IN THE
INDIANA SUPREME COURT
CAUSE NO. _____

TIMOTHY R. CHAMBERLAIN, M.D., TIMOTHY R. CHAMBERLAIN, M.D., P.C., C. BRYAN WAIT, M.D., ALFRED F. ALLINA, D.O., CARL S. WROBLESKI, M.D., CHRISTOPHER ZEE-CHENG, M.D., GARY HAMBEL, M.D., WHITLEY MEMORIAL HOSPITAL, INC. a/k/a WHITLEY COUNTY MEMORIAL HOSPITAL, INC., LUTHERN HOSPITAL OF INDIANA a/k/a LUTHERAN HOSPITAL OF INDIANA, INC.,	)	On Petition to Transfer from The Indiana Court of Appeals Cause No. 02A04-0302-CV-00092
Appellant/Defendant,	)	
v.	)	Appeal from the Allen County Superior Court
RICHARD STEVEN WALPOLE,	)	Cause No. 02D01-0201-CT-14
Appellee/Plaintiff.	)	The Honorable Daniel G. Heath

BRIEF OF *AMICUS CURIAE* DEFENSE TRIAL COUNSEL OF INDIANA

Peter H. Pogue
Atty. No. 14631-49

Donald B. Kite, Sr.
Atty. No. 11601-41

SCHULTZ & POGUE, LLP
11611 N. Meridian Street, Suite 706
Carmel, IN 46032
Telephone: (317) 569-2570

James D. Johnson
Atty. No. 11984-49

RUDOLPH FINE PORTER & JOHNSON
221 N.W. Fifth Street, Second Floor
P.O. Box 1507
Evansville, IN 47708
Telephone: (812) 422-9444

Attorneys for Amicus Curiae
Defense Trial Counsel of Indiana

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INTEREST OF *AMICUS CURIAE*

As indicated in Amicus Curiae's Motion for Leave of Court to File its Amicus Curiae Brief, Defense Trial Counsel of Indiana (DTCI) is an association of Indiana lawyers who defend clients in civil litigation including but not limited to traditional medical malpractice and wrongful death actions. DTCI has an interest in the outcome of the present case given the fact that the outcome will have a great impact upon the prosecution and defense of medical malpractice cases involving allegations of wrongful death in the State of Indiana.[1]

SUMMARY OF THE ARGUMENT

Amicus contends that the Court of Appeals' decision in the present case is in error for the reasons stated in Appellant's Petition to Transfer. The present Brief focuses specifically, however, upon the Judge Baker's dissenting argument that the Court of Appeals' interpretation of Indiana's Medical Malpractice Act, specifically its holding that a non-dependent adult child may recover non-pecuniary damages in an action alleging that their parent's death was caused by a medical provider, violates the Equal Privileges and Immunities Clause of the Indiana Constitution. The Equal Privileges and Immunities Clause simply does not permit the difference in treatment that would be occasioned by the Court of Appeals' interpretation. If sustained, the Court of Appeals' interpretation would permit non-dependent adult children who allege that a parent's death was caused by a medical provider to recover non-pecuniary damages while denying such damages to non-dependent adult children who allege that the death of a parent was caused by an individual or entity who (or which) does not constitute a medical provider. Enlarging the types or categories of damages which can be recovered under the Medical

[1] Pursuant to Appellate Rule 46(E)(2), the undersigned counsel for Amicus has consulted with counsel for Appellants, whose position Amicus supports, to ascertain the arguments that are being made in Appellants' Petition to Transfer. This was done, in accordance with the Rule, in order to avoid repetition or restatement of Appellants' arguments.

Malpractice Act is simply inconsistent with the Act's purposes, particularly given the absence of evidence to support the view that the Indiana General Assembly intended such an expansion.

I. ARGUMENT

The Court of Appeals' Finding That a Non-Dependent Adult Child is Entitled to Recover Non-Pecuniary Damages in an Action Alleging That a Parent's Death Was Caused by Medical Malpractice Violates the Equal Privileges and Immunities Clause of the Indiana Constitution. Transfer Should be Granted and the Dissent's Analysis Should be Sustained.

A. The Constitutional Issue Raised in Judge Baker's Dissent has Not Been Waived.

Although the Court of Appeals' decision is in error and in need of correction for the reasons stated in Appellants' Petition to Transfer, the present Brief of Amicus focuses upon the constitutional issue that was articulated by Judge Baker in his dissent. Amicus submits that the constitutional issue which was addressed by Judge Baker, whether the Court of Appeals' interpretation of Indiana's Medical Malpractice Act violates Article I, Section 23 of the Indiana Constitution, is of sufficient importance to the bench and bar, and indeed to citizens of the State of Indiana, to justify review by this Court notwithstanding the fact that the issue was not raised by the parties below.

In this regard, the present case is similar to Maurin v. Hall, 2003 WL 22869950, *5 (Wis.App. October 29, 2003), in which the Wisconsin Court of Appeals rejected the argument that the defendants had waived review of the issue, which they had not raised in the trial court, of whether a plaintiff in a medical malpractice case involving a death caused by medical malpractice may recover both non-economic damages for medical malpractice and wrongful death. The Maurin Court observed that the case "present[ed] statutory interpretation issues of first impression and of public policy concerns" and that "[a]s the court with the constitutional

obligation to oversee the development of the law and to implement the law to meet the needs of the citizens of the state, the [Wisconsin Supreme Court] is the proper court to resolve the question of what is fair compensation when a death is caused by medical malpractice." Maurin v. Hall, 2003 WL 22869950, *4; see generally Garber v. Snetman, 712 So.2d 481, 482 (Fla.App. 1998)(per curiam)(certifying the question, which it found to be "of great public importance", whether a Florida statute precluding a decedent's adult child from recovering non-pecuniary damages when the cause of death was medical malpractice, given the fact that such recovery is permitted where the decedent's death was instead due to other forms of negligence, passes muster under the equal protection clauses of the Florida and Federal constitutions).

B. The Analysis Employed by the Majority Does Not Withstand Scrutiny Under Indiana's Equal Privileges and Immunities' Clause.

Article I, Section 23 of the Indiana Constitution provides that: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." As this Court observed in Dvorak v. City of Bloomington, 796 N.E.2d 236, 238 (Ind. 2003), "[t]he requirements of Article I, § 23 govern not only state statutes, but also the enactments and actions of county, municipal, and other governmental agencies and their equivalents." Significantly, the principles that guide the analysis of a claim that a particular legislative enactment violates Indiana's Equal Privileges and Immunities Clause are well settled. As this Court recently stated in Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 251 (Ind. 2003):

> From at least 1971 until about nine years ago, this court analyzed claims under the state Equal Privileges and Immunities Clause using the same techniques as those employed by the United States Supreme Court to analyze claims under the Equal Protection Clause of the Fourteenth Amendment. See Collins v. Day, 644 N.E.2d 72, 75 (Ind. 1994). In Collins, this court jettisoned the use of federal equal protection methodology to claims alleging violations of Art. I, § 23, and

held that such claims should be analyzed under a different standard. Id. That standard was summarized as follows:

> Article 1, Section 23 of the Indiana Constitution imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

Id.;[2] see also Martin v. Richey, 711 N.E.2d 1273, 1280 (Ind. 1999), wherein it was observed that "unlike the federal equal protection analytical framework, the resolution of Section 23 claims does not necessarily require the application of different degrees of scrutiny depending on the class or right at issue." Id. (citing Collins v. Day, 644 N.E.2d 72 (Ind.1994)). The two part Collins test applies regardless of whether the legislative enactment at issue is the type that "create[s] special privileges" or the type which "impose[s] special burdens[.]" Cornell v. Hamilton, 791 N.E.2d 214, 217 (Ind.Ct.App. 2003)(citing Collins, supra, 644 N.E.2d at 77).

In the present case, it is clear that the two part Collins test is not satisfied. As succinctly stated in Judge Baker's dissent, "[u]nder the majority's view, a non-dependent child would be allowed to sue medical providers for non-pecuniary damages if the father died because of the providers' malpractice. Yet, the same non-dependent child would be prohibited by the Wrongful Death Act from seeking non-pecuniary damages if a truck negligently ran over his father." Chamberlain v. Walpole, 796 N.E.2d 818, 828 (Ind.Ct.App. 2003)(Baker, J., dissenting).

[2] In Humphreys, Justice Boehm observed, in his opinion concurring in part and dissenting in part in the principle opinion in the case, that "[b]y demanding that legislative privileges be dispensed "equally", and plainly applying to treatment of Indiana's own citizens, [Indiana's Equal Privileges and Immunities Clause] also differs significantly from the Privileges and Immunities Clause of the Fourteenth Amendment. The Equal Privileges Clause was found in the Indiana Constitution well before 1868 when the Fourteenth Amendment introduced both the Equal Protection Clause and the Privileges and Immunities Clause into the United States Constitution."

Interestingly, while Judge Sharpnack believes that whether non-pecuniary damages are available in other types of actions is not the issue, his concurrence concedes that "[i]f this case were for the death or injury to Walpole's father caused by the tort of a negligent truck driver, Walpole would have no cause of action because he is a non-dependent child and not the personal representative of the decedent." Chamberlain, supra, 796 N.E.2d at 823 (Sharpnack, J., concurring). Simply stated, if the Court of Appeals' interpretation is sustained there will clearly be a difference in treatment with respect to non-dependent adult children as between those who allege that a parent's death was caused by a medical provider and those who allege that the death of a parent was caused by an individual or entity who (or which) does not constitute a medical provider.

The difference in treatment which would result if the Court of Appeals' interpretation is sustained is distinguishable, for example, from the situation under Indiana's Child Wrongful Death statute in which the parents of children ages twenty to twenty-three who are not pursuing post-secondary education "are treated differently from the parents of children in the same age bracket who are pursuing post-secondary education". As the Indiana Court of Appeals observed when it construed the Child Wrongful Death Act in Ledbetter, " . . . there is a rationale for such treatment: the inherent characteristics of the group of twenty- to twenty- three-year-olds still pursuing post-secondary education include a dependence on their parents not generally shared by those who are free to hold jobs at that age." Ledbetter v. Ball Memorial Hosp., 724 N.E.2d 1113, 1118 (Ind.Ct.App.), trans. den. (Ind. 2000). Simply stated, given the fact that the difference in treatment between the two classes of claimants clearly would not be reasonably related to acknowledged legislative objectives of the Medical Malpractice Act, there is no similar characteristic inherent in adult non-dependent children that justifies unequal treatment between those who establish that their parent's death was caused by medical malpractice as opposed to

those who establish that their parent's death was caused by another form of negligence or a tortfeasor who (or which) does not constitute a medical provider.

C. The Purposes Underlying Indiana's Medical Malpractice Act are Not Well Served by Expanding the Damages Available to Non-Dependent Adult Children who Assert a Claim for Wrongful Death of a Parent.

While the Collins test indicates that the Indiana courts are to give "substantial deference to legislative discretion", Collins, supra, 796 N.E.2d at 251, there can little doubt in the present case that the purposes of the Medical Malpractice Act are not served by the Court of Appeals' interpretation. In determining legislative intent, Indiana's appellate courts "consider the objects and purposes of the statute [under review], as well as the effects and consequences of such an interpretation." Robinson v. Gazvoda, 783 N.E.2d 1245, 1250 (Ind.Ct.App.), trans. den. (Ind. 2003)(citing Turner v. Bd. of Aviation Comm'rs, 743 N.E.2d 1153, 1161 (Ind.Ct.App.), trans. den. (Ind. 2001)). In Martin v. Richey, this Court noted that the Court had previously held that Indiana's medical malpractice statute "was rationally related to the legitimate legislative goal of maintaining sufficient medical treatment and controlling medical malpractice insurance costs." Id., supra, 711 N.E.2d at 1280 (citing Rohrabaugh v. Wagoner, 274 Ind. 661, 666-667, 413 N.E.2d 891, 894-895 (1980), and Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 379-380, 404 N.E.2d 585, 589-590 (1980)).[3] There can be little doubt, as Judge Baker noted in his dissent, that "expand[ing] the liability of medical providers is rationally related to no expressed overarching goal, and in fact does violence to the goals stated in Martin." Chamberlain v. Walpole, supra, 796 N.E.2d at 829 (Baker, J., dissenting)(emphasis in original). This fact, when considered in conjunction with the acknowledged purposes of Indiana's Medical Malpractice

[3] In Rohrabaugh, Justice DeBruler concluded that the Indiana General Assembly had "chose[n] to attack" the problem of the reduction in health care services that had been occasioned by "the actual and threatened loss to the health care industry of malpractice insurance at a reasonable cost" on "several levels". Rohrabaugh, supra, 413 N.E.2d at 894-895. Justice DeBruler noted that one level of attack "involved limiting patient remedies" which involved, at least in part, the medical malpractice statute of limitations. Id.

Act, leads to the conclusion that the majority's interpretation does not withstand constitutional scrutiny. Indiana's Equal Privileges and Immunities Clause is violated because no reasonable or rationale basis justifies according disparate treatment to the two classes which furthers, rather than undermines, the legislative goals underlying the Medical Malpractice Act.

As observed in Appellants' Petition to Transfer, in recent years two State Supreme Courts have upheld precluding adult children from recovering non-pecuniary damages in actions alleging that the death of a parent was caused by medical malpractice. While Amicus recognizes that there often are substantial differences between a state's statutes and constitutional provisions and the statutes and constitutional provisions of other states, these recent Wisconsin and Florida Supreme Courts' decisions are probative with respect to the issue raised in Appellants' Petition to Transfer. In Czapinski v. St. Francis Hosp. Inc., the Wisconsin Supreme Court observed, in a case that came to the Court on certification from the Wisconsin Court of Appeals, that "adult children are not included in the classification of claimants entitled to collect damages for loss of society and companionship in medical malpractice suits", and it held that appellants' (plaintiffs) equal protection challenge under the Wisconsin Constitution was without merit. Finnegan v. Wisconsin Patients Compensation Fund, 2002 WL 1023064, *2 (Wis.App. May 22, 2002), reversing trial court 666 N.W.2d 797 (Wisc. 2003)(citing and discussing Czapinski v. St. Francis Hosp., Inc., 236 Wis.2d 316, 613 N.W.2d 120 (Wisc. 2000)). There are obvious parallels between Czapinski and the present case which included (1) the fact that the purposes underlying Indiana's Medical Malpractice Act are similar to the purposes underlying Wisconsin's Act (Czapinski, supra, 613 N.W.2d at 126), and (2) the complete lack of evidence that either states' legislature intended to broaden the category of damages that may be recovered by claimants, specifically non-dependent adult children, in medical malpractice cases. In view of these

parallels, the Czapinski Court's conclusions, including its rejection of the proposition that non-dependent adult children must be permitted to recover damages for loss of society and companionship, which is a part of the court's equal protection analysis (Czapinski, supra, 613 N.W.2d at 130-131), are not surprising.

Similarily, in Mizrahi v. North Miami Medical Center, Ltd., 761 So.2d 1040, 1042-1043 (Fla. 2000), the Florida Supreme Court rejected a challenge, based on the equal protection provisions in the Florida and federal constitutions, to the Florida statutory scheme which does not permit adult children to recover non-pecuniary damages in those cases wherein it is alleged that a parent's death was caused by medical malpractice. Similar to the Wisconsin Supreme Court's analysis in Czapinski, the Florida Supreme Court's determination that the statutory scheme did not run afoul of equal protection concerns stemmed from the Court's conclusion that the exclusion of non-dependent adult children served the important goal of "controlling healthcare costs and accessibility[.]" Id. at 1043.

Given the fact that the analysis which was employed by the Court of Appeals fails to withstand scrutiny under Indiana's Equal Privileges and Immunities Clause, and would result in non-dependent adult children who pursue wrongful death claims being treated differently depending upon whether they were asserting that a parent had died due to medical malpractice as opposed to other types of negligence, and given the fact that the majority's analysis would accord disparate treatment to the two classes of claimants which would not serve, and in reality would undermine, the salutary purposes underlying the Medical Malpractice Act, this Court should grant transfer and reverse the Court of Appeals' decision.

II. CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the Appellants' Petition to Transfer, this Court should grant transfer and reverse the Indiana Court of Appeals' determination that the Appellee's potential recovery under Indiana's Medical Malpractice Act is not limited by the Wrongful Death Act's damages provisions.

Respectfully submitted,

SCHULTZ & POGUE, LLP

By:_____
Peter H. Pogue, #14631-49
Donald B. Kite, Sr., #11601-41
Attorneys for Amicus Curiae
Defense Trial Counsel of Indiana

RUDOLPH FINE PORTER & JOHNSON, LLP

By:_____
James D. Johnson, #11984-49

VERIFIED STATEMENT OF WORD COUNT IN
AMICUS CURIAE BRIEF OF DEFENSE TRIAL COUNSEL OF INDIANA

The undersigned counsel for Defense Trial Counsel of Indiana, pursuant to Appellate Rule 44(E) and (F), hereby verifies that the Amicus Curiae Brief of Defense Trial Counsel of Indiana contains 2,717 words, exclusive of each of the items listed in Appellate Rule 44(C), as counted by the word processing system used to prepare the Brief, Word 8.0.

I verify under the penalty for perjury that the foregoing representation is true and correct.

Respectfully submitted,

SCHULTZ & POGUE, LLP

By:_____
Peter H. Pogue, #14631-49
Donald B. Kite, Sr., #11601-41

CERTIFICATE OF SERVICE

Service of the foregoing was made by placing a copy of the same into the United States Mail, first class postage prepaid, certified mail, return receipt requested, this 31st day of December, 2003, addressed to:

Diana Carol Bauer
Calvert Sterling Miller
1400 One Summit Square
Fort Wayne, IN 46802

Steven Jay Cohen
9465 Counselors Row, Suite 104
Indianapolis, IN 46240

Robert Francis Parker
9191 Broadway
Merrillville, IN 46410

Mary Ruth Feldhake
201 N. Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

Norma Jean Schendel
803 South Calhoun Street, 9th Floor
P.O. Box 11489
Fort Wayne, IN 46858-1489

Philip Wine Ogden
301 North Lake Street, Suite 9
Warsaw, IN 46580

SCHULTZ & POGUE, LLP
11611 N. Meridian Street, Suite 706
Carmel, IN 46032
317-569-2570
Fax: 317-569-2580

RUDOLPH FINE PORTER & JOHNSON, LLP
221 N.W. Fifth Street, Second Floor
P.O. Box 1507
Evansville, IN 47708
Telephone: (812) 422-9444
Facsimile: (812) 421-7459