NO. 29988

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

MICHAEL RAY, Individually and as Next Friend for ALYSSA RAY, a minor, and DEBBIE RAY,

Plaintiff-Appellees/ Cross-Appellant,

vs.

KAPIOLANI MEDICAL SPECIALISTS; KAPIOLANI MEDICAL CENTER FOR WOMEN AND CHILDREN,

Defendants-Appellants/ Cross-Appellees,

DOES 1-20,

Defendants.

CIVIL NO. 06-1-1150

APPEAL FROM THE

1) JUDGMENT, filed herein on March 25, 2009;

2) ORDER DENYING DEFENDANT KAPIOLANI MEDICAL SPECIALISTS' MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE TO ALTER OR AMEND JUDGMENT, FILED APRIL 6, 2009, filed herein on July 7, 2009;

3) ORDER DENYING KAPIOLANI MEDICAL SPECIALISTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, FILED APRIL 6, 2009, filed herein on July 7, 2009;

4) ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION FOR COSTS, FILED JUNE 2, 2009, filed herein on July 7, 2009;

5) AMENDED JUDGMENT, filed herein on July 17, 2009;

CROSS APPEAL FROM THE

1) ORDER DENYING PLAINTIFF MICHAEL RAY, AS NEXT FRIEND OF ALYSSA RAY'S MOTION TO AMEND JUDGMENT ENTERED ON MARCH 25, 2009 REGARDING AWARD OF DAMAGES FOR PAIN AND SUFFERING FILED, FILED APRIL 6, 2009, filed herein on July 7, 2009;

2) ORDER DENYING PLAINTIFF MICHAEL RAY, AS NEXT FRIEND FOR ALYSSA RAY'S MOTION FOR NEW TRIAL, FILED APRIL 6, 2009, filed herein on July 7, 2009;

3) ORDER DENYING PLAINTIFFS' MOTION TO AMEND JUDGMENT ENTERED ON MARCH 25, 2009 FOR ADDITION OF PREJUDGMENT INTEREST, FILED APRIL 6, 2009, filed herein on July 7, 2009;

FIRST CIRCUIT COURT

HONORABLE GLENN J. KIM
HONORABLE ROM A. TRADER
Judges

AMICUS CURIAE BRIEF OF HAWAII MEDICAL ASSOCIATION AND AMERICAN MEDICAL ASSOCIATION

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NO. 29988

IN THE INTERMEDIATE COURT OF APPEALS

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MICHAEL RAY, Individually and as Next Friend for ALYSSA RAY, a minor, and DEBBIE RAY, Plaintiff-Appellees/ Cross-Appellant, vs. KAPIOLANI MEDICAL SPECIALISTS; KAPIOLANI MEDICAL CENTER FOR WOMEN AND CHILDREN, Defendants-Appellants/ Cross-Appellees, DOES 1-20, Defendants.	CIVIL NO. 06-1-1150 APPEAL FROM THE 1) JUDGMENT, filed herein on March 25, 2009; 2) ORDER DENYING DEFENDANT KAPIOLANI MEDICAL SPECIALISTS' MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE TO ALTER OR AMEND JUDGMENT, FILED APRIL 6, 2009, filed herein on July 7, 2009; 3) ORDER DENYING KAPIOLANI MEDICAL SPECIALISTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, FILED APRIL 6, 2009, filed herein on July 7, 2009; 4) ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION FOR COSTS, FILED JUNE 2, 2009, filed herein on July 7, 2009; 5) AMENDED JUDGMENT, filed herein on July 17, 2009; CROSS APPEAL FROM THE 1) ORDER DENYING PLAINTIFF MICHAEL RAY, AS NEXT FRIEND OF ALYSSA RAY'S MOTION TO AMEND JUDGMENT ENTERED ON MARCH 25, 2009 REGARDING AWARD OF DAMAGES FOR PAIN AND SUFFERING FILED, FILED APRIL 6, 2009, filed herein on July 7, 2009;

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AMICUS CURIAE BRIEF OF HAWAII MEDICAL ASSOCIATION AND AMERICAN MEDICAL ASSOCIATION

Amicus Curiae, the Hawaii Medical Association ("HMA") and the American Medical Association ("AMA")[1] submit their brief in the above-entitled appeal pursuant to this Honorable Court's Order filed February 24, 2010.

I. FACTS RELATED TO THE LEGISLATIVE HISTORY OF HRS § 663-8.7

In 1986, Hawai'i's legislature passed HRS § 663-8.7 as a temporary fix for the tort and insurance crisis in Hawaii. After revisiting the law several times, in 1995 the legislature made HRS § 663-8.7 a more permanent fixture in Hawaii law. During the 1986 special session, the legislature focused its efforts on tort reform and sought to reduce and stabilize insurance rates. It sought a solution to the "crisis in liability insurance" and saw "an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insurance regulatory system." S.L.H. 1986 Special Session, Act 2 § 1 at 3-4.

Hawai'i's limit on pain and suffering damages began in 1986. This and other reforms were positive steps expected to reduce costs of and increase availability of commercial liability insurance, which includes professional malpractice insurance. See infra, n.2. The legislature defined non-economic damages (HRS § 663-8.5) to distinguish other categories of noneconomic damages from "pain and suffering." 1986 Hawaii Senate Journal (hereafter "HSJ"), Special Session at 29 § 19. Only pain and suffering damages were capped. HRS § 663-8.7. The legislature set the cap at $375,000. because the highest award to date in Hawaii at that time was $300,000, and they wanted some figure above that, arriving at $375,000 as a compromise. 1986 HSJ, Special Session at 11. The tort reform of 1986 was "a test or an experiment to determine if the changes that are being made will work" over the following three years, and contained a "drop dead" clause, ensuring future review by the legislature in 1989. Id. at 19.

The 1986 reform was revisited not only in 1989, but also in 1991, 1993 and 1995. In 1989, the conference committee stated that the full impact of the limits on pain and suffering had yet to be revealed, and therefore, the innovations "should be allowed to continue for two more years" in order to evaluate the reforms. 1989 Hawaii House Journal at 744, Conf. Com. Rep. No.

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[1]The AMA participates in this brief on its own behalf as an Illinois not-for-profit corporation and as a representative of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

80, and 1989 S.L.H. at 664, Act 300. They extended the "drop dead" provisions in 1991 and 1993, and in 1993 the standing committee stated that it had amended the then-pending bill to "include a study by the Auditor to review the effects of Hawaii's tort reform law." 1993 HSJ at 1243, S.C.Rep. No. 1309.

In 1995 the standing committee stated that the 1986 tort reform act intended to "prevent the recurrence" of the 1986 insurance crisis. 1995 HSJ at 1422 at S.C. Rep. No. 1563. The committee found that the tort reforms had "proven effective in accomplishing their intended purpose and should therefore be made permanent to perpetuate the improvements", and stated that the "Auditor's Report No. 94-26[2] recommended that the entire Act 2 of the 1986 Special Session be made permanent." Id.

II. ISSUES PRESENTED

1. Does HRS § 663-8.7 violate Hawaii's constitutional right to trial by jury[3]?

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[2]Report 94-26 to the Governor and the Legislature of Hawaii, dated December 1994, stated the following with relevant pages cited. Much of the testimony preceding Act 2 [1986 Special Session] "centered on the high cost and unavailability of insurance for physicians, hospitals, others in the medical community, counties and small businesses." At p. 2. The auditor's study covered only commercial liability insurance (including general, business, and professional liability insurances) and included a survey and limited comparative analysis of tort law reform in other states, and interviews with knowledgeable persons, among other activities. At pp. 3-4. The Auditor found that "rate reductions imposed by the Act improved the availability and affordability of commercial liability insurance in Hawaii since 1986" and that "some of the tort provisions may have helped to restrain costs in a very small way." At p. 7. Principal causes of the insurance crisis of the mid-1980s were believed to be "highly competitive pricing", "an increasingly litigious society resulting in larger jury awards and greater liability claims losses," and a decrease in previously high interest rates. At p. 9. The Auditor concluded that the cap on damages for pain and suffering was one of several of Act 2's provisions which may have had a slight impact on reducing insurers' loss costs. At p. 13. Said cap was "intended to limit the amount of monetary awards and to make them more predictable", but it only applied to pain and suffering and was "high compared to some other states." At p. 16. The Auditor estimated "that the $375,000 cap could reduce total losses by less than 4 percent." At p. 17. The Auditor concluded that since 1986, Act 2 may have helped increase the "availability and affordability of commercial liability insurance", and recommended that the legislature make the entire act permanent. At p. 18.

[3]The Constitution of the State of Hawaii (hereafter "Hawaii Constitution") Article I § 13 states in full: "In suits at common law where the value in controversy shall exceed five thousand

2. Does HRS § 663-8.7 violate Hawaii's constitutional separation of powers[4]?

3. Does HRS § 663-8.7 violate Hawaii's constitutional right to equal protection[5]?

4. Does HRS § 663-8.7 violate Hawaii's constitutional right to due process of law[6]?

III. ARGUMENT

Plaintiffs submitted a verdict form which failed to delineate categories for various types of non-economic damages, and made no objection to their own verdict form which was submitted to the jury. Now Plaintiffs claim that HRS § 663-8.7[7], which applies a cap on pain and suffering damages, is unconstitutional under Hawaii's constitution. In the event that this Court

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dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury."

[4]The Hawaii Constitution Article VI § 1 states in full (with emphasis added): "The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules." The Hawaii Constitution Article III § 1 states in full (with emphasis added): "The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

[5]The Hawaii Constitution Article I § 3 states in full: "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section." And the Hawaii Constitution Article I § 5 states in full: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

[6]See supra n.3 at Hawaii Constitution Article I § 5

[7]Plaintiffs should not be allowed to challenge the constitutionality of HRS § 663-8.7 because they: failed to specifically set out "mental anguish" in the verdict form which they submitted; did not object to the verdict form; argued at trial that mental anguish/emotional distress damages were included in the "loss of enjoyment of life" damages; and now claim that "pain and suffering damages" should not be capped pursuant to statute because they might include "mental anguish" damages. Plaintiffs should not be allowed to complain when they not only failed to object to the verdict form but in fact created the ambiguity of which they complain.

reaches the issue of the constitutionality of HRS § 663-8.7, the Amici HMA and AMA request this court to affirm its constitutionality[8].

A. Hawaii's Statutory Cap on Pain and Suffering Damages Does Not Violate the Constitutional Right to Jury Trial

Plaintiffs *did* have a jury trial, and the jury rendered a verdict, determining both liability and damages. Plaintiffs now complain that after the jury completed its job, the trial court reduced one element of their damages under the mandate of HRS § 663-8.7. This complaint is outside the scope of the right to jury trial. The right to a jury trial has never been construed so broadly as to prohibit reasonable conditions upon its exercise. Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 513, 880 P.2d 169, 188 (1994) (affirmed sanctions against litigants who proceeded to a jury trial and failed to improve upon the ruling made by an arbitrator). Cf. Kang v. Harrington, 59 Haw. 652 n.3 and accompanying text , 664, 587 P.2d 285,293 n.3 and accompanying text (1978) (affirmed reduction of punitive damages from $20,000. to $2,500). Hawaii's laws, practices, and procedures affecting the right to trial by jury under article I, § 13 are valid as long as they do not significantly burden or impair the right to ultimately have a jury determine issues of fact. Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 513, 880 P.2d 169, 188 (1994).

Hawaii courts looks for guidance on Hawai'i's constitution to interpretations of the Seventh Amendment to the federal constitution. Porter v. Hu, 116 Hawai'i 42, 57, 169 P.3d 994, 1009 (App. 2007); and Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968). Under the Seventh Amendment, the federal courts affirm reasonable conditions upon the exercise of a right to jury trial. Tronzo v. Biomet, 236 F.3d 1342, 1351 (Fed.Cir.2001) (district court did not

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[8] State courts have upheld limits on noneconomic damages in at least 19 other jurisdictions: Fein v. Permanente Med. Group, 211 Cal.Rptr. 368, 384 (1985); Garhart v. Colombia/HealthONE, L.L.C., 95 P.3d 571, 582 (Colo. 2004) (joining states that have upheld damages caps as not infringing impermissibly on the judicial role in the separation of powers); Mizrahi v. Miami Med. Ctr., Ltd., 761 So.2d 1040, 1043 (Fla.2000); Adams v. Via Christi Reg'l Med. Ctr., 19 P.3d 132, 139 (Kan. 2001); Peters v. Saft, 597 A.2d 50, 52-54 (Me.1991); Meech v. Hillhaven W., Inc., 776 P.2d 488 (Mont. 1989); Wright v. Colleton Cty. School Dist., 391 S.E.2d 564 (S.C. 1990); Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex.1990) (cap on all damages); and see state court cases cited in Answering Brief of Defendant-Appellant/Cross-Appellee Kapiolani Medical Services Specialists at 15 n.11 and 16 n.12.

reweigh evidence or exercise discretion, it simply reduced damages to the maximum permitted under the law and the record); Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1332-33 (11th Cir. 1999)(affirming reduction of punitive damages from 15 million to 4.35 million dollars); New York, L.E. & W.R. Co. v. Estill, 147 U.S. 591, 622 (1893) (affirming deduction of improperly added interest because no statute allowed jury to award interest).

Plaintiffs rely on Sofie v. Fibreboard Corp., 771 P.2d 711, 716-17 (Wash. 1989) and Lakin v. Senco Prods., Inc., 987 P.2d 463, 468-70 (Or. 1999). Opening Brief, filed December 16, 2009 ("OB") at 19. Sofie and Lakin are distinguishable: Washington's and Oregon's constitutions protect as "inviolate"[9] the right to a jury, while Hawai'i "preserves" the right; the Washington and Oregon caps applied to all non-economic damages, while Hawai'i law caps only pain and suffering (applying no limit to other noneconomic damages); and the Washington and Oregon statutes provide that a jury "shall not be informed of the limitation" while Hawai'i has no such blindfold. Sofie, 771 P.2d at 712-713 and n.1, 716, and 721-22, and Lakin, 987 P.2d at 466 n.1, and 468.

HRS § 663-8.7 does not preclude the jury from being informed of the cap. Cf. Kaeo v. Davis, 68 Haw 447, 459-61, 719 P.2d 387, 396-96 (1986) (choosing not to "set juries loose in a maze of factual questions to be answered without intelligent awareness of the consequences," instead holding that the jury should be informed of the legal consequence of its verdict apportioning negligence among joint tortfeasors);[10] and Franklin v. Mazda Motor Corp., 704

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[9]In Atlanta Oculoplastic Surgery v. Nestlehutt __ S.E.2d ___, 2010 WL 1004996 at n.8 and accompanying text (Ga., 3/22/2010), the court held that the term "inviolate" in Georgia's constitution supported its holding that a cap on non-economic damages violated Georgia's constitutional right to jury trial; and distinguished caselaw from states like Hawai'i which do not contain the word "inviolate" in their constitutions.

[10]In their Reply brief at 3, Plaintiffs cite Primus v. Galgano, 329 F.3d 236, 238 (1st Cir. 2003) (holding that a defendant must request an instruction under Mass. Gen. Laws Ann. Ch. 231, § 60H and waives his claim for application of a cap if he does not do so). Primus is distinguishable because M.G.L.A. 231 § 60H states: "the court shall instruct the jury that in the event they find the defendant liable, they shall not award the plaintiff more than five hundred thousand dollars for pain and suffering ... " Hawaii's statute has no such mandatory language, but instead is silent on what the jury is to be told.

F.Supp 1325, 1328-29 (jury should be informed of impact of cap). Finally, Sofie relied in its reasoning on the overruled case of Boyd v. Bulala, 647 F.Supp. 781 (W.D. Va. 1986). *Compare* Sofie, 771 P.2d at 722 (citing Boyd, 647 F.Supp. at 789-90, holding that Virginia's cap was unconstitutional) *with* Boyd v. Bulala, 877 F.2d 1191, 1194 (1989) (reversing district court, citing conclusive Virginia law which held the Virginia cap constitutional under both the Virginia and federal constitutions, and agreeing that the cap comports with the federal constitution).

Statutory damage caps do not violate the Seventh Amendment because a court does not 'reexamine' a jury's verdict or impose its own factual determination of a proper award. Rather, the court simply implements a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable. Estate of Sisk v. Manzanares, 270 F.Supp.2d 1265, 1277-1278 (D.Kan.2003). Accord, Franklin, 704 F.Supp at 1333 (cap represents policy judgment by legislature that pain and suffering will be compensable in range between zero and $350,000).

In Tull v. United States, 481 U.S. 412, 426 n. 9 (1987), the U.S. Supreme Court stated that there was no evidence indicating that the Seventh Amendment was meant to extend the right to a jury trial to the remedy phase of a civil trial. While the Supreme Court held that the petitioner was entitled to a trial by jury on the issue of liability,[11] the Court refused to extend that right to the remedy phase of the trial. Id. at 427. The court held that only "those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." Tull, 481 U.S. at 425-26 (quoting Colgrove v. Baffin, 413 U.S. 149 (1973)), cited with approval in Housing Finance and Development Corp. v. Ferguson, 91 Hawai'i 81, 90, 979 P.2d 1107, 1116 (1999) (while determination of value of condemned property was jury question, determination of blight of summons damages was not).

Hawai'i's common law "is not limited to published judicial precedent, but includes the entire wealth of received tradition and usage, 'fundamental principles, modes of reasoning, and

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[11]Plaintiffs claim in their reply brief at p.6 that Tull was declared to be "inapposite" to claims recognized at common law, citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 350 (1998). However, Feltner dealt with whether Columbia was entitled to a jury trial even though it had elected statutory damages, and did not deal with a cap on damages. Feltner, 423 U.S. at 353. Moreover, the common law has never recognized a right to full recovery in tort. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 88-89 n.32 (1978).

the substance of its rules as illustrated by the reasons on which they are based, rather than the mere words in which they are expressed.'" Housing Finance, 91 Hawai'i at 89-90, 979 P.2d at 1115-16, citing Territory v. Alford, 39 Haw. 460, 466 (1952). New forums may be erected, and new remedies provided, accommodated to the ever shifting state of society. See, Richardson, 76 Hawai'i at 514-15, 880 P.2d at 189-90 (1994) (sanctions for failure to improve on non-binding arbitration award did not violate constitutional right to jury trial; arbitration rules did not impose an unreasonable burden on the right to a civil jury trial); and Azer v. Myers, 8 Haw.App. 86, 115, 193 P.2d 1189, 1208 (1990) (amendment of judgment to state that settlement regarding parking was not enforceable did not violate right to jury trial because no factual inquiry was required).

The scope of the right to a trial by jury does not extend to the remedy phase of a civil trial because the court does not always award the plaintiff the exact measure of damages found by the jury without limitation or modification. In Hawaii, the legislature has previously made policy decisions and enacted statutes that allow courts to make changes to the amount of damages found by the jury before determining the ultimate remedy—just as the legislature has done in HRS § 663-8.7. See, e.g., Han v. Yang, 84 Hawai'i 162, 177-78, 931 P.2d 604, 619-20 (App. 1997) (allowing a trebling of the jury's compensatory damages award, pursuant to statute); Ozaki v. Association of Apartment Owners of Discovery Bay, 87 Hawai'i 265, 269 and 270, 954 P.2d 644, 648 and 649 (1998) (jury's special verdict apportioned greater fault to plaintiff than to Discovery Bay, thus, pursuant to HRS § 663-31, affirming trial court's judgment in favor of Discovery Bay); HRS § 663-10.9 (precluding and limiting claims against certain co-defendants); and HRS § 663-31 (reducing recovery by plaintiff's percent of fault).

The jury trial right is satisfied by the rendering of the verdict. The court is allowed to subsequently make the strictly legal decision of entering the judgment. Estate of Bainbridge, 169 Cal. 166, 169 (1915) (jury trial constitutional guarantee is fully observed when the verdict is rendered and recorded; pronouncement of the judgment is determined by the trial court); Etheridge v. Medical Center Hospitals, 376 S.E.2d 525, 529 (Va. 1989) (upholding statute limiting total damages in medical malpractice cases, once the jury has ascertained facts and assessed damages, the constitutional mandate is satisfied; thereafter, the court applies the law to

the facts, and the limitation on damages does nothing more than establish the outer limits of a remedy provided by the legislature); Smith v. Botsford General Hosp., 419 F.3d 513, 519 (6th Cir. 2005) (jury determines facts not legal consequences of facts); Phillips v. Mirac, Inc., 685 N.W.2d 174, 183 (Mich. 2004) (Plaintiff had a jury trial and the jury determined the facts, the jury's function is complete); Kirkland v. Blaine County Medical Center, 4 P.3d 1115, 1120 (Idaho 2000) (plaintiffs only have a right to "present all of their claims and evidence to the jury and have the jury render a verdict based on that evidence"); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992) (jury assessed liability and determined economic and noneconomic damages, and that completed its constitutional task); Boyd v. Bulala ,877 F.2d 1191, 1196 (4th Cir. 1989) (once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law).

A statutory damage limitation does not interfere with or usurp the jury's important—but limited—role as a fact finder. A legislature adopting a prospective rule of law that limits claims for pain and suffering does not act as a fact finder in a legal controversy, but acts permissibly within its legislative powers that entitle it to create and repeal causes of action. Franklin, 704 F.Supp. at 1331. Juries always find facts on a matrix of laws from the legislature and from precedent, and limitations imposed by law do not usurp the jury function. Id. The cap in the Franklin case was $350,000 for all noneconomic damages. Franklin, 704 F.Supp. at 1326. Pain and suffering damages originally were a means to punish wrongdoers and assuage the feelings of those who had been wronged, but awards have become increasing anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and other means, affirming that the nature of pain and suffering makes it "incapable of measurement without speculation and guesswork." Franklin, 704 F.Supp. at 1332. Therefore, "juries have pulled enormous numbers from the air," making such damages an "anomaly in a system" that seeks to "foster rationalism and predictability." Franklin, 704 F.Supp. at 1326.

See also, Arbino v. Johnson & Johnson, 880 N.E.2d 420, 432 (Ohio 2007) (courts simply apply limits as a matter of law to facts found by the jury; they do not alter the findings of facts and thus avoid constitutional conflicts); Judd v. Drezga, 103 P.3d 135, 144 (Utah 2004) ("The

damage cap enacted by the legislature represents law" to which "the trial court must comport the jury's factual determinations"); Gourley ex rel. v. Methodist Health System, 663 N.W.2d 43, 75 (Neb. 2003) ("the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function"); Evans ex rel. Kutch v. State, 56 P.3d 1046, 1051 (Alaska 2002) ("The decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury"); Hemmings v. Tidyman's Inc, 285 F.3d 1174, 1202 (9th Cir. 2002) (same); Murphy v. Edmonds, 601 A.2d 102, 117 (Md. 1992) (statutory limit "fully preserves the right of having a jury resolve the factual issues with regard to the amount of noneconomic damages"); Davis v. Omitowoju, 883 F.2d 1155, 1162 (3d Cir. 1989) (the trial judge did not reexamine the jury verdict or make an independent finding for a different amount, rather, the reduction in damages came about as a requirement of legislation); and English v. New England Medical Center, Inc., 541 N.E.2d 329, 331 (Mass.1989) (plaintiffs had no right to a jury determination of damages in excess of the legislatively limited amount). Therefore HRS § 663-8.7 does not violate Hawai'i's constitutional right to jury trial.

B. Hawaii's Statutory Cap on Pain and Suffering Damages Does not Violate the Constitutional Provisions for Separation of Powers

Two decades before plaintiff's lawsuit, the Legislature, employing its far-reaching power to weigh competing interests and determine social policy, passed a generally applicable mechanism to modify the common law by limiting pain and suffering damages in many cases. This was the exercise of a quintessentially legislative prerogative. Even the highest courts of the land allow much weight to the legislative judgment, and hesitate to declare a law unconstitutional. State v. Taylor, 49 Haw. 624, 630, 425 P.2d 1014, 1019 (1967). The Legislature did not exercise a judicial function. It did not determine the maximum award. Instead, it established a maximum for pain and suffering damages in many classes of tort cases as part of its tort reform of 1986.

It is "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining" to establish that the legislature acted in an arbitrary and irrational way. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Plaintiffs "face an uphill battle" in meeting

this burden. Ileto v. Glock, Inc., 565 F.3d 1126, 1140 (9th Cir. 2009); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985). The United States Supreme Court has acknowledged lawmakers' constitutional authority to modify or abolish common law remedies:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, **to attain a permissible legislative object,**' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (internal citations omitted, emphasis added). "Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn v. Illinois, 94 U.S. 113, 134 (1876).

Accord, Hoffman, 767 F.2d 1431 (9th Cir. 1985) (Cal. law); Patton v. TIC United Corp., 77 F.3d 1235 (10th Cir.) (Kan. law), cert. denied, 518 U.S. 1005 (1996); Smith v. Botsford Gen. Hosp., 419 F.3d 513 (6th Cir. 2005) (Mich. law), cert. denied, 547 U.S. 1111 (2006); Etheridge v. Medical Center Hospitals, 376 S.E. 2d 525 (Va. 1989); Judd v. Drezga, 103 P.3d 135, 145 (Utah 2004); Arbino v. Johnson & Johnson, 880 N.E. 2d 420, 437-38 (Ohio, 2007); Estate of McCall v. United States, 663 F.Supp.2d 1276, 1306-07 (N.D. Fla. 2009); Federal Express Corp. v. United States, 228 F. Supp. 2d 1267 (D. N.M. 2002) (N.M. law); Owen v. United States, 935 F.2d 734 (5th Cir. 1991) (La. law), cert. denied, 502 U.S. 1031 (1992); Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands law); and Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989) (Md. law).

Historically, noneconomic damages were generally modest and large awards were uniformly reversed. See Ronald J. Allen & Alexia Brunet Marks, The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century, 4. J. Empirical Legal Stud. 365 (2007). By 1971, the Third Circuit found that in personal injury litigation "the intangible factor of 'pain, suffering, and inconvenience' constitutes the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." Nelson v. Keefer, 451 F.2d 289, 294 (3d Cir. 1971).

Hawai'i is not alone in trying to restrain limitless pain and suffering awards. Hawaii is among many states that have adopted a limit on pain and suffering in certain tort actions[12]. Courts upholding such statutes have recognized, "It is not this court's place to second-guess the Legislature's reasoning behind passing the act," Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 69 (Neb. 2003); rather, "it is up to the legislature . . . to decide whether its legislation continues to meet the purposes for which it was originally enacted." Estate of Verba v. Ghaphery, 552 S.E.2d 406, 412 (W. Va. 2001).

The Hawaii Supreme Court has traditionally respected the legislature's authority to decide broad economic and tort policy rules. State v. Mallan, 86 Hawai'i 440, 453 and 454, 950 P.2d 178, 191 and 192 (1998) (Courts do not substitute "their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws" or usurp the responsibilities of the legislature). Social and economic legislation is reviewed not by strict scrutiny but by the rational basis review unless a fundamental right is infringed. Mallan, 86 Hawai'i at 453, 950 P.2d at 191. No fundamental right is infringed in this case. See supra, at 4-9. See also, Thompson v. Kyo-Ya Co., Ltd., 112 Hawai'i 472, 481,146 P.3d 1049, 1058 (2006) (affirming summary judgment which confirmed legislative intent to have landowner immune from liability if he holds land open for recreational use); Iddings v. Mee-Lee, 82 Hawai'i 1, 19, 919 P.2d 263, 281 (1996) (deferring to legislature's choices regarding Hawai'i's workers' compensation system, and respecting those choices when interpreting the statute); Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 261, 861 P.2d 1, 7 (1993) (legislature could distinguish between commercial thrill craft and recreational thrill craft, affirming prohibition of commercial thrill craft operations on weekends and holidays). The Hawaii legislature did not preclude a jury from learning of the existence of the cap and did not intrude into the judicial function by passing HRS Section 663-8.7. *Compare* discussion of Sofie and Lakin *with* discussion of Kaeo and Franklin, supra at 5-

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[12] See, e.g., Ind. Code § 34-18-14-3; La. Rev. Stat. Ann. § 40:1299.42; Miss. Code Ann. § 11-1-60(2)(a); Mo. Rev. Stat. § 538.210; Neb. Rev. Stat § 44-2825; 63 Okla. Stat. § 1-1708.1F; S.C. Code Ann. § 15-32-220; Tex. Civ. Prac. & Rem. Code Ann. § 74.301; see also Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5(3)(a); Idaho Code § 6-1603; Kan. Stat. Ann. § 60-19a02(b); Md.. Ct & Jud. Proc. Code Ann. § 11-108; Ohio Rev. Code Ann. § 2315.18.

6.[13] Hawaii's statute has no such "blindfold" provision and therefore does not violate the constitutional provision for separation of powers.

C. Hawaii's Statutory Cap on Pain and Suffering Damages Does not Violate the Constitutional Provision for Equal Protection

The guarantee of equal protection does not bar any legislative classification that treats people differently. Classification is inherent in the law-making process and endemic to every statute. "The Legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals." Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws , 38 Calif. L Rev. 341, 343 (1949) . Courts apply a relaxed test for reasonableness[14] in most equal protection challenges: does the statute bear a rational relationship to a realistically conceivable purpose or goal of the legislation or some reasonable differentiation fairly related to the object of regulation? The question is whether the legislature could rationally have decided that its act might, not that it necessarily will, promote the legislative objectives. Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 466 (1981).

Most statutes, especially "economic and social welfare" measures like HRS § 663-8.7, are constitutional so long as they bear a reasonable relationship to their legitimate objectives. Dubin

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[13]See also Lebron v. Gottlieb Memorial Hosp., __ N.E.2d. __, 2010 WL 375190 (Ill. 2/4/10) (citing to 735 ILCS 5/2-1706.5 which precludes the jury from learning of the cap as do the statutes in Sofie and Lakin, thus holding that the Illinois statute violated the separation of powers. Moreover, the Illinois constitution, unlike Hawaii's and the federal constitution, holds the right to jury trial "inviolate". Anderson v. Klasek, 913 N.E.2d. 615, 618 (Ill.App.2009) (citing section 13 Article 1 of the 1970 Illinois constitution).

[14]The only exception to this rule of reasonableness is if the persons disadvantaged by the statute are a "discrete and insular minority" for whom ordinary legislative processes are unavailable, persons whom the courts have identified by the "suspect criteria" of race, religion, national origin and, in some cases, gender, United States v. Carolene Products Co., 304 U.S. 144, at 152 n.4 (1938), or by those denied a "fundamental" interest such as the right to vote, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), travel, Shapiro v. Thompson, 394 U.S. 618 (1969), or marry, Loving v. Virginia, 388 U.S. 1, 12-13 (1967). Legislative classifications based on "suspect" criteria or a trammeling upon "fundamental" interests violate "equal protection" unless the state interest animating the legislation is "compelling" and the legislation is "narrowly drawn" so as not to sweep within its ambit more persons than necessary to effectuate its objective.

v. Wakuzawa, 89 Hawai'i 188, 197, 970 P.2d 496, 505 (1998) (HRS chapter 671 does not violate equal protection; requiring medical malpractice claims to go through a Medical Claims Conciliation Panel proceeding prior to suit, rationally furthers the legislative purposes of assuring adequate protection for tort victims while keeping insurance premiums affordable); Del Rio v. Crake, 87 Hawai'i 297, 306-07, 955 P.2d 90, 99-100 (1998) (holding HRS § 431:10C-306 does not deny equal protection of the laws to those ineligible for no-fault benefits, deferring to legislative judgments for creating a system of reparations for accidental harm and loss arising from motor vehicle accidents, to compensate without regard to fault, and to limit tort liability); and In re Pacific Marine & Supply Co., Ltd., 55 Haw. 572, 581, 524 P.2d 890, 896 (1974) (if a classification in a non-suspect discrimination is arguably tailored to serve the state policy, it is not arbitrary or capricious, and is constitutional under the equal protection clause).

The constitutionality of statutory discriminations is presumed. New Orleans v. Duke, 427 U.S. 297, 303-304 (1976) ("States are accorded wide latitude in the regulation" of "local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude"). Legislatures may adopt regulations that only partially ameliorate a perceived evil and defer complete elimination of the evil to future regulations. Id. The "judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Id.

The cap in this case is not based on a "suspect criteria," and does not trammel a fundamental right. Therefore, the legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest. Del Rio v. Crake, 87 Hawai'i 297, 306-307, 955 P.2d 90, 99-100 (1998). Even if the court accepts Plaintiff's contention that the noneconomic-damages cap disproportionately affects certain classes such as females and children, facially neutral laws that may have such an impact do not violate the Equal Protection Clause. See, Washington v. Davis, 426 U.S. 229, 242 (1976) (the requirement that police recruits take written exam affected black applicants four times more than whites but did not violate equal protection without proof of discriminatory purpose); Massachusetts Personnel Admr. v. Feeney,

442 U.S. 256, 274-75 (1979) (despite disproportionate impact on women, facially gender-neutral statute giving preference to veterans for public employment, did not violate equal protection absent showing of discriminatory legislative purpose); Arbino v. Johnson & Johnson, 880 N.E.2d 420, 436 (Ohio 2007) (damages cap was facially neutral and did not violate equal protection); and Greenberg v. Kimmelman, 494 A.2d 294, 308-09 (N.J. 1985) (no equal protection violation by statute precluding spouses of judges from working in a casino; it does not facially distinguish between sexes, and Plaintiff failed to prove any legislative intent to discriminate against women). Thus, Hawai'i's cap on pain and suffering is facially neutral, rationally related to the solution of Hawaii's problems with insurance and tort law, and therefore does not violate Hawai'i's constitutional right to equal protection.

D. Hawaii's Statutory Cap on Pain and Suffering Damages Does not Violate the Constitutional Provision for Due Process

To support a claimed violation of due process, a plaintiff must assert that some state action has deprived him of a constitutionally protected "liberty" or "property" interest. The court applies two tests: if a fundamental right is implicated, the statute is subject to strict scrutiny, and if not, the statute is subject to the rational basis test. Doe v. Doe, 116 Hawai'i 323, 333,172 P.3d 1067, 1077 (2007), citing State v. Mallan, 86 Hawai'i 440, 451, 950 P.2d 178, 189 (1998). As discussed supra at 4-9, no fundamental right is implicated.

See, State v. Cotton, 55 Haw. 148, 151 and 153-54, 516 P.2d 715, 718 and 719 (1973) (courts do not have authority to substitute judges' opinions for legislators' opinions as to the wisdom of any law enacted; whether use of goggles by motorcyclists would prevent or lessen injuries is debatable, therefore the legislature could have reasonably determined that the use of goggles would accomplish the results intended). Only if there is no rational basis to sustain the challenged statutes will there be a violation of due process under the Haw. Const. art. I, § 5. Daoang v. Department of Education, 63 Haw. 501, 507-08, 630 P.2d 629, 633 (1981); Nagle v. Board of Education, 63 Haw. 389, 403-04, 629 P.2d 109, 118-19 (1981).

Similarly, Mainland cases find that the cap on damages does not violate the constitutional right to due process. Franklin, 704 F. Supp. at 1335-38 (D. Md. 1989) (rejecting due process and other constitutional challenges to the cap); Estate of McCall v. United States,

663 F.Supp 2d 1276, 1307 (N.D.Fla. 2009) (no due process violation when cap on all non-economic damages was enacted before injury occurred); Arbino v. Johnson & Johnson, 880 N.E.2d 420, 434-35 (Ohio 2007) (no violation of due process; legislature sought to limit uncertain and potentially tainted non-economic damages awards to help resolve economic problems); Evans ex rel. Kutch v. State, 56 P.3d 1046, 1055 (Alaska, 2002) (damages cap statute had reasonable relationship to legitimate state objective); Boyd v. Bulala, 877 F.2d 1191, 1196-97 (4th Cir. 2004) (limitation on common law measure of damages is classic economic regulation; plaintiff failed to prove legislature acted in an arbitrary or capricious way); and Estate of Sisk v. Manzanares, 270 F.Supp.2d 1265, 1278 (D.Kan. 2003) (same, stating that when legislature passed cap, it was "engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life", and therefore it rationally furthered legitimate state interests). In this case, the legislature carefully and rationally furthered legitimate interests and therefore its statute, HRS § 663-8.7, does not violate Hawai'i's constitutional right to due process.

IV. CONCLUSION

For the reasons discussed above, this Court should hold HRS § 663-8.7 is consistent with and upholds the Hawaii constitutional rights to jury trial, separation of powers, equal protection and due process.

Dated: Honolulu, Hawaii, March 29, 2010.

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NO. 29988

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

MICHAEL RAY, Individually and as Next Friend for ALYSSA RAY, a minor, and DEBBIE RAY, Plaintiff-Appellees/ Cross-Appellant, vs. KAPIOLANI MEDICAL SPECIALISTS; KAPIOLANI MEDICAL CENTER FOR WOMEN AND CHILDREN, Defendants-Appellants/ Cross-Appellees, DOES 1-20, Defendants.	CIVIL NO. 06-1-1150 APPEAL FROM THE 1) JUDGMENT, filed herein on March 25, 2009; 2) ORDER DENYING DEFENDANT KAPIOLANI MEDICAL SPECIALISTS' MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE TO ALTER OR AMEND JUDGMENT, FILED APRIL 6, 2009, filed herein on July 7, 2009; 3) ORDER DENYING KAPIOLANI MEDICAL SPECIALISTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, FILED APRIL 6, 2009, filed herein on July 7, 2009; 4) ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION FOR COSTS, FILED JUNE 2, 2009, filed herein on July 7, 2009; 5) AMENDED JUDGMENT, filed herein on July 17, 2009; CROSS APPEAL FROM THE 1) ORDER DENYING PLAINTIFF MICHAEL RAY, AS NEXT FRIEND OF ALYSSA RAY'S MOTION TO AMEND JUDGMENT ENTERED ON MARCH 25, 2009 REGARDING AWARD OF DAMAGES FOR PAIN AND SUFFERING FILED, FILED APRIL 6, 2009, filed herein on July 7, 2009;

2) ORDER DENYING PLAINTIFF MICHAEL RAY, AS NEXT FRIEND FOR ALYSSA RAY'S MOTION FOR NEW TRIAL, FILED APRIL 6, 2009, filed herein on July 7, 2009;

3) ORDER DENYING PLAINTIFFS' MOTION TO AMEND JUDGMENT ENTERED ON MARCH 25, 2009 FOR ADDITION OF PREJUDGMENT INTEREST, FILED APRIL 6, 2009, filed herein on July 7, 2009;

FIRST CIRCUIT COURT

HONORABLE GLENN J. KIM
HONORABLE ROM A. TRADER
Judges

CERTIFICATE OF SERVICE

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