

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Emily Cowan,)	
)	
Plaintiff, Appellant, and)	
Cross-Appellee)	Supreme Court No. 20250367
)	
v.)	District Court No. 53-2020-CV-01198
)	
Dr. Guy Slann; Williston Foot and)	
Ankle Clinic, a trade name for)	
Accessible Podiatry, P.C.; and)	
Doe and Roe Defendants,)	
)	
Defendants)	
)	
CHI St. Alexius Health Williston, a)	
trade name for Mercy Medical Center,)	
)	
Defendant, Appellee, and)	
Cross-Appellant)	

On Appeal from the Amended Judgment Entered on August 18, 2025 and
from the Order Entered on January 22, 2025; from the District Court for
the Northwest Judicial District, Williams County, North Dakota,
The Honorable Kirsten M. Sjue, Presiding

**AMICI CURIAE BRIEF OF NORTH DAKOTA HOSPITAL ASSOCIATION,
NORTH DAKOTA MEDICAL ASSOCIATION, AMERICAN MEDICAL
ASSOCIATION AND AMERICAN TORT REFORM ASSOCIATION
IN SUPPORT OF DEFENDANTS**

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

[¶1] *Amici curiae* North Dakota Hospital Association, North Dakota Medical Association, American Medical Association, and American Tort Reform Association have a substantial interest in the constitutionality of N.D.C.C. § 32-42-02.¹ The statute is critical to ensure that North Dakotans have access to affordable health care. Without it, liability insurance costs would rise, making healthcare less affordable and less available. The state would face greater challenges attracting and retaining physicians.

STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶2] No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

LAW AND ARGUMENT

I. REASONABLE LIMITS ON MEDICAL LIABILITY IMPROVE THE HEALTH CARE SYSTEM FOR DOCTORS AND PATIENTS

[¶3] All North Dakotans need access to affordable health care. N.D.C.C. § 32-42-02 furthers that goal by providing a substantial, but not unlimited, recovery to the minority of citizens who may be plaintiffs in healthcare liability cases. Overall, it is pro-consumer.

[¶4] Damages limits are important for controlling outlier awards. They reduce and

¹ North Dakota Medical Association and American Medical Association appear on their own behalves and as representatives of the Litigation Center of the AMA and State Medical Societies. The Litigation Center is a coalition among the AMA and all state medical societies whose purpose is to represent the viewpoint of organized medicine in the courts.

stabilize medical liability insurance rates, improve access to critical specialists, lessen the incentive to engage in defensive medicine, and facilitate settlements. *See* Am. Med. Ass’n, *Medical Liability Reform NOW!*, at 9-12 (2025 ed.) [hereinafter AMA Rep.]; Mark Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 *Obstetrics & Gynecology* 335, 338-39 (Aug. 2011); Patricia Born et al., *The Effects of Tort Reform on Medical Malpractice Insurers’ Ultimate Losses*, 76 *J. Risk & Ins.* 197 (2009); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 *J. Legal Stud.* S183, S221 (June 2007).

[¶5] Caps such as N.D.C.C. § 32-42-02 are especially important in the current tort climate, where extraordinary verdicts are increasingly severe and frequent. *See* Am. Med. Ass’n, *Why Medical Malpractice Awards Are On The Rise* (Jan. 2026) (“In 2024, the average of the top 50 medical malpractice verdicts in the U.S. was \$56 million.... That’s up from \$32 million in 2022 and \$48 million in 2023....”); U.S. Chamber of Commerce Inst. for Legal Reform, *Nuclear Verdicts: An Update on Trends, Causes and Solutions* 8 (May 2024) (over 20% of all nuclear verdicts nationwide are in medical liability cases).

A. Caps Lower Insurance Premiums, Losses, and Settlement Payments

[¶6] “[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps ... and states without meaningful caps.” U.S. Dep’t of Health & Human Servs, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 15 (2002). On average, internal medicine premiums are 17.3% less in states with limits on noneconomic damages than in states without limits. Limits on damages have an even greater impact on doctors practicing in other specialties. Physicians in general surgery and obstetrics/gynecology

experience 20.7% and 25.5% lower premiums, respectively, in states with damage limits compared to states without limits. *See* AMA Rep. at 10.²

[¶7] Conversely, when noneconomic damages limits are repealed, medical liability insurance premiums increase significantly. *See* Yuji Mizushima et al., *The Repeal of Noneconomic Damage Caps and Medical Malpractice Insurance Premiums*, 34 Health Econ. 2238 (Dec. 2025) (after Illinois and Georgia courts invalidated reforms, ob-gyns and general surgeons saw premiums increase between 20% to 25% in those states).

B. Caps Increase Access to Care

[¶8] “Many studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state.” Robert Barbieri, *Professional Liability Payments in Obstetrics and Gynecology*, 107 *Obstetrics & Gynecology* 578, 578 (Mar. 2006).

[¶9] States that limit noneconomic damages generally experience increases in physician supply per capita compared to states without limits. *See* Ronald Stewart et al., *Tort Reform is Associated with Significant Increases in Texas Physicians Relative to the Texas Population*, 17 *J. Gastrointest. Surg.* 168 (2013); William Encinosa & Fred Hellinger, *Have*

² *See also* Hoa Yu & Olesya Baker, *Do Noneconomic Damage Caps Reduce Medical Malpractice Insurance Premiums? Evidence from North Carolina*, 25 *Risk Mgmt. & Ins. Rev.* 201 (2022) (significant reduction in premiums following noneconomic damages cap); Leonard Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 *J. Health & Biomed. L.* 69, 84 (2008) (“across a number of rigorous studies ... damages caps have been shown to be effective in reducing medical malpractice insurance premiums”).

State Caps on Malpractice Awards Increased the Supply of Physicians?, 24 Health Aff. 250 (2005).

[¶10] North Dakota must compete with other states. If its medical liability climate is not stable and competitive, doctors will practice elsewhere. See Chiu-Fang Chou & Anthony Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 Health Serv. Res. 1271 (2009); Daniel Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (2005). The legislature considered the challenge North Dakota faces in recruiting and retaining health care professionals and serving geographically dispersed communities when it enacted N.D.C.C. § 32-42-02. See *Condon v. St. Alexius Med. Ctr.*, 2019 ND 113, ¶14, 926 N.W.2d 136.

C. Caps Reduce the Practice of Defensive Medicine

[¶11] “[T]he fear of being sued ... leads to an increase in the quantity of care rather than an increase in the efficiency or quality of care.” Scott Spear, *Some Thoughts on Medical Tort Reform*, 112 Plastic & Reconstructive Surgery 1159 (Sept. 2003). Most physicians report practicing defensive medicine. See AMA Rep. at 5-7 (discussing studies).

[¶12] Defensive medicine also manifests itself in physicians eliminating high-risk procedures and turning away high-risk patients. See Brian Nahed et al., *Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons*, PLoS ONE, vol. 7, no. 6, at 6 (June 2012) (“Reductions in offering ‘high-risk’ cranial procedures have decreased access to care for potentially life-saving neurological procedures.”); Timothy Smith et al., *Defensive Medicine in Neurosurgery: Does State-Level Liability Risk Matter?*, 76 Neurosurgery 105 (Feb. 2015) (neurosurgeons are 50% more likely to practice defensive

medicine in high-risk states).

[¶13] A survey of high-risk specialists in Pennsylvania found that 93% practice defensive medicine. See David Studdard et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609, 2609 (June 2005); see also Manish K. Sethi et al., *Incidence and Costs of Defensive Medicine Among Orthopedic Surgeons in the United States: A National Survey Study*, 41 Am. J. Orthop. 69 (2012) (96% of orthopedists surveyed reported having practiced defensive medicine).

[¶14] Recent studies demonstrate that “[d]efensive medicine practice is becoming more common.” Rana Can Özdemir et al., *Factors Affecting Physician Fear of Malpractice and Defensive Medicine Practices: A Cross-Sectional Study*, 14 J. Acad. Res. Med. 77, 77 (2024) (“increased fear of malpractice” leads physicians to order unnecessary tests).

[¶15] Damages limits can reduce the practice of defensive medicine. See Steven Farmer et al., *Association of Medical Liability Reform with Clinician Approach to Coronary Artery Disease Management*, 10 JAMA Cardiology E1, E8 (June 2018); see also Daniel Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, 25 J. Econ. Perspectives 93, 106 (2011) (“[R]eforms such as caps on damages ... that have a direct effect on awards reduce malpractice pressure and, in turn, defensive medicine.”).

[¶16] “[M]alpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9[%] in hospital expenditures without substantial effects on mortality or medical complications.” Donald Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol’y, L. & Ethics 371, 377 (2005) (citing Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. of Econ. 353 (1996)); see also Leonard Nelson et al., *Medical Malpractice Reform in Three Southern*

States, 4 J. Health & Biomed. L. 69, 84 (2008) (finding link “between the adoption of malpractice reforms and the reduction in defensive medical practices”).

II. NORTH DAKOTA IS AMONG MANY STATES WITH A REASONABLE UPPER LIMIT ON NONECONOMIC DAMAGES

[¶17] About half of the states limit noneconomic damages³ or total damages⁴ in medical liability cases. Other states limit noneconomic damages in all personal injury actions.⁵ These laws recognize that the broader public good is served when liability is predictable and noneconomic damage awards are constrained.

[¶18] N.D.C.C. § 32-42-02 is within the mainstream. *See, e.g.*, 24-A Me. Rev. Stat. Ann. § 4313(9)(B); Mont. Code Ann. § 25-9-411; Colo. Rev. Stat. § 13-64-302; Idaho Code § 6-1603; Miss. Code Ann. § 11-1-60(2)(a).

³ *See, e.g.*, Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Iowa Code § 147.136A; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H; Mich. Comp. Laws § 600.1483; Miss. Code Ann. § 11-1-60(2)(a); Mo Rev. Stat. § 538.210; Mont. Code Ann. § 25-9-411; Nev. Rev. Stat. § 41A.035; N.C. Gen. Stat. § 90-21.19; Ohio Rev. Code Ann. § 2323.43; S.C. Code Ann. § 15-32-220; S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code § 74.301; Utah Code § 78B-3-410; W. Va. Code Ann. § 55-7B-8; Wis. Stat. § 893.55.

⁴ *See, e.g.*, Ind. Code Ann. § 34-18-14-3; La. Rev. Stat. § 40:1231.2; Neb. Rev. Stat. § 44-2825; Va. Code Ann. § 8.01-581.15; *see also* N.M. Stat. Ann. § 41-5-6.

⁵ *See, e.g.*, Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5; Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Md. Cts. & Jud. Proc. Code § 11-108; Miss. Code Ann. § 11-1-60(2)(b); Ohio Rev. Code Ann. § 2315.18; Tenn. Code Ann. § 29-39-102.

III. MOST COURTS UPHOLD NONECONOMIC DAMAGE LIMITS AS CONSISTENT WITH THE RIGHT TO JURY TRIAL

[¶19] Courts have upheld limits on noneconomic damages in medical liability cases⁶ and limits on total recoveries against healthcare providers.⁷ Courts have also upheld limits on noneconomic damages for all civil actions⁸ or for certain types of claims or entities.⁹

[¶20] Importantly, most courts have held that limits on tort awards do not violate the right

⁶ See *Fein v. Permanente Med. Grp.*, 695 P.2d 665 (Cal. 1985); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002); *Ordinola v. Univ. Physician Assocs.*, 625 S.W.3d 445 (Mo. 2021); *Tam v. Eighth Jud. Dist. Ct.*, 358 P.3d 234 (Nev. 2015); *Siebert v. Okun*, 485 P.3d 1265 (N.M. 2021); *Knowles v. United States*, 544 N.W. 2d 183 (S.D. 1996), superseded by statute; *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678 (Wis. 2018).

⁷ See *Garhart*, 95 P.3d at 571; *Indiana Patient's Comp. Fund v. Wolfe*, 735 N.E.2d 1187 (Ind. Ct. App. 2000); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999).

⁸ See *C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio

to trial by jury, notwithstanding state constitutional guarantees that the jury trial right shall remain “inviolable.” *See, e.g., Siebert v. Okun*, 485 P.3d 1265, 1277 (N.M. 2021) (following the “great weight of persuasive authority” from other states holding that statutory caps do not violate the right to a jury trial); *McClay v. Airport Mgm’t Servs., LLC*, 596 S.W.3d 686, 692 (Tenn. 2020) (“we find persuasive the reasoning from many of our sister states that have similarly concluded a variety of statutory caps on damages do not violate a plaintiff’s right to trial by jury.”); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432 (Ohio 2007) (upholding cap where jury trial right “inviolable”); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989) (cap satisfied requirement that “trial by jury ... ought to be held sacred.”); *Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992) (cap satisfied requirement that right to jury trial “shall be inviolably preserved”); *Tam v. Eighth Jud. Dist. Ct.*, 358 P.3d 234, 238 (Nev. 2015) (cap upheld where right to jury trial shall “remain inviolable forever.”); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho 2000) (cap upheld where jury trial right “shall remain inviolable”).

[¶21] A law such as N.D.C.C. § 32-42-02 “does not interfere with the jury’s factual

2007); *Simpkins v. Grace Brethren Church of Del., Ohio*, 75 N.E.3d 122 (Ohio 2016); *McClay v. Airport Mgm’t Servs., LLC*, 596 S.W.3d 686 (Tenn. 2020).

⁹ *See, e.g., Quackenbush v. Super. Ct. (Congress of Cal. Seniors)*, 60 Cal. App. 4th 454 (1997) (uninsured motorists, intoxicated drivers, felons); *Peters v. Saft*, 597 A.2d 50 (Me. 1991) (alcohol servers); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004) (vehicle lessors); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. Ct. App. 2004) (product liability); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) (loss of consortium).

findings because it takes effect only after the jury has made its assessment of damages, and thus, it does not implicate a plaintiff's right to a jury trial." *Tam*, 358 P.3d at 238. As the New Mexico Supreme Court held, "the right to trial by jury is satisfied when evidence is presented to a jury, which then deliberates and returns a verdict based on its factual findings. The legal consequence of that verdict is a matter of law, which the Legislature has the authority to shape." *Siebert*, 485 P.3d at 1277. Likewise, the Tennessee Supreme Court has held that the jury trial right "is satisfied when an unbiased and impartial jury makes a factual determination regarding the amount of noneconomic damages, if any, sustained by the plaintiff. That right is not violated when a judge then applies, as a matter of law, the statutory cap on noneconomic damages." *McClay*, 596 S.W.3d at 693. The Virginia Supreme Court has said that, "although a party has a right to have a jury assess his damages, he has no right to have a jury dictate through the award the legal consequences of its assessment." *Etheridge*, 376 S.E.2d at 529. Once a jury "has ascertained the facts and assessed the damages ... it is the duty of the court to apply the law to the facts." *Id.*; *see also L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1131 (Alaska 2009) ("A damages cap does not intrude on the jury's fact-finding function because the cap represents a policy decision that is applied after the jury's determination."); *Kirkland*, 4 P.3d at 1120 (noneconomic cap satisfied right to a jury trial "because the statute does not infringe upon the jury's right to decide cases. The jury is still allowed to act as the fact finder in personal injury cases.").

[¶22] Federal courts have also upheld limits on damages in medical liability¹⁰ and tort

¹⁰ *See Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Hoffman*

cases generally,¹¹ including in cases involving the right to a jury trial.¹² For example, in *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir.1989), the Fourth Circuit held that Virginia’s cap on the total amount recoverable in a medical malpractice action did not violate the Seventh Amendment. The court said the jury’s role “as factfinder [is] to determine the extent of a plaintiff’s injuries,” not “to determine the legal consequences of its factual findings.” *Id.* at 1196. In *Smith v. Botsford General Hospital*, 419 F.3d 513 (6th Cir. 2005), the Sixth Circuit found “this reasoning persuasive” in holding that Michigan’s noneconomic damages cap in medical liability actions “implicat[es] no protected jury rights.” *Id.* at 519.

CONCLUSION

[¶23] For these reasons, this Court should affirm the judgment of the district court and hold that N.D.C.C. § 32-42-02 is constitutional.

v. United States, 767 F.2d 1431 (9th Cir. 1985); *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002); *see also Boyd v. Bulala*, 877 F.2d 1191 (4th Cir.1989); *Schmidt v. Ramsey*, 860 F.3d 1038, 1045-46 (8th Cir. 2017).

¹¹ *See Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989).

¹² *See Boyd*, 877 F.2d at 1196 (Virginia); *Learmonth*, 710 F.3d at 264 (Mississippi); *Smith*, 419 F.3d at 519 (Michigan); *Franklin*, 704 F. Supp. at 1335 (Maryland); *Schmidt*, 860 F.3d at 1046 (Nebraska statute); *Davis*, 883 F.2d at 1165 (Virgin Islands).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing brief complies with N.D. R .App. P. 29(a) and 32(a) and contains 19 pages.

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