

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01713

DOUBLE QUICK, INC.

APPELLANT-DEFENDANT
CROSS-APPELLEE

v.

RONNIE LEE LYMAS

APPELLEE-PLAINTIFF
CROSS-APPELLANT

APPEAL FROM THE CIRCUIT COURT OF
HUMPHREYS COUNTY, MISSISSIPPI
THE HONORABLE JANNIE M. LEWIS, CIRCUIT JUDGE

BRIEF OF GOVERNOR HALEY BARBOUR AS *AMICUS CURIAE*
IN SUPPORT OF CROSS-APPELLEE DOUBLE QUICK, INC. AND REQUESTING
AFFIRMANCE OF THE CIRCUIT COURT'S RULING ON THE
CONSTITUTIONALITY OF SECTION 11-1-60(2) OF
THE MISSISSIPPI CODE ANNOTATED

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Appellant-Cross Appellee/Defendant

Double Quick, Inc.

Amicus Curiae

Governor Haley Barbour—Governor of the State of Mississippi

By:



J. SCOTT NEWTON

INTEREST OF *AMICUS CURIAE*

As chief executive of the State, Governor Haley Barbour has a substantial legitimate interest in the outcome of any ruling on the constitutionality of Mississippi's non-economic damages cap, codified at Miss. Code Ann. § 11-1-60(2). Judicial repeal of the non-economic damages cap would have horrendous consequences for the State. Insurance premiums for Mississippi businesses and healthcare providers would dramatically increase due to the added uncertainty of exposure to outrageous awards. Further, the State's ability to attract and retain new businesses that create jobs and economic opportunity would be significantly hindered.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Governor Haley Barbour submits this *amicus curiae* brief in support of the Cross-Appellee, Double Quick, Inc. ("Double Quick"), and urges this Court to affirm the trial court's decision confirming the constitutionality of Mississippi's non-economic damage caps, codified at Miss. Code Ann. § 11-1-60(2).

INTRODUCTION

The statute that Plaintiff Cross-Appellant, Ronnie Lee Lymas, attacks in his cross-appeal was an integral component of bipartisan tort reform legislation enacted into law by an overwhelming majority of the Mississippi Legislature in 2004. Exercising its police powers to protect the health and welfare of the State's citizens and promote economic development, the Legislature's tort reform measures were intended to, and have accomplished, an important state interest. The non-economic damage caps and other tort reform measures leveled the playing field for all litigants, ensured fair and predictable results; averted a health care crisis and attracted new businesses to the State. The Governor is now concerned that any judicial repeal of the non-economic damage caps or other tort reform measures would destroy the positive progress made in recent years, crush current economic development and drive away desperately needed jobs in one of the gravest economic times in the Nation's history.

As explained in the arguments of law submitted by Double Quick, which the Governor adopts, the non-economic damage cap of §11-1-60(2) (b) is unquestionably constitutional. The Legislature plainly has the constitutional authority to enact prospective limitations on remedies such as the subject limit on non-economic damages. Lymas simply cannot meet his heavy burden of proving beyond all reasonable doubt that the non-economic damage cap imposed by the Legislature clearly contradicts the Mississippi Constitution.

ARGUMENT

I. LEGAL STANDARD

"[C]ourts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy" of legislative acts. *Miss. Milk Comm'n v. Vance*, 129 So. 2d 642, 660 (Miss. 1961). As such, a party who attacks the constitutionality of a legislative act has the

burden of proving that the act is unconstitutional. *Miss. Milk Comm'n*, 129 So. 2d at 660. A statute can only be struck down "where it appears *beyond all reasonable doubt* that the statute violates the clear language of the constitution." *PHE, Inc. v. State*, 877 So. 2d 1244, 1247 (Miss. 2004) (quoting *James v. State*, 731 So. 2d 1135, 1136 (Miss. 1999) (emphasis added)). Stated differently, the challenged law must "clearly and apparently conflict with organic law." *Id.* (quoting *Cities of Oxford, Carthage, Starkville & Tupelo v. N.E. Miss. Elec. Power Ass'n*, 704 So. 2d 59, 65 (Miss. 1997)).

"[L]egislative findings are presumed to be true and the act is presumed to be constitutional . . . [and] all doubt must be resolved in favor of validity" of the statute. *Miss. Milk Comm'n*, 129 So. 2d at 660. This heightened standard, which gives great deference to the Legislature's enactments, is only logical given the Legislature's representative function in our State's government.

II. THE LEGISLATURE HAS THE CONSTITUTIONAL AUTHORITY TO LIMIT RECOVERY FOR NON-ECONOMIC DAMAGES.

The statutory cap on non-economic damages was an essential piece of the 2004 tort reform spearheaded by the Governor and passed with an overwhelming bipartisan majority of the Legislature. The cap was partly a response to the multitude of outrageous and unpredictable damage awards being handed to plaintiffs in civil suits. Its aim was to restore predictability and fairness to the system by setting a reasonable limit on non-economic which are inherently difficult to quantify. Predictability and fairness were needed for the protection of the public welfare to prevent doctors from closing their practices, to stop insurance companies from not issuing policies, and to keep new business enterprises from choosing other states over Mississippi.

Lymas' constitutional challenges to this legislative act are meritless. This Court has already held that prospective limitations on remedies, such as the subject limit on non-economic damages in § 11-1-60(2), are within the Legislature's authority and thus do not violate the Mississippi or federal Constitution. *Walters v. Blackledge*, 71 So. 2d 433, 446 (Miss. 1954) ("It is well settled that there is no vested right in any remedy for torts yet to happen, and except as to vested rights a state legislature has full power to change or to abolish existing common law remedies or methods of procedure"). Moreover, the only Mississippi court to address constitutionality of § 11-1-60(2) summarily rejected the same constitutional challenges that Lymas makes here. *Learmonth v. Sears, Roebuck & Co.*, 4:06 CV 128, 2009 WL 2252878 (S.D. Miss. July 28, 2009). The overwhelming majority of the highest courts from other states that have addressed the constitutionality of similar caps have also rejected them. *See* Opposition Brief of Double Quick at § VI.

As demonstrated below, the statutory cap was an appropriate and much needed exercise of the State's police power.¹ This Court should follow its precedent regarding the deference afforded the Legislature's enactment of public policy. This Court should affirm the trial court conclusion that the legislative act creating the cap is constitutional.

III. THE PRE-TORT REFORM CLIMATE HAMPERED ECONOMIC PROGRESS AND CREATED A LITIGATION CRISIS

Prior to enactment of the non-economic damage caps and other tort reform measures in 2002 and 2004, Mississippi's civil justice system continually ranked as the worst litigation environment in the country by the United States Chamber of Commerce and in Harris Poll State

¹ "[T]he state exercises the highest governmental authority when it invokes its police powers." *Miss. Milk Comm'n*, 129 So. 2d at 660. The State exercises its police powers when the Legislature passes laws that promote the health and general welfare of the public. *State v. J. J. Newman*, 59 So. 2d at 925. These powers include promotion of "development in industry[.]" *Barnwell, Inc. v. Sun Oil Co.*, 162 So. 2d 635, 641 (Miss. 1976).

Systems Ranking Liabilities Studies. The state was described as a "judicial hellhole" and "lawsuit capital of the world." This reputation was due in large part to unconscionably high awards to personal injury litigants with little, if any, identifiable injuries or medical expenses. For example, six Holmes County plaintiffs, who had experienced virtually no effects from exposure to asbestos, were awarded \$150 million in non-economic damages with no remittitur by the trial court. *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005). Moreover, the awards had little or no connection to Mississippi or the county where the cases were filed. For instance, although Jefferson County had fewer than 10,000 residents, there were more than 21,000 plaintiffs in suits filed there between 1995 and 2000.²

As a result of Mississippi's deplorable legal environment in the late 1990's and early in this decade, business, industry, and health care providers faced sky-rocketing, and in many instances, unaffordable liability insurance premiums. More than 70 insurance companies stopped writing insurance coverage in Mississippi.³

Mississippi faced an imminent health care crisis, as well. Medical Assurance Company of Mississippi ("MACM"), which provides medical malpractice insurance to approximately 70% of the physicians in the State, was forced to significantly increase rates every year between 2000 and 2004. In fact, MACM had to increase its rates over 50% in 2003 alone. The legal climate was so bad and malpractice insurance rates were so high that many physicians had to stop practicing in certain specialties. The State also lost jobs and economic development opportunities as a result of the legal climate.

² Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001 at A1 available at 2001 WL 26417393.

³ *Lawsuit Climate Blamed in Exodus of 71 Insurance Firms From State*, Commercial Appeal (Memphis, Tenn.), May 2, 2002, at DS4.

National studies recognized Mississippi's appalling legal climate. The 2002 American Tort Reform Association's ("ATRA") Judicial Hellhole report ranked Mississippi's 22nd Judicial Circuit (Jefferson, Claiborne and Copiah counties) as the third worst in America due to the mass actions and high jury verdicts.⁴ The ATRA's 2003 study again ranked the 22nd Judicial Circuit as the third worst in America, but also listed Holmes County as the twelfth worst and Hinds County as the thirteenth worst in the country.⁵ Additionally, studies conducted by the Perryman Group in 2002 and 2004 revealed that the total cost of the State's tort system was approximately \$1.3 billion in 2002 and \$1.5 billion in 2004.⁶ Many flocked to the litigation "Mecca" created by Mississippi's pre-tort reform crisis. Conversely, the Governor and others who cared about creating jobs and providing stable employment for Mississippi families addressed the crisis with reasonable and meaningful reforms such as the damage cap in issue. These reforms were desperately needed then and are now essential to the continued growth of Mississippi and the preservation of thousands of Mississippi jobs.

**IV. THE MISSISSIPPI LEGISLATURE'S BI-PARTISAN 2004 TORT REFORM MEASURES
ADDRESSED THE LITIGATION CRISIS AND IMPOSED STRUCTURE, PREDICTABILITY AND
FAIRNESS TO THE MISSISSIPPI'S JACKPOT JUSTICE CLIMATE**

It was clear that action had to be taken to address the looming health care crisis and the perception by out of state businesses that they could not receive a fair trial in Mississippi. The Legislature addressed the health care crisis in 2002 by capping non-economic damages in medical malpractice lawsuits. *See* Miss. Code Ann. § 11-1-60(2)(a).

⁴*Judicial Hellholes 2002*, Am. Tort Reform Ass'n, at 10, available at <http://www.atra.org/reports/hellholes/2002/hellholes2002.pdf>.

⁵*Judicial Hellholes 2003*, Am. Tort Reform Ass'n, at 6-7, available at <http://www.atra.org/reports/hellholes/2003/hellholes2003.pdf>.

⁶ *See Why Tort Reform?*, Mississippians for Economic Progress, available at <http://www.mfep.org/TR.html>

In 2004, a bipartisan Mississippi Legislature overwhelmingly passed comprehensive tort reform legislation and addressed the most significant problems. The 2004 reforms ensured fairness and predictability for all litigants by addressing damage caps and other serious problems such as changing venue law to require (in most cases) that trial be held in the county where the event in question occurred, Miss. Code Ann. § 11-11-3; abolishing joint and several liability except for cases where defendants acted together, Miss. Code Ann. § 85-5-7; and protecting sellers of products who had no involvement in the design and no reason to know about alleged defects in product liability suits, Miss. Code Ann. § 11-1-63(f). An essential component of the reforms was the cap on non-economic damages for all cases other than medical malpractice actions. Miss. Code Ann. § 11-1-60(2)(b).

The cap on non-economic damages was the only one of these reforms that directly guards against the unpredictable and unconscionably high awards for pain and suffering and similar damages that had become common and that continue in the State. By providing a clear and reasonable limit for these damages, the cap promotes predictability and fairness in the civil justice system.

V. THE 2004 TORT REFORM HAS DEMONSTRATED TANGIBLE PROGRESS THAT CANNOT BE UP-ENDED BY INDIVIDUAL LITIGANTS PERSONAL DISAGREEMENT WITH CONSTITUTIONAL REFORM MEASURES THAT ARE VITAL TO THE PRESERVATION OF JOBS AND STABILITY OF CONTINUED ECONOMIC OPPORTUNITY

The tangible success of tort reform is undeniable. Medical malpractice lawsuits have fallen by almost 90 percent. Mississippi physicians are now paying approximately 40 percent less in liability insurance premiums than in 2004. “The important thing is that the legal climate, thanks to curbs on abuses of the civil justice system, has improved enough in Mississippi that physicians can once again find affordable insurance”⁷ Indeed, thousands of new jobs were

⁷ Staff Editorial, *Tort Reforms Have Worked As Billed*, MCCOMB ENTERPRISE JOURNAL, Sept. 17, 2007.

created following the 2004 Tort Reforms. Federal Express invested \$1 billion in a new facility in the state. Toyota chose Mississippi over about a dozen other states for a new \$1.2 billion, 2,000-worker auto plant.

The importance of tort reform to the overall economic health of Mississippi cannot be understated. These laws give companies the confidence and security to locate major operations in Mississippi. In 2006, GE Aviation chose Batesville, Mississippi as the location for a jet engine manufacturing plant. Workers there produce some of the most-sophisticated technology in the industry. The standard of excellence at the facility led GE to recently announce expansion plans, which will add another 350 jobs. PACCAR, a global leader in the manufacturing of medium and heavy-duty trucks, chose to locate a facility in Lowndes County in 2007. The company is set to invest \$300 million and employ 500 Mississippians. The civil reform initiatives by the Governor and Legislature created thousands of jobs and have received widespread praise from the public and business communities.

In addition, several major insurance companies have returned to Mississippi because of the reforms. One of them, St. Paul Travelers, announced a decrease for one of its general liability programs by an average of 60% in Mississippi. Similarly, GE Capital Insurance Group decreased its commercial property insurance rates by an average of 20%. Overall, more than 50 new insurance programs have been approved by the Insurance Department.⁸

Following the reforms, MACM lifted its moratorium on issuing new medical malpractice policies.⁹ And after years of double digit premium increases, MACM has reduced its rates six times. In fact, MACM refunded 15% of its insured's premiums for 2005 policies and 20% for

⁸ See *Why Tort Reform?*, *supra*, note 6.

⁹ *Id.*

2006 policies. It also reduced rates by 5% in 2006, 10% in 2007, 15.5% in 2008, and 20% in 2009.¹⁰ The reforms have resulted in a 42.2% reduction in professional liability premiums for Mississippi physicians since 2004.¹¹

The reforms also have significantly changed Mississippi's reputation. In its 2008 report, The Pacific Research Institute, ranked Mississippi ninth on the U.S. Tort Liability Index due to low tort cost and litigation risk.¹² ATRA's 2004 Judicial Hellhole report stated that "Mississippi has transformed its litigation environment for the better over the past three years, making it this report's brightest 'point of light.'"¹³ Similarly, ATRA's 2005 report said "Mississippi has transformed from the jackpot justice capital of America to America's number one reformer."¹⁴ While other factors were involved, there is no question that the cap on non-economic damages was a driving force behind many of these positive results. In short, tort reform has protected the health and general welfare of the citizens of Mississippi as the Legislature intended.

CONCLUSION

Placing a sensible limit on pain and suffering and other indeterminable damages was a public policy enactment by Mississippi's elected Legislature. The limit on *unvested* rights was and remains necessary to ensure predictability and fairness in the civil justice system. Moreover,

¹⁰ See Gov. Haley Barbour, Press Release, *Governor Barbour Applauds Reduction in Medical Liability Insurance Rates* (September 12, 2007), available at <http://www.governorbarbour.com/news/2007/sep/ratereduction.htm>; Gov. Haley Barbour, Press Release, *Governor Barbour Praises Rate Reduction for Majority of Mississippi Physicians* (February 24, 2009), available at <http://www.governorbarbour.com/news/2009/feb/MACMininsurance2009.htm>

¹¹ *Id.*

¹² Lawrence J. McQuillan et al., *U.S. Tort Liability Index: 2008 Report*, Pacific Research Institute, at 3, available at http://liberty.pacificresearch.org/doclib/20080222_2008_us.tort_liability_index.pdf

¹³ *Judicial Hellholes 2004*, Am. Tort Reform Ass'n, at 10, available at <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>.

¹⁴ *Judicial Hellholes 2005*, Am. Tort Reform Ass'n, at 10, available at <http://www.atra.org/reports/hellholes/2005/hellholes2005.pdf>.

as this Court has already held, the limit is within the State's police power and does not violate the Mississippi or federal Constitutions. The Cross-Appellants have not met their heavy burden of demonstrating beyond all reasonable doubt that the Act of the Legislature, duly signed into law, is unconstitutional. The Court should affirm the trial court's finding that Mississippi Code Annotated § 11-1-60(2) is constitutional.

THIS the 17th day of December, 2009.

Respectfully submitted,

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I, J. Scott Newton, do hereby certify that on December 17, 2009, I caused a true and correct copy of the foregoing *Amicus Curiae* Brief of Governor Haley Barbour in Support of Cross-Appellee and Requesting Affirmance of The Circuit Court's Ruling on the Constitutionality of Mississippi Code Annotated § 11-1-60(2) to be forwarded *via* U.S. Mail to the following:

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