No. S18G1190

In the
SUPREME COURT OF GEORGIA

Shawn G. Evans, et al.

Plaintiffs/Appellants,

v.

Rockdale Hospital, LLC

Defendant/Appellee.

AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND MEDICAL ASSOCIATION OF GEORGIA IN SUPPORT OF DEFENDANT/APPELLEE

Philip S. Goldberg
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW
Washington, DC 20006
Phone: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com

Leonard Searcy, II
(Ga. Bar No. 633303)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (816) 421-5547
lsearcy@shb.com

Attorneys for *Amici Curiae*
* Counsel of Record

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STATEMENT OF INTEREST

Amici are the American Medical Association (AMA) and the Medical Association of Georgia (MAG). The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including Georgia, and in every medical specialty.

MAG was founded in 1849 and focuses on legal, legislative, and third party payer issues. MAG's mission is to, "Enhance patient care and the health of the public by advancing the art and science of medicine and by representing physicians and patients in the policy making process." MAG has more than 8,000 members, including physicians in every specialty and practice setting. Its membership has increased by more than 35 percent since 2010. The organization and its members are dedicated to a healthy Georgia, working to ensure the sanctity of the physician–patient relationship and advocating for the rights of patients and physicians for the delivery of the highest quality medical care.

The AMA and MAG appear on their own behalf and as representatives of the AMA Litigation Center. The Litigation Center is a coalition among the AMA and the medical societies of every state. The AMA Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts. It brings lawsuits, files *amicus* briefs and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

STATEMENT OF FACTS

Amici adopt the Defendant's/Appellee's Statement of Material Facts to the extent relevant to *amici's* arguments in this brief. This case involves allegations that the physicians and hospital did not meet their standards of care in treating Ms. Evans. Ms. Evans had a history of hypertension, and in 2012, after more than 40 hours of experiencing a headache and episodes of vomiting and diarrhea, presented to the Emergency Room at Rockdale Hospital. When Ms. Evans was discharged, she was given instructions for follow up care. Her symptoms reportedly worsened over the next few days. Six days later, she was rushed to the Emergency Room and diagnosed with an intracranial hemorrhage and significant brain damage. At trial, the jury appeared to reach a compromise verdict. It found for the physicians and split responsibility between the Hospital (51%) and Ms. Evans (49%). The

jury then awarded Ms. Evans only her past medical expenses ($1.2 million) and Mr. Evans' loss of consortium ($67,000). It did not award anything for future medical costs, lost wages and pain and suffering damages. Ms. Evans is now seeking a damages-only re-trial for these additional damages.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Medical liability litigation, such as the case at bar, often involves complex medical issues, severe injuries or ailments, and highly sympathetic plaintiffs. Jurors are asked to assign liability, even though most medical injuries do not result from medical negligence, but pre-existing conditions, inherent risks of procedures, or unpreventable complications. This particular case involves a tragic set of circumstances; Ms. Evans presented to the Emergency Room for a certain set of conditions, and over the course of the next week suffered an aneurysm, intracranial hemorrhaging, and significant brain damage. She alleges that her conditions were caused by a failure to properly diagnose and treat her initial symptoms, but as Judge Barnes stated in oral argument, the jury's liability award had the hallmarks of a "compromise verdict." *See* Def. Pet. at 5-6.

A compromise verdict results when some jurors do not view a defendant as liable, but vote for liability in exchange for a relatively low damages award. *See*, *e.g.*, *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008); *Skinner v. Total*

Petroleum, Inc., 859 F.2d 1439, 1445-46 (10th Cir. 1988). Here, the jurors likely believed defendants were not liable for Ms. Evans' injuries. They agreed to a defense verdict for the physicians, but found the hospital liable for a bare majority of 51 percent of responsibility. The jury then awarded the Plaintiffs' only their past medical damages, choosing against allocating the costs of treating Ms. Evans in the future, her lost wages, and any pain and suffering. This mixed verdict suggests the jury was largely motivated by sympathy for Plaintiffs' current financial situation. In these cases, the liability finding and damages awards are inextricably intertwined. They are parts of the same compromise.

In the medical liability arena, as this Court has recognized generally, verdicts are "frequently . . . the result of compromise." *Werk v. Big Bunker Hill Mining Corp.*, 193 Ga. 217, 244 (1941). Whether a compromise verdict can and should stand is within the province of the trial judge and, under an abuse of discretion standard, the appellate courts. But, no court should undo only a part of the jury's compromise. The concern here is not that the jury failed to understand the extent of Plaintiffs' injuries such that another jury is needed to assess proper damages, but that physicians, hospitals, and other defendants will be subject to much greater liability than the jury thought was just. *Amici*, therefore, respectfully urge the Court to deny Plaintiffs' appeal for a damages-only retrial.

ARGUMENT

In considering post-verdict motions, courts must assess the validity of a jury's verdict and take only those measures needed to ensure that the right to a jury trial is protected for plaintiffs and defendants. It is well-settled, under long-standing Georgia and U.S. Supreme Court precedents, that "where a judgment is entire and indivisible, it can not be affirmed in part and reversed in part." *Martin v. Six Flags Over Ga. II, L.P.*, 301 Ga. 323 (2017) (quoting *Chicago Bldg. & Mfg. Co. v. Butler*, 139 Ga. 816, 819 (1) (1913)). Partial re-trials, including as sought here, are permitted only for "distinct portions of the judgment" that are erroneous and separable. *Id.* at 338. It must "clearly appear[] that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.,* 283 U.S. 494, 500 (1931). Accordingly, courts have developed a presumption against damages-only re-trials. *See Pryer v. C.O. 3 Slavic*, 251 F.3d 448 (3d Cir. 2001).

The U.S. Court of Appeals for the Eleventh Circuit has explained that damages-only retrials must be barred when there are *any* "indications" that the jury "may have rendered a compromise verdict." *Collins v. Marriott Int'l, Inc*., 749 F.3d 951, 960 (11th Cir. 2014). When the "indicia of a compromise are present," as here, "the issues of liability and damages are inseparable." *Mekdeci v. Merrell*

Nat'l Labs., 711 F.2d 1510, 1514 (11th Cir. 1983); *see also Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 17 (2nd Cir. 1992) ("[A] new trial on damages only is not proper if there is reason to think that the verdict may represent a compromise among jurors."). The deference a court must show to a jury's finding dictates that, even when it suspects a damages award is too low, it must leave the verdict intact or order a full re-trial.

What courts must not do, though, is step into the role of the jury by keeping the liability portion of a jury's compromise and discarding its low monetary award. Allowing a second jury to award damages for conduct the first jury did not find rendered the defendant fully liable violates the defendant's right to a jury trial and due process protections. *See* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771, 796 (1998) ("[D]etermining who is harmed by jury compromise requires no speculation, for the defendant is always harmed."). Damages-only retrials significantly favor plaintiffs. They eliminate variability with respect to liability, which undermines the ability of the defendants to achieve justice, and guarantee that plaintiffs will be awarded much higher sums of compensation in the new trial.

I. Damages-Only Re-Trials Would Irreparably Prejudice Physicians and Hospitals in Medical Liability Cases, Particularly When There Is an Indication of a Jury Compromise

This Court has categorically ruled against damages-only trials in comparative negligence cases because liability and damages are not distinct issues. *See*, *e.g.*, *Bridge Farms v. Blue*, 267 Ga. 505 (1997) (liability and damages are "inextricably joined"). It should not divert from that path due to O.C.G.A § 51-12-12, which requires juries to apportion liability and similarly allows a damages-only retrial when liability and the apportionment of damages are distinct. While the shift to apportionment reduces some areas of liability law that may have led juries to seek compromise, namely contributory negligence and the assumption of the risk doctrine, today's litigation provides other drivers of compromise. Liability decisions often involve complex scientific and medical issues, amorphous categories of "soft" damages, and highly sympathetic plaintiffs.

Correctly identifying medical error can be challenging, as juries must "differentiate between adverse events and medical errors." David Sohn, *Negligence, Genuine Error, and Litigation*, 6 Int'l J. Gen. Med. 49 (2013). Adding to this challenge is that studies have shown that juries are more likely to be charged with deciding a case that does not involve negligence than that does. A Harvard Public Health Study found that only about 27 percent of adverse events are caused

by medical negligence. *See* Troyen A. Brennan *et al.*, *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 151 Qual. Saf. Health Care 51 (2004). Also, a study for the U.S. Congress found that 80 percent of the lawsuits their experts reviewed did not contain medical negligence. *See The Perverse Nature of the Medical Liability System*, U.S. Congress Joint Economic Committee, Research Report 109-2 (March 2005). Given the complexity of the scientific issues involved and proliferation of professional expert witnesses, jurors understandably may not always be able to distinguish with certainty whether negligence has occurred.

In these situations, experience has shown that jurors tend to fill gaps in their knowledge with hindsight or positive outcome bias. *See Kortus v. Jensen*, 237 N.W.2d 845, 851 (Neb. 1976) (providing initial research into hindsight biases in medical malpractices cases). "[T]he existence of these biases suggest that it may be difficult for finders of fact to evaluate fairly (*e.g.*, without reference to whether the decision, in retrospect, turned out to be the right choice)." Michael A. Haskel, *A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases*, 42 Tort & Ins. L. J. 895, 905 (2007). They try to "find someone to blame" for an event so that they can award money to a sympathetic plaintiff. David P. Sklar, *Changing the Medical Malpractice System to Align with What We Know About Patient Safety and Quality Improvement*, 92

Acad. Med. 891 (2017). Hindsight bias has particularly detrimental effects in cases such as the one at bar that involve "important, highly consequential situations." Hal R. Arkes, *The Consequences of Hindsight Bias in Medical Decision Making*, 22(5) Curr. Directions in Psych. Sci. 356, 359 (2013).

In addition, damages awards have become less principled and much higher with the growth of noneconomic damages. Historically, pain and suffering awards were modest. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545, 560 (2006) (explaining "personal injury lawsuits were not very numerous and verdicts were not large"). The size of these awards took its first leap after World War II as personal injury lawyers became adept at finding ways to enlarge them. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951); *see also* Merkel, 34 Cap. U. L. Rev. at 560-65 (examining post-war expansion of pain and suffering awards). By the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience constitute[d] the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971). This trend has continued today,

although not because plaintiffs suffer more today than in earlier eras. Now, jurors may differ widely on the appropriate level of damages for a given case.

Consequently, determining liability and the right amount of damages for a plaintiff who sustained a catastrophic outcome, such as Ms. Evans, can be difficult, leading to significant opportunities for compromise among the jury. Undoing such compromises, where a jury sought to contain damages to what it thought was just, by throwing out only the assessment of damages is unjust and will fuel deep-pocket jurisprudence. In these cases, defendants are liable for a person's harm not because he or she engaged in wrongdoing, but because the plaintiff is sympathetic and the jury wants to provide some compensation. Deep-pocket jurisprudence is often the hidden foundation in many medical liability cases. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 398-404 (2018).

To this end, hospitals and physicians with high insurance limits are particularly vulnerable to high awards in damages-only retrials, as jurors are known to consider a defendant's financial resources in determining compensation. *See* Valerie P. Hans, *The Jury's Response to Business & Corporate Wrongdoing*, 52 L. & Contemp. Probs. 177, 195-98 (1989); Audrey Chin & Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 43 & tbl. 4.5

(RAND Corp. 1985) (finding civil juries awarded significantly more money in cases with corporate defendants than individual or governmental defendants, particularly when plaintiffs were "permanently and severely" injured). For these reasons, the Court should apply the presumption against damages-only trials with equal or greater force today and, particularly, in medical liability claims and when there is any indicia of jury compromises in deciding liability and damages.

II. Allowing a Separate Jury to Hear a Damages-Only Trial Has Been Proven to Lead to Excessive Damages and Injustice

A concern courts have identified with partial retrials is the prejudice to the parties that can result from the evidentiary decisions made in the retrial. Often, the second jury cannot set damages without an understanding of the underlying breach. *See Pryer*, 251 F.3d at 459 n.3 (quoting *Williams v. Rene*, 72 F.3d 1096, 1101 (3d Cir. 1995)) (Damages "cannot be submitted to the jury independently of [liability] without confusion and uncertainty."). In these situations, the court is caught in a Catch-22: if it admits too much evidence relevant to liability, there is risk of inviting the jury to second-guess the first jury, but admitting too little evidence risks prejudicing the party whom that evidence would have favored. The result will create confusion and "a genuine risk that the general issue would be 'redecided' by the subsequent jury." *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 96 (W.D. Mo. 1997). It also would diminish any time saved.

Most courts have found that bifurcating liability from damages and having separate juries hear each part of the case, even absent a compromise verdict, can make a plaintiff's case appear "much stronger" than it actually is. *See In re Paxil Litig.*, 212 F.R.D. 539, 548 (C.D. Cal. 2003) (quoting *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 415 (C.D. Cal. 2000) and refusing to create a class trial on liability separate from individual damages findings). It is well recognized that "the better and preferred practice is to use the same jury for all issues in an action, even though it may hear the issues at different times. This certainly is the safer course for the court to follow." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2391 (3d ed. Sept. 2017 update).

This public policy underlies the reason that when courts in Georgia and other states bifurcate punitive damages, the same jury should her both phases. *See, e.g.,* O.C.G.A. § 51-12-5.1; *Webster v. Boyett*, 269 Ga. 191, 192 (1998) (requiring bifurcation of punitive damages issues); *see also* Mo. Rev. Stat. § 510.263(1) ("All actions tried before a jury involving punitive damages . . . shall be conducted in a bifurcated trial before the same jury if requested by any party."). This is a matter of fairness and due process. *See Rivera v. Sassoon*, 39 Cal. App. 4th 1045, 1048 (1995). A California case involving a punitive damages trial illustrates this point. *See Casey v. Kaiser Gypsum Co., Inc.*, No. A133062, 2016 WL 258670 (Cal. Ct.

App. Jan. 21, 2016). The initial jury found Kaiser 3.5 percent liable for the plaintiff's injuries, awarded $21 million in compensatory damages arising from asbestos exposure, and were deadlocked on punitive damages. *See id.* The trial court ordered a retrial on punitive damages and empaneled a new jury. It did not inform this jury of the first jury's findings, what conduct the first jury found tortious, or the plaintiff's other asbestos exposures. *Id.* at *12. The second jury awarded $20 million in punitive damages, which was likely inflated by its lack of knowledge of the case.

In Georgia and other states, the goal in medical liability cases such as the one at bar is to properly identify medical negligence and compensate a plaintiff for his or her losses. Damages-only re-trials hinder the ability of the courts to achieve a fair and just outcome, both generally and when there is any indication as here that the jury likely compromised in reaching its verdict. The Court should ensure that a half-measure finding of liability does not lead to full-throated damages.

CONCLUSION

For these reasons, this Court should deny Plaintiffs' request for a damages-only retrial and support the trial court's finding on liability.

Respectfully submitted,

/s/Leonard Searcy, II
Leonard Searcy, II (Ga. Bar No. 633303)

SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (816) 421-5547
lsearcy@shb.com

Philip S. Goldberg
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW
Washington, DC 20006
Phone: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com

Attorneys for *Amici Curiae*

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PROOF OF SERVICE

I certify that on April 9, 2019, I caused to be served a true and correct copy of the foregoing Amici Brief by U.S. Mail in a first-class postage-prepaid envelope addressed to the following:

Counsel for Appellee

Daniel J. Huff, Esq.
Francesca G. Townsend, Esq.
Huff Powell & Bailey, LLC
999 Peachtree St, NE, Suite 950
Atlanta, GA 30309

Counsel for Appellants

Lloyd N. Bell
Bell Law Firm
1201 Peachtree Street, N.E., Suite 2000
Atlanta, GA 30361

Leighton Moore
The Moore Law Firm, PC
400 Colony Square, Suite 2000
1201 Peachtree St., NE
Atlanta, GA 30361

/s/Leonard Searcy, II
Leonard Searcy, II (Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (908) 848-6310