

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

**J.S., A MINOR, BY HEATHER LYNN
SITES AND JARET W. SITES AS
NEXT FRIENDS,
Plaintiff**

V.

**WINCHESTER PEDIATRIC
CLINIC, P.C.,**

Defendant

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) **Civil No. 5:19-CV-0097**
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) **By: Michael F. Urbanski**
) **Chief United States District Judge**
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MEMORANDUM OPINION

Plaintiff J.S., represented by next friends, filed a lawsuit alleging that health care providers employed by defendant Winchester Pediatric Clinic, P.C. (“WPC”) were negligent in their provision of care to him and that their negligence resulted in serious injury to him. Because J.S. had previously settled a lawsuit against other defendants for \$2 million, the maximum amount of damages he could receive in a medical malpractice lawsuit capped under Virginia Code § 8.01-581.15, he seeks a declaratory judgment that the damages cap is unconstitutional. The court asked the parties to brief the issue of whether the constitutionality of the malpractice award cap is ripe for adjudication. The parties, along with the Commonwealth of Virginia which has appeared in the case, filed briefs on the issue of ripeness and the court held a hearing on November 23, 2020. Having considered the briefs and the argument presented at the hearing, the court finds that the matter is not ripe for declaratory relief at this time and **DENIES** J.S.’s request for such relief.

I.

Plaintiff's complaint alleges the following facts. On February 2, 2010, when J.S. was 20 months old, the car in which he was riding was involved in an accident. J.S. was transported to the hospital where he presented with cervical pain. An X-ray was taken which appeared normal, and J.S. was discharged home. On February 8, 2010, J.S. saw his primary care physician at WPC with complaints of neck pain and was noted as crying in pain. WPC referred J.S. to the emergency department at the Winchester Medical Center. At that facility J.S. was examined and a CT scan was taken and read as normal before he was discharged with a pediatric Aspen collar. On February 11, 2010, J.S. returned to the Winchester Medical Center for an MRI of his cervical spine which was unremarkable. On February 19, 2010, J.S.'s mother called WPC and reported that J.S. was experiencing symptoms consistent with a spinal cord injury. On February 22, 2010, J.S.'s mother again called defendant WPC and reported that J.S. was experiencing symptoms consistent with a spinal cord injury, including that he would not walk. He was seen by a healthcare provider at WPC who referred him to physical therapy.

Over the next couple of years, J.S. developed chronic health and developmental problems including problems with his gait, gross and fine motor development, balance, tone, respiratory issues, and an overall failure to thrive. On May 8, 2012, J.S. was seen by a healthcare provider employed by WPC where he showed signs of a spinal cord injury, including an abnormal gait. He was referred to physical therapy.

In March 2015, J.S. had a CT scan and MRI of his cervical spine at West Virginia University Hospital which showed severe stenosis at the craniocervical junction resulting from an alignment abnormality of the odontoid process, severe spinal cord compressions, spinal

cord signal changes, and subluxation at the C1-C2 level. He immediately underwent a C1-C2 fusion. Since then, his health has improved, but he still suffers from severe and permanent neurological deficits. J.S. asserts that his lifelong medical costs stemming from the accident will be more than three million dollars.

J.S. alleges that he sustained cervical injuries in the car accident and that the injuries began a cervical spinal process that continued to worsen over the next five years. He asserts that had WPC agents or employees recognized his neurological symptoms and promptly referred him to the appropriate health care providers, his injuries likely would not have been permanent or would have been significantly lessened. Thus, he brings negligence claims against WPC.

In 2018, J.S. brought a lawsuit in Winchester Circuit Court against WPC and its employee physicians and also named the radiologists as defendants. In that lawsuit, the primary allegation was that the radiologists interpreted a CT scan and MRI scan as normal when the studies showed evidence of a spinal cord injury. J.S. alleged sparse allegations against WPC and its pediatrician defendants. (Ex. A to ECF No. 19-1.) The proceeding was non-suited on June 21, 2019. See Sites v. Winchester Pediatric Clinic, No. CL18000303-00 (Va. Cir. Ct. June 21, 2019).

J.S. next filed a lawsuit in this court, naming Winchester Radiologists, P.C., as defendants. See J.S. v. Winchester Radiologists, P.C., No. 5:18-cv-75 (W.D. Va., filed May 11, 2018). The radiologist defendants settled the case for the full amount of the Virginia medical malpractice cap. J.S. next filed the instant lawsuit against WPC alleging malpractice, and also seeking a declaratory judgment that the Virginia medical malpractice cap is unconstitutional.

At issue is whether the request for relief under the Declaratory Judgment Act is ripe for adjudication. The Commonwealth filed a notice of intervention, asserting that because the issue of the application of the medical malpractice statutory cap will not be implicated unless liability is first determined against WPC in an amount exceeding two million dollars, briefing of the constitutionality of the statute should be stayed until liability is determined. ECF No. 17. Plaintiff J.S. contends that the issue is ripe. ECF No. 18.

Defendant WPC contests liability and damages and argues that the issue is not ripe until liability has been determined. More particularly, WPC denies that its employees breached the standard of care or were negligent, or that their acts or omissions were the proximate cause of J.S.'s injuries, and asserts that J.S.'s injuries were caused by the intervening, superseding negligence of other healthcare providers such as the radiologists. WPC also contests that J.S.'s damages exceed the amount recovered in settlement from the other defendants. ECF No. 19.

II.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides in relevant part the following:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

J.S. seeks a declaratory judgment that Virginia Code § 8.01-581.15 is unconstitutional because it violates the Seventh Amendment of the United States Constitution; the guarantees in the Fourteenth Amendment of the United States Constitution to due process, access to the courts, and equal protection; the Virginia constitutional guarantee of equal protection; the

separation of powers mandated by the Virginia Constitution; and the prohibition against special legislation mandated by art. IV of the Virginia Constitution.

The Virginia malpractice damages cap statute provides the following:

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after August 1, 1999, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed . . . \$2 million.

Va. Code Ann. § 8.01-581.15. The statute has been found constitutional by both the Fourth Circuit Court of Appeals and by the Supreme Court of Virginia. See Boyd v. Bulala, 877 F.2d 1191, 1195-97 (4th Cir. 1988) (citing Etheridge v. Medical Center Hospitals, 237 Va. 87, 376 S.E.2d 525 (1989)) (finding statute does not violate the right to trial by jury, separation of powers, due process or equal protection under the federal or Virginia constitutions and does not violate the anti-discrimination or special legislation clauses of the Virginia Constitution); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 257 Va. 1, 509 S.E.2d 307 (1999) (upholding constitutionality of damages cap)).

J.S. argues that since Boyd was decided, “the relevant constitutional principles have received significant elaboration that differ from that decision’s understandings.” ECF No. 18 at 16. He points to three Supreme Court decisions he claims reveal a different attitude about applying Bill of Rights provisions to the states: Ramos v. Louisiana, 140 S.Ct. 1390 (2020) (discussing Sixth Amendment unanimity in jury trials); Timbs v. Indiana, 139 S.Ct. 682 (2019) (discussing Eighth Amendment Excessive Fines Clause) and McDonald v. Chicago, 561 U.S. 742 (2010) (discussing the Second Amendment). He appears to anticipate reviving the

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