

SB 33: THE BRAVE NEW WORLD OF MALPRACTICE LITIGATION

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On July 25, 2011, the North Carolina House of Representatives, by a vote of 74-42, overrode Governor Perdue's veto of the medical malpractice bill (SB 33). The enactment of SB 33 culminated an intense six-month legislative battle.

When the Act (Exhibit 1) becomes effective on October 1, 2011, a new era of malpractice litigation in North Carolina will begin. Injured patients, who already face formidable barriers, will find it harder to find a lawyer, pursue their claims, and recover adequate compensatory damages. Lawyers and judges will be forced to decipher complex new statutory language. Courts will confront constitutional challenges to the bill's most controversial provision, the \$500,000 cap on noneconomic damages.

I. SUMMARY OF PROVISIONS OF SB 33

The new statute includes eight distinct new provisions:

Section 1 amends G.S.1-289 to require that the trial judge, in setting the amount of the **appeal bond**, consider the amount of the judgment, the limits of the appellant's liability insurance coverage, and the appellant's net worth. The appeal bond provision applies to all money judgments.

Section 2 amends Rule 42(b) to provide that, upon motion by any party in a tort action **where the plaintiff seeks damages exceeding \$150,000, the court shall order a bifurcated trial on liability and damages, except on a showing of good cause for a single trial.**

Section 3 amends **Rule 9(j)** to require the complaint to assert that **the 9(j) expert has reviewed "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry."**

Section 4 amends Rule 702(h) to make clear that, in a malpractice action against a hospital or other health care facility, an expert "shall not" testify about the standard of care as to administrative or other nonclinical issues "unless" the expert has substantial knowledge by training or experience about similar facilities in the same or similar communities.

Section 5 expands the definition of "medical malpractice action" in G.S. 90-21.11(2) to include **actions against a hospital, nursing home, or adult care home** when, under new subsection (b), the action **1) alleges a breach of administrative or corporate duties to the patient, and 2) arises from the same facts or circumstances as the underlying malpractice claim based on the furnishing of professional health care services.** A malpractice action under new subsection (b) does not require a Rule 9(j) expert (see Section 3, line 3).

Section 6 amends G.S. 90-21.12 to provide that in any malpractice action arising out of the treatment of an “**emergency medical condition**” (as defined in the federal EMTALA statute), the plaintiff must **prove a violation of the standards of practice “by clear and convincing evidence.”**

Section 7 creates a **\$500,000 cap on noneconomic damages** in medical malpractice cases. G.S. 90-21.19. **To avoid the cap, the plaintiff must prove that s/he suffered “disfigurement, loss of use of part of the body, permanent injury or death” and the defendant’s acts “were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.”** **Section 8** provides for a **special verdict** to indicate the amount of the jury’s award of noneconomic damages.

Section 9 amends G.S. 1-17 to **shorten the statute of limitations for minors in malpractice actions** to the limitations period in G.S. 1-15(c) (ordinarily three years after the last act of negligence), unless that period expires before age 10, in which case the action may be brought at any time before the child reaches age 10.

If the cap on noneconomic damages (Section 7) is held to be unconstitutional, Section 10 severs and preserves the unrelated sections of the Act: “If the provisions of Section 7 of this act are declared to be unconstitutional or otherwise invalid by a court of competent jurisdiction, then Section 8 [special verdict for noneconomic damages] of this act is repealed, but the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions.”

II. THE EFFECTIVE DATE

The effective date of SB 33 is October 1, 2011. For some provisions, the Act becomes effective for all actions “arising” on or after October 1, 2011. Other provisions, including the cap on noneconomic damages, become effective for all actions “commenced” on or after that date.

Section 5 (expanded definition of medical malpractice action), **Section 6** (new burden of proof for negligent treatment of “emergency medical condition”), and **Section 9** (statute of limitations for claims by minors) **become effective on October 1, 2011, and apply to causes of action “arising on or after that date.”**

The other sections -- including Section 7, the cap on noneconomic damages -- apply to “actions commenced” on or after October 1, 2011. Rule 3(a) provides that “[a] civil action is commenced by filing a complaint with the court.” **To avoid the cap on noneconomic damages, you must file the complaint, with a proper Rule 9(j) certification, by Friday, September 30, 2011.**

By providing that the cap applies to all “actions commenced” on or after the effective date, the General Assembly placed impossible demands on attorneys evaluating malpractice

claims that arose before October 1, 2011. In many cases, lawyers will have insufficient time to obtain the pertinent medical records and the necessary Rule 9(j) reviews. In other cases, lawyers -- necessarily relying on truncated expert reviews -- will feel compelled to sue multiple defendants, instead of focusing their claims more narrowly after a full evaluation.

The arbitrary filing deadline creates ethical and malpractice risks for the lawyer. A "Lawyers Mutual Alert," issued on August 23, provides sound advice:

If [filing suit before October 1] is not likely or not possible, the lawyer should advise the potential client in writing that her case may be affected by the new statute and it is unlikely that the firm will be able to have the case reviewed and filed by the October 1 deadline. As a consequence, the client's claim may be subject to the cap on noneconomic damages. If the client still wants you to handle her case, get her to signify in writing that she understands and accepts the probability that her case may not be filed before October 1, 2011 and as a result will be subject to the cap on noneconomic damages.

To expedite the process of evaluation and expert review, consider the following options:

TIP # 1: Rule 9(j) requires certification that the medical care has been reviewed by a qualified expert "who is willing to testify that the medical care *did not comply with the applicable standard of care.*" Note that **the 9(j) certification is directed only to negligence, not to causation or damages.** In the compressed period between now and October 1, you may be able to obtain satisfactory expert review on negligence, but not causation. To avoid the cap, file suit by September 30, including your 9(j) certification, and then proceed to evaluate causation.

TIP # 2: Current Rule 9(j) requires the complaint to assert that the "medical care" has been reviewed by a qualified expert. Section 3 of SB 33 amends Rule 9(j) by adding the requirement that the expert review "*all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry.*" Note that Section 3 does not become effective until October 1, 2011. For cases filed before October 1, it is of course preferable to have the expert review all pertinent medical records. However, under current law, Rule 9(j) does not require that the "medical records" be reviewed by the expert:

A review of a summary of the treatment provided to a patient is sufficient compliance with Rule 9(j), and this summary may be provided to the expert in the form of hypothetical questions. *See Haponski v. Constructor's, Inc.*, 87 N.C. App. 95, 100, 360 S.E.2d 109, 112 (1987) (hypothetical questions are permitted under Rule 705 and may be predicated on "such facts as the evidence reasonably tends to prove"). **There is no requirement the expert review the actual medical records prior to expressing his opinion with regard to the medical care provided.**

Hylton v. Koontz, 530 S.E.2d 511, 515-16 (N.C. App. 2000) (emphasis added).

TIP # 3: Some health care providers, seeking to benefit from the new cap on damages, may deliberately delay producing medical records in order to impede the timely evaluation and expert review of potential malpractice claims. You may want to remind them of their potential liability for obstruction of justice. See Grant v. High Point Regional Health Systems, 645 S.E.2d 851, 855 (N.C. App. 2007) (allegations that defendants "effectively precluded Plaintiff from obtaining required Rule 9(j) certification" by deliberately destroying medical records stated a claim for obstruction of justice).

TIP # 4: If the noneconomic damages may exceed \$500,000 and your firm does not have the capacity to obtain timely expert review, consider immediate association with a firm that has established relationships with qualified experts.

TIP # 5: If you are not able to file the complaint by September 30, or if the client contacts you after the effective date, you will want to lay the foundation for a constitutional challenge. As discussed in Section V below, the cap violates the plaintiff's rights under the North Carolina Constitution, and is doubly unconstitutional if the trial court seeks to apply the cap to a claim that arose before October 1, 2011.

For any complaint filed after October 1, 2011, include separate paragraphs challenging the constitutionality of:

- 1) Rule 9(j);
- 2) the cap on noneconomic damages (Section 7 of SB 33);
- 3) the effective date of the cap (Section 11 of SB 33), if the cause of action arose before October 1, 2011.

(Samples are attached as Exhibits 2.1, 2.2, and 2.3.)

Note: A failure to assert a constitutional challenge to the cap in the complaint does not waive the objection. The objection becomes ripe after the jury awards noneconomic damages in excess of the cap, and the judge undertakes to reduce the verdict, pursuant to G.S. 90-21.19(a).

III. THE EVOLUTION OF SB 33

A. Summary of Legislative History

Senators Tom Apodaca, Harry Brown and Bob Rucho filed SB 33 on January 25, 2011, one day before the legislative session began. The bill was referred to the Senate Judiciary I Committee, chaired by Sen. Pete Brunstetter. The Judiciary Committee approved an amended version of SB 33 on March 1, and the Senate passed the bill on March 2, 2011 by a vote of 36-13.

SB 33 was referred to the House Select Committee on Tort Reform, chaired by Rep. Jonathan Rhyne. Initially, the provisions of SB 33 were subsumed into HB 542, the general "tort

reform” bill. On April 14, the Tort Reform Committee severed the malpractice provisions, considered the malpractice provisions independently, and approved an amended version of SB 33. On April 20, the full House, by a vote of 67-49, adopted the “Mills amendment,” providing exceptions to the cap on noneconomic damages. The House then passed the amended bill with broad bipartisan support (88 votes on second reading; 91 votes on third reading).

SB 33 was then referred to a 12-member Conference Committee, appointed by President Pro Tem Phil Berger and Speaker Thom Tillis. On June 9, the Conference Committee released its report, which was immediately submitted to the Senate and House for concurrence. The Senate concurred by a vote of 32-9, and the House concurred by a vote of 62-44.

Governor Bev Perdue vetoed SB 33 on June 24, 2011. In a public statement, she said she was “strongly committed to meaningful medical malpractice reform” but that the bill, in its current form, “does not sufficiently protect the catastrophically injured.” Exhibit 3.

On July 25, 2011, the General Assembly considered motions to override the veto of SB 33. The Senate overrode the veto by a vote of 35-12 and the House did so by a vote of 74-42. At that point, SB 33 became law. Session Law 2011-400.

B. Amendments to SB 33

In its final form, SB 33 inflicts a devastating blow to patients injured by medical malpractice. Earlier versions of the bill were even worse.

- The original bill provided a \$250,000 cap on noneconomic damages. The final bill provides a \$500,000 cap, adjusted for inflation at three-year intervals.
- The bill that originally passed the Senate and the House required certification that the 9(j) expert had reviewed all medical records pertaining to the “alleged injury.” The Conference Committee properly narrowed the scope of required expert review to records regarding the “alleged negligence,” thus avoiding the pointless and costly exercise of submitting medical records on damages to the standard of care expert.
- The original bill required a bifurcated trial for every case in which the plaintiff sought \$75,000 or more in damages, with no exceptions. In the House version and the final bill, the threshold was doubled to \$150,000, and the judge was given discretion to order a unitary trial, for good cause shown.
- The Senate version of SB 33 required periodic payments of future economic damages. After representatives of the structured settlement industry raised technical objections, the House sponsors withdrew that provision.
- The Senate version provided complete immunity for negligence in the ER by requiring proof of “gross negligence” to establish liability. With 4,000,000 ER visits in North Carolina annually, the adverse impact on patient safety and

patients' rights would have been enormous. NCAJ and the NC Coalition for Patient Safety mounted an effective campaign, inside and outside the legislature, to demonstrate that ER immunity was unfair and unwise. See, e.g., Exhibits 4.1 (Boone letter); 4.2 (NC-CPS press release). The House mitigated the harm by eliminating the gross negligence standard, instead requiring proof of negligence in the ER by "clear and convincing evidence." Without notice or explanation, the Senate/House Conference Committee shifted the higher burden of proof from the ER to the treatment of every "emergency medical condition."¹ Although the enacted provision will harm many patients, it is less reprehensible than the original ER immunity provision.

- In the House Committee, Rep. Chuck McGrady proposed shortening the statute of limitations in all actions brought on behalf of minors. When concerned citizens pointed out that almost all sexual abuse of children would be immunized, the provision was amended to apply only to medical malpractice actions.

The general "tort reform" bill, HB 542 (Exhibit 5) includes two provisions that further harm victims of malpractice. Section 1.1 establishes a new rule of evidence (Rule 414), limiting evidence of past medical expenses to the amount paid to satisfy the obligation. Section 1.3 amends Rule 702(a) to make it more difficult to qualify expert witnesses. Both provisions are effective for all actions "arising on or after" October 1, 2011. SB 586, Section 1.1.

Several other general "tort reform" proposals that would have adversely affected plaintiffs in malpractice actions did not become law. A comprehensive collateral source provision died in the House Tort Reform Committee. A provision of HB 542 that would have transferred 75% of an award of punitive damages in excess of \$100,000 to the Civil Penalty and Forfeiture Fund was removed on the House floor.

IV. THE CAP ON NONECONOMIC DAMAGES

A. The Basic Provisions

For medical malpractice actions filed on or after October 1, 2011, the Act places a \$500,000 cap on noneconomic damages, defined as "[d]amages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and any other nonpecuniary compensatory damage." G.S. 90-21.19(c)(2). The cap does not encompass punitive damages. *Id.* The \$500,000 limit applies regardless of the number of defendants or the number of plaintiffs. G.S. 90-21.19(a) ("all defendants" ... "all parties").

The jury may not be informed about the cap. G.S. 90-21.19(d). The verdict form will separately itemize noneconomic damages. G.S. 90-21.19B. If the jury awards more than \$500,000 in noneconomic damages, the trial judge shall modify the judgment to conform to the statutory cap. G.S. 90-21.19.

¹ The companion paper by Matthew D. Ballew analyzes this provision. Ballew, "Clear and Convincing Evidence: Senate Bill 33 and the Higher Standard of Proof for 'Emergency Medical Conditions.'"

The amount of the cap will be adjusted at three-year intervals, beginning on January 1, 2014, to reflect changes in the Consumer Price Index.

B. The Exceptions to the Cap

Subsection (b) of G.S. 90-21.19 creates an exception to the cap “if the trier of fact finds *both* of the following”:

- 1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death.
- 2) The defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in **reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.**

Under North Carolina law, “reckless disregard” is a synonym for “wanton conduct.” In the vivid language of our Supreme Court, severely injured patients (and their lawyers) will be wandering in the “twilight zone” and “penumbra” of “quasi-intent,” seeking an escape from the cap:

The concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury. The state of mind of the perpetrator of such conduct lies within the penumbra of what has been referred to as "quasi intent." W. Prosser and W. Keeton, *The Law of Torts* § 34 (5th ed. 1984).

We have described “wanton” conduct as an act manifesting a reckless disregard for the rights and safety of others.... The term "reckless," as used in this context, appears to be merely a synonym for "wanton" and has been used in conjunction with it for many years. *See Bailey v. R.R.*, 149 N.C. 169, 62 S.E. 912 (1908).

Pleasant v. Johnson, 312 N.C. 710, 713, 325 S.E.2d 244, 247-48 (1985).

In Yancey v. Lea, the Supreme Court defined the terms “wanton conduct,” and “gross negligence” as interchangeable:

In determining or defining gross negligence, this Court has often used the terms "willful and wanton conduct" and "gross negligence" interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct. We have defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others."

[Gross negligence] is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a

breach of duty to others, i.e., a *conscious* disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the *injury or damage* itself is intentional.

Yancey v. Lea, 354 N.C. 48, 52-53, 550 S.E.2d 155, 157-58 (2001) (Lake, C.J.) (emphasis in original) (citations omitted).

The Supreme Court views “reckless disregard” as marginally less culpable than other forms of quasi-intentional misconduct. In the excerpt from Yancey v. Lea quoted above, the Court defines an act as “wanton” when it is “done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others.” Id. at 53, 550 S.E.2d at 157 (emphasis added). See Abernathy v. Consolidated Freight, 321 N.C. 236, 240, 362 S.E.2d 559, 562 (1987) (“Constructive intent to injure exists where conduct threatens the safety of another and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified.”) (citing Pleasant v. Johnson).

Some malpractice plaintiffs will be able to invoke the statutory exceptions to the cap. If the health care provider needlessly places the patient at great risk, the exceptions may apply. An injured patient who proves that the negligent doctor was incapacitated by alcohol or drugs may avoid the cap. If the jury finds the evidence sufficient to support a claim for punitive damages, the cap will not limit the award of compensatory damages.

V. CONSTITUTIONAL CHALLENGES TO THE CAP

The backers of SB 33 recognize that the cap on noneconomic damages is vulnerable to attack under the North Carolina Constitution. Soon after filing the bill, the Senate sponsors added a severability clause that preserves the remainder of the bill if the cap is declared unconstitutional or otherwise invalid. SB 33, Senate Judiciary I Committee Substitute Adopted 3/1/11.

The companion paper by Robert S. Peck of the Center for Constitutional Litigation places the North Carolina constitutional challenge in a national context. Peck, “Challenging the Constitutionality of Caps and Other Restrictions on Civil Justice.” This section focuses on North Carolina law.

A. The Cap Is Unconstitutional.

Two weeks after SB 33 was filed, former Chief Justice I. Beverly Lake, Jr. released a letter expressing his view that the cap violates the right to trial by jury, guaranteed by Article I, Section 25 of the North Carolina Constitution. Exhibit 6. The letter was especially noteworthy because the author is recognized as the state’s leading conservative jurist. In his letter, Chief Justice Lake clearly presents the constitutional challenge:

For over 200 years, the North Carolina Constitution has provided that, in “**all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.**” N.C. Const., art. I, § 25. The North Carolina Supreme Court has long recognized that compensatory damages, including damages for “mental

and physical pain,” is a form of “property” protected by the constitutional right to trial by jury.

In *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), the Court determined that a libel law was constitutional, even though it abolished a plaintiff’s right to recover punitive damages. *Id.* at 632-33, 47 S.E. at 813. The Court noted, however, that if the law had restricted the recovery of actual or compensatory damages, it would have been unconstitutional. In drawing this distinction, the Court stated: “The right to have punitive damages assessed is . . . not property. The right to recover actual or compensatory damages *is property.*” *Id.* at 633, 47 S.E. at 813 (emphasis in original). The Court elaborated:

The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are *actual* damages, and these are *property*. ‘The right to recover damages for an injury is a species of property and vests in the injured party immediately on the commission of the wrong. . . . Being property, it is protected by the ordinary constitutional guarantees.’ . . . It cannot be *extinguished* except by act of the parties or by operation of the statute of limitation.

Id. (emphasis in original) (citation omitted).

When I served as Chief Justice, a unanimous Court expressly reaffirmed this principle in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004). We stated that compensatory damages “represent a type of property interest vesting in plaintiffs,” while punitive damages are not a vested property interest. *Id.* at 176, 594 S.E.2d at 12.

The clear import of *Osborn* and *Rhyne* is that Section 3 of SB 33 is unconstitutional. North Carolina citizens have a “sacred and inviolable” right to have a jury determine the amount of compensatory damages, including noneconomic damages, under our Constitution. The right to have a jury make that decision cannot be eliminated or restricted by the General Assembly.

Chief Justice Lake then drew the legislature’s attention to a recent decision of the Georgia Supreme Court:

The Georgia Supreme Court recently reached the same conclusion, striking down a similar law in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010). In 2005, the Georgia legislature enacted a \$350,000 cap on noneconomic damages in medical malpractice cases. Georgia’s state constitution protects the right to a jury trial, as does ours, stating “[t]he right to trial by jury shall remain inviolate.” Ga. Const. of 1983, Art. I, Sec. I, Par. XI (a). Because the determination of damages has always been the jury’s province, and noneconomic damages have always been a component of compensatory damages, the damages cap unconstitutionally infringed on the right to a jury trial. *Id.* at

223. The Court concluded: “The very existence of the caps, in any amount, is violative of the right to trial by jury.” *Id.*

Two days after the Lake letter was released, proponents of SB 33 put forth a letter from former Chief Justice Burley Mitchell, arguing that the cap is constitutional. Exhibit 7.

One week after the Mitchell letter, former Justice Edward Thomas Brady submitted a letter supporting chief Justice Lake’s analysis. Exhibit 8. Justice Brady’s letter commands particular attention because he authored the unanimous 2004 Supreme Court opinion in Rhyne v. K-Mart. The Rhyne Court explicitly recognized that a jury’s award of compensatory damages is a vested property right, protected by the North Carolina Constitution.

B. The Cap Is Doubly Unconstitutional for Actions Arising Before October 1, 2011.

The cap on noneconomic damages is constitutionally infirm, regardless of its effective date. But the legislature compounded its constitutional problem by making the cap apply to all actions “commenced” on or after October 1, 2011, instead of all cases “arising” on or after the effective date.² This retroactive denial of vested property rights violates the North Carolina Constitution.

A patient has a vested property right to compensatory damages the moment she is injured by a health care provider’s negligence. The Supreme Court in Osborn spoke clearly and unequivocally: “**The right to recover damages for an injury is a species of property and vests in the injured party immediately on the commission of the wrong.**” 135 N.C. at 633, 47 S.E. at 813. That right is substantive, and cannot be abridged by subsequent legislative enactment.

Article IV, Section 13(2) of our Constitution provides that “No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury.” The constitutional command is doubly compelling when the procedural rule is applied retroactively.

In his February 10, 2011 letter to legislators defending the constitutionality of the cap, former Chief Justice Mitchell acknowledged that the cap could not be applied to actions arising before the effective date of the Act: “if a person has been injured and has become entitled to damages at the time a statute such as that contemplated by Senate Bill 33 is enacted, the legislation could not strip that **vested** property right from the injured party.” Exhibit 8 at 2 (emphasis in original). In Mitchell’s view, the cap would only be constitutional “if the limitation on non-economic damages in medical malpractice actions is made to apply only to injuries arising after it is enacted.” *Id.*

² The original bill filed on January 25, the bill passed by the Senate on March 1, and the bill presented to the House Tort Reform Committee on April 1 all provided that the cap applies to actions “arising” on or after the effective date. On April 19, the Committee approved a Proposed Committee Substitute that changed the effective date of the cap to actions “commenced” on or after October 1, 2011. There was no notice to Committee members or the public about the change, and no discussion or debate in the Committee or on the floor about the effective date. The “commenced” effective date remained in the bill through final enactment on July 25, 2011. See North Carolina General Assembly website www.ncga.state.nc.us (SB 33).

In Gardner v. Gardner, 300 N.C. 715, 718-19, 268 S.E.2d 468, 471 (1980) (Exum, J.), the North Carolina Supreme Court stated the principles that govern a constitutional challenge to the effective date of SB 33:

Regardless of its "procedural" subject matter, no rule of procedure or practice may be applied to abridge substantive rights. N.C. Constitution, Art. IV, Sec. 13(2); *Branch v. Branch*, 282 N.C. 133, 191 S.E. 2d 671 (1972)... [T]he proper question for consideration is whether the act as applied will interfere with rights that have "vested." *Booker v. Medical Center*, 297 N.C. 458, 467, 256 S.E. 2d 189, 195 (1979). Stated otherwise, the statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis.

See Fogleman v. D & G Equipment Rentals, Inc., 11 N.C. App. 228, 232, 431 S.E.2d 849, 852 (1993) ("The trial court's application of the amended version of section 97-10.2 deprived appellants of vested rights and, thus, was unconstitutionally retroactive.").

In Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752 (Mo. 2010), the Missouri Supreme Court recently addressed the question that will soon confront our trial and appellate courts: may the legislature apply a cap on noneconomic damages to actions that accrued before the effective date of the statute? In 2006, Mr. Klotz and his wife filed suit for medical malpractice and loss of consortium, based on events that occurred in 2004. In 2008, a jury awarded Mr. Klotz \$760,000 in noneconomic damages and Mrs. Klotz \$329,000 in noneconomic damages for loss of consortium. Applying a malpractice reform statute enacted in 2005, the trial judge reduced the jury awards. The Missouri Supreme Court summarized and resolved the issue:

The issue is straightforward. When the malpractice accrued, the legislature had an established cap on noneconomic damages of \$579,000, and both Mr. and Mrs. Klotz were entitled to their own noneconomic damages up to that cap amount. But § 538.210 reduced the cap on noneconomic damages for all suits filed after August 28, 2005, without regard to causes of action that had already accrued prior to August 28, 2005....

It is settled law in Missouri that the legislature cannot change the substantive law for a category of damages after a cause of action has accrued.... [W]here, as here, the legislature, contrary to this clearly established constitutional precedent, passes a statute that purports to decrease the amount of damages a victim of malpractice could recover after the cause of action has accrued, this Court is bound... to find the statute unconstitutional as applied to the Klotzes. Therefore, the new noneconomic damages cap established by HB 393 may not be applied to a cause of action that accrued prior to August 28, 2005.

Klotz is consistent with decisions in other jurisdictions. See, e.g., Prince George's County v. Longtin, 19 A.3d 859, 880-83 (Md. 2011) (no retroactive application of statutory cap on damages); Estate of Bell v. Shelby County Health Care, 318 S.W.3d 823, 833 (Tenn. 2010) ("the rights of the plaintiff vest or accrue with the commission of the tort" and may not be

subjected to later damages limitations); Blair v. McDonagh, 894 N.E.2d 377, 391 (Ohio Ct. App. 2008) (“a court cannot apply [punitive damages cap] to causes of action that arose before the statute’s effective date”); Martin by Sceptur v. Richards, 531 N.W. 2d 70, 89-92 (Wis. 1995) (retroactive application of damages cap to plaintiffs injured before enactment would impermissibly impair substantive rights). The North Carolina courts will reach the same conclusion: under our Constitution, SB 33’s cap on noneconomic damages may not be applied to causes of action that arose before October 1, 2011.

CONCLUSION

Senate Bill 33 harms all victims of medical malpractice, especially those with catastrophic injuries. Fortunately, the legislature does not have the final word. The North Carolina courts have the duty to enforce the rights guaranteed by our Constitution. The cap on noneconomic damages will not withstand a constitutional challenge.

11/10/11