

S17802 / 17821

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL )  
 PRESIDENTS REGIONAL HOUSING )  
 AUTHORITY, )  
 Appellant/Cross-Appellee, )  
 v. )  
 DIETRICH MAEL, on his own behalf and on )  
 behalf of his minor children D.K. and E.M., )  
 and ROSE MAEL, and THOMAS MAEL, )  
 Appellees/Cross-Appellants, )  
 v. )  
 STATE OF ALASKA, )  
 Appellee. )

Nos. S-17802/17821

Superior court: 4BE-17-00061CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA  
 FOURTH JUDICIAL DISTRICT AT BETHEL  
 THE HONORABLE TERRENCE HAAS, PRESIDING

BRIEF OF CROSS-APPELLANT DIETRICH MAEL

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**AS 09.17.010. Noneconomic damages.**

(a) In an action to recover damages for personal injury or wrongful death, all damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment, loss of consortium, and other nonpecuniary damage.

(b) Except as provided under (c) of this section, the damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed \$400,000 or the injured person's life expectancy in years multiplied by \$8,000, whichever is greater.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed \$1,000,000 or the person's life expectancy in years multiplied by \$25,000, whichever is greater, when the damages are awarded for severe permanent impairment or severe disfigurement.



## STATEMENT OF JURISDICTION

Dietrich Mael appeals to the Alaska Supreme Court from the final judgment of the superior court, entered on May 13, 2020, to the extent the judgment incorporates the superior court's decision to reduce the jury's award of non-economic damages from \$1,580,000 to \$1,000,000, based on the court's ruling that the statutory cap on non-economic damages is constitutional as applied to Dietrich Mael. [Exc. 624-25, 687]<sup>1</sup> Dietrich Mael timely filed his notice of cross-appeal on June 23, 2020, within 14 days of when the appellant filed its notice of appeal. This Court has jurisdiction over this appeal pursuant to AS 22.05.010.

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<sup>1</sup> Dietrich Mael is the sole cross-appellant on the issue presented in this brief, since he is the only plaintiff who received a jury award of non-economic damages that exceeds the statutory cap. His co-plaintiffs at trial are appellees with him in Appeal No. S-17802, the appeal from the verdict and judgments in favor of all plaintiffs that was filed by the Association of Village Council Presidents Regional Housing Authority.

## ISSUE PRESENTED

Alaska Statute 09.17.010(c) caps the amount of non-economic damages that may be awarded to an injured plaintiff at \$1,000,000, if the plaintiff suffered severe and permanent physical impairment or disfigurement. The jury found that Dietrich Mael suffered severe permanent physical impairment when the boiler in his home exploded with such force that the walls of the boiler room were forced outward and he was blown against a wall. [Exc. 433] Trial evidence showed that, because Dietrich Mael now endures near-constant severe pain, he cannot support his family or enjoy the activities that gave his life meaning and value; he wonders whether life is worth living.<sup>2</sup> The jury awarded him \$1,580,000 in past and future non-economic damages. [Exc. 435] The trial court reduced the award to \$1,000,000, based on AS 09.17.010(c). [Exc. 687]

Does the statutory cap on non-economic damages violate the constitutional guarantee of substantive due process as applied in this case, where:

(1) the plaintiff described the most severe imaginable non-economic damage – that his life is so profoundly altered by his injuries that he contemplates taking his own life – yet he is subject to the same statutory cap as all other plaintiffs with less severe non-economic injuries?

(2) the statutory cap was applied 23 years after it was enacted, so that the \$1,000,000 awarded in 2020 is worth only 62.5% of the cap adopted by the legislature in 1997?<sup>3</sup>

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<sup>2</sup> See *infra* at 4.

<sup>3</sup> The remaining issues listed in the Statement of Points on Appeal that was filed with

## STATEMENT OF FACTS

### Dietrich Mael before his accident

In January 2016, Dietrich Mael was a 34-year-old resident of Chefnak, a village in western Alaska. [R. 3912] Dietrich<sup>4</sup> lived with his mother Rose and two of his children, Dillon and Erica, in a home built by and belonging to the Association of Village Council Presidents Regional Housing Authority (“AVCP RHA”). [9/18 Tr. 154, 157; 9/20 Tr. 28]<sup>5</sup> His father Thomas lived nearby. [9/18 Tr. 157]

Dietrich was regularly employed by both the village water-sewer project and by the City of Chefnak. [9/19 Tr. 192-93] In addition to his paying employment, Dietrich supported his extended family through regular subsistence activities, including hunting moose and birds, fishing for salmon and halibut, and collecting berries and birds’ eggs. [9/17 Tr. 100-01; 9/19 Tr. 194] Dietrich had almost completed building a new house for his family, and he enjoyed activities with his children. [9/17 Tr. 102; 9/19 Tr. 194-96]

### Dietrich’s accident

On January 6, 2016, Dietrich came home from work, and he settled on the couch in the living room to watch the news on television. [9/19 Tr. 197]

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the Notice of Cross-Appeal will be addressed in the Maels’ appellee brief in Appeal No. S-17802, because the remaining points are not separate appeal points but grounds for upholding the trial court’s rulings that have been challenged by the appellant in that case.

<sup>4</sup> To avoid confusion among the family members who share the same last name, this brief typically refers to each of them by first name.

<sup>5</sup> The transcript in this case is *not* numbered consecutively; the transcript of each day of court proceedings starts with page 1. This brief therefore cites to the transcript by date (month/day) and then page number.

Family members noticed the boiler – the central component of the home’s heating system – making an unusual whistling sound. [9/18 Tr. 84, 86-87, 158] Dietrich’s mother, Rose, asked him to check on it. [9/18 Tr. 159; 9/19 Tr. 197] Dietrich walked the short distance from the couch to the boiler room, intending to turn off the boiler. [9/18 Tr. 85-86; 9/19 Tr. 197-99] He approached the boiler, but, before he could flip the switch to turn it off, the boiler exploded, spraying him with boiling water and glycol. [9/19 Tr. 199-200, 202]

The force of the explosion pushed out all the boiler room walls and threw Dietrich violently backward against a wall. [9/18 Tr. 58; 9/19 Tr. 172, 200, 204-07] Dietrich was stunned and may have been knocked briefly unconscious. [9/19 Tr. 201-02] He then picked himself up off the floor and staggered into the living room. [9/18 Tr. 161; 9/19 Tr. 202] He was soaking wet and obviously in great pain, with extensive burns on his face and hands. [9/17 Tr. 94-95, 97-99; 9/18 Tr. 84, 104, 161-62; 9/19 Tr. 202] Dietrich was rushed by family members to the village clinic, then medevaced to the hospital in Bethel. [9/17 Tr. 99; 9/18 Tr. 89-91] He received in-patient treatment for a week, and remained in Bethel for another week for out-patient wound care. [9/20 Tr. 32; 9/25 Tr. 162-63]

As Dietrich was weaned from some of the powerful painkillers prescribed to help him deal with the intense pain from his burns, he began to experience significant back pain. [9/19 Tr. 9-11; 9/20 Tr. 30-32; 9/25 Tr. 124-25, 159, 177-78] Because he had not been experiencing back pain in the months before the boiler exploded, it was reasonable to infer that the pain resulted from his being thrown against the wall by the force of the explosion. [9/18 Tr. 122-23; 9/20 Tr. 41]

In the nearly four years between the explosion and the trial in this case, Dietrich's severe back pain never went away. [9/18 Tr. 112-13] At trial, Dietrich described "bad back pain" that was "getting worse and worse," so that he could not stand, walk, lift, or carry. [9/20 Tr. 32] He was visibly uncomfortable while sitting to testify. [9/19 Tr. 191] He suffered numbness and tingling going down his legs, which is indicative of nerve pain. [9/19 Tr. 16] He obtained no relief from prescribed painkillers. [9/19 Tr. 15]

Dietrich consulted a series of doctors. The medical records confirmed his complaints of nearly constant pain in his mid and low back, sometimes so bad he could not get up in the morning. [9/19 Tr. 12] For example, a doctor's note from January 2019, three years after the accident, records Dietrich's complaint of the long history of back pain, "nearly debilitating." [R. 4076] The pain was "diffusely over LB [lower back] usually. Reports that i[t] feels like bones are rubbing against each other. Worse with everything." [Id.]<sup>6</sup>

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<sup>6</sup> Other medical records are similar. *See, e.g.*, R. 4094 (4/9/19: "severe pain with weight bearing"; "continued pain worsening"), 4081 (3/8/19: "chronic back pain not getting better"; "cannot sit straight on chair back hurts"), 4072 (1/7/19: "long history of low back pain . . . getting worse for several years"; "has to lie down frequently to relieve the pain in his back"; "gets sharp pain in his back with jolts of pain that go down his legs" if he tries to ride a four-wheeler; "can't lift and can't really do any physical work because of his back pain"), 4064 (12/28/18: pain intensity is 8 out of 10; "worse, can't sit down, can't sit well, can't sit regularly"), 4047, 4051 (10/5/18: "it is so painful that it is very difficult to be a parent, to do work, to even bend over"; chronic low back pain ongoing for more than 2 years), 3996 (5/18/18: "back pain . . . is intermittent but nearly constant. Bending, sitting, moving, sometimes standing a long time increases his pain. Sometimes . . . has a really hard time getting up. Can't go on the boat anymore or walk on the tundra."), 4022 (9/29/17: "Overall Orthopedic Condition: Worsening"), 3996 (6/29/17: pain at 7 out of 10).

Doctors recommended and Dietrich tried a variety of treatments, but nothing worked to relieve the pain. [9/19 Tr. 11-22; 9/20 Tr. 32-33] As one of the experts testified at trial, some patients, like Dietrich, continue to suffer intractable pain following an injury, even when current medical science is unable to identify a reason for the pain. [9/18 Tr. 122-23; *see also* 9/19 Tr. 23; 9/25 Tr. 109-11] Even the defense expert acknowledged Dietrich's pain is real. [9/25 Tr. 109-10]

The severe, ongoing pain disrupts every aspect of Dietrich's life. He liked his job and wanted to return to work, but he could not walk, sit, or stand for long enough periods to perform his job duties. [9/19 Tr. 191; 9/20 Tr. 32, 35] He tried to return to some of the subsistence activities that gave him pleasure and made him feel valued, but he hurt too much to continue to hunt or fish. [9/20 Tr. 34, 63-64] His father observed that Dietrich "can't do anything hardly." [9/18 Tr. 65] His mother confirmed that he can "barely move around." [9/18 Tr. 166]

Doctors diagnosed Dietrich as clinically depressed and prescribed medication, but the drugs did not resolve his bleak mood. [9/19 Tr. 20]<sup>7</sup> He told a doctor in April 2019 that "he can't live like this." [R. 4094] Because the chronic pain prevents him from caring for his family, Dietrich testified that he feels useless and thinks about harming himself or others. [9/20 Tr. 37] Both his father and mother expressed concern for his mental stability.

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<sup>7</sup> *See also, e.g.*, R. 4055 (12/5/18: "Major depressive disorder . . . appears quite depressed"), 4044 (9/11/18: "stressed about back pain taking over his life"), 4028 (6/4/18: "depression, from back pain, and change in lifestyle"), 4119-22 (6/29/17: pain interferes with mood at 8 out of 10; interferes with enjoyment of life at 10 out of 10), 4015 (8/12/16: feels "Down, Depressed, Hopeless: Lots of times"; feels bad about himself; has trouble sleeping and concentrating, poor appetite, and moves and speaks slowly).

[9/18 Tr. 61, 65; 9/19 Tr. 166] His mother worried, “Sometimes I think he wants to die.”

[9/18 Tr. 166] Sharing these deeply personal details in court was obviously not easy.

### Course of proceedings

Dietrich and other members of his family filed suit against AVCP RHA in early 2018. [Exc. 1-5] Among other claims, their complaint asserted that AVCP RHA had a duty to inspect and maintain the boiler in the home, and its negligent failure to fulfill these duties caused Dietrich’s injuries and negligently caused other family members to suffer severe emotional distress by witnessing Dietrich’s condition in the immediate aftermath of the explosion. [Exc. 3-4]

The case went to trial in September 2019. [9/17 Tr. 4] AVCP RHA contested liability as well as damages. [9/26 Tr. 148-71; 9/27 Tr. 5-13] After nine days of testimony and argument, the jury returned a verdict finding that AVCP RHA breached its duties to the Maels; the jury allocated 100% of the fault for the accident to AVCP RHA, rejecting defense requests to apportion fault to Thomas and Rose and to Burnham LLC, the manufacturer of the boiler. [Exc. 433-34, 436; 9/27 Tr. 51-52] The jury awarded Dietrich \$1,672,000 in economic damages for past and future medical expenses, past and future lost wages, and the value of past and future lost subsistence harvests. [Exc. 435; 9/27 Tr. 52] The jury also awarded Dietrich \$1,580,000 to compensate him for past and future non-economic injuries. [*Id.*]<sup>8</sup>

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<sup>8</sup> Additionally, the jury awarded damages to other family members on their claims for negligent infliction of emotional distress. [Exc. 435] Those awards are not at issue in this cross-appeal.

Dietrich submitted a proposed final judgment form incorporating the jury's awards. [Exc. 437] AVCP RHA opposed it, arguing (among other claims) that the award of non-economic damages could not exceed \$1,000,000, based on AS 09.17.010(c). [Exc. 439] AVCP RHA raised the same legal argument as one of the grounds in its motion for remittitur. [Exc. 457-58, 564-69]

In his responsive memoranda and at oral argument, Dietrich acknowledged the existence of the statutory cap and the cases from this Court that rejected facial challenges to the constitutionality of the cap, but he contended that these are not dispositive in his case. [Exc. 481-83, 520; 2/26 Tr. 61-67] He observed that this Court expressly left open the possibility that the cap could be unconstitutional as applied in a particular case, and he argued that his was such a case on either or both of two grounds: First, the most extreme non-economic damages that a person could suffer would be near-constant excruciating pain that causes the person to feel suicidal; thus, if ever the cap is too low to be constitutional, this is one such case. [Exc. 483-84, 487; 2/26 Tr. 65-66] Second, more than twenty years have passed since the legislature enacted the cap, and, due to inflation, \$1,000,000 in 2019 was worth only 62.5% of what it was worth in 1997 when the cap was adopted. [Exc. 484, 488-92; R. 1936; 2/26 Tr. 62, 66] To rely on the cap to limit damages so many years later arbitrarily and irrationally limits the ability of a recently injured plaintiff to be compensated for the noneconomic injuries he proved to the jury, in a way the legislature did not contemplate or intend. For both these reasons, applying the cap to Dietrich violates the constitutional guarantee of substantive due process. [Exc. 480-92; 2/26 Tr. 61-67]

AVCP RHA opposed Dietrich's arguments and asked the court to enter judgment



for non-economic damages limited to the \$1,000,000 authorized by AS 09.17.010(c). [Exc. 564-69; 2/26 Tr. 69-73]

The superior court ruled against Dietrich and entered judgment in accordance with the statutory cap. [Exc. 624-25, 687] The court did not actually rule on Dietrich's as-applied challenge, because the court did not perceive how Dietrich's arguments were an as-applied challenge to the cap. [Exc. 685-86] Treating Dietrich's arguments as essentially a facial challenge to the damages cap, the superior court concluded that this Court's decisions upholding the facial constitutional validity of the law precluded an order rejecting the cap on the grounds Dietrich urged. [Exc. 686-87]

Dietrich timely filed his cross-appeal on this issue.

#### **STANDARD OF REVIEW**

This Court applies its independent judgment in reviewing a statute's constitutionality as applied to the facts of a particular case.<sup>9</sup>

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<sup>9</sup> See *Sands ex rel. Sands v. Green*, 156 P.3d 1130, 1132 (Alaska 2007); see also *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1049 (Alaska 2002) (issues of constitutional law are subject to de novo review).

## ARGUMENTS

### THE STATUTORY CAP ON NON-ECONOMIC DAMAGES IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

The Alaska legislature adopted comprehensive, so-called “tort reform” legislation in 1997.<sup>10</sup> Among the provisions enacted at that time were AS 09.17.010(b) and (c), which set caps on the amount that may be awarded for non-economic damages in a tort action for personal injury or death.<sup>11</sup> Subsection (b) sets the limit at \$400,000 for most cases. Subsection (c) increases the limit to \$1,000,000 if the plaintiff proves he suffered severe permanent impairment or severe disfigurement. The stated goals for the legislation include “encourag[ing] the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost, and complexity of litigation without diminishing the protection of innocent Alaskans’ rights to reasonable, but not excessive, compensation for tortious injuries caused by others[.]”<sup>12</sup>

#### A. PREVIOUS CASES PRINCIPALLY ADDRESSED FACIAL CHALLENGES TO THE CAP.

The year after the legislation passed, prospective plaintiffs filed a broad facial challenge to the constitutionality of all aspects of the new laws.<sup>13</sup> Among other arguments,

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<sup>10</sup> See 1997 SLA, ch 26; *Evans*, 56 P.3d at 1048.

<sup>11</sup> See 1997 SLA, ch 26, § 9; *Evans*, 56 P.3d at 1049-50.

<sup>12</sup> 1997 SLA, ch 26, § 1(1).

<sup>13</sup> See *Evans*, 56 P.3d at 1048. The litigants were “prospective plaintiffs” in personal injury suits in the sense that some had filed and others were contemplating filing such suits, but none had had a trial, so none had proved their claims or received an award from a jury. See *id.*

they sought a declaration that the statutory limits on non-economic damages are unconstitutional, in violation of the right to jury trial, separation of powers, the right of access to the courts, and the guarantees of equal protection and due process.<sup>14</sup> The superior court rejected all these facial challenges to the cap on non-economic damages, and plaintiffs appealed.<sup>15</sup> The four Justices who heard the appeal were evenly divided on the constitutionality of the damages cap, so the superior court's decision upholding the cap was affirmed in an opinion without precedential value.<sup>16</sup>

The dispositional opinion in *Evans* was explicit that plaintiffs brought only facial challenges and did not "complain of specific application of the challenged statutes to tort actions brought by the plaintiffs."<sup>17</sup> Consequently, the Court stressed that any result it reached in that opinion "might be different if we were presented with challenges to the law as applied in a particular case. Therefore, our ruling is limited to the facial import of the challenged provisions of chapter 26, SLA 1997."<sup>18</sup>

In subsequent cases, a majority of the Court embraced the *Evans* dispositional opinion on the facial constitutionality of the non-economic damages cap.<sup>19</sup> The plaintiffs

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<sup>14</sup> See *id.* at 1049-57.

<sup>15</sup> See *id.* at 1049.

<sup>16</sup> See *id.* at 1049-57 (dispositional opinion), 1070-75 (dissenting opinion); see generally *id.* at 1070 n.1 (explaining significance of equally divided Court).

<sup>17</sup> *Id.* at 1049.

<sup>18</sup> *Id.*; see generally *Sands*, 156 P.3d at 1133-36 (declaring that a provision of SLA 1997, ch 26 violates due process as applied to a young minor, after upholding its facial constitutionality in *Evans*).

<sup>19</sup> See *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1129-31 (Alaska 2009); *C.J. v. State, Dep't of Corrs.*, 151 P.3d 373, 379 (Alaska 2006).

in those cases also raised discrete challenges to the constitutionality of the cap as applied to them. In *L.D.G., Inc. v. Brown*, a wrongful death case, the estate of the deceased argued that the cap on non-economic damages violates the guarantee of equal protection as applied, because the cap discriminates irrationally among the dependents of a deceased based on their number; in that case, involving a deceased with two statutory dependents, each could receive at most half of the statutory cap, whereas if a deceased had a single dependent, that person could receive the total amount allowed by the cap.<sup>20</sup> This Court rejected the claim, emphasizing that, even if individual beneficiaries are treated differently, the statute treats each estate the same.<sup>21</sup> The Court also rejected the plaintiff's attempt to have the \$1,000,000 cap, instead of the \$400,000 cap, applied in that case, holding as a matter of statutory construction that the larger cap applies only in personal injury cases, and not in wrongful death cases.<sup>22</sup> This Court explained the rationale for a larger cap in a personal injury case:

[T]here are some injured persons whose injuries are so significant that they will permanently and seriously alter the course of the injured person's life. It is these severely injured persons, and not the survivors of a decedent, whom the legislature recognized were in need of the greatest non-economic damages recoveries.<sup>23</sup>

In *C.J. v. State, Department of Corrections*, the plaintiff was the victim of multiple

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<sup>20</sup> See *L.D.G.*, 211 P.3d at 1131.

<sup>21</sup> See *id.* at 1133.

<sup>22</sup> See *id.* at 1135-36.

<sup>23</sup> *Id.* at 1136.

sexual assaults committed by a parolee.<sup>24</sup> She asserted that the damages cap was particularly arbitrary and unfair as applied to her, because as a rape victim and a low-wage earner, a disproportionate amount of her total damages was non-economic.<sup>25</sup> This Court expressed sympathy for her situation but held, using the low-level scrutiny that this Court applies to purely economic interests, that the harsh result in the case did not make the statute unconstitutional.<sup>26</sup> Notably, this Court considered C.J.'s claims in response to a petition for review, so there was no jury verdict; no one could know either how C.J. would describe her non-economic injuries to the jury or what the jury would award<sup>27</sup>; also, the Court held that, because C.J. suffered three separate sexual assaults (in a single incident), she was entitled to have the cap applied separately to each assault.<sup>28</sup>

**B. THE CAP VIOLATES THE GUARANTEE OF SUBSTANTIVE DUE PROCESS AS APPLIED IN THIS CASE.**

None of the above cases controls the determination of Dietrich Mael's as-applied challenge. This Court expressly left the door open to as-applied challenges, but it has not yet considered a claim brought by a severely injured plaintiff after jurors, who heard evidence that he lived with near-constant excruciating pain, awarded him a sum substantially in excess of the statutory cap.

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<sup>24</sup> See 151 P.3d at 376.

<sup>25</sup> See *id.* at 381.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 377.

<sup>28</sup> See *id.* at 382-84. CourtView suggests the case was settled following the appellate opinion, so no jury award was ever at issue. See *Doe v. Pugh*, 3AN-99-08349 CI (entries for July 12 and 13, 2007).

Although the *Evans* plaintiffs challenged the cap facially on multiple constitutional grounds, Dietrich focused his challenge on the argument that applying the cap to him, and significantly cutting the jury's substantial award for non-economic damages, violates his right to substantive due process. [Exc. 485-92; 2/26 Tr. 66] The doctrine of substantive due process "is meant to guard against unfair, irrational, or arbitrary state conduct that 'shock[s] the universal sense of justice.'"<sup>29</sup> The guarantee of substantive due process requires that legislation have, at minimum, a "reasonable relationship to a legitimate governmental purpose."<sup>30</sup> A more demanding means-end test applies and a more important governmental interest is required when legislation infringes on important or fundamental private interests.<sup>31</sup>

This Court has held that the receipt of the non-economic damages awarded by a jury is a purely economic interest and therefore only the lowest-level scrutiny applies.<sup>32</sup> As discussed, *infra*, at 21-23, this Court should reconsider this position. But even at the lowest level of judicial scrutiny, this Court should conclude that applying the cap on non-economic damages in this case violates Dietrich Mael's right to substantive due process.

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<sup>29</sup> *Doe v. State, Dep't of Public Safety*, 444 P.3d 116, 124 (Alaska 2019) (quoting *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999) (internal quotation marks in *Church* omitted)).

<sup>30</sup> *Evans*, 56 P.3d at 1055, quoting *State v. Niedermeyer*, 14 P.3d 264, 267 (Alaska 2000) (internal quotation marks omitted).

<sup>31</sup> *See Doe*, 444 P.3d at 125-26.

<sup>32</sup> *See C.J.*, 151 P.3d at 379; *Evans*, 56 P.3d at 1052-53, 1055.

1. **Even Under The Least Demanding Scrutiny, Applying Alaska's Cap On Non-Economic Damages To Dietrich Mael Denies Him Substantive Due Process.**

Under the lowest level of scrutiny, a statute violates the guarantee of substantive due process when it is applied in such a way that it is “unfair, irrational, or arbitrary” and the State’s denial of protected interests “shock[s] the universal sense of justice.”<sup>33</sup>

Application of the non-economic damages cap to Dietrich violates this test due to two unique factors about this case that this Court has not considered in any previous case. Separately or combined, they require concluding that the statutory cap on non-economic damages violates the due process clause as applied to Dietrich.

**The statute unreasonably fails to account for inflation:** First, if, as this Court determined, a \$1,000,000 cap on non-economic damages was reasonably related to legitimate governmental interests in 1997, it is now arbitrary and irrational to impose the same cap – 23 years later – when inflation has significantly eroded the value of the award. When the legislature adopted \$1,000,000 as the upper cap in 1997, it intended to set a fairly high limit, in apparent recognition of the severity of non-economic damages some plaintiffs suffer.<sup>34</sup> Some states around that time adopted much lower caps.<sup>35</sup> But, however fair the

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<sup>33</sup> *Doe*, 444 P.3d at 125 (internal quotation marks omitted).

<sup>34</sup> *See L.D.G.*, 211 P.3d at 1136 (discussing the legislature’s belief that some injured persons are entitled to greater compensation than most victims because they have injuries that permanently and seriously alter the course of their lives (quoted *supra* at 12)).

<sup>35</sup> *See, e.g., Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 157-64 (1985) (upholding Cal. Civ. Code § 3333.2, which set \$250,000 cap on non-economic damages in medical malpractice cases); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901, 906-07 (Colo. 1993) (upholding 6A Colo. Rev. Stat. § 13-64-302, which set \$250,000 cap on non-economic damages in medical malpractice cases); *Kirkland v. Blaine Co. Med. Ctr.*, 4

Alaska legislature thought it was being in 1997, the value of the maximum award has diminished greatly with the passage of time. By 2019, \$1,000,000 was worth only 62% of what it was worth in 1997. [Exc. 484; R. 1936] Other states address the problem of inflation by adopting statutes that adjust non-economic damages caps over time.<sup>36</sup> In a different context – examining a city’s rent control ordinance – the California Supreme Court held that failure to allow for adjustments based on inflation violates due process.<sup>37</sup> (The California Supreme Court later upheld that state’s cap on non-economic damages in medical malpractice cases, even though it is not indexed to inflation.<sup>38</sup> The right to some kind of inflation adjustment was not raised in that case, though dissenting justices

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P.3d 1115, 1118-22 (Ida. 2000) (upholding former Idaho Code § 6-1603, which set cap of \$400,000, with an inflation adjustment, on non-economic damages for personal injury or wrongful death); *Murphy v. Edmonds*, 601 A.2d 102, 107-18 (Md. 1992) (upholding former Md. Code, Cts. & Jud. Proc. § 11-108, which set cap of \$350,000 on non-economic damages in actions for personal injury or wrongful death; Maryland later added an inflation adjustment provision).

<sup>36</sup> See, e.g., Idaho Code § 6-1603 (2020); Md. Code, Cts. & Jud. Proc. § 11-108 (2020); Mich. Comp. Laws § 600.1483 (2020); Mo. Rev. Stat. § 538.210 (2020); N.C. Gen. Stat. § 90-21.19 (2020); S.C. Code § 15-32-220 (2020); see also Kan. Stat. § 60-19a02 (2014) (including inflation-adjustment provisions) (cap on non-economic damages in personal injury actions held unconstitutional in *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kans. 2019)); Neb. Rev. Stat. § 44-2825 (2020) (inflation-adjusted cap applies to all damages in medical malpractice cases); Va. Code § 8.01-581.15 (2020) (inflation-adjusted cap applies to all damages in medical malpractice cases).

<sup>37</sup> See *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 169 (1976) (for “rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances”); see also *Cotati Alliance for Better Housing v. City of Cotati*, 148 Cal. App. 3d 280, 295-96 (1983) (upholding a city’s rent control ordinance where landlords’ right to a fair and reasonable return on their investment was met in part by provision authorizing rent control board to consider the decrease in purchasing power due to inflation).

<sup>38</sup> See *Fein*, 38 Cal. 3d at 157-64.



mentioned how inflation would erode the real value of the allowable compensation.<sup>39)</sup>

The voluminous legislative history surrounding passage of AS 09.17.010 contains no reference to inflation. Evidently, the legislature did not then consider the consequence of setting a limit on non-economic damages that would be fixed by statute for many decades in the future.<sup>40</sup> Presumably, the 1997 legislature recognized that subsequent legislatures could adjust the cap upward to account for inflation – but that has not happened, leaving the cap outdated and now unconstitutional.

The jury award in this case – \$1,580,000 in 2019 dollars – is worth just slightly less than \$1,000,000 in 1997 dollars.<sup>41</sup> Upholding the jury award would give Dietrich almost exactly the value of what the legislature allowed someone like him to recover in 1997. It shocks the universal sense of justice to deny a 2019 victim the same kind of recovery the legislature allowed a 1997 victim. Furthermore, allowing the caps to shrink over time, in terms of their value to the injured person, is arbitrary and not reasonably related to any legitimate governmental purpose. In fact, the shrinkage disserves the legislature’s goal to avoid “diminishing the protection of innocent Alaskans’ rights to reasonable . . .

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<sup>39</sup> See *id.* at 171 (Bird, C.J., dissenting); see also *Chan v. Curran*, 237 Cal. App. 4th 601, 616-17 (2015) (holding that inflation is not a “changed circumstance” that court could rely on to invalidate the cap); *Stinnett v. Tam*, 198 Cal. App. 4th 1412, 1432 (2011) (rejecting equal protection challenge based on the effects of inflation during the years since the California law was enacted).

<sup>40</sup> The legislature held 12 committee hearings on the proposed bill, and it appears that inflation was never discussed. See generally <http://www.akleg.gov/basis/Bill/Detail/20?Root=HB 58>.

<sup>41</sup> See [www.usinflationcalculator.com](http://www.usinflationcalculator.com) (\$1,580,000 in 2019 is equivalent to \$991,914.95 in 1997) (last visited Nov. 2, 2020).

compensation for tortious injuries caused by others.”<sup>42</sup> Thus, as applied to Dietrich, the cap violates substantive due process because the court allows him so much less simply because he was injured almost 20 years after the legislature passed the law.

**The statute unreasonably fails to allow an exception for a plaintiff with the most serious imaginable non-economic injuries:** In *C.J.*, this Court considered the hypothetical situation of “severely injured persons who are under-compensated as a result of [the cap in AS 09.17.010].”<sup>43</sup> This Court recognized that the cap would not “seem fair” to such people.<sup>44</sup> However, this Court dismissed this problem as a consequence of a legitimate legislative solution to the perceived problem of high insurance rates.<sup>45</sup> The Court noted that other statutes provide that some injured plaintiffs may not receive any monetary compensation for their non-economic damages – such as plaintiffs who are injured at work, for whom recovery is limited by the Workers’ Compensation Act, and plaintiffs who are injured by government actors who have statutory immunity against any liability for their tortious conduct.<sup>46</sup> Neither of these situations is an apt analogy.

A workers’ compensation award is not based on proving fault or responsibility for the injuries. This purely statutory system has been upheld against constitutional challenges because it limits the awards available to injured workers as part of an explicit quid pro quo:

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<sup>42</sup> SLA 1997, ch 26, § 1(1).

<sup>43</sup> *C.J.*, 151 P.3d at 382.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* at 381, citing AS 23.30.175-.215 and AS 09.50.250.

workers lose the right to sue in tort, but in exchange are guaranteed some economic support when they are injured, even if they are at fault, under a scheme that provides for prompt and predictable payments without need for litigation.<sup>47</sup>

The sovereign immunity statute is also not an apt analogy that provides a basis for rejecting Dietrich's as-applied challenge. At common law, people injured by an act of the government had no legal recourse, because the sovereign was immune from any legal liability.<sup>48</sup> The so-called sovereign immunity statute *expands* liability, allowing some injured individuals to sue the State in tort, while retaining common law immunity for other kinds of claims. Thus, the statute cited in *C.J.*, AS 09.50.250, expands the damages that injured persons may collect, whereas AS 09.17.010 limits the damages that were available at common law.

Dietrich's case should not be resolved by reference to *C.J.* or to the limitations authorized in other statutory schemes. Rather, this Court should fairly and with an open mind consider whether, in this case, the statutory limitation on recovery of non-economic damages bears a reasonable relationship to a legitimate governmental purpose or whether, as applied to Dietrich, the limit is arbitrary and unfair and an affront to the universal sense of justice. On the facts of this case, this Court should conclude that denying Dietrich full recovery for his severe non-economic injuries is not reasonably related to the legislature's

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<sup>47</sup> See generally *Burke v. Raven Electric, Inc.*, 420 P.3d 1196, 1202-03 (Alaska 2018); *Wright v. Action Vending Co., Inc.*, 544 P.2d 82, 84-85 (Alaska 1975).

<sup>48</sup> See *Glover v. State, Dep't of Transp.*, 175 P.3d 1240, 1256 (Alaska 2008); *State v. Abbott*, 498 P.2d 712, 717 (Alaska 1972) ("The doctrine of sovereign immunity . . . sprang from the ancient maxim that the King can do no wrong[.]").

legitimate goals.

The present case involves evidence that the jury apparently accepted as credible establishing that Dietrich is at risk of suicide as a result of having to live with severe near-constant pain. [9/18 Tr. 166; 9/20 Tr. 37] There can be no more extreme example of a life-affecting non-economic injury. The legislature meant to allow reasonable but not excessive awards,<sup>49</sup> and the jury's award here cannot be characterized as "excessive." As shown above, in 1997 dollars, the jury's award to Dietrich is almost exactly what the legislature allowed as reasonable for a plaintiff with severe, permanent non-economic injuries.<sup>50</sup> If ever an injury is so severe that the statutory limitation on damages is unconstitutional as applied, because it arbitrarily and irrationally precludes a severely injured person's ability to receive what the jury awarded, this is that case.

Adhering to the decisions in *Evans* and *C.J.*, this Court can reiterate that the legislature's legitimate goals can be achieved by having the courts enforce the limits in most cases, but that constitutionally courts must recognize the rare exception for cases where the nature of the non-economic injury could not be more severe. To limit damages in such cases is arbitrary and irrational and inconsistent with our sense of justice.<sup>51</sup>

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<sup>49</sup> See SLA 1997, ch 26, § 1(1) (stating legislature's intent not to "diminish[] the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others").

<sup>50</sup> See *supra* at 17 & n.41; see generally *L.D.G.*, 211 P.3d at 1136 (noting that the legislature recognized that individuals with injuries that permanently and seriously alter the course of their lives are in need of the greatest non-economic damages recoveries).

<sup>51</sup> See *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 57 (Fla. 2017) ("reducing damages for the most grievously injured is not only arbitrary, but irrational, and . . . it

Applying the cap in this case therefore violates the guarantee of substantive due process even at the lowest level of judicial scrutiny.

**2. Applying Alaska's Cap On Non-Economic Damages To Dietrich Mael Denies Him Due Process Because Capping The Damages Of The Most Severely Injured Tort Victims Has No Close And Substantial Relationship To A Legitimate State Interest.**

If the Court concludes, notwithstanding the above arguments, that the as-applied challenge fails at the lowest level of judicial review despite the passage of time and the nature of Dietrich's injuries, then this Court should consider anew whether that is the appropriate test to apply. As Dietrich argued in the superior court, a severely injured plaintiff's interest in receiving the amount of non-economic damages awarded by a jury in fact is *not* a purely economic interest. [Exc. 487-88; 2/26 Tr. 65] The credible testimony from this case established that Dietrich's ongoing, intractable pain imperils his very will to live. [9/18 Tr. 166; 9/20 Tr. 37] In *Sampson v. State*,<sup>52</sup> this Court expressly recognized the value of life and the importance of protecting people against pressures to end their lives.<sup>53</sup>

Having the court system accept and enforce the jury's award is of profound importance to an injured person such as Dietrich. Reducing the jury's award sends the message that the government, like the defendant, does not take his distress seriously and

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offends the fundamental notion of equal justice under the law") (internal quotation marks omitted).

<sup>52</sup> 31 P.3d 88 (Alaska 2001).

<sup>53</sup> See *id.* at 97 (stressing the importance of "life-valuing decision-making" in upholding a statutory ban on physician-assisted suicide).

does not value his life or treat him with dignity.<sup>54</sup> To be believed can contribute to healing, and thus to life itself.<sup>55</sup> This Court should recognize that Dietrich's interest in continuing to live cannot be dismissed as merely an economic injury.

Applying intermediate scrutiny would align this Court with other state courts that have concluded that an individual's right to retain the damages awarded by the jury is an important, albeit not a fundamental, interest, and thus legislation limiting that right must be scrutinized to determine not just whether the legislature had a rational basis for infringing on individual rights but whether there is a close and substantial reason between the legislature's interests and the means it chose to accomplish them. In reviewing limitations enacted as part of a bill focused on medical malpractice cases, the New Hampshire Supreme Court explained:

Although the right to recover for personal injuries is not a "fundamental right," it is nevertheless an important substantive right . . . . [T]he rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than

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<sup>54</sup> See generally Edgar Allen Lind et al., *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* at 22-23 (RAND: The Institute for Civil Justice 1989) ("[U]ndignified treatment by the justice system is viewed as a personal affront and stimulates the same sort of strong reaction that an insult would provoke in daily social life." (footnote with citations omitted)), available at <https://www.rand.org/pubs/reports/R3708.html>.

<sup>55</sup> See, e.g., Michelle L. Howarth, *Being Believed and Believing In: The Impact of Delegitimation on Person-Centred Care for People with Chronic Back Pain* at 191 (2012) (unpublished Pd.D. thesis, University of Salford) ("*being believed* . . . meant that participants were able to regain control of their pain"; "suffering can present existential problems of identity and continuity of self"; "[u]nderstanding sociological influences on a person's management and acceptance of pain illustrates why people with chronic pain feel impelled to have pain legitimised either through *being believed*, or through a diagnosis" (internal quotation marks and citations omitted)), available at [usir.salford.ac.uk/id/eprint/27328/1/050269F.pdf](http://usir.salford.ac.uk/id/eprint/27328/1/050269F.pdf).

allowed under the rational basis test.<sup>56</sup>

Similar conclusions were reached by courts in North Dakota,<sup>57</sup> South Dakota,<sup>58</sup> and the Virgin Islands.<sup>59</sup> Other courts have applied only low-level scrutiny.<sup>60</sup>

In applying Alaska's intermediate scrutiny in a case raising a substantive due process challenge, this Court requires the State to "show a legitimate state interest and a close and substantial relationship between that interest and the chosen means of achieving it."<sup>61</sup> Applying similar tests, the courts mentioned above struck down the laws they reviewed that arbitrarily capped the damages tort victims could recover, because they concluded that the caps bear no close and substantial relationship to the interests the laws were designed to serve.<sup>62</sup>

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<sup>56</sup> *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980); *see also Brannigan v. Usitalo*, 587 A.2d 1232, 1234 (N.H. 1991) (reaffirming use of intermediate scrutiny when evaluating cap on non-economic damages in general tort cases); *see generally Cmty. Res. for Justice, Inc. v. City of Manchester*, 917 A.2d 707, 718-21 (N.H. 2007) (increasing the scrutiny required under that state's intermediate review and overruling *Carson* to the extent it articulated a less demanding standard).

<sup>57</sup> *See Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978).

<sup>58</sup> *See In the Matter of the Certification of Questions of Law*, 544 N.W.2d 183, 189-91 (S.D. 1996).

<sup>59</sup> *See Balboni v. Ranger American of the V.I., Inc.*, 70 V.I. 1048, 1096 (2019).

<sup>60</sup> *See, e.g., Trujillo v. City of Albuquerque*, 965 P.2d 305, 313-14 (N.M. 1998) (adopting rational basis review and overruling the portions of earlier cases that applied intermediate scrutiny to damages caps).

<sup>61</sup> *Doe v. State, Dep't of Public Safety*, 444 P.3d 116, 125-26 (Alaska 2019) (internal quotation marks omitted).

<sup>62</sup> *See Carson*, 424 A.2d at 836-38 (holding cap on non-economic damages in medical malpractice cases unconstitutional on equal protection grounds); *Arneson*, 270 N.W.2d at 135-36 (holding cap on damages recoverable in medical malpractice case unconstitutional on equal protection grounds); *In the Matter of the Certification of Questions of Law*, 544 N.W.2d at 189-91 (holding cap on damages recoverable in medical malpractice cases

One key difference between the lowest level, rational basis review and intermediate scrutiny is the shift in the burden of demonstrating an adequate means-end nexus. At the lowest level, the challenger has the burden of proving the lack of any rational reason for the legislature's action. By contrast, at the intermediate level, the State must establish the existence of a close and substantial relationship between the means chosen and its legitimate goal.<sup>63</sup>

In *Evans*, in the context of equal protection analysis, this Court determined that the cap on non-economic damages is facially valid because there is a substantial relationship between capping non-economic damages and the legislature's stated goals.<sup>64</sup> However, a different conclusion is warranted when the Court conducts the as-applied due process analysis in this case.

First, while the Court declined to substitute its judgment for the legislature's when weighing the conflicting evidence available in 1997 about the link between a damages cap and the goals of reducing insurance costs and discouraging frivolous litigation,<sup>65</sup> such

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unconstitutional on due process grounds); *Balboni*, 70 V.I. at 1098-1104 (holding cap on non-economic damages recoverable in cases arising from a motor vehicle accident unconstitutional on equal protection grounds); see also *Richardson v. Carnegie Library Restaurant, Inc.*, 763 P.2d 1153, 1163-64 (N.M. 1988) (holding cap on damages recoverable in a Dramshop Act suit unconstitutional on equal protection grounds), *superseded in part by Trujillo*, 965 P.2d at 313-14 (directing that henceforth courts should analyze damages caps using rational basis test).

<sup>63</sup> See *Doe*, 444 P.3d at 126, citing *Sampson*, 31 P.3d at 91; see also *Cmty. Res. for Justice*, 917 A.2d at 719-21 (discussing federal intermediate scrutiny cases that place the burden of proof on the government to justify restrictions on individuals' rights).

<sup>64</sup> See *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1054-55 (Alaska 2002).

<sup>65</sup> See *id.* at 1055.



complete deference is no longer warranted. More than twenty years have passed. There has been plenty of time to collect data on the actual effect of imposing caps on non-economic damages, yet the current record contains no evidence that the legislature's goals have been served by the means that it chose. As the Florida Supreme Court observed a few years ago in a similar context, a legislature may have a rational basis for limiting injured individuals' rights to recover full damages based on facts available at the time the law passes, but two decades later the same facts may not exist to justify denying full recovery.<sup>66</sup>

Second, this case in particular illustrates the lack of a close and substantial fit between the arbitrary cap on non-economic damages and the stated goals. Dietrich's litigation is obviously not frivolous. Even the defense expert acknowledged that his pain is not imagined. [9/25 Tr. 109-11] To reduce the damage award here will deter other legitimate claims, at least as much, if not more so, as it will deter frivolous claims. Nor is the jury's award excessive. As discussed above, the jury in 2019 returned a verdict awarding Dietrich an amount *within* the cap as measured in 1997 dollars. If allowing a \$1,000,000 award in 1997 was a reasonable way to serve the legislature's goals,

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<sup>66</sup> See *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 59 (Fla. 2017); see also *Ferdon ex rel. Petrucelli v. Wisc. Patients Comp. Fund*, 701 N.W.2d 440, 468 (Wis. 2005) ("A statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies. A past crisis does not forever render a law valid.") (footnotes omitted, citing *inter alia* NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 34:5, at 38, 40 (6th ed. 2000) ("Over a period of time social, political and economic changes may render a statute obsolete . . . . Where changed conditions have rendered a statute unconstitutional, the basis for its abrogation by court action is clear.")), holding overruled by *Mayo v. Wisc. Injured Patients & Families Comp. Fund*, 914 N.W.2d 678 (Wisc. 2018). But see, e.g., *Verba v. Ghaphery*, 552 S.E.2d 406, 411-12 (W. Va. 2001) (declining to consider inflation as a factor that could render a damages cap unconstitutional).

disallowing an award of the same value (only higher-appearing because of the effects of inflation) is not closely and substantially related to the legislature's legitimate goals.

Using the heightened review of intermediate scrutiny, this Court should hold that applying the cap on non-economic damages in this case violates Dietrich's right to substantive due process. The jury's award of non-economic damages should be respected in this case.

**C. THIS COURT MAY REVERSE OUTRIGHT OR REMAND FOR ADDITIONAL FINDINGS.**

Based on the above arguments, this Court could find that applying the \$1,000,000 cap on non-economic damages to Dietrich is unconstitutional and remand with directions to enter judgment in accordance with the jury's verdict.

Alternatively, this Court could use this case as the vehicle for announcing standards for evaluating whether the cap is unconstitutional as applied in a particular case, and remand with directions to the superior court to apply those standards. Dietrich has suggested two such standards: whether the passage of time has so eroded the value of the cap that it is arbitrary and irrational to continue applying the outdated cap without some adjustment for inflation, and whether the plaintiff in the case has proved one of the most severe imaginable non-economic injuries, such as near-constant crippling pain and the consequent loss of a desire to live. This Court might develop other tests. Typically, the superior court, as the finder of fact, determines whether legal tests are met by the facts in a particular case.

## CONCLUSION

This Court should reverse the judgment in this case in favor of Dietrich Mael to the extent that it applies the \$1,000,000 cap on non-economic damages. This Court should remand with directions to enter judgment in accordance with the jury's verdict, or, at minimum, remand with directions to the superior court to apply standards that this Court articulates for evaluating whether the cap is unconstitutional as applied in this case.

Respectfully submitted, this 13<sup>th</sup> day of November, 2020.

REEVES AMODIO LLC

/s/ Susan Orlansky  
Susan Orlansky [8106042]

WINNER & ASSOCIATES, PC

/s/ Russell L. Winner  
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