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## Tort Reform Unraveled

### *Georgia Supreme Court Finds Noneconomic Damages Caps to be Unconstitutional*

In 2005, the Georgia Legislature enacted a broad tort reform package which, among other things, capped noneconomic damages arising from medical malpractice claims ("Tort Reform Act of 2005"). Such an effort mirrored tort reform efforts by various state legislatures across the country.

By its recent ruling in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt et al.*, Case No. S09A1432 (Ga. March 22, 2010), the Georgia Supreme Court found these noneconomic caps to be unconstitutional. Equally notable, the reasons and bases for the Court's decision may well have substantial implications for damages caps on tort claims generally and the Georgia Legislature's ability to offset or "reverse" the *Nestlehutt* decision or undertake additional tort reform efforts through legislative activity.

### Background

As part of the Georgia Tort Reform Act of 2005, the Georgia Legislature enacted a number of caps on noneconomic damages for medical malpractice claims. As ultimately set forth in Section 51-13-1 of the Georgia Code, noneconomic damages for medical malpractice claims were capped at \$350,000 in actions against health care providers, \$350,000 in actions against a medical facility, \$700,000 in actions against multiple medical facilities, and \$1,050,000 in actions against multiple health care providers and medical facilities.

In the *Nestlehutt* case, Plaintiff Betty Nestlehutt claimed that plastic surgery had been improperly performed by Defendant, leaving her permanently disfigured and without blood supply to her face. Both Betty Nestlehutt and her husband sought economic damages, as well as noneconomic damages, for pain and suffering and loss of consortium. Following trial, the jury returned a total verdict of \$1,265,000, which consisted of \$115,000 for past and future medical expenses, \$250,000 for Mr. Nestlehutt's loss of consortium, and \$900,000 for Mrs. Nestlehutt's pain and suffering. With the application of the Tort Reform

Act of 2005, however, Plaintiff's recovery would have been reduced to a total of \$465,000 (\$115,000 for medical expenses and \$350,000 for all the noneconomic damages).

Following trial, Plaintiffs moved the trial court to have the \$350,000 damages cap declared unconstitutional. The trial court granted Plaintiffs' motion and entered judgment for the full amount of damages awarded by the jury. Defendant-Appellant then appealed the case directly to the Georgia Supreme Court.

### The Georgia Supreme Court's Decision Affirming the Unconstitutionality of the Noneconomic Damages Cap

On March 22, 2010, the Georgia Supreme Court unanimously held that the noneconomic damages cap of \$350,000 in medical malpractice cases was unconstitutional and violated the constitutional right to trial by jury embodied in the Georgia Constitution.

The Court began its analysis by noting that the Georgia Constitution expressly provides that the "right to a trial by jury shall remain inviolate." Relying upon prior precedents, the Georgia Supreme Court noted that the Georgia legislature had adopted the common law of England as the law of Georgia prior to the adoption of the Georgia Constitution in 1798, and that the Georgia constitutional "guarantee" to the right to trial by jury only exists with respect to those causes of action where there had previously existed a right to trial by jury prior to the Georgia Constitution's adoption.

The Georgia Supreme Court then appeared to go on to hold that a constitutional right to trial by jury *always* exists for any common law claims that existed prior to the adoption of the Georgia Constitution. Following a historical analysis, the Court found that such a right to trial by jury did exist for medical malpractice claims prior to 1798, and, therefore, there exists a Georgia constitutional right to a trial by jury of medical malpractice claims.<sup>1</sup>

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**Tort Reform Unraveled** (cont'd.)

The Court next turned to the issue of whether a noneconomic cap on damages for such claims violated this constitutional right. In finding that it did violate the Georgia Constitution, the Court held that the right to a trial by jury necessarily provides for an attendant right to obtain the full measure of damages as determined by a jury. By imposing restrictions on the ability of a jury to award damages for noneconomic factors, the Court found the Tort Reform Act of 2005 to have “clearly nullif[ied] the jury’s findings of fact regarding damages,” thereby “undermin[ing] the jury’s basic function” and infringing on a party’s constitutional right to a jury’s determination of such damages.

The Court concluded by determining that this ruling of unconstitutionality would apply retroactively to all pending cases from the date of enactment of the Tort Reform Act of 2005.<sup>2</sup>

**Implications**

While the Court’s finding of unconstitutionality of noneconomic damages caps was limited to the medical malpractice caps imposed by the Tort Reform Act of 2005, there may be a number of significant implications for noneconomic damages caps on tort claims generally, and the ability to have those caps imposed.

First, it may be argued, under the reasoning and “rule” of *Nestlehutt*, that any statute imposing noneconomic damages caps for any common law claims existing at the time of the Georgia Constitution’s adoption are necessarily unconstitutional.

Further, given the constitutional nature of these rights, it may be argued that the only method by which such caps may be imposed would be through the amendment of the Constitution itself, obviously a more significant challenge than simple legislative passage of a statute. Hence, not only would a constitutional amendment be required to “fix” the Tort Reform Act of 2005, but moreover, such amendment would equally be required to impose noneconomic damages caps for a number of other long-established common law claims.

While the ultimate interpretation and application of the *Nestlehutt* decision will, of course, require further analysis and application by the Georgia courts, insurers and policyholders should now be aware that Georgia law may no longer provide limitations on noneconomic damages, absent some future constitutional amendment to the Georgia constitution.

**Endnotes**

- 1 Ironically, English law and procedure no longer provide for jury trials in almost all civil cases.
- 2 While the Court unanimously agreed to this retroactive effect, the Court did split on the bases for such retroactivity.

**About the Authors**

Nigel Wright is a partner in Locke Lord’s Atlanta office. He focuses on all aspects of dispute resolution with particular emphasis on arbitration, international law, insurance and reinsurance, aviation and product liability.

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