IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

NICOLE WALLACE, *et al.*	
Plaintiffs,	
v.	**CASE No. 24-C-17-6410**
STATE OF MARYLAND, *et al.*	**HEARING REQUESTED**
Defendants.	

PLAINTIFFS' MOTION TO RECONSIDER APPLICATION OF THE MTCA CAP, MOTION FOR JUDGMENT NOTWITHSTANDING THE CAPPED JUDGMENT, MOTION TO ALTER OR AMEND AND MOTION TO REVISE JUDGMENT

Comes now the plaintiffs, through counsel, pursuant to Rules 2-532, 2-534, 2-535 and all other applicable rules, and file the above-referenced motion, stating as follows:

I. Introduction

The Maryland Constitution provides the right to trial by jury and that "every man, for any injury done to him" shall have a "remedy" and "justice and right, freely without sale, **fully without any denial**." Maryland Declaration of Rights, Art. 19 & Art. 5. To place this provision in historical context, the signers also required that "all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, ***accountable for their conduct***." Maryland Constitution, Article 6.

Article 19 of the Maryland Declaration of Rights "guarantees a remedy for an injury to a person" in the courts of the State. *Cooper v. Rodriguez*, 443 Md. 680, 722–29, 118 A.3d 829, 854–58 (2015). This guarantee has special significance where constitutional issues, like Daquan Wallace's Article 24 claims, are involved. Indeed, it is a "basic tenet" of Article 19, "that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong." *Id.*

In *Espina v. Jackson*, 442 Md. 311, 344, 112 A.3d 442, 462 (2015), the Court of Appeals adopted the following test for whether a limitation on damages complies with Article 19:

> in assessing the reasonableness of the damages cap, the question before us is whether application of the damages cap leads to no remedy or a "drastically inadequate" remedy, *i.e.*, the equivalent of "almost no compensation" to the plaintiff.

Id.

If the $200,000 damages limitation found in the Maryland Tort Claims Act is applied to the jury's $25 Million judgment, Daquan will receive "no remedy or a 'drastically inadequate' remedy, *i.e.*, the equivalent of 'almost no compensation'" in violation of Article 19.

This is true for two reasons. First, Mr. Wallace spent months in the hospital in a coma during which time an insurance company and the Medicaid program were covering his medical expenses, which *far exceed* $200,000. By contract and operation of law, Medicaid and his insurer will assert a lien over any judgment collected in this case in the amount of their expenditures on Mr. Wallace's behalf. Thus, if the verdict is reduced to a mere $200,000, *Mr. Wallace will receive absolutely nothing at all.*

Given that Article 19 forbids denying Mr. Wallace any remedy at all in connection with the State's violation of his Article 24 rights, the procedure outlined below should be followed to reach a just and constitutional final judgment.

Second, even setting aside the question of the medical liens, an award of $200,000 for what Daquan has suffered is "a 'drastically inadequate' remedy, *i.e.*, the equivalent of 'almost no compensation'" in violation of Article 19. *Id.* Daquan has endured utter agony in the five years since his injuries, including the beating itself, the coma, the tracheotomy, the feeding tube, confinement to a wheelchair, muteness, over a year without being able to communicate except by shaking his head and the inability and indignities of not even being able to bathe or use the

restroom unassisted. A mere $200,000 is drastically inadequate and almost no compensation at all under these circumstances. As such, the strict application of the cap to the constitutional claims in this case would violate Article 19.

Focusing only on past pain and suffering, just over 4 years and 8 months passed between Mr. Wallace's injuries and the verdict. Even setting the liens aside, $200,000 would represent a mere $4.80 an hour and only a little over $42,000 a year for all he has suffered (24 hrs/day x 365 days/yr x 4.75 years = 41,610 hours; $200,000/41,610 hours = $4.80/hr). This is *grossly* inadequate. *Who would trade places with Daquan for a year for $42,000?*

In *Jackson v. Dackman Co.*, 422 Md. 357, 30 A.3d 854 (2011), the Court of Appeals addressed a statutory scheme which operated as a cap of $17,000 for injuries arising from lead paint exposure. In holding the statute unconstitutional under Article 19, the Court appropriately looked toward the reasonableness of the remedy:

> For a child who is found to be permanently brain damaged from ingesting lead paint, proximately caused by the landlord's negligence, the maximum amount of compensation under a qualified offer is minuscule. It is almost no compensation. Thus, the remedy which the Act substitutes for a traditional personal injury action results in either no compensation (where no qualified offer is made or where a qualified offer is rejected) or drastically inadequate compensation (where such qualified offer is made and accepted).
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> * * *
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> We hold, therefore, that the immunity provisions of the Reduction of Lead Risk in Housing Act are invalid under Article 19 of the Maryland Declaration of Rights.

Jackson v. Dackman Co., 422 Md. 357, 30 A.3d 854 (2011).

The present case *also* involves a young person permanently brain damaged, albeit *far worse* that the lead paint victim at issue in *Jackson v. Dackman Co.* While the $200,000 MTCA cap is higher than the effective $17,000 cap in *Jackson v. Dackman Co.*, lead paint injuries do approach the severity of Daquan's injuries. While lead paint victims may suffer developmental

delays, they are not wheelchair bound, mute and otherwise afflicted with all that Daquan must suffer.

Even so, Daquan askes far less of this Honorable Court than the plaintiff asked in *Jackson v. Dackman Co*. There, the plaintiff sought, *and the Court of Appeals granted*, a complete abrogation of the cap scheme in the statute.

In other words, *Jackson v. Dackman Co*. involved a facial constitutional challenge to the entire statute. *See, e.g., Motor Vehicle Admin. v. Seenath*, 448 Md. 145, 181 (2016) (a facial challenge is "[a] claim that a statute on its face ... always operates unconstitutionally"). Facial challenges are daunting because, to be successful in a facial challenge, a litigant must establish that there is no set of circumstances under which the regulation would be constitutional. *Id.*

Daquan seeks for more modest relief with a much lower standard than that applied in *Jackson v. Dackman Co*. His Article 19 challenge is only to the MTCA cap *as it applies* in his very unique case. *See Powell v. Md. Dep't of Health*, 455 Md. 520, 550 (2017) ("An as-applied challenge is defined as a claim that a statute ... is [only] unconstitutional *on the facts of a particular case or in its application to a particular party*.") (internal citation omitted & emphasis supplied).

The Court is not asked to strike down the statute or modify its operation for any other litigant. Instead, this motion seeks only to protect Daquan's right to a *meaningful* remedy. A capped remedy would be "drastically inadequate" in Daquan's unique case, and, therefore, unconstitutional, as applied to Daquan.

In seeking a just result from this Court, the plaintiff is mindful of the competing interest the State has in protecting the public fisc.[1] In recognition of the conflict here between justice for Daquan and any fiscal concerns professed by the State, the plaintiff does not seek the full amount of the jury's award.

Instead, the plaintiff asks only that this Honorable Court enter the minimum award, *below the jury's verdict, but above the cap*, which this Court believes is required by the tenants of justice enshrined in Article 19.

The plaintiff respectfully suggests that the minimum award still sufficient to pass constitutional muster given the brutal facts of this case is a total of $10 Million. This figure is a mere 40% of what the jury awarded, but the bare minimum which might begin to compensate Daquan for all he has endured. Having made this plea, however, the plaintiff moves the court to enter whatever judgment the court deems minimally constitutionally adequate under the reasonableness standard of Article 19 described more fully below.

Certainly, if the courts are empowered to strike down an entire statutory cap scheme for tort compensation as occurred in *Jackson v. Dackman Co.*, then the Trial Court is empowered to

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[1] While the State often bemoans the perceived fiscal impact of potential jury awards, and, indeed, used such arguments to justify passage of the MTCA, the reality is very different. The State of Maryland has an annual budget of more than $41 Billion. *See* https://dbm.maryland.gov/budget/Documents/operbudget/2019/Proposed/BudgetHighlights.pdf. The full jury award of $25 Million represents a mere 1/1640th of the State's annual budget. To put that in perspective, $25 Million bears the same relationship to the State's budget as $30 does to a person making $50,000 per year. And verdicts of this size are so rare that this is, in fact, the highest civil rights verdict ever against the State. Only 2 others in state history have ever broken $10 Million and the number over $1 million can be counted on one hand. In short, it simply is not accurate for the State to claim any inability to pay. The entire judgement here amounts to the equivalent of a $30 fine to the State. Respectfully, this is the least that is owed Daquan. Nevertheless, the plaintiff seeks far more conciliatory and conservative relief above.

take the far more modest step of entering whatever award it deems minimally necessary to avoid an unconstitutional and unjust result here.

This approach is necessary, given the unique facts of this case, in order to satisfy the requirements of Article 19 that a reasonable remedy be available. This approach is also in keeping with the General Assembly's instructions for interpreting the Maryland Tort Claims Act, which itself provides that, **"This subtitle shall be construed broadly, to ensure that injured parties have a remedy."** Md. Code, State Government § 12-102.

II. Analysis

A. The MTCA Damages Limitation Violates Article 19 of the Maryland Declaration of Rights as Applied in this Case.

Thomas Jefferson described the right to trial by jury as "'the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.'" *Lucky Ned Pepper's, Ltd. v. Columbia Park & Recreation Asso.*, 64 Md. App. 222, 225, 494 A.2d 947, 948 (1985) (*quoting* Thomas Jefferson, Letter to Thomas Paine (1789)). The fundamental right to trial by jury is enshrined in the Declaration of Rights, which provides in Article 5: "The inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law." Article 23 of the Declaration of Rights likewise provides: "The right of trial by Jury of all issues of fact in civil proceedings...shall be inviolably preserved."

A jury award, based, as it is on determinations of fact which are left to the discretion of the jury, is presumed reasonable and correct. *See, e.g., John Crane, Inc. v. Linkus*, 190 Md. App. 217, 244, 988 A.2d 511, 527 (2010); *Thorne v. Contee*, 80 Md. App. 481, 502-03, 565 A.2d 102, 112-13 (1989). Indeed, "the jury is sacrosanct and its importance is unquestioned." *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395, 408, 705 A.2d 58, 65 (1998); *see Fowler v. Benton*, 245

Md. 540, 545, 226 A.2d 556, 560 (1967) (judging weight of evidence is the province of the jury alone). Thus, the analysis of the application of any cap begins with a presumptively reasonable jury verdict.

Article 19 of the Maryland Declaration of Rights was part of the original Maryland constitution adopted in 1776. Over the years, it was renumbered to reflect its modern place as Article 19 and a single word (not relevant here) was modified by convention in 1867, after which the Article reads as follows:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

Id.

"Article 19 of the Declaration of Rights has no counterpart in the United States Constitution." *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 620, 805 A.2d 1061, 1071 (2002); *Serio v. Baltimore Cty.*, 384 Md. 373, 383, 863 A.2d 952, 958 (2004) ("Article 19 has no federal counterpart."). However, among other rights more unique to this Maryland provision, the "'law of the land' in Article 19 is the same due process of law required by the fourteenth amendment." *Attorney Gen. v. Johnson*, 282 Md. 274, 298, 385 A.2d 57 (1978) (*citing In re Easton*, 214 Md. 176, 187, 133 A.2d 441 (1957)).

Thus, Article 19 encompasses federal notions of due process, but also provides additional protections. *See Piselli v. 75th Street Medical*, 371 Md. 188, 205, 808 A.2d 508 (2002) (Article 19 of the Maryland Declaration of Rights "generally protects two interrelated rights: (1) a right to a remedy for an injury to one's person or property; (2) a right of access to the courts").

Article 19 was first cited by the Court of Appeals as a limitation on the doctrine of State sovereign immunity in 1909:

> Our declaration of rights (article 19) declares that every man, for any injury done him in his person or his property, ought to have remedy by the course of the law of the land, and (article 23) that no man ought to be deprived of his property but by the judgment of his peers, or by the law of the land, and section 40, art. 3, of the Constitution prohibits the passing of any law authorizing private property of be taken for public use without the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation. Nor shall any state deprive any person of his property without due process of law. Const. U. S. Amend. 14, § 1. Speaking of this amendment, Judge Dillon says: "It was of set purpose that its prohibitions were directed to any and every form and mode of state action—whether in the shape of constitutions, statutes, or judicial judgments—that deprived any person, white or black, natural or corporate, of life, liberty, or property, or of the equal protection of the laws. Its value consists in the great fundamental principles of right and justice which it embodies and makes part of the organic law of the nation."
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> It is conceded that no suit can be brought against the state without its consent. This immunity of the state from suit rests upon grounds of public policy, and is too firmly fixed in our law to be questioned. **But it would be strange indeed, in the face of the solemn constitutional guaranties, which place private property among the fundamental and indestructible rights of the citizen, if this principle could be extended and applied so as to preclude him from prosecuting an action of ejectment against a state official unjustly and wrongfully withholding property, by the mere fact that he was holding it for the state and for state uses. It is easy to see the abuses to which a doctrine like that would lead.** That such is not law has been conclusively settled by *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137; *Smith v. Reeves*, 178 U. S. 438, 20 Sup. Ct. 919, 44 L. Ed. 1140; 10 Am. & Eng. Ency. of Law, 528.

Weyler v. Gibson, 110 Md. 636, 73 A. 261, 263–64 (1909) (Ironically, *Weyler* involved an unconstitutional government seizure of land to expand the Maryland Penitentiary, which later became the Baltimore City Detention Center, were guards orchestrated the attack on Daquan Wallace almost 120 years later.).

Article 19 was next cited by the Court of Special Appeals in ruling that, despite sovereign immunity, Baltimore City could still be sued for compensatory monetary damages in a nuisance action. *Herilla v. Mayor & City Council of Baltimore*, 37 Md. App. 481, 490, 378 A.2d 162, 168 (1977).

In discussing Article 19, the Court of Appeals has more recently held that "[a] reading of [a] statute that would create an unreasonable impediment to the pursuit, or defense, of a recognized common law right of action is certainly to be avoided, as it would raise a serious question of the constitutionality of the provision." *Witte v. Azarian*, 369 Md. 518, 533–34, 801 A.2d 160, 169–70 (2002).

Shortly thereafter, in *Piselli v. 75th Street Medical*, 371 Md. 188, 204-205, 808 A.2d 508, 517-518 (2002), the Court of Appeals detailed some of the history of Article 19 as follows:

> Article 19 was part of the original Maryland Declaration of Rights adopted in 1776, although it was then designated as Article 17 of the Declaration of Rights. Except for one word, the wording today is identical to the 1776 wording. All of the original state constitutions adopted at the time of the Revolutionary War, except Virginia's and North Carolina's, contained provisions like Article 19.
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> While the United States Constitution contains no comparable provision, today the constitutions of 39 states have clauses similar to Article 19. These provisions, often referred to as 'Remedy Clauses' or 'Open Courts Clauses' or 'Access to Courts Clauses,' are based on Chapter 40 of the Magna Carta or, more particularly, Lord Coke's interpretation of Chapter 40.

Id.

In *Piselli*, the Court of Appeals recognized that Article 19 "generally protects two interrelated rights: (1) a right to a remedy for an injury to one's person or property; [and] (2) a right of access to the courts." *Piselli v. 75th St. Med., P.A.*, 371 Md. 188, 205, 808 A.2d 508, 518 (2002). Thus, Marylanders have a general, constitutional right to redress in the courts: "Where a person clearly has a right to money or property under a statute or common law principle, and no statute specifically provides for a remedy, Article 19 guarantees a common law remedy to enforce the right." *Id.* at 206, 808 A.2d at 518.

Moreover, "Article 19 [also] insures that rights belonging to Marylanders are not illegally or arbitrarily denied by the government." *Doe v. Doe*, 358 Md. 113, 127, 747 A.2d 617, 624

(2000) (internal quotation marks omitted). Accordingly, Article 19 permits only "reasonable restrictions upon traditional remedies or access to the courts." *Piselli*, 371 Md. at 206, 808 A.2d at 518 (emphasis added).

Article 19, for instance, "precludes the Legislature from immunizing from suit both the government and the governmental official involved...when the cause of action is based upon a violation of state constitutional rights." *Piselli*, 371 Md. at 207, 808 A.2d at 519; *see Lee v. Cline, supra*, 384 Md. at 262-264, 863 A.2d at 307-308; *DiPino v. Davis*, 354 Md. 18, 50-51, 729 A.2d 354, 371-372 (1999); *Ashton v. Brown*, 339 Md. 70, 105-106, 660 A.2d 447, 464-465 (1995); *Ritchie v. Donnelly*, 324 Md. 344, 370-375, 597 A.2d 432, 445-447 (1991); *Clea v. City of Baltimore*, 312 Md. 662, 680-681, 541 A.2d 1303, 1312 (1988); *Weyler v. Gibson*, 110 Md. 636, 653-654, 73 A. 261, 263 (1909).

Based on these principles, the *Piselli* Court held that a statute of repose, running against a minor child during his or her period of minority, and "barring an injured child's medical malpractice claim before the child is able to bring an action is an unreasonable restriction upon the child's right to a remedy and access to the courts guaranteed by Article 19 of the Maryland Declaration of Rights." 371 Md. at 216, 808 A.2d at 524

In addition to the important Article 24 due process rights at issue in the verdict arising from the present case, the Court of Appeals has held that "Article 19 provides a measure of constitutional protection even for causes of action which are not based on constitutional rights." *Dua v. Comcast Cable, supra*, 370 Md. at 644, 805 A.2d at 1084-1085; *see also Robinson v. Bunch, supra*, 367 Md. at 444, 788 A.2d at 644; *Doe v. Doe*, 358 Md. 113, 128, 747 A.2d 617, 624 (2000); *State v. Board of Education, supra*, 346 Md. at 647, 697 A.2d at 1341; *Renko v.*

McLean, 346 Md. 464, 484, 697 A.2d 468, 478 (1997); *Johnson v. Maryland State Police, supra*, 331 Md. at 297, 628 A.2d at 168; *Murphy v. Edmonds, supra*, 325 Md. at 365, 601 A.2d at 113.

"While Article 19 generally prohibits a grant of immunity to both the governmental official and the governmental entity which tortiously violates a plaintiff's state constitutional rights, the effect of Article 19 upon non-constitutional torts is somewhat more fluid. The test is one of reasonableness." *Lee v. Cline*, 384 Md. 245, 264-266 (2004). Specifically, "'A statutory restriction upon access to the courts violates Article 19 . . . if the restriction is unreasonable.'" *Murphy*, 325 Md. at 365, 601 A.2d at 113.

When next called on to interpret Article 19 after *Piselli*, the Court of Appeals was faced with a police misconduct case involving a pretextual traffic stop and brief detention. *Lee v. Cline*, 384 Md. 245, 264-266 (2004). The Court held that Article 19, "generally prohibits unreasonable restrictions upon traditional remedies or access to the courts but allows the Legislature, pursuant to its authority to change the common law or statutory provisions, to enact *reasonable* restrictions upon traditional remedies or access to the courts." *Lee v. Cline*, 384 Md. 245, 264-266 (2004); *Johnson v. Maryland State Police*, 331 Md. 285, 297, 628 A.2d 162, 168 (1993).

In *Lee v. Cline*, the Court ruled that "at least to the extent that the Maryland Tort Claims Act substitutes the liability of the State for the liability of the state employee committing a tort, the requirements of Article 19 are satisfied." *Id.* However, the Court was careful to note that:

> There is one issue regarding the impact of Article 19 upon Maryland Tort Claims Act immunity which has not been raised in this case, which is not likely presented by the facts of the case, and upon which we intimate no opinion. The Tort Claims Act, in § 12-104(a)(2) of the State Government Article, caps the State's liability at $200,000, but the Act, in § 5-522(b) of the Courts and Judicial Proceedings Article, grants total immunity to state personnel for torts "for which the State or its units have waived immunity . . . even if the damages exceed the [monetary] limits of that waiver." Whether Article 19 of the Declaration of Rights precludes

> the grant of immunity to state personnel, to the extent that damages exceed $200,000, is an issue which has not previously been decided by the Court. As indicated above, we express no opinion on the issue.

Lee v. Cline, 384 Md. 245, 264–66, 863 A.2d 297, 308–10 (2004).

Further, the *Lee* Court was careful to remind us that the constitution limits the ways in which the government might seek to avoid liability to its citizens: "Article 19 precludes the application of public official immunity to constitutional torts. The same constitutional provision may operate to restrict an expansion of public official immunity with respect to non-constitutional torts if the restriction is held to be unreasonable." *Id.*

While rejecting a very particular *facial* challenge to the MTCA cap under Article 19, *Lee* was careful to leave open the type of challenge asserted here: namely, an *as-applied* challenge. In other words, *Lee* held that the MTCA cap did not generally violate Article 19 in all cases, but expressly recognized that certain applications of it might. *Id.* Those issues were left for another day. *Id.*

Lee illustrates something else of significance here: Like *Weyler v. Gibson*, 110 Md. 636, 73 A. 261, 263–64 (1909) almost a hundred years earlier, *Lee* illustrates that legislative or judicial restraints on claims against the government or its employees must pass Article 19 scrutiny. *See, e.g., Lee v. Cline*, 384 Md. 245, 264-266 (2004). After all, "the principle that individual state officials should not be immune from suit for state constitutional violations is bound up with the basic tenet, expressed in Article 19 of the Maryland Declaration of Rights, that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong." *Ashton v. Brown*, 339 Md. at 105, 660 A.2d at 464–465 (1995); *see also Dua v. Comcast Cable, supra*, 370 Md. at 644, 805 A.2d at 1061.

Article 19 has sufficient constitutional clout to strike down entire statutory immunity schemes (*Jackson v. Dackman Co.*, 422 Md. 357, 30 A.3d 854 (2011)) or require that whole new regulatory processes be adopted. As to the latter point, the principle that one has a Maryland constitutional right to judicial review of adjudicatory administrative decisions is based, in significant part, upon Article 19. *State v. Board of Education, supra*, 346 Md. at 647, 697 A.2d at 1341; *see also Board of License Comm. v. Corridor*, 361 Md. 403, 415, 761 A.2d 916, 922 (2000).

Given that Article 19 is sufficient to imbue the courts with the power to review the carefully-considered and case-by-case administrative decisions of the executive branch, certainly the courts are entitled to review the unthinking and arbitrary application of a blanket cap adopted over two decades ago by legislators who never met Daquan and could never have foreseen his predicament. After all, the propriety of a jury's verdict has been entrusted to the trial judge at least since the founding of our State and country. *See, e.g., Mona v. Mona Elec. Grp., Inc.*, 176 Md. App. 672, 711, 934 A.2d 450, 472 (2007)("a circuit court has broad power to revise its judgment before it is enrolled, that is, within 30 days after entry").

Indeed, trial courts are routinely called upon to assess the maximum legally permissible award in cases in which they find an award excessive in response to a motion for remittitur. *See, e.g., Hebron Volunteer Fire Dep't, Inc. v. Whitelock*, 166 Md. App. 619, 635-39, 890 A.2d 899, 908-10 (2006) (collecting federal and state cases addressing the discretion of trial courts to determine the appropriate amount of a remittitur). The trial court's discretion in this regard is broad:

> We think that, as a natural corollary to its discretion to find that a verdict is excessive, a Maryland trial court has equally broad discretion in its determination of the amount of an appropriate remittitur that will ensure that the award is a full

> and adequate compensation for the plaintiff's injuries, after "lopping off" the excess amount of the jury's verdict.

Whitelock, 166 Md. App. 642, 890 A.2d at 912 (internal quotation marks and citations omitted).

Further, the Court of Appeals has declared that "'the essence of judicial power is the final authority to render and enforce a judgment.'" *Maryland Aggregates Ass'n, Inc. v. State*, 337 Md. 658, 677, 655 A.2d 886, 895 (1995) (*quoting Attorney General v. Johnson*, 282 Md. 274, 286, 385 A.2d 57, 64 (1978)).

It is no great leap to say that a trial judge, after himself carefully watching the trial, can – and, indeed, should – review the application of an arbitrary cap on the jury's verdict to ensure that it meets the minimum requirements of the State's own constitution in the case before the Court. Indeed, this is all that the plaintiff asks.

Perhaps the clearest application of the principles the plaintiff asks the court to apply here occurred in the recent case of *Cooper v. Rodriguez*, 443 Md. 680, 722–29, 118 A.3d 829, 854–58 (2015). Like this matter, *Rodriguez* was a correctional misconduct case in which guards had orchestrated a prisoner-on-prisoner attack and then failed to intervene.

The Attorney General's Office, representing the officer who bore most of the blame, argued on appeal that the officer enjoyed public official immunity because the jury had found that he acted with gross negligence, and not malice. Indeed, it appeared that the prior state of the law supported his position.

But the Court of Appeals struck down the immunity officers previously enjoyed for grossly negligent misconduct under Article 19, ruling as follows:

> After careful review of the relevant principles and authorities, in accordance with the dictates of Article 19, we hold that gross negligence is an exception to common law public official immunity; in other words, if a public official's actions are grossly negligent, the public official is not entitled to common law public official immunity. To hold otherwise would effectively leave a void in liability, leaving plaintiffs, such as Respondents, without a remedy for a public official's

> gross negligence. We would be remiss to leave Maryland common law in this position.
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> We decline to construe common law public official immunity in such a way that it is inconsistent with Article 19 and leaves those injured by the gross negligence of a public official without a remedy.

Cooper v. Rodriguez, 443 Md. 680, 722–29, 118 A.3d 829, 854–58 (2015).

Finally, the Court of Appeals' most recent analysis of Article 19 occurred in *Espina v. Jackson*, 442 Md. 311, 344, 112 A.3d 442, 462 (2015). *Espina* dealt with a challenge to the $200,000 cap under the Local Government Tort claims Act cap, which is analogous to the MTCA cap at issue here.

In *Espina*, like *Lee v. Cline*, the Court rejected a ***facial*** challenge seeking to strike down the entire cap in all cases. But, the *Espina* Court, like the *Cline* Court before it, implicitly recognized that ***as-applied*** challenges remain viable under Article 19 and adopted the following standard:

> in assessing the reasonableness of the damages cap, the question before us is whether application of the damages cap leads to no remedy or a "drastically inadequate" remedy, i.e., the equivalent of "almost no compensation" to the plaintiff.

Espina v. Jackson, 442 Md. 311, 344, 112 A.3d 442, 462 (2015).

While the court answered these questions in the negative given the specific facts of *Espina*, and the facial challenge primarily asserted there, the decision nevertheless adopted this test, which demonstrates the court's intention that the test be applied by the trial courts.

The present case differs radically from *Espina* and a different result should be reached here. First, the *Espina* plaintiffs sought alternatively to strike down the cap entirely under a facial challenge like that rejected in *Cline* or to keep their *entire* $11,505,000 award, *without* regard to the *minimum* constitutional requirements. *Espina v. Jackson*, 442 Md. 311, 343, 112 A.3d 442, 461–62 (2015).

The plaintiff here is not so bold. First, this case is not a facial challenge to the cap. *A ruling for the plaintiff would leave the cap totally intact.*[2] Instead, the plaintiff brings only an "as applied" challenge, asking the Court to apply the test laid out in *Espina* to the facts in this particular case.

Second, the plaintiff here does not ask the Court to simply reinstate his entire award without exercising any discretion as the plaintiffs did in *Espina.*

Instead, the plaintiff asks that the Court find that the $200,000 cap, which will be entirely lost to third parties through medical liens, "leads to no remedy or a 'drastically inadequate' remedy" given the plaintiff's severe and debilitating injures.

Should the Court so find, then, as a remedy, the plaintiff seeks *only* that the Court enter the minimum verdict the Court believes is required to avoid a "drastically inadequate" result. This is the bare minimum that Article 19 requires.

In addition to the fact that the plaintiff here does not seek to overturn the cap in its entirety, and in addition to the far more modest remedy sought, there are other factors which weigh strongly in favor of granting the relief sought here. For instance, in *Espina*, the Court of

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[2] While the plaintiff does *not* seek this result here, other jurisdictions have applied their constitutional equivalents of Article 19 to strike down governmental tort claims caps. For instance, in *Clarke v. Or. Health Scis. Univ.*, 343 Ore. 581, 608-610 (Or. 2007), the Court struck down the immunity of individual government employees despite the fact that the statute vested liability with the government itself, up to a two-part cap totaling $200,000.00. *Id.* The cap there, like the cap in this case, attempted to alleviate the individual of any liability while capping the government's liability at a total of $200,000.00. Simply put, the statutory scheme in Clarke is virtually identical to the MTCA, and the Court held, under a constitutional provision virtually identical to Article 19, that, "the elimination of a cause of action against public employees or agents...as applied to plaintiff's claim against the individual defendants, violates the Remedy Clause of Article I, section 10, because the substituted remedy against the public body...is an emasculated version of the remedy that was available at common law." *Id.* The cap here likewise eviscerates the jury's verdict, leaving it with no meaning, either to the plaintiff or the State.

Appeals distinguished the application of the cap at issue there from the cap struck down in *Dackman* by stressing that the *Dackman* cap was "primarily payable to individuals other than the injured plaintiff." *See Espina v. Jackson*, 442 Md. 311, 343, 112 A.3d 442, 461–62 (2015) (*citing Dackman*, 422 Md. at 382, 30 A.3d at 868).

On this critical point, the present case is identical to *Dackman* and unlike *Espina*. Here, if a mere $200,000 is collected, any monies otherwise due the plaintiff will go to pay his medical liens, which *stretch well into seven figures*. Thus, if the cap applies here, the funds will be "primarily payable to individuals other than the injured plaintiff," just as in *Dackman*, where the entire statutory cap scheme was struck down. Manuel Espina, in contrast, died on the scene and his family owed no medical bills and cited no liens of any type over their judgment.

Espina also teaches that there is not "any bright line monetary value that we use to determine whether a remedy is reasonable." *Espina v. Jackson*, 442 Md. 311, 343, 112 A.3d 442, 461–62 (2015). This passage illustrates that the *Espina* Court expected and allowed for "as applied" challenges in the future. And it also stands for the proposition that simply because the $200,000 cap at issue in *Espina* survived the facial challenges brought there, does *not* mean that the same figure will survive a future challenge from a victim as worthy as Daquan.

In addition to the far superior legal posture, and the factual parallels between this case and *Dackman*, the other details of the present case provide much more support for an award above the cap. First, *Espina* involved a brief interaction of apparently mere minutes after which a police officer shot and killed Manuel Espina. *Espina v. Jackson*, 442 Md. 311, 319, 112 A.3d 442, 447 (2015). Daquan also underwent the similar horror of a physical attack, but, in contrast to *Espina*, Daquan then went on to suffer unspeakably for years.

The undersigned is loath to weigh what Daquan has been through against Mr. Espina's death, but the fact is that the law allows only pre-death pain and suffering to Mr. Espina, measured in mere minutes, while Daquan is entitled to be compensated for all that he and his family described at trial about the last five years.

It is also true that Manuel Espina died married and with an adult son of his own. *Espina v. Prince George's Cty.*, 215 Md. App. 611, 619–28, 82 A.3d 1240, 1245–50 (2013). Daquan was attacked and left wheelchair bound as an unmarried and childless 20 year old.

In any event, *Espina* simply never asked the trial court, *or any court*, what Daquan now asks: that this Honorable Court find the cap unconstitutional *as applied* in his unique case and enter the *minimum* verdict the Court finds necessary to pass constitutional muster.

B. The MTCA Damages Limitation Does Not Apply to *Longtin* Claims Against the State Itself for Constitutional Violations.

The MTCA does not confer any immunity on the State of Maryland. Put differently, nothing in the statute creates immunity for the State.[3] Instead, the MTCA merely waives whatever preexisting common law immunity the State may have in any given case:

> (a)(1) Subject to the exclusions and limitations in this subtitle and notwithstanding any other provision of law, **the immunity of the State** and of its units is waived as to a tort action, in a court of the State, to the extent provided under paragraph (2) of this subsection.
> (2) The liability of the State and its units may not exceed $400,000 to a single claimant for injuries arising from a single incident or occurrence.

Md. Code, State Government § 12-104.

[3] In contrast to the State itself, the law does grant individual "State personnel" certain limited immunity from suit. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-522. But, that immunity, and the case law discussing it, have no application here.

Not only does the MTCA create no new immunity for the State, but the Act is careful to recite that "[t]his subtitle does not...limit any other law that...waives the sovereign immunity of the State or the units of the State government in tort." Md. Code, State Government, § 12-103.

The MTCA cap is properly understood as a condition of the waiver of *any applicable pre-existing common law immunity*. Md. Code, State Government § 12-104. Therefore, claims for which there is *no* common law immunity in the first place are not subject to the cap. This is because a litigant bringing claims for which the State is not immune does not need to rely on the waiver of immunity in the MTCA.

There is no reported case in Maryland applying the doctrine of sovereign immunity to protect the State, or any local government, from a *Longtin* pattern or practice claim like the one the jury found here.

In fact, the only two reported cases in Maryland involving a *Longtin* claim are the opinion form the Court of Special Appeals upholding the award against all claims of immunity and the Court of Appeals decision affirming that award. Ultimately, both courts affirmed a judgment of over $5 Million, which was collected from the government.[4]

While the *Longtin* cases involved a claim against a local government and not the State, the cases contained significant indications of how our appellate courts might rule on the question of any State sovereign immunity against a *Longtin* claim. *See, e.g., Prince George's Cty. Maryland v. Longtin*, 190 Md. App. 97, 131, 988 A.2d 20, 40 (2010)**("we think it highly unlikely that Article 24 contains *any exemption* from liability for an unconstitutional pattern or practice."**).

[4] Unlike Daquan, Mr. Longtin, who was a powerfully built, six foot, three inch tall, bodybuilder, suffered no physical injuries during his unlawful 8-month detention.

There is nothing from the *Longtin* decision that expressly limits a pattern and practice claim to local governments. Indeed, the language of the decision speaks in broad terms, with a goal of punishing unconstitutional practices wherever such practices may be found. *See id.* at 496, 19 A.3d at 856. There are no geographic or political limitations. *See id.* In adopting a "pattern or practice" claim, the Court held:

> ***The State* is appropriately held answerable for the acts of its officers and employees because it can avoid such misconduct by adequate training and supervision and avoid its repetition by discharging or disciplining negligent or incompetent employees.... Moreover, there is no reason why the deterrent value of holding the State answerable for an actionable assault by one of its employees is warranted but the deterrent value of holding it liable for an employee's constitutional tort is not. A pattern or practice claim is merely a more egregious subset of the actions that are prohibited by Maryland constitutional law.**

Id. (emphasis added) (internal citations omitted).

The decision goes on to declare that "Maryland's constitutional protections require more from public officials ***and*** municipalities than § 1983. . . ." *Id.* (emphasis added).

Longtin applies to "public officials" – not just "local officials," "city officials," or "county officials." *See id.* No such limitation should be read into the decision. Had the Court of Appeals intended to limit its decision only to municipalities, it would have done so. Instead, the inclusion of the phrase "public officials" was no mistake, and was intended to carry the scope of the *Longtin* decision to both the local and state level. *See id.*

There is additional support for this contention. In *Longtin*, the Court of Appeals found support for the pattern and practice claim, by looking to *DiPino v. Davis*, 354 Md. 18, 729 A.2d 354 (1999). *Longtin*, 419 Md. at 494, 19 A.3d at 886. *DiPino*, in turn, relied on a New York case, in which the plaintiffs had sued ***the State of New York*** for constitutional torts by its police officers. *DiPino*, 354 Md. at 52-53, 729 A.2d at 372 (*quoting Brown v. State*, 674 N.E.2d 1129,

1142-43 (N.Y. 1996)). In *Brown*, the New York Court of Appeals concluded that the plaintiffs could bring their claims against the State of New York, because the "***State*** is appropriately held answerable for the acts of its officers and employees because it can avoid such misconduct by adequate training and supervision and avoid its repetition by discharging or disciplining negligent or incompetent employees." 674 N.E.2d at 1142-43.

Both *DiPino* and *Longtin* reprised this language. Indeed, in *Longtin*, the Court of Appeals anchored its pattern and practice decision to the mooring provided by the *Brown* decision:

> [O]ur decision to impose respondeat liability on local governments has a firm policy foundation: The State is appropriately held answerable for the acts of its officers and employees because it can avoid such misconduct by adequate training and supervision and avoid its repetition by discharging or disciplining negligent or incompetent employees. Moreover, there is no reason why the deterrent value of holding the State answerable for an actionable assault by one of its employees is warranted but the deterrent value of holding it liable for an employee's constitutional tort is not.

Longtin, 419 Md. at 494, 19 A.3d at 886. To craft some unseen and unstated limitation on a pattern and practice claim would be particularly inappropriate in light of this case history.

The defense has previously cited an unreported federal court opinion to support the incorrect contention that the State cannot be held liable for an unlawful pattern or practice. First, there is no Maryland case cited on this point. Second, the case was unreported. So it is not controlling precedent even in federal court, let alone here. Third, none of the arguments presented above were decided by the federal court. Fourth, states have immunity from suit in federal court for all claims under the 11th Amendment, so a federal court decision is extremely unlikely to permit state liability. Indeed, the court mentioned 11th Amendment immunity in its brief ruling. Finally, as a result, any discussion of the *Longtin* issue was *dicta*.

Finally, the State cannot claim immunity from liability for an unconstitutional pattern or practice claim. If it could, the State Constitution, and the entire social compact it represents, would be rendered meaningless and unenforceable.

A pattern or practice claim does not turn on the vicarious liability of the State for individual rogue officers committing isolated incidents. Instead, such a claim requires a showing that the constitutional violations are sufficiently frequent or otherwise rise to the level of an actual or implied State policy. A *Longtin* Claim is a direct claim against the State for *the State's own failure* to abide by the original social contract with the people who saw fit to grant the State form and the limited license to govern, through elected representatives, in the first instance.

If the State can breach the social contract and violate its own constitution without fear of owing money damages, then our fundamental rights to life, liberty and property are for naught.

The usual refrain is that the State would do no such thing and it can be trusted, without money damages, to act in the best interests of its people. This case illustrates starkly that claim to be untrue – at least for Daquan Wallace on December 18, 2014.

In the present case, there is extensive testimony from the officers themselves admitting that Correctional Officers cooperated with inmates to commit crimes in BCDC, including attacks on inmates like Daquan.

Major Moore, the high-ranking *Acting Security Chief* who testified via deposition, explained that officers at BCDC would allow assaults to occur. She learned of this as early as 2011, but it continued thereafter. Although she claims that the frequency decreased, Major Moore admitted this continued to be a problem and that officers were intentionally allowing inmate-on-inmate assaults to occur in 2013 and 2014. Major Moore testified that BCDC still had such problems as it was being closed in 2016 – almost two years *after* the assault on Daquan.

Maj, Moore specified that Officers would open doors to allow inmates to attack one another. She said she was aware of incidents where inmates were harmed as a result of guards cooperating with gang members. Maj. Moore described the problem as "pretty bad," from 2011 to 2014 and stated that she sometimes had *10 or 12 such incidents in a day.*

Maj. Moore also testified that guards would do other illegal things that gang members would ask them to do.

Another high ranking official, Lieutenant Patterson, testified that during her tenure at BCDC, "prisoners cooperated with guards and guards cooperated with prisoners to perform criminal conduct at BCDC." Lt. Patterson testified about guards who had sexual relationships with detainees and that "there was other potential criminal conduct that these guards were engaging in with or on behalf of inmates."

Officer Henderson, who was called by the defense, admitted on cross examination that asking for protective custody would cause an inmate to be labelled a snitch. He explained that the way things were at BCDC in 2014, it was very dangerous to be labelled a snitch.

Sgt. Lisa Portee testified that inmates at BCDC faced repercussions from other inmates if they complained of being attacked or threatened.

Officer Shird testified that gangs would attack inmates who refused to join gangs.

Warden Betty Johnson was more evasive than some other witnesses, but had to admit that when she arrived in October of 2014 and learned of correctional officers being involved with gang members in the fashion described by other witnesses, she reported each officer to "Headquarters." Warden Johnson admitted that not a single officer she reported was ever fired as a result.

Similarly, Sgt. Portee testified that when she reported Correctional Officer misconduct to her superiors, her Captain screamed and yelled at her for making a report and refused to take action.

In all, the Warden, a Lieutenant, a Major, a Sergeant, and two Correctional Officers, all of whom had actual custody and control of Mr. Wallace at relevant times, testified about rampant unconstitutional misconduct. All of this was known at highest levels, - including by the Warden herself, who claims to have reported everything she knew to "Headquarters."

Yet, despite the State's acute awareness of these problems *at the highest levels*, they were allowed to fester, without any efforts by the State to meaningfully intervene, for years. Indeed, Maj. Moore identifies a five-year period during which this unconstitutional mayhem ensued.[5]

There is a young man who is now mute and in a wheelchair as a result.

This is exactly the type of case for which the *Longtin* Claim was created and this case illustrates exactly why there should be no cap on pattern or practice claims:

Every relevant person in State government knew for years what was happening at BCDC. Yet, nothing was done. Then, Daquan was crippled and *almost every piece of information which came out at trial was developed by State investigators* and still, *nothing was done.*

Even after the depths of the problems there became so public that the institution was shuttered, not a single person who testified in this case was ever disciplined in any way. As the

[5] All of this is to say nothing of the rampant violations of nearly every rule or procedure applicable in the institution, from falsifying grounds for a transfer, to avoiding seeking proper approvals for it, to faking the traffic officer's signature, to not recording Daquan's arrival in the logbook at MDC, to holding inmates back from dinner, to allowing the attack itself to occur, to falsifying the logbook time records by 26 minutes or more to hide that the attack was orchestrated during dinner, to carrying Daquan to medical without waiting for medical staff to transport him.

Court heard, each person involved in what happened to Daquan either became fully vested and retired on a full State pension or still works for a government entity in one capacity or another.

Even now, ten days after the verdict and all of the attention it garnered, plaintiffs' counsel has not received a single telephone call from any government agency or investigator interested in learning what their current employees did to lead to this verdict or Daquan's injuries.

Very simply put, if this verdict does not stand, nothing will be done and nothing will change.

C. The MTCA Limitation Violates the Equal Protection Guarantees of the Maryland Constitution, As Applied Against the Catastrophically Injured and Disabled.

Article 24 of the Maryland Declaration of Rights provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Although Article 24 does not include an express equal-protection provision, Maryland Courts have long held that "equal protection is implicitly guaranteed by the due process provision found in Article 24 of the Declaration of Rights." *Kirsch v. Prince George's County*, 331 Md. 89, 96, 626 A.2d 372, 375 (1993). The plaintiff also relies on the well-know equal protection guarantees of Article 26.

In an equal-protection challenge, there are differing standards of review depending upon the nature of the right at issue:

> In most instances when a governmental classification is attacked on equal protection grounds, the classification is reviewed under the so-called "rational basis" test. Generally under that test, a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational. . . .

> Where, however, a statutory classification burdens a "suspect class" or impinges upon a "fundamental right," the classification is subject to strict scrutiny. Such statutes will be upheld under the equal protection guarantees only if it is shown that they are suitably tailored to serve a compelling state interest.
>
> Finally, there are classifications which have been subjected to a higher degree of scrutiny than the traditional and deferential rational basis test, but which have not been deemed to involve suspect classes or fundamental rights and thus have not been subjected to the strict scrutiny test. . . .

Ehrlich v. Perez, 394 Md. 691, 716-718, 908 A.2d 1220, 1235 (2006) (internal quotation marks and citations omitted).

In *Murphy*, the Court held that the rational-basis test applies to the legislative classification of "plaintiffs" under Cts. & Jud. Proc. § 11-108. *Murphy*, 325 Md. at 367, 601 A.2d at 114. Similarly, in *Gooslin v. State*, 132 Md. App. 290, 296–98, 752 A.2d 642, 645–46 (2000), the plaintiffs alleged that, "the Legislature has created a statutory 'classification' of injured persons that denies equal protection of the law to those injured by the negligence of State employees when compared to those injured by private individuals." *Id.* Not surprisingly, the Court applied the rational-basis test in *Gooslin* as well. Neither "plaintiffs" nor "those injured by State employees" fit the definition of traditional suspect classes.

This case is different, however. Daquan is mute, wheelchair bound and otherwise disabled. The cap plainly discriminates against those disabled from their injuries. This is true for the simple reason that one who is mute and wheelchair bound after an injury (or otherwise rendered disabled) is naturally more likely to receive an award over the cap.

Awards under the cap are left unadjusted and paid in full, while only awards over the cap are reduced. Thus, the cap tends to discriminate against the disabled by reducing their awards while the able-bodied, more often than not, do not have their awards reduced.

Because here, unlike in other cases, the cap "burdens a 'suspect class'...the classification is subject to strict scrutiny." Murphy, 325 Md. at 356, 601 A.2d 102. Such statutes will be upheld under the equal protection guarantees only if it is shown that "'they are suitably tailored to serve a compelling state interest.'" *Id. citing Broadwater v. State*, 306 Md. 597, 603, 510 A.2d 583 (1986) (quoting Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)); *see, e.g., Trujillo v. City of Albuquerque*, 110 N.M. 621, 798 P.2d 571 (1990) (applied heightened scrutiny to damage cap on City's liability under Tort Claims Act to determine whether it violated equal protection; remanded for fact-finding).

The cap fails this test, as applied in the present case.

D. In the Alternative, the $15 Million Negligence Verdict Awarded by the Jury Should be Limited to no Less than $400,000 under the MTCA.

As Nicole Wallace explained at trial, BCDC would provide her with no information about what happened to her son. The State certainly did not put her on notice that officers had allowed this attack to occur. In fact, Ms. Wallace had to engage in significant investigative efforts spanning the better part of three years before a picture of the State's liability began to emerge.

These efforts included Ms. Wallace attempting to speak with other prisoners, healthcare providers and BCDC personnel to learn what had happened. She was, by and large, stonewalled. Ms. Wallace was unable, on her own, to develop the facts necessary to make out a claim against the State because the State would not release information to her.

As a result, Ms. Wallace began a search for lawyers, but finding one to take her case was difficult because she did not have sufficient information for her claim to be fully evaluated.

Shortly after being retained, the undersigned filed formal Public Information Act (PIA) requests with the State. Despite the legal obligation to respond, the State continued to stonewall.

A PIA request was sent on October 18, 2016 seeking information related to Daquan's time at BCDC and what happened to him. That request was denied in its entirety on October 26, 2017.

After follow up by the office of the undersigned, the request was denied again on November 3, 2016.

On December 7, 2016, the office of the undersigned requested mediation with the State's PIA ombudsman.

On February 8, 2017, Laura Mullally, Esq., who later became trial counsel in the civil rights case, again denied our requests.

On April 18 and 24, 2017, plaintiff's counsel again communicated with the State's Ombudsman, requesting that mediation remain open.

On April 25, 2017, FOIA and MPIA requests were sent to the State's Attorney Office for Baltimore City (SAO) in the hopes that they might provide records since the Department of Corrections had refused for almost a year.

On May 3, 2017, plaintiff's counsel sent the SAO an email request to confirm receipt of our MPIA request and we received an email back stating that there were no documents found.

On May 9, 2017, we received a letter from the SAO formally denying our requests.

On May 5 and throughout the summer, plaintiff's counsel continued to reach out to the Ombudsmen in order to obtain the public records sought.

Finally, having exhausted all other efforts, on September 18, 2017 the office of the undersigned was forced to file a lawsuit under the Maryland Public Information Act to force the production of documents. *See Nicole Wallace, et al. v. Mayor And City Council of Baltimore City, et al.*, Circuit Court for Baltimore City, Case Number: 24C17004675.

On October 30, 2017 – over a year since the initial requests, plaintiff's counsel had a telephone call with Laura Mullally, Esquire, to discuss the case.

On November 1, 2017, after over a year of effort and having to file a lawsuit, a six part document production, consisting of thousands of pages, was finally produced.

That same day, the office of plaintiff's counsel emailed back and identified obvious deficiencies in the production.

A day later, Laura Mullally, Esq. responded to acknowledge that there were *still* items missing, including the phone calls counsel later played at trial and dozens of pages of documents.

On November 3, 2017, Ms. Mullally, Esq. filed a Motion to Dismiss the MPIA Case asserting that all documents had been produced.

On November 13, 2017, ten days after her motion, defense counsel produced an additional 66 pages of material, all of which was responsive to the original request of over a year prior.

After extensive review by plaintiff's counsel and additional demand, on December 6, 2017, still more responsive documents were produced.

During this entire period, the State was vigorously litigating the MPIA case. After the Complaint, an Answer and Motion to Dismiss were filed, the plaintiff was forced to successfully oppose the motion despite the fact that documents were admittedly still forthcoming. This required attending a hearing. The plaintiff was forced to take the depositions of witnesses who were providing affidavits in the case. The State filed a Motion for Protective Order which the plaintiff had to (again successfully) oppose. Pretrial Statements were filed and the matter was finally resolved with a promise of additional production on January 9, 2019, the day before trial.

In all, the State had been forced to produce thousands of pages of documents and had not one a single motion filed in the case.

Even after all of this effort over more than 2 years, there were numerous documents responsive to the original request that were not produced until during the civil rights case – some as late as one week before the September 16, 2019 start of trial.

All of this background is critically import to understanding which cap, *if any*, should apply to the negligence claims.

The entire case has currently been capped at $200,000, which was the cap under the Maryland Tort Claims Act until the General Assembly, in the Acts of 2015, c. 132, § 1, in para. (a)(2), substituted "may not exceed $400,000 to a single claimant" for "may not exceed $200,000 to a single claimant." That change went into effect on October 1, 2015.

> In an uncodified section, Acts 2015, c. 132, § 2, further provides:
> SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before the effective date of this Act.

As of October 1, 2015, the State was refusing to tell Ms. Wallace what happened and no documents had been produced by the State. Her claim had not yet "arisen," because the final element of the claim, namely what, if any, wrongdoing occurred, had not yet been disclosed to her in sufficient detail to draft a viable lawsuit, all despite diligent efforts.

In fact, the present case was not filed – *and could not be filed* – until December 15, 2017, just over a month after the State finally produced thousands of pages of documents and counsel had time to review them. Even then, due to the large volume of material withheld, a review of the Complaint demonstrates that many of the key facts on which liability later turned were not yet know.

Had the State been forthcoming with Ms. Wallace in response to her initial inquires, the case might have "arisen" before October 1, 2015. But, because the State withheld the involvement of its officers (and critical documents like the log books and Transfer Form) until long after this date, Ms. Wallace did not become sufficient aware of her cause of action in order to actual draft and file a Complaint until after October 1, 2015.

Given the circumstances, this case arose after October 1, 2015 and the $400,000 cap, if any, should apply to the negligence claims.

HEARING REQUEST

The plaintiffs respectfully request a hearing.

Respectfully submitted,

HANSEL LAW, PC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2019, I caused the foregoing to be mailed, postage prepaid, to Laura Mullally, Esquire, Office of the Attorney General, 300 East Joppa Rd, Suite 1000, Towson, MD 21286.

Cary J. Hansel (Bar No. 14722)

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

NICOLE WALLACE, *et al.*

Plaintiffs,

v.

STATE OF MARYLAND, *et al.*

Defendants.

CASE No. 24-C-17-6410

ORDER

Upon consideration of the post-trial motions of all parties, all associated briefing, and any hearing of the matter, it is, this _____ day of _____, by the Circuit Court for Baltimore City, hereby,

ORDERED, that the defendants' post-trial motions be, and hereby are, DENIED, and it is further,

ORDERED, that the plaintiffs' post-trial motions be, and hereby are, GRANTED, and it is further,

ORDERED that the clerk shall correct the judgment in this matter in favor of the plaintiffs and against the defendants to reflect the following amount: $ _____.

_____
Honorable Philip S. Jackson
Circuit Court for
Baltimore City, Maryland

Copies to: Counsel of record.