



Georgia Supreme Court Strikes Down Medical Malpractice Cap

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On March 22, 2010, the Georgia Supreme Court issued the long-awaited opinion in the *Nestlehutt* case. The Supreme Court held that legislation capping non-economic damages in a medical malpractice action to between \$350,000 and \$1,050,000 (depending on the number of defendants) is unconstitutional, because it deprives the injured plaintiff of his or her right to a jury trial.

“Non-economic damages” are defined in Georgia as “damages for physical and emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature.”

The damages caps were intended by the Legislature to help address what the General Assembly determined to be a “crisis affecting the provision and quality of health care services in this state.” Specifically, the Legislature found that health care providers and facilities were being negatively affected by diminishing access to and increasing costs of procuring liability insurance, and that these problems in the liability insurance market bore the potential to reduce Georgia citizens’ access to health care services, thus degrading their

health and well-being. The provisions of the Tort Reform Act were therefore intended by the Legislature to “promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and . . . thereby assist in promoting the provision of health care liability insurance by insurance providers.”

Patient advocate groups expressed concern that the caps would essentially close the courthouse doors to injured patients such as stay-at-home parents and children because they had no economic damages. In those cases, non-economic damages are the only recoverable amounts, and, given the complexity and out-of-pocket expense of a medical malpractice lawsuit, contingent fee lawyers simply could not afford to take a case that could only result in an award of \$350,000.



Importantly, the opinion is to be applied retroactively. That means that pending cases are no longer subject to the cap. Additionally, because caps were deemed to be an unconstitutional deprivation of the right to a jury trial, it does not appear that the Legislature can re-institute the cap with a new bill. That will take a constitutional amendment.

The facts of the *Nestlehutt* case were as follows: In January 2006, Harvey P. Cole, M.D., of

Atlanta Oculoplastic Surgery, d/b/a Oculus, performed CO2 laser resurfacing and a full facelift on appellee Betty Nestlehutt. In the weeks after the surgery, complications arose, resulting in Nestlehutt's permanent disfigurement. Nestlehutt, along with her husband, sued Oculus for medical malpractice. The case proceeded to trial, ending in a mistrial.

On retrial, the jury returned a verdict of \$1,265,000, comprised of \$115,000 for past and future medical expenses; \$900,000 in non-economic damages for Mrs. Nestlehutt's pain and suffering; and \$250,000 for Mr. Nestlehutt's loss of consortium. The statutory cap (O.C.G.A. § 51-13-1) would have reduced the jury's non-economic damages award by \$800,000 to the statutory limit of \$350,000.

The full opinion is available at <http://www.gasupreme.us/sc-op/pdf/s09a1432.pdf>