STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Talbot, P.J., Servitto, and M.J. Kelly)

MARIE HUDDLESTON,

Plaintiff/Appellee,

vs.

Supreme Court Docket No. 146041
Court of Appeals Docket No. 303401
Washtenaw County Circuit Court
Case No.GCW 09 657 NH

IHA OF ANN ARBOR, P.C., d/b/a ASSOCIATES OF INTERNAL MEDICINE – CHERRY HILL, ASSOCIATES IN INTERNAL MEDICINE – CHERRY HILL, P.C., and DR. JOYCE LEON,

Defendants/Appellants.

AMICUS CURIAE BRIEF
BY MICHIGAN DEFENSE TRIAL COUNSEL

Respectfully submitted by:

Carson J. Tucker (P62209)
Lacey & Jones, LLP
Attorney for *Amicus Curiae*
600 South Adams Rd., Suite 300
Birmingham, MI 48009
(248) 283-0763

Lawrence T. Garcia (P54890)
Garcia Law Group, PLLC
Attorney for *Amicus Curiae*
3011 W. Grand Blvd. Ste. 2500
Detroit, MI 48202
(877) 643-6255

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Constitutional Provisions

Unpublished Opinions

STATEMENT OF JURISDICTION

Amicus curiae Michigan Defense Trial Counsel agrees with Defendant / Appellant's Statement of Jurisdiction. This Court has jurisdiction over this appeal pursuant to MICH CONST 1963 ART 6, § 4, MCL 600.212, MCL 600.215(3), and MCR 7.301(A)(2), (7).

STATEMENT OF QUESTIONS PRESENTED

In its order granting oral argument on Defendant-Appellant's Application for Leave to Appeal this Court asked the parties to brief the following issues: (1) whether the Court of Appeals erred when it concluded that the plaintiff suffered a compensable injury; whether it misapplied *Sutter v. Biggs*, 377 Mich. 80. (1966); and (2) whether its decision is contrary to *Henry v. Dow Chemical Co.*, 473 Mich. 63 (2005).

The Court invited Michigan Association of Justice and Michigan Defense Trial Counsel to file briefs *amicus curiae*.

STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae, Michigan Defense Trial Counsel (MDTC), is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case.

MDTC is particularly concerned about judicial deviations from well-established constitutional and common-law principles, because defense lawyers, insurers, and insureds depend on fairness, predictability, and certainty in the law when managing their practices and businesses, respectively. MDTC respectfully submits that at the core of this case lies the fundamental right of a jury to consider legally awardable damages. As this Court noted long ago in *Griggs v. Saginaw & F. Ry. Co.*,[1] "[t]he foundation facts of the injury are for the jury, and with them decided it is their further province to make such award as in the light of all the evidence seems in their united judgment adequate."[2] Although available damages in the instant

---

[1] 196 Mich. 258 (1917).

[2] *Id.* at 269.

case are defined and limited by statute,[3] the ultimate decision concerning the scope and extent of injury, if any, and what damages shall be as a result thereof, resides primarily with the jury.[4]

In this brief, MDTC submits the questions to be addressed in the first instance, whether Plaintiff suffered a compensable injury as a result of the removal of one of her kidneys, and the extent of damages arising therefrom, was properly returned by the majority Court of Appeals opinion to the province of the jury.[5] In reversing the trial court's grant of summary disposition to the Defendants, the Court of Appeals upheld a fundamental tenet recognized by Michigan jurisprudence and solidified in its Constitution, the right to have a jury consider whether a plaintiff in a civil action suffered an injury and the extent of damages arising therefrom. Indeed, "the hurdle a judge must clear to overrule a jury is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation."[6] In granting summary disposition, the trial court removed the right of a jury to even determine the question of injury and damages.

MDTC believes the majority opinion properly relied on this Court's decision in *Sutter v. Biggs*[7] as establishing the reserved right of the jury to consider whether Ms. Huddleston has

---

[3] See MCL 600.1483(3). Thus, while MCL 600.1483 places a cap on noneconomic damages, damages for "pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss" are legally awardable damages. See also *Velez v. Tuma*, 492 Mich. 1 (2012).

[4] In *Kelly v. Builder's Square, Inc.*, 465 Mich. 29 (2001), this Court stated it "has long recognized that the authority to measure damages for pain and suffering inheres in the jury's role as trier of fact."

[5] *Huddleston v. Trinity Health Michigan, et al.*, Unpublished Decision of the Michigan Court of Appeals, dated September 11, 2012 (Docket No. 303401).

[6] *People v. Bart (On Remand)*, 220 Mich. App. 1, 13 (1996) (Taylor, J.).

[7] 377 Mich. 80 (1966).

suffered an injury and damages, and, if so, the extent thereof.[8] Moreover, while this Court's order granting oral argument on the application requested the parties to address whether the Court of Appeals opinion is contrary to *Henry v. Dow Chemical Co.*,[9] MDTC respectfully submits the presence of a past, actual physical intervention alleged to have been the basis for the claimed medical malpractice in the case *sub judice* differentiates the claimed damages from the type of speculative, medical monitoring damages claims this Court addressed in *Henry*.

ARGUMENT AND ANALYSIS

Appellate courts do not sit as a "superjury".[10] The question of a plaintiff's injury, and the extent thereof, is within the province of the "[t]hose twelve summoned to judge the facts of the case".[11] As long as damages are legally available for a claimed injury, the plaintiff has a right to present these questions of fact to a jury. "It is not the province of an appellate court" as the "parties have a constitutional right to trial by jury in the general courts in this State."[12] "Appellate courts passing on questions of fact deprive the parties of this right."

The right to trial by jury is guaranteed by the Michigan Constitution, which provides: "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law."[13] This constitutional right to trial by jury

---

[8] *Huddleston, supra*, Slip Op. at 4-5.

[9] 473 Mich. 63 (2005).

[10] *Whitson v. Whiteley Poultry Co.*, 11 Mich. App. 598, 601 (1968).

[11] *Id.*

[12] *Id.*, citing U.S. CONST. AM. 7; MICH. CONST. 1963, ART. 1, § 14.

[13] MICH. CONST. 1963, ART. 1, § 14.

extends to the determination of damages.[14] In the instant case, both the question of Plaintiff's claimed injury (the unnecessary removal of her entire kidney as a result of the Defendant's alleged negligence) and the extent of damages to which she is entitled are reserved questions of fact. The former is recognized as a traditional question of fact reserved to the jury.[15] In the instant case, the latter, the extent of her available damages, are provided for by statute.[16]

With respect the nature of Plaintiff's injury in the case *sub judice* the dissenting opinion confounds the actual physical injury suffered with the potential results of that injury (or the potential damages), such that the expert opinion of both plaintiff and defendant that Plaintiff may or may not suffer physical incapacities as a result of the loss of her kidney (whether plaintiff will or has suffered damages) is relied on to override the primary question (whether an injury resulted).[17] MDTC respectfully submits, these are interrelated questions of fact which cannot be removed from the province of the factfinder.

To be sure, the Legislature has the constitutional authority to abolish the common law.[18] And, it did so, to a degree, in placing a cap on non-economic damages recoverable in a medical

---

[14] *Wiley v. Henry Ford Cottage Hosp.*, 257 Mich. App. 488, 507 (2003), citing *Leary v. Fisher,* 248 Mich. 574, 578 (1929); *Mink v. Masters,* 204 Mich. App. 242, 246-247 (1994); *Equico Lessors, Inc., v. Original Buscemi's, Inc.,* 140 Mich. App. 532, 536 (1985); *Waisanen v. Gaspardo,* 30 Mich. App. 292, 293-294 (1971).

[15] *De Groot v. Winter*, 261 Mich. 660, 674 (1933) ("[w]hat in fact causes a wound or injury is a question for the jury, but what might or might not have caused it is a matter of expert testimony").

[16] MCL 600.1483(3).

[17] See *Huddleston v. Trinity Health Michigan, et al.*, Unpublished Decision of the Michigan Court of Appeals, dated September 11, 2012 (Docket No. 303401), Slip. Op. at 2, Talbot, J., dissenting.

[18] MICH CONST 1963, ART. 3, § 7. See also *Zdrojewski v. Murphy*, 254 Mich. App. 50, 77-78 (2002).

malpractice action.[19] Much of the jurisprudence concerning this provision has focused on the requirements necessary for a plaintiff to prove damages that allow an award that exceeds the lower of the non-economic damages "cap" placed on certain claims[20] and whether such a "cap" is constitutional.[21] However, the question of damages, even where reasonable minds can differ as to the extent thereof caused by medical malpractice is one reserved to the jury, regardless of whether there is a material factual dispute about the nature and extent of the plaintiff's injuries.[22]

That Plaintiff suffered a corporeal injury to her person in a degree and to an extent greater than she would have experienced had the alleged oversight of the lesion on her kidney not occurred cannot be disputed.[23] Thus, even if both experts opined the loss of one kidney would not necessarily lead to injury in the future, the extent and scope of the damages attributable thereto also remains within the province of the jury, as there is no question that some injury occurred.[24]

---

[19] MCL 600.1483.

[20] *Id. Lewis v. Krogol*, 229 Mich. App. 483 (1998), app. den'd 460 Mich. 851.

[21] A question this Court and the Court of Appeals have answered in the affirmative. See *Jenkins v. Patel (After Remand)*, 263 Mich. App. 508 (2004) (cap on non-economic damages available in medical malpractice actions in MCL 600.1483 constitutional on the basis of this Court's decision in *Phillips v. Mirac, Inc.*, 470 Mich. 415 (2004) (statutory cap on damages found in MCL 257.401(3) available against motor vehicle lessors for leases of less than 30 days constitutional)). See also *Wiley v. Henry Ford Cottage Hosp.*, 257 Mich. App. 488 (2003).

[22] *Krogol, supra* at 486-488.

[23] See MAJ Amicus Brief, pp. 3 to 5 (explaining the recognized concept of "injury" in a tort action as being one resulting in a present and physical disruption or invasion of one's person...). See also *Wickens v. Oakwood Healthcare System, et al.*, 465 Mich. 53, 61-62 (2001).

[24] *Krogol, supra.*

As to the issue of the precise non-economic damages allowed, MCL 600.1483(3) defines the damages Plaintiff may recover for her injury. That subsection provides: "As used in this section, 'noneconomic loss' means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss." As explained by this Court in *Jenkins v. Patel*, this definition is not limited to the itemized damages listed, but allows juries to award "other noneconomic loss" damages. [25] Interpreting a similar provision in the No-Fault Act, which also allows an award for non-economic damages where a person proves a "threshold" injury suffered in a motor vehicle accident, this Court has stated "any noneconomic loss compensable at common law may be recovered under the statute once the injured person has suffered injuries which meet the statute's threshold requirements."[26]

It may appear, at first glance, that despite the extreme nature of the initial injury in this case, Plaintiff may not suffer future harm as a result, as Plaintiff still has one functioning kidney. It may also appear, on the other hand, that the extreme nature of the loss threatens to overwhelm a jury's reason to even consider this possibility. Certainly, as with the range of non-economic damages, which in this instance are capped by statute, [27] and the scope or extent thereof, there are available safeguards to preventing a jury determination beyond allowable outcomes.[28] There is also the possibility the jury will consider the evidence and, upon the proper instructions,

---

[25] 471 Mich. 158, 168-69 (2004).

[26] *Rusinek v. Shultz, Snyder & Steele Lumber Co.*, 411 Mich. 502, 506 (1981) (citing *Warner v.* Brigham, 90 Mich. App. 640 (1979), lv. den. 407 Mich. 907 (1979) and interpreting allowance for noneconomic damages in MCL 500.3135 of the No-Fault Act).

[27] MCL 600.1483(1).

[28] See, e.g., *Palenkas v. Beaumont Hosp.*, 432 Mich. 527, 533-534 (1989).

determine that damages should be limited, or, even non-existent.[29] Such is the jury's prerogative. But this is not an inquiry which can be passed on by an appellate court, at least in the first instance. Of course, an appellate court can find a jury's verdict inadequate or adequate depending on the demonstration in the record of damages truly suffered.[30]

Indeed, the fundamental distinction between this case and *Henry*[31] is that no present, physical injuries to the plaintiff had yet occurred in the latter case, and thus, the question of a *remedy* or *damages* from the tort alleged there were indeed speculative and left to conjecture.[32] However, in this case, the fact that plaintiff may not suffer adverse consequences in the future (indeed, that some or all future damages remain speculative or conjectural), cannot negate that (1) plaintiff did suffer a present, physical injury as a result of the alleged malpractice, and (2) statute provides for both a remedy and some form of damages as a result.[33] Both the question of injury and the question of the extent of damages are reserved by Michigan law to the province of the jury.

---

[29] *Nault v. Webb*, Unpublished Decision of the Michigan Court of Appeals, dated November 2, 2004 (Docket No. 251225) (despite proving "threshold" injury under No-Fault Act, MCL 500.3135, jury's determination plaintiff failed to prove non-economic damages was entitled to deference and would not be disturbed on appeal).

[30] *Moore v. Spangler*, 401 Mich. 360, 372 (1977), *cf. Nault*, *supra*.

[31] *Henry v. Dow Chemical Co.*, 473 Mich. 63 (2005).

[32] *Id.*

[33] MCL 600.1483(3); *Jenkins v. Patel*, 471 Mich. 158, 168-69 (2004).

CONCLUSION

That disputed issues of fact are for the jury is a fundamental tenet of our jurisprudence.[34] The questions of whether an injury was suffered and the extent of damages arising therefrom are included within the ambit of this principle.[35] Preservation of the jury by constitutional amendment was designed as a limitation on judicial power.[36] The "special role accorded jurors under our constitutional system of justice" has been acknowledged for centuries.[37]

> "Now let any man of sense consider, whether this method be not more proper for bolting out the truth, for finding out the guilty, and preserving the innocent, than if the whole decision were left to the examination of a judge, or two or three, whose interests, passion, haste, or multiplicity of business may easily betray them into error."[38]

Respect for the province and function of the jury requires the Court to carefully consider the current Application for Leave to Appeal. It asks the Court to consider the Court of Appeals sound decision to allow submission of the question of injury and damages arising therefrom to the jury in this case. These questions are within the province of a jury and the trial court should have allowed them to be properly presented.

---

[34] *Rizzo v. Kretschmer*, 389 Mich. 363, 371-72 (1973).

[35] *Wiley v. Henry Ford Cottage Hosp.*, 257 Mich. App. 488, 507 (2003) (internal citations omitted).

[36] *People v. Lemmon*, 456 Mich. 625, 639 (1998).

[37] People v. Bart (On Remand), 220 Mich. App. 1, 12 (1996) (Taylor, J.).

[38] Care, English Liberties, pp. 205-209, written in 1680 (and cited in 2 Few, In Defense of Trial by Jury, p. 278, published in 1993 by the American Jury Trial Foundation).

Amicus curiae, MDTC, urges the Court to deny the Application for Leave to Appeal and leave the Court of Appeals opinion intact.

Respectfully submitted,

Lawrence T. Garcia (P54890)
Garcia Law Group, PLLC
Attorney for *Amicus Curiae*
3011 W. Grand Blvd. Ste. 2500
Detroit, MI 48202
(877) 643-6255

Carson J. Tucker (P62209)
Lacey & Jones, LLP
Attorney for *Amicus Curiae*
600 South Adams Rd., Suite 300
Birmingham, MI 48009
(248) 283-0763

Dated: October 9, 2013