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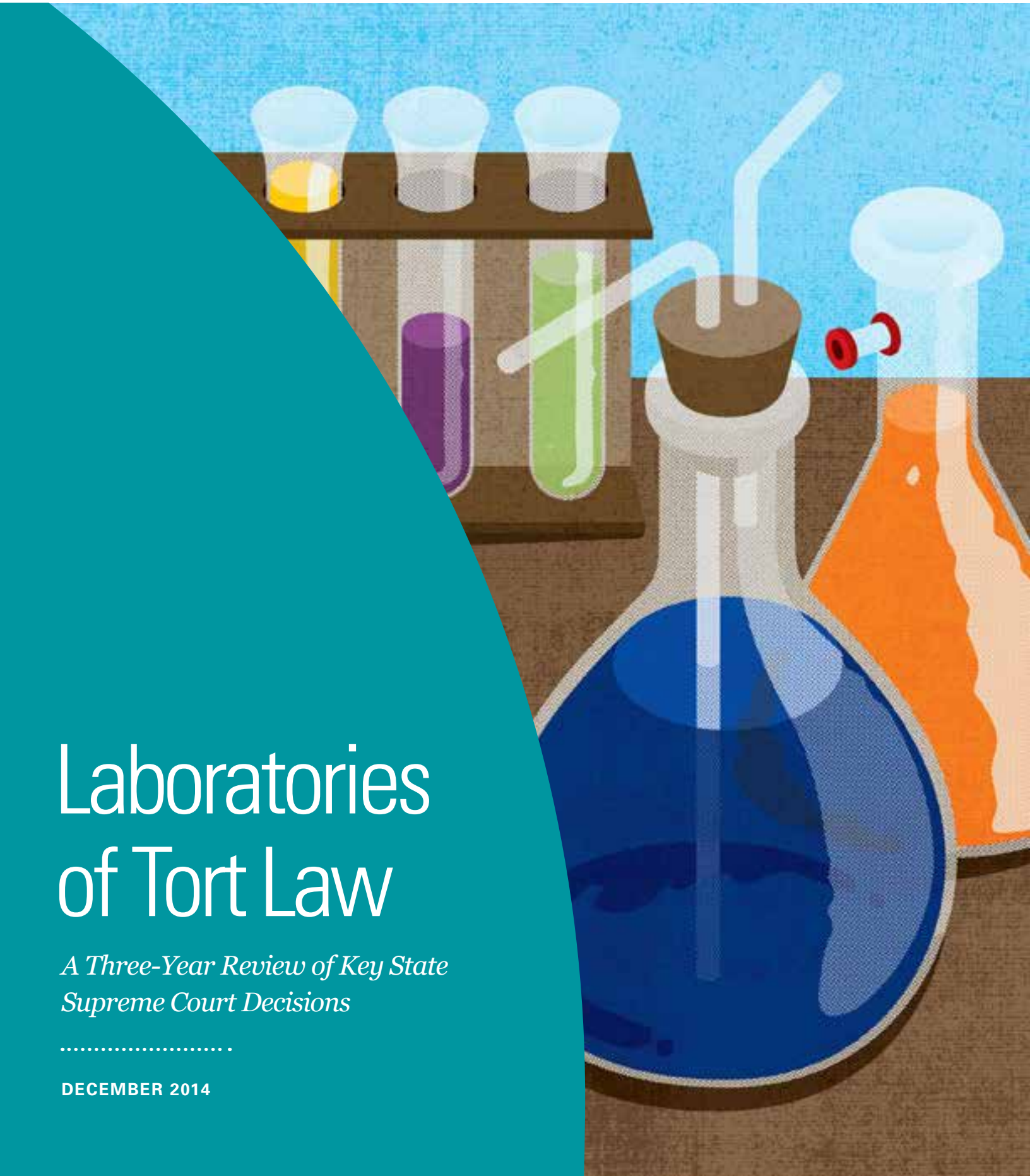

Laboratories of Tort Law

A Three-Year Review of Key State Supreme Court Decisions

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U.S. CHAMBER
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Introduction

State courts are the principal laboratories for developing tort (personal injury) law, including rulings that create or limit liability, determine causation, establish the scope of defenses, and calculate damages. Some courts adhere to traditional principles or carefully evolve the law to meet changing times. Other courts have experimented with unprecedented expansions of liability. The cases highlighted in this report show stark contrasts in judicial philosophy.

In some cases, this conflict is displayed within the court between the majority and dissenting justices. In others, sister state supreme courts have reached diametrically different results on the same issue of tort law.

For example, the New York Court of Appeals unanimously applied the "fundamental principle" that a person who was not physically harmed does not have a tort claim to reject a cause of action for medical monitoring.[1] The Missouri Supreme Court, however, joined West Virginia in allowing individuals to recover cash awards for exposure to a hazardous substance.[2]

The Wisconsin Supreme Court found that the collateral source rule permits plaintiffs to recover the billed rate of medical expenses, even if the amount actually paid by the plaintiff or his or her insurer for medical care was a significantly lower amount.[3] Six months earlier, the California Supreme Court held that this rule does not support awarding such "phantom damages" for the "simple reason that the injured plaintiff did not suffer any economic loss in that amount."[4] If a court awards invoiced amounts that do not reflect actual losses, the California court found, a defendant is entitled to a new trial due to the excessive damages.

The highest courts of Nevada and West Virginia abandoned a traditional tort rule that recognizes that businesses and homeowners have no duty to warn visitors of "open and obvious dangers" on their property.[5] Instead, these courts considered knowledge of a hazard to be an issue of comparative fault, an approach that may require a full trial for every trip-and-fall. The Nevada Supreme Court extended this expanded duty to anyone who comes onto the property, including trespassers. Meanwhile, the Illinois Supreme Court applied traditional rules to throw out a multi-million dollar award to a teenager who

repeatedly attempted to jump onboard a moving train to impress his friends.[6]

Minnesota's highest court has opened the door to lawsuits by patients against doctors purely for their "lost chance" of recovery stemming from a late diagnosis of a pre-existing condition.[7] Dissenting justices, as well as other courts, found that such claims ignore established tort law by imposing liability for a future outcome that is uncertain and that the disease, not the doctor, caused.

The Massachusetts Supreme Judicial Court allowed a plaintiff to use the state's consumer protection statute to recover even after a jury found a lack of evidence supporting a wrongful death claim.[8] By way of contrast, the Alaska Supreme Court found that consumer protection laws were never intended for such situations and that allowing their use in this manner would circumvent reasonable constraints on liability applicable in tort suits.[9]

State high court decisions on tort law issues are final and are purely matters of state common law. The U.S. Supreme Court can only consider such cases when a decision raises an independent federal constitutional or statutory issue. State legislatures typically step in to set tort law rules only when court-made law becomes highly imbalanced. "Tort reform" is the exception, not the rule.

When state legislatures do enter the fray of tort law, state supreme courts often respect the policy choices of elected officials, but sometimes use obscure portions of state constitutions to nullify rationally-based legislative judgments. The Oklahoma Supreme Court's use of its state constitution's "single subject" rule to throw out a comprehensive tort reform law is an example.[10] State supreme courts also occasionally substitute their own views for that of the legislature. The Florida Supreme Court's striking down of a limit on noneconomic damages in suits against doctors and healthcare providers because it disagreed with the legislature's finding that there was a medical malpractice crisis that was jeopardizing access to healthcare may be the most extraordinary example to date.[11] Meanwhile, other courts show strong deference to the co-equal legislative branch, as was the case when the Maryland Court of Appeals turned down an invitation to replace the state's longstanding contributory negligence defense with a comparative fault system when the General Assembly had repeatedly declined to do so.[12]

Each year, state courts decide hundreds of cases that shape tort law. This report highlights significant tort law decisions over the past three years that are examples of particularly sound or unsound rulings.[13] These rulings span a wide range of issues including asbestos liability, consumer litigation, loss of chance in medical negligence cases, medical monitoring claims, calculation of damages for medical expenses, premises liability, product liability, and respect for the legislature's role in establishing rules for liability.

Each analysis examines the traditional tort law principles involved, whether the court followed or deviated from these principles, and the court's reasoning in reaching its decision. The report also considers the impact that these decisions may have on businesses and the likelihood that the ruling will influence the law in other jurisdictions.

O'Neil v. Crane Co. (Cal. 2012)

A manufacturer has no duty to warn about asbestos-related risks in connected or replacement parts made by others.

O'Neil is the capstone of a series of court rulings finding that a manufacturer is not liable for an injury caused by asbestos-containing adjacent products or replacement parts that were made by others and used in conjunction with the manufacturer's product.

In recent years, some plaintiffs' counsel have promoted the theory that makers of uninsulated products in "bare metal" form—such as turbines, boilers, pumps, valves, and evaporators used on ships to desalinize sea water—should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, such as by the Navy. Plaintiffs' lawyers have also claimed that manufacturers of products that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement gaskets or packing manufactured and sold by third parties.

Plaintiffs' lawyers have sought to impose such "guilt by association" liability because most major manufacturers of asbestos-containing products have been forced into bankruptcy and the Navy enjoys sovereign immunity. As a substitute, plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold.

Thus far, courts have almost uniformly drawn the line, holding that manufacturers are only responsible for harms caused by their own products.[14] The California Supreme Court's unanimous decision in *O'Neil v. Crane Co.*[15] is perhaps the most significant of these decisions.

Tort Law Principles

Product liability law is based on the rationale that a business is accountable for the risks internal to its operations, namely the manufacture, design, and warnings of the goods that it makes, distributes, or sells.[16] As the Restatement (Second) of Torts explains, by marketing a product for use, a seller undertakes a special responsibility to those who might be injured by it. The Restatement recognizes that the cost of accidental injuries from product defects should be placed on the seller because it can incorporate that expense into the price of the product and obtain insurance to cover injuries.[17]

This foundation is stripped away when considering whether manufacturers must warn of the hazards of exposure to asbestos-containing products that they did not make or sell. Manufacturers do not have a "special responsibility" to the public for the products of others. They have no duty to stand behind the goods of another company. They are not in a position to incorporate the costs of liability insurance into their prices when liability is associated with products they did not sell.

To require manufacturers to warn of the dangers of products other than their own, simply because their own products are likely to be used in conjunction with others that pose a risk of injury, would place a substantial burden on manufacturers that is out of step with traditional tort law principles.[18]

The Case

In *O'Neil*, a plaintiff who developed mesothelioma sued two companies that sold valves and pumps to the U.S. Navy for use in a ship's steam propulsion system at least twenty years before the plaintiff worked aboard the ship. The defendants never manufactured or sold any of the asbestos-containing materials to which the plaintiff was exposed. The plaintiff's exposure allegedly came from external insulation and internal gaskets and packing made by third parties and added to the pumps and valves post-sale.

The Supreme Court of California soundly rejected an invitation to expand product liability law.

> *"To require manufacturers to warn of the dangers of products other than their own... would place a substantial burden on manufacturers that is out of step with traditional tort law principles."*

Key Court Findings

- Strict liability "insure[s] that the costs of injuries resulting from *defective* products are borne by the manufacturers that put such products on the market" or who are in chain of commerce for that product.[19]
- "[M]anufacturers, distributors, and retailers have a duty to ensure the safety of their products, and will be held strictly liable for injuries caused by a defect in their products. Yet, we have never held that these responsibilities extend to preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product."[20]
- "Recognizing plaintiffs' claims would represent an unprecedented expansion of strict products liability."[21]
- "It is unfair to require manufacturers of nondefective products to shoulder a burden of liability when they derived no economic benefit from the sale of the products that injured the plaintiff."[22]
- "[F]oreseeability alone is not sufficient to create an independent tort duty."[23]

- "[E]xpansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law."[24]

Significance

Historically, the California Supreme Court's decisions in product liability cases have been highly influential with other courts. The *O'Neil* decision will continue that trend.

O'Neil demonstrates the emergence of a national consensus among courts that manufacturers generally have no duty to warn about the dangers of connected or replacement asbestos-containing products made by third parties.

Following *O'Neil*, and earlier decisions from the Washington Supreme Court, third party duty to warn claims have been rejected by many courts, including several state appellate courts.

"O'Neil *demonstrates the emergence of a national consensus among courts that manufacturers generally have no duty to warn about the dangers of connected or replacement asbestos-containing products made by third parties.*"

Betz v. Pneumo Abex (Pa. 2012) and *Bostic v. Georgia Pacific Corp.* (Tex. 2014)

The "any exposure" theory in asbestos litigation is scientifically unsound: dose matters.

Plaintiffs' lawyers often attempt to introduce expert testimony suggesting that each and every fiber of inhaled asbestos is a substantial contributing cause of asbestos-related disease. The Supreme Court of Pennsylvania recognized that evaluation of dose is essential to establishing whether exposure to a toxic substance from a defendant's product can cause development of an illness. The Texas Supreme Court also recognized the need for scientific evidence showing that the manner in which the plaintiff was exposed could have significantly contributed to the harm. These courts have rejected an invitation to replace the core requirement of causation in tort law with deep-pocket based jurisprudence.

Under the "any exposure" or "any fiber" theory, each defendant—no matter how trivial its product's contribution to a plaintiff's cumulative lifetime exposure to asbestos—is subject to liability. The theory is the gateway for plaintiffs' lawyers to name defendants in asbestos cases as a result of exposures far below the type actually known to cause disease. It is the path for asbestos plaintiffs' lawyers to sue low-dose defendants.[25]

The driver of the theory is the interest of asbestos plaintiffs' lawyers in expanding the pool of viable parties to name as asbestos defendants. The plaintiffs in these lawsuits typically had many years of exposure to more potent forms of asbestos associated with companies that may be bankrupt from asbestos litigation.

Tort Law Principles

Product liability law requires plaintiffs to prove that the defendant's product was either the "but-for" cause or a "substantial factor" in causing a plaintiff's injury. In toxic tort cases, causation should "require not only proof of exposure to the defendant's product, but also exposure to *enough of a dose* of the defendant's product to actually cause disease."[26]

In applying the "substantial factor" test in asbestos cases, many courts require the plaintiff to show the "frequency, regularity, and proximity" of his workplace activities to products made or sold by a particular defendant.[27] This test is at odds with expert testimony that views each asbestos fiber as substantially causative of disease.

The Case

In *Betz v. Pneumo Abex LLC*, the estate of an auto mechanic alleged that the asbestos contained in brake pads caused the man's mesothelioma.[28] The plaintiffs' lawyers presented the claim as a test case for establishing "any exposure" as satisfying substantial factor causation in Pennsylvania. For that reason, the lawyers took the position that there was no need for them to discuss their client's individual exposure history, so long as they could establish exposure to at least a single fiber from each defendant's products.

> *"The plaintiffs' lawyers presented the claim as a test case for establishing 'any exposure' as satisfying substantial factor causation in Pennsylvania."*

The trial court excluded an expert witness who would have presented the "any exposure" theory, granting summary judgment for the automotive brake pad defendants. An intermediate appellate court reversed and reinstated the case. The Pennsylvania Supreme Court affirmed the trial court decision and reversed the appellate court. The Pennsylvania Supreme Court held that the trial judge did not abuse his discretion in deciding to hold a *Frye* hearing on the expert's testimony and agreed that the expert should be excluded.[29]

In July 2014, the Texas Supreme Court similarly rejected the "any exposure" theory, extending the court's earlier opinion in *Borg-Warner Corp. v. Flores*.[30] In *Flores*, an asbestosis case, the court held that "proof of mere frequency, regularity, and proximity is necessary but not sufficient" to establish causation.[31] The plaintiff also must present "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease."[32]

In *Bostic,* the court extended the reasoning and holdings in *Flores* to mesothelioma cases.[33]

Key Court Findings (*Betz*)

- "[The trial judge] appreciated the considerable tension between the any-exposure opinion and the axiom (manifested in myriad ways both in science and daily human experience) that the dose makes the poison."[34]
- "[T]he any-exposure opinion…obviates the necessity for plaintiffs to pursue the more conventional route of establishing specific causation (for example, by presenting a reasonably complete occupational history and providing some reasonable address of potential sources of exposure other than a particular defendant's product)."[35]
- "[T]he analogies offered by [plaintiff's expert] in support of his position convey that it is fundamentally inconsistent with both science and the governing standard for legal causation."[36]
- "[W]e do not believe that it is a viable solution [to the difficulties facing plaintiffs in latent disease cases] to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case. The result, in our review, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm."[37]

Key Court Findings (*Bostic*)

- "Proof of substantial factor causation requires some quantification of the dose resulting from [the plaintiff's] exposure to [the defendant's] products."[38]
- "While the exposure of those in the study need not exactly match the plaintiff's exposure, 'the conditions of the study should be substantially similar to the claimant's circumstances….'"[39]
- "Without any meaningful and scientific attempt to quantify the exposures from the two sources [glass factory and construction work], the [expert] testimony was legally insufficient, for there was no meaningful way for the jury to conclude that Bostic's exposure to Georgia-Pacific's products was a substantial factor in causing his disease, nor was there any basis for the jury to apportion liability between these two sources of asbestos."[40]

> *"'[W]e do not believe that it is a viable solution… to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation'…"*

Significance

When asbestos suits were first brought, plaintiffs' lawyers mostly focused on insulation defendants. This was to be expected as these "high dose" defendants bore primary responsibility. Their products were friable (i.e., could be crumbled easily when dry) and contained long, rigid amphibole fibers, rather than the more common, but far less toxic, chrysotile form of fiber.

The exit of most primary historical asbestos defendants from the tort system in the early 2000s led plaintiffs' lawyers to focus their attention on businesses associated with encapsulated products, such as the automotive friction products involved in *Betz*, and residential construction products, such as the joint compound involved in *Bostic*. These "low dose" products contain the chrysotile form of asbestos.

> *"The Pennsylvania and Texas decisions are representative of a growing number of courts that have held that 'any exposure' expert testimony is inadmissible to establish causation in asbestos litigation."*

The Pennsylvania and Texas decisions are representative of a growing number of courts that have held that "any exposure" expert testimony is inadmissible to establish causation in asbestos litigation.[41] The Texas Supreme Court's rulings in *Flores* and *Bostic* contribute to this body of law by recognizing that scientific evidence must also show that the type of exposure at issue could have caused development of the plaintiff's illness.

The reasoning of these courts demands that plaintiffs prove causation in toxic tort cases and does not allow liability-expanding short cuts. As a result, plaintiffs' lawyers will have less incentive to engage in shotgun lawsuits that impose significant defense costs on companies whose products could not have caused their clients' injuries.

Widespread rejection of the "any exposure" theory will have implications beyond asbestos litigation. The theory also arises in toxic tort litigation involving other substances, such as benzene, ephedrine, diesel fumes, and even microwave popcorn fumes.[42]

Georgia Pacific, LLC v. Farrar (Md. 2013)

Product makers have no duty to warn household members of the risks of exposure to asbestos carried home on workers' clothing.

Extending a duty to warn of the dangers of asbestos beyond those who were exposed in the workplace goes too far, Maryland's highest court ruled, since the dangers of "take home" exposure were not widely known until 1972.

Plaintiffs' lawyers allege that product manufacturers and premises owners had a duty to warn workers or take precautions to prevent household members from exposure to asbestos brought home on a worker's clothing. These "take home" exposure cases would allow lawsuits on behalf of individuals who had no relationship with the defendant and were not occupationally exposed to asbestos. The Maryland Court of Appeals in *Georgia Pacific, LLC v. Farrar* ruled that a manufacturer of joint compound used to install drywall had no duty to warn the granddaughter of a construction worker of the dangers of asbestos before the risks of take-home exposure were understood.[43]

Tort Law Principles

The concept of duty is the standard of liability for tort law. Whether one party had a duty to exercise due care to protect the safety of another is a question of law decided by the court. Judges typically determine the existence and scope of a duty based on considerations such as the relationship between the parties, the foreseeability of injury to the plaintiff, the policy of preventing future harm, the moral blameworthiness of the defendant's conduct, the social value of the conduct, and the burden to the defendant and consequences to the community of imposing such an obligation.[44]

As U.S. Supreme Court Justice Benjamin Cardozo, then on New York's highest court, so aptly recognized in a case that law schools continue to use to teach tort law, *Palsgraf v. Long Island Railroad Co.*, duty is not based solely on whether a defendant could foresee that his or her conduct might injure another.[45] Courts realize that there are other policy reasons that may disfavor imposing a legal duty and tort liability.

Most courts that have considered whether there is a duty to warn household members of employees of the risks associated with exposure to asbestos have concluded that no such duty exists.[46]

> *"[M]any courts…have concluded that premises owners and manufacturers owed no duty to guard against non-occupational asbestos exposures before that danger of take-home exposure was understood."*

Courts that emphasize the relationship of the parties in the duty analysis "uniformly hold that an employer or premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos."[47]

Where a duty was found to exist, the decision focused primarily, if not exclusively, on the foreseeability of the risk of harm.[48] In these jurisdictions, the time period when the exposures occurred is often critical. For example, many courts in foreseeability-based duty jurisdictions have concluded that premises owners and manufacturers owed no duty to guard against non-occupational asbestos exposures before that danger of take-home exposure was understood.[49] In 1972, OSHA, for the first time, adopted restrictions on allowing asbestos to be carried home on clothing.

The Case

Maryland's highest court, in *Farrar*, joined this group in a case in which the plaintiff, as a teenager, shook out her grandfather's work clothes from the 1960s after he was exposed as a bystander to others working around asbestos at work.[50] The court found that prior to the 1972 OSHA regulation, which the court observed did not cite a single supporting scientific study, a manufacturer or employer would not have been on notice of the danger of take-home exposure.[51] Further, "there was no practical way" that any warning about the hazards of take-home exposure in the late 1960s "would or could have avoided that danger."[52] The court's ruling reversed a $5 million judgment against Georgia Pacific, which was originally one of over thirty defendants named by the plaintiff, but the only defendant that remained at trial.

Key Court Findings

- "The elements of 'duty,'…especially the foreseeability of danger and the ability, through a warning, to ameliorate that danger, must be based on facts that were known or should have been known to the defendant at the time the warning should have been given, not what was learned later."[53]
- "Although the danger of exposure to asbestos in the workplace was well-recognized at least by the 1930s, the danger from exposure in the household to asbestos dust brought home by workers…was not made publicly clear until much later."[54]
- "To impose a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect would be poor public policy indeed."[55]
- "[I]n an era before home computers and social media, it is not at all clear how the hundreds of thousands of manufacturers and suppliers of products containing asbestos could have directly warned household members who had no

connection with the product, the manufacturer or supplier of the product, the worker's employer, or the owner of the premises where the asbestos was being used, not to have contact with dusty work clothes of household members who were occupationally exposed to asbestos."[56]

- Until OSHA adopted regulations in 1972, unless employers and premises owners voluntarily provided workers with protective clothing, changing rooms, and safe laundering, "[t]he simple fact is that, even if Georgia Pacific should have foreseen back in 1968-69 that individuals such as Ms. Farrar were in a zone of danger, there was no practical way that any warning given by it to any of the suggested intermediaries would or could have avoided that danger."[57]

Significance

It is important in take-home exposure cases that courts not fall into the fallacy that Justice Cardozo warned about in *Palsgraf*. Relying on foreseeability alone—particularly without a careful analysis of what was known about non-occupational exposure risks in the relevant time period—can create an infinite pool of potential plaintiffs.[58]

A manufacturer or premises owner's duty to guard against secondhand asbestos exposures could potentially cover anyone who might come into contact with a dusty employee or that person's dirty clothes, such as a babysitter, relative, neighbor, or laundry service employee.[59]

The Maryland Court of Appeals recognized these concerns. Its decision is in the mainstream of tort law. The court did not join the few courts that have failed to carefully distinguish between knowledge of the general danger of substantial, prolonged occupational asbestos exposure and the pivotal issue of when it became generally known that non-occupational exposure to asbestos could be dangerous.[60]

The Maryland high court's reasoning will be of significant interest to courts in foreseeability-based duty states that continue to wrestle with whether there is a duty in take-home exposure cases and, if so, when the duty arose. In addition, the court's decision to not recognize a duty to warn when a product manufacturer had no practical and effective means of communicating such warnings has application that transcends asbestos litigation.

"The Maryland high court's reasoning will be of significant interest to courts in foreseeability-based duty states that continue to wrestle with whether there is a duty in take-home exposure cases and, if so, when the duty arose."

Klairmont v. Gainsboro Restaurant, Inc. (Mass. 2013)

A state consumer protection statute may provide a means for recovery for personal injury and wrongful death claims that is not available under traditional tort law theories.

State consumer protection laws were intended to provide people with a means to recover out-of-pocket losses resulting from deception in the purchase of consumer goods. A Massachusetts case demonstrates how far consumer protection claims have strayed from this purpose.

State consumer protection statutes broadly prohibit "unfair" or "deceptive" trade practices. When applied by the Federal Trade Commission or state regulators, such terms are constrained by policy, public accountability, and administrative discretion. Private lawsuits have no such bounds.

> *"Lawyers now routinely assert consumer protection claims in product liability and other personal injury cases where there is already a full and fair means to recover through tort law."*

Lawyers now routinely assert consumer protection claims in product liability and other personal injury cases where there is already a full and fair means to recover through tort law. Such cases often do not involve small economic losses for which consumer protection acts were intended, but seek substantial damages for personal injuries. Using a consumer protection claim in this manner may allow a plaintiff who cannot prove that the defendant is responsible for an injury under traditional tort law to recover not only actual damages, but treble (triple) damages and attorneys' fees.

Tort Law Principles

Consumer protection statutes were enacted to fill a gap in tort law. Common law fraud claims often did not provide a viable remedy for small consumer losses for two reasons. First, lawyers were unwilling to take such cases due to the small financial losses involved, typically just a few dollars. Second, common law fraud claims generally require individuals to prove that the business intended to deceive the plaintiff, a challenging standard to meet. For these reasons, states enacted laws that reduced the burden of proof and permitted recovery of statutory damages, attorneys' fees, and court costs for consumer claims.[61]

The Case

Klairmont v. Gainsboro Restaurant, Inc. involved the use of a consumer protection claim to recover damages in a wrongful death suit.[62] It involved the tragic death of a college student who, after a night of drinking, fell down a flight of stairs to the storage basement in a back area of a local bar and restaurant. There were no witnesses. A jury found that the bar's negligence did not cause his fall, finding for the defendant on the family's wrongful death claim.

The family's lawyer also alleged a creative claim under Massachusetts' consumer protection law, known as Chapter 93A. The lawyer alleged that the bar committed an unfair or deceptive practice because its stairway violated the building code. The jury found that the building code violations were not a substantial contributing cause of the death. Under Massachusetts law, however, a judge can disregard such findings because the court—not the jury—decides consumer protection claims. The trial court judge used regulatory violations as a predicate for imposing triple damages under the consumer law, amounting to $6.7 million, for his parents' loss of consortium, plus $2.4 million in attorneys' fees and costs.

Massachusetts' Supreme Judicial Court upheld the trial court's finding of liability under the consumer protection act, its tripling of damages, and its award of attorneys' fees and costs. It reversed the trial court's calculation of damages, however, remanding the case to the trial court for further consideration of losses recoverable under the state's consumer protection law.

Key Court Findings

- "The defendants' conduct in this case was unfair within the meaning of [the consumer protection statute]: the defendants consciously violated the building code for more than twenty years, thereby creating hazardous conditions in a place of public assembly where alcohol is served to commercial patrons."[63]
- "The defendants' conduct also may qualify as deceptive because if Jacob or other patrons had known of the highly dangerous conditions…they very well may have taken their business elsewhere, or, in any event, Jacob may have decided not to take his telephone call in the alcove."[64]
- "This type of unfair conduct is actionable whether the injury it causes is economic or personal."[65]
- "[T]he conduct occurred in trade or commerce, because Jacob was a patron…at the time of his fall…"[66]

- "[N]ot all building code violations—indeed, very few—will give rise to violations of c. 93A, either because they would lack the unfairness or deceptiveness present in this case or because they do not arise in trade or commerce…Here, however,…"[t]here was no error in the judge's conclusion that the defendants' violations of the building code were of a duration and character to violate c. 93A, § 2."[67]
- "[T]he statute is sufficiently dynamic to allow for a change in judicial conceptions of what types of harm constitute legally redressable 'damage to the person.'"[68]
- "Although the plaintiffs are entitled to seek loss of consortium damages as beneficiaries under the wrongful death act, they may not recover such damages in a separate cause of action brought on behalf of Jacob's estate under [the consumer protection law]."[69]

"The Massachusetts case is perhaps the starkest example of a court allowing use of a state consumer protection law to circumvent traditional liability law requirements to date."

Significance

The Massachusetts case is perhaps the starkest example of a court allowing use of a state consumer protection law to circumvent traditional liability law requirements to date. Unless constrained by courts, the vague language of consumer protection acts can transform them into providing a "universal claim" for nearly any injury.

Although most states have allowed private rights of action for unfair and deceptive practices since the 1960s or 1970s, it is only over the past decade that plaintiffs' lawyers have fully recognized the potential of these laws. Consumer protection claims are now routinely tacked on or used as an alternative to traditional product liability, premises liability, public nuisance, and other tort actions. When courts are receptive, as was the case in Massachusetts, plaintiffs can circumvent tort law requirements such as causation, impose treble damages for conduct that would not qualify for punitive damages, or recover attorneys' fees not ordinarily available in litigation.

Klairmont was, pure and simple, a premises liability case, not a consumer protection claim. The claim was unrelated to the advertising or purchase of any consumer good. There was nothing in the record to indicate that the business deceived the plaintiff. He did not seek a refund of a purchase. The Massachusetts high court engaged in judicial acrobatics to justify how a fall involves "trade or commerce" or why the construction of an employee-only stairway leading to a storage room was "unfair" or "deceptive" to patrons. There was no "gap" in consumer protection—traditional negligence law and the state's Wrongful Death Act provided specific proof

requirements, which a jury found the plaintiff did not meet, and established a measure of damages. As a result of the decision, plaintiffs' lawyers in Massachusetts view their consumer protection law as "a powerful weapon for plaintiffs in premises liability cases" and as "giv[ing] the plaintiff important options to a traditional negligence action."[70]

By way of contrast, in a case involving a student's fall at a rock climbing gym, the Alaska Supreme Court recently ruled that its consumer protection law did not extend to personal injury claims. If it did, the court recognized, plaintiffs would be able to use the Unfair Trade Practices Act (UTPA) to circumvent laws that fairly constrain liability in personal injury cases. Plaintiffs could impose treble damages even where defendants did not engage in the type of outrageous conduct needed for punitive damages under Alaska law. The liability of defendants would not be reduced in proportion to a plaintiff's degree of fault for his or her own injury. Courts also would not be able to apportion damages between multiple responsible parties. "A UTPA cause of action for personal injury or wrongful death would sidestep all of these civil damages protections," the Alaska Supreme Court found.[71]

Klairmont also shows how plaintiffs, with the aid of some courts, have created private rights of action to sue for violations of statutes or regulations that the legislature intended government agencies, not private lawyers, to enforce.[72] The bar was repeatedly inspected by local officials, but never fined, for building code noncompliance. Yet, the court viewed a small business's failure to obtain a permit for stairway construction, and its failure to meet code requirements, as warranting imposition of strict liability for a fall. The decision gives plaintiffs' lawyers an incentive to search far and wide for any technical permitting or regulatory violation to assert a consumer claim and seek inflated recovery. Finding such a violation can transform an unsuccessful wrongful death suit into a multi-million dollar consumer protection award.

> *"Klairmont also shows how plaintiffs, with the aid of some courts, have created private rights of action to sue for violations of statutes or regulations that the legislature intended government agencies, not private lawyers, to enforce."*

Klairmont may not be followed outside of Massachusetts because it specifically interprets that state's consumer protection statute. The language of consumer protection acts varies, and it is a leap to use them as vehicles to recover tort damages in personal injury cases. Nevertheless, the case sends a message to plaintiffs' lawyers that will fuel misuse of consumer protection laws in other states. If such expansion continues unchecked, state legislatures may ultimately intervene to restore the laws to their original purpose.[73]

Dickhoff v. Green (Minn. 2013)

Individuals who believe their doctor did not properly diagnose a medical condition quickly enough can recover for a "loss of chance" of recovery.

The Minnesota Supreme Court's decision in *Dickhoff* abandons a core principle of tort law: cause in fact. It allows a patient to recover damages purely for a lost chance of a more favorable outcome, regardless of whether a delayed diagnosis or course of treatment was a cause in fact of his or her harm. The case is an outlier even among courts that have recognized some form of a "loss of chance" claim. The ruling may spur speculative lawsuits against doctors for harm beyond their control and encourage unnecessary and costly defensive medicine.

Recognition of claims for loss of chance marks a significant erosion to principles of causation. Hornbook law says that plaintiffs must show that a defendant's conduct was a cause in fact of their injury. In the form adopted by the Minnesota Supreme Court, a loss of chance claim gives a right to sue to anyone who believes that he or she might be better off had a doctor spotted a medical condition sooner or taken a different approach to treatment. Patients can bring such claims against their physicians even if the probability of a better outcome is relatively small and the harm concerned has not occurred, and never actually does.

From a public policy perspective, such liability runs counter to efforts to rein in the rising cost of healthcare. This type of litigation is also contrary to progress toward controlling medical malpractice liability and high insurance premiums. Excessive medical malpractice liability discourages doctors from practicing in high-risk specialties, encourages needless defensive medicine, and can impact public access to needed healthcare.

Tort Law Principles

In medical malpractice claims, a plaintiff must generally prove: (1) the appropriate standard of reasonable care recognized by the medical community; (2) the doctor

deviated from this standard of care; and (3) the doctor's departure from this standard caused the patient's injuries.

To show causation, a plaintiff must demonstrate, to a reasonable degree of medical certainty, that the harm was a foreseeable consequence of the doctor's negligence and that had the doctor not acted negligently, the harm would not have occurred. Where there is more than one potential cause of harm, the doctor's negligent care must be a substantial factor in bringing about the injury. As in any tort case, an unrealized threat of future harm is not a sufficient basis for a claim.

"Loss of chance" claims typically attempt to address the difficult situation in which a doctor is late in diagnosing a person with a terminal illness, such as cancer. Where cancer is associated with a less than 50% chance of survival, no matter how quickly the doctor had acted, the unfortunate situation is the same: the person will more likely than not die from the underlying illness. Under traditional causation principles, that person cannot recover damages because it is more probable that the pre-existing condition, not a delayed diagnosis, caused the injury.

Some courts have relaxed causation requirements and allowed plaintiffs to recover damages for an underlying injury or illness where the chance of recovery or survival is 50% or less if a jury finds that a delayed diagnosis was a substantial contributing factor to the ultimate outcome.[74] Other courts adhere to the traditional rule that precludes recovery where it is not medically probable (51% or more) that a physician's negligence caused the harm alleged.[75] In such states, a patient can recover if a delay in diagnosis or treatment proximately and probably causes actual injury to the patient.[76]

The Case

The Minnesota Supreme Court took an outlier approach among states that have relaxed causation rules in loss of chance cases. The *Dickhoff* case involved a girl born with a rare form of cancer.[77] Her family claimed that, shortly after birth, doctors should have recognized a bump as a potentially serious issue and referred her to a specialist, but believed it to be a nonmalignant cyst and did not do so until her one-year checkup. The delayed diagnoses did not alter the treatment, the same chemotherapy later used. At that point, however, the family claimed, the girl's chance of survival had fallen from 60% (a slightly better than even chance) to 40% (a slightly less than even chance). At the time of the Minnesota Supreme Court's decision, the girl was seven years old. She lost her battle with cancer shortly after the high court's ruling.

A three-justice majority found that a reduction of a patient's "chance to survive or to achieve a more favorable medical outcome" is itself a cognizable injury.[78] It viewed a 20% reduction in the chance of survival as significant and sufficiently supported by medical science. Under the court's reasoning, a doctor is liable for a predicted reduction in a patient's life expectancy resulting from a delay in treatment, regardless of the outcome.

Two dissenting justices sharply criticized the majority for ignoring traditional tort causation principles and creating a new type of injury to allow recovery in such situations. As the dissent observed, "'chance' only has meaning with reference to the actual

outcome. The true harm or injury to the plaintiff is the death… And if the doctor cannot be said to have caused the ultimate injury (if it ever occurs), of what relevance is it that the doctor can be said to have caused the loss of chance?"[79]

Key Court Findings

- "[A] physician harms a patient by negligently depriving her of a chance of recovery or survival and should be liable for the value of that lost chance."[80]
- "The [plaintiffs] have presented evidence that [the doctor's] negligence reduced [the patient's] chances of survival from at least 60 percent to 40 percent. Such a reduction, as a matter of law, is neither token nor de minimis."[81]
- "[T]he reliability of the evidence that victims of medical malpractice are able to marshal when a physician's negligence reduces a patient's chance of recovery or survival has dramatically improved in recent years—now making it possible to prove causation in a loss of chance case."[82]
- "[U]nder our view of the loss of chance doctrine, the total amount of damages recoverable is equal to the percentage chance of survival or cure lost, multiplied by the total amount of damages allowable for the death or injury."[83]
- "Because this is not a death case at this point in time, the appropriate baseline to determine loss of chance damages for [plaintiff]'s injury is not the total amount of damages allowable for death. Rather, the appropriate measure of damages is the value of the reduction of the plaintiff's life expectancy from her pre-negligence life expectancy.… While we recognize that this task is not easy, it is the type of duty that courts routinely delegate to juries in personal injury cases."[84]

DISSENT (Justice Dietzen, joined by Chief Justice Gildea):

- "It is a cardinal principle of tort law and fundamental fairness that a defendant should be responsible only for the injuries that are legally *caused by* the defendant's negligence. The majority disregards this cardinal principle and introduces speculation by concluding that a physician may be liable for harms not directly caused by the physician's negligence, but caused by the patient's underlying disease."[85]

"'It is a cardinal principle of tort law and fundamental fairness that a defendant should be responsible only for the injuries that are legally caused by the defendant's negligence. The majority disregards this cardinal principle and introduces speculation by concluding that a physician may be liable for harms not directly caused by the physician's negligence, but caused by the patient's underlying disease.'"

- "[E]ven if we were unconstrained by precedent, I would decline to adopt the loss of chance doctrine because it unfairly holds physicians…liable for harms that may never materialize and, if they do occur, are not proximately caused by the physician's negligence."[86]
- "[T]he majority has concocted a legal fiction in order to obscure the very real causation problem in this case."[87]
- "[T]he majority allows plaintiffs to recover damages for the reduction in their life expectancy but gives no guidance to litigants, juries, and our state's district courts on how such a novel claim should be valued.… I see no framework that would allow a jury to assess damage fairly and logically, without inviting speculation, guess, passion or prejudice."[88]
- "As to deterrence, I agree that the prevention of medical negligence is a laudable goal. But it is not the only goal. Fairness and the tailoring of liability to those that have actually directly caused harm is also important."[89]

Significance

The Minnesota Supreme Court adopted the broadest form of the loss of chance doctrine. Within days of the ruling, plaintiffs' lawyers in Minnesota recognized that "[t]he Dickhoff decision dramatically changes the landscape in medical malpractice actions" and advertised that "if you or a loved one has suffered a 'loss of chance' due to a medical provider's conduct, you should seek counsel immediately, even if another lawyer previously declined to represent you."[90]

The majority decision, endorsed by just three of the seven member court (with two justices in dissent and two recused) is likely to be considered by state supreme courts that continue to follow the traditional rule or have not decided the viability of a loss of chance claim. While judges will be understandably sympathetic toward such plaintiffs, they should resist the temptation to breach fundamental principles of causation to allow lawsuits against doctors based on mere probabilities of future injuries.

The most fundamental concern with the court's decision, and any loss of chance claim, is its imposition of liability for a harm that a defendant, the doctor, is not likely to have caused. The law provides compensation when a person's negligence

> *"Now, under Minnesota law, it is possible for a person to obtain compensation even when a doctor's negligence did not cause the harm. No other profession faces such a standard, which imposes liability based on chance that is less than a coin toss."*

causes harm. Now, under Minnesota law, it is possible for a person to obtain compensation even when a doctor's negligence did not cause the harm. No other profession faces such a standard, which imposes liability based on chance that is less than a coin toss. This concept could be stretched to apply beyond medical malpractice claims.

The Minnesota Supreme Court's broad adoption of a "pure chance" approach is more expansive than that adopted by most state courts that have recognized loss of chance claims. For example, Minnesota's broad loss of chance claim is not limited to situations in which a patient dies from a terminal illness. As the dissent recognizes, the ruling will overcompensate plaintiffs by awarding damages for a loss of chance "before knowing whether that chance will ever materialize in harm." If a surviving plaintiff receives a million dollars in compensation for a harm that never befalls her, the "award is not 'compensation' in any meaningful sense of the word, but a windfall at the expense of physicians and the healthcare system and an invitation to abuse."[91]

The Minnesota Supreme Court's approach also fails to recognize that the practice of medicine is not an exact science. It allows recovery for small statistical probabilities that a plaintiff would be better off had a doctor used a different course of treatment. Doctors often have many treatment options and may need to make quick decisions. Reasonable and experienced doctors can take different paths. Yet, a lawsuit might allege that had a doctor taken a different approach, there would have been a 20% lower chance that a patient's arm would need amputation. A loss of chance claim might then seek 20% of the plaintiffs' damages in living without an arm for the remainder of his or her life. Similarly, a lawsuit might allege that a physician's failure to promptly treat an infection resulted in a 25% reduced chance of a woman being able to have children. That plaintiff could then seek 25% of her economic and emotional harm damages stemming from that loss, even if she ultimately has a child.

In addition, while the Minnesota Supreme Court purported to require more than a de minimis reduction in the lost chance of recovery, it is questionable whether science can reliably predict a difference between a 60% and 40% chance of recovery. Such probabilities must take into account an individual's specific age, health, treatment options, illness, and other factors, as well as the limitations of the scientific studies used to reach such percentages. These probabilities also do not account for future advances in science and treatment options. Litigation will involve an expensive battle of experts arguing over uncertain probabilities of a future injury.

The ruling also fails to address the significant questions of how to objectively measure damages. What is the financial value of a pure loss of chance, particularly when it is not tied to any actual harm? How will juries allocate responsibility between a doctor's negligence and nature, i.e., the statistical survivability of an illness? One thing is inevitable—more litigation over such issues.

Finally, the ruling may have implications for patient treatment. The potential for loss of chance liability may lead doctors who are treating cancer patients to more quickly recommend aggressive treatments, such as surgery or chemotherapy, over other options.

Adopting a theory that permits recovery of damages for loss of chance in medical malpractice cases is likely to lead to increased insurance rates for doctors and decreased access to health care.

As the dissent notes, such "serious policy considerations…are better addressed by the Legislature."[92] In fact, at least three state legislatures have intervened to restore the traditional rule soon after their state high courts recognized loss of chance claims against doctors.[93]

Minnesota's definition of the loss of chance doctrine represents the outer bounds of the theory, and not one that courts concerned about adhering to traditional principles of causation and carefully shaping medical liability should follow.[94]

Caronia v. Philip Morris (N.Y. 2013)

Individuals cannot recover damages for medical monitoring absent a present physical injury.

A bedrock principle of tort law is that plaintiffs must have a present physical injury to obtain recovery. This rule has endured because it prevents a flood of speculative claims, provides faster access to courts for those with reliable and serious claims, and ensures that the sick will not have to compete with the non-sick for compensation. All eyes were on the New York Court of Appeals as the court was asked to approve a court-supervised program that would provide heavy smokers over the age of fifty who had not been diagnosed with lung cancer with a low-dose CT scan of the chest at the defendant's expense. Plaintiffs claimed the testing would enable early detection of lung cancer. The court held that the presence of a physical injury is a "fundamental" requirement for a party to obtain a recovery under New York law.

For several decades, plaintiffs' lawyers have urged courts to recognize a cause of action for medical monitoring to detect the potential onset of disease in asymptomatic individuals. The problem with imposing such liability is that everyone is exposed to small amounts of potentially harmful substances on a daily basis. There is often no certainty that plaintiffs will actually use cash awards for medical monitoring. There is usually no scientific evidence that medical monitoring will prevent an illness. Most importantly, allowing such claims could lead to highly speculative lawsuits on behalf of many people who will never develop an injury.

Tort Law Principles

Most courts have rejected medical monitoring claims brought on behalf of people who do not have a present physical injury, but the overall record is mixed.

In the 1980s and 1990s, a handful of state appellate courts allowed medical monitoring claims that met strict criteria and used a court-supervised fund to directly reimburse verified medical testing costs.[95]

In 1997, the U.S. Supreme Court rejected a claim for medical monitoring under a federal tort law substitute for workers' compensation in the railroad industry. The Court rejected the claim as "beyond the bounds of currently evolving common law."[96]

The Court was concerned that "tens of millions of individuals" might qualify for some form of substance-exposure-related medical monitoring."[97] Courts would be flooded with questionable cases, defendants would face uncertain liability, and those who actually develop an injury would have less chance of recovery after depletion of resources for medical testing, the Court found.[98]

In a highly criticized case in 1999, however, West Virginia's highest court took the unprecedented step of allowing cash awards for medical monitoring even without a present physical injury.[99] It allowed such recovery "based on the subjective desires of a plaintiff for information" even when medical monitoring is not medically necessary or beneficial.[100] A dissenting justice cautioned that the ruling may allow anyone who comes in contact with a hazardous substance to "be able to collect money as victorious plaintiffs," and spend the money as they choose, "without any showing of injury at all."[101]

The West Virginia decision was an outlier. A flurry of state supreme courts followed the U.S. Supreme Court's reasoning in rapid succession, including the high courts of Nevada (2000),[102] Alabama (2001),[103] Kentucky (2002),[104] Michigan (2005),[105] Mississippi (2007),[106] and Oregon (2008).[107]

Over the past several years, some courts have shown a greater willingness to consider medical monitoring claims. The Missouri Supreme Court joined West Virginia in 2007. The court relied on pre-1997 rulings to find that "tort law has evolved over the years to allow plaintiffs compensation for medical monitoring."[108] The court's decision did not acknowledge the substantial body of precedent in more recent years that has rejected such claims absent a present physical injury or the policy reasons cautioning against such an approach.[109] The decision has been limited.[110]

The Supreme Court of Massachusetts followed in 2009, when it narrowly found that chronic smokers who had not developed any smoking-related illness, but could show damage to their lungs that may indicate a significantly heightened risk of developing cancer, could seek medical monitoring through a court-supervised program.[111] A recent federal appellate decision that dismissed a medical monitoring claim stemming from exposure to beryllium dust and fumes shows that courts are carefully applying this ruling.[112]

The Maryland Court of Appeals was the most recent state high court to permit a claim for medical monitoring, ruling just months before the New York Court of Appeals decided the issue.[113] The Maryland court did, however, provide significant safeguards intended to prevent speculative lawsuits. For instance, each individual

seeking medical monitoring must present expert testimony to show a "particularized, significantly-increased risk of developing a disease in comparison to the general public" to recover proven medical costs.[114] The court also found that instead of giving plaintiffs' cash awards that could be spent on items other than healthcare expenses, the appropriate relief is to establish a fund to reimburse valid medical monitoring expenses.[115]

The Case

Coming on the heels of recent decisions allowing medical monitoring to various degrees in Missouri, Massachusetts, and Maryland, the case before the New York Court of Appeals, *Caronia v. Philip Morris USA, Inc.*,[116] was closely watched. In *Caronia*, three long-time smokers, who exhibited no symptoms of any smoking-related disease, brought a class action on behalf of Marlboro cigarette smokers aged 50 or older who have smoked 20 "pack years." They alleged that Philip Morris failed to design a safer cigarette—one with a lower risk of smokers eventually developing lung cancer, but that does not diminish their enjoyment of the product. The plaintiffs' alleged injury was that medical professionals recommend that they receive medical monitoring based on their allegedly heightened risk of lung cancer from smoking. The lawsuit sought to require the manufacturer to fund a court-supervised medical surveillance program for asymptomatic long-time smokers. In response to a certified question from the U.S. Court of Appeals for the Second Circuit, the New York Court of Appeals adhered to the bedrock principle of tort law that there is no recovery in tort without a present physical injury.

> *"The requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system.'"*

Key Court Findings

- "The requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system."[117]
- "The physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims."[118]
- "This Court undoubtedly has the authority to recognize a new tort cause of action, but that authority must be exercised responsibly, keeping in mind that a new cause of action will have both 'foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability.'"[119]
- "[D]ispensing with the physical injury requirement could permit 'tens of millions' of potential plaintiffs to recover

monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage."[120]

- "[I]t is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure."[121]
- "From a practical standpoint, it cannot be overlooked that there is no framework concerning how such a medical monitoring program would be implemented and administered."[122]
- "The Legislature is plainly in the better position to study the impact and consequences of creating such a cause of action, including the costs of implementation and the burden on the courts in adjudicating such claims."[123]

Significance

The New York Court of Appeals' decision in *Caronia* will influence courts that are asked to recognize medical monitoring claims. The decision finds support in traditional tort law principles, a 1997 U.S. Supreme Court's decision, and decisions from many other state courts of last resort, particularly since the year 2000. The decision stands in stark contrast to the unsound, minority approach, illustrated by Missouri and West Virginia, which permits large class actions seeking unrestricted cash payments based on a speculative future harm.

> *"The New York Court of Appeals' decision... finds support in traditional tort law principles, a 1997 U.S. Supreme Court's decision, and decisions from many other state courts of last resort."*

Orlowski v. State Farm (Wis. 2012)

Plaintiffs can recover "phantom damages"—the invoiced rate for medical care that no one ever paid.

"List" or "sticker" prices for products or services do not always reflect their actual cost. The Wisconsin Supreme Court rejected this basic fact in *Orlowski*, holding that a plaintiff in a personal injury lawsuit is entitled to recover the amount initially billed for medical treatment even when the amount paid is significantly lower. As a result, plaintiffs receive inflated awards that do not accurately reflect the reasonable value of medical care.

Anyone buying a new car, shopping at an outlet store, or visiting a doctor's office has probably seen a "sticker" or "list" price that they would never expect to pay. Rather, they would anticipate receiving a discount either directly from the seller or, in the case of a doctor visit, from a healthcare provider that accepts a lower amount from an insurer.

"Phantom damages" represent the difference between the full price listed and the amount actually paid or the reasonable value of the service.[124] With respect to medical care, the difference between a healthcare provider's list price and the amount actually paid by a patient or his or her insurer is often dramatically different. It is common for list prices to be three, four, or even six times higher than the amount actually paid through Medicare, Medicaid, or a private insurer.[125] The list price for a treatment often varies tremendously among healthcare providers. As a *Washington Post* investigation found, "even on the same street, hospitals can vary by upwards of 300 percent in price for the same service."[126] Healthcare providers often discount or write off charges when a patient is uninsured.[127] In sum, list prices for medical treatments are more a matter of internal billing practices unique to the healthcare system than a reflection of the reasonable value of medical services.

Whether a plaintiff in a personal injury lawsuit can recover the "billed amount" or the "amount actually paid" for medical expenses can be the difference between a $100,000 and $500,000 economic damage award. Considered in the aggregate, it means that defendants are paying millions of dollars in personal injury judgments and settlements each year that serve no compensatory purpose.

Tort Law Principles

The collateral source rule is a common law doctrine that permits plaintiffs to recover damages, such as medical expenses, irrespective of whether the plaintiff had already received compensation for those expenses through insurance or other sources. Most states, including Wisconsin, follow this rule.[128] The public policy underlying the collateral source rule is that a defendant should not be relieved of the result of its negligent conduct based on the plaintiff's foresight in purchasing insurance. In practice, the rule results in duplicative recovery by the plaintiff.

The question that state courts continue to struggle with is whether the portion of a medical bill that was discounted or written off by a healthcare provider and not paid by a patient or an insurer is considered a collateral source. Currently, about one-third of states permit plaintiffs to recover phantom damages, while about the same number limit or bar phantom damage recovery.[129] In the remaining states, the law is undecided or uncertain. In some states, application of the collateral source rule blindfolds jurors from even learning the amount actually paid. They only hear the billed amount and must determine damages accordingly.

The Case

The Wisconsin Supreme Court reaffirmed that it is among those state courts requiring courts to calculate damages for medical expenses based on the billed, rather than paid, rate.[130] After a car accident, an arbitration panel had awarded the plaintiff approximately $11,500 reflecting a medical lien claimed by her healthcare provider and her out-of-pocket medical expenses. [131]

A trial court judge found the panel's decision a "manifest disregard of the law" and awarded her what he considered the "full reasonable value of medical expenses, $72,985.94."[132] The Wisconsin Supreme Court affirmed this decision, allowing the plaintiff to recover around $61,500 in "phantom damages"—over five times the actual cost that the insurer would have paid for her care.[133]

Key Court Findings

- "[A]n injured party is entitled to recover the reasonable value of medical services, which, under the operation of the collateral source rule, includes written-off medical expenses."[134]
- "[T]he collateral source rule furthers several public policy considerations, including the deterrence of negligent conduct, fully compensating injured parties and giving the insured the benefit of premiums he or she paid."[135]
- Whether in an uninsured motorist coverage claim or a tort claim, "by operation of the collateral source rule,

> *"The Wisconsin Supreme Court...allow[ed] the plaintiff to recover around $61,500 in 'phantom damages'—over five times the actual cost that the insurer would have paid for her care."*

parties [are] precluded from introducing evidence of the amount actually paid for medical services to prove the reasonable value of such services."[136]

- "[Plaintiff] has paid a premium to [her health insurer] for the benefit of coverage for medical expenses, and to [her auto insurer] to recover the reasonable value of her medical expenses under her UIM coverage. Since [plaintiff] has paid a premium for both of these policies, she should receive the benefit from both."[137]

Significance

The issue of phantom damages is rising in importance as the practice of hospitals and other healthcare providers of writing off or discounting rates becomes more commonplace and the gap between amounts charged and paid continues to grow.

Orlowski and other court decisions allowing phantom damages demonstrate a striking disconnect between tort law damages and reality. The collateral source rule is intended to ensure that a person who is responsible for an injury pays the full amount of the harmed person's damages, regardless of whether that person received money from other sources. The rule is not intended to require defendants to pay inflated damages based on amounts that exist only on paper.

The Wisconsin Supreme Court's reasoning stands in stark contrast with the California Supreme Court in a case decided just six months earlier. In *Howell v. Hamilton Meats & Provisions*, California's highest court held that a plaintiff may not recover amounts billed but never paid "for the simple reason that the injured plaintiff did not suffer any economic loss in that amount."[138] The court found that where a healthcare provider has accepted less than a billed amount as full payment, evidence of the billed amount is not relevant in determining past medical expenses.[139] "Where a trial jury has heard evidence of the amount accepted as full payment by the medical provider but has awarded a greater sum as damages for past medical expenses," the California Supreme Court found, "the defendant may move for a new trial on grounds of excessive damages."[140]

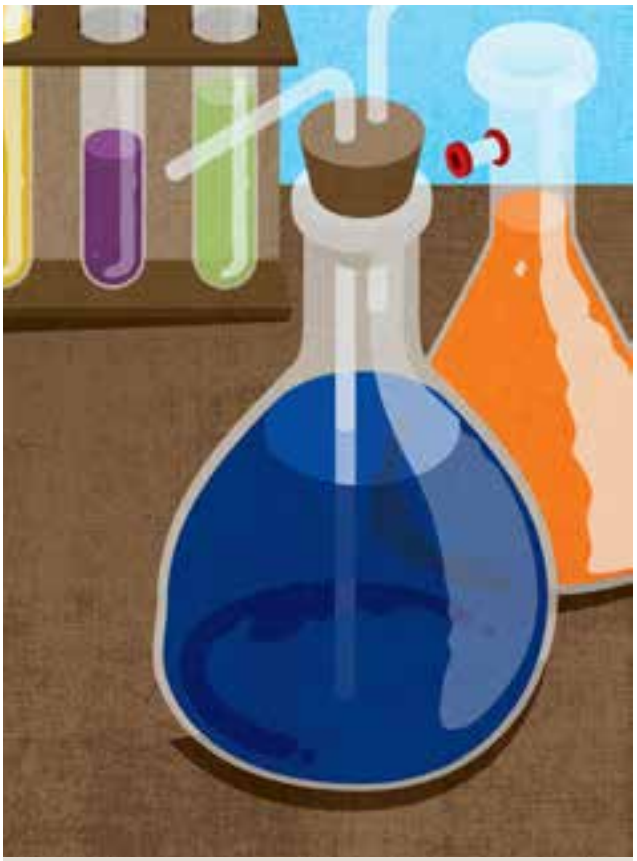
Personal injury lawyers who support permitting phantom damages argue, and the courts that agree with them find, that the lower rates for medical services negotiated between insurers and healthcare providers is a benefit that an individual earned through purchasing insurance and paying premiums. Therefore, proponents of awarding phantom damages reason that, under the collateral source rule, a plaintiff is entitled to collect the discounted amount.

Here is how the Supreme Court of California reacted to this incorrect view: It recognized that the "plaintiff's insurance premiums contractually guaranteed payment of her medical expenses at rates negotiated by the insurer with the providers; they did not guarantee payment of much higher rates the insurer never agreed to pay."[141] The court pointed out that "had her insurer not negotiated discounts from medical providers, plaintiff's premiums presumably would have been higher, not lower."[142] Since the plaintiff did not pay premiums based on the list prices, those higher amounts were not a collateral benefit and she was not entitled to recover the amount of the discount.[143]

This debate is continuing. On June 4, 2014, in *Kenney v. Liston*, West Virginia's highest court issued a ruling similar to *Orlowski*, allowing phantom damages.[144] Justice Loughry, in dissent, wrote "[i]t is difficult to conceive how allowing the plaintiff to present to the jury fictitious evidence of amounts paid for medical services, while preventing the tortfeasor from challenging that evidence, serves the interests of justice … Are we to blindly accept the fiction that hospitals and other medical providers routinely and as a matter of freely-negotiated contracts accept *less* than the reasonable value of their services?"[145]

A growing number of courts and legislatures, however, are rejecting phantom damages. For example, in the year leading up to the *Orlowski* decision, Oklahoma and North Carolina enacted legislation providing that the amounts actually paid for medical expenses are admissible at trial, not the amounts billed for treatment.[146] They followed in the footsteps of Texas, which enacted a similar law in 2003.[147] Legislative efforts to address phantom damages are underway in Wisconsin and several other states.[148]

The stakes are high. California insurers estimated that requiring compensation based on the amount billed, rather than the amount paid based on negotiated rates and discounts, would have cost them $3 billion annually.[149] Such inflated awards result in higher rates for auto and health insurance.



"A growing number of courts and legislatures, however, are rejecting phantom damages."

Foster v. Costco (Nev. 2012)

Land possessors owe a duty of reasonable care to prevent injury to anyone on their property, trespassers included.

A longstanding principle of tort law is that a possessor of land ordinarily owes no duty of reasonable care to a trespasser except to refrain from willful conduct that causes injury. In 2012, the Nevada Supreme Court was the first state high court to expressly adopt a new "Restatement" provision that imposes on businesses and homeowners a broad duty of care to protect anyone, including a trespasser, who comes onto their property from injury. At least fifteen state legislatures have enacted laws since 2011 to avoid such an expansion of liability.

The common law of most states provides that a property owner, occupant, or other land possessor does not owe a duty of reasonable care to a trespasser, except in narrow and well-defined circumstances.[150] This traditional common law approach is intended to promote property owners' free use and enjoyment of land and deter people from trespassing on the land of another.[151]

In 2012, an influential private organization, the American Law Institute (ALI), published the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, which abandons this traditional approach by recommending that courts impose a duty on land possessors to exercise reasonable care for all land entrants, including unwanted trespassers.[152] Courts often look to the ALI Restatements when developing legal rules. Courts do so because the ALI, composed of the nation's top echelon judges, law professors, and practitioners, is perceived to be reliable and objective—standards that it usually meets. In this case, however, the ALI adopted an outlier approach that would impose costly burdens on land possessors.

The Nevada Supreme Court is the first state high court to expressly adopt this Restatement provision. Accordingly, land possessors in Nevada owe an "amplified" duty to prevent injury to trespassers.[153]

Tort Law Principles

Under traditional common law rules, the duty of care owed to a land entrant is based on that entrant's status on the property as an invitee, licensee, or trespasser.[154] Land

possessors owe a duty of reasonable care to those individuals they invite or otherwise give permission to be on the property, but not to trespassers whose presence is neither permitted nor wanted.[155] The duty owed to trespassers by land possessors is to refrain from willful injury-causing conduct.

Courts have recognized only a few exceptions to this rule. For example, the so-called "attractive nuisance" doctrine provides a duty of reasonable care when a child is attracted to a dangerous feature on the property and would not appreciate a risk that was or should have been known to the possessor.[156]

The ALI's Restatement (Third) of Torts rejects these longstanding duty rules in favor of a broad, unitary land entrant duty of care. The only exception to the Restatement's recommended approach is for harm to so-called "flagrant trespassers"—a concept likely to result in confusion and litigation because the term is left undefined in the Restatement, and had never been part of any state law.[157]

The Case

The Nevada Supreme Court announced its adoption of the Restatement's approach to land possessor liability in a case that did not involve a trespasser; it involved a Costco customer who tripped and fell over a wooden pallet placed in an aisle by a store employee. The retailer defended itself by asserting that the obstacle was an "open and obvious" danger for which there is no liability.[158] The Nevada Supreme Court refused to dismiss the case. Instead, it abandoned the open and obvious danger defense, finding that the plaintiff's recognition of the danger does not eliminate the duty of care, but rather may reduce damages under principles of comparative fault.[159]

That aspect of the decision alone significantly expanded premises liability, but the court went further. The court adopted wholesale the new Restatement rule—and presumably its novel "flagrant trespasser" exception. These principles will govern future cases. They will allow people who are injured while trespassing to sue the owner or lessor for damages.

Key Court Findings

- "In recognition of the continuing development of the law governing landowner liability, we adopt the rule set forth in the Restatement (Third) of Torts: Physical and Emotional Harm section 51, and consequently, we conclude that a landowner owes a duty of reasonable care to entrants for risks that exist on the landowner's property."[160]
- "[T]he duty imposed in the Third Restatement is amplified…[U]nder the Restatement (Third), landowners bear a general duty of reasonable care to all entrants, regardless of the open and obvious nature of dangerous conditions."[161]
- "[T]he fact that a dangerous condition is open and obvious does not automatically shield a landowner from liability but rather bears on whether the landowner exercised reasonable care with respect to that condition and issues of comparative fault."[162]

Significance

Foster is important because it marks the first and only state supreme court decision to date expressly adopting the new Restatement's recommended approach to land possessor liability. Any adoption of this Restatement provision is significant given that the approach threatens to reverse the longstanding "no duty" to trespassers rule of most states. Other courts, such as the Illinois Supreme Court, continue to apply traditional tort law rules. The Restatement's new approach will impose costly new burdens on property owners and is likely to lead to higher insurance premiums.

In order to prevent such an unprecedented expansion of liability, sixteen states have enacted laws precluding courts from granting trespassers broad new rights to sue. Legislatures in Alabama, Arizona, Georgia, Kansas, Michigan, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin codified existing state common law,[163] freezing it as it now stands. These legislatures took the extraordinary step of preemptively blocking judicial adoption of a Restatement provision.[164]

Finally, the ruling shows how a court's adoption of a broad rule in one context may lead to confusion in another. Because *Foster* involved an invited store patron, the Nevada Supreme Court made no effort to discuss how adoption of the Restatement approach impacts liability for the injuries of trespassers or the meaning of the "flagrant trespasser" exception. As a result, home and business owners face uncertainty in their obligations to prevent harm to those who come onto their property without permission.

Hersh v. E-T Enterprises (W. Va. 2013)

The "open and obvious" doctrine in premises liability negligence actions is abolished in West Virginia.

The "open and obvious" doctrine provides that land possessors have no duty to protect visitors from clear hazards on their property, such as a rock, a stream, or a stairway. They do not have to post warning signs in their own homes and yards, or take other measures, to protect visitors from obvious conditions. The West Virginia Supreme Court of Appeals, in abandoning the open and obvious doctrine, has exposed homeowners and businesses to new liability and higher insurance rates, and relieved visitors of personal responsibility.

The common law traditionally protects those who own or lease property from owing an expansive duty of care to all visitors on their land. While the West Virginia Supreme Court of Appeals claims not to require land possessors to be "insurers of the safety of every person legitimately entering the property,"[165] as a dissenting justice observed, the *Hersh* decision may "throw open the courthouse doors to frivolous claims."[166]

Tort Law Principles

The foundation of premises liability is grounded in the rule that the property owner or possessor is in the best position to keep his or her land free of obstructions and safe for visitors. The common law charged land possessors with a duty of reasonable care to maintain the land in a safe condition and to warn of hidden dangers not known to invited visitors.[167]

The open and obvious doctrine recognizes that a land possessor has no duty to take steps to prevent injuries from hazards that are obvious or known to visitors. In other words, there is no obligation to warn visitors or alter the land or building to protect guests from risks that would be obvious to an ordinary person, such as the danger of descending a stairway in the dark. Instead, visitors are responsible for exercising ordinary care to avoid those dangers. This "no duty" approach allows courts to dismiss cases stemming from obvious, often inherent, dangers at the motion to dismiss stage.

The alternative is to impose a duty on home owners and businesses to protect visitors from open and obvious hazards. Under this comparative negligence approach, a visitor's failure to avoid such risks reduces recoverable damages based on his or her share of responsibility for the injury. This approach typically requires lengthy and expensive litigation. It imposes costs on property owners to take steps to protect their guests from risks, no matter how obvious.

The Case

In *Hersh*, a man who had difficulty walking parked in the lower level of a shopping plaza parking lot and climbed a set of stairs to the upper-level to visit a store. There were no handrails on the stairs. The property owner had removed them for repairs after they had become damaged by skateboarders jumping on them and he was concerned they would get hurt. When the plaintiff returned to the lot and began to walk down the stairs, he fell, suffering a severe head injury.

A trial court dismissed the case, finding that the missing handrail was "open, obvious, reasonably apparent and well-known to Mr. Hersh…".[168] The West Virginia Supreme Court of Appeals reversed, abandoning the open and obvious doctrine. Instead, the court ruled that if it was foreseeable that a hazard can cause injury, even if it was obvious to invited visitors encountering it, a landowner has a duty to remedy the danger.[169]

About half of the states have now abandoned the "no duty" approach.[170] The majority viewed itself as joining the "manifest trend" away from the traditional rule.[171]

Key Court Findings

- "If a hazard is open and obvious on premises, it does not preclude a cause of action by a plaintiff for injuries caused by that hazard. Instead, a jury may consider the obviousness of the hazard in determining the comparative negligence of the plaintiff against that of the owner or possessor of the premises."[172]
- "A plaintiff's knowledge of a hazard bears upon the plaintiff's negligence; it does not affect the defendant's duty."[173]
- "[D]espite the opportunity for an entrant to avoid an open and obvious hazard, a possessor is still required to take reasonable precautions when the possessor 'should anticipate the harm despite such knowledge or obviousness.'"[174]

> *"'The majority has saddled property owners with the impossible burden of making their premises 'injury proof' for persons who either refuse or are inexplicably incapable of taking personal responsibility for their own safety.'"*

- "The rule that a land possessor was not subject to liability for any open and obvious danger is much easier to justify in an era when contributory negligence constituted a complete bar to recovery… However, such a rule cannot be justified after contributory negligence becomes a comparative defense."[175]
- "In determining whether or not an owner or possessor of land has a duty of care to alter their conduct when faced with a hazard on the land, the focus is on foreseeability."[176]

DISSENT (Justice Loughry):

- "It is decisions like these that have given the state the unfortunate reputation of being a 'judicial hellhole.'"[177]
- "The majority has saddled property owners with the impossible burden of making their premises 'injury proof' for persons who either refuse or are inexplicably incapable of taking personal responsibility for their own safety."[178]
- "[A]s a result of the majority's decision, farmers who enclose their property in barbed wire face liability whenever someone simply walks into the fence and suffers an injury. Similarly, owners of land with streams and ponds face potential liability if someone falls into the water. In fact, every natural hazard now represents another source of potential liability for the property owner. Should a proactive property owner seek to mitigate the hazard by placing a barrier around it, I am certain that a property owner somewhere would face liability because they should have anticipated that someone could be injured while trying to climb over the barrier."[179]

> *"'Where the open and obvious doctrine once operated to prevent meritless suits…elimination of the doctrine will throw open the courthouse doors to frivolous claims.'"*

DISSENT (Chief Justice Benjamin):

- "Where the existence of a duty was previously a question of law, it is now dependent on findings of fact regarding foreseeability."[180]
- "With this decision, our traditional concept of personal responsibility now no longer exists in the realm of premises liability."[181]
- "Where the open and obvious doctrine once operated to prevent meritless suits from proceeding through the court system, I fear that elimination of the doctrine will throw open the courthouse doors to frivolous claims."[182]

Significance

The West Virginia Supreme Court of Appeals decision exemplifies the tug-of-war that occurs in many courts on tort law issues.

The majority values providing every plaintiff with his or her "day in court" above other significant public policy concerns. The judges abandoned over a century of precedent that allowed courts to dismiss premises liability cases involving open and obvious hazards at an early stage. Understandable sympathy for an individual who hurt himself led the majority to replace prior law with a broad new duty on home and property owners to protect visitors from even the most obvious of hazards. The court's loose "foreseeability" test and consideration of the plaintiffs' conduct as a matter of comparative fault guarantees that most premise liability cases will go to trial and place pressure on defendants to settle claims that stem from avoidable accidents.

The dissenting justices placed a higher value on providing society with clear rules as to the rights and responsibilities of individuals and businesses. Without the traditional rule precluding liability for obvious hazards, people would need to take steps to warn or otherwise protect visitors from every rock, hole, stream, stairway or stove on their land or in their home. Such steps are burdensome, expensive, and typically unnecessary.

The dissenting justices also emphasized the importance of individual responsibility in tort law. Should the cost of an accident fall on a person who had removed a damaged railing for repair to protect the safety of others or a person with severe mobility issues who knew a stairway lacked a railing, but chose to navigate it?

The dissenting judges recognized that allowing every lawsuit to go to trial can adversely affect people beyond the litigants. The majority's significant expansion of premises liability is likely to lead to increased rates for property insurance in the state.[183] As Justice Loughry recognized, "homeowners will pay the highest price for the majority's pandering to persons who ignore the risk associated with open and obvious hazards that ordinary, hard-working citizens encounter every day and invariably utilize their common sense and good judgment to avoid."[184]

Choate v. Indiana Harbor Belt R.R. Co. (Ill. 2012)

Railroads owe no duty to trespassers to guard against the obvious danger of a moving train.

At a time when some state supreme courts are broadening the duty of businesses and homeowners to protect those who come onto their property from harm, the Illinois Supreme Court held the line. The court reaffirmed the principle that a land possessor ordinarily owes no duty to a trespasser and that all land entrants are responsible for avoiding "open and obvious" risks of injury.

The high courts of Nevada and West Virginia have developed a reputation as prone to favor expansion of tort liability. Their consideration of the open and obvious danger doctrine, as well as Nevada's adoption of the new Restatement, can be compared to the Illinois Supreme Court, which is viewed as often taking a more measured approach to development of tort law.

Tort Law Principles

Illinois, like most states, recognizes that land possessors have no obligation to make their property safe for trespassers. There is generally no duty of care owed to trespassers, except to refrain from willfully and wantonly injuring them.[185]

Some exceptions to this rule have developed through common law. One such exception is the "attractive nuisance" doctrine, which requires land possessors to protect children from manmade conditions on the property that may cause injury in some circumstances. Such a duty applies when the land possessor knew or had reason to know that children frequent the property and there is a dangerous condition on the property that children are not likely to discover or appreciate the risk, and the expense and inconvenience of remedying the dangerous condition is slight when compared to the risk involved.[186]

When a land possessor does have a general duty of care to protect those who come onto its property, many courts continue to follow the traditional rule that this duty does not extend to open and obvious dangers.

The Case

These tort law principles applied in *Choate*, which involved a tragic set of circumstances. A 12-year-old entered a railroad's property, tried repeatedly to jump onto a moving train to impress his friends, and suffered a severe injury that led to a partial leg amputation.[187] The plaintiff blamed the railroad for his injury, claiming that it failed to adequately fence and monitor the property or warn of the danger of accessing trains or the railroad tracks.[188] The railroad had posted a "No Trespassing" sign, but the plaintiff said he did not see it.[189] A trial resulted in a $3.9 million verdict,[190] which an intermediate appellate court affirmed.

The Illinois Supreme Court reversed. It found no reason to depart from settled law recognizing no duty to guard against obvious dangers.[191] The court also held that there is no duty to child trespassers when they should be fully expected to appreciate the risk of an injury.[192] It found that the trial court should have dismissed the claim.

Key Court Findings

- "In any negligence action, the court must first determine as a matter of law whether the defendant owed a duty to the plaintiff."[193]
- "[T]he requirement of an open and obvious danger is not merely a matter of the plaintiff's contributory negligence, or the parties' comparative fault, but rather a lack of the defendant's duty owed to the child."[194]
- "[A] landowner has no duty to remedy a dangerous condition if it presents *obvious* risks that children generally of the plaintiff's age would be expected to appreciate and avoid."[195]
- "In Illinois, obvious dangers include fire, drowning in water, or falling from a height. We observe that this is not an exclusive list. Rather, there are many dangers which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large."[196]
- "[T]he weight of authority from jurisdictions across the country recognizes that a moving train presents a danger that is so obvious that any child allowed at large can reasonably be expected to appreciate the risk involved in coming within the area made dangerous by it."[197]
- "[I]f a duty were imposed on a railroad to erect a fence where one accident occurred, the railroad would likewise be subject to the duty of fencing the innumerable places along its many miles of tracks frequented by trespassing children. We hold that Illinois law does not impose any such requirement."[198]

> *"The Illinois Supreme Court…found no reason to depart from settled law recognizing no duty to guard against obvious dangers."*

- "It has never been part of our law that a landowner may be liable to a trespasser who proceeds to wantonly expose himself to unmistakable danger in total disregard of a fully understood risk, simply for the thrill of the venture."[199]

Significance

The Illinois Supreme Court's ruling stands in stark contrast to rulings in Nevada and West Virginia that abandoned the traditional rule and imposed a broad duty on land possessors to guard against even the most obvious dangers on their property.

Whether a condition is open and obvious, the Illinois Supreme Court recognized, is a matter of law determined by the court based on an objective, reasonable person (or child) standard.[200] As a practical matter, this aspect of the decision allows courts to dismiss claims involving obvious dangers early in the litigation, rather than subjecting every claim to a jury trial to allocate responsibility between the plaintiff and the defendant.

The court also adhered to the longstanding common law rule that there is generally no duty to protect trespassers from injury.

The *Choate* decision reaffirms that personal (and parental) responsibility continues to play a role in tort law.[201] The court recognized that even if the railroad had fenced in the tracks, there was no reason to believe that such a step would have prevented the injury when the plaintiff, who was trying to impress his friends, ignored existing fence segments and a posted warning sign. "No fence would have prevented such bravado."[202]

Finally, the Illinois Supreme Court's ruling is notable in that the court resisted allowing bad facts to make bad law. It did not impose a form of strict liability on a "deep pocket" defendant for an unfortunate injury that it had no duty to guard against and that it could not have prevented.

Wyeth v. Weeks (Ala. 2014)

Brand-name drug makers can be subject to "innovator liability" when a plaintiff alleges harm caused by a generic drug.

Can a product manufacturer be subject to liability for a competitor's product? American tort law has always said, "No." Yet, in 2013, the Supreme Court of Alabama became the first state high court to rule that a manufacturer of a brand-name prescription drug can be subject to liability when a plaintiff alleges that he or she was harmed by a generic version of the drug. It later withdrew the opinion, giving hope that fundamental tort law principles would prevail, but then reached the same result in August 2014. Is the ruling a fluke or game changer?

In 2011, the U.S. Supreme Court ruled in *PLIVA v. Mensing* that product liability lawsuits that allege a generic drug's labeling failed to adequately warn of risks are preempted (barred) by federal law. This is the case because federal law requires generic drugs to carry the same labeling approved by the U.S. Food and Drug Administration for the brand-name version. Longstanding federal regulations do not allow generic drug manufacturers to change the labeling of their products without first obtaining permission from the FDA.[203] Since the U.S. Constitution's Supremacy Clause does not allow a state tort claim to require actions prohibited under federal law, failure-to-warn claims against generic drug manufacturers are not permitted.

Individuals can, in most cases, proceed with failure-to-warn claims against manufacturers when they have taken brand-name medications. The U.S. Supreme Court ruled in a separate case, *Wyeth v. Levine*, which claims against brand-name manufacturers are not preempted because federal law allows them to alter their labels, then inform the FDA of the changes and obtain approval.[204]

Even before *Mensing*, plaintiffs' lawyers representing individuals who believe they were harmed by a generic drug have repeatedly sued the makers of brand-name drugs that their clients did not take, almost always without success. Companies viewed as deep pockets are always magnets for

lawsuits. Often, brand-name drug companies have more assets than small generic companies. The Supreme Court's rulings in *Mensing* and *Levine* may fuel these deep-pocket efforts.[205]

Over one hundred court decisions, however, reached both before and after *Mensing*, have rejected invitations to expand tort law to impose liability on a brand-name company for an injury allegedly stemming from the generic products of a competitor.[206] Five federal courts of appeal, interpreting state law, have so ruled.[207] Federal courts applying Alabama law reached the same conclusion.[208] Nevertheless, the Alabama Supreme Court is now one of four courts—the first at the state supreme court level—to say otherwise.

Tort Law Principles

A core principle of product liability law is that a company is only subject to liability for products it makes, sells, licenses, or distributes. Companies that are in the chain of distribution of a product benefit from its sale and can obtain insurance to cover risks and incorporate that expense into the cost of the product. They must stand behind their products and compensate people if the product causes an injury because it is unreasonably dangerous.

"A core principle of product liability law is that a company is only subject to liability for products it makes, sells, licenses, or distributes."

Manufacturers should have no duty to users of another's product. Artful pleading by bringing claims under theories of misrepresentation or fraud should not nullify the core requirements of product liability law. That a risk of injury is "foreseeable" to a person or entity does not necessarily give rise to a duty to protect another from harm. Courts must consider public policy and basic fairness, including whether there is an actual relationship between the parties.[209]

The U.S. Supreme Court's decision on federal preemption in *Mensing* does not alter state tort law. In fact, before *Mensing* reached the Supreme Court, the U.S. Court of Appeals for the Eighth Circuit had dismissed the competitor liability claims in that suit.[210] The Supreme Court made its ruling in light of this history, and on remand, the Eighth Circuit found that the Supreme Court's decision did not alter this determination.[211]

A responsible party may not be a viable defendant for many reasons. It may be beyond the jurisdiction of the court, such as a foreign entity. It may have immunity from suit, such as a state government. It may be insolvent. The unavailability of a party for litigation should not change whether another company is subject to tort liability.

The Case

In January 2013, the Alabama Supreme Court, without holding oral argument, recognized innovator liability in an 8-1 ruling. It then withdrew its decision six months later to allow the parties the opportunity to present their sides to the court.[212] To the surprise of many legal observers, the court doubled down in August 2014, reaching the same result through the same reasoning in a 6-3 decision.

Key Court Findings

- "We recognize that other jurisdictions… have concluded that a brand-name manufacturer does not owe a duty to users of the generic version of the prescription drug to warn those users of the dangers associated with the drug… A few courts have held otherwise."[213]
- "An earlier influential court ruling finding that manufacturers of generic drugs are responsible for the representations they make in their labeling regarding their products is flawed based on the 'sameness' requirement subsequently discussed in PLIVA."[214]
- "A brand-name manufacturer could reasonably foresee that a physician prescribing a brand-name drug (or a generic drug) to a patient would rely on the warning drafted by the brand-name manufacturer even if the patient ultimately consumed the generic version of the drug."[215]
- "In the context of inadequate warnings by the brand-name manufacturer placed on a prescription drug manufactured by a generic manufacturer, it is not fundamentally unfair to hold the brand-name manufacturer liable for warnings on a product it did not produce because the manufacturing process is irrelevant to misrepresentation theories based, not on manufacturing defects in the product itself, but on information and warning deficiencies, when those alleged misrepresentations were drafted by the brand-name manufacturer and merely repeated, as allowed by the FDA, by the generic manufacturer."[216]

DISSENT (Justice Murdock):

- "The just answer [to unfairness to those harmed by generic drugs], if there is to be one, must come from a change of federal policy or preemption jurisprudence. It is not to come from ignoring age-old, elemental precepts of tort law in order to impose liability on an entity with whom the plaintiff has no relationship, in regard to a product that that entity did not manufacture or sell."[217]
- "To say that a physician's or pharmacist's reliance upon a brand-name manufacturer's labeling in prescribing or dispensing a generic drug makes the brand-name manufacturer liable for injuries suffered by the generic-drug consumer is to 'bootstrap' into existence a duty on the part of the brand-name manufacturer to that consumer; the first inquiry must be whether the brand-name manufacturer had a duty to one who did not consume its product to publish adequate labeling."[218]
- "Ultimately, the main opinion is inextricably grounded on a single notion: The foreseeability of a deficiency in a brand-name drug, including its labeling, being replicated in a generic drug, including its labeling, is so great that

we must recognize a duty owing from the brand-name manufacturer to whomever might be hurt by the deficiency in the generic drug. But the clear foreseeability upon which this notion is based has either been explicitly acknowledged or clearly understood by each of the scores of other federal and state courts that have addressed the issue we now address. Yet, essentially all of them reach a different conclusion than do we. They do so on the same ground that Professor Prosser implores us to remember: Foreseeability alone is not enough."[219]

- "I can reach no conclusion other than that the 'ground' we plow today is 'new.' And we are the only court in the nation plowing it."[220]

Significance

The true justification for the extension of liability in *Wyeth v. Weeks* is deep-pocket jurisprudence, which is neither sound as a matter of public policy nor fair as a matter of law. It is based on a judge's views about who can pay and can lead tort law almost anywhere a judge decides to venture.

The Alabama Supreme Court decision's greatest legal flaw is that foreseeability alone does not determine a duty in tort law. The "foreseeability" relied upon by the court does not result from a brand-name drug manufacturer's own conduct, but arises from laws over which it has no control. Congress and the FDA decided that generic drugs must have the same label as brand-name drugs. Congress also made the public policy decision to lower barriers of entry for generic drugs, and state legislatures have encouraged their use by requiring pharmacists to fill certain prescriptions with available generics. These laws have led pharmacists to fill about 90% of prescriptions with generics within months after a brand-name drug's patent expires. Most courts have said that using these laws as a basis for imposing liability stretches foreseeability much too far.

The Alabama Supreme Court's ruling also has several other major shortcomings: (1) it attempted to separate warning labels from the production of drugs when the two are inextricably interlinked; (2) it did not consider critical legal or healthcare consequences of its decision; and (3) despite its rhetoric, the expanded theory of liability could be applied to other products and circumstances.

Wyeth v. Weeks and a California appellate court decision in *Conte v. Wyeth* are "two outlier appellate decisions," as the Iowa Supreme Court recognized in rejecting innovator liability in July 2014.[221] As that court found, "[d]eep-pocket jurisprudence is law without principle,"[222] which does not advance public health and safety.[223]

> *"The true justification for the extension of liability in* Wyeth v. Weeks *is deep-pocket jurisprudence, which is neither sound as a matter of public policy nor fair as a matter of law."*

The only other courts to permit innovator liability, federal district courts in Vermont and Illinois, made totally subjective "guesses" as to the tort law of the states in which they sit.[224] Federal courts are to follow and apply state law in cases that arise under their jurisdiction to hear state law claims involving citizens of different states.[225] These decisions are unsupported by state law, as the U.S. Court of Appeals for the Sixth Circuit recognized in a recent case in which it evaluated the law of 22 states implicated in multidistrict litigation and found that each state's high court would not recognize a competitor liability claim.[226] As that court found, "almost every court has rejected this theory, reasoning that a brand manufacturer does not owe a duty to a consumer unless the consumer actually used the brand manufacturer's product."[227]

In fact, since *Mensing*, about forty courts have rejected competitor liability, joining the sixty or so additional courts that have adhered to fundamental principles of tort law. As these decisions show, regardless of whether a judge disagrees with the U.S. Supreme Court's preemption decision, courts should not be tempted to alter their state's tort law to find defendants for users of generic drugs to sue.

Saddling companies that may have less than 10% of the market share with 100% of the liability exposure would create an unsustainable imbalance. Shifting such liability is likely to discourage innovation and lead to higher prices for new drugs during periods of exclusivity to pay for the liability of generic drug makers. It could also encourage brand-name drug makers to leave the market once a drug's patent expires, taking their knowledge base with them, rather than endlessly prolong their liability exposure.

The Alabama Supreme Court's outlier decision is not likely to be followed by judges in other states who adhere to bedrock principles of tort law.

"[S]ince Mensing, *about forty courts have rejected competitor liability, joining the sixty or so additional courts that have adhered to fundamental principles of tort law."*

Lance v. Wyeth (Pa. 2014)

Drug makers may face new liability for claims alleging a lack of due care in designing and selling their products.

Courts have long recognized that drug makers are not subject to liability for alleged defects in how their products are designed. If a manufacturer altered the design of a drug, it would become a fundamentally different product subject to new FDA approval. Traditional principles of product liability do not impose liability on manufacturers that provide a drug that helps one group of people, but poses a significant risk to others, when the manufacturer provides adequate warnings. Nevertheless, the Supreme Court of Pennsylvania has recognized a claim based on negligence in designing or marketing a drug.

For years, plaintiffs' lawyers have asserted claims that a prescription drug manufacturer negligently designed a product. Most attempts have failed. Drugs are not like cars, lawn mowers, and other products where plaintiffs' lawyers may be able to show a reasonable alternative design that may have prevented an injury. If a drug maker alters a product's design, the drug becomes a different compound with its own unique benefits and risks. Any change would also have to surmount an uncertain, expensive, and time-consuming FDA-approval process. Further, the problem with claiming that a manufacturer did not exercise reasonable care in designing and developing a drug is that such a claim essentially attacks the FDA's decision to approve a drug and a physician's expertise in prescribing it to a patient.

Nevertheless, in January 2014, the Pennsylvania Supreme Court allowed a negligent design claim against a prescription drug manufacturer.[228] The plaintiffs' bar touts the decision as a "big win"[229] and "monumental."[230] Some defense-oriented law firms have decried the decision as "stunning…with broad implications," a "landmark decision," and "a significant expansion of pharmaceutical manufacturer liability."[231] The ultimate impact of the decision is yet to be seen. The initial reaction from many on both sides, however, may turn out to be overstated.

Tort Law Principles

There are generally three types of product liability claims: (1) manufacturing defects, in which a product deviates from the intended design (i.e., broken glass in a bottle); (2) design defects, in which it is alleged that the product should have a reasonable alternative design that would have prevented the injury; and (3) inadequate instructions or warnings that lead to an unacceptable risk of harm.[232]

As indicated, the reasonable alternative design approach works well with mechanical and other products, but not drugs. The bedrock for the principle and public policy behind the position that pharmaceutical companies should not be subject to liability for defective design is "comment k" to Section 402A of the Restatement (Second) of Torts. Comment k recognizes that some products, such as prescription drugs, are incapable of being designed in a manner that is safe for all people for their intended use.[233] Some patients will experience side effects as a result of a "known but apparently reasonable risk."[234]

Comment k makes clear that a drug that is accompanied by adequate directions and warnings is not considered defective. Pharmaceutical litigation typically focuses on whether the manufacturer adequately warned of a drug's risks. Courts typically dismiss design defect claims or view them as encompassed by a failure-to-warn claim, since the only way to avoid the risks of the design of a drug is to warn of them. Until 2014, Pennsylvania was one of a number of jurisdictions that applied Comment k to broadly preclude design-defect claims for all prescription drugs.[235]

"Until 2014, Pennsylvania was one of a number of jurisdictions that applied Comment k to broadly preclude design-defect claims for all prescription drugs."

The Case

In *Lance v. Wyeth*, the Supreme Court of Pennsylvania, in a 4-2 decision, reversed a trial court decision dismissing a negligent design claim against a pharmaceutical maker. The ruling came in the context of a weight loss drug, Redux, which had already been removed from the market following reports that it was linked to heart disease. The high court allowed a limited form of negligent design claim, holding that a manufacturer is subject to liability for selling a drug when it knew or should have known that the drug poses such a high risk of harm that it should not be used to treat any person's condition.[236]

Key Court Findings

- "Under Pennsylvania law, pharmaceutical companies violate their duty of care if they introduce a new drug into the marketplace, or continue a previous tender, with actual or constructive knowledge that the drug is *too harmful to be used by anyone*."[237]
- "[W]e need not consider the wisdom of modifications or exceptions to the [learned intermediary] doctrine, because Appellee has staked her claim on the premise that Wyeth knew or should

have known of information (that Redux was so dangerous that it should not have been ingested by anyone) that it did not convey to prescribing physicians. In such scenarios, the prescribing physician, as an intermediary, is not likely to be appropriately 'learned' relative to the critical subject matter."[238]

- "We recognize that the application of Appellee's theory of liability would present more difficult questions in a circumstance in which a prescription drug maintained its FDA approval, it remained on the market, and U.S. doctors continued to prescribe it. The assertion that no reasonable physician would prescribe the drug…is capable of gaining greater traction when, as here, the inquiry is more in the nature of a post-mortem."[239]

DISSENT (Justice Eakin, joined by Chief Justice Castille):

- "Given the significant public policy implications of allowing 'negligent design defect' claims to be brought in prescription drug cases, this Court should wait for a full, developed record on a properly preserved claim, in order that we may consider advocacy on both sides expressing the various incentives and disincentives created by changing this area of products liability law."[240]
- "As I see it, Wyeth sought to preclude the creation of new claims, not 'extinguish' ones already in existence."[241]

Significance

Read broadly, the *Lance* decision suggests that a court and lay jury can find that a company should have removed a drug from the market, even as the FDA approved the drug for treatment. Negligent design claims may also provide a means for plaintiffs' lawyers to attempt to circumvent the learned intermediary doctrine, namely that a drug company's duty is to accurately inform doctors of the risks and benefits of drugs so they can make informed prescribing decisions for individual patients. *Lance* provides plaintiffs' lawyers with an opportunity to claim that a drug is so dangerous that no warning would render the drug sufficiently safe for use. Such a reading is not a reasonable interpretation of the *Lance* decision. Rather, the Pennsylvania Supreme Court's reasoning could lead even judges that accept the viability of a negligent design claim against drug makers in theory to find it largely inapplicable in practice.

> *"[T]he Pennsylvania Supreme Court's reasoning could lead even judges that accept the viability of a negligent design claim against drug makers in theory to find it largely inapplicable in practice."*

The court's language closely tracks the Restatement (Third) of Torts, Products Liability, which states that "[a] prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients."[242] Such cases are likely to be extremely rare. If the drug would help even a small subset of patients, then a negligent design claim should fail under the court's reasoning.[243] In fact, the court acknowledges that a negligent design claim may not be viable when a drug is still on the market and prescribed by physicians.[244]

The court also repeatedly emphasizes that, at the summary judgment phase of the case, courts are bound to accept a plaintiff's factual allegations as true. In allowing a design claim to move forward, the Pennsylvania high court assumed that the drug at issue was so dangerous that no doctor could be justified in prescribing it to treat any person's condition. Such contentions may not withstand scrutiny if a design defect claim proceeds to trial.

Another hurdle to reading *Lance* as broadly recognizing a claim for negligent design against pharmaceutical manufacturers is the constitutional principle known as "preemption," which does not allow state law to trump federal law. The U.S. Supreme Court recently recognized in a case involving generic drug liability that a drug cannot be redesigned without becoming a different drug that would require new FDA approval.[245] The court ruled that a design defect claim that would require a company to "stop selling" a drug that a federal agency approved for use is likely preempted.[246]

Plaintiffs' lawyers and some academics have long urged courts to open the door to design liability exposure for pharmaceutical companies.[247] *Lance* may have unlocked that door and creative plaintiffs' lawyers will push it. But the court's narrow holding, based on factual allegations accepted as true, likely indicates that this decision will not have sweeping liability implications in Pennsylvania or beyond.

Coleman v. Soccer Association of Columbia (Md. 2013)

The legislature is responsible for deciding whether to adopt a comparative fault liability system.

Plaintiffs' lawyers invited Maryland's highest court to, on its own, replace the state's contributory negligence defense with a comparative fault system. For decades, the Maryland General Assembly has repeatedly considered, but not adopted, such a change. The shift would affect many aspects of state liability law and lead to uncertainty for both plaintiffs and defendants. The Maryland Court of Appeals found that such a fundamental change should come, if at all, from the legislature.

How the civil justice system addresses situations in which multiple parties share responsibility for an injury is a significant public policy issue.

Maryland is one of a handful of jurisdictions retaining a contributory negligence system, whereby recovery is generally barred when a person is partially responsible for his or her injury. Maryland is also one of a few states that retain full joint and several liability, which can require a defendant that shares any degree of responsibility for an injury, no matter how small, to pay the plaintiff's full damages. Most other states allocate liability in proportion to a defendant's fault.

In *Coleman,* Maryland's highest court confronted a request to abandon the contributory negligence defense and adopt a comparative fault system.[248] Exercising judicial restraint, the court rejected the invitation to change the state's liability system overnight. It instead deferred to the General Assembly to decide this far-reaching public policy issue.[249]

Tort Law Principles

Five jurisdictions, namely Alabama, Maryland, North Carolina, Virginia, and the District of Columbia, currently follow the doctrine of contributory negligence to bar claims where the plaintiff contributed to his or her injury.[250] This traditional common law approach was once followed throughout the United States, but began to fall out of favor in the 1960s.[251] At that time, states began to move to a comparative fault system, under which a plaintiff's damages are reduced in proportion to his or her percentage of responsibility for the injury.

Most states have adopted a "modified" comparative fault system, under which a plaintiff may only recover if less than 50% or 51% responsible for his or her injury.[252] In other words, a plaintiff cannot recover damages if he or she is equally or more responsible for his or her own injury than others. Some states, such as California, Florida, and New York, have adopted "pure" comparative negligence. This approach allows a plaintiff to recover damages proportional to whatever percentage fault is determined against a defendant (even if the plaintiff is 99% at fault and the defendant is only 1% at fault). A plaintiff can recover some damages unless a jury finds the plaintiff totally at fault for the injury.

Most states made this transition by legislative act, although twelve states did so by judicial decision.[253] In Maryland, the state's highest court had, thirty years prior to its ruling in *Coleman*, rejected judicial adoption of comparative negligence and instead, expressly deferred to the legislature.[254]

The Case

The plaintiff in *Coleman*, who was injured when a soccer goal he was hanging on fell on top of him, argued that contributory negligence was an anachronism and that the clear modern trend over the past three decades of states' adopting comparative fault systems supported overruling earlier precedent.[255]

The state's highest court recognized that judicially changing liability systems would require consideration of numerous issues of law not implicated by the case before the court.[256] Modifying one legal rule, it found, could disrupt other rules developed in Maryland based on contributory negligence. This includes both common law principles, such as the impact of a plaintiff's understanding and assumption of a risk of injury, and laws enacted by the legislature based on the application of contributory negligence.[257]

As two of the dissenting justices acknowledged, "the continued vitality and fairness of the doctrine of joint and several liability" is one legal doctrine that would

"The state's highest court recognized that judicially changing liability systems would require consideration of numerous issues of law not implicated by the case before the court."

need to be reconsidered because it developed as a means to mitigate the perceived harsh results of an "all-or-nothing" contributory negligence rule.[258] This doctrine can impose a plaintiff's full damages on any party whose negligence contributed in part to the injury. The justification for imposing such disproportionate liability on defendants is that tort law should place compensating a person who is totally without fault for an injury above fairness concerns for someone who has acted negligently.[259] This justification is severely undermined when a plaintiff that shares responsibility for the injury can recover damages.

In addition, judicial adoption of comparative fault would require the court to choose, as a threshold matter, whether to implement a "pure" comparative fault system or a "modified" system.

For decades, the Maryland General Assembly has considered legislation that would adopt a particular comparative fault system and address these issues. It has repeatedly declined to adopt such proposals. The Maryland Court of Appeals viewed this outcome as "very strong evidence that the legislative policy in Maryland is to retain the principle of contributory negligence."[260]

The court, therefore, concluded that the General Assembly has thoroughly debated the issue and, if the liability system is to change, the legislature is best suited to implement it in a comprehensive way.

Key Court Findings

- "[T]o abandon the doctrine of contributory negligence in favor of comparative negligence…'involves fundamental and basic public policy considerations properly to be addressed by the legislature.'"[261]
- "[A]lthough this Court has the authority to change the common law rule of contributory negligence, we decline to abrogate Maryland's long-established common law principle of contributory negligence."[262]
- "[T]he General Assembly has continually considered and failed to pass bills that would abolish or modify the contributory negligence standard. The failure of so many bills, attempting to change the contributory negligence doctrine, is a clear indication of legislative policy at the present time."[263]
- "For this Court to change the common law and abrogate the contributory negligence defense in negligence actions, in the face of the General Assembly's repeated refusal to do so, would be totally inconsistent with the Court's long-standing jurisprudence."[264]

DISSENT (Chief Justice Bell & Justice Harrell):

- "A dinosaur roams yet the landscape of Maryland (and Virginia, Alabama, North Carolina and the District of Columbia), feeding on the claims of persons injured by the negligence of another….The name of that dinosaur is the doctrine of contributory negligence."[265]

Significance

The practical trial implications of *Coleman* may be limited. Cases are rarely dismissed on contributory negligence grounds. Evidence suggests that juries apply their own "homemade" comparative fault in contributory negligence jurisdictions.

The significance of the *Coleman* case is that it exemplifies judicial restraint in deciding a major state public policy issue. The court followed its common law precedents and resisted the temptation to engineer a new liability system based on the individual policy preferences of the presiding justices.

The case demonstrates appropriate deference to the legislative branch in determining whether Maryland should abandon its contributory negligence system. In particular, the court recognized that legislative inaction can, in certain circumstances, provide evidence of legislative intent to maintain a legal rule or practice, such as where the legislature consistently declines to pass bills that would change the law.

The *Coleman* case also reveals a strong judicial understanding that modifying one legal doctrine can have a kaleidoscope effect that distorts other legal rules. The Court of Appeals could have forced trial courts to wade through such issues on a case-by-case basis, posing years of uncertainty and appeals for both plaintiffs and defendants. Instead, the Maryland Court of Appeals identified issues that would need to be addressed and deferred to the politically-accountable legislature to make such important public policy decisions in a comprehensive way.

> *"The significance of the* Coleman *case is that it exemplifies judicial restraint in deciding a major state public policy issue."*

Douglas v. Cox Retirement Properties, Inc. (Okla. 2013)

A comprehensive liability reform package violates the state's "single subject" rule.

The Oklahoma Supreme Court's decision striking down the entirety of a comprehensive tort reform law shows that "judicial nullification" is alive and well. By re-enacting each provision in a special session, however, the state's legislature proved the court wrong—legislators knew exactly what they were enacting and would do so again. The outcome should lead courts to think twice before subjectively invalidating laws on questionable technical grounds.

Over the years, state supreme courts have occasionally struck down civil justice reforms that result from the reasonable exercise of legislative public policymaking. Some of these decisions simply substitute the personal public policy view of a judge for that of a legislature. This practice is referred to as "judicial nullification."[266]

When this occurs, courts often invalidate laws based on vague, highly-flexible, or unique state constitutional provisions, such as the "right of access to courts" or a "single subject" rule. It was the single subject rule contained in the Oklahoma Constitution that the state's high court relied upon in 2013 to invalidate the Comprehensive Lawsuit Reform Act (CLRA) of 2009.[267]

Principles of Law

While courts have a lead role in developing tort law, state legislatures have preserved their historic power to define the rights and remedies that govern society. At the birth of the nation, legislatures adopted "reception statutes," which "received" the common law of England when the colonies became states. The states then delegated to the courts the power to further develop common law, including tort law. In so doing, state legislatures preserved their ability to step in and set rules when needed, as they did in establishing an action for wrongful death when the courts had not done so.[268]

Historically, most judges have developed tort law in a conservative and thoughtful manner, slowly and incrementally, adhering to precedent. Beginning in the 1960s, however, some courts radically expanded liability. When legislators, as the policymaking body of the state, become concerned that excessive liability is adversely affecting the state's citizens and businesses, they may pass laws to restore balance.

Of course, all legislation must be constitutional. The purpose of a single subject rule is to prevent legislative logrolling—where legislatures "sneak" some irrelevant subject into a bill. Black's Law Dictionary defines the term as "[a] mischievous legislative practice, of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all." Eighty percent of states have a single subject rule in their constitutions.[269]

> *"The subject of the CLRA, reflected in its title, was to alter the state's civil liability system. There was nothing hidden or deceptive about its subject."*

The subject of the CLRA, reflected in its title, was to alter the state's civil liability system. There was nothing hidden or deceptive about its subject. As reflected in its title, the bill was all about civil justice reform. The bill's purpose was to improve Oklahoma's litigation climate and make the state more inviting to businesses. It included provisions intended to discourage frivolous lawsuits and prevent forum shopping, reduce the liability risk of volunteers and school employees, strengthen expert testimony standards, discourage "coupon" class actions, reform product liability law, prioritize the claims of sick claimants in asbestos and silica litigation, limit subjective pain and suffering damages, stop obesity-related claims against food makers, make liability proportionate to a party's fault, and require certificate of merit in support of professional negligence claims, among other reforms.

The legislation received overwhelming bipartisan and public support. The bill passed the House of Representatives by a vote of 86-13 and the Senate by a vote of 42-5. Governor Brad Henry, a Democrat, signed the bill, observing that the measure "enacts reasonable and responsible reforms that improve the civil justice system without impairing a citizen's constitutional right to have his or her legitimate grievances appropriately addressed in court."[270]

The Case

In a decision of just twelve short paragraphs, the Oklahoma Supreme Court struck down the entire law as a violation of the single subject rule.

Key Court Findings

- "The purposes of the single-subject rule are to ensure the legislators or voters of Oklahoma are adequately notified of the potential effect of the legislation and to prevent logrolling."[271]
- "If a bill contains multiple provisions, the provisions must reflect a common, closely akin theme or purpose."[272]
- "H.B. 1603 contains 90 sections, encompassing a variety of subjects that do not reflect a common, closely akin theme or purpose."[273]
- "Many of these provisions have nothing in common."[274]
- "This Court finds the Legislature's use of the broad topic of lawsuit reform does not cure the bill's single-subject defects."[275]
- "[W]e find the provisions are so unrelated that those voting on the law were faced with an all-or-nothing choice to ensure the passage of favorable legislation."[276]
- "We do not doubt that tort reform is an important issue for the Legislature. But the constitutional infirmity of logrolling, which is the basis of this opinion, can only be corrected by the Legislature by considering the acts within the CLRA of 2009 *separately*."[277]

DISSENT (Justice Winchester joined by Justice Taylor):

- "This constitutional provision does not contain any limitation on the comprehensiveness of the subject, which may be as comprehensive as the Legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several…"[278]
- "I believe it more likely that the legislature and the public understood the common themes and purposes embodied in the legislation; it was tort reform."[279]
- "Are topics such as 'civil procedure' or 'tort reform' too broad to be encompassed within one bill? In 1978, the legislature passed the Civil Procedure—Criminal Procedure—Evidence Code. It had a total of 78 sections…The Uniform Commercial Code was passed by the legislature in 1961. It had 10 articles and a total of 368 sections."[280]
- "Court opinions containing an overly restrictive interpretation of the single-subject rule will likely have a chilling effect on the legislative process. The result will be an exponential number of bills filed along with an expanded legislative process but with no greater assurance the legislation will pass the single-subject test."[281]

Significance

The subject of the Comprehensive Legal Reform Act was obvious to the legislature, the governor, and the public—everyone except seven members of the Oklahoma Supreme Court when applying the "single subject rule."

Logrolling never occurred with respect to the CLRA. The bill focused on one subject—civil justice reform—and it passed in open daylight. It is not out of the ordinary for a bill to have multiple provisions. Such bills are often, properly, a result of legislative compromise.

In response to the ruling, Oklahoma Governor Mary Fallin called a special session. Just three months after the court ruling, the legislature passed, and the governor signed, 23 separate bills reinstating the reforms.[282] Most of the bills passed easily. The five-day special session necessitated by the Court's mandate that the legislature pass each bill separately cost the state's taxpayers approximately $150,000.[283]

Lack of deference to the legislature's role in making policy damages public confidence in the judicial system. In Oklahoma, the decision has sparked a debate as to whether the state is in need of "court reform," changes to the way the state selects its judges.[284]

The aftermath of the ruling may lead judges in Oklahoma and other states to think twice before striking down a law on technical grounds. Judges who are determined to nullify tort reform laws may, as a result, be more likely to base such rulings on unique interpretations of other state constitutional provisions.

Lewellen v. Franklin (Mo. 2014)

A limit on punitive damages violates the right to jury trial.

Virtually every court that has considered the constitutionality of statutory limits on punitive damage awards has ruled that such laws do not intrude on the right to trial by jury. Nevertheless, the Missouri Supreme Court struck down the legislature's decision to reasonably constrain punishment to the greater of $500,000 or five times the plaintiff's compensatory damages.

In the late 1970s and 1980s, the size of punitive damages awards "increased dramatically."[285] By 1991, the U.S. Supreme Court expressed concern that punitive damages had "run wild."[286] The Court responded by providing substantive and procedural safeguards, including guidelines to determine whether an award is unconstitutionally excessive.[287] The Court's guideposts, however, set forth broad outer limits on awards, and state courts have not always followed the letter and spirit of the Court's rulings.

Most states have chosen to limit or bar punitive damages to address these issues, provide greater predictability and certainty in litigation, eliminate outlier verdicts, and avoid constitutionally excessive awards.[288] A wide range of respected organizations have recommended adoption of statutory limits on punitive damages as sound policy.[289]

Principles of Law

It is the role of the jury to consider and decide disputed factual issues. It is well-established that legislatures have the power to determine the legal remedies available for a particular cause of action as a matter of law.

There is no "right" to punitive damages,[290] which do not compensate a plaintiff for an injury, but serve to punish a defendant for serious misconduct and deter others from engaging in similar conduct.

A jury cannot mandate extra-legal remedies. For instance, a jury could not order emotional or mental distress damages

> *"Nationally, federal and state courts have consistently upheld the constitutionality of punitive damages caps..."*

in an ordinary contract action, or award civil penalties where no such penalties are available at law. By the same token, a jury cannot award punitive damages that are not legally available.

Courts routinely apply the law to a jury's assessment of damages before entering judgment in a case. For example, this occurs when applying joint and several liability rules, allocating damages based on fault, adding pre- or post-judgment interest, or reducing damages to reflect payments the plaintiff received from other sources.

Nationally, federal and state courts have consistently upheld the constitutionality of punitive damages caps, including the Supreme Courts of Alaska, Ohio, Kansas, North Carolina, and Virginia.[291] Federal appellate courts have also upheld such laws.[292]

As the U.S. Court of Appeals for the Fourth Circuit has recognized,

> [i]t is by now axiomatic that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object…If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well.[293]

The Kansas Supreme Court similarly found,

> [i]f the legislature may abolish punitive damages, then it also may, without impinging upon the right to trial by jury, accomplish anything short of that, such as requiring the court to determine the amount of punitive damages or capping the amount of the punitive damages.[294]

The absence of relevant case law to the contrary is striking. In 1993, the Alabama Supreme Court held that a punitive damages cap violated the right to a jury trial under the Alabama Constitution,[295] but subsequent decisions have called the validity of that decision into serious doubt.[296] In 2011, the Arkansas Supreme Court invalidated a punitive damages limit, but its decision turned on a unique provision of the Arkansas Constitution barring limits on recovery outside of the employment context.[297]

The Case

Despite overwhelming precedent to the contrary, the Missouri Supreme Court unanimously struck down the state's punitive damage limit applicable to common law claims as violating the right to jury trial.[298] The court relied, in part, on its recent ruling nullifying the state's limit on pain and suffering awards.[299]

Key Court Findings

- "Under common law as it existed at the time the Missouri Constitution was adopted [in 1820] imposing punitive damages was a peculiar function of the jury."[300]
- "Because [the statutory limit] changes the right to a jury determination of punitive damages as it existed in 1820, it unconstitutionally infringes on [a plaintiff's] right to a trial by jury…."[301]
- The underlying tort of fraud that gave rise to the punitive damages award in the case "d[id] not appear as a separate cause of action in Missouri cases until the mid-nineteenth century"—decades after the Missouri Constitution was adopted—but the Missouri Supreme Court said, "[n]onetheless, Missouri's

common law is based on the common law of England as of 1607," and "[f]raud claims were historically encompassed in trespass claims, as English common law recognized actions for trespass as a means to recover for deceit."[302]

Significance

Lewellen broadly impacts the civil justice environment in Missouri. Missouri's statutory limit on punitive damages had helped safeguard defendants' due process rights, including the right not to be subjected to arbitrary and excessive punishment, and the right to have "fair notice" of the severity of punishment that may be meted out.

The statute also promoted Missouri's interest in fostering a legal environment that is fair and attractive to existing and potential employers and taxpayers. Missouri must compete for jobs with other states, many of which limit punitive damages or do not permit them at all. If the state's legal climate is not competitive, employers will go elsewhere.

The Missouri cap also fostered settlements as a result of greater predictability in the law. As a result of the Missouri Supreme Court's decision, plaintiffs' lawyers may counsel their clients to hold out for a jackpot verdict rather than accept a reasonable settlement offer. Now, if a plaintiff is successful in obtaining a high punitive damage verdict, they can expect a lengthy appellate process because courts will need to consider whether the verdict is excessive on a case-by-case basis.

Additionally, Missouri's cap on punitive damages helped to preserve assets for sick claimants who may otherwise see their compensatory recoveries threatened if defendants' resources are depleted by earlier-filing plaintiffs that obtain artificially high settlements or large punitive awards at trial. This has happened, for example, in the asbestos litigation.[303]

Judges outside of Missouri are likely to regard *Lewellen* as an extreme outlier given the significant body of law that is contrary to its holding.

"As a result of the Missouri Supreme Court's decision, plaintiffs' lawyers may counsel their clients to hold out for a jackpot verdict rather than accept a reasonable settlement offer."

McCall v. United States (Fla. 2014)

A limit on noneconomic damages in medical negligence lawsuits lacks a rational basis under the state constitution's Equal Protection Clause.

The reasoning of the Florida Supreme Court in invalidating a limit on noneconomic damages in medical negligence cases is unique and has troubling implications for democratic governance. The decision not only poses a threat to future attempts to constrain liability, it invites judges to substitute their own views as to whether a law is sound policy for that of elected legislators and to strike down any law that, in the subjective view of a judge, is no longer needed.

In 2003, the Florida Legislature, after a lengthy process, found that limiting noneconomic damages in medical negligence cases was a key component for the state to address rising medical malpractice insurance rates that jeopardized its citizens' access to healthcare. The legislature enacted a limit of $500,000 per incident on subjective pain and suffering awards, which rises to $1 million in cases of catastrophic injury or death. Over a decade later, five members of the Florida Supreme Court invalidated the law.[304] Its decision is a stark and troubling example of judicial nullification of tort reform.

What occurred in Florida, however, goes beyond the typical judicial nullification decision, exemplified by the Oklahoma Supreme Court's invalidation of a comprehensive tort reform law on "single subject" grounds. It is even more extreme than the less common case in which a court interprets a provision of a state constitution, such as the right to jury trial, differently than the federal equivalent. The Florida Supreme Court's striking down a law under the rational basis test—a test that ordinarily requires strong deference to the legislature's constitutional role in developing public policy—is the first and worst of its kind.

Principles of Law

The Equal Protection Clause of the Fourteenth Amendment respects the legislature's authority by giving deference to the policy choices of elected representatives. Apart from laws that implicate a suspect classification, such as race, laws challenged under the Equal Protection Clause are subject to "rational basis review." Under this test, a law must be upheld if the legislature could have any conceivable legitimate government purpose in enacting it.[305] A legislature has no obligation to articulate its reasoning or prove itself through evidence or empirical data.[306] As the U.S. Supreme Court has recognized, "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."[307]

> *"Other courts have not second guessed whether the legislature had a legitimate reason to enact the law, cherry-picked testimony opposing the legislation, disputed legislative findings, or engaged in independent research based on Internet stories post-enactment as to whether the law would achieve its goals."*

More than half of the states have limited pain and suffering awards in medical negligence claims[308] or more broadly limited noneconomic damages in all personal injury cases.[309] The Florida law is set at a level that allows greater awards than most states with caps.

Most state courts have respected the prerogative of legislatures to enact such limits.[310] In addition, many federal courts have upheld state limits on noneconomic damages.[311] In fact, when the U.S. Court of Appeals for the Eleventh Circuit reviewed the *McCall* case under the Equal Protection Clause of the U.S. Constitution, it found that "[t]he legislature identified a legitimate governmental purpose in passing the statutory cap, namely to reduce the cost of medical malpractice premiums and health care. The means that Florida chose, a per incident cap on noneconomic damages, bears a rational relationship to that end."[312]

Some state courts have nullified noneconomic damages limits, including the Supreme Courts of Georgia, Illinois, and Missouri in recent years,[313] but the clear trend is to uphold such legislation. Even courts that have struck down such laws have not done so based on reasoning similar to the Florida Supreme Court. Other courts have not second guessed whether the legislature had a legitimate reason to enact the law, cherry-picked testimony opposing the legislation, disputed legislative findings, or engaged in independent research based on Internet stories post-enactment as to whether the law would achieve its goals.

Key Court Findings

PLURALITY DECISION

(Justices Lewis & Labarga):

- "[W]e are not required to accept the findings of the Legislature or the Task Force at face value…. [C]ourts must conduct their own inquiry."[314]
- "[T]he conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis are not fully supported by available data."[315]
- "[A]lthough medical malpractice premiums in Florida were undoubtably high in 2003, we conclude the Legislature's determination that 'the increase in medical malpractice liability insurance rates is forcing physicians to practice medicine without professional liability insurance, to leave Florida, to not perform high-risk procedures, or to retire early from the practice of medicine' is unsupported."[316]
- "[E]ven if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided. No rational basis currently exists (if it ever existed) between the cap…and any legitimate state purpose."[317]

CONCURRING IN RESULT

(Justices Pariente, Quince, and Perry):

- "Although this Court is not bound to blindly defer to all legislative findings, I disagree with the plurality's independent evaluation and reweighing of reports and data…as part of its review of whether the Legislature's factual findings and policy decisions as to the alleged medical malpractice crisis were fully supported by available data."[318]
- "I strongly agree with the plurality that 'even if a 'crisis' existed when [the cap] was enacted, a crisis is not a permanent condition.'… [T]here is no indication that the medical malpractice crisis…even continues to this day."[319]

DISSENT

(Chief Justice Polston & Justice Canady):

- "[T]he Florida Legislature could have rationally believed that the cap on noneconomic damages…would reduce malpractice damage awards, which would thereby increase predictability in the medical malpractice insurance market and lead to reduced insurance premiums. Then, as a result of decreased insurance premiums, physicians would be more willing to stay in Florida and perform high-risk procedures at a lower cost to Floridians."[320]

> *"'Justice Lewis' plurality opinion reweighs the evidence and disbelieves the Governor's Task Force as well as the legislative testimony, claiming that its own independent review has revealed that the other two branches were incorrect…'"*

- "Justice Lewis' plurality opinion reweighs the evidence and disbelieves the Governor's Task Force as well as the legislative testimony, claiming that its own independent review has revealed that the other two branches were incorrect…"[321]
- "While the plurality clearly would have come to a different policy choice than the Legislature based upon the hardly unambiguous data that the plurality could cull from the record and the internet, that is not the point. Instead, our precedent dictates that we employ the rational basis test, which is a relatively easy test for a statute to pass and which recognizes and respects the Legislature's role as the primary policymaker in our constitutional system."[322]
- "Justice Lewis notes that medical malpractice filings have decreased significantly since fiscal year 2003-04 and that Florida, according to a 2011 report, is now retaining a fairly high percentage of Florida-trained medical students. While he uses this information to support the plurality's argument that the statutory caps are no longer justified because a medical malpractice crisis does not currently exist, this information just as easily (and perhaps more likely) supports the argument that the cap has had its intended effect and that, if the cap is eliminated, the medical malpractice crisis would return in full force."[323]

Significance

What is most extraordinary about the *McCall* decision is that Florida's noneconomic damage limit was enacted after substantial deliberation and analysis. A Select Committee on Medical Liability, appointed by the Florida House, published an 82-page report concluding that a limit on noneconomic damages would help stabilize the medical malpractice insurance market and safeguard the access of Floridians to healthcare. It relied, in part, on recommendations of a Governor's Task Force that included healthcare experts across the political spectrum, including Bill Clinton's former HHS Secretary Donna Shalala. The Task Force traveled around the state for five months, held ten meetings, received extensive testimony, comprehensively reviewed available studies, and published a 345-page report backing its findings. The Legislature included lengthy findings based on these reports in the law. The Florida Supreme Court struck down the law because it disagreed with the legislature's conclusion that reform was needed to address a medical malpractice crisis.

When the case was argued before the Florida Supreme Court, Justice Barbara Pariente recognized that her court had always applied the Equal Protection Clause of the Florida Constitution consistently with the federal court's interpretation of the U.S. Constitution.[324] Two years later, the court reached a completely opposite conclusion from the Eleventh Circuit.

Why did the Florida Supreme Court depart from both federal and Florida constitutional precedent to strike down the noneconomic damage limit on rational basis grounds?

Under the Florida Constitution, the right of access to courts and right to jury trial protects only rights that existed at common law before adoption of the Florida Constitution. These bases were unavailable because the *McCall* case was a wrongful death claim, which was not recognized at common law, and since Florida law did not permit survivors to recover noneconomic damages until 1972. Five members of the court perceived rational basis review as providing sufficient flexibility to invalidate the cap.

Under the court's reasoning, even a law that had a rational basis when enacted could be challenged decades later. The *McCall* decision empowers judges to subjectively decide which statutes still serve their purpose and which do not. Our constitutional system entrusts to the legislature the responsibility to amend or repeal laws as needed. Absent some guiding principle, the court's decision would appear to seize this enormous and unbridled power from the legislature.

Judges in other states whose focal point is fair and responsible jurisprudence are likely to view the *McCall* decision for what it is: an anomaly in the application of rational basis review that demonstrates what occurs when judges allow their policy preferences to trump fundamental principles of constitutional law.

Conclusion

State supreme courts are often respectful of precedent, wise in their public policy decisions, and render what is prescribed on the façade of the Supreme Court of the United States: "Equal Justice Under Law." In a single afternoon, however, a judicial majority of a state supreme court can sweep away a hundred years of precedent, and, in effect, retroactively enact a law that could never pass a state legislature.

This report shows the power and the significance of choices that courts make when formulating rules of tort law. It provides several concrete examples of sound and unsound jurisprudence. These case-by-case rulings go far beyond impacting the individuals before the court. They have a broader impact on the law, the economy, and the public.

The report illustrates that courts can be respectful of the legislature when it defines rights and remedies under tort law. On the other hand, the report demonstrates that judges can trump a carefully conceived legislative judgment by substituting their own subjective views for the policymaking of a duly elected legislature.

The report does not "rank" the state supreme courts as "laboratories of tort law" based on whether they have issued well-reasoned, incremental tort law decisions or engaged in result-oriented jurisprudence. Nevertheless, the cases examined in this report provide a snapshot of where several states supreme courts generally lean in developing tort law at a specific moment in time. On any given day, however, any state high court can fall into the 'judicially fair" or the "judicial overreach" column.

It is also important to recognize that, unlike the U.S. Supreme Court, whose justices serve a lifetime term, the composition of state supreme courts changes and the courts' judicial philosophies shift. A court that may be prone to favor expansions of liability can, within a few years, develop a more cautious approach to the development of common law. The opposite is also true.

From a point of view of basic justice, it is not only important where these courts stand in their judicial philosophy, but also the quality of reasoning shown in the courts' decisions.

These are important considerations for those who have the honor to serve as state supreme court justices, those elected to state legislatures, scholars of tort law and practitioners, and, most importantly, the public.

Endnotes

1 *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 14 (N.Y. 2013).

2 *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 426-30 (W. Va. 1999).

3 *Orlowski v. State Farm Mut. Auto. Ins. Co.*, 810 N.W.2d 775 (Wis. 2012).

4 *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1133 (Cal. 2011).

5 *Foster v. Costco Wholesale Corp.*, 291 P.3d 150 (Nev. 2012); *Hersh v. E-T Enters., Ltd. P'ship*, 752 S.E.2d 336 (W. Va. 2013).

6 *Choate v. Indiana Harbor Belt R.R. Co.*, 980 N.E.2d 58 (Ill. 2012).

7 *Dickhoff v. Green*, 836 N.W.2d 321 (Minn. 2013).

8 *Klairmont v. Gainsboro Restaurant, Inc.*, 987 N.E.2d 1247 (Mass. 2013).

9 *Donahue v. Ledgends, Inc.*, 331 P.3d 342, 353 (Alaska 2014).

10 *Douglas v. Cox Retirement Properties, Inc.*, 302 P.3d 789 (Okla. 2013).

11 *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).

12 *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1159, 1157 (Md. 2013).

13 Additional examples of soundly-reasoned tort law decisions issued between 2012 and 2014 include *Town of Kearny v. Brandt*, 67 A.3d 601 (N.J. 2013) (holding that a jury may allocate fault among all parties that contributed to an injury regardless of whether such parties are subject to liability); *Martino v. Stolzman*, 964 N.E.2d 399 (N.Y. 2012) (holding that homeowners had no duty to prevent intoxicated social guest from leaving property or to guide guest when exiting driveway); *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) (reaffirming traditional rule that a pet is property, reversing appellate court that had "creat[ed] a novel—and expansive—tort claim: loss of companionship for the wrongful death of a pet"). Other court decisions that moved away from traditional tort law principles and expanded liability include *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013) (limiting the economic loss rule to product liability claims and allowing tort claims in disputes in which the parties had entered a contract agreeing to specific rights and remedies); *Howard v. Zimmer, Inc.*, 299 P.3d 463 (Okla. 2013) (overruling prior precedent and holding that, in general, violations of federal regulations suffice as a basis for negligence per se, effectively creating a private right of action not authorized by Congress).

14 *See* Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association,* 37 Am. J. Trial Advoc. 489 (2014).

15 *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012).

16 Restatement (Second) of Torts § 402A cmt. c (1965).

17 *Id.*

18 *See* James Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products,* 37 Sw. U. L. Rev. 595, 601 (2008) (finding that if a manufacturer is required to warn about someone else's products, then the manufacturer "is being required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control").

19 *Id.* at 995 (quoting *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (1963) (emphasis added)).

20 *Id.* at 991 (emphasis in original).

21 *Id.*

22 *Id.* at 1006.

23 *Id.*

24 *Id.* at 1007.

25 *See* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013); Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. L. Rev. 479, 486-87 (2008); William L. Anderson et al., *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J.L. & Pub. Pol'y 1 (2012).

26 Behrens & Anderson, *supra*, at 483.

27 *See e.g., Holcomb v. Georgia Pacific, LLC*, 289 P.3d 188, 197 (Nev. 2012) (following *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986)).

28 *Betz v. Pneumo Abex LLC*, 44 A.3d 27, 55 (Pa. 2012).

29 *Id. at* 54-58; *see also Howard ex rel. Estate of Ravert v. A.W. Chesterton, Inc.,* 78 A.3d 605, 608 (Pa. 2013).

30 *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007).

31 *Id.* at 772.

32 *Id.* at 773.

33 *See Bostic v. Georgia Pac. Corp.*, No. 10-0775, 2014 WL 3797159, at *5 (Tex. July 11, 2014).

34 *Betz*, 44 A.3d at 53.

35 *Id.* at 54.

36 *Id.* at 57.

37 *Id.* at 56-57 (quoting *Gregg*, 943 A.2d at 226-27).

38 *Bostic*, 2014 WL 379159, at *16.

39 *Id.* at *18.

40 *Id.*

41 See *Moeller v. Garlock Sealing Techs., LLC,* 660 F.3d 950 (6th Cir. 2011); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Sclafini v. Air & Liquid Sys. Corp.*, 2014 WL 161391 (C.D. Cal. Apr. 17, 2014); *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26 (D.D.C. 2013); *Sclafini v. Air & Liquid Sys. Corp.*,_ F.Supp.2d_, 2013 WL 2477077 (C.D. Cal. May 9, 2013); *Anderson v. Ford Motor Co.*, 2013 WL 3326832 (D. Utah July 1, 2013); *Smith v. Ford Motor Co.*, 2013 WL 214378 (D. Utah Jan. 18, 2013); *In re Asbestos Prods. Liab. Litig (No. VI) (Sweeney v. Saberhagen Holdings, Inc.)*, 2011 WL 346822 (E.D. Pa. Jan. 13, 2011), *adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011); *In re W.R. Grace & Co.*, 355 B.R. 462 (Bankr. D. Del. 2006), *appeal denied*, 2007 WL 1074094 (D. Del. Mar. 26, 2007); *Daly v. Arvinmeritor, Inc.*, 2009 WL 4662280 (Fla. Cir. Ct. Broward County Nov. 30, 2009); *Brooks v. Stone Architecture, P.A.*, 934 So. 2d 350 (Miss. Ct. App. 2006); *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013); *Free v. Ametek*, 2008 WL 728387 (Wash. Super. Ct. King County Feb. 28, 2008).

42 *See Pluck v. B.P. Oil Pipeline Co.,* 640 F.3d 671 (6th Cir. 2011) (benzene); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005) (ephedrine); *Wills v. Amerada Hess Corp.,* 379 F.3d 32 (2d Cir. 2004) (benzene); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001) (PCB); *Newkirk v. ConAgra Foods, Inc.*, 727 F. Supp. 2d 1006 (E.D. Wash. 2010), *aff'd*, 438 F. App'x 607 (9th Cir. 2011) (microwave popcorn); *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865 (S.D. Ohio 2010), *aff'd*, 2013 WL 3968783 (6th Cir. Aug. 2, 2013) (benzene); *Henricksen v. ConocoPhillips Co.*, 605 F.Supp.2d 1142 (E.D. Wash. 2009) (benzene); *In re Bextra and Celebrex Marketing Sales Practices and Prod. Liab. Litig.*, 524 F.Supp.2d 1166 (N.D. Cal. 2007); *Richardson v. Union Pac. R.R. Co.*, 386 S.W.3d 77 (Ark. Ct. App. 2011) (diesel fumes); *Parker v. Mobil Oil Corp.,* 857 N.E.2d 1114 (N.Y. 2006) (benzene); *Blanchard v. Goodyear Tire and Rubber Co.,* 30 A.3d 1271 (Vt. 2011) (benzene) (quoting *White v. Dow Chem. Co.*, 321 F. App'x 266, 273 (4th Cir. 2009).

43 *Georgia Pac., LLC v. Farrar*, 69 A.3d 1028, 1030 (Md. 2013).

44 *See, e.g., Parsons v. Crown Disposal Co.*, 936 P.2d 70, 80 (Cal. 1997); *Buczkowski v. McKay*, 490 N.W.2d 330, 333 (Mich. 1992); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *see also* Prosser & Keeton on Torts § 53, at 385 (5th ed.1984) ("'Duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.").

45 *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99-100 (N.Y. 1928).

46 *See* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59, 79-87 (2013).

47 *See, e.g., In re Asbestos Litig.*, No. 04C-07-099-ASB, 2007 WL 4571196, at *8 (Del. Super. Ct. Dec. 21, 2007), *aff'd sub nom. Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 26-27 (Del. 2009); *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 169-70 (Del. 2011); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005); *Van Fossen v. MidAm. Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009); *In re Certified Question from Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d 206, 218, 220, 222 (Mich. 2007); *In re N.Y.C. Asbestos Litig. (Holdampf v. A.C.&S., Inc.*), 840 N.E.2d 115, 116 (N.Y. 2005).

48 *See, e.g., Satterfield v. Breeding Insulation, Co.*, 266 S.W.3d 347, 352, 366 (Tenn. 2008), and *Olivo v. Owens-Ill., Inc.*, 895 A.2d 1143, 1149 (N.J. 2006).

49 *See, e.g., Martin v. Gen. Elec. Co.*, No. 02-201-DLB, 2007 WL 2682064, at *5 (E.D. Ky. Sep. 5, 2007), *aff'd sub nom. Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 447 (6th Cir. 2009); *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 422 (Tex. Ct. App. 2008). Some courts have found that a duty could arise slightly earlier, recognizing that the danger of non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably before 1965, when the first study showing an association between asbestos disease and fibers brought home from the workplace was published. *See, e.g.*, *Hoyt v. Lockheed Shipbuilding Co.*, No. C12-1648 TSZ, 2013 WL 3270371, at *7 (W.D. Wash. June 26, 2013), *aff'd*, No. 13-35573, 2013 WL 4804408, at *1 (9th Cir. Sept. 10, 2013).

50 *Farrar*, 69 A.3d at 1030.

51 *Id.* at 1037-38.

52 *Id.* at 1039.

53 *Id.* at 1035.

54 *Id.* at 1036.

55 *Id.* at 1039.

56 *Id.*

57 *Id.*

58 *See In re N.Y.C. Asbestos Litig. (Holdampf v. A.C.&S., Inc.)*, 840 N.E.2d 115, 119 (N.Y. 2005) (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001)) (stressing the existence of a duty does not depend on foreseeability of injury, but instead is based on the defendant's relationship with the plaintiff, and thus "the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship").

59 *See, e.g.*, *In re Certified Question from Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d 206, 219 (Mich. 2007) (quoting Mark Behrens & Frank Cruz-Alvarez, A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims, 21 Mealey's Litig Rep.: Asbestos 1, 4 (2006).) (noting that potential plaintiffs could include "extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker"); *Van Fossen v. MidAm. Energy Co.*, 777 N.W.2d 689, 699 (Iowa 2009) (explaining that the plaintiff's proposed expansion of duty "would be incompatible with public policy" and "would arguably also justify a rule extending the duty to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a Laundromat").

60 *See Simpkins v. CSX Corp.*, 929 N.E.2d 1257, 1264 (Ill. App. Ct. 2010) ("[W]e believe that it takes little imagination to presume that when an employee who is exposed to asbestos brings home his work clothes, members of his family are likely to be exposed as well. Thus, the general character of the harm to be prevented was reasonably foreseeable… from 1958 to 1964."), *aff'd but criticized*, 965 N.E.2d 1092, 1100 (Ill. 2012); *Zimko v. Am. Cyanamid*, 905 So. 2d 465, 472, 483 (La. Ct. App. 2005) (regarding asbestos fibers brought home on the clothes and person of the plaintiff's father from 1945 through 1966, the court said the defendant's "duty is the general duty to act reasonably in view of the foreseeable risks of danger to household members of its employees resulting from exposure to asbestos fibers carried home on its employee's clothing, person, or personal

effects"); *Francis v. Union Carbide Corp.*, 116 So.3d 858, 859 (La. Ct. App. 2013) (permitting take-home exposure claim to proceed where plaintiff alleged his father brought asbestos fibers home on his work clothes from 1943-1945). *But see Thomas v. A.P. Green Indus., Inc.*, 933 So.2d 843, 870-71 (La. Ct. App. 2006) (Tobias, J., concurring) ("Any person citing *Zimko* in the future should be wary of the problems of the majority's opinion in *Zimko* in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.").

61 For an overview of state consumer protection laws, *see* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 15 (2006).

62 *Klairmont v. Gainsboro Restaurant, Inc.*, 987 N.E.2d 1247 (Mass. 2013).

63 *Id.* at 1255.

64 *Id.*

65 *Id.*

66 *Id.* at 1256.

67 *Id.* at 1257.

68 *Id.* at 1258 (quoting *Harrison v. Loyal Protective Life Ins. Co.*, 396 N.E.2d 987 (1979)).

69 *Id.* at 1260.

70 Liz Mulvey, *Case Law Update: Chapter 93A and the Building Code*, Crowe & Mulvey LLP, *at* http://.crowemulvey.com/////case-law-update-chapter-93a-and-the-building-code/ (last visited May 27, 2014).

71 *See Donahue v. Ledgends, Inc.*, 331 P.3d 342, at 353 (Alaska 2014). In reaching its decision, the Alaska Supreme Court cited supportive appellate case law in Hawaii, Oregon, Tennessee, and Washington holding that cases involving personal injury do not fall within the scope of their consumer protection acts. *See id.* at 354.

72 *See generally* Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 5-6 (2010); Victor E. Schwartz & Cary Silverman, *"That's Unfair!" Says Who—The Government or Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93 (2007).

73 For example, in 2011, the Tennessee legislature vested enforcement of the state consumer protection law's "catchall provision," prohibiting "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person," exclusively to the attorney general. *See* H.B. 2008 (Tenn. 2011) (codified at Tenn. Code Ann. § 47-18-104(b)(27).

74 About half of state supreme courts have recognized some form of the "loss of chance" claim. A recent example of the substantial contributing factor approach is *Matsuyama v. Birnbaum*, 452 Mass. 1, 890 N.E.2d 819 (Mass. 2008).

75 Approximately one-quarter of the states continue to apply the traditional rule. *See McAfee v. Baptist Med. Ctr.*, 641 So.2d 265, 267 (Ala. 1994); *Boone v. William W. Backus Hosp.*, 864 A.2d 1, 18 (Conn. 2005); *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So.2d 1015, 1020 (Fla. 1984); *Manning v. Twin Falls Clinic & Hosp., Inc.*, 830 P.2d 1185, 1190 (Idaho 1992); *Kemper v. Gordon*, 272 S.W.3d 146, 148 (Ky. 2008); *Fennell v. S. Md. Hosp. Ctr., Inc.*, 580 A.2d 206, 211 (Md. 1990); *Cornfeldt v. Tongen*, 295 N.W.2d 638, 641 (Minn. 1980); *Clayton v. Thompson*, 475 So.2d 439, 445 (Miss. 1985) (en banc); *Steineke v. Share Health Plan of Neb., Inc.*, 518 N.W.2d 904, 907 (Neb. 1994); *Joshi v. Providence Health Sys. of Or. Corp.*, 149 P.3d 1164, 1170 (Or. 2006); *Jones v. Owings*, 456 S.E.2d 371, 374 (S.C. 1995); *Kilpatrick v. Bryant*, 868 S.W.2d 594, 603 (Tenn. 1993); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 407 (Tex. 1993); *Smith v. Parrott*, 833 A.2d 843, 848-49 (Vt. 2003); *see also Murray v. United States*, 215 F.3d 460, 467 (4th Cir. 2000) (applying Virginia law); *Dumas v. Cooney*, 235 Cal.App.3d 1593, 1608-11 (1991). Several state supreme courts have not decided the viability of a loss of chance claim.

76 *See, e.g., Hrynkiw v. Trammell*, 96 So.3d 794, 806-07 (Ala. 2012).

77 *Dickhoff v. Green*, 836 N.W.2d 321 (Minn. 2013).

78 *Id.* at 334.

79 *Id.* at 347 (Dietzen, J, and Gildea, C.J. dissenting).

80 *Id.*

81 *Id.* at 334 n.13.

82 *Id.* at 335.

83 *Id.* at 336.

84 *Id.*

85 *Id.* at 338 (emphasis in original, internal quotation omitted).

86 *Id.* at 339.

87 *Id.* at 347.

88 *Id.*

89 *Id.* at 348.

90 Hansen, Dordell, Bradt, Odlaug & Bradt, *Minnesota Supreme Court Recognizes "Loss of Chance" Medical Malpractice Claims*, June 13, 2013, *at* http://.hdbob.com//2013//supreme-court-recognizes-loss-of-chance-medical-malpractice-claims/ (last visited May 19, 2014).

91 836 N.W.2d at 348.

92 *Dickhoff v. Green*, 836 N.W.2d 321, 349 (Minn. 2013) (Dietzen, J., dissenting). Several courts, when rejecting recognition of loss of chance claims, found that such an expansion of liability, given its public policy implications, is reserved to the legislature. *See Fennell*, 580 A.2d at 215; *Dumas*, 235 Cal. App.Ct.3d at 1608; *Kemper*, 272 S.W.3d at 152; *Smith*, 833 A.2d at 848.

93 *See* Mich Comp. Laws § 600.2912a(2) (enacted 1994) ("In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."), *abrogating Falcon v. Memorial Hosp.*, 462 N.W.2d 44 (Mich. 1990); S.D. Codified Laws § 20-9-1.1, 1.2 (enacted 2002) ("Legislature also finds that the application of the so called loss of chance doctrine in such cases improperly alters or eliminates the requirement of proximate causation. Therefore, the rule in *Jorgenson v. Vener*, 2000 SD 87, 616 N.W.2d 366 (2000) is hereby abrogated."); N.H. Rev. Stat. Ann. § 507E:2(III) (enacted 2003) ("The requirements of this section are not satisfied by evidence of loss of opportunity for a substantially better outcome. However, this paragraph shall not bar claims based on evidence that negligent conduct by the defendant medical provider or providers proximately caused the ultimate harm, regardless of the chance of survival or recovery from an underlying condition."), *abrogating Lord v. Lovett*, 770 A.2d 1103, 1106 (N.H. 2001).

94 *See* Tory A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Causation*, 87 Mass. L. Rev. 3, 21 (2002) (concluding that loss of chance claims place "great strain upon the judicial truth-seeking process and, at a minimum, must be subject to rigid controls where only substantial losses supported by reliable and pertinent expert testimony are compensable and where recovery is not permitted for unmaterialized harms or otherwise based upon conjecture. Even with such controls, however, it remains fundamentally unfair to adopt such a doctrine as it marks a drastic and unnecessary dilution or basic and longstanding notions of causation and burdens of proof.").

95 *See Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1988); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823-24 (Cal. 1993); *Petito v. A.H. Robins Co.*, 750 So.2d 103, 106-07 (Fla. Dist. Ct. App. 1999); *Ayers v. Township of Jackson*, 525 A.2d 287, 311-12 (N.J. 1987); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145-46 (Pa. 1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993).

96 *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997).

97 *Id.* at 442.

98 *Id.*

99 *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 426-30 (W. Va. 1999).

100 *Id.* at 433-34.

101 *Id.* at 435 (Maynard, J., dissenting).

102 *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2000).

103 *Hinton v. Monsanto Co.*, 813 So.2d 827 (Ala. 2001).

104 *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002).

105 *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005).

106 *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1 (Miss. 2007).

107 *Lowe v. Philip Morris USA, Inc.*, 183 P.2d 181 (Or. 2008).

108 *See Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007).

109 *See* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Flour Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 St. Louis Pub. L. Rev. 135, 154-60 (2007) (exposing the flaws in the Missouri Supreme Court's reasoning and suggesting steps Missouri courts to take to "restore reasonableness" to the availability of medical monitoring claims in Missouri).

110 *See Ratliff v. Mentor Corp.*, 569 F.Supp.2d 926, 928-929 (W.D. Mo. 2008) ("By the Missouri Supreme Court's own definition of a medical monitoring claim, the *Meyer* decision does not apply to potential latent injuries resulting from anything other than exposure to toxic substances" and "*Meyer* does not support medical monitoring claims in garden variety products liability cases….").

111 *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 902 (Mass. 2009).

112 The First Circuit dismissed the medical monitoring claim brought by former Raytheon plant workers and family members who alleged exposure to beryllium dust and fumes placed them at an increased risk for organ problems. The court reasoned that *Donovan* unambiguously required a showing of symptoms or subclinical changes to support a medical monitoring claim and described the plaintiffs' attempt to read the case differently as through "rose colored glasses." *See Genereux v. Raytheon*, No. 13-1921, 2014 WL 2014 WL 2579908 (1st Cir. June 10, 2014).

113 *See* Exxon Mobil Corp. v. Albright, 71 A.3d 30 (Md. 2013); *see also Exxon Mobil Corp. v. Ford*, 71 A.3d 105 (Md. 2013).

114 *Id.* at 84.

115 *Id.* at 80-81.

116 *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013).

117 *Id.* at 14.

118 *Id.*

119 *Id.* at 17.

120 *Id.* at 18 (quoting *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 442-44 (1997)).

121 *Id.*

122 *Id.*

123 *Id.* (citing Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 382-85 (2005)).

124 *See* Victor E. Schwartz & Cary Silverman, *Accuracy in Damages: Florida Juries Should Base Personal Injury Awards on Actual Costs of Treatment, Not Inflated Medical Bills*, Florida Justice Reform Institute (Feb. 2014), at 1, *at* http://www.fljustice.org/docfjri/AD%20VS.pdf; Cary Silverman, *Reducing Wasteful Spending on Litigation: ALEC's Model Phantom Damages Elimination Act*, Inside ALEC (American Legislative Exchange Council), Jan. 2012, at 15.

125 *See, e.g.*, Press Release, *National Nurses United and Institute for Health and Socio-Economic Policy, New Data – Some Hospitals Set Charges at 10 Times their Costs*, Jan. 6, 2014, *at* http://.nationalnursesunited.org///data-some-hospitals-set-charges-at-10-times-their-costs/ and chart of average cost-to-charge ratio by state *at* http://nurses.3cdn.net/966a1174efbe3f9ad1_39m6bntzv.pdf (last visited June 5, 2014).

126 *See* Wilson Andrews, Darla Cameron & Dan Keating, *Disparity in Medical Billing*, Wash. Post, May 8, 2013; *see also* Sarah Kliff & Dan Keating, *One Hospital Charges $8,000 — Another*, $38,000, Wash. Post, May 8, 2013.

127 *See* Glenn A. Melnick & Katya Fonkych, *Hospital Pricing and the Uninsured: Do the Uninsured Pay Higher Prices?*, 27 Health Affairs 116, 118 (2008).

128 *See Orlowski v. State Farm Mut. Auto. Ins. Co.*, 810 N.W.2d 775, 781 (Wis. 2012).

129 *See* Cary Silverman, *Reducing Wasteful Spending on Litigation: ALEC's Model Phantom Damages Elimination Act,* Inside ALEC (American Legislative Exchange Council), Jan. 2012, at 15, *at* http://www.alec.org/docs/Jan2012_InsideALEC.

130 *See Orlowski*, 810 N.W.2d at 777; *see also Leitinger v. DBart, Inc.*, 736 N.W.2d 1 (Wis. 2007); *Koffman v. Leichtfuss*, 630 N.W.2d 201 (Wis. 2001).

131 *Orlowski*, 810 N.W.2d at 778.

132 *Id.* at 779.

133 *See id.*

134 *Orlowski*, 810 N.W.2d at 777.

135 *Id.* at 783.

136 *Id.* at 782-83.

137 *Id.* at 783.

138 *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1133 (Cal. 2011).

139 *Id.* at 1146.

140 *Id.*

141 *Id.* at 1144.

142 *Id.*

143 *Id.*

144 *See Kenney v. Liston*, No. 13-0427, 2014 WL 256563 (W. Va. June 4, 2014).

145 *Id.* (Loughry, J., dissenting) (emphasis in original).

146 *See* H.B. 2023 (Okla. 2011) (codified at 12 Okla. Stat. § 3009.1); H.B. 542 (N.C. 2011) (codified at N.C. Gen. Stat. ch. 8C, Rule 414).

147 Tex. Civ. Prac. & Rem. Code § 41.0105; *see also* Mo. Rev. Stat. § 490.715.5 (enacted 2005) (creating a rebuttable presumption that the amount actually paid represents the reasonable value of medical expenses received); Md. Code Ann., Cts & Jud. Proc. § 3-2A-09(d) (enacted 2005) (providing that "A verdict for past medical expenses shall be limited to: (i) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (ii) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay"). The Texas Supreme Court resolved a split among its appellate courts in 2011 by interpreting its statute to find that evidence of billed amounts of medical expenses that cannot actually be recovered by the plaintiff are irrelevant and therefore admissible evidence is limited to amounts actually paid or are payable by or on behalf of the plaintiff after any contractually or statutorily required reductions, write-offs or write-downs. *Haygood v. De Escabedo,* 356 S.W.3d 390 (Tex. 2011).

148 The legislatures in Colorado, Florida, South Dakota, and Tennessee are among those that have shown interest in the issue in recent years.

149 Dan Walters, *California Supreme Court Plays Role in Tort War*, Sacramento Bee, Aug. 15, 2011, *at* http://.modbee.com/////walters-california-supreme.html.

150 *See* Restatement (Second) of Torts § 333 (1965) (restating common law rule that, in general, "a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care").

151 *See id.* at cmt. b (stating that the "no duty" to trespassers rule "in effect recognize[s] the possessor as privileged to ignore the actual probability that others will trespass upon his land").

152 *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 51-52 (2012).

153 *Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 156 (Nev. 2012).

154 *See* W. Page Keeton, et al., *Prosser and Keeton on Torts*, § 57, at 386 (1984).

155 *See id.*; Restatement (Second) of Torts §§ 333-339 (1965).

156 *See* Restatement (Second) of Torts § 339 (stating "attractive nuisance" doctrine).

157 Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 51-52.

158 *See Foster*, 291 P.3d at 152-53.

159 *See id.* at 153.

160 *Id.* at 152.

161 *Id.* at 156.

162 *Id.* at 153.

163 *See* Ala. Code § 6-5-345; Ariz. Rev. Stat. Ann. § 12-557; Ga. Code Ann. § 51-3-3; H.B. 2447 (Kan. 2014) (effective July 1, 2014); H.B. 5335 (Mich. 2014) (effective June 26, 2014); Mo. Rev. Stat. § 537.351; N.C. Gen. Stat. §§ 38B-1 *et seq.*; N.D. Cent. Code §§ 32-47-01 *et seq.*; Ohio Rev. Code Ann. § 2305.402; Okla. Stat. tit. 76, § 80; S.D. Codified Laws §§ 20-9-11.1 *et seq.*; Tenn. Code Ann. § 29-34-208; Tex. Civ. Prac. & Rem. §75.007; Utah Code Ann. §§ 57-14-102, 57-14-301; Va. Code Ann. §8.01-219.1; Wis. Stat. § 895.529.

164 A number of other states, namely Arkansas, Colorado, Florida, and Kentucky, enacted legislation over a decade ago codifying the traditional duties owed by land possessors to trespassers, which similarly prevents courts in those states from altering the common law. *See* Ark. Code Ann. § 18-60-108; Colo. Rev. Stat. § 13-21-115; Fla. Stat. § 768.075; Ky. Rev. Stat. Ann. §§ 381.231-.232. In Nevada, the legislature had not codified the law, leaving the door open for the state supreme court's ruling in *Foster*.

165 *Hersh v. E-T Enters., Ltd. P'ship*, 752 S.E.2d 336, 348 (W.Va. 2013).

166 *Id.* at 355 (Benjamin, C.J., dissenting).

167 Traditional common law classified property visitors as invitees, licensees, and trespassers. Those distinctions established the duty of care owed by the landowner. West Virginia has abolished the distinction between invitees and licensees and extended the duty of reasonable care to all non-trespassing visitors. *Mallet v. Pickens*, 522 S.E.2d 436 (W. Va. 1999).

168 *Id.* at 340.

169 *Id.* at 347.

170 *Id.* at 345, n. 24 (citing cases).

171 *Id.* at 345.

172 *Id.* at 339.

173 *Id.* at 342.

174 *Id.* at 345 (quoting Restatement (Second) of Torts § 343A(1) (1965)).

175 *Id.* at 346.

176 *Id.* at 347.

177 *Id.* at 350 (Loughry, J., dissenting).

178 *Id.*

179 *Id.*

180 *Id.* at 355 (Benjamin, C.J., dissenting).

181 *Id.*

182 *Id.*

183 *Id.* at 355 (Loughry, J., dissenting).

184 *Id.* at 350.

185 *See id. at* 65-66.

186 *See id.* at 65; *see also* Restatement (Second) of Torts § 339 (1965).

187 *See Choate v. Indiana Harbor Belt R.R. Co.*, 980 N.E.2d 58, 61 (Ill. 2012).

188 *See id. at* 63.

189 *See id. at* 61.

190 *See id. at* 63.

191 *See id. at* 68.

192 *See Choate,* 980 N.E.2d at 65-66.

193 *Id.* at 67.

194 *Id.*

195 *Id.* at 66.

196 *Id.* (citations, emphasis, quotations, and alterations omitted).

197 *Id.* at 66-67 (citations omitted).

198 *Id.* at 69 (internal quotation and citation omitted).

199 *Id.* at 68.

200 *See id.* at 69.

201 *Choate,* 980 N.E.2d at 69 ("It is always unfortunate when a child gets injured while playing, but the responsibility for a child's safety lies primarily with his parents, whose duty it is to see that the child does not endanger himself.").

202 *Id.*

203 *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

204 *Wyeth v. Levine*, 555 U.S. 555 (2009).

205 *See* Victor E. Schwartz, Phil Goldberg & Cary Silverman, *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 Fordham L. Rev. 1835, 1852 (2013).

206 James M. Beck, *Innovator Liability at 100*, Drug & Device Law (blog), July 18, 2014, *at* http://druganddevicelaw.blogspot.com/2014/07/innovator-liability-at-100.html (compiling cases).

207 *See Germain v. Teva Pharm, USA, Inc.,* Slip Op., No. 12-5368 et seq., at 30-38 (6th Cir. June 27, 2014) (evaluating the law of 22 states); *Eckhardt v. Qualitest Pharmaceuticals, Inc.,* 2014 WL 1908651 (5th Cir. May 13, 2014) (applying Texas law); *Lashley v. Pfizer, Inc.,* 2014 WL

661058, at *4-5 (5th Cir. Feb. 21, 2014) (applying Mississippi and Texas law); *Strayhorn v. Wyeth Pharmaceuticals*, 737 F.3d 378, 401- 06 (6th Cir. 2013) (applying Tennessee law); *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1281-84 (10th Cir. 2013) (applying Oklahoma law); *Fullington v. PLIVA, Inc.*, 720 F.3d 739, 744 (8th Cir. 2013) (applying Arkansas law); *Guarino v. Wyeth*, 719 F.3d 1245, 1251-53 (11th Cir. 2013) (applying Florida law); *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1092-93 (8th Cir. 2013) (applying Arkansas law); *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182-83 (5th Cir. 2012) (applying Louisiana law); *Smith v. Wyeth, Inc.*, 657 F.3d 420, 422 (6th Cir. 2011) (applying Kentucky law); *Mensing v. Wyeth, Inc.*, 588 F.3d 603, 613 (8th Cir. 2009) (applying Minnesota law), *aff'd in pertinent part and vacated in part on other grounds*, 658 F.3d 867 (8th Cir. 2011).

208 *See, e.g.*, *Mosley v. Wyeth, Inc.*, 719 F.Supp.2d 1340 (S.D. Ala. 2010)

209 *See* W. Page Keeton, Prosser & Keeton on Torts 358 (5th ed. 1984) (recognizing that duty is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

210 *Mensing*, 588 F.3d at 612-14.

211 *Mensing,* 658 F.3d at 867 (reinstating Section III of its earlier decision, which found it unlikely that the Minnesota Supreme Court would find that the manufacturer of a brand name drug has a duty of care to individuals who took generic products).

212 *Wyeth, Inc. v. Weeks*, No. 1101397, 2013 WL 135753 (Ala. Jan. 11, 2013), withdrawn and substituted, 2014 WL 4055813 (Ala. Aug. 15, 2014).

213 *Id.* at 34-35, 39.

214 *Id.* at *16.

215 *Id.* at *16.

216 *Id.* at *23.

217 *Id.* at *31 (Murdock, J., dissenting).

218 *Id.* at *38 (emphasis omitted).

219 *Id.* at *44 (citing W. Prosser, Law of Torts, 708 (4th ed. 1971)).

220 *Id.*

221 *See Huck v. Wyeth, Inc.*, No 12-0596, 2014 WL 3377071, at *36 (Iowa July 11, 2014).

222 *Id.* at *23 (quoting. Victor E. Schwartz, Phil Goldberg & Cary Silverman, *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm Was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 Fordham L. Rev. 1835, 1871 (2013)).

223 *Id.* at *20.

224 *Dolin v. SmithKline Beecham Corp.,* No. 1:12-cv-06403, slip op. (N.D. Ill. Feb. 28, 2014); *Kellogg v. Wyeth*, 762 F.Supp.2d 694 (D. Vt. 2010).

225 *Erie v. Tompkins*, 308 U.S. 64 (1938).

226 *Germain v. Teva Pharm, USA, Inc.,* Slip Op., No. 12-5368 et seq., at 27, 30-38 (6th Cir. June 27, 2014).

227 *Id.* at 7 (citing Schwartz, Goldberg & Silverman, *supra*, 81 Fordham L. Rev. at 1857-58).

228 *Lance v. Wyeth*, 85 A.3d 434 (Pa. 2014).

229 *See, e.g.,* Clifford A. Rieders, *Big Win for Pharmaceutical Victims* (Pennsylvania Ass'n for Justice 2013), *at* https://.pajustice.org/.cfm?pg=LancevWyethAnalysis.

230 Max Mitchell, *Justices' Pharma Ruling Could Open New Avenue for Recovery*, Legal Intelligencer, Jan. 28, 2014 (quoting Shanin Specter of Kline & Specter).

231 *See, e.g.*, Philip N. Yannella et al., *Plaintiffs May Assert Negligent Design Claims for Prescription Drugs, Pa. Supreme Court Holds*, Ballard Spahr LLP, Jan. 23, 2014, *at* http://www.jdsupra.com//may-assert-negligent-design-c-52077/.

232 *See* Restatement of Torts, Third: Products Liability § 1 (1998).

233 Restatement (Second) of Torts § 402A, comment k (1965).

234 *Id.*

235 *See Hahn v. Richter*, 673 A.2d 888, 889 (Pa. 1996).

236 *Lance*, 85 A.3d at 461.

237 *Id.* at 461 (emphasis added).

238 *Id.* at 457.

239 *Id.* at 457 n.33.

240 *Id.* at 466 (Eakin, J., joined by Castille, C.J., dissenting).

241 *Id.* at 465.

242 Restatement of Torts, Third: Products Liability, § 6(c) (1998) (emphasis added).

243 *See id.,* comment b ("[A] prescription drug or medical device that has usefulness to any class of patients is not defective in design even if it is harmful to other patients.").

244 *Id.* at 457 n.33.

245 *See Barlett v. Mutual Pharmaceuticals Co.*, 133 S. Ct. 2466, 2475 (2013).

246 *See id.* at 2478 ("Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability.").

247 *See, e.g.,* James Henderson & Aaron Twerski, *Drug Designs are Different*, 111 Yale L.J. 151, 180 (2001); David S. Torborg, *Design Defect Liability and Prescription Drugs: Who is in Charge*, 59 Ohio St. L.J. 633, 638-43 (1998) (cited by the Supreme Court of Pennsylvania).

248 *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1159 (Md. 2013).

249 *See id.* at 1158.

250 *See* Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts*, § 220, at 771-72 (2d ed. 2011).

251 *See* Victor Schwartz, *Comparative Negligence*, § 1.01, at 2 (5th ed. 2010).

252 *See* Schwartz, *supra*, at § 2.01, at 33-34.

253 *See Coleman*, 69 A.3d at 1161 n.5 (Harrell, J., dissenting, joined by Bell, C.J.).

254 *See id.* at 1150 (citing *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894 (Md. 1983)).

255 *See id.* at 1156.

256 *See id.* at 1154-55.

257 *See id.* at 1154-55.

258 *Id.* at 1180 (Harrell, J., dissenting, joined by Bell, C.J.).

259 *See id.*

260 *Id.* at 1158.

261 *Id.* at 1150 (quoting *Harrison*, 456 A.2d at 905).

262 *Id.* at 1152.

263 *Id.* at 1157.

264 *Id.* at 1158.

265 *Id.* (Harrell, J., dissenting, joined by Bell, C.J.).

266 *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001).

267 *Douglas v. Cox Retirement Properties, Inc.*, 302 P.3d 789 (Okla. 2013).

268 Schwartz & Lorber, 32 Rutgers L.J. at 908-10.

269 *See* Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 Utah L. Rev. 957, 1004-25 (1999) (compiling state constitution single subject provisions).

270 *Lawsuit Reform Bill Signed Into Law By Oklahoma Gov. Brad Henry*, The Oklahoman, May 21, 2009.

271 *Douglas,* 302 P.3d at 792.

272 *Id.* at 793.

273 *Id.*

274 *Id.*

275 *Id.*

276 *Id.*

277 *Id.* at 794 (emphasis in original).

278 *Id.* at 801-02 (quoting William Mark McKinney & Burdett Alberto Rich, RULING CASE LAW 842 (1919)).

279 *Id.* at 802.

280 *Id.* at 802-03 (citations omitted).

281 *Id.* at 803.

282 *See* Randy Ellis & Graham Lee Brewer, *Oklahoma Lawmakers Conclude Special Session*, Sept. 9, 2013, *at* http://newsok.com/oklahoma-lawmakers-conclude-special-session/article/3881088.

283 *See id.*

284 *See, e.g.,* Mike Seney, *State Chamber Official: Oklahoma Needs Fair, Impartial Judiciary*, Apr. 18, 2014*, at* http://newsok.com/state-chamber-official-oklahoma-needs-fair-impartial-judiciary/article/4035954; T.W. Shannon: *A Call for Judicial Reform*, Tulsa World, Nov. 10, 2013, *at* http://www.tulsaworld.com//of-the-house-t-w-shannon-a-call-for/article_71b6b837-985e-5f24-93de-64ad89088477.html; http://www.oklahomaconstitution.com/ns.php?nid=492&commentary=1.

285 George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982); *see also* E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 Ala. L. Rev. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years.").

286 *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."); Victor E. Schwartz *et al.*, *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003 (2000).

287 *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (providing three guideposts for the analysis of the constitutionality of punitive awards under the Due Process Clause of the Fourteenth Amendment).

288 *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102; Conn. Gen. Stat. § 52-240b; Fla. Stat. § 768.73, Ga. Code § 51-12-5.1; Idaho Code § 6-1604; Ind. Code § 34-51-3-4; Kan. Stat. § 60-3702; Me. Rev. Stat. tit.28-A § 2-804(b) (wrongful death); Miss. Code § 11-1-65; Mont. Code Ann. § 27-1-220(3); Nev. Rev. Stat. § 42.005; N.J. Stat. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); Ohio Rev. Code § 2315.21; Okla. Stat. tit. 23, § 9.1; S.C. Code § 15-32-530; Tenn. Code § 29-39-104; Tex. Civ. Prac. & Rem. Code § 41.008; Va. Code § 8.01-38.1. An additional six states generally do not permit punitive damages awards: Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008).

289 *See* 2 Am. Law Inst., *Reporters' Study on Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 257 (Apr. 15, 1991) (recommending adoption of a ratio); American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 15 (Mar. 3, 1989) (recommending greater of 2:1 ratio or $250,000); ABA Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination* 62 (1986) (recommending 3:1 ratio).

290 *See, e.g.*, *Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993) (in upholding a law requiring the court to determine the amount of punitive damages to be awarded, finding that "[a]lthough the amount of punitive damages may be regarded as a fact question, punitive damages are different from compensatory damages," because "there is no right to punitive damages."); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. Ct. App.-Hous. 1998) (holding that "[b]ecause the statutory cap on punitive damages affects only public punishment interests, it does not infringe upon any constitutional right…").

291 *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002); *Printup*, 866 P.2d at 994; *Rhyne v. K-Mart Corp.,* 594 S.E.2d 1 (N.C. 2004); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Pulliam v. Coastal Emergency Servs.*, 509 S.E.2d 307 (Va. 1999) (upholding a total cap on medical malpractice damages—compensatory and punitive—finding that the statute did not violate the right to a jury trial).

292 *See Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (upholding Virgin Island's cap); *Wackenhut Applied Tech. Center, Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980 (4th Cir. 1992) (upholding Virginia cap); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (upholding Virginia cap) (same).

293 *Boyd*, 877 F.2d at 1196.

294 *Printup*, 866 P.2d at 994.

295 *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993).

296 *See Ex Parte Apicella*, 809 So.2d 865, 874 (Ala. 2001) (overruling *Henderson* to the extent that restricted the legislature from removing from the jury the unbridled right to punish); *Oliver v. Towns*, 738 So.2d 798, 804 n.17 (Ala. 1999) ("Given the post-*Henderson* developments in the concept of due-process law [from the United States Supreme Court] and the forceful rationale of the dissents in *Henderson*, we question whether *Henderson* remains good law.") (internal citations omitted).

297 *See Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011).

298 *Lewellen v. Franklin*, No. SC 92871, 2014 WL 4425202 (Mo. banc Sept. 14, 2014).

299 *See id.* at *1 (citing *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 638 (Mo. banc 2012)).

300 *Id.* at *4.

301 *Id.* at *5.

302 *Id.* at *4 n.10.

303 *See, e.g.,* Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J.L. & Pub. Pol'y 50 (2011).

304 *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014).

305 *See Heller v. Doe*, 509 U.S. 312, 321 (1993).

306 *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

307 *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937).

308 *See* Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Fla. Stat. § 766.118; Ind. Code § 34-18-14-3; La. Rev. Stat. Ann. § 40:1299.42; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H; Mich. Com. Laws Ann. § 600.1483; Miss. Code § 11-1-60(2)(a); Mont. Code § 25-9-411; Neb. Rev. Stat. § 44-2825; Nev. Rev. Stat. § 41A.035; N.M. Rev. Stat. § 41-5-6; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code Ann. § 2323.43; S.C. Code Ann. § 15-32-220; S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code Ann. § 74.301; Utah Code § 78B-3-410; Va. Code § 8.01-581.15; W. Va. Code § 55-7B-8; *see also* 27 V.I.C. § 166b.

309 *See* Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5; Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. §§ 60-19a01 to -19a02; Md. Cts. & Jud. Proc. Code § 11-108; Miss. Code § 11-1-60(2)(b); Ohio Rev. Code Ann. § 2315.18; 23 Okla. Stat. § 61.2; Tenn. Code Ann. § 29-39-102.

310 For cases upholding noneconomic damages limits in medical negligence cases, *see Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Rashidi v. Moser*, 219 Cal. App. 4th 1170 (2013), *review granted on other grounds*, 315 P.3d 1183 (Cal. 2014); *Jimena v. Wong*, 2013 WL 820492 (Cal. App. Mar. 6, 2013), *cert. denied*, 134 S. Ct. 703 (2013); *Stinnett v. Tam,* 198 Cal. App. 4th 1412, 1430-33 (2011); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571, 580-84 (Colo. 2004); *Univ. of Miami v. Echarte*, 618 So.2d 189, 191 (Fla. 1993); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115, 1119-22 (Idaho 2000); *Miller v. Johnson,* 289 P.3d 1098, 1109-24 (Kan. 2012); *Oliver v. Magnolia Clinic*, 85 So.3d 39, 44-46 (La. 2012); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 736-39 (Mich. App. 2002); *Needham v. Mercy Mem. Nursing Ctr.*, 2013 WL 5495551 (Mich. App. Oct. 3, 2013); *Knowles v. United States*, 544 N.W.2d 183, 204-05 (S.D. 1996), *superseded by statute*; *Prabhakar v. Fritzgerald*—S.W.3d—2012 WL 3667400, at *11-13 (Tex. App.-Dallas Aug. 24, 2012); *Judd v. Drezga*, 103 P.3d 135, 139-45 (Utah 2004); *MacDonald v. City Hosp., Inc.,* 715 S.E.2d 405, 413-22 (W. Va. 2011). For cases upholding laws limiting noneconomic damages in all personal injury cases, see *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1129-33 (Alaska 2009); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 95 (Colo. App. 1998); *Samsel v. Wheeler Transp. Servs., Inc.,* 789 P.2d 541, 557-58 (Kan. 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *McGinnes v. Wesley Med. Ctr.*, 224 P.3d 581, 591-92 (Kan. Ct. App. 2010); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 55-59 (Md. 2010); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432-38 (Ohio 2007).

311 *See, e.g., Learmonth v. Sears, Roebuck & Co.,* 710 F.3d 249 (5th Cir. 2013) (Mississippi); *Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944 (11th Cir. 2011) (Florida); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005) (Michigan); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996) (Kansas); *Owen v. United States*, 935 F.2d 734 (5th

Cir. 1991) (Louisiana); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (Virginia); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (California); *Bixby v. KBR, Inc.*, 2013 WL 1789792 (D. Or. Apr. 26, 2013); *Watson v. Hortman*, 844 F.Supp.2d 795 (E.D. Tex. 2012); *Federal Express Corp. v. United States*, 228 F.Supp.2d 1267 (D. N.M. 2002); *Simms v. Holiday Inns, Inc.*, 746 F.Supp.596 (D. Md. 1990); *Franklin v. Mazda Motor Corp.*, 704 F.Supp.1325 (D. Md. 1989).

312 *Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011).

313 *See Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Lebron v Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Watts v. Lester E. Cox Med. Ctrs.,* 376 S.W.3d 633 (Mo. 2012); *see also Moore v. Mobile Infirmary Assoc.*, 592 So.2d 156 (Ala. 1991); *Smith v. Dep't of Ins.*, 507 So.2d 1080 (Fla. 1987); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lakin v. Senco Prods. Inc.*, 987 P.2d 463 (Or. 1999); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), *superseded by constitutional amendment*, Tex. Const. art III, § 66 (amended 2003); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005). *But see Bixby*, 2013 WL 1789792, at *30-31 (casting doubt on viability of *Lakin* post-*Howell*, 298 P.3d at 9, which held that "the legislature is authorized to enact a limit on tort claim recovery so long as the remaining remedy is 'substantial'").

314 *McCall*, 134 So.3d at 906.

315 *Id.*

316 *Id.* at 909.

317 *Id.* at 914.

318 *Id.* at 916 (Pariente, J, concurring in result, joined by Quince, and Perry, JJ).

319 *Id.* at 920.

320 *Id.* at 930 (Polston, J., dissenting, joined by Canady, J.).

321 *Id.* at 931.

322 *Id.* at 932.

323 *Id.* at 932 n.14.

324 *See* Transcript of oral argument *at* http://www.wfsu.org/gavel2gavel/transcript/pdfs/11-1148.pdf and video of oral argument at http://wfsu.org/gavel2gavel/viewcase.php?eid=274.

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