

PUBLICATION

Tennessee Supreme Court Decides that Personal Injury Claims and Derivative Loss of Consortium Claims are Aggregated for the Purposes of the Tennessee Damages Cap Statute

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In 2011, the Tennessee legislature enacted limitations on non-economic compensatory damages and punitive damages which are recoverable in Tennessee. T.C.A. 29-39-102 was part of the Tennessee Civil Justice Act of 2011. It limits non-economic compensatory damages suffered by each injured plaintiff to \$750,000 except in cases of what the legislature defined as "catastrophic" injury, in which case the limit on non-economic damages is increased to \$1,000,000. T.C.A. sections 29-39-102(a)(2), (c) and (e). It is helpful to understanding the Supreme Court's analysis of this issue to see the entire statute. It is set forth below:

(a) In a civil action, each injured plaintiff may be awarded:

(1) Compensation for economic damages suffered by each injured plaintiff; and

(2) Compensation for any non-economic damages suffered by each injured plaintiff not to exceed seven hundred fifty thousand dollars (\$750,000) for all injuries and occurrences that were or could have been asserted, regardless of whether the action is based on a single act or omission or a series of acts or omissions that allegedly caused the injuries or death.

(b) If multiple defendants are found liable under the principle of comparative fault, the amount of all non-economic damages, not to exceed seven hundred fifty thousand dollars (\$750,000) for each injured plaintiff, shall be apportioned among the defendants based upon the percentage of fault for each defendant, so long as the plaintiff's comparative fault (or in a wrongful death action, the fault of the decedent) is not equal to or greater than fifty percent (50%), in which case recovery for any damages is barred.

(c) If an injury or loss is catastrophic in nature, as defined in subsection (d), the seven-hundred-fifty-thousand-dollar amount limiting non-economic damages, as set forth in subdivision (a)(2) and subsection (b) is increased to, but the amount of damages awarded as non-economic damages shall not exceed, one million dollars (\$1,000,000).

(d) "Catastrophic loss or injury" means one (1) or more of the following:

(1) Spinal cord injury resulting in paraplegia or quadriplegia;

(2) Amputation of two (2) hands, two (2) feet or one (1) of each;

(3) Third degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) percent or more of the face; or

(4) Wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation.

(e) All non-economic damages awarded to each injured plaintiff, including damages for pain and suffering, as well as any claims of a spouse or children for loss of consortium or any derivative claim for non-economic damages, shall not exceed in the aggregate a total of seven hundred fifty thousand dollars (\$750,000), unless subsection (c) applies, in which case the aggregate amount shall not exceed one million dollars (\$1,000,000).

(f) If there is a disputed issue of fact, the trier of fact, by special verdict, shall determine the existence of a catastrophic loss or injury as defined in subsection (d).

(g) The limitation on the amount of non-economic damages imposed by subdivision (a)(2) and subsections (b)-(e) shall not be disclosed to the jury, but shall be applied by the court to any award of non-economic damages.

(h) The limitation on the amount of non-economic damages imposed by subdivision (a)(2) and subsections (b)-(e) shall not apply to personal injury and wrongful death actions:

(1) If the defendant had a specific intent to inflict serious physical injury, and the defendant's intentional conduct did, in fact, injure the plaintiff;

(2) If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue; provided, however, that this subsection (h) does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the defendant's document retention policy or state or federal regulations;

(3) If the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulant, resulting the defendant's judgment being substantially impaired, and causing the injuries or death. For purposes of this subsection (h), a defendant shall not be deemed to be under the influence of drugs or any other intoxicant or stimulant, if the defendant was using lawfully prescribed drugs administered in accordance with a prescription or over-the-counter drugs in accordance with the written instructions of the manufacturer; or

(4) If the defendant's act or omission results in the defendant being convicted of a felony under the laws of this state, another state, or under federal law, and that act or omission caused the damages or injuries.

(i) If there is a dispute of fact, the trier of fact, by special verdict, shall determine whether the exceptions set forth in subsection (h) apply to the defendant and the cause of action.

(j) The liability of a defendant for non-economic damages whose liability is alleged to be vicarious shall be determined separately from that of any alleged agent, employee or representative.

(k) Non-economic damages are not permitted for any claim arising out of harm or loss of property, except as authorized by statute.

(l) No provision in this part shall apply to claims against this state to the extent that such provision is inconsistent with or conflicts with the Tennessee Claims Commission Act, compiled in title 9, chapter 8, part 3. In addition, no provision in this part shall apply to claims against a governmental entity or its employees to the extent that such provision is inconsistent with or conflicts with the Governmental Tort Liability Act, compiled in chapter 20 of this title.

(m) Nothing in this chapter shall be construed to create or enhance any claim, right of action, civil liability, economic damage or non-economic damage under Tennessee law.

(n) The limitations on non-economic damages in this section shall apply to restrict such recoveries in all civil actions notwithstanding conflicting statutes or common law.

The Tennessee Supreme Court was called upon to decide the constitutionality of the Tennessee statutory cap on non-economic damages in the case of *Jodi McClay v. Airport Management Services LLC*, No. M2019-00511-SC-R23-CV (2020). In *McClay*, three constitutional challenges were found to be without merit.

The three constitutional challenges were (1) whether or not the non-economic damages cap violated the plaintiff's right to a trial by jury as guaranteed in Article I, Section 6 of the Tennessee Constitution, (2) whether the non-economic damages cap violated Tennessee's Constitutional Doctrine of Separation of Powers between the legislative branch and the judicial branch, and (3) whether or not the non-economic damages cap violated the Tennessee Constitution by discriminating disproportionately against women. Justices Bivins, Page and Kirby, signed or filed opinions upholding the constitutionality of the statute. Justices Clark and Lee filed separate dissenting opinions expressing their judgment that the statute was unconstitutional. (See previous Litigation Alert at [Tennessee Supreme Court Accepts Certification of Non-Economic Damages Caps Question](#) – June 27, 2019 and the Supreme Court's June 19, 2019 Order.)

On June 2, 2021, the Tennessee Supreme Court decided the case of *Yebuah et al., v. Center for Urological Treatment, PLC.*, No. M2018-01652-SC-R11-CV. *Yebuah* was a healthcare liability action involving an application of the statutory cap on non-economic damages to loss of consortium claims. In this case, a patient suffered non-economic damages (pain and suffering) resulting from a physician's negligence. A portion of a device was unintentionally left in her body after surgery. In the same suit, the patient's spouse claimed damages for loss of consortium. It was discovered that her small bowel was looped around a fourteen-centimeter ring which was left in her body during a laparoscopic surgery performed in March of 2005. The foreign object remained inside Mrs. Yebuah's body for eight years before it was discovered during an unrelated surgery to remove her gall bladder. In 2013, Mrs. Yebuah underwent surgery to remove the fourteen-centimeter ring from her abdominal cavity. She suffered significant pain and suffering and loss of enjoyment of her life and her husband suffered significant loss of consortium.

At trial, the jury awarded Mrs. Yebuah \$4,000,000 in damages for pain and suffering and loss of enjoyment of life. The jury awarded Mr. Yebuah \$500,000 in damages for loss of consortium. Although the trial court initially applied the statutory cap in aggregate to both plaintiffs' non-economic damages for a total award of \$750,000 to both plaintiffs in total, the trial court thereafter granted the plaintiff's motion to alter or amend and applied the statutory cap to each plaintiff separately; the trial court thereby entered a judgment of \$750,000 for Mrs. Yebuah pursuant to the damages cap and \$500,000 for her husband, since his award did not exceed the damages cap. The Court of Appeals affirmed the trial court's altered judgment applying a separate statutory cap to each plaintiff's damages. The Tennessee Supreme Court granted permission to appeal pursuant to Tenn. R. App. P. 11 and held in a 3-2 decision that the language of T.C.A. 29-39-102 only allowed both plaintiffs to recover \$750,000 in the aggregate for non-economic damages. The Supreme Court, therefore, reversed the holding of the Court of Appeals and the trial court. As they did in *McClay*, Justices Lee and Clark dissented from the application of the damages cap in *Yebuah* on the basis that the damages cap statute was unconstitutional; neither dissenting Justice opined on aggregation of non-economic damages under the statute.

According to the majority opinion, both parties argued that the phrase "each injured plaintiff", which appears in the statutory language quoted above, was key to the interpretation of the statute. The Yebuahs argued that both Mrs. Yebuah and Mr. Yebuah were "injured plaintiffs" and that therefore each plaintiff was entitled to their own damages cap. The defendant argued that "each injured plaintiff" is not synonymous with "each plaintiff,"

and that because Mr. Yebuah's injury was derivative and because he suffered no personal injury, the non-economic damages of both husband and wife should be aggregated under one damages cap ([Decision](#)). The Court also noted that Instruction 14.20 of the Tennessee Pattern Jury Instructions, which discusses spousal consortium claims, makes a distinction between the "injured spouse" and the "other spouse."

The Yebuahs also argued unsuccessfully that distinguishing between the spouse with the physical injury and the spouse with the loss of consortium claim gave the loss of consortium claim less than full plaintiff status. The Court agreed that a loss of consortium claim is clearly a separate injury and a separate cause of action, as it had held in *Hunley v. Silver Furniture Mfg. Co.*, 38 S.W.3d 555, 557 (Tenn. 2001). However, the Court stated that, "[b]ut for purposes of clarity in cases such as this – where Mrs. Yebuah suffered medical negligence and Mr. Yebuah did not – it is helpful to distinguish between the plaintiffs by using the word 'injured' to modify 'plaintiff' when discussing the party with the primary cause of action. A loss of consortium claim is a derivative claim, and recovery is dependent on the spouse's recovery." The Court also focused on the use of the words "in the aggregate" as found in T.C.A. 29-39-102(e). That section arguably demonstrates the legislature's intent that there can be more than one claim under the same damages cap because the language says that the damages, "...shall not exceed *in the aggregate* a total of \$750,000."

The Tennessee Supreme Court also rejected the Yebuahs' argument that the language of the Tennessee Governmental Tort Liability Act supported their reading of the statute, pointing out that a spouse can recover for loss of consortium even though their spouse has exhausted the liability limit under the Governmental Tort Liability Act. *Hunt v. Fayette County Board of Education*, 1990 WL 62834, at *4 (Tenn. Ct. App. May 16, 1990). The Court did not find that the statutory language in the Governmental Tort Liability Act was helpful in interpreting the damages cap statute.

The Yebuahs pointed out that there is another problem with reading the statute the way the Court interpreted it, namely that the statute provides no guidance for allocation of capped damages. The Yebuahs argued that the statute's silence on allocation was especially concerning from a policy standpoint where allowing only one cap for non-economic damages between spouses, such as between Mrs. and Mr. Yebuah, has the potential to create marital discord over how the damages award is allocated once reduced under a single cap. For example, Mr. Yebuah's award was \$500,000, however, Mrs. Yebuah's award was eight times that amount. If Mr. and Mrs. Yebuah cannot agree on how to allocate the award, will Mr. Yebuah receive one-ninth of the total award or will he and his wife each get half of the damages cap amount? Observing that a loss of consortium award presupposed the existence of an intact marital relationship, the Court disregarded the Yebuahs' policy concern and their argument that the statute failed to address allocation. The issue of allocation of damages for multiple plaintiffs after a single cap is applied is likely to be the subject of future litigation.

Finally, it is interesting to note that Justice Page's opinion discusses the issue of whether or not the Yebuahs had waived their constitutional challenge to the statute at issue. The trial court had determined that the Yebuahs had waived constitutional challenges to the statute. According to Justice Page's opinion, the Yebuahs had served the Attorney General with a copy of a proposed amended complaint which included a challenge to the constitutionality of the statute, however, the Yebuahs ultimately did not include these constitutional challenges in the amended complaint that they filed. The Court of Appeals disagreed with the trial court and elected to review the constitutional issues raised before it, including violations of the Due Process Clause, the right to trial by jury, separation of powers, the Equal Protection Clause, and the Takings Clause. The majority opinion in the Supreme Court holds that the Yebuahs, "...very briefly touch on 'a due process issue' and a potential ...violation of the Takings Doctrine." The Court noted that these issues were not mentioned in their response to the Center's Application for Permission to Appeal and that in their brief to the Supreme Court they only mentioned potential "constitutional problems" without properly explaining or giving adequate legal support for such claims. The Tennessee Supreme Court held, therefore, that the Yebuahs waived any constitutional issues. It appears therefore that since the due process issue and the Takings Clause issues were not raised in

McClay and since they were not part of the Tennessee Supreme Court's analysis in *Yeboah*, the issue of the statute's constitutionality under the Due Process Clause and the Takings Clause may still be open issues.

The implications of *Yeboah*, coupled with *McClay*, are profound. It is noteworthy that the Sixth Circuit had reached a different result than the Tennessee Supreme Court in *McClay* in a case involving punitive damages and that it is technically still an open issue whether the punitive damage limitation under the statute is constitutional. While it is unlikely that the Tennessee Supreme Court would go a different direction, the Court has been careful to point out that the punitive damage section of the statute has not been the subject of any Tennessee Supreme Court decision.

Lawyers at Baker Donelson are handling cases in which the compensatory damages cap and the punitive damages caps are in play. The statute and the decisions in *McClay* and *Yeboah* will increase the stakes and, therefore, the intensity and frequency of litigation over whether Tennessee law applies in cases with non-economic damages. Litigators should be aware of the issues which have been decided under the statute, the provisions of the statute, and the constitutional and statutory issues which remain in the wake of *McClay* and *Yeboah*. We will continue to monitor litigation construing this statute and will issue other alerts as appropriate.

For questions about the *Yeboah* decision, contact [Buck Lewis](#) or [Nicholas W. Diegel](#).