

No. 05-CV-833

DISTRICT OF COLUMBIA COURT OF APPEALS

MEDSTAR-GEORGETOWN UNIVERSITY HOSPITAL,

Defendant-Appellant,

v.

JILL WEISE, et al.,

Plaintiffs-Appellees.

ON APPEAL FROM THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS
ASSOCIATION OF METROPOLITAN WASHINGTON, D.C.
SUPPORTING AFFIRMANCE OF THE JUDGMENT BELOW

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**MOTION OF THE TRIAL LAWYERS ASSOCIATION OF
METROPOLITAN WASHINGTON, D.C. FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE*
SUPPORTING AFFIRMANCE OF THE JUDGMENT BELOW**

The Trial Lawyers Association of Metropolitan Washington, D.C. (“TLA-DC”), by its President, Patrick A. Malone, moves for leave to file a brief as *amicus curiae* in this case pursuant to Rule 29 of this Court’s Rules and states as follows:

1. This case is an appeal by the defendant in a medical malpractice action which resulted in a jury verdict for the plaintiffs. The defendant below, Medstar-Georgetown University Hospital (“Medstar”), successfully moved for remittitur on one component of damages and now has appealed the trial court’s denial of its remittitur and new trial motions on the rest of the damages.

2. This appeal involves settled principles regarding the deference to be accorded a trial court’s decisions on post-trial motions such as those filed below and regarding the relevance of financial impact to a negligence case. However, three entities (“*amici*”), including a national “tort reform” association, have sought leave to file a brief in which they ask this Court to adopt and act upon their assumptions regarding, *inter alia*, District juries, pricing decisions by medical insurers in the District, and the supply of physicians in the District. Specifically, *amici* urge that this Court adopt a formula linking economic and non-economic damages for the alleged policy reason that insurers will raise premiums without the predictability that they assume such a formula would provide.

3. TLA-DC seeks leave of this Court to file the attached brief. The Appellees have consented under Rule 29(a); Medstar, the Appellant, has not. In the attached brief, TLA-DC provides a copy of the Superior Court data which show that District juries are not “runaway,” as

amici label them, but rather have awarded District malpractice plaintiffs no money more often than they have awarded damages. TLA-DC also sets forth the factors concerning insurers' pricing decisions which make those decisions more properly an issue for economists and legislative commissions than for litigation in a negligence case. TLA-DC further shows that the linkage of economic to non-economic damages would have the unfair result of valuing the pain and suffering of those of employment age over that of the elderly, and those with good jobs to lose over that of those without. *Amici's* proposed rule would lead to unjust results. It would also remove from the province of the jury the determination of the impact of the tort on each individual plaintiff's quality of life.

For the reasons stated above, the Trial Lawyers Association of Metropolitan Washington, D.C. respectfully seeks leave to file the attached brief as *amicus curiae*.

Respectfully submitted,
Trial Lawyers Association of Metropolitan
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RULE 28 (A) CORPORATE DISCLOSURE STATEMENT

The Trial Lawyers Association of Metropolitan Washington, D.C. (“TLA-DC”) is a § 501(c)(6) non-profit corporation affiliated with the Association of Trial Lawyers of America.

In accordance with Rule 28(a)(2)(A), this *amicus curiae* further states that it neither appeared nor had counsel below and that this brief is submitted by Patrick A. Malone, as its president.

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INTEREST OF *AMICUS CURIAE*

The Trial Lawyers Association of Metropolitan Washington, D.C. (“TLA-DC”) is the preeminent organization of lawyers in and around Washington, D.C., who principally represent plaintiffs in personal-injury, wrongful-death, and civil-rights actions, and claimants in workers'-compensation and Social Security disability administrative claims. Founded in 1955, TLA-DC is an incorporated, nonprofit affiliate of the Association of Trial Lawyers of America. Several hundred trial lawyers, including many of the leaders and most accomplished practitioners in the trial bar, comprise TLA-DC's membership.

TLA-DC is dedicated to the goals of protecting consumer health and safety, promoting the right to trial by jury, securing enforcement of civil rights, safeguarding our civil-justice system, and enhancing the professional development of trial lawyers. TLA-DC welcomes as members, without regard to race, sex, religion, nationality, ethnic background, age, or disability, all qualified persons who genuinely support its mission and who are dedicated to the cause of individuals who are injured, who are accused, or whose rights are violated or jeopardized.

TLA-DC’s interest in this case arose when Appellant and Defendant below, Medstar-Georgetown University Hospital (“Medstar”) filed a brief containing this threat: “Careful Review By This Court Is Particularly Warranted in Light of the Crippling Impact of Runaway Jury Awards on the Availability of Medical Services to the Community.” (its argument heading II(D)). By asserting that claim, Medstar asks this Court to undertake the following actions not normally in the purview of an appellate court: to find as fact the series of assumptions needed to link this case to the availability of health care locally; to adopt those assumptions as a matter of original jurisdiction and despite the settled principle that the financial impact of a verdict is irrelevant in negligence cases; and then to apply a new standard of review by which a trial court’s

rulings against medical tortfeasors are subject to a level of scrutiny stricter than that applied to cases involving other tortfeasors.

Medstar's *amici* filed a brief asking the Court to adopt the same series of assumptions. Those *amici* further ask this Court to legislate a formula by which non-economic damages would be capped at a certain ratio to economic damages.

TLA-DC has asked leave to participate in this case to give the Court a perspective and information on the analytical steps requisite to any acceptance of the compound factual proposition offered by Medstar and its *amici*. The first step is whether the District has experienced "runaway jury awards," and TLA-DC therefore includes a survey of jury awards in the Superior Court, done by Judges Joan Zeldon and Stephanie Duncan-Peters, in their capacity as chiefs of that court's Civil Division. Then, the role played by malpractice losses in insurers' profitability requires multiple steps and multiple sets of data, as set forth in studies by economists and General Accounting Office investigators. All of these analyses must be done both in light of the relevant geographic market, which may or may not be defined by District lines for a particular insurer, and in light of the point in time in the insurance cycle. Whether the "crippling" impact Medstar assumes would result in a shortage of health care for District residents creates a whole new set of inquiries about the reasons why doctors choose to practice where and when they do.

In short, by asking this Court to give super-scrutiny to this trial court's discretionary rulings because Medstar is a hospital, Medstar and its *amici* are asking this Court to make economic and sociological findings of fact without the necessary methodology and data and then to carve out exceptions for Medstar on the basis of those projections. As set forth in TLA-DC's first argument, these issues are not properly before this Court, either on procedural or evidentiary

grounds, and they are not properly resolved by this Court in an adversarial proceeding between two parties litigating issues relevant to a basic negligence case.

TLA-DC's interest in assuring its members' clients' access to an efficient justice system leads it to challenge Medstar's and its *amici's* injection of legislative issues into this case. TLA-DC's interest in assuring its members' clients' access to an equitable justice system leads it to challenge Medstar's and its *amici's* request for special treatment for medical tortfeasors. That same interest leads TLA-DC to question the fairness of the damages formula which *amici* seek - a formula by which malpractice victims who lost time from high-paying jobs and can prove high lost wages will be deemed to have more valuable pain and suffering claims than those with lower economic damages.

Amicus American Tort Reform Association concedes that it "regularly" files *amicus curiae* briefs on behalf of corporate entities. TLA-DC does not regularly file *amicus* briefs. It does so here to safeguard the justice system from the political urgings of one sector and to urge the preservation of the traditional role of juries in assessing non-economic damages.

SUMMARY OF ARGUMENT

Issue 1: Medstar and its *amici curiae* ("*amici*") argue that "runaway" jury verdicts cause rate hikes, which then cause doctors to leave the profession or move or switch specialties. (Medstar's brief at 11, 13, 38; *amici's* at p. 3). Their characterization of the procedural posture of this case is wrong, because the verdict in this case was reviewed by the trial court. Their opinions on why insurers raise rates are not relevant to this Court's application of the District's Rules on remittitur and new trial motions.

Neither the Rules nor the common law contemplates that courts may grant remittitur and

new trial motions on the theory, whether proven or unproven, that insurance rates will go up as a result of that particular award. It does not serve the public interest to either change the rules on relevance or expand appellate jurisdiction at the behest of one class of tortfeasors and their insurers.

Furthermore, Medstar's and defense *amici's* opinions, which they would have this Court adopt as a matter of law and apply to this case, are factually inaccurate and simplistic. The Superior Court's data on jury decisions in malpractice cases from 2001 to July 2005 do not support the notion of runaway juries. Over that period, most malpractice plaintiffs have been awarded nothing. (Appendix, p.1). And, the assumption that this verdict against Medstar would cause other providers' premiums to rise to a level unacceptable to them does not take into account the complex business and economic reasons underlying insurers' decisions to raise rates in some markets. We respectfully urge this Court not to try to resolve here questions regarding the relative roles of financial markets, business decisions, liability costs, insurance cycles, and reinsurance rates in insurers' calculations of rates for their particular markets. The consideration of those questions in turn requires examination not of simple trends in the face value of jury verdicts, but rather of such underlying issues as the correlation between the escalating cost of medical care and the amount of damages awards; the fact of the slower rise in non-economic damages; the effect of comparatively low interest rates on insurers' assets; the role of increased defense costs and an increased number of grave accidents; the effect of property and casualty losses on reinsurance premiums; the validity of extrapolations of data from one geographic market to another, and particularly the District; and the rate-of-return and inflation assumptions used by insurers when they calculate their reserves.

Amici's suggestion that premiums will rise to some unspecified level which will cause medical providers to leave the District assumes the many economic issues away and rests on assumptions of fact that are disputable and should not be litigated here. They also assume away issues regarding the relative roles of managed care systems, lower reimbursements, the nature of urban practice, the low profitability of obstetrics in light of the hours required, and insurance rates in physicians' decisions regarding their practices. Here, too, the facts that *amici* and Medstar would have this Court assume have been questioned.

The societal questions of who should bear the cost of accidents, how accidents may best be deterred, and how the delivery of health care should be assured, are not suitable for resolution in an adversarial proceeding between two parties to a tort case, and the law does not impose that task on this Court.

Issue 2: The request of Medstar's *amici* that this Court legislate a ratio of economic to non-economic damages, despite the fact that they bear no logical relationship to each other, would place a higher value on the suffering of those who can prove time lost from high-paying jobs than on the value of the suffering of those who are retired or lack such jobs. That novel rule would also remove from the purview of the jury the determination of the significance of a particular lost ability or skill to each individual plaintiff. This Court should reject that request and apply its usual standard of review of non-economic damages.

ARGUMENT

I. MEDSTAR’S AND ITS *AMICI*’S POLITICAL ARGUMENT ON “RUNAWAY JURIES,” MALPRACTICE INSURANCE RATES, AND THE SUPPLY OF PHYSICIANS AVAILABLE TO TREAT DISTRICT PATIENTS IS NEITHER GERMANE TO THIS COURT’S REVIEW OF THE DENIAL OF POST-TRIAL MOTIONS IN THIS CASE NOR FACTUALLY ACCURATE.

Medstar and its *amici* urge that a special degree of scrutiny should be applied in this case because it involves medical malpractice, and, in their opinion, “runaway verdicts” against medical providers in the District will cause premiums to rise and physicians to flee. Whether Medstar actually carries insurance is not part of this record. In any event, their policy arguments overlook the posture of this case, the data on juries in the District, the evidentiary rule that the financial impact of a verdict on a defendant is irrelevant in negligence proceedings, the many sets of data that would have to be addressed by anyone examining the causes of insurance companies’ profits and pricing decisions, and the hard recent data on the healthy supply of obstetricians accepting new patients in the District.

A. The issues in this case involve a trial court’s rulings on post-trial motions, not “runaway juries,” and, in any event, Superior Court data show that District juries in recent years awarded plaintiffs nothing in the majority of the cases in which they deliberated.

Medstar refers to “runaway juries” (its brief at 11, 13, 38); its *amici* refer to “runaway damages awards.” (their brief at p. 3). As a procedural matter, those clichés have no bearing on this case. The verdict this jury awarded in favor of the Weises was subject to motions for remittitur and new trial. The trial court (Kravitz, J.) cited this Court’s law on the applicable tests (JA-56), remitted the award for past medical expenses for lack of proof (JA-54-55), and articulated its finding “that nothing about the jury’s verdict shocks the conscience.” (JA-54). Judge Kravitz was not a “runaway jury.” Indeed, this Court accords “double deference” to a trial

judge's assessment of whether a verdict is excessive. *District of Columbia v. Watkins*, 684 A.2d 395, 403-04 (D.C.1996). *Amici* do not cite law by which this Court may exempt Medstar from that settled standard of review.

Medstar's notion that the District is infested with runaway juries is not supported by the Superior Court's data on medical malpractice juries. In July 2005, Judges Zeldon and Duncan-Peters examined results in medical malpractice trials from 2001 forward. Their summary, "Medical Malpractice Jury Trial Data, July 22, 2005," is included in the Appendix to this brief. Their results showed that the supposedly runaway juries in the District in fact have not been particularly friendly to plaintiffs. In 2001, defendants won 12 out of 18 verdicts. Of the 15 jury verdicts in 2002, defendants won 11, and there were also two hung juries. In 2003, things temporarily improved for plaintiffs: of the 12 jury verdicts, plaintiffs won six. There were also two hung juries. In 2004, however, defendants won 15 verdicts of 22. Five juries had deliberated by July, 2005. One was a hung jury; and the plaintiffs and defendants won two each. The report also sets forth the amounts of the awards. Not counting the many awards of zero dollars, in favor of defendants, the lowest award was \$52,000, for permanent partial impairment of renal function (*Id.*, p. 2); fewer than half exceeded one million dollars. In fact, over the most recent (nearly five-year) period, only two medical malpractice verdicts have exceeded 5 million dollars and these higher verdicts involved more grave injuries. (Neither *amici* nor Medstar acknowledge the possibility that claims and losses vary according to the effects of the negligence.) Further, as discussed at p. 11, *infra*, in the District since 1991, adjusted malpractice verdicts in obstetric cases have gone down by 77%. The "runaway jury" in the District is a mythological creature.

Under District law, the limited question on appeal is whether the trial court applied the correct test when it ruled on the post-trial motions. *See, e.g., District of Columbia v. Murtagh*, 728 A.2d 1237, 1241 (D.C.1999) (affirming trial court’s denial of new trial motion under abuse of discretion standard; remarking on “broad latitude” to be afforded to trial court in that regard); *Wingfield v. People’s Drug Store, Inc.*, 379 A.2d 685, 687 (D.C.1977) (affirming trial court’s ruling on new trial because the trial court had applied the proper test). Defense *amici* invite this Court to overlook the procedural posture of Medstar’s appeal when they argue that the trial court “erroneously” refused to reduce the verdict (p. 5; *see also* p. 6), and when they offer a version of the facts rejected by both the jury and the trial court. However, neither *amici*’s *de novo* take on the injuries suffered by the Weises nor Medstar’s status as a hospital entitles Medstar to enhanced scrutiny of the rulings below.

Amici’s stated interest in challenging high verdicts in medical malpractice cases on behalf of their members (their brief at 2) neither alters the procedural posture of this case nor supports a departure from the standards of review applicable in civil cases generally. *Amici*’s appearance in this case on the basis of their perception of “runaway” damages and mere “error” by the trial court adds little to the analysis of the remittitur and new trial issues actually posed.

B. Financial impact, even when proven and even when applicable to a party, was not relevant to the issues tried below and is not relevant to this Court’s review of post-trial rulings, and the mere fact that this appellant is a hospital does not change those principles.

Medstar and its *amici* have submitted argument on the alleged effect of malpractice awards on liability insurance rates. Neither has articulated a legal theory establishing the relevance of evidence of financial impact in negligence proceedings, even when such an impact is capable of proof and affects a party. This is not even such a case. The fact that the tortfeasor

in this case is a medical entity does not support a judicially-created exemption for such tortfeasors from the tests to be applied to post-trial motions, the evidentiary rules on relevance, and the doctrines applicable to appellate review.

The District law on the circumstances in which a trial court may exercise its discretion to grant motions for remittitur and/or new trial is settled. *See, e.g., Murtagh*, 728 A.2d at 1241 (citing cases on the standards governing motions attacking the amount of a verdict). Nothing in the cases permits a trial judge to reduce or vacate a jury verdict on a post-trial allegation that insurance rates for that class of tortfeasor might go up. Rather, the trial court is to address the verdict in light of its perception of the weight of the evidence admitted during trial. *Cf. id.* *Amici's* matter about District juries, insurers' premium-setting decisions and physicians' interest in siting their practices in the District or the suburbs is not in the trial record and is not germane here.

Similarly settled is the principle that evidence concerning a party's ability to pay is not relevant in a negligence case. Such evidence is thus inadmissible. *See, e.g., Van Bumble v. Wal-Mart Stores, Inc.*, 407 F. 3d 823, 826 (7th Cir. 2005) (stating that evidence of plaintiff's lack of resources was "irrelevant and would have been prejudicial to the jury's determination of damages."); *Kies v. City of Aurora*, 156 F. Supp. 2d 970, 978 (N.D.Ill. 2001) (holding that defendants could not introduce evidence of inability to pay). This trial court could not have reached and could not have applied its own findings of fact on any financial effects of the verdict, whether on Medstar or on insurers in the District. The fact that this appellant is a hospital does not support the expansion of the definition of relevance to include issues not probative of the negligence and damages issues litigated below.

The jurisdiction of this Court is appellate. As this Court has made clear, it will not decide issues not litigated below. *Williams v. Gerstenfeld*, 514 A.2d. 1172, 1177 (D.C.1986). Because the lower court here did not and could not adjudicate issues regarding financial impact issues when it addressed Medstar's new trial and remittitur motions, those issues also have no place in this Court's review of the proceedings below. Defense *amici* offer no law to support such an expansion of relevance principles and such an interference with the trial court's original jurisdiction over the issue of damages.

Beyond their interest in reversal here, the purpose behind defense *amici*'s request that this Court adopt a rule making financial impact relevant is unclear. Here, defense *amici* ask this Court to grant Medstar relief on the theory that some unspecified reduction of this verdict will grant their own members relief from rate hikes. The Court's consideration of such grounds in this case would signal its adoption of a novel rule by which both parties may offer post-trial argument urging both personal and societal economic ramifications as factors in the reasonableness of an award. Such an expansion of relevance and appellate jurisdiction would not invariably serve the defense *amici*'s stated interests. For instance, a plaintiff deeming an award insufficient could well offer studies showing that a higher award might have the beneficial effect of causing insurers to reward insureds for having injury-prevention systems in place. In such a case, under such a rule, the trial court would be asked to weigh the benefits of deterrence against the detriment of added expense to the class of tortfeasor. *Cf.* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (discussing the allocation of the cost of accidents).

Defense *amici* have offered this Court no broadly applicable policy reason for expanding the definition of relevance so as to impose upon the courts the role of adjudicating competing social values. Because parties, especially individuals, are ill-equipped to litigate issues regarding economic and societal trends affecting entities other than themselves, TLA-DC respectfully urges this Court to apply the settled law concerning the relevance of financial impact and the scope of appellate jurisdiction.

C. *Amici's* arguments concerning liability insurers' profitability ask this Court to resolve complex economic and societal questions in a tort proceeding between two private parties, to disregard facts regarding insurers' premium-setting decisions, and to adopt facts based on obsolete assumptions and questionable data.

As a matter of law and sound public policy, insurance rate-setting issues are not justiciable in a negligence case in which insurance is not at issue, and they should not be considered by this Court. Nonetheless, *amici*, one of which “regularly participates in cases involving unpredictable and excessive verdicts,” assert that verdicts at some unspecified level will cause malpractice insurers to raise their rates to some unspecified level at which practitioners will cease practicing in the District. At the outset, it should be noted that in the District, since 1991, inflation-adjusted malpractice verdicts have gone down by 53%, and by 73% for obstetrics cases. (“Fact Sheet: Washington D.C.’s Neighbors Have Seen Medical Malpractice Payment Increase, While the District Has Seen Payments Decline,” Public Interest, December 2005, available at http://69.63.136.213/documents/DC_VA_MD_comparison.pdf). And, as shown by the Superior Court’s data, verdicts for plaintiffs in the District from 2001 to mid-2005 were more often zero dollars than a substantial amount. (Appendix, p.1). *Amici's* argument on the effect of this verdict on this market is based on a false premise.

Whatever the trends in awards, studies into the causes of the decrease in profits experienced by some insurers in some locations make clear that it is not so easy to generalize about premium trends from one market to another, and it is not so easy to lay rate increases at the feet of people injured by malpractice. Nor, as one commentator has pointed out, is it so easy to generalize about the cumulative reasons causing some doctors to leave their practices. The propositions offered by defense *amici* and Medstar avoid the complexities of both issues and contain generalities not applicable to the District. TLA-DC sets forth here the issues that researchers address when studying the medical malpractice industry.

Preliminarily, to reach any conclusions about the causes of a malpractice insurer's profits or losses in a particular locality, data are needed for that locality. The Government Accounting Office (now called the Government Accountability Office) investigated the causes of premium increases in seven markets and found that "both the extent and the premium levels varied greatly not only from state to state but across medical specialties and even among areas within states." *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* (GAO Report 03-702) (June, 2003), available at <http://www.gao.gov/new.items/d03702.pdf>. ("GAO Study"). The GAO did not study the District.

The use of current data is also important, because conditions prevailing in one year will change according to the movement of the "insurance cycle." Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms: Do Recent Events Constitute a Crisis or Merely the Working of the Insurance Cycle?* Health Affairs (Jan.21, 2004), available at: <http://content.healthaffairs.org/cgi/content/full/hlthaff.wf.20v1/DC1> ("Thorpe"); see also GAO Study (referring to the "movement of the medical malpractice

insurance market through cycles of hard and soft markets’); Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul Law Review 393 (2005), accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=616281. Baker, referring to “before-tax operating profit margins in U.S. medical malpractice from 1980 to 2003,” notes,

the well known features of the underwriting cycle: a profit valley in the final years of the 1980s and 1990s soft markets, followed soon after by a profit peak. By 2003, the market had passed the profit valley, and was on an upward trend.

Id. at 404.

After identifying the geographic market entered by a particular insurer and the point in the insurance cycle, an analyst seeking to understand the causes of the profitability of a medical malpractice insurer needs data responsive to four generally-applicable factors, including (1) the presence or absence of competitors in the insurer’s particular market; (2) the frequency and severity of liability pay-outs; (3) trends in investment income; and (4) prices of re-insurance. *See, e.g.*, GAO Study, *supra*, p. 4. As illustrated by Dr. Thorpe, whose article is cited by defense *amici*, and Professor Baker, each factor in turn involves multiple subsidiary inquiries. *See also* KATHERINE BAICKER & AMITABH CHANDRA, *THE EFFECT OF MALPRACTICE LIABILITY ON THE DELIVERY OF HEALTH CARE* (Nat’l Bureau of Economic Research, 2004) available at <http://www.dartmouth.edu/~kbaicker/Baicker/chandraMedMal.pdf>. (“Dartmouth Study”) (identifying four factors). Much of the debate concerns the relative influence of these factors.

1. The presence of competitors. Market conditions and insurers’ decisions to expand into new markets are frequently-cited factors in the profitability of medical malpractice underwriting. The GAO Study explained,

[D]uring the 1990s insurers competed vigorously for medical malpractice

business, and several factors, including high investment returns, permitted them to offer prices that in hindsight, for some insurers, did not completely cover their ultimate losses on that business. As a result of this, some companies became insolvent or voluntarily left the market, reducing the downward competitive pressure on premium rates that had existed through the 1990s.

GAO Study, *supra*, at p. 4.

Dr. Thorpe recounted this history:

In addition to the St. Paul, several physician-owned companies – most notably PHICO (in Pennsylvania) and PIE Mutual (in Ohio) -- expanded their medical malpractice business outside their state of domicile. In virtually every case, these companies generated large operating losses outside their home states. By 1996 PHICO wrote medical malpractice policies in twenty states.

Health Affairs, *supra* at p.23. PIE was declared insolvent in 1998; PHICO in 2002. *Id.*

When insurers left markets, their insureds then had to find insurance in a market in which capacity was limited. *Id.* Professor Baker explains the effect of limited capacity on pricing:

Capacity constraint is very important to the traditional economic understanding of the underwriting cycle because it helps explain why prices can rise so sharply when there is relatively little change in the underlying pattern of claim payment. In a competitive market, insurers should not be able to raise prices today to make up for past losses. If they did, new insurers would enter the market and offer a lower price based solely on the cost of providing the insurance policies of today. *** The fact that capacity is constrained gives insurers “room” to raise prices beyond what is needed to pay the claims of today, and thereby recover for the accounting losses that resulted from inadequate pricing and reserving during the later years of the soft market.

54 DePaul L. Rev., *supra* at p. 414.

The role of market share and competitive power in the setting of rates in the District is not acknowledged by the defense *amicus* which complains of premium increases despite a lack of claims against it. No fact is before this Court on that subject. Indeed, it is not even known that

any verdict against Medstar will be paid by an insurer which underwrites other providers in the District.

2. Liability pay-outs. Defense *amici* sketch a scenario in which juries award “runaway” non-economic damages awards, and then insurers raise rates in response to those liability losses. The researchers found the picture to be more complex, not only as to the causes of liability losses, but also on their extent and the extent of the influence. First, some data question whether liability losses even are increasing, if looked at nationally on a per-physician basis. *Medical Malpractice Insurance: Stable Losses/Unstable Rates* (Americans for Insurance Reform, October 10, 2002), available at <http://www.insurance-reform.org/StableLosses.pdf>. The graph at page 6 of that study shows that direct losses paid per doctor per year in the late 1985-89 exceeded those for every year from 1990-2001, the last year shown on the graph. *Id.*, Exhibit 3, p. 6.

Then, it is by no means clear that non-economic awards drive the increase in pay-outs. The GAO investigators concluded that, in seven markets, “increased losses appeared to be the greatest contributor to increased premium rates.” However, they also found that the data were not clear on what component of the losses had risen. They remarked that:

a lack of comprehensive data at the national and state levels on insurers’ medical malpractice claims and the associated losses prevented us from fully analyzing the composition and causes of those losses. For example, data that would have allowed us to analyze claims severity at the insurer level on a state-by-state basis or determine how losses were broken down between economic and non-economic damages were unavailable.

GAO Study, *supra*, at p. 4.

Others have questioned the impact on non-economic awards on premium hikes. Non-economic costs were deemed by one Texas insurer to be such a small part of its pay-outs that a

\$250,000 cap on such awards would only provide it with a loss savings of 1.0%. (Regulatory Filing of The Medical Protective Company with Texas Department of Insurance (October 31, 2003) *available at* <http://www.aisrc.com/caps.pdf>.)

Defense *amici*'s allegations that rises in liability losses are attributable to "runaway" jury awards of non-economic damages disregard the other components of insurers' liability costs.

3. Investment income and interest rates. Regarding the investment income factor, the literature explains that insurers' liability costs are funded by both premiums and investment income, and that when investment income declines, higher premiums are imposed to make up for the difference. The GAO study explains, "While almost no medical malpractice insurers experienced net losses on their investment portfolios over this period [1998-2001], a decrease in investment income meant that income from insurance premiums had to cover a larger share of insurers' costs." *Id.* at p. 4. Professor Baker elaborates:

Unlike changes in loss expenses, however, interest rates affect not only the size of insurers' liabilities, but also the value of insurers' assets. A decline in the interest rate simultaneously increases the amount of funds that must be set aside to pay future claims and decreases the value of the assets that the insurer previously has set aside to pay those claims. As Professor Harrington and others have pointed out, the recent hard market and the hard market of the mid-1980s followed a significant decline in interest rates. On the other hand, not every shift in interest rates leads to a shift in the direction of the insurance cycle.*** Nevertheless, the consensus appears to be that interest rates do provide an important, if incomplete, explanation for the underwriting cycle."

54 DePaul L. Rev., *supra*, at pp. 407-08.

4. Cost of reinsurance. Unlike malpractice pricing, reinsurance pricing reflects events affecting the insurance industry as a whole. Dr. Thorpe explained:

The rise in claims severity flows through to the reinsurance market. Rising severity, coupled with the events of 11 September 2001, has led reinsurers to add

to their reserves and increase reinsurance rates to medical malpractice companies.

Health Affairs, *supra*, p. 23.

As shown by the types of analyses needed for an understanding of why medical insurers raise their rates at certain times in certain markets, the issues raised by *amici*'s assumptions cannot be suitably addressed in an adversarial proceeding between two parties litigating tort claims.

D. *Amici*'s argument on the degree to which liability premiums affect physicians' interest in practicing in the District asks the Court to adopt its in-house survey as a competent fact, to disregard the other data on the subject, and to assume market conditions which are speculative at best.

Medstar paints a picture by which this verdict will have a "crippling impact" on the "availability of medical services to the community." (its argument heading II(D)). Its *amici* agree. However, the available evidence does not support the existence of such a shortage. First, the American Medical Association has found that the District has more practicing physicians per resident than any state in the country -- over twice the national average. Further, a Public Citizen analysis of data from the Federation of State Medical Boards found that the number of licensed physicians per 1,000 residents in the District has risen by 51.9% over the last ten years.

Testimony of Jillian Aldebron, Civil Justice Counsel, Public Citizen's Congress Watch Before the Committee on the Judiciary Hearing on B.16-283, "Health Care Reform Act of 2005" and B16-418 "Medical Malpractice Reform Act of 2005" (December 1, 2005), p. 2, available at <http://www.citizen.org/documents/Testimony%20Jillian%20Aldebron%2012.1.final.pdf>.

In the same testimony, Ms. Aldebron explained Public Citizen's investigation of the numbers reported in the physician survey to which *amici* refer at their page 3. The Medical

Society had reported on its website, “the 2005 Washington Physicians Directory lists 151 OB/GYNs. Earlier this year MSDC surveyed 141 of the OB/GYNs listed and found that more than 40% had stopped delivering babies in DC.” However, when Public Citizen used all available listings, it found and contacted 113 practicing obstetricians, of whom 96% were currently taking new patients. *Id.* at p. 9.

The Dartmouth researchers looked for a link between premium increases and physicians’ behavior. They found,

On average, the size of the physician workforce in each state does not seem to respond to increases in premiums. *** For example, a 10% increase in surgery premiums yields an insignificant 0.1% decrease in the number of surgeons per capita. Younger and older physicians seem slightly more responsive to increases in premiums, but these responses are small and not consistently statistically significant. These findings are consistent with those of a GAO study which was unable to substantiate claims by provider organizations that rising premiums were dramatically reducing the supply of physicians.

When we decompose increases in premiums into their subcomponents, we see that younger and older physicians seem somewhat more responsive to some subcomponents of increases in premiums, although in most cases we cannot reject the hypothesis that responses to these subcomponents are the same (or that they are zero). Younger and older doctors in general and in ob-gyn seem to respond to increases in the number of cases (as do younger ob-gyns and older internists in particular). Older internists also seem responsive to the size of the average award. The load factor seems to play a smaller role in these decisions. Overall, these results provide weak evidence that some physicians on the margins of their careers make entry and exit decisions in part based on the size and number of malpractice payments.

Dartmouth Study, *supra* at p. 17 (footnotes deleted).

The data are also not clear on the extent to which any effect of premiums on doctors might be beneficial. Professor Baker, noting an increase in the literature on “patient safety” beginning in 2000, *supra* at 434, writes:

[T]here are good reasons to believe that medical malpractice insurance crises lead medical providers to improve patient safety and, therefore, that efforts to moderate the cycle could have a negative impact on patient safety. Further research is needed before we can draw firm conclusions, but leaving the insurance cycle alone would be the wiser course for now.

54 DePaul L. Rev., *supra* at 436.

Thus, depending on that research, the better policy solution to one *amicus*' complaint about its rising premiums despite a lack of claims would be to link premiums to claims experience, as in auto insurance. The deterrence effect of the risk of liability pay-outs may in fact be reducing the incidence of accidents.

TLA-DC respectfully urges this Court to decline the request of Medstar and its *amici* that it apply an enhanced level of scrutiny to otherwise discretionary rulings on the grounds of those entities' unproven assertions regarding District juries, the pricing of malpractice premiums, and choices made by physicians.

II. THIS COURT SHOULD REJECT DEFENSE *AMICI*'S REQUEST THAT THE COURT LEGISLATE A SET RATIO OF ECONOMIC TO NON-ECONOMIC DAMAGES FOR ONE CLASS OF TORTFEASORS

Economic, or special, damages include past and future medical bills and lost income. Defense *amici* do not articulate a good reason for according less compensation for the pain of a person who has little income, who is elderly and retired, or whose injuries are untreatable than for the pain of a person who has taken time off from a good job or whose injuries can be treated. There is no good reason for such discriminatory treatment. In reality, those whose lives are most devastated by pain and injury are often those with the lowest wages. Similarly, those whose injuries cannot be ameliorated should not be deemed to suffer any less than those whose pain can

be or has been cured by an expensive operation. And, a jury would no longer be able to take into account the effect that a loss of a particular ability or skill has had on that individual plaintiff's life.

The proposal urged by defense *amici* calls for this Court to “adopt and enforce” rules that in many applications would result in a two-tier tort system which would regularly treat the pain of the poor, the elderly, and the incurable as less significant than the pain of the comfortably employed and the curable. As applied to this case, such a rule would devalue the efforts of a plaintiff who has been determined to keep working. (JA 220,221,312). That result contradicts the policy behind the requirement that plaintiffs mitigate their damages. Neither is in the public interest.

CONCLUSION

The Trial Lawyers Association of Metropolitan Washington, D.C. urges this Court to reject the arguments of Medstar and its *amici* about “runaway juries” and insurance rates. Instead, this appeal should be decided upon the issues properly presented by the record.

Respectfully submitted,

Trial Lawyers Association of
Metropolitan Washington, D.C.

By: Patrick A. Malone, President
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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this Motion and Brief were prepared in Times New Roman with 6 ½ inches of type per page and one- inch margins at each side. There is 2.0 spacing between each line and 1.0 spacing for indented quotations.

Patrick A. Malone

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2005, two copies of the foregoing Motion and Brief of *Amicus Curiae* was hand delivered to:

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No. 05-CV-833

DISTRICT OF COLUMBIA COURT OF APPEALS

MEDSTAR-GEORGETOWN UNIVERSITY HOSPITAL,

Defendant-Appellant,

v.

JILL WEISE, et al.,

Plaintiffs-Appellees.

**ON APPEAL FROM THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA**

**APPENDIX TO BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS
ASSOCIATION OF METROPOLITAN WASHINGTON, D.C.
SUPPORTING AFFIRMANCE OF THE JUDGMENT BELOW**

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APPENDIX TO BRIEF OF AMICUS CURIAE

Contents

Zeldon, Hon. J., and Duncan-Peters, Hon. S., “Medical Malpractice Jury Trial Data,” Superior Court for the District of Columbia (July 22, 2005)

Medical Malpractice Jury Trial Data

Much of the enclosed data was recorded on trial completion forms submitted by civil judges to the Presiding Judge of the Civil Division for the years 2001, 2002, 2004 and 2005. The forms collected for 2003 could not be located. The reason this data was kept is to permit the judges to have some working knowledge of malpractice cases that went to trial with a verdict. (Most malpractice cases never go to trial.) This data collected upon trial completion forms was incomplete.

In an effort to supplement the information contained in the trial completion forms, a search was made of all computer records on medical malpractice cases that were resolved by judgment based on a jury verdict between 2001-2005. A Judicial Officer examined the file for every such case listed on the court's computer records.

Information obtained from the computer records is listed in typeface that is bolded while the information obtained from the trial completion forms appears in regular typeface.

A tally of the results shows the following.

In 2001, there were 6 jury verdicts for plaintiffs and 12 for defendants.

In 2002, there were 4 jury verdicts for plaintiffs, 11 jury verdicts for defendants, 2 judgments entered by the court as a matter of law in favor of defendants at the close of the plaintiffs' cases and two hung juries.

In 2003, there were 5 jury verdicts for plaintiffs, 6 jury verdicts for defendants, one judgment entered by the court as a matter of law in favor of the defendant at the close of the plaintiff's case, two hung juries and one jury verdict for the plaintiff that was subsequently vacated by consent of the parties (who resolved the dispute).

In 2004, there were 7 jury verdicts for plaintiffs and 15 for defendants.

In 2005, as of the date this report was prepared, there were 2 jury verdicts for plaintiffs, 2 for defendants and one hung jury.

Judge Joan Zeldon
Presiding Judge, Civil Division

Judge Stephanie Duncan-Peters
Deputy Presiding Judge, Civil Division

7/22/05

MEDICAL MALPRACTICE CASES

<u>2001 Plaintiff's Verdicts</u>	<u>Amounts</u>
1. 97 ca 5807 Incompetent Surgery – Informed Consent	\$465,000
2. 99 ca 4973 Incompetent Surgery – Non-serious Permanency	\$355,000
3. 98 ca 6832 Incompetent Surgery – Non-serious Permanency	\$52,000
4. 97 ca 2117 Birth Complications	\$2.5 million
5. 98ca 3387 Improperly Performed Medical Procedure - Permanency	\$1.9 million
6. 96ca 9960 Failure to Accurately and Timely Diagnose and Treat Medical Condition – Permanency	\$1. 5 million

2001 Defendant's Verdicts

1. 97 ca 1133 Informed consent – Non-serious Permanency
2. 99 ca 2712 Informed Consent – Incompetent Surgery – Failure to Refer
3. 99 ca 5454 Birth Complications
4. 99 ca 1067 Misdiagnosis – Informed Consent – Serious Permanency (Dental)
5. 97 ca 5412 Misdiagnosis
6. 96 ca 7703 Informed Consent
7. 00 ca 4180 Improperly-Performed Medical Procedure –Permanency (Scars)
8. 99 ca 0614 Failure to Provide Proper Medical Advice
9. 99 ca 6277 Misdiagnosis; Unnecessary Medical Procedures and Surgery
10. 99 ca 7424 Cataract Surgery Negligently Performed, Resulting in Further Surgery and Loss of
Vision in one eye – Serious Permanency
11. 00 ca 0978 Informed Consent; Misdiagnosis - Permanency
12. 99 ca 7949 Misdiagnosis and Consequent Unnecessary Operative Procedure

2002 Plaintiff's Verdicts

Amounts

1. 00 ca 0539 Serious Permanency—Failure to Refer	\$160,000
2. 00 ca 0447 Informed Consent – Serious Permanency	\$1.552 million
3. 00 ca 8364 Incompetent Surgery—Non-Serious Permanency	\$899,000
4. 00 ca 6883 Misdiagnosis – Permanency	\$250,000

2002 Defendant's Verdicts

1. 99 ca 0696 Birth Complications
2. 00 ca 3001 Incompetent Surgery—Informed Consent—Serious Permanency
3. 00 ca 4401 Misdiagnosis
4. 00 ca 1978 Fatality
5. 00 ca 4890 Misdiagnosis – Fatality
6. 97 ca 2247 Informed Consent – Permanency
7. 99 ca 6361 Untimely Diagnosis and Treatment – Permanency
8. 99 ca 6373 Failure to Perform Proper Diagnostic Procedures - Serious Permanency
9. 01 ca 3477 Medical Procedure Incompetently Performed - Permanency
10. 99 ca 4759 Failure to provide Antibiotics following Surgery, Resulting in Subsequent Surgical Procedure
11. 00 ca 1471 Inadequate Post -Operative Treatment
12. 00 ca 4171 Negligent Treatment and Care Resulting in Amputation and Subsequent Injuries – Permanency
13. 98 ca 1192 Medical Negligence during surgery to repair inguinal hernia – Resulting in permanent injury to ilioinguinal nerve.

2002 – Other Outcomes

1. 00ca2788 Negligently performed surgery – Permanency (scarring)

Jury unable to reach a unanimous verdict – mistrial declared on 1/30/02.
Case settled and dismissed on 8/7/02.

2. 98 ca 1192 Negligently performed surgery – Permanent injury to ilioinguinal nerve.

Jury unable to reach a unanimous verdict – mistrial declared 10/3/2000.
Case settled and dismissed 9/13/2002.

2003 Plaintiff's Verdicts

Amounts

- | | | |
|---------------|--|---|
| 1. 00 ca 0485 | Failure to Refer for Further Tests;
Failure to Timely Diagnose – Fatality | \$ 2,880,650.00 plus
\$ 177,000.00 for child |
| 2. 00 ca 8964 | Negligence during Delivery causing Injury to
Mother and Child – Serious Permanency to Child | \$ 850,000.00 |
| 3. 01 ca 2557 | Incompetent Surgery & Post-Care-Permanency
**(Jury verdict returned in 2003 but Order of Judgment completed in 2004) | \$ 3,578,488.98 |
| 4. 01 ca 3285 | Wrong procedure performed | \$ 180,000.00 Parent
\$ 147,600.00 for child |
| 5. 01ca 690 | Failure to Properly Pre-operatively Evaluate and Test
and Failure to Perform Appropriate Surgical Procedure
– Permanency | \$ 900,000.00 |

2003 Defendant's Verdicts

1. 00 ca 8040 Negligent Psychological Assessment and Intervention – Fatality (Suicide)
2. 01 ca 5617 Improper Prescription and Treatment—Serious Permanency
3. 98 ca 5106 Failure to Render Timely Care During Pregnancy Resulting in Birth of Stillborn Infant
4. 99 ca 9054 Inadequate Treatments
5. 00 ca 5745 Failure to Detect and Treat Medical Condition--Fatality
6. 00 ca 5169 Negligence During Delivery – Serious Permanency
(Verdict for Defendants but \$450,000.00 to Plaintiff Pursuant to High/Low Agreement)
7. 00 ca 2108 Failure to inform of risk of medications

2003 – Other Outcomes

99ca4726 Failure to admit patient to hospital for further examination/treatment – fatality, which occurred on highway on departure from hospital

Jury unable to reach a unanimous verdict – mistrial declared on 1/27/03
Case settled and dismissed on 8/12/03f

00ca8967 Alleged negligence during medical procedure resulting in new injury – serious permanency

Jury unable to reach a unanimous verdict – mistrial declared on 5/29/03
Case settled and dismissed on 6/26/03

01ca6541 Failure to repair a tear to the external anal sphincter muscle that allegedly occurred during delivery.

On 8/25/03, the jury returned a verdict for Plaintiff in the amount of \$50,000,000.00. On 9/9/03, a motion for new trial or, in the alternative, for a remittitur was filed. At the request of the parties, resolution of that motion was stayed and on 12/30/03, the parties resolved this dispute. On that same date, the Court granted a consent motion to dismiss and to vacate the judgment.

<u>2004 Plaintiff's Verdicts</u>	<u>Amounts</u>
1. 01 ca 9416 Informed Consent--Inappropriate Surgery – Permanency	\$501,300
2. 00 ca 3439 Incompetent Surgery – Other	\$590,753
3. 03 ca 2151 Incompetent Surgery - Serious Permanency	\$1.3 million
4. 03 ca 2251 Misdiagnosis – Other	\$3,224,284
5. 02 ca 3860 Incompetent Surgery - No Permanency	\$765,000
6. 02 ca 7886 Fatality - Inadequate follow-up care	\$700,354 \$ 61,250 for son
7. 02 ca 8381 and 01 ca 9379(Consolidated cases) – Misdiagnosis – Serious Permanency	\$5,744,156.07

2004 Defendant's Verdicts

1. 99 ca 2749 Misdiagnosis - Failure to Provide Proper Care Post Surgery
2. 00 ca 8613 Failure to Diagnose and Follow-up - Serious Permanency--Other
3. 02 ca 3813 Incompetent Surgery
4. 02 ca 8725 Incompetent Surgery
5. 02 ca 4614 Misdiagnosis – Fatality
6. 00 ca 5794 Informed Consent – Serious Permanency
7. 01 ca 7485 Incompetent Surgery – Serious Permanency
8. 03 ca 0428 Misdiagnosis – Fatality
9. 99 ca 0508 Incompetent Laser Surgery--Serious Permanency
10. 01 ca 4476 Incompetent Surgery – Fatalities
11. 03 ca 0636 Misdiagnosis – Permanency
12. 01 ca 8547 Incompetent Surgery – Other
13. 01 ca 6870 Informed Consent, Failure to Consider Family Medical History
14. 01 ca 5738 Negligently Performed Medical Procedure; Untimely Diagnosis – Permanency
15. 02 ca 4121 Failure to timely diagnose and treat – Fatality

2005 Plaintiff's Verdicts

Amounts

1. 03 ca 0024 Serious Permanency	\$5,942,542
2. 03 ca 2255 Incompetent Surgery—Serious Permanency	\$17, 442,174

2005 Defendant's Verdicts

1. 03 ca 1380 Injured during medical procedure - Permanent disfigurement
2. 03 ca 9580 Failure to exhaust all treatments prior to surgery

2005 - Other Outcomes

01ca5326 Jury unable to reach a unanimous verdict – mistrial declared on 6/21/05.
Case still pending with a new trial date having been set.