STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

ASCARIS MAYO ET AL.,

Plaintiffs,

v.

Case No.: 2012CV006272

THE WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND, ET AL.,

Defendants.

DECISION AND ORDER

This action stems from the medical treatment that plaintiff Ascaris Mayo received in the emergency room at Columbia St. Mary's Hospital from defendants Wyatt Jaffe, M.D. and Donald Gibson, P.A.-C. (collectively with the Wisconsin Injured Patients and Families Compensation Fund, "the Defendants"). Mrs. Mayo suffered extreme complications after her stay in the emergency room. She and her husband, Antonio (collectively, "the Plaintiffs"), brought this medical malpractice action as a result. After trial, a jury found that the Defendants were not medically negligent in their treatment of Mrs. Mayo, but that they failed to inform Mrs. Mayo of alternate diagnoses and treatments that were available to treat her symptoms.

The Court heard the parties' motions after verdict on September 5, 2014. Following that hearing, two issues remain: (1) the Defendants'[1] motions to change the answers on the informed consent questions or, alternatively, motion for a new trial or for judgment not withstanding the verdict; and (2) the Plaintiffs' motion to find the $750,000 noneconomic damages cap ("the Cap") set forth in Wis. Stat. § 893.55(4) unconstitutional as applied to their case.

[1] The Defendants join in each others' motions after verdict. Therefore, the motions are referred to as having been brought collectively by all of the Defendants.

STATEMENT OF FACTS

On May 24, 2011, Mrs. Mayo was admitted to the emergency room at Columbia St. Mary's Hospital with a fever and acute abdominal pain. The symptoms were indicative of infection, and the Defendants included infection on their differential diagnosis. However, the Defendants ultimately decided to treat Mrs. Mayo for uterine fibroids because she had a medical history of fibroids. They discharged Mrs. Mayo that evening with instructions to follow up with her personal gynecologist. Mrs. Mayo visited a different emergency room the following day because her illness worsened. At this visit, she was diagnosed with a septic infection caused by Strep A. As a result of the septic infection, Mrs. Mayo had all four of her limbs amputated. Now, Mrs. Mayo's mobility depends on how well she adapts to the use of prosthetic arms and legs.

The Plaintiffs filed this action, claiming that the Defendants were negligent in their diagnosis and treatment of Mrs. Mayo. During a three-week jury trial, the parties debated whether the Defendants should have treated Mrs. Mayo for an infection given her signs and symptoms in the emergency room. They also debated whether the administration of antibiotics would have quelled Mrs. Mayo's infection and possibly prevented the amputations. The case was submitted to the jury on medical negligence and informed consent claims. The jury found that the Defendants were not medically negligent in their diagnosis and treatment of Mrs. Mayo, but did find that the Defendants failed to properly inform Mrs. Mayo about the availability of antibiotics to treat her suspected infection. The jury found that the Defendants' failure to discuss the possibility of infection or the availability of antibiotics was a cause of Mrs. Mayo's injuries.

The jury awarded the Plaintiffs nearly $9 million in economic damages and $16.5 million in noneconomic damages. Of these noneconomic damages, $15 million was meant to compensate Mrs. Mayo for her pain, suffering, disability, and disfigurement. The remaining

$1.5 million was meant to compensate Mr. Mayo for the loss of society and companionship of his wife.

DISCUSSION

The Court recently heard oral argument on a variety of motions after verdict. Two issues remain to be decided by this Court. First is the Defendants' motion to change the jury's answers on the informed consent questions. In the alternative, they ask the Court for a new trial or to enter judgment notwithstanding the verdict ("JNOV"). The Defendants generally contend that there is no credible evidence to sustain the jury's findings on the informed consent questions.

The second issue is the Plaintiffs' as-applied challenge to Wisconsin's $750,000 noneconomic damages limit in medical malpractice cases. The Plaintiffs argue that, although the Cap may be constitutional with regard to the majority of medical malpractice plaintiffs, it is unconstitutional as applied to the facts of this case. They ask the Court to enter judgment on the jury's $16.5 million noneconomic damages award.

For the reasons discussed below, the Court hereby DENIES the Defendants' motions to change the jury's answers, for a new trial, and for JNOV. Furthermore, the Court GRANTS the Plaintiffs' motion for a finding that the Cap is unconstitutional as applied to them.

I. THE DEFENDANTS' MOTION TO CHANGE THE JURY'S ANSWERS ON THE INFORMED CONSENT QUESTIONS OR, IN THE ALTERNATIVE, MOTIONS FOR A NEW TRIAL OR FOR JUDGMENT NOT WITHSTANDING THE VERDICT

The special verdict contained questions about the Defendants' duty to obtain Mrs. Mayo's informed consent regarding her diagnosis and treatment. The essence of the informed consent statute, as set forth in Wis. Stat. § 448.30 (2011), is that "when a reasonable person would want to know about an alternative treatment or method of diagnosis… the decision is not the physician's alone to make." *Jandre v. Wis. Injured Patients and Families Comp. Fund*, 2012

WI 39, 340 Wis. 2d 31, 83. The specific issue for the jury was whether the Defendants properly informed Mrs. Mayo of the possibility that she had an infection, and whether they should have offered her antibiotics. The jury found that the Defendants failed to inform Mrs. Mayo of the possibility of infection and of the availability of antibiotics, and that a reasonable patient in Mrs. Mayo's condition would want to know such information. The jury also found that the Defendants' failure to discuss infection and antibiotics was a cause of Mrs. Mayo's injuries.

A. STANDARD OF REVIEW

1. Motion to change answers

As a result of the jury's findings, the Defendants ask the Court to change the jury's answers in their verdict. A party may move the court to change an answer in the verdict on the grounds that there is insufficient evidence to sustain it. Wis. Stat. § 805.14(5)(c). Because a motion to change an answer challenges the sufficiency of the evidence, it must be considered in context with the jury instructions. *Kovalic v. DEC Intern, Inc.*, 161 Wis. 2d 863, 873 (Ct. App. 1991). "The trial court is not justified in changing the jury's answers if there is any credible evidence to support the jury's findings." *Richards v. Mendivil*, 200 Wis. 2d 665, 671 (Ct. App. 1996). "In reviewing the evidence, the trial court is guided by the proposition that '[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence,' the trial court must accept the inference drawn by the jury." *Id.* (*citing Nelson v. Travelers Ins. Co.*, 80 Wis. 2d 272, 282-83 (1977)).

2. Motion for a new trial

In the alternative, the Defendants ask the Court to grant a new trial. A party may move for a new trial "because of errors in the trial, or because the verdict is contrary to law or to the

weight of evidence." Wis. Stat. § 805.15(1). A trial court's decision to grant a new trial is discretionary. *Schreiner v. Beghin*, 260 Wis. 561, 566 (1952). A new trial may be granted where the verdict is "wholly unwarranted by the evidence" but, if the verdict is one that "reasonable men might find," it is not the trial court's duty to disturb that decision. *Shaver v. Davis*, 175 Wis. 592, 185 N.W. 227, 230 (1921). The fact that others may not agree with the jury's verdict, or that a different jury could reach a different conclusion, is not grounds for granting a new trial. *Bartell v. Luedtke*, 52 Wis. 2d 372, 379 (1971).

3. Motion for Judgment Notwithstanding the Verdict

If the Court declines to change the jury's answers or to grant a new trial, the Defendants request JNOV. A motion for JNOV does not challenge the sufficiency of the evidence to support the verdict but asserts that, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment. Wis. Stat. § 805.14(5)(b); *see also Danner v. Auto-Owners Ins.*, 245 Wis. 2d 49, 61 (2001). A motion for JNOV admits the facts found by the jury but contends that, as a matter of law, those facts are insufficient to constitute a cause of action. *Wozniak v. Local No. 1111 of UE*, 57 Wis. 2d 725, 733 (1973). For the motion to be granted, there must be no dispute as to material issues of fact, and the evidence must be so clear and convincing as to permit reasonable minds to come to only one conclusion. *Id.* "Thus, it is only in the most unusual case that a jury's verdict will be upset." *Millonig v. Bakken*, 112 Wis. 2d 445, 451 (1983).

B. ANALYSIS

The Defendants advance multiple arguments in support of their motions. First, that there is no credible evidence to sustain the jury's findings that the Defendants failed to obtain Mrs. Mayo's informed consent; second, that there is no credible evidence to sustain the jury's findings

that the Defendants were a cause of Mrs. Mayo's injuries; third, that two recent cases finding a lack informed consent, *Jandre*, 340 Wis. 2d 31, and *Bubb v. Brusky*, 321 Wis. 2d 1, are distinguishable from the facts of this case; and finally, that recent modifications to Wisconsin's informed consent law, from a "reasonable patient" standard to a "reasonable physician" standard, justify changing the jury's answers. Each argument is addressed in turn.

1. **There is credible evidence to sustain the jury's determination that the Defendants failed to obtain Mrs. Mayo's informed consent.**

The Defendants first contend that Mr. Gibson repeatedly discussed the possibility of infection with the Plaintiffs, and therefore the jury's findings that the Defendants failed to obtain informed consent are not supported by the evidence. The Defendants originally considered the possibility of infection because Mrs. Mayo was feverish and her lab results showed a high white blood cell count. In evaluating the Defendants' argument, the Court must consider all credible evidence "and reasonable inferences therefrom in the light most favorable to" the Plaintiffs. Wis. Stat. § 805.14(1). The Court may not change the jury's answers unless there is no credible evidence to support them. *Richards,* 200 Wis. 2d at 671. Similarly, the Court may not grant a new trial unless it concludes that the jury's findings on the informed consent questions were "wholly unwarranted by the evidence." *Shaver*, 185 N.W. at 230. That is not the case here.

The Defendants' contention that Mr. Gibson adequately discussed the possibility of infection is not uncontroverted. There is some evidence that Mr. Gibson briefly discussed the possibility of infection with Mrs. Mayo because it was part of her differential diagnosis. However, most of Mr. Gibson's testimony was phrased in terms of generalities, as he does not remember much about his specific communications with Mrs. Mayo, which date back to 2011. From this testimony, the jury could have inferred that Mr. Gibson only briefly discussed infection with Mrs. Mayo, if discussed at all. In addition, Mr. Mayo testified that neither Mrs.

Mayo's lab results nor the general possibility of infection was discussed when she was discharged. This contradicts Mr. Gibson's testimony that he went over the labs again upon discharge.

Moreover, even if Mr. Gibson did adequately discuss the possibility of infection, there was no evidence that the Defendants discussed the availability of antibiotic treatment. A health care provider must "disclose information necessary for a reasonable person to make an intelligent decision with respect to the choices of treatment or diagnosis." *Jandre*, 340 Wis. 2d at 51. Thus, there was credible evidence from which the jury could find that the Defendants breached their duty to obtain informed consent because they did not advise Mrs. Mayo of the availability of antibiotics as an alternative treatment option. This is particularly true given both Dr. Jaffe and Mr. Gibson's testimony that they considered infection throughout their treatment of Mrs. Mayo. If they never definitively ruled out infection, the jury could have found that it was improper not to offer Mrs. Mayo antibiotics. The jury's finding that the Defendants failed to properly inform Mrs. Mayo is supported by the evidence. Therefore, the Defendants cannot meet their burden to prove that changing answers or a new trial is warranted.

2. There is credible evidence to sustain the jury's determination that the Defendants' failure to obtain informed consent caused Mrs. Mayo's injuries.

Next, the Defendants argue that there was insufficient evidence at trial to prove their actions caused Mrs. Mayo's injuries. The Defendants' experts testified that it is speculative to say that administration of antibiotics in the emergency room would have made any difference in the outcome of Mrs. Mayo's infection. The Plaintiffs' experts offered contrary opinions, testifying that administration of broad-based antibiotics in the emergency room would have controlled Mrs. Mayo's infection. In fact, one of the Plaintiffs' experts testified that administration of antibiotics as late as 8:00 a.m. on May 25, 2011 could have controlled the

infection. In addition, testing conducted after Mrs. Mayo left Columbia St. Mary's Hospital proved her infection could have been treated by the use of broad-based antibiotics. The Court acknowledges that the issue of causation was contested at trial, but the jury was competent to evaluate the evidence and resolve those conflicts. *Richards*, 200 Wis. 2d at 671. The jury resolved those conflicts in the Plaintiffs' favor, and there was sufficient evidence for it to do so.

Mr. Gibson argues that his actions in particular cannot have been causal because, as a physician assistant, he has limited knowledge of Strep A infections. Mr. Gibson relies on the fact that health care providers are not liable "for failing to disclose information if they could not reasonably have known, based on circumstances then existing, that the information was potentially important." *Jandre*, 341 Wis. 2d at 53. But, even if a health care provider does not know the full extent of a patient's condition, he is still required to make whatever disclosures reasonably necessary to allow a patient to "intelligently exercise his right to consent or to refuse the treatment or procedure proposed." *Id.* at 52. Mr. Gibson testified that he understood the general signs and symptoms of infection and that Mrs. Mayo displayed those signs and symptoms. The fact that he could not connect the infection to Strep A does not relieve him of the duty to inform Mrs. Mayo of the general possibility of infection. A reasonable patient would have wanted to know that infection was part of her differential diagnosis, whether or not her health care provider could specifically attribute it to Strep A. A reasonable patient would also want to know that antibiotics are available to treat a suspected infection, even though her health care provider believed there was a more likely cause of her symptoms. Therefore, there was credible evidence upon which the jury could have based its answers to the informed consent questions.

3. Recent cases do not dictate a reversal of the jury's answers to the informed consent questions.

The Defendants also attempt to combat the jury's informed consent answers by distinguishing two recent cases decided by the Wisconsin Supreme Court, *Jandre*, 2012 WI 39, 340 Wis. 2d 31, and *Bubb*, 2009 WI 91, 321 Wis. 2d 1. In *Jandre*, an emergency room doctor diagnosed Jandre with Bells palsy and sent him home. *Jandre*, 341 Wis. 2d at 61. Although the doctor noted the possibility that Jandre suffered a stroke, she did not order a simple carotid ultrasound to rule out that possibility or advise Jandre of the availability of the procedure. *Id.* at 61. He suffered a stroke a few days later. *Id.* at 62. Similarly, in *Bubb*, the emergency room doctor correctly determined that Bubb suffered a mini-stroke. *Bubb*, 321 Wis. 2d at 5. The doctor did not order a Doppler ultrasound to address the possibility of a more serious stroke, and Bubb suffered a full-blown stroke just two days after he was discharged from the emergency room. *Id.* at 7.

The Defendants attempt to distinguish *Jandre* and *Bubb* because, in those cases, the ultrasounds that the doctors failed to order were simple and noninvasive. *Jandre*, 340 Wis. 2d at 61; *Bubb*, 321 Wis. 2d at 7-8. In this case, the antibiotics that the Plaintiffs' experts testified would have quelled Mrs. Mayo's infection had potential side effects and may have contributed to antibiotic resistance. However, the Court notes that, even if the administration of antibiotics did have potential drawbacks, a health care provider is not relieved of his or her duty to inform a patient of viable alternative modes of treatment just because the treatment was not simple or noninvasive.

The Defendants also observe that, in *Jandre* and *Bubb*, neither doctor discussed the possibility of a stroke or the availability of an ultrasound with the plaintiffs, whereas here there was testimony that Mr. Gibson at least mentioned infection to Mrs. Mayo. *Jandre*, 340 Wis. 2d

at 61-62; *Bubb*, 321 Wis. 2d at 7. They further argue that there was no evidence that the administration of antibiotics would have changed the outcome of this case. As already discussed, there was conflicting testimony about whether Mr. Gibson sufficiently addressed the possibility of infection with Mrs. Mayo, and there was no testimony that the Defendants ever advised her of the availability of antibiotics. There was also testimony, although contested, that Mrs. Mayo's outcome would have been different if the Defendants had administered antibiotics in the emergency room. In that sense, the Defendants' arguments are unpersuasive.

Jandre and *Bubb* are but two of many cases addressing Wisconsin's informed consent law. The Court acknowledges that the facts of this case are different than the facts in *Jandre* and *Bubb*, but they are not so significantly different as to make the cases distinguishable. In each case, the central question is the same: Would reasonable patients in the plaintiffs' positions have wanted to know of potential different diagnoses, and the alternate treatments for those diagnoses? In all three instances, the answer was "yes." For these reasons, the Court declines to hold that *Jandre* and *Bubb* dictate a finding in the Defendants' favor on the informed consent questions.

4. Legislative modifications to Wis. Stat. § 448.30 do not require that the jury's answers be consistent on the medical negligence and informed consent questions.

The version of Wis. Stat. § 448.30 (2011) in effect during the Defendants' treatment of Mrs. Mayo required health care providers to disclose "what a reasonable person in the patient's position would want to know." *Jandre*, 340 Wis. 2d at 51-52. This was known as the "reasonable patient" standard. The legislature changed the "reasonable patient" standard in 2013. Now, a physician's conduct is governed by the "reasonable physician" standard. This new standard "requires disclosure only of information that a reasonable physician in the same or similar medical specialty would know and disclose under the circumstances." Wis. Stat. § 448.30

(2014). Wisconsin's medical negligence law, which the jury found that the Defendants did not violate, is also governed by the "reasonable physician" standard. *Jandre*, 340 Wis. 2d at 78.

The Defendants argue that, given the 2013 modifications to Wis. Stat. § 448.30, they should not be liable for failure to obtain informed consent when they were found not negligent in their treatment of Mrs. Mayo. The Defendants believe the jury's findings are inconsistent because both claims are now governed by the same standard. In *Jandre*, the Court considered whether it was inconsistent for a jury to determine that a doctor was not negligent in diagnosis or care and yet that he was negligent with respect to obtaining informed consent about a procedure unrelated to the patient's diagnosis. *Id.* at 77. When *Jandre* was decided, the law of medical negligence and the law of informed consent were governed by two different standards—"reasonable physician" and "reasonable patient," respectively—so the Court declined to hold that the jury's findings were "contradictory or anomalous." *Id.* at 80. In so deciding, the Court relied on precedential case law and decided that "no compelling reasons have been brought forth for the court to reverse precedent." *Id.* The Defendants argue that the legislature created a compelling reason to reverse that precedent through the recent modifications to Wis. Stat. § 448.30.

The change in informed consent law from a "reasonable patient" to a "reasonable physician" standard does not require the Court to grant the Defendants' motions after verdict. The standard governing the Defendants' conduct on May 24, 2011 was the "reasonable patient" standard. The jury was instructed as to that standard. A motion to change answers must be considered in context with the jury instructions. *Kovalic*, 161 Wis. 2d at 873. The jury was properly instructed on the standard governing the Defendants' conduct when they treated Mrs. Mayo, and there is credible evidence to support the jury's findings. Similarly, there were no

errors to justify a new trial because the jury properly considered the Defendants' conduct based on the law as it existed when they treated Mrs. Mayo. *See* Wis. Stat. § 805.15(1). Therefore, the Court will not change the jury's answers on the informed consent questions.

Nor will the Court grant JNOV, because the jury's answers are not irreconcilably inconsistent as a matter of law. *Hicks v. Nunnery*, 2002 WI App 87, 253 Wis. 2d 721, 736. First, the modified text of Wis. Stat. § 448.30 says nothing about whether a doctor can be liable for failure to obtain informed consent without a finding of negligence. Absent express legislative intent to that effect, this Court will not make inferences regarding Wis. Stat. § 448.30 that are not present in its clear, explicit language. *See Bostco, LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, 350 Wis. 2d 554, 585 ("Statutory interpretation requires [courts] to determine the statute's meaning, which is assumed to be expressed in the language chosen by the legislature.") Second, it could be said that the legislature's reenactment of Wis. Stat. § 448.30 simply affirms its desire to have two separate approaches to medical malpractice—a medical negligence claim and an informed consent claim. Despite the change to the "reasonable physician" standard, a health care provider's duty to obtain informed consent remains intact.

For all of these reasons, the Court denies the Defendants' motions after verdict regarding the informed consent questions. The jury's answers as to the informed consent questions will stand.

II. THE PLAINTIFFS' MOTION TO DECLARE WIS. STATS. §§ 655.017 AND 893.55(4) UNCONSTITUTIONAL AS APPLIED

The remaining issue is the Plaintiffs' as-applied challenge to Wisconsin's $750,000 noneconomic damages cap. In Wisconsin, successful medical malpractice plaintiffs may receive awards of economic and noneconomic damages through the Wisconsin Injured Patients and Families Compensation Fund ("Fund"), for which health care providers pay premiums. The

purpose of the Fund is to cover the full amount of claims in excess of the providers' liability insurance. Wis. Stat. § 655.27(1). "The [F]und, including any net worth of the [F]und, is held in irrevocable trust for the sole benefit of health care providers participating in the fund and proper claimants." Wis. Stat. § 655.27(6).

In an effort to improve health care in Wisconsin, Wis. Stats. §§ 655.017 and 893.55(4) limit the amount of noneconomic damages a medical malpractice plaintiff may recover to $750,000 per occurrence. The goal of the Cap is to "ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to victims of medical malpractice." Wis. Stat. § 893.55(1d)(a). The legislature found the Cap meets this goal by (1) protecting access to health care by limiting disincentives for physicians to practice in Wisconsin, such as the unavailability of malpractice insurance and unpredictable or large noneconomic damages awards; (2) helping contain health care costs by limiting incentives to practice defensive medicine; (3) helping curtail health care costs by providing more predictability in noneconomic damage awards, allowing insurers to set insurance premiums that better reflect financial risk; and (4) helping curtail health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the Fund. Wis. Stat. § 893.55(1d)(a)1-4. The $750,000 limit "represents an appropriate balance between providing reasonable compensation for noneconomic damages...and ensuring affordable and accessible health care." Wis. Stat. § 893.55(1d)(b).

The Plaintiffs dispute the legislature's findings and ask the Court to declare the Cap unconstitutional as applied to them. They believe that, given the financial strength of the Fund and the substantial damages they have suffered, there is no rational basis for treating them differently than other medical malpractice victims. The Plaintiffs ask the Court to find that the

Cap violates their rights to a jury trial, a certain remedy, the separation of powers, due process, and equal protection. In addition, they ask the Court to enter judgment on the jury's noneconomic damages award. The Court agrees that the Cap violates the Plaintiffs' right to due process and equal protection. Therefore, the Court will not reduce the Plaintiffs' noneconomic damages award to comport with the Cap, but will enter judgment on the jury's $16.5 million award.

A. STANDARD OF REVIEW

An as-applied challenge "is a claim that a statute is unconstitutional as it relates to the facts of a particular case or to a particular party." *State v. Pocian,* 2012 WI App 58, 341 Wis. 2d 380, 384. A court considers the facts of the particular case before it, not "hypothetical facts in other situations." *State v. Hamdan,* 2003 WI 113, 264 Wis. 2d 433, 462. In an as-applied challenge, the constitutionality of the statue itself is not attacked; accordingly, the statute is presumed constitutional. *State v. Wood,* 2010 WI 17, 323 Wis. 2d 321, 338. However, there is no presumption that the statute is applied in a constitutional manner. *Soc'y Ins. v. Labor & Indus. Review Comm'n,* 2010 WI 68, 326 Wis. 2d 444, 463. To show that the challenger's constitutional rights were actually violated, he or she must prove the statutes, as applied to him or her, are unconstitutional beyond a reasonable doubt. *Wood,* 323 Wis. 2d at 339.

B. ANALYSIS

Prior to trial, the Plaintiffs argued that the Cap is facially unconstitutional in that it violates medical malpractice plaintiffs' rights to a jury trial, to a certain remedy, the separation of powers, due process, and equal protection. In its April 10, 2014 decision, the Court found that the Cap was not facially unconstitutional. This current challenge is as-applied and, therefore, requires a different consideration of law and facts than the facial challenge. In both the facial

challenge and in this challenge, the Cap is presumed constitutional. *Wood,* 323 Wis. 2d at 338. However, unlike with the facial challenge, this as-applied challenge involves only the specific facts of the Plaintiffs' case. How the Cap may affect other hypothetical medical malpractice victims in different cases is not at issue. *See Hamdan,* 264 Wis. 2d at 462. In making its decision on the constitutionality of the Cap as applied to the Plaintiffs, it is the intent of this Court to rule on the specific facts of the Plaintiffs' case, and those facts alone. This decision is not meant to be precedential, nor is it intended to dictate the legal outcome of any other factual matters. With that said, and with a view of the Plaintiffs' particular facts in mind, this Court finds that the Cap violates the Plaintiffs' rights to due process and equal protection as applied in this instance.

1. **The Cap does not violate the Plaintiffs' rights to a jury trial, to a certain remedy, or to the separation of powers.**

The Plaintiffs' as-applied challenge alleges the same constitutional violations at issue in their facial challenge. Their as-applied arguments regarding the rights to a jury trial, to a certain remedy, and to the separation of powers repeat many of the same arguments that the Court denied in its decision on the facial challenge. Thus, the Plaintiffs have not made any specific showing that the Cap violates those rights as applied to them, and the Court cannot find the Cap unconstitutional as applied in this regard.

2. **The Cap violates the Plaintiffs' rights to due process and equal protection.**

The Court does find that the Cap violates the Plaintiffs' rights to due process and equal protection because there is no rational basis to require the Plaintiffs to submit to the Cap. The Plaintiffs have coupled their due process and equal protection challenges to the Cap because they require similar considerations and analyses. *See State v. Quintana*, 2008 WI 33, 308 Wis. 2d 615, 659. To advance a successful equal protection claim, the Plaintiffs must show that the Cap treats them differently than other medical malpractice victims. *See Aicher v. Wis. Patients Comp.*

Fund, 2000 WI 98, 237 Wis. 2d 99, 127-28. Where, as here, the equal protection challenge is subject to rational basis review,[2] the fundamental determination is whether the Cap is arbitrarily discriminatory "and thus whether there is a rational basis which justifies a difference in rights afforded." *State ex rel. Watts v. Combined Cmty. Services Bd. of Milwaukee Cnty.,* 122 Wis. 2d 65, 77 (1985). The Court must determine whether there is any rational basis for requiring these Plaintiffs to submit to the Cap. *See State v. Smith,* 2010 WI 16, 323 Wis. 2d 377, 391-92. Similarly, in a due process challenge, the court must identify the Plaintiffs' protected constitutional interest at stake and "the conditions under which competing state interests might outweigh it." *Wood,* 323 Wis. 2d at 340.

There is no doubt that the Plaintiffs are entitled to damages because a jury found them to be victims of medical malpractice and awarded economic and noneconomic damages. The Plaintiffs' economic damages will be paid in full by Dr. Jaffe and Mr. Gibson's insurance providers and the Fund, but application of the Cap would deprive the Plaintiffs of 95.46% of their noneconomic damages award. Put another way, the Plaintiffs will recover just 4.54% of their jury award if the Cap is applied. Although the Cap may be constitutional as applied to medical malpractice victims as a whole, there is no rational justification for depriving Mrs. Mayo, who is in her mid-fifties, limbless, and largely immobile, and Mr. Mayo of the award the jury decided was appropriate to compensate them for their injuries. Even though the Plaintiffs' noneconomic damages award is large, denying them the full amount of the jury's award will not further the Cap's purpose. The Cap is meant to promote affordable and accessible health care in Wisconsin, but it is also meant to ensure that medical malpractice victims are adequately compensated.

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[2] *See* the Court's April 10, 2014 Decision and Order at pages 12-13.

i. The Plaintiffs fall into the classes of medical malpractice victims who are most affected by the Cap.

It is indisputable that the Cap creates two classes of medical malpractice plaintiffs: (1) those awarded greater noneconomic damages because they are more severely injured, and whose damages are reduced the most; and (2) those awarded smaller noneconomic damages because they are less severely injured, and whose damages are reduced the least. *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 616-17. "In other words, the statutory cap creates a class of fully compensated victims and partially compensated victims." *Id.* at 617. Mrs. Mayo will fall into the class of partially compensated victims. Some may say she will be a minimally compensated victim. She received a large noneconomic damages award because she was severely injured, and therefore stands to lose the vast majority of her award if the Cap is applied.

Mr. Mayo falls under a sub-classification of plaintiffs as the spouse of an individual who suffered due to medical malpractice. Because the total amount of damages recovered per occurrence may not exceed the Cap, the total award to the Plaintiffs may not exceed $750,000. "Thus, classes of victims are created depending on whether the patient has a spouse, minor children, or a parent." *Id.* Despite the severity of Mrs. Mayo's life-altering injuries, she and her husband will receive just $750,000 in noneconomic damages if the Cap is applied.

ii. Applying the Cap to the Plaintiffs' noneconomic damage award is not rationally related to the legislature's goals of compensating medical malpractice victims and reducing health care costs.

The Plaintiffs' noneconomic damages award will be paid from the Fund. In 2013, the Fund was valued at around $1.08 billion.[3] Deducting the Plaintiffs' $16.5 million award from the Fund will not affect its profitability. In fact, the Fund will be able to pay the Plaintiffs award in

[3] *Injured Patients and Families Comp. Fund 2013 Functional and Progress Report*, Wis. Office of the Comm'r of Ins., 13 (Oct. 2, 2014) http://oci.wi.gov/ipfc/progrpt2013.pdf.

full from its 2013 investment income alone.[4] Given the Fund's financial viability, payment of the full award will also not affect the Fund to the point that it must raise premiums. This is compounded by the fact that the Plaintiffs' claim may be the only one that is paid out for a significant period of time. From the Fund's inception in 1975, through December 2013, 5,955 claims were filed in which the Fund was named as a defendant.[5] During this nearly 40-year period, the Fund paid 667 claims, totaling $845,665,150 in payments.[6] Since 1996, there have only been about 25 claims that have required the Fund to pay in excess of $5 million.[7] Furthermore, the quantity of claims that the Fund must pay is declining. The number of medical malpractice lawsuits filed annually in Wisconsin fell from almost 225 in 2004 to just 117 in 2012.[8] Given the relatively few payments the Fund actually makes, there is no concern that payment of the Plaintiffs' actual award will deprive other claimants of the money due to them.

The viability of the Fund is significant because it demonstrates that requiring the Plaintiffs to submit to the Cap is not rationally related to the Cap's purposes. First, given the relatively few payments the Fund actually makes, there is no concern that payment of the Plaintiff's award will deprive other claimants of the money due to them. Second, sustaining the Plaintiffs' award will not increase the overall cost of health care in the state. An isolated, $16.5 million payment will not force insurers to increase premiums because the Fund is sufficiently capitalized to pay potential claimants. Payment of the Plaintiffs' award will also not encourage doctors to practice defensive medicine, since evidence suggests that the practice of defensive

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[4] *Id.* at 15.

[5] *Id.* at 4.

[6] *Id.*

[7] Jeff Kohlmann, *Injured Patients and Families Comp. Fund Claims Experience,* WiscRisk- A Quarterly Publication of the State of Wis. Injured Patients and Families Comp. Fund, Summer 2014, at 3.

[8] *Civil Disposition Summary Statewide Reports* 2004-2012, Wisconsin Court System (Oct. 2, 2014), https://www.wicourts.gov/publications/statistics/circuit/circuitstats.htm.

medicine is not a substantial factor in the overall cost of health care. Moreover, the policy of discouraging defensive medicine is not a factor in this case. There was an abundance of evidence that the administration of antibiotics would not have been "defensive," but rather a reasonable response to Mrs. Mayo's symptoms.

Third, and perhaps most importantly, applying the Cap to the Plaintiffs' award would not advance the legislative purpose of policing high or unpredictable noneconomic damages awards. The Plaintiffs' $16.5 million award seems large, but the number is dwarfed by the wealth of the Fund. And, although all jury awards contain an element of unpredictability, it is unreasonable to assert that a $16.5 million award to the Plaintiffs in this particular case was unpredictable. This is not a runaway verdict. It is certainly not outrageous, and no one could seriously argue that it is not in proportion to Mrs. Mayo's injuries. Mrs. Mayo lost all of her limbs to a septic infection, which evidence suggests could have been prevented if the Defendants had offered her standard antibiotics in the emergency room. The size of the jury's award is commensurate with injuries this severe, and it was not unnecessarily high or unpredictable. It is reasonable to read the legislative purpose of policing high or unpredictable noneconomic damages awards as addressing awards that are out of sync with the severity of the injury. Here, no one has even challenged the award as excessive or as not corresponding to the severity of Mrs. Mayo's injuries. Thus, applying the Cap in this case does not advance this legislative purpose.

The Wisconsin Supreme Court's decision in *Ferdon* also supports the Court's finding the Cap is unconstitutional as applied to the Plaintiffs. *Ferdon*, 284 Wis. 2d 573. In *Ferdon*, a boy sustained injuries during birth that resulted in a partially paralyzed and deformed arm. *Id.* at 592. Although he was awarded $700,000 in noneconomic damages on his medical malpractice claim, that award was subject to a $350,000 noneconomic damages cap. *Id.* at 593. At that time, the cap

was adjusted for inflation, so the plaintiff stood to recover $410,322, or 58.6%, of his noneconomic damages award if the cap was applied. *Id.* The Court found that the cap was facially unconstitutional because it was not rationally related to the legislature's goals of improving health care and compensating medical malpractice victims. *Id.* at 675.

The $750,000 Cap, enacted nearly a decade ago, has the same buying power as $884,866 today.[9] Yet, unlike the unconstitutional cap in *Ferdon,* the current Cap is not even adjusted for inflation. The Plaintiffs will receive $750,000 regardless of the fact that this amount is worth much less in 2014 than when the Cap was enacted in 2006. In addition, the 41.4% reduction that was ruled unconstitutional in *Ferdon* stands in stark contrast to the 95.46% reduction confronting these Plaintiffs. These numbers must be considered in light of the victims' injuries. The plaintiff in *Ferdon* was an infant when he lost partial use of his right arm. Mrs. Mayo is a middle-aged, married mother of four who lost all of her limbs and, consequently, the ability to work and to care for herself and her family. The factual differences between *Ferdon* and this case illustrate the classifications that the Cap creates and highlight the unconstitutional disparity in treatment of these severely injured Plaintiffs.

C. CONCLUSION

Even assuming that the Cap does address some of the legal factors that influence health care, "the cap imposed here seeks to fix that system at the sole expense of those most seriously injured. That strikes [the Court] as neither fair nor equitable." *Ferdon,* 284 Wis. 2d at 467 (*citing Martin v. Richards,* 192 Wis. 2d 156, 210 (1995)). Who among us would give up all four of his or her limbs in exchange for $15 million? Who among us would give up married life as he or she knows it in exchange for $1.5 million? The Court knows of no one who would trade those

[9] *CPI Inflation Calculator*, Bureau of Labor Statistics (Oct. 2, 2014, 9:10 AM), www.bls.gov/data/inflation_calculator.htm.

enjoyments for financial gain. It is unreasonable to require Mrs. Mayo and her husband, whose lives have been so drastically altered, to bear the brunt of the legislature's intended "tort reform." Again, this decision is not intended to impact state law or otherwise affect legal proceedings apart from this one. But in this particular instance, there is no rational basis for requiring the Plaintiffs to forgo their jury award in the hopes of marginally improving health care in Wisconsin. For these reasons, the Court believes the Cap is unconstitutional as applied. The Court will order entry of judgment on the jury's $16.5 million noneconomic damages award.

III. ORDER

Based on a review of the record and the arguments of the parties, it is hereby ordered that, for the reasons stated herein, the Defendants' motions to change the jury's answers on the informed consent questions or, in the alternative for a new trial or for JNOV, is DENIED, and the Plaintiffs' motion for the Court to find the Cap unconstitutional as applied is GRANTED. The Court further orders that judgment be entered in accordance with the verdict.

Dated this 3rd day of October, 2014, at Milwaukee, Wisconsin.

BY THE COURT:

The Honorable Jeffrey A. Conen
Milwaukee County Circuit Court, Branch 30

THIS IS A FINAL ORDER FOR THE PURPOSES OF APPEAL