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A DECADE EXAMINED: A REVIEW OF THE RECOVERY UNDER MISSISSIPPI'S CIVIL JUSTICE REFORMS

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I. INTRODUCTION

Over the past decade, many reviewers—supporters and critics alike—have studied and commented on Mississippi's legal and tort reforms. Judged objectively, by the late 1990s and early 2000s, Mississippi's civil justice system was in a crisis. For example, prior to 1995, Mississippi courts had not produced a damage verdict greater than $9 million.[1] But by the early 2000s, that had changed.[2] This change earned Mississippi the reputation as a "magnet for liability lawsuits, a Mecca for frivolous lawsuits, with unlimited damages."[3]

In 2002, through legislative changes followed by other judicial and legislative reforms, Mississippi began to address the crisis and implement needed civil justice reforms. Many of the issues that caused several Mississippi venues to be labeled among the worst judicial venues have been corrected. Nearly all the reforms, such as venue, joinder, joint and several liability, and pleading standards are now well established and fully integrated within the judicial system. But one reform (the statutory cap on noneconomic damages) continues to face some challenges. This article provides an overview of some of the more established reforms, along with context and a brief analysis of the authority that led to those changes. This Article then reviews the current status of nationwide jurisprudence on noneconomic damage caps with an emphasis on recent litigation challenging Mississippi's caps on noneconomic damages.

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1. David Clark, *Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359, 362 (2001).

2. Given Mississippi's comparatively small population and lack of many large businesses or industry, this increase was dramatic. From "1994 to 2000, Mississippi had the second highest percentage of jury verdicts over $1 million of all the fifty states . . . passing all except New York in this dubious category." *Id.* at 363-64 (citing Current Award Trends in Personal Injury, 2001 Edition, Jury Verdict Research Series (LRP Publications, 2002) at 35-36)).

3. *Id.* at 361 (citing Robert Pear, *Mississippi Gaining as a Lawsuit Mecca*, N.Y. TIMES, Aug. 20 2001 at A1).

II. PRE-TORT REFORM LANDSCAPE IN MISSISSIPPI

For those readers who only have anecdotal impressions of the pre-reform litigation climate in Mississippi, an historic overview provides an important background. In 2001, Dick Thornburgh observed that Mississippi had "earned a reputation as a mecca for litigators."[4] He commented:

> It does not reflect well on your state or your civil justice system when small business owners can't afford liability insurance because rates have become so expensive, when doctors stop performing high-risk procedures because of enormous concerns about medical malpractice liability and when physicians and pharmacists hesitate to prescribe and dispense FDA-approved drugs for fear of product liability suits. These are warning signs in response to which you must begin to fashion a response.[5]

He also observed Mississippi's civil justice system had become "something of a legal lottery propelled by visions of huge damage awards and equally outside legal fees."[6] This, and a number of other factors contributed to Mississippi's threatening legal landscape: abuse of (or failure to enforce) Mississippi's joinder rule,[7] forum shopping under venue statutes,[8] multi-million dollar verdicts,[9] and defendants settling to avoid litigation risks in what were labeled judicial "hellholes."[10] This rise in litigation did not occur in isolation. The filings were fueled by aggressive marketing to and solicitation[11] of numerous potential plaintiffs who were then

4. Dick Thornburgh, *Litigation in Mississippi Today*, 71 MISS. L.J. 505, 514-15 (2001).

5. *Id.*

6. *Id.* at 506.

7. *See* MISS. R. CIV. P. 20 cmt. (2003) (pre-amendment comment noted that Rule 20 allowed virtually unlimited joinder at pleading stage); *See also* Illinois Cent. R.R. v. Travis, 808 So. 2d 928, 931 (Miss. 2002)(citing the official comment to the pre-amendment Rule 20 held, "The general philosophy of these Rules is to allow virtually unlimited joinder at the pleading stage, but to give the Court discretion to shape the trial to the necessities of the particular case.") *overruled by* Capital City Ins. Co, v. G.B. "Boots" Smith Corp, 889 So. 2d 505 (Miss. 2004) *abrogated by* Wyeth-Ayerst Laboratories. v. Caldwell, 905 So. 2d 1205 (Miss 2005).

8. Prior to various venue reforms, Mississippi law provided that in cases with multiple defendants: "if *one* of the defendants is a non-resident of the State, the plaintiff may bring suit against the non-resident in the county of plaintiff's residence. Jurisdiction and venue of that nonresident makes the county of plaintiff's residence the proper venue against *all* resident defendants even though they may live in different counties." Senatobia Cmty. Hosp. v. Orr. 607 So. 2d 1224, 1226 (Miss. 1992) (emphasis added) *overruled by* Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 516-17 (Miss. 2004) (holding that the suit in plaintiff's home county is never an option when a resident defendant is sued therefore analysis in *Orr* was flawed and therefore overruled).

9. Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS COL. L. REV. 393, 400 (2005) (discussing extraordinary verdicts and large punitive damage awards).

10. Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST (2002) at 12-13 (hereinafter "Bell, *Asbestos Litigation and Judicial Leadership*").

11. The volume of new mass tort filings also had been fueled by an aggressive solicitation of new plaintiffs through advertising. Some of these ads more benignly beckoned "all contract, union . . . workers . . . [y]ou may have been exposed to asbestos and silica sand for a period of time and may be

"screened" for targeted conditions and aggregated together in large cases with hundreds if not thousands of other plaintiffs unrelated in all respects except for a common screening result. For example, during the *Daubert* hearings in *In re Silica*, it became clear that nearly 10,000 silica claims had been generated by screening companies.[12]

Mississippi became a lawsuit "Mecca"[13] as New York Times columnist Robert Pear put it. Or as a leading plaintiff's attorney described it, Mississippi was one of the "magic jurisdictions."[14] With aggressive solicitation, many asymptomatic plaintiffs from around the nation flooded into Mississippi's courts—diluting, devaluing, and delaying claims of injured plaintiffs.

Defendants were also affected. With the improper joinder of hundreds (and frequently thousands) of dissimilar claims in single cases; the liberal application of Mississippi's venue statutes, joinder rule, and joint and several liability; and several other factors, this mass of cases aggregated tens of thousands of claims in only a handful of Mississippi jurisdictions. Defendants many times were coerced into settlements instead of risking trials in unwieldy and massive cases in dangerous plaintiff-favoring venues. A strategy that was openly acknowledged by a leading plaintiff's lawyer: "[you] raise the stakes so high that they can't afford to lose or can't afford to go to trial."[15] Vast inventories of mass tort cases were settled with little

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eligible to be screened for ASBESTOSIS, MESOTHELIOMA, LUNG CANCER, OR SILICOSIS." *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 597 (S.D. Tex. 2005) (capitalization in original). Others were more aggressive. In one reported instance, the ad enticed would-be plaintiffs: "Find out if YOU have MILLION DOLLAR LUNGS!" *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs,* U.S. NEWS & WORLD REPORT, Dec. 17, 2001 (on file with authors). Aside from the patently conscience-shocking implication that compared diagnoses of incurable and often fatal diseases to the "excitement" of winning the lottery, such aggressive solicitation apparently was successful and garnered plaintiffs' counsel "inventories" of thousands of clients.

12. Based on testimony from the 2005 hearings, the Court described the assembly line screening process as follows:

> a) the law firm provided the screening company with a list of people (for instance, existing asbestos plaintiffs or workers at industrial sites); b) either the law firm or the screening company sent out a mass e-mail asking the recipient to call the screening company's toll-free number; c) the staff answering the phone would ask if the caller had been exposed to silica; and, d) for those who showed some form of being exposed to silica," the caller would be encouraged to attend the mass screening. . ..[o]n the day of the screening, the screening company parked its van or truck in the parking lot of a hotel or retail establishment. . .As each client arrived in front of the van or trailer, a receptionist greeted the client and using a standard form prepared by the screening company or law firm, verified that the client had an appointment and the information previously given by the client over the telephone. The client then underwent a chest X-ray.

In re Silica, 398 F. Supp. 2d at 597-598 (internal citations omitted).

13. Robert Pear, *Mississippi Gaining as a Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001 at A1.

14. Judicial Hellholes (2011-2012), http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf (last accessed June 25, 2015) ("What I call the 'magic jurisdiction,' [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges . . . and it's almost impossible to get a fair trial if you're a defendant in some of these places .... Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is.") (quoting Richard "Dickie" Scruggs).

15. Richard Scruggs, Esq., *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001).

or no detailed information about the plaintiffs' alleged injuries or the actual products that they used or were exposed to, much less information regarding the actual basis for liability of each defendant.

III. THE PRINCIPLE REFORMS.

Significant legislative reforms were enacted in both 2002 and 2004. The Mississippi legislature passed comprehensive reforms which addressed venue, joint and several liability, punitive damage caps, innocent seller issues, apportionment of fault, and caps on noneconomic damages. Additionally, Mississippi Supreme Court opinions ordered severance,[16] enforced a rigorous pleading standard,[17] exposed the flaws in mass screening,[18] and adopted or amended rules including those that allowed independent medical examinations[19] and heightened standard for admissibility of expert testimony.[20]

A. Rule 20 and Janssen: Severing Improperly Joined Plaintiffs

The first major procedural reform was the February 19, 2004 landmark decision of *Janssen v. Armond.*[21] *Armond*, and its later progeny,[22] as well as the February 20, 2004 amendment to the comment to Mississippi Rule of Civil Procedure 20,[23] all require the severance of improperly joined plaintiffs whose claims do not arise out of the "same transaction or occurrence," and are not linked by a common litigable event.[24]

16. Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004).

17. Harold's Auto Parts, Inc., v. Mangialardi, 889 So. 2d 493 (Miss. 2004).

18. *In re* Silica Products Liab. Litig., 398 F. Supp. 2d 563, 597 (S.D. Tex. 2005).

19. MISS. R. CIV. P. 35.

20. MISS. R. EVID. 702.

21. *Armond*, 866 So. 2d at 1092.

22. *See, e.g.,* Janssen Pharmaceutica, Inc. v. Scott, 876 So. 2d 306 (Miss. 2004); Janssen Pharmaceutica, Inc. v. Grant, 873 So. 2d 100 (Miss. 2004); Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004); Janssen Pharmaceutica, Inc. v. Keys, 879 So. 2d 446 (Miss. 2004); and Janssen Pharmaceutica, Inc. v. Jackson, 893 So. 2d 91 (Miss. 2004); Purdue Pharma, L.P. v. Estate of Heffner, 904 So. 2d100, (Miss. 2004).

23. *See* MISS. R. CIV. P. 20 cmt. Mississippi Rule 20 requires that all plaintiffs' claims: (1) must arise out of the same transaction, occurrence, or the same series of transactions or occurrences; *and* (2) must involve some common question of law or fact. *Id.* The "phrase 'transaction or occurrence' requires that there be a *distinct litigable event linking the parties.*" *Id.* (emphasis added).

24. Although the Supreme Court first addressed the improper joinder in pharmaceutical cases, it has been applied to many other categories of claims and cases. *See* 3M Co. v. Johnson, 895 So. 2d 151, 159 (Miss. 2005) ("Although asbestos litigation is a 'mature tort' as discussed in dicta in *Armond*, this Court does not intend, nor will we proceed to exempt such cases from the requirements of Rule 20."); 3M Co. v. Glass, 917 So. 2d 90 (Miss. 2005) (silica); *See also* Harold's Auto Parts, Inc., v. Mangialardi, 889 So. 2d 493 (Miss. 2004). The Mississippi Supreme Court broadly proclaimed that "our holding in *Armond* and its progeny is that plaintiffs may not be joined under Rule 20 unless their claims are connected by a distinct litigable event." Canadian Nat'l Ill. Ctr. R.R. Co v. Smith, 926 So. 2d 839, 843 (Miss. 2006).

The term "distinct litigable event" was not unknown to Mississippi law since the term "same litigable event" had been included in the pre-amendment Rule 20 comment and is complementary to the current "distinct litigable event."[25] But whether "two or more plaintiffs' claims arise from a distinct litigable event is very much fact dependent."[26] The Court in *Illinois Central R.R. Co. v. Adams*,[27] explained that to "be bound together by some distinguishable litigable event . . . there must be some claim of wrongful conduct or actionable conduct which, if proven by plaintiffs at trial, would result in liability of the defendant to all joined plaintiffs."[28]

In a series of cases, the Mississippi Supreme Court has held that the following allegations cannot be the sole basis for joining plaintiffs under Rule 20: alleging that plaintiffs were exposed to the same product,[29] allegations that the plaintiffs had a common worksite/employer,[30] allegations of mass fraud and common misrepresentation,[31] or allegations of an industry-wide conspiracy.[32]

B. Rules 8, 9, 10 and 11: Enforcing the Pleading Standard

In addition to the volume of cases generated by the improper joinder of hundreds, and even thousands, of plaintiffs, the lack of basic core information regarding individual plaintiff's claims was yet another significant factor. While the language of the Rules of Civil Procedure simply requires "notice pleading," many large tort cases were more akin to "mystery pleading." Or to borrow the explanation given by a recent political figure: "we have to pass the bill so that you can find out what is in it."[33]

Defendants were compelled to incur ongoing legal fees, conduct extensive discovery, and blindly litigate these cases simply to find out why they had been sued, by whom and for what. The pleading in these complaints, other than for a few "trial" or "lead" plaintiffs, gave little or no information about plaintiffs. The "threat" of trial setting for "trial plaintiffs" cases in some of Mississippi's "magic jurisdictions," combined with utter lack of information on remaining plaintiffs, created tremendous improper settlement

25. Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 834 (Miss. 2005); *but see* Alexander v. AC And S, Inc., 947 So. 2d 891, 899 n.2 (Miss. 2007) (Diaz, J. dissenting) in which Justice Diaz dissenting commented that "distinct litigable event" is an "odd term" with "no basis in prior Mississippi law."

26. *Ill. Cent. R.R.*, 912 So. 2d at 834.

27. 922 So. 2d 787 (Miss. 2006).

28. *Id.* at 789-790 (applying *Armond* and Miss R. Civ. P. 20).

29. Purdue Pharma v. Heffner, 904 So. 2d 100, 103 (Miss. 2004) ("The mere taking of the *same* prescription drug does not supply the plaintiff with the *same* transaction or occurrence, or the *same* transactions or occurrences, as required by Rule 20."); Amchem Products, Inc. v. Rogers, 912 So.2d 853, 858 (Miss. 2005).

30. Crossfield Products Corp. v. Irby, 910 So. 2d 498, 501 (Miss. 2005) (holding that merely working at a common workplace does not establish "distinct litigable event linking the parties together").

31. Miss. Life Ins. Co. v. Baker, 905 So. 2d 1179, 1184-85 (Miss. 2005).

32. Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1098 (Miss. 2004) (citing Insolia v. Philip Morris, Inc., 186 F.R.D. 547, 549 (W.D. Wis. 1999)).

33. *Slaughter House Rules, how Democrats may 'deem' ObamaCare into law, without voting*, The Wall Street Journal., Mar. 16, 2010, (quoting Speaker of the House Nancy Pelosi), http://www.wsj.com/articles/ SB10001424052748703909804575123512773070080. (last accessed June 25, 2015).

leverage on these massive cases. It was a candid and troubling observation noted by former United States Attorney General, Griffin B. Bell:

> The selective filing of non-sick claimants in courts that will not turn these claims away coerces defendants into settling unsubstantiated claims by the non-sick. Certain courts will not scrutinize the unsubstantiated claims, and plaintiff lawyers often will not settle the substantiated claims absent payment for their nonsick inventories.[34]

In its 2004 landmark ruling, *Harold's Auto Parts v. Flower Mangialardi*,[35] the Mississippi Supreme Court again addressed improper joinder[36] and also condemned the practice of "shotgun" style complaints,[37] labeling that pleading practice a "perversion of the judicial system unknown prior to the filing of mass tort cases."[38] The *Mangialardi* ruling not only required severance of the 264 asbestos plaintiffs, but also required each severed plaintiff to sue *only* the defendants against whom he had a claim.[39]

A year later in *3M et al. v. Glass*,[40] (a silica case) the Mississippi Supreme Court again affirmed that a plaintiff cannot shift his burden to both know and disclose (through pleading)[41] the core information as to each individual plaintiff: "[W]e reject the notion that a plaintiff may shift to a defendant the light burden imposed by notice pleading requirements."[42]

While this series of decisions provided relief to defendants, over the years these reforms have not been not unreasonably applied so as to prejudice plaintiffs.[43] For example, in *Illinois Central R.R. Company v. Easterwood*,[44] a suit brought by 54 plaintiffs against a single defendant, the court applied *Mangialardi* and declined to dismiss a single plaintiff's amended complaint even though he "[could] not recall specific asbestos (or

34. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/ pdfs/9142.pdf. (last accessed June 25, 2015).

35. 889 So. 2d 493 (Miss. 2004).

36. "In [*Mangialardi*] we were faced not only with misjoined plaintiffs but also with inadequate pleading." Canadian Nat'l v. Smith, 926 So. 2d 839, 843 (Miss. 2006).

37. *See also* Byrne v. Nezhat, 261 F.3d 1075, 1130 (11th Cir. 2001) "In *Byrne*, the court observed 'Why . . . would a lawyer engage in shotgun pleading? Plaintiffs file shotgun complaints and include frivolous claims to extort the settlement of a meritorious claim; worse yet, they file shotgun complaints to extort the settlement of unmeritorious claims.'" Chancellor v. Parker, Case No. CV-040BE-2554-S, at 3, n. 1. (N.D. Ala. 2004) (Order Dismissing the Case).

38. *Mangialardi*, 889 So. 2d at 495.

39. *Id.*

40. 917 So. 2d 90 (Miss. 2005).

41. This requirement is not new, "*Mangialardi* simply reminds the Bar . . . ." *See Glass*, 917 So. 2d at 93 (discussing requirements of Rules 8, 9, 10, and 11). Even under the relaxed "notice pleading" standard, Mississippi Rule of Civil Procedure 8 "[did] not eliminate the necessity of stating *circumstances, occurrences, and events* which support the proffered claim." MISS. R. CIV. P. 8, cmt.

42. Ill. Central R.R. Co. v. Adams, 922 So. 2d 787, 790-91 (Miss. 2006).

43. *Glass*, 917 So. 2d at 92.

44. 939 So. 2d 769 (Miss. 2006).

silica) containing products and material that he worked around while an employee of Defendant . . . ."[45]

C. *Venue: Stop the Shopping*

The effect of "magic jurisdictions" was not the overly dramatic stuff of urban legend, nor is it merely anecdotal. The weight of the dockets generated was documented by the sheer number of filings in certain venues.

Venue is a significant right. And the Mississippi Supreme Court in *Mangialardi* also expressly required plaintiffs' counsel to have a good faith belief that "*each plaintiff* has an appropriate cause of action to assert against a defendant *in the jurisdiction* where the complaint is to be filed. To do otherwise is an abuse of the system and is sanctionable."[46] Given the evolution of Mississippi's "magic jurisdictions"[47] it "is no coincidence that a few jurisdictions have become the favorite locations for plaintiff attorneys."[48]

Venue shopping literally swamped the courts in several Mississippi counties with tens of thousands of mass tort claimants. But with severance required by both Rule 20 and *Armond*, each plaintiff is now required to independently establish venue or risk dismissal.[49] This rule equitably balanced the interests of all sides: if a claim had been improperly joined and dismissed, the plaintiff would be allowed to refile "a new action for the same cause, at any time within one year . . . ."[50]

D. *Rule 35: Evaluate the Plaintiff*

Until January 2003, when the Mississippi Supreme Court adopted Mississippi Rule of Civil Procedure 35,[51] defendants had been without one of the fundamental tools in defending personal injury and emotional distress claims—an independent medical examination of the plaintiff.[52] With the adoption of Rule 35, defendants in Mississippi state courts (for the first time) were given the mechanism to request and conduct physical and mental examinations of plaintiffs.[53] These examinations afforded defendants the procedural mechanism to examine and challenge the veracity of a

45. *Id.* at 771.

46. Harold's Auto Parts v. Flower Mangialardi, 889 So. 2d 493, 494 (Miss 2004). (citing Miss. R. Civ. P. 11) (first emphasis original, second emphasis added).

47. *See supra* n.13-14 and accompanying text.

48. Bell, *supra* n.34 at 21.

49. The Supreme Court provided additional guidance for trial courts when severing and transferring improperly joined claims in the subsequent case of *Canadian National v. Smith*, 926 So. 2d 839, 845 (Miss. 2006).

50. *Id.* (citing the Mississippi Savings Statute, Miss Code Ann. § 15-1-69 (1972)). But this savings "did not deprive the defendant[s] of seeking dismissal for [plaintiff's] failure to file the original action within the applicable statute of limitations." *Id.* (citing Evans v. Broadhead, 233 So. 2d 771, 774 (Miss. 1970)).

51. Miss. R. Civ. P. 35 (adopted by Supreme Court in Order dated January 16, 2003).

52. Miss. R. Civ. P. 35 cmt. ("[P]reviously, the omission in the Mississippi Rules of Civil Procedure of a counterpart to Federal Rule 35 was held to preclude a state court from ordering an examination under any circumstances.") (citing Swan v. I.P., Inc., 613 So. 2d 846, 859 (Miss. 1993)).

53. Miss. R. Civ. P. 35(a).

plaintiff's claims and, in some cases, provided the needed evidence to challenge many litigation-driven "diagnoses."

But Mississippi Courts have not interpreted Rule 35 to give defendants an unfettered right to examine plaintiffs. Rule 35 itself requires a court order upon motion of the party seeking the examination.[54] And in *LeBlanc v. Andrews*, the Court of Appeals affirmed the chancery court's decision to not require a mental examination of a husband in a divorce proceeding despite expert testimony that an exam was necessary.[55] The chancellor found the testimony of one minor child, who stated she did not fear the defendant or feel unsafe around him, sufficient to deny the requested examination.[56] This holding is consistent with cases interpreting Federal Rule 35,[57] upon which Mississippi's Rule 35 is based.[58]

E. Rule 702 and Daubert: The Court as Gatekeeper

For years, Mississippi had followed the *Frye* general acceptance test regarding admissibility of expert testimony.[59] But on May 29, 2003, the Mississippi Supreme Court amended Mississippi Rule of Evidence 702 to "clarify the gatekeeping responsibility of the courts in evaluating the admissibility of expert testimony."[60] In clarifying a trial courts' responsibility, the Supreme Court struck all references to the prior *Frye* and *House* tests. It adopted a modified *Daubert* standard and recognized that under *Kumho Tire Co. Ltd. v. Carmichael*, Rule 702 was the standard "for other fields as well as for scientific testimony."[61]

In addition to amending Rule 702 and its comment, the court in *Mississippi Transportation Commission v. McLemore* expressly held: "[T]his court today adopts the federal standards and applies our amended Rule 702 for assessing the reliability and admissibility of expert testimony."[62] It

54. *Id.*

55. 931 So. 2d 683, 689 (Miss. Ct. App. 2006).

56. *Id.*

57. Teche Lines v. Boyette, 111 F.2d 579, 581 (5th Cir. 1940) (ordering Rule 35 examination was within district court's discretion). There are very few cases interpreting Mississippi Rule of Civil Procedure 35. Where no state interpretive authority exists concerning a rule, the court will rely on federal decisions interpreting corresponding federal rules. Nichols v. Tubb, 609 So. 2d 377, 383 (Miss. 1992).

58. There are very few cases interpreting Mississippi Rule of Civil Procedure 35. Where no state interpretive authority exists concerning a rule, the court will rely on federal decisions interpreting corresponding federal rules. *Nichols*, 609 So. 2d at 383.

59. *See e.g.*, Mattox v. State, 128 So. 2d 368, 372-73 (Miss. 1961); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

60. MISS. R. EVID. 702 cmt. Interestingly, this amendment was not adopted unanimously. Two Justices dissented stating, "I have to wonder how many members of this Court have tried a case where they presented an expert witness. This amendment puts restraints on the evidence and is not in the best interest of justice." *In re Miss Rules of Evidence*, In the Supreme Court of Mississippi, No. 89-R-99002-SCT (Order May 29, 2003, Easley, J., dissenting) http://courts.ms.gov/rules/ruleamendments/2003/sn104780.pdf (last accessed June 5, 2015).

61. MISS R. EVID. 702 cmt (amendment to comment described application of Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) and Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999) as standards for admission of expert testimony under Rule 702).

62. Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31, 39 (Miss. 2004).

further explained that revised Rule 702 had "effectively *tightened* not loosened, the allowance of expert testimony."[63] The *McLemore* court struck would-be expert testimony as speculative.[64]

This heightened standard for admissibility of expert testimony has served its intended purpose of safeguarding against improper and unreliable expert testimony. Comprehensive empirical studies have shown that "*Daubert* is a stricter standard than *Frye* for the admissibility of expert testimony."[65] It has given litigants and courts significant tools to examine, expose, and exclude improper litigation-driven "diagnoses" as well as all areas of "junk science" that do not meet the required standards of reliability and admissibility.

F. Innocent Seller

The Mississippi Legislature enacted the first of two Innocent Seller statutes with the 2002 Bill. Codified at section 11-1-64, this new statute made great progress in recognizing an innocent seller doctrine. Prior to its passage, federal courts in Mississippi refused to find improper joinder of mere sellers of products.[66] But the wording of the statute demonstrates that it was a product of legislative compromise. Initially, the innocent seller defense was an effort to prevent plaintiff's from joining resident retailers (merely sellers putting product in stream of commerce) to destroy federal court's diversity jurisdiction. Under section 11-1-64, after 60 days of discovery the innocent seller could be dismissed "without prejudice" but even with "dismissal," inexplicably the dismissed "innocent" seller had to remain a party[67] to the case for the sole purpose of preventing defendants from removing the case to federal court.[68] Cases were nevertheless

63. *Id.* at 38 (emphasis added); *Cf.* House v. State, 445 So. 2d 815, 822 (Miss. 1984) (former general acceptance test inquired: "Is the field of expertise one in which it is has been scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion? Where the answer to this question is in the affirmative, we *generally allow* expert testimony." (emphasis added) (cited in comment to pre-amendment MISS. R. EVID 702)).

64. *McLemore*, 863 So. 2d at 43.

65. Andrew Jurs and Scott DeVito, *The Stricter Standard: An Empirical Assessment Of Daubert's Effect On Civil Defendants*, 62 Cath. U. L. Rev. 675, 679 (Spring 2013).

66. Haley v. Hammett Autos., Inc., 341 F. Supp. 2d 634, 636 (S.D. Miss. 2004) (finding fraudulent joinder based on section 11-1-64, but, citing Clark v. Williamson, 129 F. Supp. 2d 956, 960-61 (S.D. Miss. 2000), noted that prior to enactment of section11-1-64 federal courts remanded cases because Mississippi law had allowed recovery "from either a manufacturer or a seller of a product.").

67. The order of dismissal remained interlocutory until final disposition of the plaintiff's claim. *See* MISS CODE ANN. § 11-1-64(6) (2002) ("No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a part to such action only for such purposes.").

68. United States District Judge Mills (a former Mississippi legislator who was a principal architect of the product liability statute and was not unaware of the workings of Mississippi's legislative process) remarked in *Henderson v. Ford Motor Company* that the Mississippi Legislature's clear intent was a compromise to allow dismissal of innocent sellers, but was designed to "defeat removal jurisdiction." 340 F. Supp. 2d 722, 728 (N.D. Miss. 2004).

removed and federal courts routinely denied remand.[69] Ultimately, section 11-1-64 was "repealed outright during the 2004 special [tort reform] session."[70]

The current Innocent Seller defense enacted as part of the 2004 tort reform legislation—codified at section 11-1-63(h)[71]—eliminated the anti-removal provisions and provided clear direction to trial courts. Section11-1-63(h) provides that sellers "shall not be liable" in actions for defective products unless they fall into one of three categories:

> Sellers who exercised "substantial control over that aspect of design, testing, manufacture, packaging or labeling the product that caused the alleged harm . . ."
>
> Sellers who "altered or modified the product, and the alteration or modification was a substantial factor in causing the harm . . ."
>
> Sellers who "had actual or constructive knowledge of the defective condition of the product at the time he or she supplied [it]."[72]

For added clarity, the Mississippi Legislature in the last sentence of this subsection clearly announced that "[i]t is the intent of [section11-1-63(h)] to *immunize* innocent sellers who are not actively negligent, but instead are mere conduits of a product."[73]

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69. *See, e.g,*. Weathersby v. Gen. Motors Corp., 2006 WL1487025 (N.D. Miss. May 24, 2006); Lott v. Chickasaw Equip. Co., 353 F. Supp. 2d 749 (N.D. Miss. 2005); *Haley*, 341 F. Supp. 2d at 639; Burton v. Werner Co. 335 F. Supp. 2d 734 (N.D. Miss. 2004) (holding that insofar as section 11-1-64 would operate to prevent defendants from their "statutory right to remove" such actions to federal court, it conflicted not only with "removal statutes but also with Article VI, clause 2 of the U.S. Constitution which provides that 'the Laws of the United States . . . shall be the supreme Law of the Land . . . .'"); *see also Henderson*, 340 F. Supp. 2d at 728. In *Henderson,* Judge Mills denied the plaintiff's motion to remand, but certified his ruling for interlocutory appeal to the Fifth Circuit Court of Appeals. *Id.* at 728. Despite the court's certification, the Fifth Circuit "denied [plaintiff's] motion for interlocutory appeal without explanation." *See Lott*, 353 F. Supp. 2d at 750.

70. *Henderson*, 340 F. Supp. 2d at 727.

71. The section was codified as follows:

> In any action alleging that a product is defective pursuant to paragraph (a) of this section, the seller of a product other than the manufacturer shall not be liable unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; or the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller had actual or constructive knowledge of the defective condition of the product at the time he supplied the product. It is the intent of this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product.

MISS CODE ANN. § 11-1-63(h) (1972).

72. *Id.*

73. *Id.* (emphasis added).

G. Apportionment Based on Fault: Section 85-5-7

Prior to the 2002 Mississippi tort reform legislation amending section 85-5-7, juries were allowed to allocate fault both to named defendants and to most non-joined alleged tortfeasors.[74] But juries were not permitted to consider the fault of an absent and *immune* tortfeasors.[75] Additionally, under pre-2002 law, once the percentage of fault had been allocated, each tortfeasor became jointly and severally liable to the plaintiff to the extent necessary for the plaintiff to recover 50% of his recoverable damages. Under this standard, a defendant only 1% at fault would still have been forced to pay up to 50% of the recoverable damages.[76] The inherent unpredictability and unfairness of the problems caused by these provisions were addressed first in the 2002 tort reform bill, with further reforms in 2004.

The current section 85-5-7, as now revised and amended by the 2004 tort reform legislation,[77] made significant strides to eliminate much of the inherit unfairness under Mississippi's joint and several liability. The new statute eliminated several subsections entirely,[78] and now provides that other than for defendants who "consciously and deliberately pursue a common plan or design" or "actively take part in it,"[79] each defendant will be liable only for the damages proportionate to his percentage of fault.[80]

H. Punitive Damage Caps

Mississippi's punitive damages statute was first enacted in 1993.[81] Similar to the punitive damage system we have today, the statute required proof that the defendant acted with malice or gross negligence, and that the

74. Alleged tortfeasors may not have been joined due to settlement, because the alleged tortfeasor was outside the court's jurisdiction, or for other reasons.

75. Accu-Fab & Constr. v. Ladner, 778 So. 2d 766 (Miss. 2001), *overruled by* Mack Trucks v. Tackett, 841 So. 2d 1107 (Miss. 2003).

76. *See e.g.*, *Mack Trucks*, 841 So. 2d at 1116-17.

77. For cases filed between January 1, 2003 and September 1, 2004, the applicable version of section 85-5-7 (MISS CODE ANN. § 85-5-7 (Rev. 2002)) requires the jury to determine the percentage of fault for each joint tortfeasor, including named parties and absent tortfeasors, without regard to whether the absent joint tortfeasor (such as an employer protected by Workers' Compensation exclusivity) is immune. And it also provides that noneconomic damages (e.g., pain and suffering) are not subject to joint and several liability. Consequently a defendant's liability is several only for the percentage of fault *allocated to it by the jury* for noneconomic damages; and one defendant cannot be forced to pay any noneconomic damages caused by the conduct of another tortfeasor. Furthermore, for economic damages (e.g., lost wages), joint and several liability was abolished for any defendant determined to be *less than 30%* at fault. Defendants found to be more than 30% at fault will continue to face joint and several liability to the extent necessary for the plaintiff to recover up to 50% of his recoverable economic damages.

78. Section (2) of the prior statute allowed for joint and several liability for damages caused by two or more persons for up to 50% percent of the plaintiff's recoverable damages. And section (4) of the prior statute provided for contribution among tortfeasors held jointly liable up to the amount equal to the percentage of fault allocated to that defendant. Old section (8) provided the method of apportioning fault among all defendants. *See* MISS CODE ANN. § 85-5-7 (pre-2002 version).

79. MISS. CODE ANN. § 85-5-7(4) (Supp. 2004).

80. *Id.* at § 85-5-7(2) (Supp. 2004).

81. 1993 Miss. Laws Ch. 302 § 2(1)(a) (H.B. 1270) (adopting MISS. CODE ANN. § 11-1-65 (1972)).

plaintiff first receive an award of compensatory damages.[82] Notwithstanding, juries were returning enormous punitive damage awards that were many times greater than the compensatory award.[83] Mississippi was not alone in this regard. In *BMW of North America, Inc. v. Gore*, the United States Supreme Court established standards and placed parameters on excessive punitive damage verdicts.[84]

While the United States Supreme Courts' opinion in *Gore* held that a punitive damage award could be so excessive as to violate a defendant's due process rights under the Fourteenth Amendment, it also recognized that "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."[85]

As part of the 2002 reforms, the Mississippi Legislature amended section 11-1-65 to include caps on punitive damages based on a defendant's net worth.[86] These caps were amended again slightly in 2004 to further reduce the maximum punitive damage award against certain defendants.[87] Today, punitive damage awards are governed by the provisions in section 11-1-65, providing further protection to defendants in addition to the due process protections enunciated in *Gore* and its progeny.

I. Noneconomic Damage Caps

Similar to the cap on punitive damages, as part of its tort reform measures in 2002 and 2004, the Mississippi Legislature also established caps on the recoverable amount of noneconomic damages. As one author contemporaneously observed, "[e]xtremely high jury verdicts indicate that limits on non-economic damage are also appropriate in Mississippi."[88] Mississippi's noneconomic damage caps were first added as part of the 2002 legislative session.[89] Initially, the caps only applied to medical malpractice claims and capped noneconomic damages at $500,000.[90] The 2004 tort

82. *Id.*

83. W. Kip Viscusi, The Blockbuster Punitive Damages Awards, Discussion Paper No. 473 at 8-9 and Table 2, Harvard John M. Olin Center for Law, Economics, and Business (Apr. 2004), http://www.law.harvard.edu/ programs/olin_center/papers/pdf/473.pdf (last accessed June 25, 2015) (At the time of Mississippi's cap on punitive damages, Mississippi was considered a venue "sympathetic to plaintiffs" and was one of "the leading punitive damages awards states.").

84. 517 U.S. 559 (1996) (awarding $2 million punitive in damages for failing to disclose that an automobile had been repainted was grossly excessive and violated due process).

85. *Id.* at 568, 611.

86. CIVIL JUSTICE REFORM, 2002 Miss. Laws 3rd Ex. Sess. Ch. 4 (H.B. 19) (adopting caps in MISS. CODE ANN. § 11-1-65(3)(a)).

87. CIVIL PROCEDURE—TORT REFORM—VENUE; DAMAGES; JURIES, ETC., 2004 Miss. Laws 1st Ex. Sess. Ch. 1 (H.B. 13).

88. Clark, *supra* n.1 at 388.

89. MEDICAL MALPRACTICE TORT REFORM, 2002 Miss. Laws 3rd Ex. Sess. Ch. 2 (H.B. 2).

90. *Id.*

reform efforts left medical malpractice caps unchanged but enacted a $1 million noneconomic damage cap for all other claims.[91]

For the most part, Mississippi's two categories of statutory noneconomic damage caps have been consistently applied since their enactment[92] even though a few Mississippi trial courts have found their application to be unconstitutional.[93] The Fifth Circuit in its March 2013 *Learmonth* opinion upheld Mississippi's caps.[94] But as discussed more fully below, since no Mississippi appellate court has directly addressed the issue, litigants have continued to challenge the constitutionality of Mississippi's noneconomic damage caps.

IV. THE REMAINING CHALLENGE 10 YEARS LATER: NONECONOMIC DAMAGE CAPS IN THE SPOTLIGHT

Although there appears to no longer be any serious dispute that the tort reform measures discussed above are fair and have brought beneficial and needed reforms to Mississippi's civil justice system,[95] one reform continues to receive scrutiny—caps on noneconomic damages established under section 11-1-60.

Mississippi's noneconomic damage caps are not unique. At least thirty-nine states have enacted such damage caps.[96] Nearly all of them have been challenged at some point, but the majority of state statutory caps have been upheld.[97]

The Mississippi Supreme Court has not yet directly addressed the constitutionality of the cap on noneconomic damages in a case in which that

91. CIVIL PROCEDURE—TORT REFORM—VENUE; DAMAGES; JURIES, ETC., 2004 Miss. Laws 1st Ex. Sess. Ch. 1 (H.B. 13).

92. Double Quick, Inc. v. Lymas, 50 So. 3d 292, 293 (Miss. 2011) (trial court reduced noneconomic damages to $1million pursuant to section 11-1-60); Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986, 990 (Miss. 2012) (same); *see also* Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494 at *2, *11 (S.D. Miss. June 13, 2013), appeal dismissed (Aug. 21, 2013) (applying $500,000 cap to medical malpractice claim).

93. Tanner v. Eagle Oil & Gas Co., No. 111-0013, slip op. at 10, 2012 WL 7748580 (Jasper Cnty. Cir. Ct. Oct. 22, 2012) (declaring Section 11-1-60 unconstitutional); Carter v. Interstate Realty Mgmt. Co., No. 14-CI-09-0019, slip op. at 5-6 (Coahoma Cnty. Cir. Ct. Apr. 20, 2012) (same); *but see* Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 263 (5th Cir. 2013) ("We first observe that other Mississippi trial courts do not share the *Carter* court's view.") (citing Bryant ex rel. Bryant v. McCarty, Cause No. CV2006-0261CD (DeSoto Cnty. Cir. Ct. Aug. 27, 2009); Lymas v. Double Quick, Inc., Civ. No. 2007-0072 (Humphreys Cnty. Cir. Ct. Sept. 17, 2008)).

94. *Learmonth*, 710 F.3d at 249.

95. Audio Recording: Ten Years Later: The Effects of Tort Reform in Mississippi, held by the Mississippi College Law Review (Mar. 20 2015) (on file with author).

96. *Clemons*, 2013 WL 3943494 at *2 (citing David F. Maron, *Statutory Damage Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 Miss. C.L. Rev. 109, 110 (2013) ("In all, some thirty-nine states enacted caps on noneconomic damages. In nineteen states, courts have upheld the statutes; courts in nine states have struck them down, and eleven states have statutory caps that have never been challenged. Of those eleven, two have statutes which were previously struck down but then reenacted.").

97. *See id.* After the *Clemons* opinion and cited article were authored, another state struck down its statutory damage cap. *See* Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014). The majority of states, however, still uphold them.

issue was squarely presented.[98] In 2012, the issue reached the Fifth Circuit after the caps were upheld by the Southern District of Mississippi. Ultimately,[99] the Fifth Circuit, in a thorough and well-grounded opinion, affirmed the district court's holding that the caps were constitutional.

Less than a year later, another Mississippi federal court had the opportunity to address the constitutionality of the lesser caps for medical malpractice actions. District Court Judge Carlton Reeves, while expressing deep concerns about the impact of caps in certain cases,[100] held that the plaintiff had not met its heavy burden of proving that they were unconstitutional.[101]

Notwithstanding the consecutive federal opinions upholding Mississippi's statutory caps on noneconomic damages, because no Mississippi appellate court has directly decided the issue, their constitutionality continues to be challenged. A few Mississippi trial courts have held them to be unconstitutional,[102] but to date, those cases have settled or been dismissed prior to a ruling from an appellate court. In the past year, three cases have had the opportunity to go before a Mississippi appellate court on the issue. One involved a dispute over the timing of the application of the damages cap, but apparently was not appealed.[103] Another presumably settled and

98. *See* Estate of Klaus v. Vicksburg Healthcare, LLC, 972 So. 2d 555, 556 (Miss. 2007) (refusing to look beyond the plain language of the statute in order to redress "the potential unintended consequences of the legislative act").

99. Because the constitutionality of the caps is governed by state law, the Fifth Circuit certified the question to the Mississippi Supreme court, Learmonth v. Sears, Roebuck & Co., 631 F.3d 724, 740 (5th Cir. 2011), who initially accepted. *See* Sears, Roebuck & Co. v. Learmonth, 95 So. 3d 633 (Miss. 2012). But after reviewing the jury verdict, the Mississippi Supreme Court could not determine what portion of the $4 million jury verdict was attributable to noneconomic damages (it was a general verdict). *Id.* at 637. Thus, the Mississippi Supreme Court declined to answer the question. *Id.* The Fifth Circuit therefore had to make an *Erie*-guess about whether the caps were constitutional under Mississippi. Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 255-57 (5th Cir. 2013). It found that they were. *Id.* at 267.

100. Judge Reeves explained how the cap's application under the unique circumstances of this case prevented full recovery by the plaintiffs and also allowed the government to escape penalties:

> [T]he Court will take a moment to explain just how discriminatory the application of the statutory cap is in this case. . . . [A]pplication of the cap reduces Tiara and Aubrey Anna's own pain and suffering below that amount shown by the evidence. It then values Elona, Keontray, and Kathy Clemons' losses at $0. This is an absurd result because the value of having a mother, sister, and child is greater than $0. No reasonable fact-finder could assess the loss to the Clemons family at $0, no matter how intangible and subjective loss is. [Furthermore], punitive damages are not permitted in this case because the defendant is the government. That is unfortunate, since there was strong evidence in this case showing that the government knew of but failed to act upon very serious deficiencies with the quality of the physicians and the medical equipment at the facility where Tiara and Aubrey Anna were treated.

Clemons, 2013 WL 3943494 at *14.

101. *Id.* ("The undersigned obviously believes that § 11-1-60(2)(a) has a discriminatory effect as to the plaintiff and her family, leaving them without adequate remedy for their very real, serious injuries. And there may be doubts as to the correctness of the legislature's ostensible belief that capping noneconomic damages lowers medical malpractice premiums . . . But that is not enough. Doubts require upholding the statutory provision, and it cannot be said that the plaintiff has proven beyond a reasonable doubt that there is *no* possible rational basis for the legislature's action.").

102. Tanner v. Eagle Oil & Gas Co., No. 111-0013, 2012 WL 7748580 (Jasper Cty. Cir. Ct. Oct. 22, 2012) (declaring section 11-1-60 unconstitutional); Carter v. Interstate Realty Mgmt. Co., No. 14-CI-09-0019, slip op. at 5-6 (Coahoma Cty. Cir. Ct. Apr. 20, 2012) (same).

103. Walls v. Williams-Pyro, Inc., Cause No. 251-13-126CIV (Cir. Ct. Hinds Cty. Oct. 7, 2014).

was dismissed on March 12, 2015.[104] And a third challenge, *Brooks v. Glover*, remains pending.

On March 9, 2015, the plaintiff in *Brooks v. Glover* filed a cross-appeal with the Mississippi Court of Appeals challenging the constitutionality of section 11-1-60.[105] But as the Mississippi Attorney General's appellate brief clearly states, neither the arguments presented in *Glover*, nor the arguments presented in similar constitutional challenges from around the country, can satisfy a plaintiff's heavy burden of proving section 11-1-60 is unconstitutional "beyond a reasonable doubt."[106]

A. Standard of Review for Constitutional Challenges

There is a "strong presumption" that legislation is constitutional.[107] To overcome this presumption, the party challenging a statute must prove that the statute is unconstitutional "beyond a reasonable doubt."[108] Consistent with the legislature's plenary authority to establish public policy for the state, the judiciary is prohibited from substituting its own judgment when conducting a constitutional analysis:

> In determining whether an act of the Legislature violates the Constitution, the Courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution. Nor are the courts at liberty to declare an Act (of the legislature) void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words.[109]

When conducting judicial review, a court should keep in mind that "the challenged act has been passed by legislators and approved by a governor sworn to uphold the selfsame constitution as we are."[110] "All doubts must be resolved in favor of validity of a statute."[111]

Furthermore, in a due process or equal protection analysis, the level of scrutiny must be determined. If a statute implicates a "suspect class" or infringes upon a "fundamental right," it is subject to strict scrutiny.[112] But

104. Interstate Realty Mgmt. Co. v. Carter, No. 2013-CA-00420-SCT (Mar. 12, 2015).

105. Brief of Appellee at 41-50, Brooks v. Glover, 2013-CA-00052-COA. (2015) (No. 251-11-716CIV).

106. Brief of Attorney General at 6, Brooks v. Glover, 2013-CA-00052-COA. (2015) (No. 251-11-716CIV).

107. Cities of Oxford, Carthage, Starkville and Tupelo v. Ne. Elec. Power Ass'n, 704 So. 2d 59, 65 (Miss. 1997).

108. Pascagoula Sch. Dist. v. Tucker, 91 So. 3d 598, 603 (Miss. 2012); Hemba v. Miss. Dep't of Corr., 998 So. 2d 1003, 1005 (Miss. 2009); Oxford Asset Partners, LLC v. City of Oxford, 970 So. 2d 116, 120 (Miss. 2007); PHE, Inc. v. State, 877 So. 2d 1244, 1247 (Miss. 2004).

109. Pathfinder Coach Div. of Superior Coach Corp. v. Cottrell, 62 So. 2d 383, 385 (Miss. 1953).

110. State v. Roderick, 704 So. 2d 49, 52 (Miss. 1997).

111. PHE, Inc., 877 So. 2d at 1247.

112. Wells by Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883, 893 (Miss. 1994).

if neither of these are present, a statute is subjected to the less rigorous rational basis review.[113] Under rational basis review, a law need only be "rationally or reasonably related to a proper legislative purpose."[114] Laws subject to rational basis review are almost always upheld even if the legislature does not select the best method to accomplish its stated goal.[115] So the level of scrutiny tends to be dispositive under that standard.[116]

In reviewing challenges to noneconomic damage caps, the clear majority of courts have applied rational basis review, finding that those laws did not implicate a fundamental right or a suspect class.[117] A few states have applied a higher level of scrutiny,[118] and the recent trend of litigants is to argue that strict scrutiny applies.[119] Some trial courts have agreed.[120] But as discussed below—and as recognized by the majority of courts—rational basis review, not strict scrutiny, remains the correct standard.

1. There is no "fundamental right" to full recovery.

There are a number of recognized fundamental rights, but the right to a full recovery in tort is not one of them. Indeed, many state courts have affirmatively recognized as much.[121] Since a plaintiff's interest in tort recovery is economic, it is only entitled to rational basis review.[122] The minority of jurisdictions that recognize a full recovery as a fundamental right do so because of provisions in their state constitutions specifically guaranteeing that the amount of recovery shall not be limited.[123] Courts have held that the absence of such a provision establishes that "full recovery" is

113. *Id.*; Justus v. State, 750 So. 2d 1277, 1279 (Miss. Ct. App. 1999) (citing Westbrook v. City of Jackson, 665 So. 2d 833, 838 (Miss. 1995); Heller v. Doe, 509 U.S. 312 (1993)).

114. *Wells*, 645 So. 2d at 893; U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980).

115. *See* Minn. v. Clover Leaf Creamery Co., 449 U.S. 456 (1991).

116. Carly N. Kelly, & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED & ETHICS 515, 522 (Fall 2005).

117. *Id.*

118. *Id.*; *see, e.g.*, Moore v. Mobile Infirmary Assoc., 592 So. 2d 156, 167-69 (Ala. 1991) (implicitly applying a heightened standard of review when it considered empirical studies in determining whether Alabama's cap on noneconomic damages served its intended purpose).

119. Brief of Appellee at 42, Brooks v. Glover, 2013-CA-00052-COA. (2015) (No. 251-11-716CIV).; Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494 at *8-9 (S.D. Miss. June 13, 2013), *appeal dismissed* (Aug. 21, 2013) (court rejected plaintiff's argument that strict scrutiny applied).

120. *See* Memorandum and Order at 9-10, Clark v. Cain, et al., Docket No. 12-C-1147 (Hamilton Cty. Cir. Ct. Mar. 9, 2015). The trial court in *Clark* believed that Tennessee's noneconomic damage caps infringed upon a plaintiff's right to a jury trial. *Id.* at 9-10. Believing the right to a jury trial was akin to the fundamental right to privacy, the trial court applied strict scrutiny. *Id.* at 4 (citing Planned Parenthood v. Sundquist, 38 S.W.3d 1 (Tenn. 2000)).

121. *See, e.g.*, Meech v. Hillhaven W., Inc., 776 P.2d 488, 493 (Mont. 1989) ("[O]ur remedy guarantee does not create a fundamental right to full legal redress." This is in accord with another Montana rule: "No one has a vested right to any rule of common law."); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 531 (Va. 1989) ("[A] party has no fundamental right to a particular remedy or a full recovery in tort."); Stuart v. City of Morgan City, 504 So. 2d 934, 941 (La. Ct. App. 1987) ("[A] victim's right to sue in tort for full recovery for an injury is not a fundamental right.").

122. Miller v. Johnson, 289 P.3d 1098, 1120 (Kan. 2012) (citing Duke Power Co. v. Carolina Env. Study Grp., 438 U.S. 59, 83 (1978)).

123. *See* ARIZ. CONST. art. XVIII, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.").

not a fundamental right.[124] Not only does Mississippi's constitution not contain such a provision, but also the Mississippi Supreme Court has itself refused to apply a heightened level of scrutiny to statutes limiting recovery of damages.[125]

2. Tort Plaintiffs are not a "suspect class."

Damage caps have been challenged on the basis that they treat different groups of plaintiffs or defendants differently.[126] Basically, challengers have claimed that making a distinction between plaintiffs based on the type or severity of their injuries violates equal protection guarantees. But Mississippi law is clear: "[p]arties injured by . . . tortfeasors, are not a 'suspect class.'"[127] Other jurisdictions agree.[128]

In sum, because there is no fundamental right to a full recovery and because tort victims are not a suspect class, a constitutional challenge to section 11-1-60 should be analyzed under rational basis review.[129]

B. Constitutional Challenges to Section 11-1-60.

The seminal case addressing the constitutionality of section 11-1-60 is *Learmonth v. Sears, Roebuck & Co.*[130] In *Learmonth*, the Fifth Circuit's *Erie*-decision upheld Mississippi's $1 million noneconomic damage cap against challenges based on right to jury trial and separation of powers challenges.[131] Not long after *Learmonth*, the United States District Court for the Southern District of Mississippi addressed the constitutionality of

124. Boyd v. Bulala, 647 F. Supp. 781, 787 (W.D. Va. 1986) *affd in part, rev'd in part and question certified,* 877 F.2d 1191 (4th Cir. 1989), *certified question answered,* 389 S.E.2d 670 (Va. 1990) and *amended,* 678 F. Supp. 612 (W.D. Va. 1988) ("[A]lthough the constitutions of certain states specifically prohibit limitations upon recovery in personal injury actions, *see, e.g.,* ARIZ. CONST. art. 18 § 6, the Virginia Constitution contains no such provision. Thus, the right to a full recovery in tort is not a fundamental right under the Virginia Constitution.").

125. Wells by Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883, 896 (Miss. 1994) ("Parties injured by government tortfeasors, or by any tortfeasor, are not a 'suspect class.' There is no fundamental right to sue the government for damages.").

126. Equal protection challenges to damage caps have been based on one or more of three alleged "suspect classes": (1) medical malpractice plaintiffs versus all others; (2) defendants sued for medical negligence versus all other tort defendants; and (3) plaintiffs with injuries below the cap, which receive full recovery, versus plaintiffs with injuries above the cap which do not. Kelly and Mello, *supra* note 116 at 522.

127. *Wells*, 645 So. 2d at 896.

128. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1071 (Ill. 1997) (establishing rational basis test for classifications involving tort victims); Murphy v. Edmonds, 601 A.2d 102, 111 (Md. 1992) (same); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 534 (Va. 1989) (same); *but see* Mary Ann Willis, Comment, *Limitation on Recovery of Damages Medical Malpractice Cases: A Violation of Equal Protection?,* 54 U. CIN. L. REV. 1329, 1350-51 (1986) (advocating intermediate scrutiny for classifications disadvantaging tort victims).

129. The United States District Court of the Southern District of Mississippi has recently held that even Section 11-1-60(2)(a)'s lesser cap in medical malpractice cases does not interfere with a fundamental right of disadvantage a suspect class. Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494, *9 (S.D. Miss. June 13, 2013), *appeal dismissed* (Aug. 21, 2013) (citing *Ford Motor Co.,* 264 F .3d at 510; *Wells,* 645 So. 2d at 896).

130. 710 F.3d 249, 267 (5th Cir. 2013).

131. *Id.* (upholding MISS. CODE ANN. § 11-1-60(2)(b) (1972)).

Mississippi's cap on noneconomic damages in medical practice cases.[132] As discussed above, while voicing disapproval of the effect the damage caps had on the plaintiff in that particular case,[133] the court nevertheless found the caps constitutional against special legislation, due process, equal protection, and takings clause challenges, concluding that "it cannot be said that the plaintiff has proven beyond a reasonable doubt that there is *no* possible rational basis for the legislature's action."[134]

Over the course of the following year and a half, Mississippi plaintiffs continued to challenge the constitutionality of section 11-1-60.[135] One of those challenges, *Brooks v. Glover,* is pending. The plaintiff in *Glover* filed a cross-appeal[136] challenging the constitutionality of section 11-1-60[137] on the following grounds:

Miss. Const., art. III § 24 Open Courts; remedy for injury;

Miss. Const., art. III § 25 Access to courts;

Miss. Const., art. III § 31 Trial by jury;

Miss. Const., art. III §§ 1-2 Separation of Powers; and

Miss. Const., art. IV § 87 Special or local laws.[138]

Because the *Glover* appeal is pending as of the writing of this Article, whether or how the court will reach the issue remains to be seen.[139]

The following subsections in this Article analyze constitutional challenges that have been or could be made against section 11-1-60. Consistent with the majority of other states, section 11-1-60 should be upheld under any constitutional challenge.

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132. *Clemons*, 2013 WL 3943494 at *9 (upholding MISS. CODE ANN. § 11-1-60(2)(a)).

133. *Id.* at *12-14.

134. *Id.* at *14.

135. *See supra* n.103-104 and accompanying text.

136. Although the Mississippi Supreme Court typically hears constitutional issues and issues of first impression, the case was assigned to the Court of Appeals before the appellees filed a cross-appeal challenging the constitutionality of Section 11-1-60. Once a case has been assigned, "neither the Court of Appeals nor any party may file any pleading or certification seeking reassignment." MISS. R. APP. P. 16(e). Appellees nevertheless filed a motion to challenge the assignment, which was denied.

137. Brief of Appellee at 41-50, Brooks v. Glover, 2013-CA-00052-COA. (2015) (No. 251-11-716CIV).

138. *Id.*

139. If the Court of Appeals decides the primary appeal in the appellants' favor and reverses the underlying judgment, the constitutional challenge should be mooted. Reply Brief of Appellant at 20, Brooks v. Glover, 2013-CA-00052-COA (2015) (No. 251-11-716CIV) (citing Manhattan Nursing & Rehab. v. Pace, 134 So. 3d 810, 817 (¶ 23) (Miss. Ct. App. 2014) ("'Courts have a solemn duty to avoid passing upon the constitutionality of any law unless compelled to do so by an issue squarely presented to and confronting a court in a particular case.'") (quoting State v. Watkins, 676 So. 2d 247, 149 (Miss. 1996)). And even if the Court of Appeals decides the issue, the Supreme Court would still have an opportunity to rule.

1. Right to Jury Trial.

Perhaps the most often-cited basis for challenging noneconomic damage caps is that it infringes upon a plaintiff's constitutional right to a trial by jury. "There are essentially two lines of cases addressing whether a cap on damages deprives a victim of the right to a jury trial."[140] "One position is that the jury's right to determine damages extends not only to a factual assessment of their amount, but also to an actual award of those damages."[141] "The other position . . . notes that although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment."[142] The majority of states have subscribed to the latter view, as did the Fifth Circuit in *Learmonth*.[143]

As the Fifth Circuit correctly noted, the first step in the constitutional analysis is to place the issue in the framework of Mississippi law, which "distinguishes between a jury's verdict and a court's judgment."[144] The distinction between a verdict and award can be seen in both the mechanics of Mississippi's Rules of Civil Procedure,[145] as well as its earliest laws of remedies.[146] A "verdict" or "award" is "a purely factual finding with respect to compensatory damages," whereas a "judgment" is "an act whereby the law that applies to the facts at bar is given effect."[147] Placing section 11-1-60(2)(b) into this framework, the Fifth Circuit concluded that section could "be interpreted not to alter a jury's factual damages determination, but instead to impose a strictly legal limitation on the judgment that provides the remedy for a noneconomic injury."[148]

After establishing the mentary damage caps, Section 11-1-60 provides that the "trier of fact shall not be advised of the limitations imposed by this

140. Judd v. Drezga, 103 P.3d 135, 144 (Utah 2004).

141. *Id.*

142. *Id.* (quoting Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989)).

143. Learmonth v. Sears, Roebuck and Co., 710 F.3d 249, 259-61 (5th Cir. 2013).

144. *Id.* at 259.

145. *Id.* (citing MISS. R. CIV. P. 54, advisory committee's note) ("The terms 'decision' and 'judgment' are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.").

146. *Id.* (citing Lewis v. Garrett's Adm'rs, 6 Miss. (5 Howard) 434, 455 (1841) ("[Wlhether the court pronounces the judgment of the law upon facts found by the jury in cases where a trial by jury is required, or upon facts ascertained in other modes when they are permitted, the judgment is still the award of law."); 3 WILLIAM BLACKSTONE, COMMENTARIES *396 ("The judgment, in short, is the remedy prescribed by law for the redress of injuries."); Stanford Young, Mississippi Trial Handbook § 37:1 (3d ed. 2012) ("[A] judgment is the conclusion of the law upon the matters contained in the record.")).

147. *Learmonth*, 710 F.3d at 259 (citing Sears, Roebuck & Co. v. Learmonth, 95 So. 3d 633, 639 (Miss. 2012) (the amount of noneconomic damages is "an essential, contested, requisite *fact*" (emphasis added)); City of Jackson v. Locklar, 431 So. 2d 475, 481 (Miss. 1983) ("The jury's [damages] verdict is a finding of fact."); Nichols v. Daniels, 1 Miss. (1 Walker) 224, 224 (1826) (in a court of law, a judge "pronounce[s] the law arising upon the facts found by the jury"); *cf.* Oakes v. State, 54 So. 79, 80 (Miss. 1910) (a verdict as to liability reflects a mixed question of law and fact)).

148. *Learmonth*, 710 F.3d at 260.

subsection."[149] The jury remains free to fulfill its fact-finding role unhampered. Only then, after the jury has made its finding, "the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation."[150] Section 11-1-60 thus permits the jury to determine the facts and the judge to thereafter apply the law.[151] Accordingly, the Fifth Circuit held that the Mississippi legislature "has not invaded the jury's fact-finding role in enacting § 11-1-60(2)(b)."[152]

The plaintiff in *Glover* raised essentially the same right to jury trial challenge before the Mississippi Court of Appeals.[153] If the Court of Appeals applies *Learmonth's* thorough analysis, section 11-1-60 will be upheld.[154]

2. Separation of Powers

Like the federal and most state constitutions, the Mississippi Constitution contains a separation of powers clause.[155] Applying separation of powers, the Mississippi Supreme Court has held that "the judicial branch should not engage in policy decisions"[156] and courts "are without the right to substitute their judgment for that of the Legislature as to [a statute's] wisdom and policy."[157]

In *Learmonth*, the plaintiff argued that section 11-1-60(2)(b) violated separation of powers for two reasons.[158] First, she argued that the damage caps interfered with the judicial procedure of remittitur.[159] Second, she claimed section 11-1-60(2)(b) was facially invalid as a legislatively promulgates rule of judicial procedure.[160] The Fifth Circuit squarely rejected these arguments.[161] The plaintiff in *Glover* pursued a separation of powers

149. Miss. Code Ann. § 11-1-60(c) (1972).

150. *Id.*

151. Learmonth, 710 F.3d at 260 (citing Natchez & S.R.R. Co. v. Crawford, 55 So. 596, 598 (Miss. 1911) ("[T]he common-law jury, guaranteed by section 31, is a jury with power alone to try issues of fact, and not of law."); Yazoo & Miss. Valley R.R. Co. v. Wallace, 43 So. 469, 470-71 (Miss. 1907) ("trial by jury" means "in court under the forms of law, with a judge presiding to direct the proceedings in conformity with it"); Commercial Bank of Rodney v. State, 12 Miss. (4 S. & M.) 439, 515 (1845) (Sharkey, C.J., dissenting) ("The law defines rights and provides remedies, but it is for the judiciary to construe the law in its application to the objects of its provisions, and to enforce the remedy."); 3 BLACKSTONE, *supra* note 146 at *116 (the victim of a legal wrong "acquire[s] an incomplete or inchoate right [to damages], the instant he receives the injury; though such right be not fully ascertained till they are assessed by the intervention of the law") (footnote omitted).

152. *Learmonth*, 710 F.3d at 261.

153. Brief for Appellee at 43-46, Brooks v. Glover, 2013-CA-00052-COA (Miss. Ct. App. 2013).

154. For a more detailed analysis of jury trial challenges to noneconomic damage caps in Mississippi and other states, *see* David Maron, *Statutory Damage Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 Miss. C.L. Rev. 109, 112-19 (2013).

155. MISS. CONST. art. I, § 2

156. Limbert v. Miss. Univ. for Women Alumnae Ass'n, 998 So. 2d 993, 1000 (Miss. 2008).

157. Albritton v. City of Winona, 178 So. 799, 803 (Miss. 1938).

158. Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 264-266 (5th Cir. 2013).

159. *Id.* at 264-65.

160. *Id.* at 265-66.

161. *Id.*

challenge for substantially the same reasons.[162] For the reasons discussed in *Learmonth*, the challenges in *Glover* should be unsuccessful under controlling law as well.[163]

Plaintiffs' choice to raise separation of powers arguments is interesting because it is a two-edged sword. Just as a legislature should not overstep its bounds into the province of the judiciary, the judiciary must likewise refuse to undertake the policy-setting role of the legislature.[164] "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[165] "Courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution."[166] "All doubts must be resolved in favor of validity of a statute."[167]

A clear example of this is *Clemons v. United States*.[168] Though expressing some doubt and deep concerns regarding the application of Mississippi's caps on noneconomic damages to the facts of a case involving serious injuries, the court declined to "substitute [its] judgment" for that of the legislature:

[T]here may be doubts as to the correctness of the legislature's ostensible belief that capping non-economic damages lowers medical malpractice premiums; the parties presented no evidence on that point either way. But that is not enough. Doubts require upholding the statutory provision, and it cannot be said that the plaintiff has proven beyond a reasonable doubt that there is *no* possible rational basis for the legislature's action.[169]

Likewise, the Mississippi Supreme Court has also declined to find section 11-1-60(2)(a) facially unconstitutional.[170] It concluded that "to properly preserve the separation of powers mandated by the Mississippi Constitution, this Court should act with restraint."[171]

There are times, however, when courts substitute their opinion for that of the legislature. A trial court in Tennessee recently declared Tennessee's noneconomic damage cap unconstitutional. In doing so, that court improperly considered not only the "social justification for the legislation . . . but

162. Brief for Appellee at 46-60, Brooks v. Glover, 2013-CA-00052-COA (Miss. Ct. App. 2013).

163. For a more detailed analysis of separation of power challenges to noneconomic damage caps in Mississippi and other states, *see* Maron, *supra* note 154, at 120-123.

164. Jones v. City of Ridgeland, 48 So. 3d 530, 536 (Miss. 2010) ("We also must be cautious not to encroach on the constitutional powers belonging to the Legislature.").

165. Chase v. State, 873 So. 2d 1013, 1024 (Miss. 2004) (citation omitted).

166. Pathfinder Coach Div. of Superior Coach Corp. v. Cottrell, 62 So. 2d 383, 385 (Miss. 1953).

167. PHE, Inc. v. State, 877 So. 2d 1244, 1247 (Miss. 2004).

168. Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494, *14 (S.D. Miss. June 13, 2013), appeal dismissed (Aug. 21, 2013).

169. *Id.* (emphasis in original).

170. Estate of Klaus v. Vicksburg Healthcare, LLC, 972 So. 2d 555, 556 (Miss. 2007) (refusing to look beyond the plain language of the statute in order to redress "the potential unintended consequences of the legislative act").

171. *Id.*

also the factual basis for that social justification."[172] Although citing a thirty-five year old case which prohibited "independently examin[ing] the factual basis for the legislative justification for the statute," the trial court nevertheless did the opposite—it examined and re-weighed the factual basis for the legislature's justification.[173] This account is not isolated. In fact, most courts that have declared noneconomic damage caps unconstitutional have done so after re-examining and re-weighing the policy and data underlying the legislature's deliberative decision.[174]

When a court examines whether *it* believes that there is sufficient data to support a legislative decision, it must re-weigh numerous (and competing) studies that purport to show that damage caps have served their intended purpose and vice versa.[175] Thus, when such courts go beyond judicial review and re-weigh the legislative process, they necessarily substitute their views for that of the broader deliberative legislative process, a process that is precisely designed address and weigh such policy issues.[176] Mississippi's long-standing jurisprudence prohibits this encroachment.[177] The Mississippi Supreme Court has emphasized that courts "have no constituency."[178] Instead, they "have a duty to respect legitimate policy choices made by those who do," and the "responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are *not* judicial ones."[179] Tellingly, "the people" do not always favor abolition of noneconomic damage caps or even an increase in their amounts. For instance, in November 2014, California voters were asked to decide whether to raise the state's $250,000

172. Memorandum and Order at 16, Clark v. Cain, et al., Docket No. 12-C-1147 (Hamilton Cnty. Cir. Ct. Mar. 9, 2015).

173. *Id.* at 16-17 (citing Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980) *overruled by* Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007)).

174. *See, e.g.,* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 168 (Ala. 1991) ("The correlation between the damages cap . . . and the reduction of health care costs . . . is, at best, indirect and remote."); Carson v. Mewer, 120 N.H. 925 (1980) ("The necessary relationship between the legislative goal of rate reduction and the means chosen to attain that goal is weak at best."); State v. Sheward, 715 N.E.2d 1062 (Ohio 1999) ("[U]nable to find . . . any evidence between the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates."); *see also* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 649 (Mo. 2012) (Russell, J., dissenting) (calling majority's decision to overrule twenty years of precedent by declaring Missouri's cap on noneconomic damage unconstitutional, results oriented).

175. *Compare The Effects of Tort Reform: Evidence from the States*, A Congressional Budget Office Paper, at vii (June 2004) ("The most consistent finding in the studies that CBO reviewed was that caps on damage awards reduced the number of lawsuits filed, the value of awards, and insurance costs."), http://www.cbo.gov/ sites/default/files/report_2.pdf (last accessed June 25, 2015), *with Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform,"* 5 YALE J. HEALTH POL'Y L. & ETHICS 357, 363-69 (2005) (arguing that caps do little to address the rising costs of health care and medical malpractice insurance and that one way to address those concerns is to have "stronger regulation of the insurance industry").

176. Chase v. State, 873 So. 2d 1013, 1024 (Miss. 2004) (citations omitted).

177. *See supra*, n.165-167 and accompanying text.

178. Barbour v. State ex rel. Hood, 974 So. 2d 232, 243 (Miss. 2008) (quoting Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)).

179. *Id.* at 243 (quoting *Chevron*, 467 U.S. at 866) (emphasis added).

limit on noneconomic damages in medical liability cases to $1.1 million.[180] California voters overwhelmingly rejected the proposal two to one.[181]

3. Due Process

While the plaintiff in *Learmonth* failed to preserve certain arguments on appeal, the Fifth Circuit nevertheless noted the possibility that "the Mississippi Constitution's Due Process Clause . . . might impose substantive constraints on the legislature's authority to cap compensatory damages."[182] The plaintiff in *Clemons* asserted a due process challenge to section 11-1-60.[183]

a. Procedural Due Process

A procedural due process challenge to legislative, noneconomic damage caps rests on the premise that a plaintiff has a vested property interest in whatever damages award a jury delivers and that imposition of any statutory damage cap deprives them of this full amount without an opportunity to present evidence as to why the full award amount is justified.

These arguments have been unsuccessful. For example, in *Etheridge vs. Medical Center Hospitals*, the plaintiff argued that Virginia's $750,000 damage cap deprived her of an effective opportunity to be heard since the damage cap "preordain[ed] the result of the hearing" and created "a conclusive presumption that no plaintiff's damages exceed $750,000."[184] The Virginia court, however, rejected that argument.[185] The district court in *Clemons* rejected a similar procedural due process argument because "[t]here ha[d] been a substantial amount of process offered by the proceedings in this Court, during which the plaintiff was well-represented and argued every one of her theories of recovery and unconstitutionality."[186] In fact, procedural due process arguments on this issue have never been successful.[187]

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180. *See* Mark A. Behrens & Cary Silverman, *Building on the Foundation: Mississippi's Tort Reform Success and a Path Forward*, __ MISS. C.L. REV. __ (2015).

181. *Id.* (citing Cal. Sec. of State, Ballot Measures by County (Dec. 10, 2014) (reporting that 66.8% of voters said "no" to Proposition 46), http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/88-ballot-measures.pdf).

182. Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 266 (5th Cir. 2013) (citing MISS. CONST. ART. III, §§ 14, 24).

183. Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494 at *8-15 (S.D. Miss. June 13, 2013), *appeal dismissed* (Aug. 21, 2013).

184. Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 530 (Va. 1989).

185. *Id.*

186. *Clemons*, 2013 WL 3943494 at *15

187. A compiled analysis of damage cap challenges concluded: "The procedural due process theory has never been successfully used to defeat damages caps legislation in any federal or state court." Kelly & Mello, *supra* note 116, at 523; *see also* Nicholas T. Timm, *From Damages Caps to Health Courts: Continuing Progress in Medical Malpractice Reform*, 2010 MICH. ST. L. Rev. 1209, 1228 (2010) (arguing that alternative tort reforms such as health courts would not violate procedural due process "because non-economic damages caps do not violate procedural due process"). The most recent high court cases addressing the constitutionality of noneconomic damage caps have not even considered procedural due process challenges. *See, e.g.*, Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012), *reh'g denied* (Sept. 25, 2012); Miller v. Johnson, 289 P.3d 1098 (Kan. 2012); MacDonald v. City

b. Substantive Due Process

To succeed on a substantive due process challenge, a plaintiff must prove both that he or she has a protected property interest under Mississippi law *and* that the government's limitation on his or her right is not rationally related[188] to a legitimate governmental interest.[189] Furthermore, the court should consider the social and economic conditions that existed when the statute was enacted or at the time the case was decided.[190] Mississippi "laws will not be invalidated under the due process or equal protection clauses unless they are manifestly arbitrary or unreasonable for the classifications."[191]

The first problem with a substantive due process challenge to section 11-1-60 is that "although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment."[192] Section 11-1-60 allows the jury to assess damages unimpeded. And, only after the jury has made its decision, does the court apply the statutory limitation on damages.[193] Thus, section 11-1-60 does not invade a protected property interest under Mississippi law.

The second, and perhaps higher, hurdle that a plaintiff must overcome is to show that section 11-1-60 is not rationally related to a legitimate government interest. Section 11-1-60 was enacted in the midst of a climate that had earned Mississippi national notoriety as a "judicial hellhole."[194] States across the country have similarly upheld noneconomic damage caps that were intended to combat "social or economic evils," such as excessive jury verdicts, rising health insurance premiums and a corresponding increase in healthcare costs.[195] There can be no doubt that the Mississippi legislature was trying to address the identical problems. While there may be policy debate about whether noneconomic damages caps were the best method to curb these problems and whether the caps had their intended effect, courts are not allowed to substitute their own judgment for that of the legislature and any doubts should be construed in favor of upholding the statute.[196]

Hosp., Inc., 715 S.E.2d 405 (W. Va. 2011); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010).

188. As discussed in Section IV. A. *supra*, and accompanying text, rational basis review should apply to a due process challenge to section 11-1-60. The United States District Court for the Southern District of Mississippi has applied this very standard when analyzing whether section 11-1-60 violated due process. *Clemons*, 2013 WL 3943494 at *14.

189. *Id.* (citing Simi Inv. Co., Inc. v. Harris Cnty., Tex., 236 F.3d 240, 250-51 (5th Cir. 2000)).

190. Albritton v. City of Winona, 178 So. 799, 804-05 (Miss. 1938).

191. *Clemons*, 2013 WL 3943494 at *9 (quoting Miss. Bd. of Nursing v. Belk, 481 So. 2d 826, 830 (Miss. 1985)).

192. Judd v. Drezga, 103 P.3d 135, 144 (Utah 2004) (quoting Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989)); *see supra* note 142 and accompanying text.

193. *Id.*

194. American Tort Reform Foundation, Judicial Hellholes (2004), http://www.atra.org/news-room/worst-states-liability-systems-are-home-judicial-hellholes%C2%AE (last accessed June 25, 2015).

195. *Judd*, 103 P.3d at 139.

196. *See supra* n.164-167 and accompanying text.

Under this deferential standard, recent substantive due process challenges to section 11-1-60 have not succeeded.[197]

The last remaining substantive due process argument is the statutory amount—that the caps are too low.[198] In other words, while the legislature can lawfully limit recoverable noneconomic damages, a cap of one dollar may be unreasonable or arbitrary.[199] This argument should not prove persuasive in Mississippi. Section 11-1-60 caps noneconomic damages for medical malpractice at $500,000 and all other claims at $1 million.[200] This is well above the national average.[201] Since 2011, the supreme courts in two other states have upheld statutory noneconomic damage caps of $250,000[202]—an amount far lower than Mississippi's caps. And in at least one other state, voters declined to increase their $250,000 noneconomic damage cap.[203]

4. Equal Protection

"Mississippi's constitution has no equal protection clause."[204] Even so, an equal protection challenge under the United State's Constitution should be unsuccessful because due process and equal protection challenges are usually reviewed under the same rational basis standard discussed in Section IV. B. 3. of this Article. Accordingly, many courts dispense with both questions in the same analysis.[205] As discussed *supra*, the Mississippi legislature had a rational basis in enacting section 11-1-60.[206]

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197. Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494 at *15 (S.D. Miss. June 13, 2013), *appeal dismissed,* (Aug. 21, 2013) ("[P]laintiff's substantive due process challenge fails for the same reason as her equal protection challenge: the State can articulate a rational basis for limiting non-economic damages . . . .").

198. While it is theoretically possible that a damage cap may be too low, Mississippi law is clear that the legislature does not have to provide a substitute remedy when statutorily limiting a plaintiff's recovery. *See* Wells by Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883, 891-892 (Miss. 1994). *Cf.,* Miller v. Johnson, 289 P.3d 1098, 1114 (Kan. 2012) (requiring legislature to provide a substitute remedy to replace the loss of a right (*i.e.,* a quid pro quo)).

199. Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 266 (5th Cir. 2013) (noting that Mississippi's due process clause might impose substantive constraints on the legislature's authority to cap damages at one dollar).

200. MISS. CODE ANN. § 11-1-60(2) (1972).

201. Maron, *supra* n.154 at Appendix.

202. *Miller*, 289 P.3d at 1118; MacDonald v. City Hosp., Inc., 715 S.E.2d 405, 419 (W. Va. 2011).

203. *See supra* n.180-181 and accompanying text.

204. Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494 at *10 (S.D. Miss. June 13, 2013), *appeal dismissed,* (Aug. 21, 2013).

205. Kelly & Mello, *supra* note 116 at 524; *see, e.g.*, Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1055 (Alaska 2002) (holding that the substantive due process question was dispensed with once the court found that the damages caps did not violate equal protection guarantees); *Clemons*, 2013 WL 3943494 at *8-10 (applying same rational basis analysis to due process and equal protection challenges to section 11-1-60).

206. *Clemons*, 2013 WL 3943494 at *15 ("[P]laintiff's substantive due process challenge fails for the same reason as her equal protection challenge: the State can articulate a rational basis for limiting non-economic damages . . . .").

5. Special Legislation

Section 11-1-60 has also been challenged as unlawful special legislation. The argument does not challenge section 11-1-60 in its entirety; rather, it maintains that the lesser $500,000 cap for medical injuries in section 11-1-60(2)(a) unlawfully benefits healthcare providers and penalizes plaintiffs who happen to be injured by healthcare providers.[207]

The Mississippi Constitution's special legislation clause, Article IV, section 87 provides:

> No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this State; nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted.[208]

Article IV, section 90 similarly provides that "[t]he legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws . . . . Regulating the practice in courts of justice . . . ."[209]

"The purpose of such provisions is to confine the power of the legislature to the enactment of general statutes conducive to the welfare of the state as a whole, to prevent diversity of laws on the same subject, to secure uniformity of law throughout the state as far as possible, and to prevent the granting of special privileges."[210] "A law is classified as general when it operates uniformly on all members of a class of persons, places or things requiring legislation peculiar to that class."[211] A local or private law cannot, however, be "enacted for the benefit of 'private individuals or corporations.'"[212]

Under this rubric, the Mississippi Supreme Court has repeatedly struck down laws that applied only to a particular city or county.[213] It has

207. This argument is substantially similar to equal protection challenges. *See supra* n.126, and accompanying text.

208. MISS. CONST. art. IV, § 87.

209. MISS. CONST. art. IV, § 90.

210. *Clemons*, 2013 WL 3943494 at *7 (quoting Smith v. Transcon. Gas Pipeline Corp., 310 So. 2d 281, 282 (Miss. 1975)).

211. *Id.* (quoting Sec'y of State v. Wiesenberg, 633 So. 2d 983, 995 (Miss. 1994)).

212. *Id.* (quoting Brandon v. City of Hattiesburg, 493 So. 2d 324, 326 (Miss. 1986)).

213. Oxford Asset Partners, LLC v. City of Oxford, 970 So. 2d 116, 118-19 (Miss. 2007) (striking down law that did not apply to the City of Oxford only); State ex rel. Pair v. Burroughs, 487 So. 2d 220, 225 (Miss. 1986) (striking down law applicable to Jones County only); Rolph v. Bd. of Trustees, 346 So. 2d 377, 379 (Miss. 1977) (striking down law applicable to Forrest County only); Smith v. Transcon. Gas Pipeline Corp., 310 So. 2d 281, 284 (Miss. 1975) (striking down law that did not apply to Jones County only).

likewise voided laws applicable to particular companies.[214] But laws that affect an entire industry have not been held to be impermissible special legislation.[215] A prime example is a case involving the Mississippi bar itself.

Under Mississippi law, only those admitted to the Mississippi bar, or those admitted *pro hac vice* into a particular court, can practice law in Mississippi.[216] This law clearly provides a special benefit exclusively to licensed attorneys.[217] It also "discriminates" against both non-lawyers and lawyers not admitted to the Mississippi bar.[218] Nevertheless, since this law is applicable to the entire legal industry, it is considered a permissible general law.[219]

For the same reason, the cap in section 11-1-60(2)(a) also is a general law.[220] "The statute applies to all health care providers across the State on equal terms . . . . Under Mississippi law, then, it is more akin to a general law than special legislation, and survives [a special legislation] constitutional challenge."[221]

6. Takings Clause

Article III, section 17 of the Mississippi Constitution prohibits "taking" property without just compensation.[222] Nationally, the takings clause has not been frequently used to challenge damage caps. But in Mississippi the argument has been presented and rejected with one court deeming it "'creative, but not persuasive.'"[223]

Takings jurisprudence almost always concerns real property where state action has the effect of either taking or diminishing the value of the real property (*e.g.,* eminent domain proceedings). In *Wells*, the Mississippi Supreme Court declined to invalidate the cap on damages recoverable against parents of minor school children because it had "never construed the [takings] clause to apply to a cause of action."[224] Essentially the same

214. State v. Mobile, J. & K.C.R. Co., 38 So. 732, 737 (Miss. 1905) (finding that "an express grant of power by the Legislature for the two [railroad] companies to consolidate . . . would have been void" under section 87 of the state Constitution).

215. *Clemons*, 2013 WL 3943494 at *7.

216. MISS. CODE ANN. § 73-3-55 (1972) ("It shall be unlawful for any person to engage in the practice of law in this state who has not been licensed according to law.").

217. *Clemons*, 2013 WL 3943494 at *8 n.8.

218. *Id.*

219. *Id.*

220. *Id.* at *7-8.

221. *Id.* at *8.

222. MISS. CONST. ART. III, § 17 ("Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.").

223. *Clemons*, 2013 WL 3943494 at *15 (quoting Wells by Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883, 895 (Miss. 1994)).

224. *Wells*, 645 So. 2d at 894-895.

argument was presented in *Clemons* to attack section 11-1-60(2)(a).[225] Relying on *Wells*, the district court determined "the plaintiff's takings challenge fails because her claim does not concern real property."[226]

7. Open Court and Access to Courts

The *Learmonth* opinion also left the question open of whether section 11-1-60 violated the Remedy Clause of the Mississippi Constitution,[227] also known as the "Open Courts" clause, which states: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."[228] In its challenge to section 11-1-60, the plaintiff in *Glover* relied upon both this section and the related "Access to Courts" section.[229]

The Mississippi Supreme Court has interpreted section 24 to provide "a reasonable right of access to the courts—a reasonable opportunity to be heard."[230] Significantly, the right of access to courts is not "absolute," and a litigant must "comply with legislative enactments, rules and judicial decisions."[231]

In *Wells*, the Mississippi Supreme Court reviewed whether a statute that limits the amount of damages for personal injuries violates article III, section 24.[232] It concluded it did not.[233] There, the plaintiffs challenged a statute that limited the amount of damages a school district could recover against the parents of a minor child to $20,000.[234] They claimed that this limitation of damages destroyed the constitutional guarantee that all courts shall provide a remedy by due course of law.[235] In rejecting this argument, the Mississippi Supreme Court held:

> We need not . . . elaborate the rule that the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object . . . . [T]here is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power

225. *Clemons*, 2013 WL 3943494 at *15.

226. *Id.*

227. Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 266 (5th Cir. 2013) (citing MISS. CONST. art. III, § 24).

228. MISS. CONST. art. III, § 24.

229. *Id.* at § 25 ("No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both.").

230. Arceo v. Tolliver, 949 So. 2d 691, 697 (Miss. 2006).

231. *Id.*

232. 645 So. 2d 883, 890-92 (Miss. 1992).

233. *Id.* at 892.

234. *Id.* at 890 (citing MISS. CODE ANN. § 37-11-53 (1972)).

235. *Id.*

> exists to change or abolish existing statutory and common-law remedies.[236]

In other words, the Open Courts clause provides a "fair hearing" in accordance with the principles of due process.[237] Article III, section 24 "has never been construed 'as guaranteeing limitless or absolute recovery for injury.'"[238]

V. MAINTAINING THE SUCCESS OF THE REFORMS

At the beginning of the last decade one author proposed many of the reforms discussed in this Article. He predicted that if enacted they would "contribute to eliminating Mississippi's unfavorable business reputation, return a sense of fairness to the state's judicial system, and increase the state's chances of creating and attracting more and better jobs for Mississippians."[239] Around the same time, former Mississippi Supreme Court Justice Rueben Anderson, commenting on Mississippi's then increasingly hostile business climate, cautioned that "[t]his state simply cannot expect to thumb its nose at national enterprise in the courtroom, while reaching out to shake its hand in the customer line."[240] And as Dick Thornburgh noted more than a decade ago, citizens have a significant stake in reforms at least in three areas: "Enhancing our economic competitiveness and ensuring job security, preserving our healthcare system and the viability of medical research, and guaranteeing to all citizens a timely day in court."[241] Indeed, civil justice reforms were, and remain, essential to all Mississippians.

With the legislative and judicial reforms discussed in this Article, we believe that the warnings by Justice Anderson and others have been heeded, and tort reform measures adopted have served their purposes. But certainly, "gains can become ground lost if [tort reform] efforts stop."[242] Policy arguments will continue on both sides of many of these tort reform issues.[243] And with those healthy debates, it is important to keep in mind

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236. *Id.*

237. Miles v. Bd. of Supervisors of Scott Cnty., 33 So. 2d 810, 814 (Miss. 1948). As discussed *supra*, a procedural due process challenge has never been effectively used to invalidate a noneconomic damage cap. *See supra* note 187 and accompanying text.

238. Chamberlin v. City of Hernando, 716 So. 2d 596, 602 (Miss. 1998) (quoting *Wells*, 645 So. 2d at 892).

239. Clark, *supra* n.1 at 394.

240. Reuben V. Anderson, *Why Mississippi Needs to Pay Attention to National Trends on Punitive Damages*, 71 MISS. L.J. 579, 584 (2001).

241. Thornburgh, *supra* n.4 at 514-15.

242. Behrens & Silverman, *supra* n.9 at 422.

243. For a discussion of studies demonstrating that tort reform has been beneficial, s*ee Medical Liability reform - NOW!*, American Medical Association (Feb. 1, 2011) (analyzing empirical evidence that tort reform measures, including noneconomic damage caps, have had both direct and indirect benefits on the healthcare industry, doctors, insurers, and patients alike); Ronald M. Stewart, Molly West, Richard Schirmer, & Kenneth R. Sirinek, *Tort Reform is Associated with Significant Increases in Texas Physicians Relative to the Texas Population*, Journal of Gastrointestinal Surgery (2012) (peer-reviewed article finding a significant increase in Texas physicians after enactment of tort reforms); Behrens & Silverman *supra* note 9 (empirical evidence that Mississippi's noneconomic damage caps expanded access to healthcare and increased business investment).

the history behind Mississippi's tort reform measures. Failure to learn from this history is the surest way to risk repeating the crisis.[244]

VI. CONCLUSION

There were very real problems with Mississippi's civil justice system 10 years ago. The numerous reform efforts discussed in this Article have served their intended purpose. Today, many of those reforms go unchallenged, with the exception of Mississippi's cap on noneconomic damages. While Mississippi's statutory cap on noneconomic damages has faced various constitutional challenges, it has and should continue to survive such attacks. How Mississippi's legal landscape will evolve over the next 10 years remains to be seen, but its course should be guided with an historical awareness and appreciation for these reforms and the significant problems they addressed.

Of course, there are studies to the contrary. *See* Scott Devito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 STANFORD J. COMPLEX LITIG. 62 (2015). While there may be ongoing policy arguments, it cannot be said that Mississippi's civil justice problems were "nonexistent." Nor, in light of Mississippi's disproportionately high jury verdicts, its reputation as a Mecca for tort claims, and other factors discussed in this article, can it be said that the tort reform measures were an "overreaction." *See e.g. supra* notes 2, 3, 12, 88 and accompanying text. Indeed Mississippi had gained national notoriety as a "judicial hellhole" to the point that a prominent Mississippi plaintiff's attorney noted that "[a]ny lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is." Judicial Hellholes (2011-2012), *supra* note 14. Furthermore, there is empirical support that Mississippi's tort reform measures did indeed address these issues: reduction in mass tort filings, reduction in medical malpractice premiums, and promotion of business development, to name a few. *See* Behrens & Silverman, *supra* note 9.

244. George Santayana observed that "[t]hose who cannot learn from history are doomed to repeat it." *George Santayana Quotes*, BRAINY QUOTE, (Jul. 18, 2015). http://www.brainyquote.com/quotes/quotes/g/georgesant101521.html.

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