

Supreme Court
State of North Carolina
Raleigh

Chief Justice
I. Beverly Lake, Jr.
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February 8, 2011

Senator Peter S. Brunstetter
Chairman, Senate Judiciary I Committee
16 W. Jones Street, Room 2022
Raleigh, NC 27601-2808

Re: Senate Bill 33

Dear Senator Brunstetter:

I understand that the Senate Judiciary I Committee will soon be considering Senate Bill 33, which would implement several medical liability reforms. In my opinion, the proposed cap on noneconomic damages is unconstitutional.

I served on the North Carolina Supreme Court for 12 years, and was Chief Justice from 2000 to 2006. I previously served as a Superior Court Judge for six years, was a State Senator for two terms, and was Deputy Attorney General for seven years. Throughout my legal career, which has spanned over 50 years, I have sought to uphold the North Carolina Constitution, the foundation of our laws.

For over 200 years, the North Carolina Constitution has provided that, in "all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const., art. I, § 25. The North Carolina Supreme Court has long recognized that compensatory damages, including damages for "mental and physical pain," is a form of "property" protected by the constitutional right to trial by jury.

In *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), the Court determined that a libel law was constitutional, even though it abolished a plaintiff's right to recover punitive damages. *Id.* at 632-33, 47 S.E. at 813. The Court noted, however, that if the law had restricted the recovery of actual or compensatory damages, it would have been unconstitutional. In drawing this distinction, the Court stated: "The right to have punitive damages assessed is . . . not property. The right to recover actual or compensatory damages *is property*." *Id.* at 633, 47 S.E. at 813 (emphasis in original). The Court elaborated:

The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are *actual* damages, and these are *property*. 'The right to recover damages for an injury is a species of property and vests in the injured party immediately on the commission of the wrong. . . . Being property, it is protected by the ordinary constitutional guarantees.' . . . It cannot be *extinguished* except by act of the parties or by operation of the statute of limitation.

Id. (emphasis in original) (citation omitted).

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When I served as Chief Justice, a unanimous Court expressly reaffirmed this principle in *Rhyme v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004). We stated that compensatory damages “represent a type of property interest vesting in plaintiffs,” while punitive damages are not a vested property interest. *Id.* at 176, 594 S.E.2d at 12.

The clear import of *Osborn* and *Rhyme* is that Section 3 of SB 33 is unconstitutional. North Carolina citizens have a “sacred and inviolable” right to have a jury determine the amount of compensatory damages, including noneconomic damages, under our Constitution. The right to have a jury make that decision cannot be eliminated or restricted by the General Assembly.

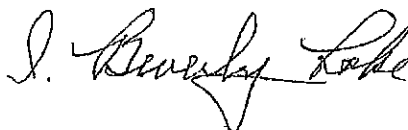
The Georgia Supreme Court recently reached the same conclusion, striking down a similar law in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010). In 2005, the Georgia legislature enacted a \$350,000 cap on noneconomic damages in medical malpractice cases. Georgia’s state constitution protects the right to a jury trial, as does ours, stating “[t]he right to trial by jury shall remain inviolate.” Ga. Const. of 1983, Art. I, Sec. I, Par. XI (a). Because the determination of damages has always been the jury’s province, and noneconomic damages have always been a component of compensatory damages, the damages cap unconstitutionally infringed on the right to a jury trial. *Id.* at 223. The Court concluded: “The very existence of the caps, in any amount, is violative of the right to trial by jury.” *Id.*

Finally, the cap on noneconomic damages is unnecessary as well as unconstitutional. As a Superior Court Judge, I presided over many civil jury trials. If a verdict is excessive, the trial judge has the well-established power and duty to offer the plaintiff the choice between a remittitur (decreased damages award) and a new trial. The trial judge, unlike the legislature, has actually heard the evidence and can make a sound judgment about whether the verdict is excessive. In doing so, the judge operates within the Constitution; instead of imposing his own view of the proper amount of the verdict, he must instead give the plaintiff the choice of a reduced verdict or a new trial.

The legislature has the responsibility to enact laws that are constitutional. With that duty in mind, I hope that your committee will remove Section 3 from SB 33.

Thank you for your consideration.

With kindest personal regards, I am, cordially,



I. Beverly Lake, Jr.

Cc: Members of the Senate