



## Top court hears challenge to damages cap

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More than 20 years ago, a Baltimore County Circuit Court judge ruled Maryland's cap on non-economic damages was unconstitutional, finding it violated equal protection principles.

The trial judge was reversed by the Court of Special Appeals, a holding affirmed by the Court of Appeals in 1992 and one that remains in place to this day.

On Friday, that trial judge had another chance to review the cap's constitutionality. And Judge Joseph F. Murphy Jr., now on the Court of Appeals, seemed to reach a similar conclusion.

"This is an equal protection problem to me," he said.

The Court of Appeals was reviewing the cap's constitutionality for only the second time since its 1992 opinion in *Murphy v. Edmonds*. The only other time was in 1995, when the court unanimously affirmed its earlier decision.

On Friday, Chief Judge Robert M. Bell — the sole remaining judge on the bench from 1995 — remained largely silent during the oral arguments.

At issue in the current case is an award to the parents of Connor Freed, who drowned in a Crofton Country Club swimming pool in 2006. The following year, an Anne Arundel County jury awarded each parent more than \$2 million from D.R.D. Pool Service Inc., but the cap reduced the award to approximately \$1.3 million.

The trial judge did not allow a jury to determine if Connor endured "conscious pain and suffering" before drowning, agreeing with D.R.D. that there was no evidence Connor had suffered because no one saw him drown. But the Court of Special Appeals reversed that

ruling in July, prompting D.R.D.'s petition to the Court of Appeals.

Connor's family also sought review of the July decision, which rejected their argument that the cap is unconstitutional.

Enacted in 1986, the cap limits a jury's award for pain and suffering to an amount set by the legislature. It was passed in response to a "legislatively perceived crisis concerning the availability and cost of liability insurance" in Maryland, according to the court's 1992 opinion.

But Andrew H. Baida, a lawyer for the Freeds, argued Friday the crisis has never been conclusively proven, therefore making the state's use of the cap "consistent and consistently wrong."

"The legislative landscape is as barren today as it was in 1986 for a rational reason," he said. Judge Sally D. Adkins asked about caps created in administrative procedure cases, such as workers' compensations claims.

"Why can't a legislature say, 'To us, a million dollars is the maximum a person can get in such-and-such an action?'" she said.

"Because it's completely arbitrary, especially to draw a line between non-economic and economic damages," replied Baida, of Rosenberg|Martin|Greenberg LLP in Baltimore.

Steven R. Migdal, representing D.R.D., noted that the General Assembly has revisited and revised the cap since its inception, upping its limits and including medical malpractice and wrongful death claims. The Court of Special Appeals has affirmed the cap in nine cases, he said, and the plaintiffs have an "extremely towering burden to overcome."

"There is no question there is precedent," said Migdal, of Buck, Migdal & Myers Chtd. in Annapolis. "I don't believe they can say, '[The case] was improperly decided, therefore overturn the cap.'"

In its 1992 opinion, the Court of Appeals applied the rational basis test and found there was no equal protection violation.

Murphy, who as a trial judge felt a "heightened scrutiny" test should have been used, said he understood the legislature's desire to pass a cap in medical malpractice cases in order to prevent doctors from giving up their practices.

But "there are cases in which there are no crises in insurance coverage," Murphy said.

Trial lawyers have long said the cap discriminates against the most seriously injured plaintiffs.

Migdal, though, argued the cap does not delineate serious injuries versus non-serious ones.

“The cap only accords to the amount of damages, not amount of injury,” he said. “The court has never applied heightened scrutiny to economic damages cases.”

### **What did Connor feel?**

Murphy also was skeptical of Migdal’s argument that there was no “objective and case-specific evidence” that Connor was conscious of his pain and suffering before he died. An autopsy determined Connor died of drowning and found no evidence of injury.

“Here you have the drowning and the absence of any physical evidence that the child was not unconscious,” Murphy said. “What else is necessary?”

“We do not know when he was unconscious,” Migdal replied.

Baida said the autopsy provided all of the necessary evidence.

“It was for the jury to decide whether Connor suffered,” he said.

Migdal also argued the plaintiffs did not meet a standard of proof for conscious pain and suffering established more than 60 years ago by the Court of Appeals, offering only an expert on drowning victims who acknowledged not all drownings are alike.

Judge Glenn T. Harrell Jr. noted, however, that the expert used “reverse differential diagnosis,” attempting to eliminate factors that would have proven Connor was unconscious before drowning.

Asked Adkins: “Why cannot an expert in what happens when a person drowns take these facts and form an opinion that guides the jury?”

“Cases in Maryland have never permitted it,” Migdal replied.

The Court of Appeals gave no indication as to when it would issue its ruling in the case, *D.R.D. Pool Service Inc. v. Freed, et al*, No. 104, September Term 2009.