IN THE COURT OF APPEALS OF MARYLAND

September Term, 2008
No. 94

KELLY GREEN, a minor, etc., *et al.*

Petitioner,

vs.

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

Respondents.

ON WRIT OF *CERTIORARI* TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Brief of *Amicus Curiae,* Maryland Defense Counsel, Inc.

Dwight W. Stone, II
Christopher C. Jeffries
Erin L. Purdy
Whiteford, Taylor & Preston L.L.P.
Seven Saint Paul Street
Baltimore, Maryland 21202-1636

Attorneys for *Amicus Curiae*
Maryland Defense Counsel, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes ***Pages***

Other

STATEMENT OF THE CASE

Amicus curiae, Maryland Defense Counsel, Inc. ("MDC"), is a voluntary, statewide organization of defense lawyers dedicated to the integrity and preservation of the civil justice system. MDC brings civil defense lawyers into close association with one another in order to promote the efficiency of the legal system and fair and equal treatment under the law.

In this lead paint personal injury case, Plaintiff/Petitioner, Kelly Green, a minor, by her mother and next friend, Celestine Green, sued Defendants/Respondents, Stanley Rochkind, N.B.S., Inc., Charles Runkles and Dear Management, Inc. seeking monetary damages for negligence and alleged violations of Maryland's Consumer Protection Act. After trial, the jury returned a verdict in favor of Petitioner. The trial court, *sua sponte*, reduced the verdict in accordance with Maryland's cap on noneconomic damages (hereafter sometimes referred to as the "Cap"). Thereafter, the trial court denied Petitioner's Motion for Reconsideration and/or Motion to Alter or Amend Judgment wherein Petitioner argued, *inter alia*, that the Cap is an unconstitutional "special law" under Article III, Section 33 of the Maryland Constitution.

The trial court's decision was affirmed by the Court of Special Appeals. *Green v. N.B.S., Inc.,* 180 Md. App. 639, 952 A.2d 364 (2008). Petitioner now argues that the Court of Special Appeals's decision should be reversed. MDC files this brief in support

of Respondents in order to provide the Court with full analysis of why the Cap is not an unconstitutional special law.[1]

QUESTION PRESENTED

Is Maryland's statutory cap on noneconomic damages constitutional, or a "special law" prohibited by Article III, Section 33 of the Maryland Constitution?

STATEMENT OF FACTS

MDC incorporates the Statement of Facts in Respondents' Brief.

ARGUMENT

I. THE CAP IS NOT AN UNCONSTITUTIONAL SPECIAL LAW.

Petitioner argues that the Cap is a "special law" in violation of Article III, Section 33 of the Maryland Constitution. This is the Petitioner's only constitutional challenge to the Cap. The Court of Special Appeals rejected this argument based upon its prior precedent. For the reasons set forth below, this Court should affirm the intermediate appellate court's decision.

A. Petitioner's Special Law Challenge is the Latest in a Series of Constitutional Challenges to the Cap, all of Which Have Failed.

The Cap has been challenged on numerous constitutional grounds since it was enacted, and each such challenge has failed. Indeed, this Court rejected an equal protection challenge under Maryland's Declaration of Rights and the United States Constitution as well as an argument that the Cap violated the right to trial by jury

[1] MDC agrees fully with Respondents' arguments that the trial court properly applied the Cap to Petitioner's claim under the Maryland Consumer Protection Act (CPA), and that the CPA does not provide for recovery for personal injuries.

guaranteed by Articles 5 and 23 of the Maryland Declaration of Rights. *Murphy v. Edmonds,* 325 Md. 342, 366-67, 370, 373, 601 A.2d 102, 114, 116-17 (1992).[2] Relying upon *Murphy*, the Court of Special Appeals affirmed the constitutionality of the Cap in *Polakoff v. Turner,* 155 Md. App. 60, 841 A.2d 406 (2004). *Polakoff* was appealed to this Court; however, the holding regarding the constitutionality of the Cap was not disturbed. *Polakoff v. Turner,* 385 Md. 467, 869 A.2d 837 (2005). Similarly, the Court of Special Appeals reviewed and rejected challenges to the Cap based on Article 23 of the Declaration of Rights (right to jury trial), Article 19 (due process), and the equal protection guarantees of the 14th Amendment of the United States Constitution and Article 24 of the Declaration of Rights. *See Potomac Electric Power Company v. Smith*, 79 Md. App. 591, 558 A.2d 768 (1989), *cert. denied,* 317 Md. 393, 564 A.2d 407 (1989), *overruled on other grounds by United States v. Streidel*, 329 Md. 533, 537, 620 A.2d 905, 907 (1993), *superseded by statute*, Md. Code Ann., Cts. & Jud. Proc. §§ 11-108-11-109.

Prior to *Murphy,* the United States District Court for the District of Maryland reviewed and rejected challenges to the Cap on the grounds that it violated: (1) the civil

---

[2] At oral argument in *Murphy*, the plaintiffs also argued that the Cap implicated Article 19 of the Declaration of Rights and, for that reason, heightened scrutiny applied. Article 19 provides that every person "'for any injury done to him in his person or property, ought to have remedy by course of the Law of the land, and ought to have justice and right . . . fully without any denial, . . . according to the Law of the land.'" *Murphy*, 325 Md. at 365, 601 A.2d at 113 (quoting Article 19 of the Maryland Declaration of Rights). The "Law of the land" means due process of law. *Id.* This Court rejected that argument, holding that Article 19 protects against unreasonable restrictions on access to the courts and concluding that the Cap does not create such an unreasonable restriction. *Id.* at 366-70, 601 A.2d at 114-16.

jury trial right guaranteed by the Seventh Amendment to the United States Constitution as well as Article 23 of the Maryland Declaration of Rights; (2) Article 20 of the Declaration of Rights (trial of facts where they arise); (3) Article 8 of the Declaration of Rights (separation of powers); and (4) Article 19 of the Declaration of Rights (access to courts). *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989). *See also, Simms v. Holiday Inns, Inc.,* 746 F. Supp. 596 (D. Md. 1990) (holding Cap constitutional on same grounds and adopting *Franklin's* analysis). This Court has cited *Franklin* with approval. *See Murphy*, 325 Md. at 367 n.9, 601 A.2d at 114 n.9. As discussed below, the Court of Special Appeals rejected a "special law" challenge to the Cap in *Univ. of Maryland Med. Sys. Corp. v. Malory*, 143 Md. App. 327, 795 A.2d 107 (2001), *cert. denied,* 368 Md. 527, 796 A.2d 696 (2002), and this Court declined to review that decision. It is clear that Petitioner's special law argument here is simply the latest in a series of unsound challenges to the Cap's constitutionality, and the Court should reject it summarily.

B. Relevant Text of the Cap Statute and Article III, Section 33 of The Maryland Constitution.

The Cap is codified in Section 11-108 of the Courts and Judicial Proceedings Article of the Maryland Code. That Section provides that "[i]n any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award

for noneconomic damages may not exceed $350,000." Md. Code Ann., Cts. & Jud. Proc. § 11-108(b)(1).[3]

Petitioner challenges the Cap on the ground that it is an unconstitutional special law in violation of Article III, Section 33 of the Maryland Constitution. Section 33 provides:

> The General Assembly shall not pass local, or special Laws, in any of the following enumerated cases, viz.: For extending the time for the collection of taxes; granting divorces; changing the name of any person; providing for the sale of real estate, belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees; giving effect to informal, or invalid deeds or wills; refunding money paid into the State Treasury, or releasing persons from their debts, or obligations to the State, unless recommended by the Governor, or officers of the Treasury Department. And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law. The General Assembly, at its first Session after the adoption of this Constitution, shall pass General Laws, providing for the cases enumerated in this section, which are not already adequately provided for, and for all other cases, where a General Law can be made applicable.

Md. Const., art. III, § 33.

---

[3] Section 11-108(a) defines noneconomic damages in a personal injury action as "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury. . . ." Section 11-108(b)(2) sets forth the manner in which the damages cap increases over time. It provides:

> Except as provided in paragraph (3)(ii) of this subsection, in any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $500,000.
>
> (ii) The limitation on noneconomic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year, inclusive.

C. The Court of Special Appeals Correctly Rejected The Special Law Challenge to the Cap in its Decision Below and in its Prior Decision in *Univ. of Maryland Med. Sys. Corp. v. Malory*.

In its decision below, the Court of Special Appeals held that the Cap is not a special law. In the opinion by Judge Salmon the court affirmed the trial court's decision that the Cap is not an unconstitutional special law, stating:

> Appellant argues that even if the statutory cap does apply to actions brought under the CPA, the statutory cap is unconstitutional because it constitutes a "special law" that is barred by Article III, section 33 of the Maryland Constitution. This same argument was considered and rejected by this Court in *Univ. of Maryland Med. Sys. Corp. v. Malory*, 143 Md. App. 327, 795 A.2d 107 (2001). No useful purpose would be served by reiterating what was so well said in *Malory*, 143 Md. App. at 352-54, 795 A.2d 107. *See also Kent Village* [*Associates Joint Venture v. Smith*], 104 Md. App. [507, 532, 657 A.2d 330, 342 (1995)] ("[The statutory cap] is a limit that is applicable now to all personal injury actions in Maryland and thus is uniform in its application . . . it applies to only one category of damage-the category least quantifiable on an objective basis and most subject to inflation through jury passion or sympathy; and it is set high enough to compensate most injured victims for the pain or disfigurement they may suffer.").

Green, 180 Md. App. at 661, 952 A.2d at 377.

Petitioner now argues that *Malory* should be overruled by this Court. Petitioner argues that the Cap is an unconstitutional special law because it is applicable to, and only burdens, personal injury plaintiffs who have been most seriously injured by excluding them from the operation of the general principle that juries decide damages. Petitioner further argues that the Cap is an unconstitutional special law because, in Petitioner's

view, it does not apply to statutory causes of action such as claims for violations of the Consumer Protection Act.[4] Neither argument has any merit.

Including its decision in this case, the Court of Special Appeals has twice held that the Cap is not an unconstitutional special law. The first case in which it did so was *Malory*, which was a wrongful death/survival action filed by the personal representative of a deceased patient and the deceased patient's mother; the case arose out of a medical malpractice claim. 143 Md. App. at 332, 796 A.2d at 110. After the jury returned a verdict in favor of the estate and the mother, the trial court reduced the verdict pursuant to the Cap. *Id.* The defendants noted appeals and the plaintiffs filed a cross-appeal arguing that the Cap is an unconstitutional special law because it "relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class[.]" *Id.* at 353, 795 A.2d at 122. The plaintiffs/cross-appellants in *Malory* relied upon *Cities Service, Co. v. Governor*, 290 Md. 553, 431 A.2d 663 (1981), which is this Court's seminal "special law" decision and will be discussed in more detail below. The *Malory* Court distinguished *Cities Service*, stating:

> In [*Cities Service*], however, the Court of Appeals held that the [special law] statute at issue "was sought by [appellant], that the Legislature was advised that one business was the sole beneficiary, that [appellant was] the only subsidiary of a producer or refiner which can qualify, and that no other existing general retail mass merchandiser could qualify in the future if it became a subsidiary of a producer or refiner," thus constituting a special law. [*Cities Service*, 290 Md.] at 570-71, 431 A.2d 663.

---

[4] As Respondents address fully in their brief, and as the Court of Special Appeals recognized below, Petitioner is wrong as a matter of law on this point.

Malory, 143 Md. App. at 354, 795 A.2d at 122-23. The *Malory* Court correctly concluded that the Cap is a very different type of statute than the one found to be a "special law" in *Cities Service*:

> Here, we are faced with the task of determining whether a statute applying to all tort victims in the State of Maryland is a "special law." The law simply does not have the same effect as the statute at issue in *Cities Service*; rather, C.J. § 11-108 applies to "*any* action for damages for personal injury." (Emphasis added.) Therefore, it is a general law and does not violate the constitutional prohibition.

Id. at 354, 795 A.2d at 123.

Here, MDC respectfully submits that this Court should follow the sound reasoning of the Court of Special Appeals in *Malory* and in its decision below in this case.

D. The Petitioner's Special Law Challenge is Flatly Inconsistent with This Court's Seminal Decision in *Cities Service, Co. v. Governor*, and Other Decisions of this Court.

Given this Court's general adherence to *stare decisis*,[5] it is logical to focus squarely on the Court's seminal decision in *Cities Service*, which discussed the purpose of Article III, Section 33 and set forth a list of factors used by the Court to determine whether an enactment is a special law. This Court has summarized *Cities Service* as follows:

> *Cities Service* involved an exemption to a prohibition against a producer or refiner of petroleum products operating any

[5] *See, e.g., Livesay v. Baltimore County*, 384 Md. 1, 14-15, 862 A.2d 33, 40-41 (2004) ("*Stare decisis* . . . is the preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (internal quotation marks omitted)).

> retail service station in Maryland with company personnel or through a subsidiary company. A producer or refiner operating any retail service station was required to divest itself of the station. There was, however, an exemption for any retail service station operated as of January 1, 1979, by a subsidiary whose gross revenues from petroleum products sold in Maryland were less than two percent of the subsidiary's gross revenues from all retail operations in Maryland. At the time of its enactment, this exemption could in fact apply to but one subsidiary in Maryland, and that fact was known to the General Assembly. Further, because the exemption applied only to a subsidiary operating any retail service station as of January 1, 1979, the class theoretically created by the exemption would not admit any subsidiary subsequently created or acquired by any petroleum producer or refiner. The exemption was a special law within the prohibition of art. III, § 33.

Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 358, 499 A.2d 178, 188 (1985).

The basis of the special law challenge in *Cities Service* was that the exception to the general prohibition on oil companies operating gasoline stations in Maryland was intended for one purpose – to allow Mobil Corporation to continue operating a gasoline station through its wholly owned subsidiary, Montgomery Ward & Co. *Id.* at 559, 431 A.2d at 667. This Court emphasized:

> The record . . . shows that the exemption was sought by Montgomery Ward, that the Legislature was advised that one business was the sole beneficiary, [ ] that Montgomery Ward is the only subsidiary of a producer or refiner which can qualify, and that no other existing general retail mass merchandiser could qualify in the future if it became a subsidiary of a producer or refiner.

Id. at 570-71, 431 A.2d at 673. Ultimately, the Court cured the constitutional violation by severing the qualifying dates. *Id.* at 577, 431 A.2d at 676.

In evaluating the constitutionality of the exemption, the *Cities Service* Court traced the history and purpose of the special law prohibition, noting that the "object of the provision" was,

> to prevent or restrict the passage of special, or what are more commonly called private Acts, for the relief of particular named parties, or providing for individual cases. In former times, as is well known and as the statute books disclose, Acts were frequently passed for the relief of named individuals, such as sureties upon official bonds, sheriffs, clerks, registers, collectors and other public officers, releasing them sometimes absolutely, and sometimes conditionally from their debts and obligations to the State. The particular provision now invoked was aimed against the abuses growing out of such legislation, and its object was to restrain the passage of such Acts, and to prevent the release of debts and obligations in particular cases, and in favor of particular individuals unless recommended by the Governor or the Treasury officials.

Cities Service, 290 Md. at 568, 431 A.2d at 672 (quoting *Montague Ex'r v. State*, 54 Md. 481, 490 (1880)). The Court emphasized that "[o]ne of the most important reasons for the provision in the Constitution against special legislation is to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others . . . ." *Id.* at 568-69, 431 A.2d at 672 (quoting *City of Baltimore v. United Rys. & Elec. Co.*, 126 Md. 39, 52, 94 A. 378, 382 (1915)).

In addition to examining the purpose of the special law prohibition, the *Cities Service* Court reviewed a number of other factors that have been considered in determining whether an enactment is a special law. Particularly, this Court has examined "the underlying purpose of the legislation in question to determine whether it was actually intended to benefit or burden a particular member or members of a class instead

of an entire class[.]" *Cities Service*, 290 Md. at 569, 431 A.2d at 672 (citing *Beauchamp v. Somerset County,* 256 Md. 541, 549, 261 A.2d 461 (1978) and *Littleton v. Hagerstown,* 150 Md. 163, 176, 132 A. 773 (1926)). Further, when determining whether an enactment applies to an entire class or just certain members, this Court has "reviewed the legislatively drawn distinctions to determine whether they are arbitrary and without any reasonable basis." *Cities Service*, 290 Md. at 570, 431 A.2d at 673 (citing *Littleton,* 150 Md. at 176, 178-80, 132 A. 773, 783-84). Additionally, "[w]hether particular individuals or entities are identified in the statute has been a consideration[,]" as well as "[i]f a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation[.]" *Cities Service,* 290 Md. at 570, 431 A.2d at 673 (citations omitted). Finally, the Court has considered "[t]he public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest[.]" *Id.* at 569-70, 431 A.2d at 672 (citations omitted).

Here, examination of the factors set forth by this Court in *Cities Service* compels the conclusion that the Cap is not an unconstitutional special law. In this regard, it is important to note that the statute is presumed constitutional, and the Petitioner bears a heavy burden of overcoming this presumption. *See e.g. Murphy v. Edmonds*, 325 Md. 342, 355, 601 A.2d 102, 108 (1992).

Initially, there is no evidence in the record to suggest that the underlying purpose of the Cap was to benefit or burden particular members of a class. *See Beauchamp*, 256 Md. at 549, 261 A.2d at 465 ("The Act thus . . . applies to one taxpayer only and to the

lands of that one taxpayer."); *Littleton*, 150 Md. at 176, 132 A. at 779 ("[I]t seems obvious that the single purpose in formulating each [exception] was to exempt Hagerstown from the operation of the Public Service Commission Law."). To the contrary, as stated in *Malory*, the Cap applies to all personal injury plaintiffs. *Malory*, 143 Md. App. at 354, 795 A.2d at 123.

Moreover, when analyzing this factor, the Court has also examined the alleged classification to determine whether it is arbitrary or without a reasonable basis. *See Cities Service*, 290 Md. at 570, 431 A.2d at 672.[6] Petitioner simply argues that the Cap applies only to those actions for personal injury where a plaintiff has been the most seriously injured. But, even accepting *arguendo* this articulation of a purported "classification," the "classification" made by the Cap is neither arbitrary nor without a reasonable basis.

Moving to the other factors listed in *Cities Service*, there are no individuals or entities specifically identified in the Cap statute. Similarly, no individual or business sought or received any special advantages from the Legislature and no individuals or businesses are discriminated against by the Cap.

The remaining factors considered by this Court in evaluating whether an enactment is a special law are "[t]he public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public

---

[6] Notably, Petitioner does not acknowledge all of the factors set forth in *Cities Service;* rather, her analysis is limited to one prong of the *Cities Service* analysis, *i.e.*, whether the underlying purpose of the Cap was actually intended to benefit or burden a particular member or members of a class instead of an entire class. *See* Petitioner's Brief, at pp. 22-23.

interest," and whether the legislatively drawn distinctions are arbitrary and without any reasonable basis. *Cities Service*, 290 Md. at 570, 431 A.2d at 672. These very factors were addressed in detail by this Court in *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992).

Murphy involved a serious automobile accident. The injured plaintiffs won a large jury verdict and the defendants filed a post-trial motion to reduce the verdict to conform to the Cap; the plaintiffs opposed this motion arguing that the Cap was unconstitutional. *Id.* at 349, 601 A.2d at 105. The trial court ruled in favor of the plaintiffs, the Court of Special Appeals reversed and the plaintiffs appealed to this Court. In this Court, the plaintiffs challenged the Cap as a violation of the guarantees of equal protection provided by Maryland's Declaration of Rights. Just like the Petitioner here, they claimed the Cap created 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." *Id.* at 355, 601 A.2d at 108.

In upholding the constitutionality of the Cap, this Court applied a rational basis analysis for purposes of the state and federal equal protection analysis, and examined the history of the Cap and the public need for it. The Court held that the Cap was rationally related to the Legislature's goals:

> The General Assembly's objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public. This is obviously a legitimate legislative objective. A cap on noneconomic damages may lead to greater ease in calculating premiums, thus making the

> market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services. **The cap, therefore, is reasonably related to a legitimate legislative objective.**
>
> * * * *
>
> Since, the General Assembly had before it several studies which concluded that $250,000 would cover most noneconomic damage claims, the Legislature did not act arbitrarily in enacting the cap at $350,000. It is also significant that the cap applies to all personal injury claimants equally rather than singling out one category of claimants.
>
> Therefore, we hold that the legislative classification drawn by § 11-108 between tort claimants whose noneconomic damages are less that $350,000 and tort claimants whose noneconomic damages are greater than $350,000, and who are thus subject to the cap, is not irrational or arbitrary. It does not violate the equal protection component of Article 24 of the Declaration of Rights.

Murphy, 325 Md. at 368-70, 601 A.2d at 114-16 (emphasis added).

In short, the Court held in *Murphy* that the Cap is reasonably related to a legitimate legislative objective, and that any classification created by the Cap is neither irrational nor arbitrary. Thus, this Court has squarely held that the Cap meets the last two prongs of the *Cities Service* analysis, and it is clear that none of the other prongs supports Petitioner's argument that the Cap is a special law. The Court therefore should reject this latest challenge to the constitutionality of the Cap, and should affirm the decision of the Court of Special Appeals.

Further, not only is Petitioner's special law theory inconsistent with *Cities Service*, it is also contrary to prior decisions of this Court which have rejected special law challenges to other statutes that arguably created classifications that burdened certain categories of individuals or businesses. For example, this Court rejected a special law

challenge to a statute of repose that created one time bar for claims against architects and engineers and a different bar for plaintiffs pursuing claims against other categories of defendants. *Whiting-Turner Contracting Co. v. Coupard,* 304 Md. 340, 499 A.2d 178 (1985). The statute provided that a person could not seek damages for contribution or indemnification from an architect or engineer when a personal injury claim resulting from an unsafe or defective condition of an improvement to real property occurred "more than 10 years after the date the entire improvement first became available for its intended use." *Id.* at 345-46, 499 A.2d at 181. However, claims against owners, builders, tenants and other potential responsible entities were subject to a twenty year bar. *Id.* at 345, 499 A.2d at 181. The tort claimant in *Coupard* was injured more than ten years after the completion of the building, and the building's owner, tenant and builder sought indemnity from the architect. This Court rejected the special law challenge, holding that there was no evidence that any particular architects or engineers were the intended beneficiaries of the statute. *Id.* at 346-47, 359, 499 A.2d at 182, 188.[7] *See also Grossfeld v. Baughman*, 148 Md. 330, 129 A. 370 (1925) (rejecting special law challenge to statute that prohibited Baltimore City's commissioner of motor vehicles from issuing or transferring license plates, markers or registrations unless all taxes were paid, where statute was explicitly inapplicable to owners of commercial trucks and applied only to owners of other vehicles).

[7] The Court also rejected an equal protection challenge to the statute. *Id.* at 354-58, 499 A.2d at 186-88.

The statutes in *Coupard* and *Grossfeld* both had the effect of burdening certain categories of individuals or entities. Accepting Petitioner's special law theory, both of these laws would be unconstitutional. However, these cases implicitly reject Petitioner's theory and make clear that a statute is not unconstitutional simply because it has the effect of "burdening" part of the population. Similarly, the Cap cannot be considered a special law even if it is deemed to burden a portion of the population.

E. The Cap Bears No Resemblance to Statutes Struck Down By This Court as Special Laws.

Notably, Petitioner cites no Maryland case other than *Cities Service* as support for her special law challenge. This is likely because the Cap bears no resemblance to any of the handful of Maryland statutes struck down as special laws by this Court. Including *Cities Service*, this Court has found a law to be unconstitutional under Article III, Section 3, on only eight occasions in the 145 year history of that provision's existence.[8] *See Beauchamp v. Somerset County Sanitary Commission*, 256 Md. 541, 261 A.2d 461(1970); *Littleton v. City of Hagerstown*, 150 Md. 163, 132 A. 773 (1926); *Mayor of Westminster v. Consolidated Pub. Util. Co.*, 132 Md. 374, 103 A. 1008 (1918); *City of Crisfield v. Chesapeake and Potomac Telephone Co. of Baltimore City,* 131 Md. 444, 102 A. 751 (1917); *State v. Baltimore & O. R. Co.*, 113 Md. 179, 77 A. 433 (1910); *City of Baltimore v. Minister & Trustees of Starr Methodist Protestant Church*, 106 Md. 281, 67

[8] The Special Law exception has been in existence since 1864; the current version has existed since 1867. Constitutional Convention Commission of Maryland, *Constitutional Revision Study Documents*, 794-96 (1968).

A. 261 (1907); *City of Baltimore v. Alleghany County Com'rs,* 99 Md. 1, 57 A. 632 (1904).

In *Beauchamp*, a statute provided an exemption in Somerset County of the "property of any incorporated American Legion Post from the levy of any taxes, charges or assessments of whatever kind against the property by the Somerset County Sanitary District." *Beauchamp*, 256 Md. at 545, 261 A.2d at 463. The exemption was held to be a special law because the intended and practical effect of the law was to exempt one specific American Legion Post from having to pay any assessment or charge levied by the Sanitary Commission. *Id.* at 549, 261 A.2d at 465.

Littleton concerned Hagerstown's attempt to build an electrical power plant. A general law provided that the city could not build such a plant without first obtaining a certificate from the Public Service Commission "PSC"). *Littleton,* 150 Md. App. at 165-66, 132 A. at 775. Another general law provided that an additional certificate had to be obtained before the city could issue bonds for the construction of the plant. *Id.* The city failed to obtain the certificates and an injunction was issued requiring the city to obtain the permits; the PSC denied the city's application. *Id.* at 166-67, 132 A. at 775. The Legislature then passed amendments to the general laws. *Id.* The exceptions in the amendments stated that the certificate requirements,

> shall not apply to municipalities as owned, operated and maintained on and prior to the date of the creation of the [PSC], and presently own, operate and maintain a gas or an electrical plant devoted in whole or in part to the supplying of the inhabitants of such municipalities with gas or electricity ... nor shall said sections ... apply to the Mayor and Council of Hagerstown nor to such municipality or municipalities having a population in excess of 20,000 and an assessable basis in excess of $15,000,000, when the majority

> of voters of such municipality or municipalities shall vote in favor of municipal ownership of lighting or power plant.

Id. at 167-68, 132 A. at 775-76. Each exception was ruled unconstitutional because there was no reasonable basis for the classifications drawn by the exceptions; rather, it appeared that the city had simply appealed to the Legislature when the PSC would not do what it wanted. *Id.* at 183, 132 A. at 781.

Similarly, in *Baltimore & O. R. Co.,* the county commissioners of Prince George's County passed a law requiring only the Baltimore & Ohio Railroad Company to "erect and maintain safety gates" at two specific areas and to cause flagmen to be stationed at each of the two areas during certain hours. *Baltimore & O. R. Co.,* 113 Md. at 181, 77 A. at 433. This enactment was held to be an unconstitutional special law because there was already an applicable general law requiring all railroads to take precautions to make crossings safer if notified to do so by county commissioners. *Id.* at 184, 77 A. at 435.

In *Starr*, a church was given "the rents, profits and yearly income of the wharf opposite the lot on Light Street in [Baltimore City]. . . . " *Starr,* 106 Md. at 283, 67 A. at 262. The church paid taxes on the property until 1904 when the Legislature passed an act exempting only that church's property from taxation. *Id.*, 67 A. at 262. Not surprisingly, the act was held to be an unconstitutional special law because there was already a general law setting forth the particular classes of property of religious entities that could be exempt from taxation. *Id.* at 289, 67 A. at 264-65. *See also Mayor of Westminster v. Consolidated Pub. Util. Co.*, 132 Md. 374, 103 A. 1008 (1918) (statute providing that one specific utility company's rate schedule was subject to approval by city held to be a

special law where general law provided that Public Service Commission was responsible for rate regulation); *City of Crisfield v. Chesapeake and Potomac Telephone Co. of Baltimore City,* 131 Md. 444, 102 A. 751 (1917) (section of city charter that allowed for regulation of rates charged by telephone company held to be a special law where general law granted that authority to the Public Service Commission.); *City of Baltimore v. Alleghany County Com'rs,* 99 Md. 1, 57 A. 632 (1904) (statute requiring entities incorporated in Alleghany county to pay taxes in that county on assessed value of shares regardless of where the shareholders resided, and exempting shareholders from paying taxes on shares, held to be a special law where general law provided that taxes on shares should be paid by shareholders to the counties or municipalities where they resided).

F. Petitioner's Reliance Upon Wisconsin and Illinois Cases is Misplaced.

Petitioner seeks to support her special law challenge by relying on three out-of-state cases. However, none of the cited cases supports her attack on the Cap. In *Ferdon v. Wisconsin Patients Compensation Fund*, 701 N.W. 2d 440 (Wis. 2005), the Wisconsin Supreme Court upheld an equal protection challenge to a noneconomic damages cap applicable only to medical malpractice cases. *Id.* at 447. *Ferdon* is irrelevant here because there is no equal protection challenge in this case; indeed this Court has held that there is a rational basis supporting the alleged classification drawn by the Cap and therefore there is no equal protection violation. *See Murphy*, 325 Md. at 368-70, 601 A.2d at 114-16.

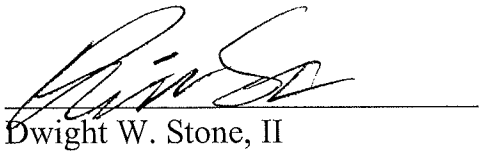
Petitioner also cites two cases in which the Illinois Supreme Court struck down damage caps as unconstitutional under the special legislation provision of the Illinois

Constitution. *See* Petitioner's Brief at 23 (citing *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057, 1062 (Ill. 1997) and *Grace v. Howlett*, 283 N.E.2d 474, 479 (Ill. 1972)). However, these cases are inapposite because in Illinois "[a] special legislation challenge generally is judged under the same standards applicable to an equal protection challenge." *Best*, 689 N.E.2d at 1070. Thus, in *Best* and *Grace* the challenged damages cap statutes were struck down because, like the Wisconsin statute in *Ferdon*, the courts held that they failed the rational basis standard. *Id.* at 1078. Thus, like *Ferdon*, *Best* and *Grace* are irrelevant to the analysis of Maryland's Cap because of this Court's holding in *Murphy*.

CONCLUSION

For all of the foregoing reasons, MDC respectfully requests that this Court reject Petitioner's constitutional challenge and affirm the Court of Special Appeals's decision.

Respectfully submitted,



Dwight W. Stone, II
Christopher C. Jeffries
Erin L. Purdy
Whiteford, Taylor & Preston L.L.P.
Seven Saint Paul Street
Baltimore, Maryland 21202-1636

Attorneys for *Amicus Curiae*
Maryland Defense Counsel, Inc.

Dated: January 12, 2009

This Brief was prepared using Times New Roman 13-point type.

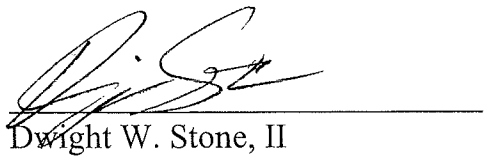
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this *12th* day of *January, 2009,* copies of the Brief of *Amicus Curiae,* Maryland Defense Counsel, Inc. were served by first class mail, postage prepaid upon:

Brian S. Brown, Esquire
Saul E. Kerpelman & Associates, P.A.
10 North Calvert Street
Suite 600
Baltimore, Maryland 21202
Attorneys for Petitioner

M. Natalie McSherry, Esquire
Gertrude C. Bartel, Esquire
Catherine M. Manofsky, Esquire
Kramon & Graham, P.A.
One South Street
Suite 2600
Baltimore, Maryland 21202-3201

Ralph Wilson, Esquire
Rollins, Smalkin, Richards & Mackie, L.L.C.
401 N. Charles Street
Baltimore, Maryland 21201
Attorneys for Respondents



Dwight W. Stone, II

406705

TEXT OF PERTINENT STATUTES AND RULES

Maryland Constitution, Art. 3, § 33

Article III. Legislative Department

§ 33. Local and special laws

The General Assembly shall not pass local, or special Laws, in any of the following enumerated cases, viz.: For extending the time for the collection of taxes; granting divorces; changing the name of any person; providing for the sale of real estate, belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees; giving effect to informal, or invalid deeds or wills; refunding money paid into the State Treasury, or releasing persons from their debts, or obligations to the State, unless recommended by the Governor, or officers of the Treasury Department. And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law. The General Assembly, at its first Session after the adoption of this Constitution, shall pass General Laws, providing for the cases enumerated in this section, which are not already adequately provided for, and for all other cases, where a General Law can be made applicable.

Md. Code Ann., Cts. & Jud. Proc., § 11-108

§ 11-108. Personal injury action – Limitation on non-economic damages.

(a) Definitions. – (1) In this section the following words have the meanings indicated.

(2)(i) "Non-economic damages" means:

1. In an action for personal injury, pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury; and

2. In an action for wrongful death, mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education, or other non-economic damages authorized under Title 3, Subtitle 9 of this article.

(ii) "Non-economic damages" does not include punitive damages.

(3) "Primary claimant" means a claimant in an action for the death of a person described under § 3-904(d) of this article.

(4) "Secondary claimant" means a claimant in an action for the death of a person described under § 3-904(e) of this article.

(b) Limitation on amount of damages established. – (1) In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for non-economic damages may not exceed $350,000.

(2)(i) Except as provided in paragraph (3)(ii) of this subsection, in any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for non-economic damages may not exceed $500,000.

(ii) The limitation on non-economic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year, inclusive.

(3)(i) The limitation established under paragraph (2) of this subsection shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim.

(ii) In a wrongful death action in which there are two or more claimants or beneficiaries, an award for non-economic damages may not exceed 150% of the limitation established under paragraph (2) of this subsection, regardless of the number of claimants or beneficiaries who share in the award.

(c) Award under § 3-2A-05 included. – An award by the health claims arbitration panel in accordance with § 3- 2A-05 of this article for damages in which the cause of action arose before January 1, 2005, shall be considered an award for purposes of this section.

(d) Jury trials. – (1) In a jury trial, the jury may not be informed of the limitation established under subsection (b) of this section.

(2)(i) If the jury awards an amount for non-economic damages that exceeds the limitation established under subsection (b) of this section, the court shall reduce the amount to conform to the limitation.

(ii) In a wrongful death action in which there are two or more claimants or beneficiaries, if the jury awards an amount for non-economic damages that exceeds the limitation established under subsection (b)(3)(ii) of this section, the court shall:

1. If the amount of non-economic damages for the primary claimants equals or exceeds the limitation under subsection (b)(3)(ii) of this section:

A. Reduce each individual award of a primary claimant proportionately to the total award of all of the primary claimants so that the total award to all claimants or beneficiaries conforms to the limitation; and

B. Reduce each award, if any, to a secondary claimant to zero dollars; or

2. If the amount of non-economic damages for the primary claimants does not exceed the limitation under subsection (b)(3)(ii) of this section or if there is no award to a primary claimant:

A. Enter an award to the primary claimant, if any, as directed by the verdict; and

B. Reduce each individual award of a secondary claimant proportionately to the total award of all of the secondary claimants so that the total award to all claimants or beneficiaries conforms to the limitation.

(e) Exclusions. – The provisions of this section do not apply to a verdict under Title 3, Subtitle 2A of this article for damages in which the cause of action arises on or after January 1, 2005. (1986, ch. 639; 1989, ch. 5, § 1; ch. 629; 1994, ch. 477; 1997, ch. 318; 2000, ch. 61, § 1; 204, ch. 25; 2004 Sp. Sess., ch. 5, § 1.)