial interpretation.” Id. at 625.³⁸

³⁸ It is noteworthy that the Utah Supreme Court has never directly addressed whether the Workers Compensation Act, which also abolishes common law tort rights against employers and substitutes a fixed compensation system, violates article I, section 11. Its validity was assumed by the majority in Masich, despite the fact that there might not be a remedy provided to each person whose common law tort rights are abrogated. See 717 P.2d at 680. If the current court were to use the first prong of Berry to examine the situation of any particular worker who cannot recover under the Workers Compensation Act but could have recovered under common law, the act would fail to pass constitutional muster, for the legislature could have found a way to permit an equivalent right to recover without frustrating the purpose of the entire act. And that is the threshold that Berry and its progeny have imposed for constitutional validity.

As written and applied, the first prong of the Berry test seems founded on the dissent in Masich, not upon the majority. The Masich majority considered the impact of the legislation on all those subject to it, and deferred to the legislature as to the wisdom of trading some individuals' common law tort rights for benefits to the class as a whole. So long as there was a trade-off, and the act did not simply abolish common law rights without benefits to the class, article I, section 11 was not offended. See id. at 624.

In articulating and applying the Berry standard, this court appears never to have explored in any detail the actual analysis and holding of Masich. See Berry, 717 P.2d at 675-77, 679-80. No opinion of the court has addressed whether Berry's first prong, which focuses solely on an individual's loss of tort rights, is inconsistent with Masich's focus on the broad effect of the legislative scheme on all those subject to it and with its deference toward the legislature's right to balance benefits and detriments to individuals who may be subjected to a statutory scheme. However, two members of the court in Lyon v. Burton, 2000 UT 19, although not citing Masich, did follow very closely its approach.

In Lyon, the statute in question immunized individual state employees from negligence claims. See 2000 UT 19 at ¶ 25. In place of the ability to recover unlimited damages from an individual employee personally, the legislature substituted a waiver of immunity so that a governmental entity could be sued for the employee's conduct. Recovery against the state, however, was capped at a maximum of \$250,000 for all damages suffered. See id. The plaintiff in Lyon, who had been struck and seriously injured by an emergency vehicle, had his jury verdict substantially reduced by the cap. See id. at ¶¶ 3, 8. Plaintiff argued before this court that the statute violated article I, section 11 because it took away the right to recover unlimited damages against an individual and substituted a right to recover only \$250,000. See id. at ¶ 25. The

defendant argued that under Masich, the limited remedy against the government was an adequate substitute for the immunization of the individual employee. See id. at ¶¶ 54, 63.

Justice Stewart, writing for himself and Justice Durham, asserted that the only proper way to apply the first prong of Berry was to determine whether the substitute remedy permitted an individual to recover the same amount of damages as the remedy taken away; if it did not, then the challenged act could not pass that test. Because by definition the cap could not satisfy this standard, Justice Stewart proceeded to apply the heightened scrutiny of the second prong of Berry and would have held the statute violative of article I, section 11. See id. at ¶¶ 53-66. Justice Stewart rejected summarily the assertion that under Masich, the substitute remedy could be found adequate. See id. at ¶ 63.

Chief Justice Howe, writing for himself and Justice Russon, applied Berry and would have upheld the challenged substitution of remedies. See id. at ¶¶ 82-83.³⁹ Although acknowledging that the cap did not permit a plaintiff to obtain an award of all damages that might be incurred, Justice Howe concluded that the first prong of Berry was satisfied. Instead of asking whether a particular injured party might have their tort rights limited by the cap, he asked whether the trade-off struck by the legislature in enacting the cap was reasonable. Although he did not cite to Masich, his language reflects the approach followed by the Masich majority. He said:

[T]he legislature should be accorded broad discretion in providing an alternative remedy. I believe that a \$250,000 judgment against the state is an effective and reasonable substitution for a possibly greater judgment against a state employee. I say this because experience has shown that large judgments against state employees for their negligence are

³⁹ Because the fifth judge, Justice Zimmerman, joined in the result with Justices Howe and Russon, although on grounds that Berry should be overruled, the result sought by Justice Howe's opinion prevailed and the statute was upheld, despite its providing a less than complete substitute remedy for the particular plaintiff.

often uncollectible. . . . A plaintiff who recovers a judgment against the state under our immunity act faces none of those problems of collectibility. In my opinion, the substitution of remedies is effective and reasonable.

Id. at ¶ 83.⁴⁰ Defendant here contends that the entire court should adopt Masich's class-wide, deferential analytical approach under Berry's first prong when addressing any statutory scheme challenged under article I, section 11. Such an approach would have several advantages over the present narrow analysis required by the first prong of Berry.

First, because statutory schemes that balance detriments and benefits to the class affected by the legislation would be evaluated as a whole, and because the legislature would have the ability to strike balances among members of the class without being micro-managed by this court, the threshold for invoking Berry's heightened scrutiny analysis would become far less mechanistic and far more nuanced. Second, by recognizing that the legislature has a legitimate role in determining what the tort law of the state should be, and that it may expand and contract tort rights as appropriate for larger public purposes, this approach would undoubtedly mute much of the criticism that Berry has arrogated to the court complete control over the contraction of tort rights. (See Attorney General's Amicus Brief at pp. 15-22.)⁴¹

Finally, because Masich assumes, but does not hold, that article 1, section 11 imposes a substantive limitation on the legislature's ability to abolish tort rights, following it would preserve this court's power to review closely statutory schemes that do not balance benefits and detriments, but only abolish common law tort rights. See Masich, 191 P.2d at 624.

⁴⁰ In Parks, 2002 UT 55 at ¶¶ 20-21, a unanimous court rejected a challenge to the same substitute remedy, based on Lyon.

⁴¹ It seems noteworthy that the court's decisions based on other constitutional provisions that can produce a heightened scrutiny review of legislation have not been the subject of this harsh criticism, much less calls to overturn them. This may be because the triggering thresholds for heightened scrutiny under those other constitutional provisions are not as low as Berry's, nor do they reach so broadly.

In the present case, the Masich approach to the first prong of the Berry analysis should lead the court to conclude that the Act, of which the \$250,000 (now \$400,000) cap on non-economic damages is a part, satisfies article I, section 11.⁴² The Act balances the interests of the public in available and affordable insured health care against their right to sue health care providers for malpractice without limitation. These interests are balanced because the legislature made the reasonable judgment, as supported by empirical evidence, that there is a direct relationship between tort rights and affordable, available insured health care. See supra at pp. 4-10.

The Act's primary purpose is to assure the continued availability of affordable, insured health care. To that end, the Act gives the insurance commissioner authority to invoke a risk pool of all insurers to assure that medical liability coverage is available to those who provide health care to the public, a public which includes an individual who may become a victim of malpractice. See Utah Code Ann. § 78-14-9. This is one benefit given the class of customers of health care providers in exchange for the detriments imposed on the members of that class who are individual malpractice plaintiffs. This also means that an individual malpractice victim benefits from the Act because he or she gains access to affordable care from an insured doctor, as opposed to an uninsured one. Moreover, the plaintiff is assured of keeping a larger portion of any award than previously might have been the case because the Act limits contingent fees to one-third of any recovery. See id. at § 78-14-7.5.

⁴² The United States Supreme Court, faced with a similar analytical challenge, has followed the course set by Masich and Justice Howe in Lyon. As the United State Supreme Court observed in upholding the provisions of the Price-Anderson Act, which placed a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident, "[i]t should be emphasized . . . that it is collecting a judgment, not filing a lawsuit, that counts. . . . [A] defendant with theoretically 'unlimited' liability may be unable to pay a judgment once obtained." Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 89-90 (1978).

While defendant does not suggest that any one provision of the Act, including the ceiling on non-economic damages, is essential to the survival of the health care or medical malpractice liability systems, there is nothing in the open courts clause which prevents the legislature from making a number of statutory changes that, in combination, provide the requisite benefits to a class of persons to justify its enactment. The fact that one of the provisions of a large legislative package may in some way impinge upon a tort cause of action or remedy should not be a reason to separate it from the entire package and subject it to heightened scrutiny under article I, section 11. It is enough that this court can review the package as a whole under the first prong of Berry and, if it is satisfied the trade-off is not unreasonable, leave the "wisdom or lack of wisdom [of the balance struck by the act] for the legislature to determine." Masich, 191 P.2d at 625.

Utah's ceiling on non-economic damages operates within an Act that should be held to satisfy the first prong of Berry.

B. The Statutory Ceiling on Non-Economic Damages Eliminates a Social and Economic Evil in a Reasonable Manner.

Even if the cap on non-economic damages, analyzed in light of the entire Act, does not satisfy the first prong of the Berry test, the damage cap satisfies the analysis required by the second prong of Berry because the non-economic damage ceiling "eliminates clear social and economic evils in a reasonable and nonarbitrary manner." Craftsman, 1999 UT 18 at ¶ 17.

Facing the social and economic problems resulting from the increased costs of medical malpractice insurance, the legislature enacted the non-economic damage ceiling as one reasonable means of keeping medical malpractice rates within the reach of more health care providers. See Utah Code Ann. §§ 78-14-2. Plaintiff has the burden of refuting the legislative findings that the ceiling on non-economic damages eliminates social and economic evils in a reasonable way. See Craftsman, 1999 UT 18 at ¶ 21

(plaintiff did not produce any “evidence to suggest that the possibility of injury is not highly remote and unexpected” and contradict the findings of the legislature). See also Parks, 2002 UT 55 at ¶ 8.⁴³ Plaintiff has not carried that burden.

As discussed in detail above, in enacting the 1976 Health Care Malpractice Act, the legislature specifically found that “the number of suits and claims for damages and the amount of judgments and settlements arising from health care . . . [had] substantially increased the cost of medical malpractice insurance.” Utah Code Ann. § 78-14-2. This resulted in increased costs for patients and discouraged health care providers from continuing to “provide services because of the high cost and possible unavailability of malpractice insurance.” See id. The purpose of the Act was to enact provisions “designed to encourage private insurance companies to provide health-related malpractice insurance . . . [and to establish] a mechanism to ensure the availability of insurance in the event that it bec[a]me unavailable from private companies.” See id.

When medical malpractice rates again began to rise dramatically in the early 1980’s, the legislature added provisions, including a cap on non-economic damages. At the time, non-economic damage caps were seen as efficacious in keeping malpractice rates from rising too fast. (See Health Care Amicus Brief at pp. 23-26.)

Plaintiff seeks to discredit these 1986 legislative findings in support of the cap’s enactment by reference to Lee v. Gaufin, 867 P.2d 572 (Utah 1993), which invalidated under article I, section 24 the Act’s statute of repose for children asserting medical malpractice claims. (See App. Br. at 20-24.) In Lee, the majority opinion questioned

⁴³ While former Justice Zimmerman stated in several cases, including Condemarin, that the burden did, de facto, shift to the legislature to justify a statute that limited tort rights, and Berry and Lee appear to have adopted such an approach, sub silentio, no majority opinion ever accepted this argument. See 775 P.2d at 368 (Zimmerman, J., concurring in part) (citations omitted). As detailed in the text, the court in Craftsman and Parks appear to reject this argument and Justice Zimmerman himself later retreated from this position. See Craftsman, 1999 UT 18 at ¶¶ 108-55 (Zimmerman, J., concurring in the result)).

whether the information available to the legislature when it enacted the statute of repose for minors justified a measure so draconian that it “terminates minors’ rights to sue in cases in which there has been no reasonable opportunity to file a claim.” Lee, 867 P.2d at 580. However, the information reviewed by the Lee court was confined to what was before the legislature in 1976 when it first passed the Act, including the statute of repose for minors, not the information that was before the legislature when it enacted the non-economic damage ceiling in 1986.⁴⁴

Furthermore, a review of the history of Utah’s medical malpractice insurance rates since the passing of the statutory ceiling on non-economic damages shows that Utah legislature was correct in its predictive judgment in 1986. The non-economic cap has successfully kept medical malpractice rates relatively stable. (See Health Care Amicus Brief at pp. 25-26.) This is precisely why the legislature should be given leeway to modify the common law to meet modern circumstances. It definitionally acts in a prospective way, and to that end is entitled to make judgments about the future impact of legislation. Here, the empirical evidence bears out the wisdom of the legislature’s choice.

Not only has the ceiling on non-economic damages proven to be effective, but it is a reasonable and non-arbitrary mechanism to achieve the legislature’s desired ends. First, it is reasonable in amount. The ceiling is currently at \$400,000 and is adjusted annually for inflation. See Utah Code Ann. § 78-14-7.1. This is a far more reasonable mechanism

⁴⁴ Moreover, giving all due deference to the court’s views in Lee about the proper weight to be given legislative findings supporting the Act, those remarks were unnecessary to the decision. Incidental statements or conclusions not necessary to the decision are not to be regarded as authority, especially in later cases involving different statutes and legislative findings. It was enough under the Utah Constitution that, in contrast to this case where the cap has an equal application to all age groups, the challenged statute in Lee adversely affected and was directed at “the rights of children.” Lee, 867 P.2d at 583. In that regard, the constitutional law of this state has long mirrored that of the United States Supreme Court which applies a stricter standard of scrutiny to equal protection cases involving children’s rights. See id. (citing to Plyler v. Doe, 457 U.S. 202, 223-24 (1982)).

than the ceilings on total damages previously upheld by this court. See, e.g., Parks, 2002 UT 55 at ¶¶ 14, 18 (upholding as constitutional total ceiling of \$250,000 on both special (economic) and general (non-economic) damages as applied to judgments against government entities); Lyon, 2000 UT 19 (upholding as constitutional total damage ceiling of \$250,000 for judgment arising from firefighting activities); Bott, 922 P.2d at 743 (noting that total damage cap of \$250,000 was constitutional as applied to judgments for injuries resulting from performance of governmental functions); McCorvey, 868 P.2d at 48 (holding total damage ceiling of \$250,000 constitutional for injuries arising out of negligence in performing governmental functions). But see Condemarin, 775 P.2d at 357-58 (per Durham, J.) (striking down on constitutional grounds the \$100,000 damage ceiling on both special and general damages recoverable against an uninsured government entity for negligently inflicted injury or death).

Second, the damage ceiling only limits “soft” damages for pain and suffering, as opposed to “hard” out-of-pocket damages, and it imposes no limit on punitive damages. This court has recognized that hard and soft damages are analytically distinct. In Condemarin, now-Chief Justice Durham cited the relatively higher importance placed on hard damages as a basis for her opinion that the \$100,000 cap on total damages was unconstitutional. She found the cap “absurdly low” in part because the amount recoverable was unlikely to cover “even the medical expenses of plaintiff.” 775 P.2d at 365-66. Another justice said, in a separate opinion in Condemarin, that “[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.” Condemarin, 775 P.2d at 369 (Zimmerman, J., concurring in part).

This distinction between hard and soft damages has also been important to the court in evaluating the sustainability of punitive damage awards. Soft damages have historically been less likely to support a high multiple of punitive damages to actual damages. See Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 n. 29 (Utah 1991). And in choosing to adopt a narrow “zone of danger” rule for defining the availability of a cause of action for negligent infliction of emotional distress, the court was plainly guided by concern regarding the ability of the judicial system to determine the existence and value of non-economic harms which are not accompanied by objective evidence of injury. See Johnson v. Rogers, 763 P.2d 771, 784-85 (Utah 1988).

The legislature obviously agreed with this court’s view about the lesser weight to be given non-economic damages in any scheme of “full recovery” when it enacted the medical malpractice cap and later barred recovery of punitive damages against pharmaceutical companies in compliance with federal standards. See Utah Code Ann. § 78-18-2.⁴⁵

In viewing non-economic damages with some skepticism, this court and the legislature are in good company. Forty years ago, California Supreme Court Justice Roger Traynor, widely recognized as the father of the doctrine of strict liability for product defects, warned of the need to limit non-economic damages to assure that more persons can receive full recovery for their economic losses:

There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those

⁴⁵ The similarity, indeed overlap, between punitive and pain and suffering damages has been long recognized. “[T]he development of damages for pain and suffering calls to mind that the origins of damages at common law for personal injury stem not so much from an interest in compensating injured persons for actual loss as buying off the anger of the victim’s family and forestalling vengeful retaliation.” O’Connell & Simon, *Payment For Pain and Suffering: Who Wants What, When & Why* 108 (1972).

who had been wronged. They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization. Nonetheless, this state has long recognized pain and suffering as elements of damages in negligence cases; any change in this regard must await reexamination of the problem by the Legislature.

Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 345 (Cal. 1961).

The California Legislature responded to Traynor's suggestion in 1975 by capping non-economic damages recoverable in medical malpractice actions at \$250,000. The California Supreme Court upheld that statute against a challenge on state and federal constitutional grounds, and cited Justice Traynor's Seffert opinion in support of its decision:

Thoughtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers.

Fein v. Permanente Med. Group, 38 Cal. 3d 137, 159 (Cal. 1985).

Appellant does not address this well-recognized legal distinction between economic and non-economic damages other than to assert that under the common law of Utah, both are essential for full recovery. (See App. Br. at 28, 35-36.) But he cites no Utah case authority in support of this proposition, only authority from Illinois, Texas and New York. (See id. at 16-17, 25-36.) The absence of Utah authority is important, since contrary to appellant's assertion, the people of Utah did not adopt the common law of England until two years after statehood. See Utah Code Ann. § 68-2-1. It is not accorded

some sacred spot in the Utah pantheon of legal sources. Even in 1898, the common law was adopted only “so far as it was not repugnant to, or in conflict with, the . . . laws of this state” Id. § 68-3-2. And Utah law expressly states that statutes in derogation of the common law are to be interpreted liberally, at the expense of the common law. See Id. The Act’s cap on non-economic damages states the law and public policy in Utah.

The ceiling on non-economic damages satisfies the second prong of the Berry test because it has helped eliminate a clear social and economic evil, and has done so in a way that was not an arbitrary or unreasonable means of achieving that objective.

IV. THE STATUTORY CEILING ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS DOES NOT VIOLATE THE UNIFORM OPERATION OF THE LAWS PROVISION OF THE UTAH CONSTITUTION, ARTICLE I, SECTION 24.

In a comparable vein to the equal protection clause of the 14th Amendment of the United States Constitution, article I, section 24 of the Utah Constitution provides: “All laws of a general nature shall have uniform operation.” The basic concept behind Utah’s uniform operation of the law provision is to restrain the legislature from the “fundamentally unfair practice of creating classifications that result in different treatment being given persons who are, in fact, similarly situated” Mountain Fuel Supply, 752 P.2d at 888.

The test under article I, section 24 is “whether the classification of those subject to the legislation is a reasonable one and bears a reasonable relationship to the achievement of a legitimate legislative purpose.” Id. at 890 (citing Malan v. Lewis, 693 P.2d 661, 670 (Utah 1988)). Although the analytical model of the uniform operation of the courts provision is different than the open courts provision, in substance it operates in much the same way. See, e.g., Lee, 867 P.2d at 582-83, 590-91 (majority applies uniform operation of the courts provision while concurring opinion reaches the same result under the open courts provision); Condemarin, 775 P.2d 352-74 (per Durham, J., Zimmerman,

J. and Stewart, J.) (applying various constitutional provisions to reach the same result including open courts, uniform operation of law, due process, and right to jury trial). Like the open courts provision, the uniform operation of the courts provision has two distinct analytical approaches: a heightened scrutiny of legislative action and one that is more deferential to legislative enactments. See Mountain Fuel Supply, 752 P.2d at 888-89.

Plaintiff contends that the statutory cap on non-economic damages in medical malpractice actions violates the Utah Constitution's uniform operation of the laws provision because the cap is not based on a reasonable classification nor is it reasonably related to a legitimate legislative purpose. (See App. Br. at 31-40.) Plaintiff's argument is based heavily on his application of the heightened scrutiny standard of review, as applied in Lee, 867 P.2d at 582-83.

Plaintiff's argument should be rejected. First, the argument for a heightened standard of scrutiny depends on acceptance of the claim that plaintiff's rights under article I, section 11 are implicated. (See App. Br. at 35.) But, as discussed at length above, no fundamental rights of plaintiff under the open courts provision are violated by the non-economic damage ceiling because there is no fundamental right to unlimited non-economic damages in a medical malpractice action. See supra at pp. 27-33.

Second, regardless of the level of analysis, the classifications plaintiff identifies are not discriminatory classifications of persons of a same class or invalid classifications of persons of different classes. See Malan 693 P.2d at 669 (noting that a law must apply equally to persons of the same class and is not invalid as it applies to persons of different classes if it is "based on differences that have a reasonable tendency to further the objectives of the statute"). The fact that a statute treats people differently does not mean that the discrimination is impermissible. All legislative classifications are either under-

inclusive or over-inclusive. "The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals."⁴⁰ That does not make the legislative classification arbitrary and unreasonable. "[T]he state is not bound to deal alike with all . . . classes, or to strike at all evils at the same time or in the same way." Semler v. Dental Examiners, 294 U.S. 608, 610 (1935).

Plaintiff points to three specific ways in which the ceiling on non-economic damages classifies potential plaintiffs so as to discriminate between those with hard damages and those with soft damages. First, plaintiff claims that the statute discriminates between victims of medical malpractice and other tort victims. (See App. Br. at 32.) The first group has their soft damages capped; the second does not. The response is that there are legitimate differences between medical malpractice victims and other tort victims that the legislature could rely upon in classifying them differently for the purpose of capping soft damages. As noted above, high and unpredictable exposure to soft damages awards in the medical malpractice area is one significant factor that is driving up insurance rates and making insurance difficult to obtain. It also feeds directly into the affordability crisis in medicine. Caps on soft damages have been found to be one of the few measures that effectively slow the growth of costs and make awards more predictable. Therefore, the differences between the medical malpractice area and tort law in general is sufficiently great that it justifies different treatment for one class of plaintiffs versus the other. (See Health Care Amicus Brief at pp. 12-16.)

Further, in order to make this argument, plaintiff sets up a straw-man distinction between medical malpractice victims and other tort victims. In considering the application of uniform operation of the laws, this is not the relevant distinction. As the dissent in Laney argued, in a slightly different context, because prospectively each of us

⁴⁰ Tussman & tenBroek, The Equal Protection of the Laws, 38 Calif. L. Rev. 341, 343 (1949).

is a potential victim of medical malpractice, “[n]o group is singled out by legislation that limits the ability to recover” for medical malpractice. 2002 UT 79 at ¶ 98 (Wilkins, J., concurring and dissenting). Accordingly, the cap does not create classifications that result in different treatment being given persons who are, in fact, similarly situated” Mountain Fuel Supply, 752 P.2d at 888.

Second, plaintiff claims that the cap discriminates between medical malpractice victims with primarily economic injuries, on the one hand, and those with primarily non-economic injuries, on the other. (See App. Br. at 32-33.) As discussed above, for several reasons independent of the medical malpractice context, the law views differently a plaintiff’s rights to recover economic and non-economic losses. The law often treats soft and hard damages differently because it is often difficult to determine the existence of soft damages, and because once their existence is determined, they are hard to measure in dollars. Neither is true of hard damages. As a consequence, the law is more wary of soft damages. See supra at pp. 30-33. If the courts and legislature may make this distinction in other areas of the law, it is hard to see how it can be unconstitutionally discriminatory in an area where there is empirical evidence that the very unpredictability of soft damage awards is the source of much of the pressure on medical malpractice insurance rates and the very availability of insurance.

Third, plaintiff claims that the statute discriminates against the most severely injured because there is a general correlation between the non-economic harm and economic losses. (See App. Br. at 33.) Plaintiff, however, offers no empirical evidence of any such correlation between the severity of the injury and high damages for pain and suffering. All that is offered is bald assertion, which is an insufficient basis for an argument, much less a holding of unconstitutionality. It takes very little creativity to conceive of numerous scenarios in which plaintiff’s assertion would not be the case. The

unpredictability of jury verdicts and the inherent difficulty in ascertaining soft damages, the ineffability of measuring them in dollars, and their subjectivity, makes any correlation speculative at best.

Plaintiff's argument also should be rejected because the damage cap is reasonably related to the legitimate purpose of keeping medical malpractice rates within the reach of more health care providers. Mountain Fuel Supply, 752 P.2d at 887. Plaintiff argues that even if the classifications made by the legislature are permissible, the means it has chosen—caps on soft damages—is not reasonably related to the objective of the legislation, which is to maintain the availability of medical malpractice insurance and keep it affordable. Plaintiff attempts to rely on this court's decision in Lee, which skeptically approached the legislature's attempt to curb the growth in malpractice premiums by imposing a very short statute of limitations on minors. The Lee court concluded that there was little evidence before the legislature that would justify the conclusion that the measure would have the result intended.

First, as discussed in detail above, Lee is distinguishable because it effectively made it impossible for a minor to bring a claim. See supra at pp. 28-29. Second, in Lee the court concluded that the insurance market was national and that the legislature had no basis to think that what it did in Utah would affect the national insurance market. See Lee, 867 P.2d at 584-588. Here, the legislature made the judgment, supported by empirical evidence, that the insurance market for medical malpractice insurance is local. See supra at pp. 4-10. It also made the judgment that statutory ceilings on non-economic damages effectively contain the growth in insurance premiums and maintain the availability of insurance. See id. That judgment was based on sound evidence of the type a legislature is entitled to rely upon in passing forward-looking legislation. See, e.g., Craftsman, 1999 UT 18 at ¶ 23.

Third, in Lee the court found that the empirical results of the legislature's action did not show that the measure was an effective way to achieve its ends. Here, the post-enactment evidence gathered in the Health Care Amicus Brief shows that the legislature's pre-enactment determination was correct. Caps on soft damages have kept down the growth in unpredictable awards, have kept the rate of the increase in insurance premiums down, and have maintained the availability of insurance for health care providers. Indeed, the evidence is that caps on damages are one of the few measures that are effective. See supra at pp. 8-10.

Finally, this court's approach in Lee, like that in Berry, of harshly scrutinizing and second-guessing the legislature's empirical evidence and the wisdom of its judgment, has not been much in evidence in the more recent cases challenging similar statutes. See Craftsman, 1999 UT 18 at ¶ 23 (the majority looked only at legislative objectives and required the party challenging the statute to submit evidence that the objectives were not met). See also Hirpa, 948 P.2d at 793-94; Parks, 2002 UT 55 at ¶ 8.

Lastly, Plaintiff contends that even if a heightened standard of the reasonable relation test is not required, the ceiling on non-economic damages is still unconstitutional. (See App. Br. at 38.) As demonstrated above, there is a very close relationship between the means used and the end sought, and the means are narrowly tailored to the end. Under such circumstances, even a heightened standard of reasonable relation is satisfied; axiomatically, a less severe test will also be met. The "rational basis" standard applicable under article I, section 24 is very deferential to the legislature. "[I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time law was enacted must be assumed." Mountain Fuel Supply, 752 P.2d at 384.

The court should reject the plaintiff's challenge to the cap under the uniform operation of the laws provision.

V. THE STATUTORY CEILING ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS DOES NOT VIOLATE THE RIGHT TO A JURY TRIAL PROVISION OF THE UTAH CONSTITUTION, ARTICLE I, SECTION 10.

Art. I, section 10 of the Utah Constitution guarantees the right to a jury trial in civil cases.⁴⁷ This right is analogous to that secured by the Seventh Amendment of the federal constitution.⁴⁸

Plaintiff argues that the right to a jury trial is a fundamental right that has been violated by the statutory ceiling on non-economic damages because it operates by “arbitrarily modifying a jury’s damage award” and therefore “infringes the constitutional right to a jury trial.” (App. Br. at 45.) Plaintiff appears to argue that the jury trial right is a right to have damages, including non-economic damages, determined exclusively by the jury without any oversight by a court, other than the possibility of a remittitur coupled with an opportunity for a new trial. (See *id.* at 42-43.) To plaintiff, the right is apparently absolute. (See *id.* at 41-42.) Plaintiff’s argument is without support in Utah law.

The only Utah authority cited by plaintiff in support of his position that his right to a jury trial has been violated is Justice Durham’s separate opinion in *Condemarin*, 775 P.2d at 365-66 (per Durham, J.). That opinion cites a violation of article I, section 10 as one of the alternative grounds upon which that justice would have struck down the \$100,000 cap on total damages applicable to the University of Utah Hospital. *See id.* No other justice joined in that part of the opinion. Interestingly, plaintiff asserts, as logic seems to require, that the right of the jury to determine damages without interference by

⁴⁷ Article I, section 10 states in relevant part that “the Legislature shall establish the number of jurors [in civil cases] by statute, but in no event shall a jury consist of no fewer than eight persons” and that “three-fourths of the jurors may find a verdict.”

⁴⁸ The Seventh Amendment states: “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 reexamined in any court of the United States, than according to the rules of common law.” U.S. Const. amend VII.

the court is absolute, and a cap of any type on a jury's verdict would offend the constitution. (See App. Br. at 41-42.) Justice Durham's opinion, however, does not take this logical absolutist approach. Rather, it applies what amounts to a heightened scrutiny standard to find that the cap was invalid because it limited total damages recoverable to \$100,000, an "absurdly low" amount unlikely to cover "even the medical expenses of plaintiff," and to further find that there was a lack of "any evidence" justifying the ceiling. On this basis, Justice Durham was led to "strike the balance" in favor of finding an infringement of the right to jury trial. Condemarin, 775 P.2d at 366 (per Durham, J.).

Even if the court were to accept Justice Durham's case-specific dicta in Condemarin and apply this balancing analysis to the cap on non-economic damages, the balance should be struck in favor of the statute's validity. The limit challenged here is significantly higher than that in Condemarin, and it applies only to soft damages. In addition, as of last year, the limit on soft damages has been raised to \$400,000, four times the absolute cap on all damages in Condemarin. Moreover, unlike the limit in Condemarin, ample justification for this narrow prescription is offered. Under Justice Durham's test in Condemarin, the present statute would be upheld.

But the law in Utah on the application of article I, section 10 is not Justice Durham's Condemarin opinion.⁴⁹ Rather, it is set forth in two later rulings by the Utah Supreme Court in which a majority rejected challenges to caps under this provision. Neither case is cited by appellant. In McCorvey v. Utah State Department of Transportation, this court held that a \$250,000 cap on total damages against the state did not violate article I, section 10. See 868 P.2d at 47-48. In Parks v. Utah Transit

⁴⁹The sole authority cited by Justice Durham was a federal district court opinion in Boyd v. Bulala, 672 F. Supp. 915 (W.D. Va. 1987). See 775 P.2d at 365-66. Bulala has long since been reversed by the Fourth Circuit, which holds that the right to jury trial is not violated by that state's cap because "it is not the role of the jury to determine the legal consequences of its factual findings. . . . That is a matter for the legislature." Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989).

Authority, the court summarily rejected the same claim when made against another total damages cap. See 2002 UT 55 at ¶ 18. While both cases were decided in the governmental immunity context, there is no analytical distinction between a governmental immunity case as contrasted to a private party case when it comes to the relative roles of the jury and the legislature as respects the constitutionality of a cap on damages. The right is either to have the jury set damages in their entirety, or it is not. And the McCorvey and Parks cases have firmly held that the jury trial right does not impair the legislature's ability to cap damages.

Other jurisdictions have likewise rejected appellant's argument. In Etheridge v. Medical Ctr. Hosps., the Virginia Supreme Court concluded that a statutory cap did not violate the right to jury trial because the role of the jury was limited to ascertaining facts and assessing damages. See 376 S.E.2d 525, 529 (Va. 1989). The court reasoned that statutory caps merely established the outer limits of a remedy and that this determination was a matter of law. Since the trial court imposed the cap only after the jury had fulfilled its fact-finding function, as is the procedure in Utah, there was no interference with the right to trial by jury. See id. at 529. The Indiana Supreme Court reached a similar conclusion for similar reasons. See Johnson v. Saint Vincent Hospital Inc., 404 N.E.2d 585, 592-93 (Ind. 1980).

Finally, the United States Supreme Court in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001), held that the determination by a reviewing court of the lawfulness of a jury determination of an award of punitive damages is not a review by the court of a determination of fact by the jury, but a question of law. Consequently, for an appellate court to determine that an award exceeds the lawful limit and to order an award reduced does not offend the federal constitutional right to a jury trial. See id. at 437-39. Analogous reasoning would result in holding that the Utah

Constitution is likewise not offended by a court reducing a damage award because it exceeds an amount that the legislature has determined is unlawful.

In sum, the right to trial by jury is not violated by the cap.

VI. THE COURT SHOULD DISREGARD PLAINTIFF'S DUE PROCESS AND SEPARATION OF POWERS ARGUMENTS AS THEY WERE NOT PRESERVED BELOW.

Plaintiff's brief raises for the first time two additional substantive arguments. Plaintiff asserts that the statutory ceiling on non-economic damages in medical malpractice cases violates the Utah Constitution's due process provision, article I, section 7, because it restricts appellant's right to recover full damages, and the Utah Constitution's separation of powers provision, article V, section 1, because the legislature exercised judicial power by enacting the statute. Because these claims were not preserved below, this court should reject them out of hand.

This court adheres to a "longstanding rule that [it] will not consider issues raised for the first time on appeal," including constitutional issues. Julian v. State, 966 P.2d 249, 258 (Utah 1998); see also Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996). To preserve issues for appeal, parties must raise them in a manner in which the "trial court [is] offered an opportunity to rule on [the] issue." Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). "A trial court has the opportunity to rule if the following three requirements are met: (1) 'the issue must be raised in a timely fashion;' (2) 'the issue must be specifically raised;' and (3) a party must introduce 'supporting evidence or relevant legal authority.'" Id. (citation omitted). Plaintiff satisfied none of these conditions.

Plaintiff did not raise either the due process or the separation-of-powers arguments properly before the trial court. Neither point was briefed. (See R. 447-74.) Plaintiff's counsel did allude to these points at oral argument, but only in rebuttal, and the trial court

did not have before it “supporting evidence or relevant legal authority” on these two legal theories. (See R. 810 at pp. 44-45.) Plaintiff’s counsel admitted as much to the trial judge. (See *id.*)

Plaintiff had ample opportunity to raise these constitutional claims before the trial court and failed to do so. This court should decline to consider these arguments.⁵⁹

A. Even if the Argument Had Been Preserved, the Statutory Ceiling on Non-Economic Damages in Medical Malpractice Actions Does Not Violate the Due Process Provision of the Utah Constitution, Article I, Section 7.

Plaintiff’s first improperly preserved argument is that the cap violates the due process clause, article I, section 7. That section reads: “No person shall be deprived of life, liberty or property, without due process of law.” Plaintiff maintains that the right to recover full damages for personal injuries is a substantive right protected by Utah’s due process clause and that this right is violated by the statutory ceiling on non-economic damages in medical malpractice cases. (App. Br. at 28.)

This court has recognized that under the Utah Constitution, a substantive “due process question can . . . arise when a statute provides that a particular right is automatically lost or impaired in a specific circumstance” Wells v. Children’s Aid Society of Utah, 681 P.2d 199, 205-06 (Utah 1984). If the court determines that the right impinged upon is a fundamental right, a heightened scrutiny standard applies, requiring the proponents of the statute to show “(1) a compelling state interest in the result to be achieved and (2) that the means adopted are ‘narrowly tailored to achieve the basic statutory purpose.’” *Id.* at 206 (internal citation omitted) (finding that parental rights are fundamental). On the other hand, if the statute does not infringe upon a fundamental right, it will be upheld if it “bears a rational relationship to an end of government not

⁵⁹ The only exceptions to the preservation requirement are plain error and manifest injustice, neither of which are applicable here. See State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994).

prohibited by the constitution.” Mountain Fuel Supply Co., 752 P.2d at 888-90 (noting that the federal due process clause and equal protection clauses are treated as requiring the same review and upholding the license tax under rational basis test); see also Wells, 681 P.2d at 204-05 (describing two levels of scrutiny, with rational basis applying to economic regulations).

Plaintiff’s initial argument under article I, section 7 is that the court should employ a “compelling state interest” test to determine the constitutionality of the cap on non-economic damages. This position rests upon the same assumption that underlies plaintiff’s call for strict scrutiny under article I, section 10 and article I, section 24 – that there exists some fundamental right to recover full damages for personal injuries, and that “full damages” includes unlimited non-economic damages. (See App. Br. at 28.)

As noted earlier, no appellate opinion of this state holds that one has a constitutional right to a particular measure of damages. See supra at pp. 30-33. If there is no constitutional right to any specific measure of damages, it is hard to understand how a court could conclude that one is constitutionally entitled to all the non-economic damages a jury might choose to award, given their inherently subjective and speculative nature, and the fact that the law has traditionally viewed them with some suspicion. It might be one thing to say that a person has a constitutional right to be fully compensated for economic losses which are objectively measurable and verifiable – something that this court has never held. But it is quite another to hold that something as amorphous, immeasurable, and unverifiable as unlimited amounts of damages for “pain and suffering” rises to the level of “an important substantive right” for which the Utah Constitution must extend heightened protection.

Because there is no fundamental right to unlimited non-economic damages, this court should apply the rational basis test and grant deference to the legislature’s

constitutional role to determine public policy.⁵¹ If such a test is applied, there is little doubt that the cap on non-economic damages for medical malpractice would withstand scrutiny. For this test is “so tolerant that the substantive content of economic statutes rarely violates due process.” Wells, 681 P.2d at 205.

But even if the court were to conclude that the compelling state interest test were the appropriate standard, the cap should still withstand scrutiny. As pointed out above in connection with the open courts discussion, the statute is fully capable of withstanding both prongs of the Berry analysis. And that analysis is as strict as a compelling state interest analysis under the Utah due process clause and not significantly different in what it weighs. See Craftsman, 1999 UT 18 at ¶¶41-47 (Stewart, J., concurring); see also Wells, 681 P.2d at 207 (upholding statute that terminated parental rights under the strict scrutiny test).

B. Even if the Argument Had Been Preserved, the Statutory Ceiling on Non-Economic Damages in Medical Malpractice Actions Does Not Violate the Separation of Powers Provision of the Utah Constitution, Article V, Section 1.

The second argument that plaintiff did not properly preserve below is that the cap violates the separation of powers provision, article V, section 1 of the Utah Constitution. That provision reads as follows:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

⁵¹Appellant relies on Condemarin as a ruling based on due process. As noted in Parks, Condemarin has “limited precedential value” and stands for little more than that three judges found the statute there challenged to be unconstitutional. 2002 UT 55 at ¶11.

Plaintiff contends that “by fixing the amount of non-economic damages a plaintiff may recover in medical malpractice cases, the legislature has exercised judicial power in violation of article V, section 1 of the Utah Constitution ”⁵² (App. Br. at 49.)

Plaintiff’s argument turns the separation of powers doctrine on its head, and if accepted, would deprive the legislature of the power to determine what the substantive law of Utah should be in the future. See Ryan v. Gold Cross Serv., Inc., 903 P.2d 423, 425 (Utah 1995). This court has recognized the fundamental precept that “[t]he power to declare what the law shall be is legislative. The power to declare what is the law is judicial.” See Ritchie v. Richards, 47 P. 670, 675 (Utah 1896) (emphasis added). Plaintiff would subvert this division of powers by prohibiting the legislature from enacting limitations on non-economic damages if unrestricted damages were the rule at common law at some undefined point in time.

This court has long acknowledged that it is for the legislature to decide what the law should be, and that the common law operates only interstitially until the legislature acts. Justice Wolfe wrote in Masich that “[n]aturally most departures from the common law, especially if marked, will be made by the legislature, but judicial legislation (and such it is regardless of what jurisprudential terminology may be employed) fills the interstices in a more gradual process.” Masich v. United States Smelting, Refining & Mining Co., 191 P.2d 612, 626 (Utah 1948) (Wolfe, J., concurring). This view of the common law as subordinate to the legislature is, at core, the plain meaning of section 68-3-2 of the Code:

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally

⁵² This argument is a variation of the right to a jury trial argument and should be rejected on the same grounds. See supra at pp. 39-42.

construed with a view to effect the objects of the statutes and to promote justice.

This provision was adopted in 1898 at the same time as section 68-3-1, the provision adopting the common law of England as the law of Utah. It was passed by a legislature that included many of those who drafted the Utah Constitution, and expresses as clear as words can that the statutes are to be supreme, not the common law.

No provision of the Utah Constitution perpetuates common law causes of action in the face of conflicting statutes, or a future entitlement to certain measures of damage.⁵³ It is true that vested rights to common law causes of action are protected against retroactive legislation. See Richards Irrigation Co. v. Karren, 880 P.2d 6, 9-10 (Utah App. 1994). But to protect an abstract right that has not yet vested in an individual against alteration or deletion by the legislature is contrary to section 68-32-2 and to the entire history of the relations between the judicial and legislative branches of government in Utah.

Defendant contends that the cap on non-economic damages can be upheld without addressing the challenge to the legitimacy of the role that Berry has given this court vis-à-vis the legislature. If, however, the court chooses to address the separation of powers point, despite the fact that it was not raised properly below, defendant takes the position set out in the Attorney General's amicus brief: To the extent Berry can be said to endorse the position of plaintiff that the common law is exalted over the legislative and that any single provision limiting tort rights that is part of a larger remedial legislative scheme is to be analyzed under a heightened scrutiny standard, it should be overruled. See State of

⁵³ In this sense, Utah is consistent with other states. See, e.g., Wheeler v. Briggs, 941 S.W.2d 512, 514 (Mo. 1997) ("legislature has the right to modify the substantive law to eliminate or restrict causes of action"); Mayo v. Rouselle Corp., 375 So.2d 449 (Ala. 1979) (the right to bring an action can be modified, limited or repealed as the legislature sees fit, except where such cause of action has already accrued); Goldstein v. Hertz Corp., 305 N.E.2d 617, 626 (Ill. App. 1973) ("While the Constitution provides that every person shall find a remedy for all injuries received, the power and adequacy of the available remedy rests with the Legislature.")

Utah Amicus Brief at pp. 15-22. Recently, Justice Wilkins, joined by Associate Chief Justice Durrant, made much the same argument for overruling Berry in Laney v. Fairview City, 2002 UT 79 at ¶¶ 89-93 (Wilkins, J., concurring and dissenting, joined by Durrant, A.C.J.). The time has come to return the relationship of the common law to statute law, and of this court to the legislature, to that assigned by the drafters of the Utah Constitution.

The legislature's decision to limit the amount of non-economic damages recoverable against a health care provider for professional negligence does not offend the separation of powers provision of the Utah Constitution.

CONCLUSION

A heightened standard of scrutiny should not be applied to Utah's statutory cap on non-economic damages in medical malpractice actions. Viewing the cap in the broader context of the entire Health Care Malpractice Act, which was designed to assure that medical services are readily available to the public and to assure that insurance is available to health care providers, the restriction imposed by the cap on the remedy available to a plaintiff is mild and more than balanced by the benefits to the class of which potential plaintiffs are members. Choosing where to strike the balance between the interests of the public in affordable, insured health care, and the interests of particular members of that public in not having their tort rights against health care providers restricted in any manner, is a matter of legislative judgment to which this court should defer.

Even if a heightened standard were to be applied to the cap alone, the current statute should be upheld as it is narrow in its application and mild in its limit on non-economic damages, and it permits complete recovery of non-economic and punitive damages. The legislature had strong empirical justifications to believe that a cap on non-

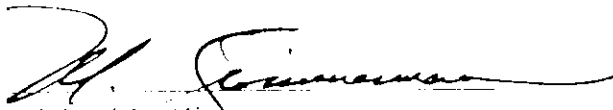
economic damages would serve to keep medical malpractice insurance rates in Utah within reach of more health care providers, and recent studies on a national and local level have shown that this type of cap actually has had the anticipated effect.

This court should find that under either standard of scrutiny, and under any constitutional provision raised by plaintiff, the cap on non-economic damages contained in the Utah Health Care Malpractice Act is constitutional.

DATED this 30th day of August, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2002, I mailed, postage prepaid, a true and correct copy of the BRIEF OF THE APPELLEE, to the following:

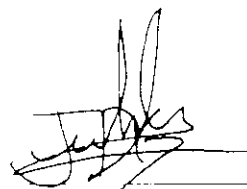
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A handwritten signature in black ink, appearing to read "David C. Gessel", is written over a horizontal line.