

IN THE SUPREME COURT OF VIRGINIA

2/2/98 revision
M:3605

KARL B. PULLIAM, EXECUTOR OF)	
THE ESTATE OF ELNORA R. PULLIAM,)	
)	
Appellant,)	
)	
v.)	
)	File # of the Circuit
COASTAL EMERGENCY SERVICES)	Court of the City of
OF RICHMOND, INC.)	Petersburg: CL96-211
)	
and)	
)	
THOMAS ANTHONY DIGIOVANNA,)	
)	
Appellees.)	

PETITION FOR APPEAL

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PETITION FOR APPEAL

ASSIGNMENTS OF ERROR:

1. As a matter of law, the trial court erred in concluding that Coastal had carried its burden of proving that it was an entity “which primarily renders health care services” within the meaning of Virginia Code § 8.01-581.1’s definition of “health care provider,” subpart (vi).
2. As a matter of law, the trial court was wrong to apply the medical malpractice cap to prejudgment interest.
3. The trial court abused its discretion in applying the medical malpractice cap before ruling on the defendants’ motion to reduce the verdict on grounds that the verdict was allegedly excessive.
4. As a matter of law, the trial court erred in failing to conclude that the cap on medical malpractice awards is unconstitutional as applied to Coastal and to Dr. DiGiovanna.
5. The trial court abused its discretion in denying Mr. Pulliam’s motion to amend his motion for judgment to add Count 5, by which Mr. Pulliam sought punitive damages against Dr. DiGiovanna.
6. The trial court abused its discretion in failing to allow discovery relevant to Mr. Pulliam’s claim for punitive damages. For example, subpoenas for medical records dealing with the injury caused to Dr. DiGiovanna’s brain when he was shot in the head with a pistol at close range in 1983; subpoenas for records dealing with Dr. DiGiovanna’s aberrant behavior when, in 1991, he forged the name of another

physician to a lab requisition form, forged his ex-girlfriend's name to a consent form to accompany HIV+ blood he had obtained from someone else, and then fraudulently represented that blood to be the blood of his ex-girlfriend; and a Rule 4:10 exam by a neurologist and a neuropsychologist to assess Dr. DiGiovanna's mental status.

7. As a matter of law, the trial court erred in excluding expert medical testimony as to the medical likelihood that Mrs. Pulliam's pulse rate and respiration rate improved as claimed by Dr. DiGiovanna as part of his defense, even though Mrs. Pulliam was gravely ill, no one administered any relevant medical treatment, and Dr. DiGiovanna failed to note the alleged improvement in Mrs. Pulliam's chart.

STATEMENT OF THE NATURE OF THE CASE
AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT
OR COMMISSION IN WHICH THE CASE ORIGINATED:

This is a wrongful death action in which the plaintiff Karl B. Pulliam ("Mr. Pulliam") alleged that his 41 year old wife Elnora died as the proximate result of the medical negligence of the defendant Thomas Anthony DiGiovanna ("Dr. DiGiovanna"), an emergency physician. The defendants are Dr. DiGiovanna and Coastal Emergency Physicians of Richmond, Inc. ("Coastal"), Dr. DiGiovanna's alleged employer. After hearing evidence as to economic losses totalling \$545,000 and devastating grief suffered by Mrs. Pulliam's husband of eighteen years and teenage son, the jury returned a verdict in favor of Mr. Pulliam against both defendants, jointly and severally, for \$2,045,000, plus interest from December 15, 1995 (the date of Mrs. Pulliam's death).

The defense filed a number of post-verdict motions. In response, the trial court reduced the verdict to \$2,000,000, the amount sued for. The trial court then applied the medical malpractice cap¹ to reduce the verdict to \$1,000,000 and held that the verdict, as reduced, was not excessive as a matter of law. Finally, the trial court concluded that the medical malpractice cap applied to prejudgment interest.

STATEMENT OF THE QUESTIONS PRESENTED:

1. Whether, as a matter of law, the trial court erred in concluding that Coastal had carried its burden of proving that it was an entity “which primarily renders health care services” within the meaning of Virginia Code § 8.01-581.1(vi)’s definition of “health care provider,” subpart (vi)?
2. Whether, as a matter of law, the trial court was wrong to apply the medical malpractice cap to prejudgment interest?
3. Whether the trial court abused its discretion in applying the medical malpractice cap before ruling on the defendants’ motion to reduce the verdict on grounds that the verdict was allegedly excessive?
4. Whether, as a matter of law, the trial court erred in failing to conclude that the cap on medical malpractice awards is unconstitutional as applied to Coastal and to Dr. DiGiovanna?

¹ The statutory limit of \$1,000,000 of Virginia Code § 8.01-581.15 will be referred to as the “medical malpractice cap” or the “cap”.

5. Whether the trial court abused its discretion in denying Mr. Pulliam's motion to amend his motion for judgment to add Count 5, by which Mr. Pulliam sought punitive damages against Dr. DiGiovanna?
6. Whether the trial court abused its discretion in failing to allow discovery relevant to Mr. Pulliam's claim for punitive damages? For example, subpoenas for medical records dealing with the injury caused to Dr. DiGiovanna's brain when he was shot in the head with a pistol at close range in 1983; subpoenas for records dealing with Dr. DiGiovanna's aberrant behavior when, in 1991, he forged the name of another physician to a lab requisition form, forged his ex-girlfriend's name to a consent form to accompany HIV+ blood he had obtained from someone else, and then fraudulently represented that blood to be the blood of his ex-girlfriend; and a Rule 4:10 exam by a neurologist and a neuropsychologist to assess Dr. DiGiovanna's mental status.
7. Whether, as a matter of law, the trial court erred in excluding expert medical testimony as to the medical likelihood that Mrs. Pulliam's pulse rate and respiration rate improved as claimed by Dr. DiGiovanna as part of his defense, even though Mrs. Pulliam was gravely ill, no one administered any relevant medical treatment, and Dr. DiGiovanna failed to note the alleged improvement in Mrs. Pulliam's chart?

STATEMENT OF THE FACTS:

When Dr. DiGiovanna examined Mrs. Pulliam in the Emergency Department of Southside Regional Medical Center ("SRMC") for only approximately ten minutes,

beginning at 5:15 AM on December 15, 1995, the window of opportunity to save her life was open. Dr. DiGiovanna negligently ignored her troubling vital signs, misrepresented to the jury what he observed during his cursory physical exam, failed to order a simple chest x-ray or any lab study whatsoever, jumped to the conclusion that the correct diagnosis was influenza, prescribed only a mild muscle relaxer as treatment, and sent her home. A previously healthy 41 year old wife, mother, and long-time teacher in the Prince George County public schools, Mrs. Pulliam was dead before the day was over.

The cause of death was bacterial pneumonia and bacteremia. The bacteria in question was Group A beta-hemolytic streptococcus, an organism that can be successfully treated with common antibiotics, provided that the antibiotic therapy is initiated quickly. Because Dr. DiGiovanna negligently failed to treat her bacterial illness while the window of opportunity was open, Mrs. Pulliam died.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES:

1. As a matter of law, the trial court erred in concluding that Coastal had carried its burden of proving that it was an entity “which primarily renders health care services” within the meaning of Virginia Code § 8.01-581.1(vi)’s definition of “health care provider,” subpart (vi).

The cap does not apply to Coastal. This is because § 8.01-581.15 provides that the cap applies only to health care providers, and because Coastal is not an entity “which primarily renders health care services” and hence is not a health care provider within the meaning of § 8.01-581.1. That statute defines “health care provider” as:

(vi) a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or engages a licensed health care provider and which primarily renders health care services.

According to its contract with Dr. DiGiovanna, Coastal is "in the business of providing duly licensed physicians to staff medical care facilities pursuant to contracts between [it] and certain medical institutions. . . ." (Defendants' Exhibit 32 at page 1). Thus, Coastal is not an entity "which primarily renders health care services" within the meaning of § 8.01-581.1. After all, Coastal owns no emergency departments, owns no equipment used in emergency departments, employs no ancillary personnel (such as nurses and technicians) who work in emergency departments, and does not participate in hospital budgeting processes. Transcript of the trial testimony Ms. McDuffie 6.19 - 7.9.

² In short, Coastal is a middleman between physicians and health care facilities, supplying physician staff to serve as emergency physicians. In this sense, it is fair to think of Coastal as nothing more than a specialized type of employment placement service or clearinghouse for physicians interested in practicing emergency medicine. As such, Coastal itself does not render health care services.

There simply is nothing in the trial record evidencing that Coastal "primarily renders health care services," an essential component of § 8.01-581.1's definition of "health care provider." Moreover, there is nothing to suggest that the General Assembly intended for § 8.01-581.1's definition of "health care provider" to include a specialized type of employment placement service such as Coastal.

Before the trial court, Coastal relied upon the "inevitable conclusion of [a] straightforward syllogism" as the basis for its contention that, after all, it is a health care

provider within the meaning of § 8.01-581.1. The “straightforward syllogism” is that, because the jury found that Coastal controlled Dr. DiGiovanna for purposes of respondeat superior liability, therefore Coastal primarily renders health care services. But the conclusion does not follow from the premise, for two reasons.

First, Coastal has the burden of proof, and all Coastal has proven is the nature of its contractual arrangement with Dr. DiGiovanna. Coastal’s contractual relationship with Dr. DiGiovanna does not evidence Coastal’s relationship with the other physicians it supplies to hospitals, and hence does not evidence what Coastal does “primarily.”

Second, Coastal’s “straightforward syllogism” equates “apples and oranges” by equating control (for purposes of respondeat superior liability) with the corporate rendering of health care services. The two are not the same. Control satisfies the first of the two prongs of subpart (vi)’s definition of “health care provider” (“employs or engages”). But control does not satisfy the second prong (“and which primarily renders health care services”). This observation is especially important in light of this Court’s admonition in Schwartz v. Brownlee, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997), made with respect to the cap, that:

The common law continues in full force in Virginia except as altered by the General Assembly. Code § 1-10. The General Assembly may abrogate the common law, but its intent to do so must be plainly manifested. Wackwitz v. Roy, 244 Va. 60, 65, 418 S.E.2d 861, 864 (1992). “Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.”

² The number before the decimal refers to the page number. The number after the decimal refers to the line number.

Cf. Turner v. Wexler, 244 Va. 124, 418 S.E.2d 886, 887-88 (1992), and Richman v. National Health Laboratories, Inc., 235 Va. 353, 367 S.E.2d 508, 510-11 (1988). Both of these decisions strictly construed § 8.01-581.1 and found that corporate entities were not health care providers for purposes of the Virginia malpractice statute.

In this regard, § 8.01-581.1 defines "health care" as "any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment, or confinement." In reading the definitions of "health care provider" and "health care" together, it becomes even more apparent that Coastal does not come within the purview of "health care provider." This is because there is nothing in the record to establish that Coastal does anything to render services "on behalf of a patient during the patient's medical diagnosis, care, treatment, or confinement." §8.01-581.1.

If prior case law is an appropriate indicator as to why subpart (vi) was added in 1994, that prior case law suggests that this 1994 amendment was aimed at closely held corporations or professional corporations in which a physician or similar health care provider is a principal shareholder. For example, Schwartz v. Brownlee, supra (closely held corporation in which physician was president and sole shareholder was not a health care provider under former version of the statute); Turner v. Wexler, supra (podiatrist's professional corporation was not a health care provider under former version of the statute).

The reasons for extending the protection of the cap to professional corporations or closely held corporations in which the physician is the primary shareholder do not carry over into the present context. As this Court noted in Schwartz v. Brownlee, 253 Va. at 167, 482 S.E.2d at 832:

The General Assembly enacted the medical malpractice cap for the purpose of enabling licensed health care providers to secure medical malpractice insurance at affordable rates. See Etheridge v. Medical Center Hospitals, 237 Va. 87, 93-94, 376 S.E.2d 525, 527-28 (1989). It would not serve that purpose to extend the protection of the cap to non-health care providers, and we will not ascribe to the General Assembly an intent to make such an extension. Rather, as indicated supra, we think it was the legislative intent, clearly manifested, to except such nonhealth care providers from the protection of the cap.

Likewise, it would not serve the legislative purpose to extend the protection of the cap to corporations such as Coastal—a corporation which is clearly separate from Dr. DiGiovanna's professional corporation (see Defendants' Exhibit 32 at page 1), which does not operate any emergency rooms, and which does not own or provide any equipment used in emergency departments. Furthermore, there is no evidence that Coastal even obtains malpractice insurance for the physicians it engages.

In further examining the definition of "health care" under the Virginia statute, it is clear that Coastal's activities such as recruiting, checking credentials, and acting as a clearinghouse to provide emergency physicians to various hospitals do not constitute health care. This is because such activities do not form an inseparable part of examination or treatment of patients. See Hagan v. Antonio, 240 Va. 347, 397 S.E.2d 810, 812 (1990) (touching of woman's breast during examination constituted medical malpractice, requiring a notice of claim, but "[r]ape or robbery during such an

examination, or during the treatment of a patient, could never arguably be classified as an inseparable part of examination or treatment"); cf. Petter v. Acevedo, 31 Va. Cir. 7 (City of Alexandria 1993) (holding that the tort alleged was not "malpractice" within the meaning of § 8.01-581.1, and that consequently the cap did not apply, since the tort alleged the fraudulent fabrication of medical records). In Petter v. Acevedo, 31 Va. Cir. at 9, the Alexandria Circuit Court explained:

While the maintenance of a patient's record is an important part of a health care provider's role, it is not "health care" within the meaning of the Code nor "professional services" rendered to the patient.

Finally, authority from other jurisdictions likewise supports the conclusion that the type of activity engaged in by Coastal does not come within the protection of the malpractice statute. See Browning v. Burt, 66 Ohio St. 3d 544, 613 N.E.2d 993, 1002-03 (1993). In Browning, the Ohio Supreme Court ruled that the negligent credentialing of a physician by a hospital was not "medical diagnosis, care, or treatment" within the meaning of the statute of limitations requiring an action to be brought within one year under Ohio's malpractice legislation.

Moreover, none of Coastal's activities suggests that it "renders" health care services. In the context of § 8.01-581.1's definition of "health care provider," "renders" means to "perform," "give," or "deliver." See Webster's New World Dictionary 1136 (3d ed. 1988); Black's Law Dictionary 1296 (6th ed. 1990). As the record here establishes, Coastal did not perform, give, or deliver health care. It delivered doctors to hospitals after recruiting, evaluating, and contracting with such doctors. Thus, although Coastal performs many administrative tasks, it does nothing to "render" health care

services. Cf. Inglewood Radiology Medical Group, Inc. v. Hospital Shared Services, Inc., 217 Cal. App. 3d 1366, 266 Cal. Rptr. 501, 503 (1989) (medical group's alleged wrongful decision to terminate physician employee was not an act of "rendering professional services" within the meaning of the coverage provision of a medical malpractice policy, despite the medical group's claim that a physician's expertise may be required properly to evaluate a particular physician's performance as employee; decision to terminate was a business or administrative decision, not a medical decision).

In short, although Coastal is a corporation which, as a specialized type of employment placement service, recruits emergency physicians and then supplies them to hospitals, Coastal has failed to carry its burden of proving that it is a corporation "which primarily renders health care services" within the meaning of § 8.01-581.1. Therefore, Coastal is not entitled to the protection of the cap.

2. As a matter of law, the trial court was wrong to apply the medical malpractice cap to prejudgment interest.
 - a. The jury's award of interest was not "for" Mrs. Pulliam's death, within the meaning of Virginia Code § 8.01-581.15.

The jury's award of interest was not "for" Mrs. Pulliam's death, within the meaning of Virginia Code § 8.01-581.15. With emphasis added, this statute states:

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after October 1, 1983, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed one million dollars.

Thus, § 8.01-581.15 limits only the total amount recoverable “for” any injury to, or death of, a patient, and interest is not “for” such injury or death. Nationwide Mutual Insurance Co. v. Finley, 215 Va. 700, 702, 214 S.E.2d 129, 131 (1975), stating, “[t]he interest the law allows on judgments is not an ‘element’ of damages, but a statutory award for delay in the payment of money due.” Accord McClung v. Smith, 870 F. Supp. 1384, 1409 (E.D. Va. 1994); Lynchburg v. Amherst County, 115 Va. 600, 608, 80 S.E. 117, 120 (1913), stating with respect to prejudgment interest “that it is but natural justice that he who has the use of another’s money should pay interest on it. . . .” Cf. Instruction No. 9.000 of Virginia Model Jury Instructions (Civil). It lists the eight items which the jury may consider in fixing the amount of “damages” in its “verdict.” Neither

interest, nor the date from which interest is to accrue, is among the list.³ Simply put, interest is not included among the damage factors listed in Instruction No. 9.000, and this is because interest is not an element of damages.

The discretionary nature of an award of interest underscores the fact that the jury's award of interest was not "for" Mrs. Pulliam's death, but rather was "for" delay in the payment of money due. Beale v. King, 204 Va. 443, 448, 132 S.E.2d 476, 480 (1963); Continental Insurance Co. v. City of Virginia Beach, 908 F. Supp. 341, 349 (E.D. Va. 1995).

³Instruction No. 9.000 reads as follows:

If you find your verdict for the plaintiff, then in determining the damages to which she is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

- (1) any bodily injuries she sustained and their effect on her health according to their degree and probable duration;
- (2) any physical pain [and mental anguish] she suffered in the past [and any that she may be reasonably expected to suffer in the future];
- (3) any disfigurement or deformity and any associated humiliation or embarrassment;
- (4) any inconvenience caused in the past [and any that probably will be caused in the future];
- (5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];
- (6) any earnings she lost because she was unable to work at her calling;
- (7) any loss of earnings and lessening of earning capacity, or either, that she may reasonably be expected to sustain in the future;
- (8) any property damage she sustained.

Your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

- b. The authority cited to the trial court by the defendants is distinguishable and not controlling.

The cases cited to the trial court by the defendants on this issue are clearly distinguishable. For example, in Taylor v. Mobil Corp., 248 Va. 101, 111 n.7, 444 S.E.2d 705, 711 n.7 (1994) (holding that the cap was not applicable to the defendant doctor, who was unlicensed), this Court explicitly left open the question of whether interest is included within the cap, as follows:

Although the jury awarded interest from the date of the verdict, the trial court awarded interest only from the date of judgment, so as not to exceed the one million dollar malpractice cap. Since we have held that the recovery in this case is not subject to the medical malpractice cap, we do not decide whether the trial court was correct in this ruling.

And in Dairyland Insurance Co. v. Douthat, 248 Va. 627, 449 S.E.2d 799 (1994), the appellant insurance companies conceded, for the point of argument, that prejudgment interest was “an element of compensatory damages,” thus eliminating the need for this Court to reach that issue. 248 Va. at 630, 449 S.E.2d at 801. Furthermore, Dairyland addressed the contractual interpretation of an insurance policy and not the statutory interpretation of § 8.01-581.15 which is at issue here.

- c. Authority from other jurisdictions supports the conclusion that prejudgment interest is not included in the malpractice cap.

Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901, 911 (Colo. 1993), supports Mr. Pulliam’s position that the cap does not apply to prejudgment interest. There, the Colorado Supreme Court held that prejudgment interest was not included

within the \$1 million cap on damages in medical malpractice cases in that state.⁴ This was because, when the Colorado cap was enacted, a Colorado statute was already in force allowing the fact finder to award prejudgment interest, because the cap statute made no reference to the interest statute, and because “when two statutes apparently conflict, a court will strive to read them harmoniously so as to give effect to both.” 851 P.2d at 911.

Likewise, in the present case, it can be assumed that the Virginia General Assembly was aware of the provisions of § 8.01-382 (the interest statute) when it enacted § 8.01-581.15 (the cap statute), and that the General Assembly did not intend to abolish or otherwise abrogate a preexisting law without a clear expression of its intent to do so. Moreover, such an intent can not be inferred from the language of § 8.01-581.15. Board of Supervisors v. Marshall, 215 Va. 756, 214 S.E.2d 146, 150 (1975), stating:

If apparently conflicting statutes can be harmonized and effect given to both of them, they will be so construed.

Therefore, like the Supreme Court of Colorado in Scholz, this Court should conclude that the cap does not apply to prejudgment interest.

3. The trial court abused its discretion in applying the medical malpractice cap before ruling on the defendants’ motion to reduce the verdict on grounds that the verdict was allegedly excessive.

The trial court abused its discretion in applying the medical malpractice cap before ruling on the defendants’ motion to reduce the verdict on grounds that the verdict was

⁴Also, the Supreme Court of Colorado ruled that whether prejudgment interest was considered "compensatory" damages was irrelevant to the inquiry of whether the malpractice damages cap contained in the Colorado malpractice act restricted the recovery of such damages. Id. at 910.

allegedly excessive. By letter dated December 23, 1997, Mr. Pulliam asked the trial court to rule on the defendants' excessiveness motion before applying the cap. The trial court refused. Transcript of the hearing held December 31, 1997, 3.1-7.9. Mr. Pulliam made this request so as to eliminate any concern this Court might have that it might not be necessary to reach the issue of the cap's constitutionality, since the defendants' excessiveness motion was unresolved. Bissell v. Commonwealth, 199 Va. 397, 400, 100 S.E.2d 1, 3 (1957), stating:

One of the most firmly established doctrines in the field of constitutional law is that a court will pass upon the constitutionality of a statute only when it is necessary to the determination of the merits of the case.

In so refusing, the trial court abused its discretion. This is because the trial court thereby arguably prevented Mr. Pulliam from squarely presenting to this Court the issue of the constitutionality of the cap.

4. As a matter of law, the trial court erred in failing to conclude that the cap on medical malpractice awards is unconstitutional as applied to Coastal and to Dr. DiGiovanna.
 - a. The cap constitutes impermissible special legislation.

The cap constitutes impermissible special legislation. In this regard, Article IV, § 14(18) of the Constitution of Virginia prohibits “[g]ranting to any . . . individual any special or exclusive right, privilege, or immunity.”⁵ But § 8.01-581.15 clearly identifies a specific elite class, described as “health care providers,” to which it accords

⁵For the reasons set forth below, Mr. Pulliam also contends that § 8.01-581.15 violates Article I, § 4 of the Virginia Constitution and its prohibition against “exclusive or separate emoluments or privileges. . . .”

special privileges and immunities that are given to no other tortfeasors in this Commonwealth. A special law has been defined by the Supreme Court as legislation which grants a benefit to some claimants to the exclusion of others similarly situated. Department of State Police v. Hines, 221 Va. 626, 272 S.E.2d 210 (1980). The purpose of the special law prohibition is aimed squarely at economic favoritism. Benderson Development Co. v. Sciortino, 236 Va. 136, 372 S.E.2d 751 (1988).

As to Coastal, the cap clearly constitutes impermissible special legislation. This is because the cap protects “health care providers,” and such a statutory classification violates Virginia’s constitutional prohibition against special legislation unless “the classification bears ‘a reasonable and substantial relation to the object sought to be accomplished by the legislation’” Etheridge v. Medical Center Hospitals, 237 Va. 87, 102, 376 S.E.2d 525, 533 (1989). And in adopting the 1994 amendment that added subpart (vi) to § 8.01-581.1’s definition of health care provider, the General Assembly did not make any findings whatsoever as to the public policy to be furthered by thus expanding the class eligible for the cap’s protection. Compare the Acts of Assembly 1976 (specifying in its preamble the need and reasons for creating the Virginia Medical Malpractice Act so as to cap the liability of licensed health care providers) with the Acts of Assembly 1994 (specifying no reasons whatsoever for extending the cap to businesses like Coastal that are not “licensed health care providers”, as the Virginia legislature defined that term when adopting the Virginia Medical Malpractice Act in 1976). As a result, subpart (vi) violates Virginia’s constitutional prohibitions against special legislation. Etheridge, 237 Va. at 93-94, 376 S.E.2d at 527-28, where this Court

wrote that “the need and reasons for the [Virginia Medical Malpractice Act] are stated in the Preamble to the Act,” and then quoted the Preamble as follows:

Whereas, the General Assembly has determined that it is becoming increasingly difficult for health care providers of the Commonwealth to obtain medical malpractice insurance with limits at affordable rates in excess of \$750,000; and

Whereas, the difficulty, cost and potential unavailability of such insurance has caused health care providers to cease providing services or to retire prematurely and has become a substantial impairment to health care providers entering into practice in the Commonwealth and reduces or will tend to reduce the number of young people interested in or willing to enter health care careers; and

Whereas, these factors constitute a significant problem adversely affecting the public health, safety and welfare which necessitates the imposition of a limitation on the liability of health care providers in tort actions commonly referred to as medical malpractice cases[.]

Schwartz v. Brownlee, *supra*, 253 Va. at 167, 482 S.E.2d at 831-832, stating:

The General Assembly enacted the medical malpractice cap for the purpose of enabling licensed health care providers to secure medical malpractice insurance at affordable rates. See Etheridge v. Medical Center Hospitals, 237 Va. 87, 93-94, 376 S.E.2d 525, 527-28 (1989). It would not serve that purpose to extend the protection of the cap to non-health care providers. . . .

In Etheridge, this Court held that the cap was not impermissible special legislation, as applied to physicians licensed by the Commonwealth, because:

Whether a classification is arbitrary “depend[s] upon the purpose and subject of the particular act and the circumstances and conditions surrounding its passage.” *Id.* at 610, 102 S.E. at 79. Accord Avery v. Beale, 195 Va. 690,

701, 80 S.E.2d 584, 591 (1954); Joyner v. Centre Motor Co., 192 Va. 627, 632-33, 66 S.E.2d 469, 472 (1951).

After careful and deliberate study, the General Assembly determined that health care providers faced increasing difficulty in obtaining affordable malpractice insurance coverage in excess of \$750,000 and that this situation would tend to reduce the number of health care providers available to serve Virginia's citizens. The General Assembly further determined that "these factors constitute a significant problem adversely affecting the public health, safety and welfare" and necessitate the imposition of a limitation on the liability of health care providers in medical malpractice actions. Having made these determinations, the General Assembly decided that the damage award in medical malpractice actions should not exceed \$750,000. The limitation applies to all health care providers and to all medical malpractice plaintiffs.

According to the legislation the presumption of validity to which it is entitled, we conclude that the classification is not arbitrary and bears a reasonable and substantial relation to the object sought to be accomplished by the legislation. We further conclude that the legislation applies to all persons belonging to the class without distinction and, therefore, is not special in effect. Accordingly, we hold that Code § 8.01-581.15 does not violate the prohibition against special legislation.

237 Va. at 102-103, 376 S.E.2d at 533.

And as to Dr. DiGiovanna, Mr. Pulliam asks this Court to reverse Etheridge and conclude that the cap violates the Virginia constitutional prohibition against special legislation. As noted by Justice Russell in his dissent in Etheridge, the General Assembly acted arbitrarily in restricting the cap so that it did not apply "to all plaintiffs and all defendants regardless of their identities." 237 Va. at 112, 376 S.E.2d at 538. Cf. Best v. Taylor Machine Works, 1997 WL 777822, at 22 (Ill. 1997), holding that a

compensatory damages cap violates the special legislation clause of the Illinois Constitution.

In at least two different ways, the cap is impermissible special legislation when applied to Dr. DiGiovanna. First, if the cap is constitutionally sound, Dr. DiGiovanna is immune to judgments in excess of \$1 million regardless of the value of the property interest damaged, solely because he committed medical malpractice. However, if Dr. DiGiovanna was negligently driving an automobile and was involved in an accident in which Mrs. Pulliam was killed, he could be held liable for the full \$2,000,000. Second, the cap distinguishes between medical malpractice victims who are made to suffer injuries determined by a jury to be valued at \$1 million or less, and those whose injuries a jury values at more than \$1 million.

The doctrine of stare decisis should not restrain this Court from reversing Etheridge. This is because the doctrine of stare decisis is not binding when it comes to constitutional issues, and reevaluation of constitutional issues is constantly necessary when there is a divided court. See Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), overruled on other grounds, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Burks v. Hinton, 77 Va. 1, 24-25 (1883).

The Supreme Court's decision in Burks is often cited for the proposition that questions of constitutionality of statutes are not affected by the doctrine of stare decisis in this Commonwealth. See Michie's Jur. Va. & W. Va., "Stare Decisis" § 8 n.8 (1995). The Supreme Court of the United States has also addressed the use of the doctrine of stare decisis, noting in Thomas v. Washington Gas Light Co., 445 U.S. 924 (1980), that

there is a much more limited application of stare decisis when the precedent rests on constitutional grounds. This is because correction through legislative action is virtually impossible.

In Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971), this Court noted that former rules should give way to rules of reason in light of changed circumstances. This is because “no legal principle is ever settled until it is settled right,” and because “it is better to be right than to be consistent with the errors of a hundred years.” Michie’s Jur. Va. & W. Va., “Stare Decisis” § 9 (quoting Adkins v. St. Francis Hospital, 149 W. Va. 705, 143 S.E.2d 154 (1965)).

- b. The cap violates Mr. Pulliam’s constitutionally guaranteed rights of due process.

Mr. Pulliam incorporates by reference the due process arguments considered and rejected by this Court in Etheridge, and asks this Court to reverse Etheridge.

But even if Etheridge is good law in all respects, the cap clearly violates substantive due process when applied to Coastal. This is because capping Coastal’s liability does not help licensed health care providers obtain affordable medical malpractice insurance. Etheridge, 237 Va. at 100, 376 S.E.2d at 531, noting that the cap does not violate substantive due process “if it is reasonably related to a legitimate government purpose”; Schwartz, 253 Va. at 167, 482 S.E.2d at 83, stating:

It would not serve that purpose [for which the General Assembly adopted the cap] to extend the protection of the cap to non-health care providers [as the term “health care provider” was defined before subpart (vi) was added]. . . .

- c. The cap constitutes a “taking” of property in violation of the Virginia Constitution and the United States Constitution.

Article I, § 11 of the Virginia Constitution and the Fifth Amendment to the United States Constitution provide that property cannot be taken without just compensation. The 1902 addition of the phrase “or damaged” to Virginia’s “takings” clause expressed a desire to broaden and strengthen the protection offered to private property by this fundamental constitutional guarantee. See A. Howard, Commentaries of the Constitution of Virginia (1974) (discussing the original “or damaged” amendment of Article 1, § 11, and how it has been interpreted by Virginia courts). Indeed, this makes Virginia’s “takings” clause even broader than its federal counterpart. In addition, the Fourteenth Amendment prohibits the state from taking one man’s property for the benefit of others. Kelleher v. French, 22 F.2d 341, 343 (W.D. Va. 1927).

This Court has never addressed the “takings” argument in the context of a challenge to the constitutionality of the cap, even though this Court has long recognized and safeguarded the fundamental importance of private property as one of the pillars of our society.

In determining whether the cap violates these various constitutional prohibitions against the taking of private property, one must make three inquiries: (1) whether there was a taking of property; (2) whether the defendant intentionally deprived the plaintiff of this property; and (3) whether this deprivation occurred without due process of law. See, e.g., HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).

As to the first inquiry, the effect of the cap is to take the property of Mr. Pulliam and his son. As the statutory beneficiaries of Mrs. Pulliam's death, Mr. Pulliam and his son had a property interest in the full measure of the jury's verdict. Personal injury and wrongful death compensation can be understood as an attempt not only to restore a plaintiff's personal integrity, but also to compensate the infringement of the plaintiff's property rights in that integrity. Cf. United States v. General Motors Corp., 65 S. Ct. 357, 323 U.S. 373, 377-378, 89 L.2d 311 (1945) (remarking that the "property" protected by the just compensation clause is not only physical property but "every sort of interest the citizen may possess"). To have a property interest in a benefit, a person must have a legitimate claim of entitlement to the property. Sabet v. Eastern Virginia Medical Authority, 611 F. Supp. 388 (E.D. Va. 1985), aff'd., 775 F.2d 1266 (4th Cir. 1985). But for the cap, Mr. Pulliam and his son would be entitled to recover \$2,000,000, not \$1,000,000.

As to the second inquiry, by invoking the cap, the defendants intentionally deprived Mr. Pulliam and his son of \$1,000,000.

As to the third inquiry, this deprivation occurred without due process of law. Section 8.01-581.15 mandates that the cap be applied without any regard to the value of the loss or other proper considerations.

- d. The application of § 8.01-581.15's damage limitation of \$1 million violates Mr. Pulliam's right to a jury trial.

Article I, § 11 of the Constitution of Virginia provides “[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred.”

Mr. Pulliam is aware that this Court rejected this argument in Etheridge, 237 Va. at 95-97, 376 S.E.2d at 528-529. In Etheridge this Court concluded that the jury’s fact-finding function extended to assessment of damages and that, once the jury has ascertained the facts and assessed damages, the constitutional mandate is satisfied and it becomes the duty of the trial court to apply the law to the facts. In other words, in Etheridge, this Court concluded that “yes, you may have a jury trial as the constitution guarantees, but legislators can make it meaningless.” Indeed, Etheridge has been criticized in other jurisdictions regarding this very issue. See e.g., Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989), stating:

The Etheridge opinion is also poorly reasoned. After conceding that the “jury’s fact-finding function extends to the assessment of damages,” the court finds that a “trial court applies the remedy’s limitation only after the jury has fulfilled its fact-finding function.” Etheridge, at 96, 376 S.E.2d 525. Thus, supposedly, the limitation does not infringe on the jury’s function. Etheridge, at 96, 376 S.E.2d 525.

It is unconstitutional for the legislature to reexamine that amount of damages assessed by the jury. The trial court may reexamine the amount of the verdict, but the legislature may not without violating Mr. Pulliam’s constitutionally guaranteed right to a jury trial.

- e. The cap violates the Fourteenth Amendment’s Equal Protection Clause based upon the statute’s discriminatory intent or effect on those with catastrophic injuries.

Other state courts have determined that statutory schemes similar to the one enacted in Virginia violate either the federal equal protection guarantee or its state counterpart. See Carson v. Maurer, 120 N.H. 925, 424 A.2d 825, 835-838 (1980); Duren v. Suburban Community Hospital, 24 Ohio Misc.2d 25, 495 N.E.2d 51, 56 (C.P. 1985); Condemarin v. University Hospital, 775 P.2d 348, 354 (Utah 1989). The equal protection clause requires a government to treat similar individuals similarly and forbids legislatures from basing a classification upon impermissible criteria which arbitrarily burden a group of individuals. Id.

The malpractice study underlying the cap was arbitrary. After all, none of the legislative studies performed for the General Assembly recommended limits on the recoveries of victims of medical malpractice. And “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against inquiry into the actual purposes underlying the statutory scheme.” Weinberger v. Wiesenfield, 420 U.S. 636, 648 (1975). Etheridge was wrong in deciding otherwise, and should be reversed.

But even if Etheridge is good law as far as the licensed health care provider Dr. DiGiovanna is concerned, the cap nevertheless violates equal protection guarantees when applied to Coastal. This is because, as explained above, the cap does not promote a legitimate state purpose when applied to Coastal -- an entity that is not a licensed health care provider. Etheridge, 237 Va. at 103-104, 376 S.E.2d at 233-34; Schwartz, 253 Va. at 167, 482 S.E.2d at 831-832.

f. The cap invades the province of the judiciary.

Article VI, § 5 of the Constitution of Virginia provides that the Supreme Court has “the authority to make rules governing . . . the practice and procedures to be used in the courts of the Commonwealth. . . .” Thus, the judiciary, not the legislature, makes the rules applicable to jury verdicts.

This Court has never addressed the “province of the judiciary” argument in the context of a challenge to the constitutionality of the cap, although in Etheridge this Court did find that the cap does not violate the doctrine of separation of powers. 237 Va. at 100-101, 376 S.E.2d at 531-532.

Although the judiciary alone has the power to order a taking away of a jury-reinstated property right, the cap divests the judiciary of that power. Regardless of the economic consequences, a legislative remittitur befalls only the truly catastrophic malpractice victims. In contrast, a judicial remittitur permits a knowledgeable and neutral party (the trial judge) to review, in a discretionary fashion, and reduce the verdict of a jury.

In short, because the cap invades the province of the judiciary, the cap is unconstitutional as to Dr. DiGiovanna as well as to Coastal.

- g. The cap is unconstitutional because it violates the separation of powers doctrine.

The cap is unconstitutional because it violates the separation of powers doctrine. Etheridge was wrong in deciding otherwise, and should be reversed. Best v. Taylor

Machine Works, supra, 1997 WL 777822, at 25, holding that a compensatory damages cap violates the separation of powers clause of the Illinois Constitution.

5. The trial court abused its discretion in denying Mr. Pulliam's motion to amend his motion for judgment to add Count 5, by which Mr. Pulliam sought punitive damages against Dr. DiGiovanna.

The Court reaches this issue only if the cap does not apply to Coastal or is unconstitutional as to either or both defendants.

The trial court abused its discretion in denying Mr. Pulliam's motion to amend his motion for judgment to add Count 5, by which Mr. Pulliam sought punitive damages against Dr. DiGiovanna. Mortarino v. Consultant Engineering Services, Inc., 251 Va. 289, 295-96, 467 S.E.2d 778, 782 (1996), stating:

Rule 1:8 states in part: "[l]eave to amend shall be liberally granted in furtherance of the ends of justice." Whether to grant leave to amend "is a matter resting within the sound discretion of the trial court." Kole v. City of Chesapeake, 247 Va. 51, 57, 439 S.E.2d 405,409 (1994). Here, nothing in the record suggests that the defendant would have been prejudiced by allowing an amended motion for judgment. Additionally, Mortarino had not previously amended his motion for judgment. We conclude, therefore, that the trial court abused its discretion in failing to allow the filing of the amended motion for judgment.

Contrary to Mortarino, the trial court denied Mr. Pulliam's motion to add Count 5.

By letter opinion dated July 28, 1997, the trial judge explained:

The Court remains of the opinion that the focus of this case must be on the care provided by Dr. DiGiovanna, a duly licensed physician, to Plaintiff's decedent in December of 1995.

Plaintiff's amendment for punitive damages would only provide a vehicle to attempt to present evidence that is both

irreverent and highly prejudicial and will, therefore, not be allowed.

There can be no doubt that, in the broadest sense, the allegations of Count 5 are “highly prejudicial” to Dr. DiGiovanna and Coastal. For in Count 5 Mr. Pulliam alleges and documents that:

- a. In 1983, Dr. DiGiovanna suffered organic brain damage when he was shot in the head at close range with a pistol. Paragraph 25 of Count 5.
- b. Dr. DiGiovanna purposefully misled the administrators of the George Washington University residency program about his history of seizures because (according to Dr. DiGiovanna’s sworn deposition testimony):

If it appears on my record I have an injury I will not be a surgeon or emergency room physician which are the two specialties I do.

Paragraph 34 of Count 5.

- c. In 1991, the Maryland Board of Physician Quality Assurance disciplined Dr. DiGiovanna for forging the name of another physician to a lab requisition form and for forging his ex-girlfriend’s name to a consent form

to accompany HIV+ blood he had obtained from someone else and then fraudulently represented to be the blood of his ex-girlfriend. Paragraph 28 of Count 5.

- d. In 1992, the Florida Board of Medicine concluded that Dr. DiGiovanna “is not able to practice medicine with reasonable skill and safety.” Paragraph 32(d) of Count 5.

Even though these allegations are, in the broadest sense, “highly prejudicial” to Dr. DiGiovanna and Coastal, in thus denying Mr. Pulliam’s motion to add Count 5, the trial court violated the mandate of Mortarino. For Count 5 is no more “prejudicial” to Dr. DiGiovanna than any claim for punitive damages is prejudicial to the party against which it is filed. As the editorial explanatory comment to Federal Rule of Evidence 403 states:

Evidence is not “prejudicial” merely because it is harmful to the adversary. After all, if it didn’t harm the adversary, it wouldn’t be relevant in the first place. Rather, the Rule refers to the negative consequence of “unfair” prejudice. Unfair prejudice is that which could lead the jury to make an emotional or irrational decision, or to use the evidence in a manner not permitted by the rules of evidence. Professor Lempert, in Modeling Relevance, 75 Mich. L. Rev. 1021 (1977), defines prejudicial evidence as “any evidence that influences jury verdicts without relating logically to the issue of guilt or innocence.” We would prefer a slightly different definition: “prejudicial evidence is any evidence that affects the trier of fact in a manner not attributable to the permissible probative force of the evidence.” This definition makes clear that evidence that strongly relates to the issue of guilt or liability might be highly prejudicial, and also that evidence that is probative for a permissible use may nonetheless be prejudicial because the jury could use it for an impermissible purpose.

And less drastic methods for preventing unfair prejudice were available to the trial court. For example, a cautionary instruction to the jury, or bifurcation of the compensatory damage and punitive damage portions of the trial.

Accordingly, the matter should be remanded to allow Mr. Pulliam to try his claim for punitive damages as set forth in Count 5.

6. The trial court abused its discretion in failing to allow discovery relevant to Mr. Pulliam's claim for punitive damages. For example, subpoenas for medical records dealing with the injury caused to Dr. DiGiovanna's brain when he was shot in the head with a pistol at close range in 1983; subpoenas for records dealing with Dr. DiGiovanna's aberrant behavior when, in 1991, he forged the name of another physician to a lab requisition form, forged his ex-girlfriend's name to a consent form to accompany HIV+ blood he had obtained from someone else, and then fraudulently represented that blood to be the blood of his ex-girlfriend; and a Rule 4:10 exam by a neurologist and a neuropsychologist to assess Dr. DiGiovanna's mental status.

The Court reaches this issue only if it remands the matter so that the allegations of Count 5 may be tried.

The trial court abused its discretion in failing to allow discovery relevant to Mr. Pulliam's claim for punitive damages. Mr. Pulliam sought this disallowed discovery in various motions⁶ heard June 3, 1997. The discovery at issue was relevant to Count 5,

⁶ By Motion #2, Mr. Pulliam sought to subpoena documents from SRMC, Tazewell Community Hospital, John D. Ward, M.D., and the Medical College of Virginia, all dealing with Dr. DiGiovanna, his medical history, or how he spent his time at SRMC during the last several hours before he examined Mrs. Pulliam. For copies of the subpoenas in question, see Attachments #15 through 18 to plaintiff's counsel's letter dated May 23, 1997, addressed to the Clerk of the Circuit Court of the City of Petersburg.

By Motion #s 3 through 6, Mr. Pulliam sought information from Dr. DiGiovanna by means of requests for production and interrogatories. Topics included Dr. DiGiovanna's history of professional disciplinary problems, including the aberrant and fraudulent behavior described above involving his ex-girlfriend and HIV+ blood. For

within the meaning of Rule 4:1(b)(1) of this Court, since it could lead to evidence as to the extent and functional effect of the brain injury Dr. DiGiovanna suffered due to the gunshot to the head in 1983, in spite of which he examined Mrs. Pulliam and then sent her home without performing any chest x-ray or lab test even though she then had lethal pneumonia.

The trial court abused its discretion in refusing to allow the discovery at issue.

By letter dated July 28, 1997, the trial court explained its decision, as follows:

The Court remains of the opinion that the focus of this case must be on the care provided by Dr. DiGiovanna, a duly licensed physician, to Plaintiff's decedent in December of 1995.

Plaintiff's amendment for punitive damages would only provide a vehicle to attempt to present evidence that is both irreverent and highly prejudicial and will, therefore, not be allowed. Plaintiff's requests for Dr. DiGiovanna's medical records, records relating to disciplinary actions,

copies of the requests for production and interrogatories in question, see Attachment #s 19, 21, 23, and 25 to plaintiff's counsel's letter dated May 23, 1997, addressed to the Clerk of the Circuit Court of the City of Petersburg.

By Motion #6, Mr. Pulliam sought documents from Coastal concerning Dr. DiGiovanna, including personnel files, medical files, and correspondence. For a copy of the request for production in question, see Attachment #25 to plaintiff's counsel's letter dated May 23, 1997, addressed to the Clerk of the Circuit Court of the City of Petersburg, at request for production #18.

By Motion #7, Mr. Pulliam sought to have Dr. DiGiovanna examined pursuant to Rule 4:10 of this Court. The exam was to be performed by a neurologist and a neuropsychologist, in accordance with the recommendations of Nathan D. Zasler, M.D., a physician who was Board Certified in Forensic Medicine as well as Physical Medicine and Rehabilitation. Dr. Zasler based his recommendations on his examination of pertinent documentation concerning Dr. DiGiovanna, gathered by plaintiff's counsel from public sources. For a copy of the report of Dr. Zasler and his CV, see Attachment #s 8 and 9 to plaintiff's counsel's letter dated May 23, 1997, addressed to the Clerk of the Circuit Court of the City of Petersburg.

and a medical exam of Dr. DiGiovanna, etc., will be denied.

But the discovery at issue “is relevant to the subject matter involved in” Count 5, and hence is appropriate. Rule 4:1(b)(1). In sum, the trial court abused its discretion in failing to allow discovery relevant to Mr. Pulliam’s claim for punitive damages, and this matter should be remanded to allow the proposed discovery to go forward.

7. As a matter of law, the trial court erred in excluding expert medical testimony as to the medical likelihood that Mrs. Pulliam’s pulse rate and respiration rate improved as claimed by Dr. DiGiovanna as part of his defense, even though Mrs. Pulliam was gravely ill, no one administered any relevant medical treatment, and Dr. DiGiovanna failed to note the alleged improvement in Mrs. Pulliam’s chart.

The Court reaches this issue only if it remands the matter so that the allegations of Count 5 may be tried.

As a matter of law, this trial court erred in excluding expert medical testimony as to the medical likelihood that Mrs. Pulliam’s pulse rate and respiration rate improved as claimed by Dr. DiGiovanna as part of his defense, even though Mrs. Pulliam was gravely ill, no one administered any relevant medical treatment, and Dr. DiGiovanna failed to note the alleged improvement in Mrs. Pulliam’s chart. Mr. Pulliam proffered the testimony at issue. It appears at 116.15 through 117.8 of Dr. Powers’s trial testimony.

There Dr. Powers, one of Mr. Pulliam’s two causation experts, testified:

Q Based solely on your knowledge of how Group A streptococcal pneumonia acts in the absence of any treatment, to a reasonable degree of medical certainty how likely is it that Mrs. Pulliam’s respiration rate or pulse rate or both decreased to within normal range during the 5:15 to 5:30 time period when Dr. DiGiovanna was with Mrs. Pulliam?

A It’s very unlikely.

Q Why do you say that based on your medical training and experience?

A Simply because what I believe was causing her respiratory rate to be rapid was her underlying disease process, and that disease process as it continued unabated would have progressed. It doesn't wax and wane, it just continues onward, and without treatment I would have expected the symptoms to either remain the same or get worse, symptoms and signs, the findings of which her rapid respiration would be one.

The trial court prohibited this testimony "for the reason it is a comment on the facts."

Transcript of the trial testimony of Dr. Powers at 51.1 through 51.16.

This issue is likely to arise again on remand as Mr. Pulliam attempts to prove the allegations of Count 5. For example, in paragraphs 35 and 36 of Count 5, Mr. Pulliam alleged that Dr. DiGiovanna purposefully failed to tell the truth when he claimed that, in the absence of any relevant medical treatment, there was an uncharted improvement in Mrs. Pulliam's pulse rate and respiration rate while Mrs. Pulliam was rapidly approaching death. As a result, Mr. Pulliam asks this Court to address this issue.

Holcombe v. Nationsbanc Financial Services, 248 Va. 445, 448, 450 S.E.2d 158, 160 (1994), stating:

Because this case will be remanded to provide the plaintiff an opportunity to have a jury decide this issue, we must address a question that likely will recur upon retrial.

Dr. Powers's proffered testimony should be admissible on remand. To exclude this testimony during the trial, the defendants relied solely upon David A. Parker Enterprises, Inc. v. Templeton, 251 Va. 235, 467 S.E.2d 488 (1996), but that decision is not dispositive. There, this Court held that expert opinion was not admissible as to whether a rotating propeller caused the plaintiff's injuries. Such testimony, this Court

explained, related to a matter “about which the fact finder is equally as capable as the expert of reaching an intelligent and informed opinion.” 251 Va. at 237, 467 S.E.2d at 490. At the same time, this Court stated:

it was appropriate for doctors to testify that [the plaintiff’s] wounds were inflicted by a sharp object because evidence about the type of injuries [the plaintiff] sustained was relevant and probative.

Id.

The Templeton decision of this Court supports the admissibility of Dr. Powers’s proffered testimony. This is because such testimony gives the jury an expert opinion as to how Group A streptococcal pneumonia affects pulse rate and respiration rate in the absence of relevant treatment -- a matter which is clearly beyond the knowledge of the typical juror. At the same time, the proffered testimony does not state any conclusion which the jury can reach as well as the expert. As a result, Dr. Powers’s proffered testimony should be admissible on remand.

CONCLUSION:

This wrongful death action, in which the jury returned a verdict of \$2,045,000, presents a number of issues of major importance throughout the Commonwealth in the critical area of medical malpractice. For example, there are no published decisions of this Court addressing the meaning or constitutionality of the 1994 amendment to § 8.01-581.1, by which the medical malpractice cap was extended to certain businesses that are not licensed to practice medicine. Because there was no evidence that the appellee Coastal

“primarily renders healthcare services” within the meaning of § 8.01-581.1 (vi), Coastal failed to carry its burden of proof that it was eligible for the shield of the cap.

Furthermore, the cap is unconstitutional as it applies to each of the two defendants - Dr. DiGiovanna and Coastal. For example, as this Court noted in 1997 in Schwartz v. Brownlee, 253 Va. at 167, 482 S.E.2d at 831-832, with respect to entities such as Coastal that are not licensed health care providers:

The General Assembly enacted the medical malpractice cap for the purpose of enabling licensed health care providers to secure medical malpractice insurance at affordable rates. See Etheridge v. Medical Center Hospitals, 237 Va. 87, 93-94, 376 S.E.2d 525, 527-28 (1989). It would not serve that purpose to extend the protection of the cap to non-health care providers. .

..

This appeal presents other important issues as well. For example, the correctness of the trial court’s refusal to allow Mr. Pulliam to amend his motion for judgment to seek punitive damages against Dr. DiGiovanna, because the proposed evidence was allegedly “irreverent and highly prejudicial.” This “irreverent” evidence included proof that, before Dr. DiGiovanna sent Mrs. Pulliam home with untreated pneumonia, he had suffered organic brain damage, engaged in aberrant behavior in which he fraudulently represented HIV+ blood to be the blood of his ex-girlfriend, and had been found by the Florida Board of Medicine to be “unable to practice medicine with reasonable skill and safety.”

KARL B. PULLIAM, Executor of
the Estate of Elnora R. Pulliam

By _____
Counsel

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220 North Sycamore Street
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Pursuant to Rule 5:17(e) of the Rules of Supreme Court of Virginia I hereby certify:

(a) The names of all appellants: Karl B. Pulliam, Executor of the
estate of Elnora R. Pulliam

The names of all appellees: Coastal Emergency Services of Richmond,
Inc. and Thomas Anthony DiGiovanna

The names, addresses, and telephone numbers of counsel for each
party:

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(b) The date of mailing or delivery of the petition to all opposing
counsel and all parties not represented by counsel: mailed February
____, 1998.

(c) Whether counsel desires to state orally to a panel of this Court the
reasons why this petition for appeal should be granted and, if so,

whether counsel intends to do so in person or by conference telephone call: counsel desires to state orally to a panel of this Court the reasons why this petition should be granted; he wishes to do so in person.

Charles H. Cuthbert, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PETERSBURG

KARL B. PULLIAM, EXECUTOR OF)
THE ESTATE OF ELNORA R. PULLIAM,)

Plaintiff,)

Court file #: CL96-211

v.)

COASTAL EMERGENCY SERVICES)
OF RICHMOND, INC.)

and)

THOMAS ANTHONY DIGIOVANNA,)

Defendants.)

NOTICE OF APPEAL

Pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, Karl B. Pulliam, by counsel, hereby gives notice of appeal of the order entered January 12, 1998. As to whether or not any transcript or statement of facts, testimony, or other incidents of the case will be filed, a transcript will be filed. The undersigned hereby certifies that a copy of the transcript has been ordered from the court reporter who reported the case.

KARL B. PULLIAM, Executor of
the Estate of Elnora R. Pulliam

By _____
Counsel

Charles H. Cuthbert, Jr.
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M:4777

CERTIFICATE OF SERVICE

On January _____, 1998, a copy of document was mailed to:

Joseph P. McMenamin, Esquire
McGuire, Woods, Battle & Boothe, L.L.P.
One James Center, 901 East Cary Street
Richmond, VA 23219

Charles H. Cuthbert, Jr.

