

No. 105741  
consolidated with  
No. 105745

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IN THE SUPREME COURT OF ILLINOIS

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ABIGAILE LEBRON, a minor, by THE  
NORTHERN TRUST COMPANY, as  
Guardian of the Estate of ABIGAILE  
LEBRON, a minor; and FRANCES  
LEBRON, Her Mother and Next Friend;  
and FRANCES LEBRON, Individually,

Plaintiffs-Appellees,

v.

GOTTLIEB MEMORIAL HOSPITAL, a  
corporation, ROBERTO LEVI-D'ANCONA,  
M.D. and FLORENCE MARTINOZ, R.N.,

Defendants-Appellants,

LISA MADIGAN, Attorney General of  
Illinois,

Intervenor-Appellant.

Appeal from the Circuit Court of  
Cook County, Illinois, County  
Department, Law Division.

No. 06 L 12109

The Honorable Diane J. Larsen,  
Judge Presiding.

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**BRIEF AND APPENDIX OF DEFENDANT-APPELLANT  
ROBERTO LEVI-D'ANCONA, M.D. (DOCKET NO. 105745)**

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## NATURE OF THE CASE

This appeal concerns the constitutionality of Public Act 94–677 (the “Reform Act”), which the General Assembly enacted in 2005 to address the health care crisis in Illinois. The Reform Act contains a comprehensive and interrelated set of reforms designed to combat the escalating cost of medical malpractice insurance that resulted from large and unpredictable awards of non-economic damages in medical malpractice suits. These awards made it difficult for physicians to afford malpractice insurance in Illinois, and the physicians responded by leaving Illinois in alarming numbers.

The Reform Act addresses each of the three factors that contributed to this health care crisis by (1) imposing substantial new regulations on the insurance industry; (2) increasing oversight of the physician community to reduce the number of medical errors; and (3) reforming medical malpractice litigation. As part of this final category of reforms, the Act adopted reasonable limitations on the amount of non-economic damages that can be imposed against physicians and hospitals, without placing any limitation on a plaintiff’s total recovery or his ability to recover out-of-pocket, economic damages. *See* 735 ILCS 5/2–1706.5. Recognizing that each component of the Reform Act was essential to tackling the health care crisis, the General Assembly adopted an inseverability clause under which the entire Reform Act would be invalidated if any of its provisions were declared unconstitutional.

Plaintiffs Frances and Abigaile LeBron brought this medical malpractice suit against three medical providers—defendants Roberto Levi D’Ancona, M.D., Florence Martinoz, R.N., and Gottlieb Memorial Hospital—arising from the delivery of plaintiff Abigaile LeBron. In Count V of their complaint, the plaintiffs sought a declaratory judgment that the Reform Act violates the Illinois Constitution. Dr. Levi-D’Ancona, in

turn, asserted a counterclaim for a declaratory judgment that the Reform Act does not violate any of the constitutional provisions cited by the plaintiffs. The parties filed cross-motions for judgment on the pleadings on these declaratory judgment claims; the circuit court granted the plaintiffs' motion and denied Dr. Levi-D'Ancona's.

The circuit court focused exclusively on the Reform Act's limitations on non-economic damages awards against physicians and hospitals and held that they violate the Separation of Powers Clause of the Illinois Constitution under this Court's decision in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 407, 689 N.E.2d 1057, 1077 (1997). Relying on the inseparability clause, the circuit court declared the Reform Act invalid in its entirety.

#### **ISSUE PRESENTED**

The issue presented is whether the circuit court erred in concluding that the limitations on non-economic damages in medical malpractice cases set forth in 735 ILCS 5/2–1706.5 violate the Separation of Powers Clause of the Illinois Constitution.

#### **JURISDICTION**

This appeal is brought pursuant to Supreme Court Rule 302(a)(1) from a judgment invalidating both 735 ILCS 5/2–1706.5 and the Reform Act as a whole. Appendix ("A.") 10. The circuit court certified the appeal under Supreme Court Rule 304(a), which permits appeals from final judgments as to fewer than all claims. A.13.

#### **CONSTITUTIONAL PROVISION INVOLVED**

The Preamble to the Illinois Constitution provides:

We, the People of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors—in order to provide for the

health, safety and welfare of the people; maintain a representative and orderly government; eliminate poverty and inequality; assure legal, social and economic justice; provide opportunity for the fullest development of the individual; insure domestic tranquility; provide for the common defense; and secure the blessings of freedom and liberty to ourselves and our posterity—do ordain and establish this Constitution for the State of Illinois.

Ill. Const. preamble.

The Separation of Powers Clause provides:

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Ill. Const. art. II, § 1.

### **STATUTES INVOLVED**

The Reform Act is reproduced in its entirety in the appendix to this brief. A.16–70.

### **STATEMENT OF FACTS**

The General Assembly enacted the Reform Act in 2005 as a bipartisan response to what it expressly described as a “health care crisis” that “endanger[ed] the public health, safety, and welfare of the citizens of Illinois.” Public Act 94–677, § 101(4). The General Assembly found that the rising costs of medical malpractice litigation had forced insurers to increase the cost of malpractice insurance to physicians and hospitals, which in turn had caused doctor flight from Illinois—reducing access to care and the quality of care available to the citizens of this State. *Id.* § 101(2). By adopting the Reform Act’s integrated reforms, the legislature sought to bring rationality to the malpractice insurance

market and thereby make practicing medicine in Illinois sustainable for physicians. *Id.* § 101(4)–(5). One of these reforms is a provision that limits the amount of non-economic damages that can be imposed against physicians and hospitals in medical malpractice cases, while allowing plaintiffs to recover their full economic damages such as medical expenses and lost wages. 735 ILCS 5/2–1706.5. The circuit court invalidated the Reform Act in its entirety after concluding that these limitations on non-economic damages violate the Separation of Powers Clause of the Illinois Constitution. A.10.

#### **A. Legislative Background Of The Reform Act**

Committees of both houses of the General Assembly convened numerous hearings to determine what reforms should be adopted. *See, e.g., In re Medical Malpractice*, Hearing Before the H. Judiciary I—Civil Law Comm., 94th Gen. Assem. (Feb. 23, 2005) [hereinafter February 23 Hearing]; *In re Medical Malpractice*, Hearing Before the H. Judiciary I—Civil Law Comm., 94th Gen. Assem. (Mar. 1, 2005) [hereinafter March 1 Hearing]; *In re Medical Malpractice*, Hearing Before the H. Judiciary I—Civil Law Comm., 94th Gen. Assem. (Mar. 8, 2005) [hereinafter March 8 Hearing]; *In re Medical Malpractice*, Hearing Before the H. Judiciary I—Civil Law Comm., 94th Gen. Assem. (Apr. 7, 2005) [hereinafter April 7 Hearing]; *In re Medical Malpractice*, Hearing Before the H. Judiciary I—Civil Law Comm., 94th Gen. Assem. (Apr. 14, 2005) [hereinafter April 14 Hearing]. They sought and obtained the input of all interested groups: patients, physicians, hospitals, insurance providers, insurance regulators, personal injury lawyers, academics, and public policy analysts. These

witnesses consistently testified that Illinois confronted a stark health care crisis, and they suggested various approaches to solve it.<sup>1</sup>

Hospital and insurance experts testified that the rise in malpractice premiums was principally caused by a torrent of medical malpractice litigation. They explained that the average jury verdict and settlement had increased substantially in recent years—up to “three, four, and even five times what they were just a few years ago.” February 23 Hearing at 92:1–6 (testimony of Max Brown, Gen. Counsel, Rush Univ. Med. Ctr.); *see also id.* at 83:21–85:9 (testimony of Mark Deaton, Gen. Counsel, Ill. Hosp. Ass’n) (attributing rising insurance costs to “unpredictable settlements and verdicts”). The legislators learned that the average jury verdict in Cook County increased 314% between 1998 and 2003. *Id.* at 27:19–22 (testimony of Dr. Harold Jensen, Chairman, ISMIE Mut. Ins. Co.); *see also id.* at 95:19–96:7 (testimony of Ken Skertich, Trust Adm’r, Chi. Hosp. Risk Pooling Program) (“The average settlement for CHRPP hospitals has risen from \$180,000 in 1994 to slightly over one million dollars per case. And that represents a 461 percent increase.”).

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<sup>1</sup> The legislative history of the Reform Act is subject to judicial notice by this Court and was raised at length in briefing before the circuit court. *See Boshuizen v. Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935) (“For the purpose of passing upon the construction, validity, or constitutionality of a statute the court may resort to public official documents, public records, both state and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith.”).

These witnesses testified that the increasing size of malpractice awards was driven in particular by non-economic damages, such as pain and suffering. As one witness testified, “especially in the last several years, the key driver has been not the economic damages awarded in lawsuits. Rather, it’s been the escalation of non-economic damages that have been awarded.” March 8 Hearing at 46:14–18 (testimony of Jim Tierney, Ill. State Med. Soc’y & ISMIE Mut. Ins. Co.); *see also* April 7 Hearing at 6:10–13 (testimony of Mark Deaton, Gen. Counsel, Ill. Hosp. Ass’n) (noting that “non-economic damages” are “clearly what’s driving the escalation of large jury awards and settlements”). In Cook County, for example, “the non-economic portion of damage awards . . . increased 247 percent” between 1998 and 2003. February 23 Hearing at 28:1–3 (testimony of Dr. Harold Jensen, Chairman, ISMIE Mut. Ins. Co.).

Several witnesses explained and analyzed the connection between subjective awards of non-economic damages and medical malpractice insurance premiums. They described how the escalation in the size of payouts—especially when combined with the impossibility of predicting how much non-economic damages a jury might award in a particular case—creates considerable risk for the insurance market, which must price insurance premiums accordingly. *See* March 1 Hearing at 73:6–14 (testimony of Mark Deaton, Gen. Counsel, Ill. Hosp. Ass’n) (noting that rate increases are “driven almost entirely by the explosion in the size of payouts in the state”); March 8 Hearing at 46:2–7 (testimony of Jim Tierney, Ill. State Med. Soc’y & ISMIE Mut. Ins. Co.) (same). One hearing focused extensively on an analysis from the National Association of Insurance Commissioners—the organization of state insurance regulators—which concluded that “underwriting losses were the major factor influencing the rate increases experienced by

physicians and other health care providers over the past several years.” April 7 Hearing at 27:15–28:1 (testimony of Larry Smarr, President, Physician Insurers Ass’n of Am.).

Legislators also heard direct testimony that physicians had left Illinois because of rising insurance premiums. The President of the Illinois State Medical Society explained that “[t]he primary reason for the exodus of the physicians has been shown to be the rising costs of medical litigation and the resultant increase in liability insurance premiums,” and offered several poignant examples. *See* February 23 Hearing at 9:7–10, 9:11–24:14 (testimony of Kenneth Printen, President, Ill. State Med. Soc’y); *see also* March 1 Hearing at 48:14–15 (testimony of Jim Tierney, Ill. State Med. Soc’y & ISMIE Mut. Ins. Co.) (“[W]e know that there are many physicians who have left Illinois.”). In addition, witnesses warned of a related problem caused by the malpractice crisis: “the inability of our hospitals, our group medical practices, clinics and others to attract physicians—new physicians to establish a practice in this state.” *Id.* at 49:20–50:4.

These witnesses agreed with scholars who had researched the issue that the single most effective solution to these problems was to limit liability for non-economic damages, thereby creating predictability where the current litigation system provided none. *See, e.g.*, April 7 Hearing at 115:1–4 (testimony of Larry Smarr, President, Physician Insurers Ass’n of Am.) (“[C]aps on non-economic damages are the major immediate remedy to keeping down the spiraling cost of medical malpractice insurance.”). Stephen D’Arcy, an actuary and professor of finance at the University of Illinois, explained that, “if caps on non-economic losses were a component of any medical malpractice tort reform effort that withstood a legal challenge, then it’s likely the market for medical malpractice insurance in the state would improve significantly.”

April 7 Hearing at 50:4–9 (testimony of Stephen D’Arcy, Professor, Univ. of Ill.). Dr. D’Arcy discussed the successful experience of Ohio and California in adopting limitations on non-economic damages, *id.* at 48:1–50:3, as well as academic research that “limits on non-economic losses were the single most influential of all the forms of tort reform adopted during the 1980s,” *id.* at 44:18–45:16. Other witnesses concurred that limiting non-economic damages is an effective way to combat rising insurance premiums, noting that insurers had reduced premiums in Texas (and additional insurers entered the market) after the state capped awards of non-economic damages. *See* March 1 Hearing at 91:8–12 (testimony of Jim Tierney, Ill. State Med. Soc’y & ISMIE Mut. Ins. Co.).

The legislators also heard testimony about the size of the limitations on non-economic damages that had been effective in other states. Dr. D’Arcy explained that California had adopted a \$250,000 limitation on non-economic damages. April 7 Hearing at 49:1–4 (testimony of Stephen D’Arcy, Professor, Univ. of Ill.); *see also* April 14 Hearing at 4:12–24 (testimony of Jim Tierney, Ill. State Med. Soc’y & ISMIE Mut. Ins. Co.). The legislators learned that Texas had also adopted a \$250,000 limitation on non-economic damages. April 7 Hearing at 137:16–19 (Rep. Lang).

Finally, the witnesses relied on a variety of governmental studies concluding that limiting non-economic damages is an effective way to combat escalating insurance premiums. *See, e.g.*, April 7 Hearing at 22:6–25:16 (testimony of Larry Smarr, President, Physician Insurers Ass’n of Am.). The Congressional Budget Office, a nonpartisan agency that examines financial consequences of proposed federal legislation, has concluded in two comprehensive studies that limitations on non-economic damages have “been found extremely effective in reducing the amount of claims paid and medical

liability premiums.” See Cong. Budget Office, *Preliminary Cost Estimate, H.R. 4250, Patient Protection Act of 1998*, at 5, available at <http://www.cbo.gov/ftpdocs/7xx/doc701/hr4250.pdf> and C.1215–1224; see also Cong. Budget Office, *Cost Estimate, H.R. 5, Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003*, at 4, available at <http://www.cbo.gov/ftpdocs/40xx/doc4098/hr5ec.pdf> and C.1197–1205. The Office of Technology Assessment, a nonpartisan agency that until 1995 provided analytical support to Congress on particularly complex issues, concluded that “caps on damage awards were the only type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators.” Office of Tech. Assessment, *Impact of Legal Reforms on Medical Malpractice Costs* 64 (1993), available at <http://biotech.law.lsu.edu/policy/9329.pdf> and C.1497–1626. And the nonpartisan General Accounting Office (now known as the Government Accountability Office) noted that premium growth has been slower on average in states that enacted limits on non-economic damages. See, e.g., U.S. Gen. Accounting Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care* 6, 30–34 (2003), available at <http://www.gao.gov/new.items/d03836.pdf> and C.1753–1814.

Other witnesses disagreed about the causes of the health care crisis and what should be done about it. Consumer groups blamed rising insurance premiums on an increase in medical errors and urged the legislators to promote physician discipline. See, e.g., February 23 Hearing at 66:24–67:6 (testimony of Amber Hard, Staff Dir., Ctr. for Justice & Democracy). State insurance regulators proposed increased governmental control over how insurance companies set premiums. See, e.g., March 1 Hearing at 84:17–21 (testimony of Deirdre Manna, Acting Dir., Div. of Ins., Ill. Dep’t of Prof’l &

Fin. Regulation). Still others suggested that rising premiums were caused by changes in the investment climate, *see, e.g.*, February 23 Hearing at 43:20–23 (testimony of Jay Angoff, Former Dir., Mo. Ins. Dep’t), fluctuations in the reinsurance market, *see, e.g.*, *id.* at 44:24–45:1, and the insurance industry’s practice of estimating future losses for accounting purposes, *see, e.g.*, *id.* at 47:2–5.

### **B. Key Provisions Of The Reform Act**

Faced with a disagreement about the most effective way to combat a pressing crisis, the General Assembly concluded that the health of Illinois citizens was too important to gamble on a partial reform that addressed only one piece of the problem. It instead adopted a comprehensive approach to the health care crisis that attacked *every* aspect of the problem. The General Assembly combined numerous individual reforms into a multifaceted response, explaining:

In order to preserve the public health, safety, and welfare of the people of Illinois, the current medical malpractice situation requires reforms that enhance the State’s oversight of physicians and ability to discipline physicians, that increase the State’s oversight of medical liability insurance carriers, that reduce the number of nonmeritorious healing art malpractice actions, that limit non-economic damages in healing art malpractice actions, that encourage physicians to provide voluntary services at free medical clinics, that encourage physicians and hospitals to continue providing health care services in Illinois, and that encourage physicians to practice in medical care shortage areas.

Public Act 94–677, § 101(5).

As Representative Bradley noted during floor debate, the Reform Act “tr[ies] to tackle the three major issues affecting medical malpractice premiums in the State of Illinois” by directly regulating medical insurance, attempting to reduce medical errors that lead to lawsuits, and reforming medical malpractice litigation. H.R. Transcription Debate, Sen. Bill 475, 94th Gen. Assem. 59 (May 30, 2005) [hereinafter H.R. Debate]. The Reform Act accomplishes the objectives described by Representative Bradley in three key sections.

Section 310 of the Act implements a number of direct insurance reforms. It provides increased oversight of malpractice premiums by the Secretary of Financial and Professional Regulation. *See* 215 ILCS 5/155.18(c)(2) (specifying criteria for convening a public hearing to evaluate malpractice insurance rates and allowing the Secretary to request statistical data from insurers); *id.* 5/155.18(d) (allowing the Secretary to impose financial penalties for willful or repeated violations of the insurance-rate statute). It requires or encourages insurers to offer plans that lower the cost of insurance. *See* 215 ILCS 5/155.18(e) (requiring insurers to offer quarterly premium payments); *id.* 5/155.18(f)–(g) (encouraging insurers to offer plans with discounts for risk-management activities). And it makes information about insurers’ rates and actuarial data transparent and publicly available. *See* 215 ILCS 5/155.18a (directing the Secretary to maintain a database of rate information and requiring insurers to provide this information); *id.* 5/155.19 (requiring insurers to report claim information to the Secretary for public release); *id.* 5/1204(C–5) (requiring insurers to provide detailed actuarial information to the Secretary for public release).

Section 315 of the Act contains a number of medical reforms that attempt to reduce the cost of malpractice insurance by curtailing medical errors. *See* H.R. Debate at 59. It changes the composition of the Illinois State Medical Disciplinary Board to make the Board's decisions more accurate, particularly with respect to the high-risk specialties that are most affected by the health care crisis. *See* 225 ILCS 60/7(A) (requiring that at least one member of the Disciplinary Board practice in each of various fields, including neurosurgery, obstetrics and gynecology, cardiology, osteopathy, and chiropractic). It also makes the Disciplinary Board more responsive to the public's concerns by doubling the number of "public" members who are not health care providers. *See id.* The Act also improves the quality of information available to the Disciplinary Board by increasing the number of investigators at its disposal. *See* 225 ILCS 60/7(G) (requiring one full-time investigator for every 2,500 Illinois physicians, as opposed to one for every 5,000 doctors under prior law). And, in a portion of the Act known as the Patient's Right to Know Law, the General Assembly provided for electronic profiles of physicians to be made available to citizens on a state-operated website. *See* 225 ILCS 60/24.1(b) (requiring the Department of Professional Regulation to create a profile of every Illinois physician). These electronic profiles allow citizens to obtain information about their health care providers, including details about criminal convictions, disciplinary actions, malpractice judgments, and educational background.

Finally, section 330 of the Act adopts a number of legal reforms designed to combat escalating insurance premiums by reducing the costs of malpractice litigation. It is these reforms that the plaintiffs challenge in this litigation. But the General Assembly recognized that each component of its reform effort was essential to resolving the health

care crisis. Because the reforms were part of an integrated whole, the Reform Act specifically declares that all of its provisions “are mutually dependent and inseverable.” Public Act 94–677, § 995.

The General Assembly adopted five legal reforms to address the malpractice insurance climate. *First*, the Act adopts reasonable limitations on non-economic damages against doctors and hospitals in malpractice cases. *See* 735 ILCS 5/2–1706.5. *Second*, the Act expands Illinois’ periodic payment provisions, which reduce costs by allowing a judgment debtor to purchase an annuity to pay for future medical expenses, while ensuring a plaintiff has access to medical funds when needed. *See* 735 ILCS 5/2–1704.5. *Third*, the Act strengthens the standards for expert witnesses in malpractice cases. *See* 735 ILCS 5/8–2501. *Fourth*, it amends the provision requiring malpractice plaintiffs to submit pre-suit reports from medical professionals by banning anonymous reports. *See* 735 ILCS 5/2–622. *Fifth*, the Act seeks to avoid unnecessary litigation by encouraging health care providers to acknowledge their mistakes promptly and offer fair settlements. *See* 735 ILCS 5/8–1901 (barring admission into evidence of apologies and similar statements made shortly after an adverse medical outcome).

### **C. Legislative History Of 735 ILCS 5/2–1706.5**

The circuit court confined its analysis to only one part of the Reform Act’s legal reforms: 735 ILCS 5/2–1706.5, which limits the amount of non-economic damages that can be awarded against certain defendants in medical malpractice cases. The statute does not place any limitation on a plaintiff’s total recovery or his ability to recover economic damages such as out-of-pocket medical expenses, lost wages, costs for care or custody, and reduced earning capacity. Rather, section 2–1706.5 provides:

(1) In a case of an award against a hospital and its personnel or hospital affiliates, . . . the total amount of *non-economic damages* shall not exceed \$1,000,000 awarded to all plaintiffs in any civil action arising out of the care.

(2) In a case of an award against a physician and the physician's business or corporate entity and personnel or health care professional, the total amount of *non-economic damages* shall not exceed \$500,000 awarded to all plaintiffs in any civil action arising out of the care.

735 ILCS 5/2–1706.5(a) (emphases added).

The General Assembly found that “[l]imiting non-economic damages is one of th[e] significant reforms designed to benefit the people of the State of Illinois.” *See* Public Act 94–677, § 101(4). Legislators repeatedly emphasized during floor debate that the limitations on non-economic damages in section 2–1706.5 were designed to combat the state’s health care crisis. *See* H.R. Debate at 4 (statement of Rep. Reitz) (noting that the “cap on noneconomic damages is narrowly drawn to address our state’s overwhelming medical malpractice litigation crisis”); *see also, e.g., id.* at 24 (statement of Rep. Rose); *id.* at 27 (statement of Rep. Bost); *id.* at 33 (statement of Rep. Hultgren); *id.* at 46–47 (colloquy between Reps. Davis and Reitz). They explained that the limitations were carefully selected to “fall squarely within th[e] range” of limitations adopted by other states. H.R. Debate 10–11 (colloquy between Reps. Winters and Reitz) (noting that limitations in other states “range from a low of 250 thousand[d] to 1 million”); *see also, e.g.,* Sen. Transcript, Sen. Bill 475, 94th Gen. Assem. 96 (May 30, 2005) [hereinafter Sen. Debate] (statement of Sen. Bomke). And they expressly relied on the

governmental studies that were cited to them during the hearings, which showed that reforms like section 2–1706.5 had been successful in other states. *See, e.g.*, Sen. Debate at 96 (statement of Sen. Clayborne) (discussing studies conducted by the Congressional Budget Office and the Department of Health and Human Services); *id.* at 109 (statement of Sen. Haine) (discussing a study conducted by the General Accounting Office); *see also* H.R. Debate at 73–74 (colloquy between Reps. Colvin and Reitz); *id.* at 92 (statement of Rep. Reitz) (discussing studies conducted by the General Accounting Office). As this legislative record reveals, the General Assembly believed the Reform Act was necessary to solve a health care crisis in Illinois—and that the limitations on non-economic damages in particular were indispensable to the Reform Act’s success.

In addition, the legislators explained that they had carefully designed section 2–1706.5 to comply with this Court’s decisions in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997), which invalidated a cap on non-economic damages applicable to every personal injury tort, and *Wright v. Central Du Page Hospital Ass’n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), which invalidated a cap on total damages that could have prevented plaintiffs from recovering their full out-of-pocket, economic losses. *See* H.R. Debate at 20–21 (statement of Rep. Rose); Sen. Debate at 92–93 (colloquy between Sens. Althoff and Clayborne); *id.* at 110 (statement of Sen. Haine). For instance, Representative Rose emphasized that section 2–1706.5 “me[t] the concerns” of *Best* because it applied only to medical malpractice cases and was therefore “narrowly focused . . . to the current crisis and . . . specifically limited to that crisis.” H.R. Debate 20–21. He explained that the statute is consistent with *Wright* because “this cap applies

only to noneconomic damages” and allows full recovery of economic damages like medical expenses. *Id.* at 20.

#### **D. Litigation Before The Circuit Court**

Plaintiffs Frances and Abigaile LeBron filed this suit against defendants Roberto Levi D’Ancona, M.D., Florence Martinoz, R.N., and Gottlieb Memorial Hospital on November 20, 2006. C.3–25.<sup>2</sup> The plaintiffs alleged that the defendants failed to provide adequate medical care in connection with the delivery of plaintiff Abigaile LeBron. C.3–14. In addition, the plaintiffs sought a declaration from the circuit court invalidating the Reform Act as inconsistent with the Illinois Constitution. C.14–21. Dr. Levi-D’Ancona answered and asserted a counterclaim for declaratory relief, asking the circuit court to declare that the Reform Act does not violate any of the constitutional provisions cited by the plaintiffs. C.650–52. Both the plaintiffs and Dr. Levi-D’Ancona moved for judgment on the pleadings on their claims for declaratory relief. C.83; C.650–52.

The circuit court invalidated the Reform Act on November 13, 2007 by granting plaintiffs’ motion for judgment on the pleadings and denying Dr. Levi-D’Ancona’s. A.7.

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<sup>2</sup> In addition to the *LeBron* litigation, two other cases before the circuit court raised similar constitutional challenges to the Reform Act: *Zago v. Resurrection Medical Center*, No. 07 L 1720, and *Alexander v. Nacopolous*, No. 07 L 2207. The circuit court consolidated all of the motions raising these constitutional issues and designated *LeBron* as the lead case. C.112. For that reason, this brief summarizes only *LeBron*’s procedural history.

Relying exclusively on this Court’s opinion in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 407, 689 N.E.2d 1057, 1077 (1997), the circuit court concluded that section 2–1706.5’s limitations on non-economic damages are “unconstitutional in violation of the Separation of Powers Clause of the Illinois Constitution.” A.7. Although the circuit court acknowledged that section 2–1706.5 applies only in medical malpractice cases—unlike the statute at issue in *Best*, which applied to all personal injury torts—the court concluded that *Best* “is no less applicable to the present case simply because the cap at issue applies only in medical malpractice cases.” A.8. Under the Reform Act’s inseverability provision, the court “declar[ed] Public Act 94–677 invalid in its entirety.” A.10.

On November 14, 2007, the circuit court amended its order to add the additional findings required by this Court’s Rule 18. A.11–12. Then, on December 6, 2007, the circuit court certified its order for appeal under this Court’s Rule 304(a), which allows appeal from judgments as to fewer than all claims. A.13. This appeal followed.

### STANDARD OF REVIEW

This Court reviews *de novo* a circuit court’s decision to grant judgment on the pleadings. *Gillen v. State Farm Mut. Auto Ins. Co.*, 215 Ill. 2d 381, 385, 830 N.E.2d 575, 577 (2005). The Court must reverse the decision unless, “consider[ing] only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record,” “the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” *Id.*

Where, as here, the People’s elected representatives exercise the legislative powers delegated to them, the legislation they create is “accorded great deference by the judiciary.” *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 389, 689 N.E.2d 1057, 1069

(1997). This Court therefore does not ask whether a statute adopted by the General Assembly is “wise,” *id.* at 390, 689 N.E.2d at 1069, or whether the General Assembly adopted statutes that the plaintiffs believe are good public policy. Rather, “[a]ll statutes enjoy a strong presumption of constitutionality, and the party challenging the statute bears the burden of clearly rebutting this presumption.” *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 85, 783 N.E.2d 1024, 1037 (2002). “Courts have a duty to sustain legislation wherever possible and to resolve all doubts in favor of constitutional validity.” *McAlister v. Schick*, 147 Ill. 2d 84, 90, 588 N.E.2d 1151, 1153 (1992).

### **ARGUMENT**

The Reform Act represents the General Assembly’s careful, bipartisan response to a crisis in medical malpractice litigation. The particular reform at issue here—limitations on non-economic damages in medical malpractice cases, 735 ILCS 5/2–1706.5—was supported by numerous governmental and scholarly studies, as well as direct testimony during the legislative hearings, that similar limits in other states have been effective in reducing malpractice premiums. The General Assembly reasonably concluded from the evidence available to it that, by reducing malpractice premiums, the limitations would help ensure that doctors remained in Illinois and that Illinois residents would have access to vital health care. Few issues could be more important for the legislature to address. *See* Ill. Const. preamble (the Illinois Constitution is designed “to provide for the health, safety and welfare of the people”). Just three years later, the Reform Act has already been hailed as a success by the Governor and the head of Department of Financial and Professional Regulation.

The circuit court improperly disregarded the careful judgment made by the People’s elected representatives and concluded that section 2–1706.5 is invalid under this

Court's decision in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997). *Best* invalidated a sweeping statute that limited the total amount of non-economic damages a plaintiff could recover in **any** personal-injury action. The Court explained that this expansive statute “unduly encroached” on judicial authority to correct excessive jury verdicts under the remittitur doctrine, in violation of the Separation of Powers Clause. The same cannot be said of section 2–1706.5 for four legally dispositive reasons.

*First*, the General Assembly did not impose a blanket damages limitation in all tort cases, as it had attempted to do in *Best*, but rather tailored section 2–1706.5 narrowly to address a specific crisis in medical malpractice litigation. *Second*, the limits it adopted are well within the range of reasonable limits imposed by other states that limit non-economic damages, which illustrates that they are consistent with judicial prerogatives. *Third*, the General Assembly declined to impose any limitation on a plaintiff's total recovery, as was the case in *Best*, but instead prescribed liability limitations for particular defendants—which this Court has previously accepted as consistent with the separation of powers. See *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 93–94, 783 N.E.2d 1024, 1042 (2002). *Fourth*, nothing in section 2–1706.5 eliminates the judiciary's power to apply the remittitur doctrine in medical malpractice cases; rather, the statute changes the legal remedies that a successful medical malpractice plaintiff may obtain against particular defendants.

The circuit court's decision to invalidate section 2–1706.5 despite these crucial distinctions represents an unnecessary and unjustified expansion of *Best*. Indeed, the court's rigid understanding of *Best* would invalidate **any** damages limitation the General

Assembly could ever adopt—no matter the evidence supporting the statute or the consequences of invalidation. The circuit court expanded *Best* so significantly that it would invalidate even statutes that this Court has previously upheld, such as the ban on punitive damages in medical malpractice cases.

Because the Reform Act is well within the General Assembly’s “wide regulatory power with respect to the health-care professions,” *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 40–41, 759 N.E.2d 533, 546 (2001), this Court should reverse the circuit court and hold that section 2–1706.5 is consistent with the Separation of Powers Clause.<sup>3</sup>

**I. Section 2–1706.5 Is Consistent With The Separation Of Powers Clause Because It Does Not “Unduly Encroach” On Judicial Authority.**

This Court has long held—and reaffirmed in *Best* itself—that “the separation of the three branches of government is not absolute and unyielding.” 179 Ill. 2d at 411, 689 N.E.2d at 1079; *see also Burger*, 198 Ill. 2d at 33, 759 N.E.2d at 541. As a result, the Separation of Powers Clause is not violated “merely because separate spheres of governmental authority may overlap.” *Best*, 179 Ill. 2d at 411, 689 N.E.2d at 1079; *see also In re J.J.*, 142 Ill. 2d 1, 7, 566 N.E.2d 1345, 1348 (1991) (noting that the separation of powers “was not designed to achieve a complete divorce among the three branches of government”). Rather, the Illinois Constitution forecloses only those legislative enactments that go beyond mere “overlap” and instead “unduly encroac[h] upon the

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<sup>3</sup> Dr. Levi-D’Ancona also adopts and incorporates by reference the arguments in the briefs filed by defendants Martinoz and Gottlieb Memorial Hospital and by the State of Illinois.

inherent powers of the judiciary.” *Burger*, 198 Ill. 2d at 33, 759 N.E.2d at 541–42 (internal quotation marks omitted); *see also Best*, 179 Ill. 2d at 411, 689 N.E.2d at 1079.

*Best* applied these principles to invalidate a sweeping statute that limited non-economic damages in *all* personal-injury torts. 179 Ill. 2d at 407, 689 N.E.2d at 1077. Under Illinois law, if a trial court determines that a jury verdict is excessive, the court must correct the verdict by giving the plaintiff an option to remit the excessive portion of the damages award; if the plaintiff does not consent to this remittitur, the court will order a new trial. *See, e.g., Peter J. Hartmann Co. v. Capitol Bank & Trust Co.*, 353 Ill. App. 3d 700, 710–11, 817 N.E.2d 913, 922–23 (1st Dist. 2004). This Court reasoned in *Best* that a limitation on non-economic damages applicable in *all* tort cases would function as a blanket “legislative remittitur” and therefore “undercu[t] the power, and obligation, of the judiciary to reduce excessive verdicts.” 179 Ill. 2d at 413, 689 N.E.2d at 1080.

Given the expansive coverage of the statute in *Best*, it is plain why this Court believed it reached the level of undue encroachment. Indeed, the Court concluded that the statute’s scope was so broad that the General Assembly acted irrationally in adopting it. *Id.* at 407, 689 N.E.2d at 1077. But at the same time, *Best* emphasized—consistent with long-standing separation-of-powers principles—that “[t]he General Assembly’s authority to exercise its police power by altering the common law and limiting available remedies is . . . dependent upon the nature and scope of the particular change in the law.” *Id.* at 408, 689 N.E.2d at 1077. There are three reasons why the “nature and scope” of the narrow statute at issue here is consistent with judicial authority and the Separation of Powers Clause.

*First*, the General Assembly carefully tailored section 2–1706.5 to apply only in medical malpractice cases—a limitation that the legislature adopted in response to this Court’s concerns about the overbroad statute in *Best*. *Second*, section 2–1706.5’s limitations on non-economic damages are well within the range established by numerous other state legislatures, which this Court has previously emphasized as an important factor in assessing the constitutionality of medical malpractice reforms. *Third*, unlike the statute in *Best*, section 2–1706.5 does not establish any statutory limit on a plaintiff’s overall recovery, but rather prescribes the maximum amount of non-economic damages for which certain defendants can be held liable. *Fourth*, section 2–1706.5 merely changes the legal remedies that a successful medical malpractice plaintiff may obtain against particular defendants and does not expressly or impliedly eliminate the judiciary’s power to apply the remittitur doctrine in medical malpractice cases. For each of these reasons, the circuit court erred in concluding that section 2–1706.5 is invalid under *Best*.

**A. The General Assembly Carefully Tailored Section 2–1706.5 To Comply With This Court’s Decision In *Best v. Taylor Machine Works*.**

The General Assembly took great care to ensure that section 2–1706.5 satisfied this Court’s constitutional inquiry under *Best*. The problem with the *Best* statute was its all-encompassing scope: The Court complained that it was “unable to discern any connection between the automatic reduction of one type of compensatory damages awarded to one class of injured plaintiffs and a savings in the systemwide costs of litigation.” 179 Ill. 2d at 407, 689 N.E.2d at 1077. The General Assembly learned from *Best* that, to comply with the Illinois Constitution, it should tailor damages limitations narrowly to respond to a particular problem, not broadly to reduce systemwide costs of litigation.

Section 2–1706.5 was designed precisely to provide the tailoring absent in *Best*: The General Assembly did not seek to reduce overall tort costs, but rather directed its legislation to a specific problem attributable to medical malpractice litigation. See H.R. Debate at 10 (statement of Rep. Reitz) (“[The bill] is directly tailored to address the public health problems caused by our medical liability crisis which has been well established in numerous hearings in the Illinois House and Senate this Session.”). This Court has previously upheld such a tailored response to a malpractice crisis. In *Anderson v. Wagner*, the Court upheld a special statute of limitations applicable only to malpractice cases because it was “a reasonable attempt to remedy what the legislature perceived to be a medical malpractice insurance crisis.” 79 Ill. 2d 295, 316, 402 N.E.2d 560, 570 (1979); see also *Orlak v. Loyola Univ. Health Sys.*, No. 102534, 2007 WL 4562822, at \*8 (Ill. Dec. 28, 2007). Similarly here, section 2–1706.5 is the General Assembly’s reasonable response to a medical malpractice crisis, and its modest scope satisfies *Best*’s undue encroachment test.

Not only did the General Assembly carefully heed this Court’s decision in *Best*, it also was mindful of *Wright v. Central Du Page Hospital Ass’n*, where the Court invalidated a statute that capped *total* damages—non-economic or otherwise—in medical malpractice cases. 63 Ill. 2d 313, 329–30, 347 N.E.2d 736, 743 (1976). The problem with the statute in *Wright* was that it could have prevented a plaintiff from recovering his out-of-pocket medical expenses. As the Court noted, “the very seriously injured malpractice victim, because of the recovery limitation, might be unable to recover even all the medical expenses he might incur, in which event he would recover nothing for any other loss suffered.” *Id.* at 327–28, 347 N.E.2d at 742; see also *Anderson*, 79 Ill. 2d 304–

05, 402 N.E.2d at 564. The current statute scrupulously avoids the problem in *Wright* because it limits only *non-economic* damages; it allows unlimited recovery of economic damages such as medical expenses and lost wages.<sup>4</sup>

In short, both *Best* and *Wright* identified statutory flaws that are absent in section 2–1706.5. This is no accident: The General Assembly carefully considered both cases and tailored its legislation to comply with them. As Representative Rose explained during debate in the House of Representatives:

Unlike the cap in *Wright*, this cap applies only to noneconomic damages. . . . Further, meeting the concerns of both the *Wright* and *Best* courts, this cap is limited to medical malpractice cases and wrongful death

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<sup>4</sup> The General Assembly focused its attention on non-economic damages awards because they are the most subjective and hence unpredictable component of compensatory damages awards, and also the component that was growing the fastest. *See supra* pp. 11–12; *see also* William G. Hamm et al., *MICRA and Access to Healthcare* 15 (2005) (noting that non-economic damages awards “exhibit a high degree of variability”); 2 Dan B. Dobbs, *Dobbs Law of Remedies* § 8.1(4), at 383 (2d ed. 1993) (“[T]here is almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent.”). The studies considered by the General Assembly demonstrated that limiting these awards creates predictability for insurers, which must accurately estimate future liabilities, and effectively reduces malpractice insurance premiums. *See supra* pp. 12–14.

actions involving medical malpractice. It is narrowly focused . . . to the current crisis and is specifically limited to that crisis.

H.R. Debate at 20–21; *see also* Sen. Debate at 92–93 (colloquy between Sens. Althoff and Clayborne); *id.* at 110 (statement of Sen. Haine).

The General Assembly’s responsible and thoughtful effort to follow this Court’s guidance reveals that it did not usurp or unduly encroach on the authority of Illinois judges. To the contrary, its efforts are the sort of “cooperation and harmony among the branches of government” that this Court has previously approved. *See, e.g., People v. Inghram*, 118 Ill. 2d 140, 152, 514 N.E.2d 977, 983 (1987); *see also Knuepfer v. Fawell*, 96 Ill. 2d 284, 293, 449 N.E.2d 1312, 1316 (1983) (“[T]he public interest requires that the three branches in our system of government work cooperatively and in harmony”). Precisely this type of dialogue among the branches led the Ohio Supreme Court to uphold a limitation on non-economic damages even broader than the one at issue here. *See Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

In *Arbino*, the Ohio Supreme Court considered a cap on non-economic damages that applied to most tort actions. The court had previously “examined several specific provisions that are similar in language and purpose,” and it had declared each of those previous statutes unconstitutional. *Id.* at 470 ¶ 10. Despite these earlier decisions, the court upheld the cap and rejected the same constitutional arguments that the plaintiffs have raised in this litigation. *Id.* at 484 ¶ 80. The court explained:

A careful review of the statutes at issue here reveals that they are more than a rehashing of unconstitutional statutes. In its continued pursuit of reform, the General Assembly has made progress in tailoring its

legislation to address the constitutional defects identified by the various majorities of this court. The statutes before us here are sufficiently different from the previous enactments so as to avoid the blanket application of stare decisis and to warrant a fresh review of their individual merits.

*Id.* at 472 ¶ 24.

As in *Arbino*, the General Assembly carefully drafted section 2–1706.5 “to address the constitutional defects identified” by this Court in its earlier decisions. The General Assembly carefully studied this Court’s decisions and—with due respect and regard for the judiciary, its co-equal branch of government—responded to the concerns this Court had identified: Section 2–1706.5 differs from *Best* because it applies only in medical malpractice cases, and it differs from *Wright* because it limits only non-economic damages. From deliberation through enactment, the General Assembly painstakingly sought to—and did—comply with this Court’s guidance. The Court should hold that section 2–1706.5 falls squarely within the bounds of the Illinois Constitution.

**B. Section 2–1706.5 Is Well Within The Range Of Reasonable Limitations Enacted By Other States.**

*Best* also requires courts to examine the particular damages limitations enacted by the legislature. *See* 179 Ill. 2d at 408, 689 N.E.2d at 1077 (constitutionality of the statute is “dependent upon the nature and scope of the particular change in the law”). If the General Assembly had adopted a damages limitation of \$1 billion in medical malpractice cases, for example, no constitutional scholar would argue that the cap unduly encroached on the judiciary’s authority to order a remittitur in medical malpractice cases—it would have no effect at all. The mandate under *Best* is to determine whether the “nature and

scope” of the supposed encroachment into judicial authority is “undue.” Here it plainly is not.

In *Anderson*, this Court resolved a similar constitutional dispute about a different type of reform to medical malpractice litigation. The statute at issue in *Anderson* imposed a four-year period of repose in medical malpractice suits, which began to run when the medical negligence occurred. 79 Ill. 2d at 298, 402 N.E.2d at 561. Even though the repose period could lapse (and thus bar a suit) even before the patient’s injury was discovered, this Court nonetheless concluded that the statute did not violate the Due Process Clause. The Court emphasized that the legislature’s selection of a four-year period—as opposed to some other limit—was constitutional because it was within “the general area of limits that had been set by other States.” *Id.* at 312, 402 N.E.2d at 568; *see also id.* at 310, 402 N.E.2d at 566–67 (noting that the four-year limitations period “generally follows the time limitation specified in the statutes of other States”).

In this case, as in *Anderson*, the limitations on non-economic damages enacted by the General Assembly are well within the range of reasonable limitations approved by other states. Indeed, the General Assembly chose these limitations *because* they were consistent with legislation in other states. Representative Reitz explained:

The majority of the states in this country have caps on noneconomic damages in medical liability cases that range from a low of 250 thousands to 1 million. . . . [T]he limits in this Bill fall squarely within that range. Other states have reasonably concluded that such amounts are fair and reasonable compensation for plaintiffs while protecting the public’s access to health care.

H.R. Debate 10–11 (colloquy between Reps. Winters and Reitz). This constitutes an independent check that the General Assembly has not cut into core prerogatives of the judicial branch: The congruity between the Reform Act’s limitations and those imposed by other states reveals that the Reform Act is a measured response to the health care crisis the General Assembly confronted rather than an arbitrary attempt by the legislature to intrude upon judicial authority.

In fact, the Reform Act’s limitations on non-economic damages are higher than those adopted in numerous other states, including California and Texas. *See* Cal. Civ. Code § 3333.2(b) (\$250,000); Tex. Civ. Prac. & Rem. Code Ann. § 74.301(a) (\$250,000). In addition to California and Texas, seven other states—Georgia, Hawaii, Idaho, Maryland, Missouri, Nevada, Oklahoma, South Carolina, and Utah—have adopted limits on non-economic damages in medical malpractice cases that are lower than those in section 2–1706.5. *See* Ga. Code Ann. § 51–13–1(b) (\$350,000); Haw. Rev. Stat. § 663–8.7 (\$375,000); Idaho Code Ann. § 6–1603(1) (\$250,000); Mo. Rev. Stat. § 538.210 (\$350,000); Nev. Rev. Stat. § 41A.035 (\$350,000); Okla. Stat. tit. 63, § 1–1708.1F (\$300,000); S.C. Code Ann. § 15–32–220(A) (\$350,000); Utah Code Ann. § 78–14–7.1(1) (\$400,000 plus inflation).

Another four states—Colorado, Mississippi, North Dakota, and West Virginia—limit non-economic damages to \$500,000, which equals section 2–1706.5’s limitations on non-economic damages awards against physicians but is well below the \$1,000,000 limitation applicable to hospitals. *See* Colo. Rev. Stat. § 13–21–102.5(3)(a) (\$250,000 or up to \$500,000 on a showing of clear and convincing evidence); Miss. Code Ann. § 11–1–60(2)(a) (\$500,000); N.D. Cent. Code § 32–42–02 (\$500,000); W. Va. Code Ann.

§ 55–7B–8(a)–(b) (\$250,000 or \$500,000 for severe injuries). And unlike Illinois, Colorado and West Virginia allow a \$500,000 non-economic damages award only if the plaintiff can satisfy additional statutory prerequisites. *Id.*

Conversely, no state that has limited non-economic damages has passed a limitation higher than section 2–1706.5’s \$1,000,000 limit on non-economic damages awards against hospitals. Maryland and Wisconsin have limitations between \$500,000 and \$1,000,000, *see* Md. Code Ann. Cts. & Jud. Proc. § 11–108(b)(2) (\$680,000 plus a yearly adjustment); Wisc. Stat. Ann. § 893.55(4)(d)(1) (\$750,000), and three other states—Alaska, Florida, and Ohio—allow recovery of up to \$1,000,000 only if the plaintiff can establish severe injuries, *see* Alaska Stat. § 09.17.010(b)–(c) (\$400,000–\$1,000,000); Fla. Stat. § 766.118(2)(a)–(b) (\$250,000–\$1,000,000); Ohio Rev. Code Ann. § 2323.43(A)(2)–(3) (\$500,000–\$1,000,000). Even these limitations are firmly in line with the \$500,000 and \$1,000,000 limitations adopted by the General Assembly.

As this Court recognized in *Anderson*, the General Assembly is on solid constitutional footing when the lines it draws are “within the general area of limits that had been set by other States.” 79 Ill. 2d at 312, 402 N.E.2d at 568. This is particularly so when the issue is whether the General Assembly unduly encroached on judicial authority: The statutes of other states constitute independent, objective benchmarks demonstrating that the General Assembly did not engage in a constitutional “power grab” but instead enacted a reasonable solution to a pressing social need. Section 2–1706.5’s congruity with other state statutes confirms that the “nature and scope” of section 2–1706.5 is measured, reasonable, and within the permissible zone of inter-branch overlap contemplated by this Court’s separation-of-powers cases.

**C. Unlike The Statute In *Best*, Section 2–1706.5 Does Not Impose Any Limit On A Plaintiff’s Total Recovery.**

Moreover, section 2–1706.5 does not encroach on judicial authority because it is simply not a “legislative remittitur” under *Best*. The statute in *Best* capped the amount of non-economic damages that a plaintiff could recover in any personal injury case—no matter how many different defendants he sued, how many causes of action he proved, or how much damages the jury chose to award. 179 Ill. 2d at 384, 689 N.E.2d at 1066. This Court reasoned that such a per-plaintiff cap was an unconstitutional “legislative remittitur” because it “disregard[ed] the jury’s careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action.” *Id.* at 413–14, 689 N.E.2d at 1080, *quoted in* A.8. But section 2–1706.5, unlike the statute in *Best*, does not establish any statutory limit on a plaintiff’s recovery of non-economic damages.

Section 2–1706.5 prescribes only the maximum amount of non-economic damages for which certain defendants can be held liable. These per-defendant limits have no effect on the jury’s determination of what damages will fairly compensate an injured plaintiff. Nor do they preclude the plaintiff from recovering the full amount of the jury’s non-economic damages award from other defendants. In short, section 2–1706.5 does not “disregar[d]”—but rather leaves intact—the total damages amount found by the jury.

Although the defendants raised this crucial distinction repeatedly in their briefs, the circuit court disregarded the issue in its order invalidating section 2–1706.5. The plaintiffs similarly offered no meaningful response: They simply dismissed the difference between per-plaintiff damages caps and per-defendant liability limitations as

“semantic.” C.1985. According to the plaintiffs, the constitutional result is the same “regardless of whether the General Assembly limits the plaintiff’s total recovery for non-economic damages, or specifically limits the liability of certain healthcare defendants in medical malpractice cases.” *Id.*

This Court has held otherwise. In *Unzicker v. Kraft Food Ingredients Corp.*, the Court held that *Best*’s separation-of-powers analysis does not apply to a statute that limits only defendant liability and leaves the jury’s determination of damages intact. 203 Ill. 2d 64, 93–94, 783 N.E.2d 1024, 1042 (2002). The statute in *Unzicker*—735 ILCS 5/2–1117—modified the common-law rule of joint and several liability to provide that, in certain circumstances, a defendant was liable only in an amount equal to his percentage of fault. *Id.* at 70–71, 783 N.E.2d at 1029. This Court upheld the statute, rejecting precisely the same “legislative remittitur” argument that the plaintiffs advance here:

Section 2–1117 is simply not a legislative remittitur. Unlike [the statute in *Best*], which set an arbitrary cap on noneconomic damages, section 2–1117 merely determines when a defendant can be held liable for the full amount of a jury’s verdict and when a defendant is liable only in an amount equal to his or her percentage of fault.

*Id.* at 93–94, 783 N.E.2d at 1042.

*Unzicker*’s analysis applies with equal force here. Section 2–1706.5 provides that certain defendants can be held liable for non-economic damages only up to a particular amount. This provision does not “cap [a plaintiff’s] noneconomic damages” because—unlike the statute in *Best*—it imposes no limitation on the total amount a plaintiff can recover. *Id.* Instead, it merely prescribes—like the statute in *Unzicker*—“when a

defendant can be held liable for the full amount of a jury's verdict." *Id.* Because section 2-1706.5 therefore does not operate as a "legislative remittitur," it does not encroach on judicial authority at all.

**D. Section 2-1706.5 Is Not A "Legislative Remittitur" Because It Does Not Correct The Jury's Application Of The Law In A Particular Case.**

Section 2-1706.5 is not a "legislative remittitur" under *Best* for an additional reason: The statute does not deprive the judiciary of its power to order a remittitur. Nothing in the statutory language displaces the remittitur doctrine, nor is there any inconsistency between a limitation on non-economic damages and the availability of remittitur. Under the Reform Act, nothing prevents trial courts from deciding in a particular case that a medical malpractice jury's damages award is so excessive that it requires a remittitur.

The circuit court erroneously conflated the power of remittitur with a statutory limitation on damages. It is true that damages limitations, like the remittitur doctrine, could lower the amount that a successful plaintiff would otherwise recover. But a damages limitation and a remittitur are very different animals.

Damages limitations are part of the *substantive law* applicable to the claims asserted in a plaintiff's complaint. Section 2-1706.5 declares, *as a matter of law*, that no medical malpractice plaintiff can recover more than \$1,000,000 for non-economic injuries against a hospital, or more than \$500,000 for non-economic injuries against a doctor. The provision therefore falls squarely within the general rule, recognized in the *Best* opinion itself, that the legislature "may alter the common law and change or *limit* available remedies." 179 Ill. 2d at 408, 689 N.E.2d at 1077 (citing *Grand Trunk W. Ry. Co. v. Indus. Comm'n*, 291 Ill. 167, 125 N.E. 748 (1919)) (emphasis added); *see also*

*Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115, 1122 (Idaho 2000) (“Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation-of-powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine.”).

By contrast, the remittitur doctrine is concerned with ensuring a jury correctly applies that governing law in a particular case. It spells out when, and by what process, a court can declare that a jury decision about damages is invalid because it is excessive. That power still exists under the Reform Act: Section 2–1706.5 does not prevent Illinois judges from ordering a remittitur based on their fact-specific determination that a particular damages award is excessive. But the remittitur doctrine does not give courts plenary power to ignore the law established by the General Assembly and impose damage awards of their own choosing.

In short, section 2–1706.5 does not deprive Illinois judges of their traditional power to order remittitur, but simply changes the legal remedies that a successful medical malpractice plaintiff may obtain against particular defendants. The General Assembly “may alter the common law and change or limit available remedies” in this context just as it has in numerous others—by authorizing treble damages, *e.g.*, *People ex rel. Dep’t of Pub. Health v. Wiley*, 218 Ill. 2d 207, 228–29, 843 N.E.2d 259, 271–72 (2006) (noting that the General Assembly may “modify the common law on the issue of damages” by imposing treble damages), or by eliminating certain categories of damages altogether, *e.g.*, *Bernier v. Burris*, 113 Ill. 2d 219, 245–48, 497 N.E.2d 763, 776–77 (1986)

(upholding statute that banned punitive damages in medical malpractice suits), or by prescribing damages limitations for certain types of suits, *e.g.*, 740 ILCS 90/1 (imposing a \$250 or \$500 cap on suits against innkeepers for damage to a guest's property).

For that reason, every state supreme court confronted with a “legislative remittitur” argument after *Best* has rejected that argument. Five state supreme courts have expressly disagreed with the expansive view of the “legislative remittitur” doctrine adopted by the circuit court. *See, e.g., Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581–82 (Colo. 2004); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 76–77 (Neb. 2003); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1056 (Alaska 2002); *Verba v. Ghaphery*, 552 S.E.2d 406, 411 (W. Va. 2001); *Kirkland*, 4 P.3d at 1122. Two other states have upheld statutory damages limitations over “legislative remittitur” claims. *See Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 189 (N.C. 2004); *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004).

In *Gourley*, for instance, the Supreme Court of Nebraska explained that a statutory cap on non-economic damages in medical malpractice cases “does not act as a legislative remittitur or otherwise violate principles of separation of powers” because “[t]he cap does not ask the Legislature to review a specific dispute and determine the amount of damages.” 663 N.W.2d at 77. Rather, the cap “imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy.” *Id.*

The Supreme Court of Idaho similarly upheld a statutory cap on non-economic damages in medical malpractice cases, concluding that the statute “does not impermissibly infringe on the judiciary’s traditional power of remittitur.” *Kirkland*, 4 P.3d at 1122. “[W]hen a legislative body, *without regard to facts of a particular case*,

*dispute or incident*, but rather as a matter of policy and rule determines for all citizens in all incidents that may occur thereafter that recovery will be limited, the function is legislative, completely analogous to the adoption or repeal of causes of action and remedies therefor.” *Id.* at 1122 (quoting *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1331 (D. Md. 1989)) (internal quotation marks omitted; emphasis in original).

As these cases uniformly recognize, the General Assembly may enact a damages limitation like section 2–1706.5 without interfering with the judiciary’s authority to order remittitur. *Best* therefore should not be read as preventing the legislature from responding to pressing public policy questions by making changes to substantive law; it stands instead for the principle that the General Assembly cannot intrude too deeply into the judicial process but must instead carefully tailor its reforms—as it has done here. *Best* did not force the legislature into a constitutional straightjacket, but rather established the parameters of permissible inter-branch overlap within which the Reform Act comfortably fits.

## **II. The Circuit Court’s Expansive Reading Of *Best* Would Prevent The General Assembly From Addressing Crises That Require Legislative Action And Would Invalidate Statutes This Court Has Previously Upheld.**

The circuit court’s decision represents an unprecedented expansion of *Best*. Under the circuit court’s inflexible approach, the General Assembly could never adopt a damages limitation—no matter how exigent the need or how strong the justifications for doing so. The General Assembly could not respond even if (as here) numerous experts agreed that a limit on non-economic damages was necessary to resolve a pressing health care crisis in Illinois. It could not respond even if (as here) physician shortages were threatening to endanger the well-being of millions of Illinois residents.

This reasoning is flatly inconsistent with the General Assembly’s “wide regulatory power with respect to the health-care professions,” *Burger*, 198 Ill. 2d at 40–41, 759 N.E.2d at 546, as well as its “broad discretion . . . to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest,” *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280, 786 N.E.2d 139, 151 (2003) (internal quotation marks omitted); *see also Best*, 179 Ill. 2d at 408, 689 N.E.2d at 1077 (noting the “well grounded” principle that the General Assembly may “alter the common law and change or limit available remedies”). Indeed, the preamble to the Illinois Constitution recognizes that the very purpose of the constitutional design—including the separation-of-powers doctrine—is to ensure that the State can “provide for the health, safety and welfare of the people.” Ill. Const. preamble.

Nothing in the Illinois Constitution or this Court’s previous decisions would prevent the People’s representatives from exercising their broad discretion to secure the public welfare by enacting a reasonable, carefully tailored damages limitation to ensure health care availability for the citizens of this State. *Best* did not hold—once and for all—that any future damages limitation would be forbidden by the Illinois Constitution. It considered only a cap on non-economic damages that applied to every personal injury suit arising in every conceivable factual setting, and it held only that the statute was an unconstitutional response to mid-1990s concerns about “the system of awarding damages for personal injury.” 179 Ill. 2d at 386, 689 N.E.2d at 1067. That decision should not be read to preclude the General Assembly from adopting section 2–1706.5—a far narrower statute—in response to Illinois’ current crisis in health care availability. Such a rigid reading of *Best* would improperly deprive the General Assembly of its ability to “provide

for the health, safety and welfare of the people,” Ill. Const. preamble, in the face of new conditions and developments that were unknown at the time *Best* was decided.

In addition, the circuit court’s expansive reading of *Best* would also endanger numerous other statutes passed by the General Assembly—including those this Court has previously upheld as constitutional. For instance, the General Assembly has prohibited awards of punitive damages in medical malpractice cases, *see* 735 ILCS 5/2–1115, and this Court upheld the ban as constitutional, *see Bernier*, 113 Ill. 2d at 245–48, 497 N.E.2d at 776–77. But the Illinois courts have long applied the doctrine of remittitur to punitive damages awards, just as they have applied it to non-economic damages. *See, e.g., Turner v. Firststar Bank, N.A.*, 363 Ill. App. 3d 1150, 1165–66, 845 N.E.2d 816, 829–30 (5th Dist. 2006). If the sole test under *Best* were whether the General Assembly limited a type of damages that Illinois judges have the power to remit, as the circuit court appeared to believe, then the ban on punitive damages would also be unconstitutional—contrary to *Bernier*.

Similarly, this Court has upheld statutes that eliminated certain categories of non-economic damages altogether. In *Siegal v. Solomon*, the court upheld a statute that severely limited the damages available in an action for alienation of affections. 19 Ill. 2d 145, 147, 166 N.E.2d 5, 6–7 (1960). In addition to barring punitive damages awards, the statute eliminated any award based on factors such as “mental anguish” and “shame, humiliation, sorrow or mortification,” *id.*, which would be non-economic damages under section 2–1706.5. *Smith v. Hill* similarly upheld a statute that barred recovery of “aggravated” damages in an action for breach of a promise to marry, even though it operated to prohibit recovery of “damages ensuing from [a] seduction . . . , the

consequent pregnancy and the costs of hospital and medical care relating to the birth of the child.” 12 Ill. 2d 588, 593, 147 N.E.2d 321, 324 (1958). But if the circuit court were correct, these statutes too would be invalid: Illinois judges obviously cannot impose a remittitur when the entire category of damages has been eliminated by statute.

The circuit court’s inflexible approach to *Best* would therefore undermine several other decisions of this Court. The circuit court simply over-read *Best* and disregarded the need for a careful inquiry into the “nature and scope” of the Reform Act to determine whether the General Assembly had “unduly encroached” on core judicial powers. *Best* recognizes that the General Assembly has broad authority to change or limit remedies as long as it carefully crafts the legislation to avoid trenching on judicial authority. See 179 Ill. 2d at 408, 689 N.E.2d at 1077. Section 2–1706.5 is a reasonable and permissible exercise of that authority.

**III. If This Court Concludes That Section 2–1706.5 Is Indistinguishable From The Statute At Issue In *Best*, It Should Limit Or Overrule *Best*’s Separation-Of-Powers Analysis.**

This Court should uphold section 2–1706.5 because the statute does not operate as a “legislative remittitur” and because it differs from the statute at issue in *Best* in crucial respects that should lead the Court to reject the plaintiffs’ separation-of-powers claim. However, if the Court were to disagree with this reasoning and conclude that section 2–1706.5 is somehow indistinguishable from the *Best* statute, it nonetheless should uphold section 2–1706.5 by limiting or overruling *Best*’s discussion of the Separation of Powers Clause.

*Best*’s separation-of-powers analysis is entitled to little weight because it was entirely unnecessary to this Court’s decision. The Court addressed the issue only after it had already concluded that the damages limitation before it was invalid on special

legislation grounds. *Best*, 179 Ill. 2d at 413, 689 N.E.2d at 1080. As both of the separate opinions in *Best* recognized, the Court’s later discussion of the separation of powers went well beyond what was necessary to decide the case. *Id.* at 471, 689 N.E.2d at 1106 (Bilandic, J., specially concurring) (“I do not join in the majority’s discussion of the constitutionality of the damages cap under the separation of powers doctrine as that discussion is wholly unnecessary and constitutes *dicta*.”); *id.* at 481, 689 N.E.2d at 1110 (Miller, J., concurring in part and dissenting in part) (“The majority’s discussion of [the separation-of-powers] argument is entirely unnecessary, given the majority’s prior holding that the same measure is invalid special legislation.”).

Moreover, *Best* rests on the incorrect premise that a statutory limitation on damages somehow interferes with the judiciary’s power to order a remittitur. *See, e.g.*, Carolyn Victoria J. Lees, *The Inevitable Reevaluation of Best v. Taylor in Light of Illinois’ Health Care Crisis*, 25 N. Ill. U. L. Rev. 217, 231–33 (2005) (“The court’s argument in *Best*, that a limit on non-economic damages robs the courts of a judicial function, is deeply flawed.”). Every state supreme court to address the issue after *Best* has rejected its remittitur analysis, properly recognizing that “nothing about [a] damages cap purport[s] to limit the exercise of the judiciary’s constitutional powers or jurisdiction.” *Gourley*, 663 N.W.2d at 76; *see also supra* pp. 39–40 (collecting cases). Section 2–1706.5 does not prevent Illinois courts from applying the remittitur doctrine in any case where damages are excessive; it simply prescribes—as a legal rather than factual matter—the outer limits of the recovery available to successful plaintiffs.

The plaintiffs defended *Best* before the circuit court by invoking *stare decisis*—the general rule that established precedents should be followed. But this Court has

recognized that “[s]tare decisis is not an inexorable command.” *Chi. Bar Ass’n v. Ill. State Bd. of Elections*, 161 Ill. 2d 502, 510, 641 N.E.2d 525, 529 (1994). To the contrary, the Court has expressed its willingness to “detour” from *stare decisis* “when the court must bring its decisions into agreement with experience and newly ascertained facts.” *Id.*; see also *People v. Jones*, 207 Ill. 2d 122, 134, 797 N.E.2d 640, 647 (2003) (noting that a prior decision may be overruled if it is “based upon a fundamental misstatement of the law”). *Stare decisis* is at its weakest “in constitutional cases,” such as the present litigation, “because in such cases correction through legislative action is practically impossible.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotation marks omitted); see also *People v. Antoine*, 286 Ill. App. 3d 920, 925, 676 N.E.2d 1374, 1377 (4th Dist. 1997) (“[B]ecause of the difficulty inherent in amending a constitution to overcome a judicial misinterpretation,” courts “must be willing to revisit decisions based upon constitutional interpretations to determine if those decisions deserve further adherence.”).

Experience has taught that the General Assembly must be allowed to respond to pressing social crises, particularly when the health of Illinois residents is at stake. It has also shown, as the General Assembly’s extensive hearings and research attest, that section 2–1706.5 is likely to be an effective response to the medical malpractice crisis—and the available evidence shows that the Reform Act has already produced dramatic results. The Governor explained, for instance, that “[n]ew competition in the malpractice insurance market is resulting in lower premium rates, and it’s making Illinois a state where doctors want to practice.” Press Release, Office of the Governor, *Gov. Blagojevich Announces Major Reduction in Medical Malpractice Insurance Rates in*

*Illinois* (Oct. 13, 2006), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=5414>. And the Secretary of the Department of Financial and Professional Regulation has explained that the Reform Act has “increased competition in Illinois and has allowed at least four [insurance] companies to enter the market or expand their market share in our state.” Dean Martinez, Sec’y, Ill. Dep’t of Fin. & Prof’l Reg., Op.-Ed., *Medical Malpractice Reforms Are Working*, *State J.-Reg.*, Jan. 22, 2007, at 5, 2007 WLNR 1400695. It would be a travesty to halt these reforms—each and every one, by operation of the inseverability clause—in their tracks. If *Best* truly stands for the sweeping and unprecedented proposition that the General Assembly can never, under any circumstances, implement a damages limitation, that decision should be limited or overruled.

## CONCLUSION

For the foregoing reasons, defendant Roberto Levi-D'Ancona, M.D., respectfully requests that this Court reverse the circuit court's judgment and conclude that 735 ILCS 5/2-1706.5 does not violate the Separation of Powers Clause. The Court should remand the plaintiffs' remaining constitutional challenges for the circuit court to consider those issues in the first instance.

Respectfully submitted,

Dated: May 8, 2008  
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