UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1971 & 2850

September Term, 2015

No. 904, September Term, 2016

MELISSA RODRIGUEZ, ET AL.

v.

STATE OF MARYLAND, ET AL.

Wright,
Arthur,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 24, 2017

This is the second appeal in this case, which arises from a decade-old wrongful death action, after one inmate murdered another inmate during a ride on a prison transport bus. Appellants, Melissa Rodriguez and Phillip E. Parker, Sr. brought suit individually and on behalf of their deceased son, Phillip E. Parker, Jr.'s, estate against the State of Maryland and various State officials, including the five Maryland State correctional officers who staffed the prison bus.

Appellants present two questions for our consideration:

1) Whether the trial court prejudicially erred in applying the cap under Section 11-108 of the Courts and Judicial Proceedings Article?

2) Whether the trial court prejudicially erred in failing to enter judgment against the State of Maryland?

For the reasons set forth below, we answer both question in the negative and affirm the circuit court's decisions.

BACKGROUND

On May 15, 2006, the parents and estate of Phillip E. Parker, Jr., filed suit in the Circuit Court for Baltimore City against the State of Maryland, the Secretary of the Maryland Department of Public Safety and Correctional Services ("the Department"), the Commissioner of the Division of Correction, the Warden of the Maryland Correctional Adjustment Center ("Supermax"), and five correctional officers—Larry Cooper, Robert Scott, Kenyatta Surgeon, Earl Generette, and Charles Gather. The complaint alleged both federal and state claims.

The defendants removed the case to the United States District Court for the District of Maryland and filed a Motion to Dismiss, or alternatively, a Motion for Summary Judgment. The federal court granted summary judgment on the federal claims, and remanded the state claims to the circuit court. Appellants appealed and the Fourth Circuit affirmed. *See Parker v. Maryland*, 413 Fed. Appx. 634, 641 (4th Cir.2011).

Following remand to the circuit court, the case proceeded to a trial by jury on October 11-24, 2011. During trial, appellants dismissed claims against the Warden of the Supermax facility. Additionally, upon defense motion, the court granted judgment in favor of the Secretary of the Department and the Commissioner of the Division of Correction on the grounds of public official immunity, thus, removing them from the suit. The court denied the motion for the remaining defendants—the State and the five correctional officers.

The jury returned a verdict in favor of appellants against the State and four of the correctional officers—Cooper, Scott, Surgeon, and Gaither. The jury found that Scott, Surgeon and Gaither were negligent, that Cooper, the "Officer in Charge," was grossly negligent, and these officers' negligence proximately caused Parker's death. The jury also returned a verdict in favor of Officer Generette, finding that he had not been negligent. The jury awarded $10,000,000 in noneconomic damages to Parker's estate, $1,000,000 in noneconomic damages to Parker's father, $7,500,000 in noneconomic damages to Parker's mother, and $15,000 in funeral expenses.

The defendants filed timely post-trial motions. The remaining correctional officers filed a Motion for Judgment Notwithstanding the Verdict ("JNOV") as to the jury's finding that Cooper had been grossly negligent and as to the liability of the individual correctional officers. All defendants, including the State, filed a Motion for Remittitur.

On June 8, 2012, the court issued two orders which: (1) struck the jury's finding of gross negligence as to Cooper; (2) held that each individual defendant, including Cooper, was immune from liability, under both the Public Official Immunity doctrine and the Maryland Tort Claims Act ("MTCA"); (3) entered judgment notwithstanding the verdict in favor of each individual defendant; (4) struck the damages award entered against the individual correctional officers; (5) ruled that there were three claimants under the MTCA, which were Parker's estate, Parker's mother, and Parker's father; (6) granted remittiturs of the jury's awards of compensatory damages to $200,000 as to each of the three appellants; and (7) entered judgment against the State in the amount of $200,000, in favor of each appellant, for a total of $600,000. Appellants and the State appealed.

On appeal, this court affirmed in part and vacated in part. *See Rodriguez v. State*, 218 Md.App. 573 (2015). We concluded that the circuit court erred in striking the jury's finding of Cooper's gross negligence because there was sufficient evidence to warrant such a finding. *Id.* at 580. We also reasoned that,

> [b]ecause Sgt. Cooper's tortious conduct was gross negligence, he was not entitled to immunity under the MTCA and because Sgt. Cooper owed a duty arising out of a special relationship with the inmates in his custody, he was not entitled to common law public official immunity.

Id. This Court ultimately held that the circuit court erred in ruling that Cooper was immune from liability and entering judgment notwithstanding the verdict in his favor. *Id.*

As to the State's cross-appeal, we determined that all plaintiffs in the aggregate were entitled to a total of no more than $200,000 from the State under the MTCA. *Id.* at 581. Therefore, the trial court erred in entering three separate $200,000 judgments against the State. *Id.* We subsequently, remanded that case "for further consideration of any other arguments that would permit a remittitur of the verdicts returned against Sgt. Cooper." Cooper filed a Petition for a Writ of Certiorari in the Court of Appeals.

While Cooper's writ of cert. was pending, he filed a Motion for Remittitur and a Motion to Stay Trial Court Proceedings and Enforcement of Judgment pending resolution of his petition for writ of cert. Appellants filed an opposition to both motions. The circuit court granted the motion to stay enforcement of the judgment and held the motion for remittitur *sub curia*, pending the outcome of the Court of Appeals proceedings.

The Court of Appeals granted Cooper's petition for writ of certiorari, but denied appellant's conditional cross-petition concerning the constitutionality of the MTCA's $200,000 limit on damages. *Cooper v. Rodriguez*, 443 Md. 680, 705 n. 11 (2015). In a decision, issued on July 24, 2015, the Court affirmed this Court's judgment, but disagreed with its reasoning. *See generally Id.* Judge Watts, writing for the Court agreed that "the circuit court erred in striking the jury's finding that Cooper acted with gross negligence [and]…is [therefore] not entitled to immunity under the MTCA." *Id.* at 709-12. The Court further concluded:

> The Court of Special Appeals was correct in holding that Cooper was not entitled to common law public official immunity, not because Cooper owed a duty arising out of a special relationship with the inmates in his custody, but instead because entitlement to common law public official immunity is limited by gross negligence.

Id. at 733. Accordingly, the Court found that Cooper was not entitled to public official immunity. *Id.*

On remand to the circuit court, Cooper requested a ruling on the fully briefed motion for remittitur that had been held *sub curia* pending appellate review. On October 13, 2015, the circuit court entered an order granting Cooper's motion for remittitur, thereby reducing the noneconomic damages award to $645,000, pursuant to § 11-108 of the Courts and Judicial Proceedings Article ("CJP"). Appellants then filed two motions: (1) a Motion for Reconsideration of the grant of remittitur and (2) a Motion to Enter Judgment against the State of Maryland and Defendant Cooper.

In the Motion for Reconsideration, appellants alleged that the defense waived its argument that the statutory cap of Section 11-108 is applicable. Notwithstanding, appellants argued that the cap does not apply because the jury found intent and the cap itself does not apply to the government or its officers. They also claimed that in applying the cap, the court incorrectly calculated the amount of the judgment. In the Motion to Enter Judgment, appellants requested entry of judgment that would hold the State and Cooper jointly and severally liable for the original jury verdict of $18,515,000. Appellees responded to both motions, conceding that the court had incorrectly determined the damages award, but claiming that all other claims were "frivolous."

After a hearing was held on December 19, 2015, the circuit court issued a memorandum and order on February 2, 2016. The court granted the Motion for Reconsideration, but only to recalculate the amount of the remittitur to correct calculation errors. The corrected amount of the judgment was entered against Cooper as $1,625,000. The court rejected appellants' argument that Cooper waived the defense of Section 11-108 and found that the cap was applicable. Additionally, the court denied appellants Motion to Enter Judgment and entered judgment "against Mr. Cooper ONLY[.]" This timely appeal followed (emphasis in original).

We shall recite additional facts as necessary to our discussion of the issues.

DISCUSSION

There are two issues on appeal that arose as a result of the remand from both this Court and the Court of Appeals. First, appellants challenge the trial court's application of CJP § 11-108, which imposes caps on awards of noneconomic damages. Secondly, appellant contests the trial court's refusal to enter judgment against the State.

I. Standard of Review

Appellants claim that the trial court erred in granting Coopers' Motion for Remittitur. This Court "will not disturb a trial judge's remittitur decision except in cases of an abuse of discretion." *Hebron Volunteer Fire Dept., Inc. v. Whitelock*, 166 Md. App. 619, 628 (2006) (citations omitted). A trial court abuses its discretion only when "no reasonable person would take the view adopted by the [trial] court," or when the court

acts "without reference to any guiding rules or principles." *King v. State*, 407 Md. 682, 697 (2009).

Within the above referenced argument, appellants assert that the statutory cap established in CJP § 11-108 is not applicable. "The proper interpretation of a statutory provision is a question of law, and, thus, we review determinations by lower courts involving statutory construction non-deferentially." *Bd. of Educ. of Prince George's Cty. v. Marks-Sloan*, 428 Md. 1, 18 (2012).

Last, appellants challenge the circuit court's refusal to alter or amend the judgment in this case. "In general, the denial of a motion to alter or amend a judgment or for reconsideration is reviewed by appellate courts for abuse of discretion." *Miller v. Mathias*, 428 Md. 419, 438 (2012).

II. § 11-108. Cap on Noneconomic Damages

In granting appellees' Motion for Remittitur, the circuit court applied CJP § 11-108. On appeal, appellants assert two main arguments in an effort to evade application of the cap on noneconomic damages. They contend that the defense waived any argument that Section 11-108 is applicable, but nonetheless assert the cap does not apply in this case.

A. Waiver

Appellants aver that the defense has waived its argument that the cap on noneconomic damages is applicable because the defense: (1) failed to raise the argument

on appeal; (2) failed to previously seek a post-trial ruling from the trial court; and (3) failed to raise it in the Answer.

1. Failure to Raise the Argument on Appeal

Appellants contend that the argument is not preserved because the defense failed to raise the issue in the first appeal. They cite *Harmon v. State Roads Comm'n*, 242 Md. 24, 31 (1966), for the proposition that the failure to raise an issue on appeal, will function as a forever waiver of that issue. While this principle is true, it is well settled that a party cannot appeal or cross-appeal on a judgment that is wholly in favor of that same party. *See Rush v. State*, 403 Md. 68, 95 (2008) ("[O]ne cannot appeal from a favorable ruling."); *see Thompson v. State*, 395 Md. 240, 248–49 (2006) ("Generally, a party cannot appeal from a judgment or order which is favorable to him, since he is not thereby aggrieved.") (internal quotations and citations omitted); *see Adm'r, Motor Vehicle Admin. v. Vogt*, 267 Md. 660, 664 (1973) ("[O]ne cannot appeal from a decree wherein the relief he prays for has been granted.").

Here, after a jury trial, the jury determined that Cooper acted with gross negligence. Upon defense motion, the trial court struck the jury's finding of gross negligence and entered judgment in favor of each individual officer, including Cooper, based on the MTCA and the doctrine of public official immunity. Appellants then appealed. At this point in the proceeding, Cooper was the prevailing party because the lower court had determined that he was immune from liability. Although this Court and the Court of Appeals eventually reversed and reinstated the jury's finding of gross

negligence, Cooper was not obligated to assert the statutory cap defense in the initial appeal because there was no enforceable judgment against him. As such, Cooper has not waived the argument that the statutory cap is applicable, simply because he did not raise the defense on the first appeal.

2. Failure to Previously Seek a Post-Trial Ruling from the Trial Court

Appellants next contend that Cooper has waived application of Section 11-108 because he failed to seek an alternative judgment from the trial court during post-trial motions. They argue that motions for remittiturs should be treated as motions for new trials. Under Maryland Rule 2-533(c),

> "[w]hen a motion for new trial is joined with a motion for judgment notwithstanding the verdict and the motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial if the judgment is thereafter reversed on appeal."

Because the trial court's opinion was silent on the issue, appellants assert that "if the defense wished to preserve any argument under 11-108, it was incumbent upon the defense to seek the alternative judgment" asserting that the cap was applicable.

To support their argument, appellants cite *Mitchell v. Montgomery County*, 88 Md. App. 542 (1991). In *Mitchell*, the plaintiff moved for judgment at the close of evidence. *Id*. at 560. The judge reserved judgment until the following day. *Id.* However, "[t]he trial judge never mentioned the motion again and counsel for Mitchell failed to renew it." *Id.* This Court found that the issue was waived because the court did not rule on the motion and the plaintiff did not renew the motion. *Id.*

Mitchell is not relevant to the case *sub judice*, and appellants have failed to provide any Maryland authority to support their argument. There is no requirement that the prevailing party on a JNOV motion, must raise alternative arguments during post-trial proceedings. Contrary to appellant's assertions, Cooper's victory on the JNOV motion made it unnecessary to assert the statutory cap on noneconomic damages because the court vacated the judgment against him. "[T]he purpose of a motion for JNOV is to set aside a verdict on the ground that it is not legally viable."*Davis v. Bd. of Educ. for Prince George's Cty.*, 222 Md. App. 246, 271 (2015). Therefore, as the trial court noted, "it would be illogical for Mr. Cooper to move for Judgment Notwithstanding the Verdict and then argue in the alternative that the application of statutory cap applies because the jury's verdict was legally sufficient."

3. Failure to Raise the Argument in the Answer

Last, appellants assert that the 11-108 cap was waived because "it is an affirmative defense which the defendants failed to plead in the Answer." We disagree.

The failure to plead an affirmative defense results in a waiver. Maryland Rule 2-323(g) expressly itemizes affirmative defenses, which are:

> (1) accord and satisfaction, (2) merger of a claim by arbitration into an award, (3) assumption of risk, (4) collateral estoppel as a defense to a claim, (5) contributory negligence, (6) duress, (7) estoppel, (8) fraud, (9) illegality, (10) laches, (11) payment, (12) release, (13) res judicata, (14) statute of frauds, (15) statute of limitations, (16) ultra vires, (17) usury, (18) waiver, (19) privilege, and (20) total or partial charitable immunity.

The statutory cap on noneconomic damages is not specifically listed among the 20 affirmative defenses. We have held that a defense that is not listed as an affirmative defense under Rule 2-323(g), is not required to be alleged in the Answer. *Fearnow v. Chesapeake & Potomac Tel. Co. of Maryland*, 104 Md. App. 1, 46 (1995), *aff'd in part, rev'd in part*, 342 Md. 363, 676 A.2d 65 (1996). Therefore, the failure to raise it, does not constitute waiver. *Id.*

Appellants do not provide any Maryland authority to support their contention that the 11-108 cap is an affirmative defense. There is nothing in statute that suggests that the statutory cap was intended to be an affirmative defense. Consequently, as the trial court held, the Court cannot read Section 11-108 into Maryland Rule 2-323(g), when the legislature expressly itemized 20 affirmative defenses. As such, we hold that the appellees did not waive their argument that the cap on noneconomic damages is applicable because they did not raise it in the answer.

B. Applicability of Section 11-108

Appellants assert that the trial court erred in applying the 11-108 cap. Specifically, they claim the cap does not extend to Cooper because his actions fall under the intentional tort exception to the application of the cap. Notwithstanding, they also aver that the cap should not apply to grossly negligent conduct because the legislative history provides otherwise. Last, they argue that the legislative history also precludes application of the cap to the State or its officers.

1. Applicability

In order to examine why the noneconomic damages cap "should not apply," we must first examine whether the cap applies. CJP §11-108(b) provides:

> (2)(i) [I]n any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $500,000.
>
> ***
>
> (3)(i) The limitation established under paragraph (2) of this subsection shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim.
>
> (ii) In a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed 150% of the limitation established under paragraph (2) of this subsection, regardless of the number of claimants or beneficiaries who share in the award.

In construing any statute, our guiding principle of statutory interpretation is to ascertain and effectuate the legislature's intent. *Sprenger v. Pub. Serv. Comm'n*, 400 Md. 1, 29 (2007). If the language of the statute, construed in light of its plain meaning, is unambiguous, our analysis ends there. *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 245 (2007). However, if the statutory text reveals an ambiguity, we may consult other resources to ascertain the legislative intent. *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 319 (2006).

The underlying causes of action in this case are, wrongful death, survival action, assault, and battery. We know that the cap does not apply to the claims of assault and battery because this court held, in *Cole v. Sullivan*, 110 Md. App. 79 (1996), that the

statutory cap does not apply to intentional torts. *Id.* at 93. Therefore, we must determine whether the cap applies to wrongful death and survival actions.

By its plain language, the cap applies to a "wrongful death" action, because the legislature expressly provided for such an action in paragraph (b)(2)(i). The General Assembly did the same for a survival action which is expressly covered under paragraph (b)(3)(i), and establishes that the cap "shall apply in a *personal injury action to each direct victim of tortious conduct and all persons who claim injury* by and *through that victim*." (Emphasis added). In a negligence action, personal injury, "[a]lso termed bodily injury," is defined as "any harm caused to a person, such as a broken bone, a cut, or a bruise[.]" *Personal Injury*, Black's Law Dictionary (10th Ed. 2014). We have held that a survival action falls under the umbrella of personal injury, because the decedent's estate is suing for "harm" suffered by the decedent immediately preceding death. *See Jones v. Flood*, 118 Md. App. 217, 223, 702 A.2d 440, 443 (1997), *aff'd*, 351 Md. 120 (1998) ("In a survival action, the personal representative may bring suit to recover for pain and suffering sustained by the decedent between the time of injury and death."); *see also Goss v. Estate of Jennings*, 207 Md. App. 151, 172-74 (2012) ("Each paragraph of § 11-108(b)(3) stands alone, with a survival action falling under paragraph (i)…[a]lthough paragraph (i) deals with multiple claimants…[t]here is and could only be one plaintiff in the survival action—Jennings' personal representative."); *see also Goss*, 207 Md. App. at 171 ("[T]he General Assembly left undisturbed the Court of Appeals' conclusion that a survival action was one for personal injury.") (citations and quotations omitted). As such,

by its plain language, the statutory cap on noneconomic damages applies to both claims for wrongful death and survival actions, and is therefore applicable in this case. *See Goss*, 207 Md. App. at 774 ("[T]he § 11-108 damage cap applies separately to damage awards in survival and wrongful death actions.").

2. Intentional Tort Exception

Appellants argue that the cap is not applicable because intentional torts are generally excluded from the Section 11-108 cap. They claim that gross negligence is an intentional tort and is therefore, excluded from coverage.

Conversely, the appellees contend that gross negligence is not an intentional tort. They assert that "the plaintiffs wrongfully equate the jury's gross negligence finding with an intentional tort, based on references to intent in the…jury instructions[.]" They aver that the cap generally applies to all tort claims, acknowledging only the exception for intentional torts. Therefore, the statutory cap on noneconomic damages is applicable. We agree.

To support their claims, appellants cite this Court's decision in *Cole*, which held that Section 11-108 does not apply to awards, steming from the commission of intentional torts. 110 Md. at 93. Although this exception still remains good law, it is not applicable because the jury found that Cooper was grossly negligent and did not conclude that he committed an intentional tort.

Maryland appellate courts have maintained a fundamental distinction between intentional torts and non-intentional torts. *See Johnson v. Valu Food, Inc.*, 132 Md. App.

118, 126 (2000) (quoting *Bugg v. Brown*, 251 Md. 99, 104 (1968) ("While it is necessary to prove actual damages to obtain a recovery in negligence actions, the same rule does not apply to intentional torts.")); *see also Gasper v. Ruffin Hotel Corp. of Maryland*, 183 Md. App. 211, 231 (2008), aff'd, 418 Md. 594 (2011) ("Intentional torts are separate offenses from torts resulting from negligence."). Most notably is the Court of Appeals decision in this very case, where the Court stated, "It is undisputed that Cooper did not commit an intentional tort or act with malice." *Cooper*, 443 Md. at 714. In the face of Maryland's highest court's assessment and past precedent, it is apparent that the tort of gross negligence is separate and apart from an intentional tort.

Appellants would have us hold that the jury's gross negligence finding is a finding that Cooper committed an intentional tort because of the reference to intent in the jury instruction. The jury instruction stated,

> Gross negligence is an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, the defense is guilty of gross negligence or acts wantonly and willfully only when that defendant inflicts injury intentionally or is so utterly indifferent to the rights of others that the defendant acts as if such rights did not exist.

The jury instruction does not purport to require the jury to find an intent to take action against someone or something, as is typically required by most intentional torts. *See Hendrix v. Burns*, 205 Md. App. 1, 23 (2012) ("As there was no evidence in the summary judgment record that Mr. Burns intended to strike Mrs. Hendrix's vehicle with his own vehicle, the evidence was legally insufficient to generate a jury question on the battery

claim."); *Mahan v. Adam*, 144 Md. 355 (1924) ("[A]ny deprivation by one person of the liberty of another without his consent, whether by violence, threat or otherwise, constitutes an imprisonment, and if this is done unlawfully, it is false imprisonment[.]"). Instead, the instruction references an "intentional failure to perform a manifest duty in reckless disregard" thereof. A failure to perform an act or duty does not equate to an intentional tort. The instruction goes on to provide that gross negligence is satisfied if the defendant either "inflicts injury intentionally or is so utterly indifferent to the rights of others that the defendant acts as if such rights did not exist." Based on the record before us, the jury could not have found that Cooper intentionally intended to inflict injury because the record contains no evidence of intent to cause harm. *See Cooper*, 443 Md. at 714 ("It is undisputed that Cooper did not commit an intentional tort or act with malice.") As such, in agreement with the trial court, we hold that "Cooper's actions were an extreme failure to perform his duties" that amounts to gross negligence, as the jury found, and not an intentional tort.

3. The Statutory Cap and Gross Negligence

Appellants next argue that the cap does not apply because gross negligence is not insurable. They cite *Cole*, where we concluded that the purpose of CJP § 11-108 was to stabilize the cost of liability insurance and "assure the availability of sufficient liability insurance, at a reasonable cost[.]" *Cole*, 110 Md. App. at 92 (citations omitted). Based on this holding, they assert that because gross negligence, as defined by the jury instruction,

involves "uninsurable conduct"—because it refers to "intentional" misconduct—it "should fall well within the holding of *Cole*[.]"

The State and Cooper counter, arguing that the applicability of the cap does not depend on whether a plaintiff's claims are insurable or are commonly insured. They assert that if the legislature had intended such criterion, it would have used such statutory language. Because the language of Section 11-108 "does not exempt from coverage any claim based on its lack of insurability," appellants' argument fails. We agree.

In the case *sub judice*, the plain meaning of Section 11-108 controls because the General Assembly made clear that the cap applies to "any action for damages for personal injury or wrongful death[.]" CJP § 11-108(b)(2)(i). Although the statute was enacted "in response to a legislatively perceived crisis concerning the availability and cost of liability insurance in this State," *Cole*, 110 Md. App. at 92, the legislature did not explicitly include a requirement that a cause of action must be insurable in order to be subject to the cap. It is not within this Court's authority to alter the statute's language to reflect such a requirement. *Gardner v. State*, 420 Md. 1, 8–9 (2011) ("We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute[.]")(citations and quotations omitted). Therefore, the noneconomic damages cap is applicable.

4. The Statutory Cap's Applicability to the State and its Officers

Last, appellants contend that the statutory cap on noneconomic damages should not apply against the government or its employees. To support this contention, they first

point to the fact that there is "not a single Maryland appellate decision applying the 11-108 cap to an action against the government for the alleged misconduct of a law enforcement officer." Appellants also highlight that the legislative history is silent as to whether the cap applies to the government and its officers. The appellees respond by asserting that appellants' claim is without merit. They argue that "The General Assembly's omission of any such exception [for the State and its officers] from the statute's text suffices to dispose of the argument. We find the appellees contention persuasive.

As previously established, the plain reading of the statute does not preclude the government or its employees from asserting the statutory cap. When the plain language is clear and unambiguous, there is no reason for this Court to consider the legislative history. *Harrison-Solomon v. State*, 442 Md. 254, 265–66 (2015) ("If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resort to other rules of construction…including the relevant statute's legislative history[.]") (citations and quotations omitted). Furthermore, the absence of an appellate decision applying the cap to the government and its officers is insignificant because the absence of such decisions, does not authorize this Court to depart from the plain language of the statute. As such, the cap is applicable.

Additionally, it is important to note that the issue of whether the statute applies to the government is not germane to this case. Here, in granting Cooper's Motion for

Remittitur, the circuit court applied the cap to reduce the damages award against Cooper, an individual. Remittitur of the award against the State was not at issue on remand because this Court had already reduced to the MTCA's $200,000 maximum. *See Rodriguez*, 218 Md App. at 581. Thus, the pertinent question is whether the cap applies to limit the damages award against Cooper. We have already established, *supra*, that it does.

Accordingly, we uphold the trial court's application of the noneconomic damages cap, outlined in CJP § 11-108, and therefore, conclude that the trial court did not abuse its discretion in granting Cooper's Motion for Remittitur.

III. Entry of Judgment

Appellants argue that the trial court "should have entered judgment against the State" because the State must indemnify Cooper in order to avoid an "unwaivable conflict of interest under Maryland Rule 1.7." They claim that there is a conflict of interest because the Office of the Attorney General represented both the State and the individual officers who they claim had "diametrically opposed financial interests." They assert that under the MTCA, the State is not liable for acts committed by its employees that are made with malice or gross negligence. As such, appellants contend that depending on the jury's finding as to issue of "malice/gross negligence," either the State or Cooper could be held liable but not both. Because of this "irreconcilable conflict of interest," appellants assert that the only remedy to address this conflict, is to require the State to fully indemnify Cooper.

The State responds by asserting six arguments : (1) the requested relief is barred by the doctrine of sovereign immunity; (2) Cooper's representation complies with the State's conditional duty to defend because the Attorney General's Office conducted an investigation and made its own determination and Cooper agreed to the representation; (3) Indemnification is not warranted because it is not authorized by statute and Cooper signed a Representation agreement which released the State indemnifying any judgment that may result against Cooper; (4) the plaintiff's lack standing to seek indemnification or raise a conflict of interest; (5) appellants have waived the alleged conflict due to untimeliness; and (6) there was no conflict of interest.

This issue can be resolved based on the State's sovereign immunity. Maryland has "long applied the doctrine of sovereign immunity to actions against the State." *Bd. of Educ. of Baltimore Cty. v. Zimmer-Rubert*, 409 Md. 200, 211 (2009) (citations omitted). The doctrine generally "precludes suit against government entities absent the State's consent." *ARA Health Servs., Inc. v. Dep't of Pub. Safety & Corr. Servs.*, 344 Md. 85, 92 (1996). The General Assembly may waive sovereign immunity either directly or by necessary implication. *Zimmer-Rubert*, 409 Md. at 212. The Court of Appeals strictly construes waivers in favor of the sovereign. *Id.*

The General Assembly provides in Section 12-104(a)(1) of the MTCA that "the immunity of the State and *of its units* is waived as to a tort action…." (emphasis added). The Act goes on to explain that "State personnel shall have immunity from liability" "for a tortious act or omission that is within the scope of the public duties of the State

personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article." MTCA § 12-105; CJP § 5-522(b). Where state personnel are negligent, "the statute generally waives sovereign immunity and substitutes the liability of the State for the liability of the State employee committing the tort." *Lee v. Cline*, 384 Md. 245, 262 (2004). Consequently, "the State does not waive its sovereign immunity for any tortious acts outside the scope of employment or when a state personnel acts with malice or gross negligence." *Barbre v. Pope*, 402 Md. 157, 175 (2007).

Here, the jury found that Cooper acted with gross negligence. The General Assembly has neither explicitly nor implicitly waived its sovereign immunity to provide for indemnification of its grossly negligent employees. In fact, it expressly excluded grossly negligent personnel. Therefore, the State has not waived its sovereign immunity and Cooper is singly liable for the entire $1,625,000 judgment.

Appellants urge this Court to enter judgment against the State, thereby forcing the State to indemnify Cooper. However, it is not within our rationale or authority to do so. *See Zimmer-Rubert*, 409 Md. at 212 ("[T]he dilution of the doctrine [of sovereign immunity] should not be accomplished by judicial fiat.") (citations and quotations omitted). *Rios v. Montgomery Cty.*, 386 Md. 104, 133–34 (2005) ("Whether, and to what extent there should be state governmental immunity from tort suits has long been regarded as the prerogative of the Maryland General Assembly.") (internal quotations and citations omitted). We therefore hold, that the State is immune from liability in this

instance and the trial court did not abuse its discretion in concluding that appellants "argument for joint and several liability fails."

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.