IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JENNIFER HYLAND, Individually and as Mother and Next Friend of CHARLOTTE HYLAND, a minor; and JENNIFER HYLAND, Representative of the Estate of JACKSON HYLAND, Deceased Plaintiff, v.	)	
ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE GOOD SAMARITAN HOSPITAL BARBARA PARILLA, M.D.; WEST SUBURBAN OBSTETRICS GYNECOLOGY, LTD.; CHRISTOPHER BARBOUR, M.D.; KATHERINE NOLAN-WATSON, M.D. and LI FAN, M.D., Defendants.	)	Case No: 2017-L-003541

MEMORANDUM ORDER

This medical negligence matter originates out of the preterm births of twins that were born at Advocate Good Samaritan Hospital. One child, Charlotte survived. Jackson, the other child did not. This lawsuit was refiled in Cook County on April 7, 2017. Plaintiff alleges that the preterm labor and birth were caused by negligently administered medication. The current complaint alleges the individual Defendant doctors negligently prescribed medication the mother was allergic to, failed to discontinue medication, and failed to monitor and respond to symptoms of an allergic reaction.

During the pendency of this lawsuit, Senate Bill 0072 ("SB 0072") was passed by the Illinois General Assembly and signed into law by Governor Pritzker with an effective date of July 1, 2021. SB 0072 amended 735 ILCS 5/2-1303 pertaining to prejudgment interest in tort lawsuits ("the Amendment") providing:

c) In all actions brought to recover damages for personal injury or wrongful death resulting from or occasioned by the conduct of any other person or entity, whether by negligence, willful and wanton misconduct, intentional conduct, or strict liability of the other person or entity, the plaintiff shall recover prejudgment interest on all damages, except punitive damages, sanctions, statutory attorney's fees, and statutory costs, set forth in the judgment. Prejudgment interest shall begin to

accrue on the date the action is filed. If the plaintiff voluntarily dismisses the action and refiles, the accrual of prejudgment interest shall be tolled from the date the action is voluntarily dismissed to the date the action is refiled. In entering judgment for the plaintiff in the action, the court shall add to the amount of the judgment interest calculated at the rate of 6% per annum on the amount of the judgment, minus punitive damages, sanctions, statutory attorney's fees, and statutory costs. If the judgment is greater than the amount of the highest written settlement offer made by the defendant within 12 months after the later of the effective date of this amendatory Act of the 102nd General Assembly or the filing of the action and not accepted by the plaintiff within 90 days after the date of the offer or rejected by the plaintiff, interest added to the amount of judgment shall be an amount equal to interest calculated at the rate of 6% per annum on the difference between the amount of the judgment, minus punitive damages, sanctions, statutory attorney's fees, and statutory costs, and the amount of the highest written settlement offer. If the judgment is equal to or less than the amount of the highest written settlement offer made by the defendant within 12 months after the later of the effective date of this amendatory Act of the 102nd General Assembly or the filing of the action and not accepted by the plaintiff within 90 days after the date of the offer or rejected by the plaintiff, no prejudgment interest shall be added to the amount of the judgment. For the purposes of this subsection, withdrawal of a settlement offer by defendant shall not be considered a rejection of the offer by the plaintiff. Notwithstanding any other provision of this subsection, prejudgment interest shall accrue for no longer than 5 years.

Notwithstanding any other provision of law, neither the State, a unit of local government, a school district, community college district, nor any other governmental entity is liable to pay prejudgment interest in an action brought directly or vicariously against it by the injured party.

For any personal injury or wrongful death occurring before the effective date of this amendatory Act of the 102nd General Assembly, the prejudgment interest shall begin to accrue on the later of the date the action is filed or the effective date of this amendatory Act of the 102nd General Assembly. 735 ILCS 5/2-1303.

Immediately upon the Amendment becoming law, Defendant Katherine Nolan Watson, M.D. filed a **"Motion to Declare Senate Bill 0072, Which Amended 735 ILCS 5/2-1303 Invalid Under the Illinois Constitution."** The Motion alleges that the Amendment violates numerous Illinois Constitutional provisions, including: (1) the right to a jury trial; (2) the prohibition against special legislation; (3) separation of powers principles; (4) the read three times requirement; and (5) the single issue requirement. Thereafter, both Defendants Advocate and Barbara Parilla, M.D. (Parilla) joined Nolan-Watson's Motion, adopting her Memorandum of Law and Reply with Advocate also filing its own Reply and Parilla also joining same. Oral argument followed on October 21, 2021.

RIPENESS

Plaintiff argues that the instant constitutional issues are not ripe for adjudication in this case as there has been no finding of liability and that because the right to

prejudgment interest arises only after a plaintiff's verdict that exceeds the highest written offer, this Court's ruling would be advisory only. Further, Plaintiff cites several insurance coverage cases to illustrate her point.

While Defendants agree that in an insurance coverage matter the duty to indemnify is not ripe until the insured has incurred liability in an underlying case, they distinguish the coverage situations cited by Plaintiff from the matter at hand by noting that by operation of the challenged statutory amendment, prejudgment interest has been accruing ever since the amendment took effect and continues to accrue even now. In addition, defendants proffer that the statute directly affects defendants in the evaluation of their prospects at trial long before that trial is held- even if it never takes place.

Ripeness is a justiciability doctrine in that it concerns whether an actual or threatened harm has matured sufficiently to warrant judicial relief. *Revelis v. Napolitano,* 844 F. Supp. 2d 915, 923 (N.D. Ill. 2012). A two-part inquiry determines ripeness: (1) whether the issues are fit for a judicial decision; and (2) whether the parties would suffer a hardship if judicial consideration was withheld. *Illinois Beta Chapter of Sigma Phi Epsilon Fraternity Alumni Board. V. Illinois Institute of Technology,* 409 Ill. App. 3d 228 (1st. Dt. 2011).

As to whether this issue is fit for judicial decision, the question as to the constitutionality of Section 2-1303(c) is purely legal rather than factual so it satisfies the first inquiry. *See Morr-Fitz, Inc. v. Blagojevich,*231 Ill. 2d 474,492. Plaintiff has filed a pending personal injury action and defendants seek to invalidate this procedure based on its being unconstitutional. A court challenge is their only option for relief.

As to the second factor, the hallmark of cognizable hardship is usually direct and immediate harm. *See Revelis*, 844 F. Supp. 2d at 924. Defendants' illustration of harm is well-taken. Upon this amendment taking effect, the accrual of prejudgment interest is triggered and imposes the burden of extending a settlement offer within a year of the filing of the case upon defendants, or they lose the opportunity to potentially avoid the imposition of prejudgment interest. This amendment continues to affect these parties well before a verdict is issued.

In *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), our supreme court stated that the requirement of ripeness is met where a challenge to the constitutionality of Illinois legislation "portends the ripening seeds of litigation" and the "course of future litigation will be controlled by resolution of the constitutional challenges presented". 179 Ill. 2d 383-84. A determination of this constitutional challenge will control future litigation in these matters and is therefore ripe for decision.

SECTION 2-1303(c) VIOLATES DEFENDANTS' RIGHTS TO TRIAL BY JURY

There is a strong presumption that legislative enactments are constitutional and one who asserts otherwise has the burden of clearly establishing the constitutional burden. *Kakos v. Butler*, 2016 IL 120377, ¶9. However, the Illinois Constitution is a not a grant, but a limitation on legislative power. *Best v. Taylor Machine Works*, 179 Ill. 2d 367,377.

Defendants primarily challenge the Amendment on the grounds that it violates the right of trial by jury as protected by Article I, § 13 of the Illinois Constitution of 1970 which provides "the right of trial by jury as heretofore enjoyed shall remain inviolate", and further assert that this language has been interpreted to secure the right of jury trial as it existed at common law. Defendants emphasize that the construction of the "heretofore enjoyed" language as set forth in *Kakos* indicates that the drafters intended that certain characteristics of a jury trial are to be maintained. One of those characteristics being the right of the jury to determine damages- an inviolate right- and not an issue for the Legislature.

In contrast, the Plaintiff argues that there has never been a common law right to prejudgment interest in Illinois. Instead, Plaintiff places great stock in the language in *Kakos* wherein our supreme court stated that the "facts in controversy" must be decided by a jury of twelve and posits that the instant facts in controversy are simply the malpractice claim and the damages flowing therefrom which do not include the imposition of prejudgment interest.

The right to a trial by jury in a civil action is a fundamental constitutional right. *Ney v. Yellow Cab Co.,* 2 Ill. 2d 74,84 (1954). *See also, Interstate Bankers Casualty Company v. Hernandez,* 2013 IL App (1st) 123035, ¶31. Defendants assert that it is the jury's right and duty to assess damages to compensate a plaintiff and the Amendment violates the fundamental right to jury trial as it improperly strips the function and role of the jury in assessing all issues, including damages, and instead requires an award of prejudgment interest after a verdict that exceeds the defense's time-limited offer. Since prejudgment interest is designed to make the plaintiff whole, they argue, the time period between injury and a finding of liability is already subsumed into the jury's determination of damages as the assessment of damages is the preeminent function of the jury. *See Kupcikevicius v Fitzgibbons,* 41 Ill. App. 3d 405, 414 (1st Dist. 1976).

Plaintiff cites *Bernier v. Burris*, 113 Ill. 2d 219 (1986) for the proposition that a predetermined interest rate for "judgments" does not offend or infringe on the right to jury trial. In *Bernier*, the Supreme Court held that:

> "We do not believe that the provisions interfere with the right to trial by jury. The jury is to continue to make all damage computations: the only change in

the jury's function from the traditional rule is that the jury is instructed not to reduce the amounts to present value, and the statute provides the discount factor that the trial court must use for that purpose. But this is no greater impediment to the jury-trial right than a statue setting a predetermined interest rate for judgments." *Id.* at 237.

Bernier addressed a statute which permitted the payment of future damages from via post-judgment periodic payments as opposed to the traditional lump sum procedure. The *Bernier* court's analysis is similar to the other post-judgment interest cases that Plaintiff cites for the same proposition: *Mikolajczyk v. Ford Motor Co.*, 373 Ill. App. 3d 646 (1st Dist. 2007), *reversed on other grounds*, 231 Ill. 2d 516 (2008) and *Schultz v. Lakewood Electric Corp.,* 362 Ill. App. 3d 716 (1st Dist. 2005). None of these cases are applicable to the instant action as the entry of post-judgment interest measures the time after a finding of liability by the jury.

Plaintiff specifically relies on two out of state cases -*Oden v. Schwartz*, 71 A. 3d 438 (R.I. 2013) and *Galayda v. Lake Hospital Systems Inc.*, 71 Ohio St. 3d 421 (Ohio 1994) - as authority that the imposition of prejudgment interest is constitutional even when the fundamental right to a trial by jury is involved. Unfortunately, neither of these cases are applicable to the case at bar. In *Oden*, the Rhode Island Supreme Court did not accept that the right to a trial by jury in a civil case is a fundamental right subject to strict scrutiny and went on to analyze its provision under a rational basis scheme. *Id.* at 455. Similarly, the Ohio Supreme Court in *Galayda* held that "the good faith effort to settle" requirement in its statute saved its constitutionality. *Id.* at 428

Plaintiff also cites a slew of cases from other jurisdictions which purport to stand as authority for the constitutionality of the imposition of prejudgment interest as applied to this action. The Defendants' reply briefs comprehensively distinguish the Amendment from those prejudgment interest statutes and rules from other jurisdictions and for the sake of brevity those distinctions are incorporated herein. For reasons above, Plaintiff lacks the ability to point to any authority which is directly on point to her arguments.

Conversely, persuasive authority exists which illustrates defendants' position that Illinois juries, specifically those in Cook County, are already awarding interest for the time period between injury and trial as part of damages. Michael S. Knoll, *A Primer on Prejudgment Interest,* 75 Texas Law Review 293 (1996) reprinted in Knoll, Michael S., "A Primer on Prejudgment Interest" (1996), *Faculty Scholarship at Penn Law*. 1146. (https:scholarship.law.upenn.edu/faculty_scholarship/1146). Knoll cites an article reporting a study focusing on the question of whether Cook County juries provided larger awards to longer delayed cases. Completed in 1983, it analyzed 1,349 Cook County motor vehicle civil jury awards- from federal, state and municipal courts- for the time period 1960 to 1979. Stephen J. Carroll, RAND CORP., *Jury Awards and Prejudgment Interest in Tort Cases* 11 (1983) *available at*

http://www.rand.org/content/dam/rand/pubs/notes/2009/N1994.pdf. Albeit somewhat dated, this article concluded that on average, juries increased awards over and above inflation as measured by the Consumer Price Index at a rate of 3.7% **per year** from the time between injury and trial. *Carroll*, *id*.

Although there exists no legislative debate history for the Amendment (as it replaced different language which was stripped out and replaced with the Amendment's language just in time for passage), Plaintiff argues that the Amendment is an antidote to the litigation strategy of many defendants and their insurers who refuse to engage in meaningful settlement negotiations until every possible attempt to avoid the inevitable has been made. She implicitly argues that when trials are long delayed, inflation erodes the real value of a plaintiff's award. Carroll's article seems to belie this last point and directly illustrates Defendants' position that the Amendment directly infringes upon the fundamental right to a trial by jury.

For the reasons stated above, the Amendment violates Article I §13 of the Illinois Constitution and is therefore invalid.

THE AMENDMENT VIOLATES THE ILLINOIS CONSTITUTION'S PROHIBITION AGAINST SPECIAL LEGISLATION

The Illinois Constitution specifically provides: [t]he General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Ill. Const. 1970, Art. IV, §13. As our supreme court stated in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), the purpose of special legislation "is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis." *Id*. at 391. As the one provision in the legislative articles that specifically limits the lawmaking power of the General Assembly, this clause also prohibits the General Assembly from conferring a special benefit or privilege upon one person or group and excluding others that are similarly situated. *Id*. at 391.

A. The Amendment does not pass the strict scrutiny test.

This Court's prior holding *supra* that the Amendment violates the fundamental and substantial right to trial by jury lessens the presumption of the Amendment's constitutionality and a strict scrutiny standard must be employed to the challenge of this legislation. *Potts v. Illinois Department of Registration and Education*, 128 Ill. 2d 322,329 (1989). Under a standard of strict scrutiny, the court must conclude that the means employed by the legislature to achieve a stated goal were necessary to advance a compelling state interest. In addition, the statute must be tailored narrowly as the

legislature must use the least restrictive means consistent with the attainment of the legislative goal. *Fumarolo v Chicago Board of Education*, 142 Ill. 2d 54 (1990).

Initially, Defendants ask this Court to determine that Plaintiff has waived or forfeited this argument as she did not address the strict scrutiny standard in her brief. Not true, as Plaintiff's steadfast position that the Amendment in no way infringes upon the fundamental right to a trial by jury which therefore prohibits this court from conducting a strict scrutiny analysis here is evident from Plaintiff's response brief.

Nonetheless, a strict scrutiny analysis is necessarily applied to the instant Amendment. The Amendment was enacted to purportedly permit an injured party to be made whole for their injury from the time of the injury until judgment is entered. The requirement that prejudgment interest be added to a jury's award removes the jury from determining questions of fact as to what is reasonable and just compensation for a party's injuries and conditions a defendant's right to a jury trial on the payment of a penalty. This purpose cannot be construed to advance any compelling State interest.

Further, the legislature could have used the more restrictive means of permitting the jury discretion to consider and award prejudgment interest. By requiring a Court to automatically add prejudgment interest when the verdict exceeds defendants time-limited offer, the legislature removed a litigant's right to have damages decided by the jury.

The Amendment does not pass strict scrutiny and is unconstitutional.

B. In the alternative, the Amendment does not satisfy the rational basis test.

In the alternative, the Amendment does not satisfy the rational basis test. A special legislation challenge is judged under the same standards applicable to an equal protection challenge and where the legislation does not affect a fundamental right or involve a quasi-suspect classification, the appropriate standard for review is the rational basis test. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 393 (1997).

"Under this standard, a court must determine whether the statutory classification is rationally related to a legitimate State interest." *Village of Petition of the Village of Vernon Hills*, 168 Ill. 2d 117,123 (1995). The inquiry to be made by the court is whether the classifications are based upon reasonable differences in kind or situation, and whether the basis for the classifications is sufficiently related to the evil to be obviated by the statute. *Grasse v. Dealer's Transport Co.*, 412 Ill. 179,193 (1952).

Plaintiff argues that the Amendment is designed to provide a benefit to plaintiffs who obtain a judgment that exceeds the highest offer, excepting out governmental entities and schools, and that these benefits are not arbitrarily conferred. Plaintiff further maintains there is a reasonable relationship between the Amendment and legitimate governmental interests because the Amendment is intended to reduce delay in settling

cases involving those who work and obtain medical care and services in Illinois, to incentivize fair settlement offers, to relieve docket backlogs and to protect financially overburdened government entities from exposure to prejudgment interest.

Plaintiff's reliance on *Mikolajczk v. Ford Motor, supra*, a case which addressed the constitutionality of a post-judgment interest statute applicable to all judgments of any kind is misplaced. There the court rejected the proposition that the post-judgment interest statue arbitrarily singled out a category of judgment debtors or provided a selected group of judgment creditors with a benefit not enjoyed by others mainly because a judgment debtor could control the accrual of post-judgment interest by tendering payment of the judgment and costs. That is not the case with this Amendment which charges a defendant with interest that begins to accrue on the date the action is filed regardless of whether or when a defendant becomes a party to the action. See also, *Schultz v. Lakewood Electric Corp., supra.*

In *Best,* the supreme court wrote "the fact that a problem exists does not permit the adoption of an arbitrary or unrelated means of addressing a problem." 179 Ill. 2d at 398. Here, the Amendment discriminates in favor of personal injury and wrongful death plaintiffs alone by granting a substantial benefit upon them while excluding all other similarly situated tort plaintiffs. As Defendants contend, this classification of personal injury and wrongful death plaintiffs as being the only ones to receive prejudgment interest is not sufficiently related to the "evil" to be obviated because other tort plaintiffs- those with privacy, emotional distress, fraud, conversion, attorney malpractice etc. actions- also desire to be fully compensated for the injuries that they themselves sustained.

Defendants further claim that personal injury and wrongful death plaintiffs are not the only group that this classification discriminates against is well-taken. They correctly point out that the classification of personal injury and wrongful death *defendants* as the only defendants paying prejudgment interest, as against all other tort defendants, corrects nothing as these other tort defendants also enjoy the funds that are purportedly being deprived from the other tort plaintiffs. Additionally, they declare that all tort cases cause congestion of courts and using an arbitrary classification of only personal injury plaintiffs to receive prejudgment interest would not encourage early settlements or relieve congestion for all other tort actions.

Three decisions relied on by defendants illustrate how statutes which create arbitrary classifications between groups of similarly situated plaintiffs or tortfeasors such as those described above violate the ban on special legislation. In *Grasse v. Dealer's Transport Co., supra,* the court considered a provision of the Worker's Compensation Act where one class of employees was deprived the right to collect compensatory damages from the tortfeasor, and the other class, which was similarly situated, was conferred such a right. In invalidating the provision, the *Grasse* court concluded there was no substantial or rational difference between the injured employees in the two

classes.

In *Grace v. Howlett*, 51 Ill.2d 478 (1972), the supreme court invalidated a limit on recovery applicable to damages inflicted by commercial motorists but not private motorists. *Id.* at 486-87. Certain provisions of the statute in question in *Grace* limited an injured plaintiff's ability to recover damages, including damages for pain and suffering, depending on whether the party at fault was using the automobile for commercial or personal purposes. Even assuming *arguendo* that problems in the system compensating car accident victims existed, the court refused to permit the adoption of an unrelated means of addressing those problems.

Finally, in *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12 (2003), amendments to the Consumer Fraud and Deceptive Practices Act divided consumer fraud plaintiffs as well as consumer fraud defendants into two groups –consumers defrauded by new and used vehicle dealers who were subject to the amendments and all other defrauded consumers. The *Allen* court determined that the amendments placed new and used vehicle dealers on more of an advantageous footing than all other retailers subject to the Act, thus creating an impermissible favored class. *Id.* at 14.

This Amendment has the same constitutional infirmities as those statues construed in the three cases above. In addition to the arguments set forth above by defendants, this classification even discriminates between similarly situated defendants in the same case.

Pursuant to the Amendment, a defendant must extend an offer to settle within one year of the *filing of the action*. Defendants who are served more than a year after the case is filed are arbitrarily penalized and deprived of any potential benefit afforded by the settlement offer. Instances of delays in service of defendants, the filing of the required healthcare professional's report (735 ILCS 5/2-622(a) (2-3)) or entry of a HIPAA order to name a few, will act to prevent even a diligent defendant named in the original action from developing knowledge about the case necessary to evaluate a fair settlement offer. This Amendment penalizes defendants regardless of whether they contributed to any delay and may allow a not so diligent plaintiff to reap the advantage of prejudgment interest even where that plaintiff has dragged their feet in the litigation. Unlike some prejudgment interest statutes from other states, the Amendment provides no vehicle in which to measure which party may be at fault for any delay which may have occurred.

The Amendment divides tort parties into two groups: parties to personal injury and wrongful death actions who are subject to prejudgment interest, and all other tort parties who are not. It clearly and arbitrarily favors personal injury and wrongful death plaintiffs and is not rationally related to any State interest. For these reasons, the Amendment is unconstitutional.

CONCLUSION

Because we have concluded that the Amendment is unconstitutional and invalid based on the right of trial by jury and the prohibition against special legislation, we need not consider defendants' alternative arguments.

Therefore, the amendments to 735 ILCS 5/2-1303 effective July 1, 2021 are unconstitutional and invalid.

ENTER:

ENTERED
Judge Marcia Maras-1781
MAY 27 2022
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

Marcia Maras