IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2009
No. 104

D.R.D. POOL SERVICE, INC.,

Petitioner/Cross-Respondent,

v.

THOMAS FREED, *et al.,*

Respondents/Cross-Petitioners.

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

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BRIEF OF AMICUS CURIAE, MARYLAND DEFENSE COUNSEL, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

CONSTITUTIONAL PROVISIONS

STATUTES, AND LAWS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Maryland Defense Counsel, Inc. ("MDC"), *Amicus Curiae*, adopts the statement of the case presented in the brief of the Petitioners/Cross-Respondents.

QUESTIONS PRESENTED

MDC adopts the questions presented in the brief of the Petitioners/Cross-Respondents, and further provides that this brief will focus on the following issues:

1. Whether the General Assembly's enactment of a reasonable limit on jury awards in personal injury cases which is well tailored to achieve its end of moderating the insurance risk climate in Maryland violates the constitutional requirement of the separation of powers?

2. Whether the cap on non-economic damages, which does not curtail any right other than to collect awards in excess of a limit set by the General Assembly, violates the constitutional right to trial by jury?

3. Whether the cap on non-economic damages violates equal protection guarantees when it does not in fact classify among kinds of claimants, but only imposes a neutral limitation on certain jury awards that applies equally to the seriously injured and not seriously injured?

4. Whether, assuming the statute classifies tort claimants, it is rationally related to the legitimate legislative goal of achieving affordable and readily available insurance in Maryland?

STATEMENT OF FACTS

MDC adopts the Statement of Facts presented in the brief of the Petitioners/Cross-Respondents.

ARGUMENT

I. Introduction

This appeal is before the Court on two issues. The first issue concerns the nature of evidence necessary to substantiate a claim for conscious pain and suffering, and while MDC believes that trial court correctly determined that the necessary evidence was not offered in this case, this brief will not address the issue. The second issue concerns the constitutionality of Maryland's cap on non-economic damages. Despite the fact that at common law, courts always retained some control over awards of this kind,[1] Respondents/Cross-Petitioners ("Respondents") and fellow *amici* the Maryland Association for Justice ("MAJ") argue that practically any limit or reduction of the damages awarded by a jury in a civil case is unconstitutional. In doing so they ask this Court to reconsider law that has been well-settled for more than fifteen years while offering no justification that would support a reversal of this established law. They rely on cases from other states that were previously considered and rejected by this Court in *Murphy v. Edmonds*, 325 Md. 342 (1992). They raise, for the first time in their briefs to this Court, issues that were not previously raised or decided in the Court of Special

[1] *See, e.g., Banegura v. Taylor*, 312 Md. 609 (1988) (remittitur); *Conklin v. Schillinger*, 255 Md. 50 (1969) (same).

Appeals or the Circuit Court. Simply stated, there is no good reason to abandon *Murphy* or its progeny.

Further, the arguments advanced by the Respondents and MAJ are seriously flawed. MAJ, for example, suggests that the cap on non-economic damages violates the constitutional requirement of separation of powers. Should the Court accept this argument serious questions will be raised as to the power of the General Assembly to legislate with respect to *any* cause of action that existed at or derived its existence from common law. One example of such a statute is the Consumer Protection Act, since it is based on common law principles of fraud, contract and warranty. *See* Md. Code Ann., Comm. Law Art. § 13-101 *et seq.*

The argument that the cap interferes with the constitutional right to a jury trial is similarly unsound (and possibly inconsistent with MAJ's position, advanced elsewhere, that the jurisdictional limit of the District Courts should be increased so as to preclude the right to jury trial in all cases in which the ad damnum does not exceed five thousand, or ten thousand, or twenty thousand dollars). Finally, the cap does not violate the equal protection guarantees of the United States Constitution or the Maryland Declaration of Rights. Although the Respondents suggest that the cap necessarily classifies tort claimants into groups of, *i.e.,* significantly injured persons and not significantly injured persons, they ignore a serious fallacy in this assumption. The assumption underlying the Respondents' equal protection argument has not been previously addressed by this Court, but if the Court wishes to reconsider *Murphy*, it should first decide whether the statute

classifies at all. Because it does not, the Court must reject this latest equal protection challenge to the cap.

II. The General Assembly's Enactment Of A Reasonable Limit On Jury Awards In Personal Injury Cases Which Is Well Tailored To Achieve Its End Of Moderating The Insurance Risk Climate In Maryland Does Not Violate The Constitutional Requirement Of The Separation Of Powers

The years 2008 and 2009 marked an unprecedented era of change – and loss – for the insurance industry. The factors that led to the federal government's "bailout" have been well-documented and debated in other sources and lie outside the scope of this brief. Nevertheless, the current insurance climate is an elephant in the room that cannot and should not be ignored.

The General Assembly was faced with an arguably less worrisome climate when it enacted the cap on non-economic damages roughly twenty-five years ago. At that time, the legislature believed that access to liability insurance was being impeded, especially for hazardous activities such as asbestos removal. *Murphy*, 325 Md. at 368. The "crisis" also led to increased insurance premiums for physicians, which in turn discouraged doctors from offering certain high risk specialties such as obstetrics. *Id.* (citing Report of the Joint Executive/Legislative Task Force on Medical Malpractice Insurance, 5 (Dec. 1985)). According to one commentator, Section 11-108 of the Courts and Judicial Proceedings Article – the "cap" on non-economic damages – was enacted for several reasons: (1) to attract private insurers back into the Maryland market; (2) to ensure that qualified physicians would remain available in all medical specialties in the state; and (3)

to maintain available, affordable professional liability insurance for health care providers. *Id.* (citing Comment, *Blasting the Cap: Constitutional Issues Arising from Maryland Limitation of Noneconomic Damages in Personal Injury Claims*, 16 U. Balt. L. Rev. 327, 328 (1987)). The legislature's objective, to provide for available and reasonably priced insurance coverage, was a legitimate one. *Id.* at 369.

Now, many years after Section 11-108 became law, MAJ asks the Court to decide that the General Assembly unconstitutionally invaded the province of the courts. MAJ's Brief at 12. In support of this contention MAJ refers the Court to an Illinois decision, *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997), and ignores local precedent decided before – and left undisturbed by – *Murphy*. *See Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989). MAJ reasons that *Best* was decided under the Illinois state constitution, which is "similar" to Maryland's Declaration of Rights. MAJ's Brief at 12. The court in *Best* concluded that because courts had traditionally exercised the power of remittitur to correct excessive jury verdicts, a statutory limit on non-economic damages unconstitutionally invaded the province of the courts. MAJ's Brief at 12-13; *Best*, 689 N.E.2d at 1080.

However, years before *Best* was decided, the United States District Court for Maryland examined Section 11-108 in light of well-settled state law and concluded that it did *not* violate the separation of powers requirement. The court said:

> While the purpose of the separation of powers provision is to parcel out and separate the powers of government and confine particular classes of powers to particular branches of the supreme authority, *Wright v. Wright's Lessee,* 2 Md. 429, 452 (1852), the doctrine can "encompass a sensible degree of elasticity and

> should not be applied with doctrinaire rigor." *Dept. of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 220, 334 A.2d 514, 521 (1975).

Franklin v. Mazda, 704 F. Supp at 1336. Further, the court quotes a Maryland case:

> It is undeniable that the mere performance by a non-judicial body of a function that would in another context be considered purely judicial – *e.g.*, the determination of facts and the application of legal principles to those facts – cannot alone suffice to support a conclusion that the separation of powers principle has been violated.

Id. (quoting *Attorney General v. Johnson,* 282 Md. 275, 284, 385 A.2d 357 (1978)).

Not only was *Franklin* decided before *Murphy*, it was relied upon by the Court of Special Appeals to reject the claim that Section 11-108 violated the constitutional right to a jury trial. *Edmonds v. Murphy*, 83 Md. App. 133 (1990). And while this Court did not specifically reach the issue in *Murphy*, Judge Chasanow in his dissent reasoned that Section 11-108 would violate the doctrine of separation of powers only if the cap was intended to be a legislatively-imposed remittitur. *Murphy*, 325 Md. at 380 (Chasanow, J., dissenting). This Court determined that the purpose of the statute was to ensure the continued availability and affordability of insurance premiums. *Id.* at 369. There is no justification for reaching back in time to revisit the legislative history of the statute; this Court's assessment of the General Assembly's reason for enacting the cap was valid at the time of the *Murphy* decision and it remains valid today. Section 11-108 does not violate the separation of powers doctrine.

III. The Cap On Non-Economic Damages, In That It Does Not Curtail Any Right Other Than To Collect Awards In Excess Of A Limit Set By The General Assembly, Does Not Violate The Constitutional Right To Trial By Jury

MAJ next argues that the legislature may never abrogate a common law cause of action, and because this is the case, the legislature's attempt to limit damages in common law causes of action violates the right to trial by jury. MAJ's Brief at 17-18. The Court need not reach this argument, since the Respondents do not assert common law causes of action. Their claims are for wrongful death and survival, both of which did not exist at common law and were created by the legislature. The power of the General Assembly to abrogate, limit or restrict statutory causes of action is without question. *See Murphy*, 325 Md. at 373 (stating that "[t]he power of the legislature to define, augment or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action") (quoting *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1331 (D. Md. 1989)).

Nor does the application of the cap to any given case amount to an unconstitutional deprivation of the jury trial right. MAJ suggests that because the Maryland Declaration of Rights states that the right to a jury determination on all issues of fact is inviolate:

> [t]he facts once tried by the jury are never reexamined, unless a new trial is granted in the discretion of the court before which the suit is pending, for good cause shown, or unless the judgment of such court is reversed by a superior tribunal, on a writ of error and a venire facias de novo is awarded.

MAJ Brief at 22 (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 8, (1899)).

This is not true, however, as remitter was accepted at common law and has been upheld as constitutional. *Banegura v. Taylor*, 312 Md. 609, 624 (1988); *Conklin v. Schillinger*, 225 Md. 50, 64 (1969); *Hebron Volunteer Fire Dep't v. Whitelock*, 166 Md. App. 619, 635-39 (2006). The facts – specifically, the appropriate compensation to be awarded to the plaintiff – are reconsidered by the trial judge applying remittitur, who necessarily substitutes his or her own factual determination for the jury's on that issue.

Further, according to MAJ, because plaintiffs have a constitutional right to have a jury determine the appropriate amount of damages, any limitation on damages is unconstitutional. MAJ Brief at 23, 25-26. In support of this argument, MAJ cites no Maryland authority but does point to a difference of opinion between the high courts of Virginia and Alabama. It seems that the Supreme Court of Alabama, which struck down a statutory cap on non-economic damages, believed that the Virginia Supreme Court's refusal to do the same thing was nothing short of dim. MAJ Brief at 24-26; *see Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 163-64 (Ala. 1991) (discussing *Ethridge v. Med. Ctr.. Hosp.*, 376 S.E.2d 525 (Va. 1989)). While this interstate judicial disagreement has a certain tabloid interest, the fact is that courts across the country have upheld caps on non-economic damages for many of the same reasons. *See, e.g., Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985) *Scholz v. Metro. Pathologists*, 851 P.2d 901 (Col. 1993); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So.2d 517 (La. 1992); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *Phillips v. Mirac,* 651 N.W.2d 437 (Mich. Ct. App. 2002); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992); *Gourley v. Nebraska Methodist Health Sys.*, 663 N.W.2d 43 (Neb. 2003); *Doe v. American Red*

Cross Blood Servs., 377 S.E.2d 323 (S.C. 1989); *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980) *overruled on other grounds by In Re Stephens*, 867 N.E.2d 148 (Ind. 2007); *Evans v. State*, 56 P.3d 1046 (Alaska 2002); *Jones v. Board of Med.*, 555 P.2d 399 (Idaho 1976). This Court also relied on *Ethridge* in *Murphy*. *See Murphy*, 325 Md. at 374.

More broadly, though, MAJ's argument represents a sharp departure from its position, taken only pages before in its brief, that remittiturs are constitutional. MAJ Brief at 8-10. In the typical civil case, a jury determines the facts including damages.

> [But] once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied. Thereafter, it is the duty of the court to apply the law to the facts.

Ethridge, 376 S.E.2d at 529 (citations omitted).

From a constitutional standpoint, the application of the case is similar to remittitur, the constitutionality of which the Respondents and MAJ do not challenge. MAJ Brief at 9 (stating that this Court has recognized the inherent authority of trial courts to limit jury awards for over one hundred years); *Brawner v. Hooper*, 151 Md. 579, 595-96 (1926) (stating that "when, in the exercise of his [or her] judgment and discretion, the circuit judge makes an order that a new trial should be granted unless the plaintiff remits so many dollars from the verdict, that is an adjudication that the verdict is by that amount excessive, and that the defendant is of legal right entitled to be relieved from that excess or have a new trial") (internal quotations omitted). This Court has held that remittitur is constitutional. *Turner v. Washington Suburban Sanitary Comm'n*, 221 Md. 494, 503 (1960). Accordingly, it follows that Section 11-108, pursuant to which the trial court acts

to reduce the damages award made by the jury, is also constitutional, or at the very least that it is not unconstitutional simply because it requires a judge to apply law to the jury's factual finding.

IV. The Cap On Non-Economic Damages Does Not In Fact Classify, But Only Imposes A Neutral Limitation On Jury Awards That Applies Equally To The Serious And Non-Seriously Disabled

Article 24 of the Maryland Declaration of Rights provides that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." It is well settled that the rights guaranteed by the Due Process Clause of the Maryland Constitution are co-extensive with those granted by the Fourteenth Amendment of the United States Constitution. *Murphy*, 325 Md. at 353-54, 601 A.2d 102. The Equal Protection Clause of the United States Constitution guarantees that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To require equal protection of the laws is to require that similarly situated persons be treated alike. *Id.* at 439; *Plyler v. Doe*, 457 U.S. 202, 216 (1982). At the most preliminary stage of the analysis, it is necessary to decide whether persons are similarly situated, and whether they are treated alike under a given statute.

The Respondents and their *amici*, MAJ, bypass this consideration altogether. They assert simply assert that Section 11-108 discriminates because it creates two classes of tort claimants: "(1) tort plaintiffs who are less severely injured and thus entitled to

keep everything which the jury awards, and (2) tort plaintiffs who are catastrophically injured and who are not entitled to receive non-economic damages over [the cap]". Respondents' Brief at 25 (quoting *Murphy v. Edmonds*, 325 Md. 342, 350 (1992)). The language quoted, however, comes from Judge Murphy's Circuit Court holding. *See Murphy*, 325 Md. at 350. This Court, reversing that decision, assumed without deciding that Section 11-108 effectively so classified tort claimants. *See id.* at 355 (stating that "the plaintiffs, like the circuit court, view § 11-108 of the Courts and Judicial Proceedings Article as creating a classification between less seriously injured tort plaintiffs who are entitled to keep everything which the jury awards and more seriously injured tort plaintiffs who are not entitled to receive noneconomic damages exceeding $350,000").[2]

The statute, however, creates no such classification and does not, either on its face or in effect, operate to identify or classify those who have been seriously injured and those who have not been. The fact that a jury makes an award in excess of the applicable cap does not automatically mean that a claimant has been more seriously injured or disabled than a claimant who does not receive as large an award.

The problem lies with the Respondents' assumption that a higher award correlates perfectly with the nature and extent of injury. It does not, practically speaking, and it should not because it was not the intention of the legislature when it enacted Section 11-

[2] Because this Court decided in *Murphy* that Section 11-108 was rationally related to reasonable legislative ends, the Court may have concluded that this preliminary analysis was not necessary. But in this case, where Respondents argue that the statute has not achieved its ends and therefore does not withstand even rational basis scrutiny, the Court should certainly consider this issue.

108 to decide which claimants are most deserving. The system allows for the recovery of monetary compensation by injured persons, but that does not mean that money is an adequate measure of injury. Judge Niemeyer said as much in *Franklin*:

> [The Plaintiff's argument] is also flawed because it assumes that pain and suffering is capable of accurate measurement by anyone. Just as happiness and love are objects of life that cannot be purchased with inexhaustible sums of money, pain, anguish and suffering are states of being that likewise cannot be compensated. . . . . Because of the speculative nature of these damages, juries have pulled enormous numbers from the air as reactions of emotion and awarded them as noneconomic damages. No one can say whether or not the amounts are correct, or whether they compensate. Rather, these damage awards for pain and suffering are an anomaly in a system that achieves to foster rationalism and predictability.

Franklin, 704 F. Supp. at 1332.

Section 11-108 defines non-economic damages in a purely impartial fashion. The statutory definition includes a limitation on awards of non-economic damages, but this has no more discriminatory effect than do many evidentiary rules. A claimant who wishes to introduce the testimony of a missing witness will feel the effects of the hearsay exclusion more keenly than another claimant, but this does not mean that the rule of evidence discriminates between claimants with absent witnesses and those without. The statute, like the hearsay rule, operates on an entirely neutral basis. It will apply to reduce awards to some plaintiffs who have been seriously injured but will apply in identical fashion to claimants who have not been as seriously injured but who have received awards in excess of the cap.

For this reason the Court need not decide whether the cap bears a rational relation to the legislature's intent to reduce the cost of Maryland insurance. But if the Court does

reach the issue, there is substantial evidence supporting the efficacy of caps like Maryland's. Between 1997 and 1998, the average number of medical malpractice awards nationwide in excess of $ 1 million rose by 39 %. Charles B. Hammond, *The Decline of the Profession of Medicine*, 100 Obstetrics & Gynecology 221, 224 (2002). That number increased again by 45 % between 1998 and 1999. *Id.* According to the American College of Gynecologists ("ACOG"), these significant increases resulted largely from verdict inflation in states *without* caps on non-economic damages. Sarah Domin, *Where Have All the Baby Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics & the Medical Malpractice Insurance Crisis*, 54 Cath. U. Law. Rev. 499, 534 (2004) (citing Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing Before the Subcomm. on Health, House Comm. on Energy & Commerce, 109th Cong. (2002) (statement of Lisa M. Hollier, M.D., M.P.H.)). ACOG also cites the State of California, which has a cap on non-economic damages, as a model for other states wishing to preserve access to affordable obstetrical care. *Id.* (citing Joseph B. Treastor, *Rise in Insurance Forces Hospitals to Shutter Wards*, N.Y. Times, Aug. 25, 2002, at A1).[3]

Nor are insurers compensating themselves at the expense of tort claimants. The Government Accounting Office reported within the past few years that medical malpractice insurance premiums have increased directly because of increased claims

[3] Treastor suggests that the primary reason legitimately injured claimants suffer under non-economic damages caps is that many attorneys refuse to take such cases because of the altered risk/reward ratio. Joseph B. Treastor, *Rise in Insurance Forces Hospitals to Shutter Wards*, N.Y. Times, Aug. 25, 2002, at A1.

losses. U.S. Gen. Acct'g Office, Med. Malpractice Ins.: Multiple Factors Have Contributed to Increased Premium Rates 15 (2003); *see also* Donald J. Palmisano, J.D., M.D., Health Care in Crisis: The Need for Medical Liability Reform, 5 Yale J. Health Pol. Law & Ethics 371, 377-78 (2005). In contrast with the skyrocketing value of the average claim, insurers' investment holdings remained fairly stable between 1998 and 2005. Palmisano, 5 Yale Health Pol. Law & Ethics at 376 (citing A.M. Best, Best's Aggregates & Averages – Property/Casualty, Quantitative Analysis and Report, Medical Malpractice Predominating 355 (2003)).

And there is significant evidence that non-economic damages caps have been successful. According to one study, in states with reforms including caps on non-economic damages, insurance premiums declined by an average of 8.4% within three years. Daniel P. Kessler & Mark B. McClellan, The Effects of Malpractice Pressure and Liability Reforms on Physicians' Perceptions of Medical Care, 60 Law & Contemp. Probs. 81, 98 (1997). Another source reports that when liability awards were capped, insurance premiums for general surgeons declined by an average of thirteen percent during the first year after passage of the cap statute, and by an average of thirty-four percent over the long term. Steven Zuckerman, *et al.*, Effects of Tort Reforms and Other Factors on Medical Malpractice Ins. Premiums, 27 Inquiry 167 (1990). In California, which has a cap on non-economic damages, insurance premiums rose 235% between 1976 and 2002, while in the rest of the country rates increased by 750%. Nat'l Ass'n of Ins. Comm'rs, Profitability by Line by State, 1976 – 2002, 116-17 (2002).

California physicians pay substantially lower insurance premiums than physicians in states without caps, such as Florida, Illinois and Nevada. Palmisano, 5 Yale Health Pol. Law & Ethics at 379. California cases are generally settled at an earlier stage, resulting in decreased litigation expense and quicker compensation for the injured. Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing Before the Subcomm. on Health of the House Comm. on Energy & Commerce, 107th Cong. 88 (2002) (statement of Richard E. Anderson, Chairman of the Doctors' Comm. for the Physicians Ins. Ass'n of Am.).

Contrast the California experience with the insurance "crisis" in Illinois, home of *Best*. The average jury verdict in Cook County in 1998 was $ 1.07 million. Carolyn Victoria J. Lees, The Inevitable Reevaluation of Best v. Taylor in Light of Illinois' Health Care Crises, 25 N. Ill. U. L. Rev. 217, 218 (2005). The average verdict was $ 4.45 million by 2003. *Id.* This stunning increase cannot be chalked up to increasing medical and other expenses, either, because in 2003 $ 3.12 million of the average represented an award for pain and suffering. *Id.* In 2003, Joliet's only two neurosurgeons walked away from their practices. Bruce Japsen, *Doctors Curtail Practices to Fight Insurance Costs*, Chi. Trib., Feb. 16, 2003, at C1. Patients brought to Joliet's hospitals with head trauma could only be stabilized, then transported forty-five minutes away to a trauma center in Chicago. *Id.*

Caps on noneconomic damages work. In the states where they have been enacted, there is evidence of significant, quantifiable improvement in both the availability and affordability of insurance. Though MAJ argues that insurance premiums have increased

despite such caps, they fail to compare those figures with the increase in premiums in states without caps. There is certainly a rational basis for the statute. The Court should reject this latest challenge to Section 11-108.

CONCLUSION

For all of these reasons, the Court should refuse to reconsider *Murphy*, which has stood as precedent for fifteen years. Section 11-108 is a constitutional effort by the General Assembly to achieve a reasonable, laudable purpose: the availability of affordable insurance for Marylanders. Caps such as Section 11-108 have been proven effective in just this purpose. On this issue, the decision of the Circuit Court should be affirmed.

Respectfully submitted,

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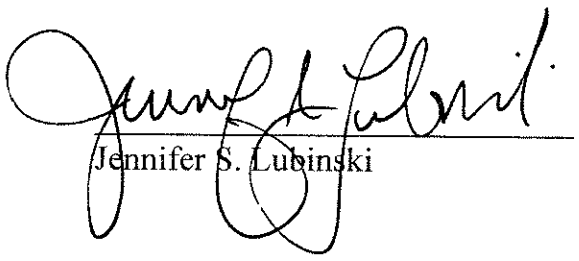
STATEMENT OF COMPLIANCE WITH MD RULE 8-504(a)(8)

This brief was prepared using Times New Roman, in 13-point font pursuant to Maryland Rule 8-504(a)(8).



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2010, a copy of the foregoing Brief of Amicus Curiae, Maryland Defense Counsel, Inc. was mailed first class, postage prepaid, to the following:

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