NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Appeals

APPELLANT'S BRIEF FILED
August 7, 2024 14:47

By: BRADLEY D. MCPEEK 0071137

Confirmation Nbr. 3240762

JOHN PAGANINI — CA 24 113867

vs.

THE CATARACT EYE CENTER OF CLEVELAND, ET AL.

Judge:

Pages Filed: 48

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT OF OHIO
CUYAHOGA COUNTY, OHIO

JOHN PAGANINI	:	Appeal No. CA-24-113867
	:	CA-24-114019
Appellee	:	
	:	
vs.	:	Trial No. CV-22-971901
	:	
THE CATARACT EYE CENTER OF	:	
CLEVELAND, INC., et al.	:	On Appeal From The Cuyahoga
	:	County Court of Common Pleas
Appellants	:	
	:	

BRIEF OF APPELLANTS GREGORY LOUIS, M.D. AND
THE CATARACT EYE CENTER OF CLEVELAND, INC.
(Oral Argument Requested)

Susan E. Petersen, Esq. (0069741)
Todd E. Petersen, Esq. (0066945)
PETERSEN & PETERSEN
10680 Mayfield Road
Chardon, OH 44024
sep@petersenlegal.com
tp@petersenlegal.com

Attorneys for Plaintiff-Appellee
John Paganini

Bradley D. McPeek (0071137)
Kellie A . Kulka (0095749)
BRICKER GRAYDON LLP
312 Walnut Street, Suite 1800
Cincinnati, OH 45202
Phone: (513) 621-6464
Fax: (513) 651-3836
Email: bmcpeek@brickergraydon.com
kkulka@brickergraydon.com

Christine Santoni (0062110)
PEREZ MORRIS
1300 East Ninth Street, Suite 1600
Cleveland, OH 44114
Phone: (216) 621-5161
Fax: (216) 621-2399
Email: csantoni@perez-morris.com

Attorneys for Defendants-Appellants,
The Cataract Eye Center of Cleveland, Inc.
and Gregory J. Louis, M.D.

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW
19428197v1

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

I. Statement of Assignments of Error. 1

II. Statement of Issues Presented for Review. 1

III. Statement of The Case. 1

IV. Statement of Facts. 3

A. Paganini's December 9, 2021 Cataract Surgery Is A Success. 3

B. Paganini's December 10, 2021 Call Leads To An Appointment 3

C. Dr. Louis' December 10, 2021 Examination of Paganini 4

D. Paganini's Visit with Dr. Hull 5

E. Dr. Huang's Testimony and Criticisms of Dr. Louis 6

1. First criticism of Dr. Louis – Not Suspecting Endophthalmitis 7

2. Dr. Huang's Second Criticism of Dr. Louis – The Examination 8

3. Dr. Huang's Third Criticism of Dr. Louis – No Referral on December 10 9

F. The Jury Invents Theories On Standard of Care and Causation. 9

V. Argument. 10

FIRST ASSIGNMENT OF ERROR: The Trial Court Erred In Denying Dr. Louis' Motion For Judgment Notwithstanding The Verdict, Or In The Alternative, New Trial. 11

A. The Court Must Enter JNOV For Dr. Louis. 11

1. Civ. R. 50(B) Requires the Trial Court to Assess the Sufficiency of the Evidence. 11

a. To Prevail On A Medical Malpractice Claim, A Plaintiff Must Prove All Elements Through Competent Expert Testimony. 12

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

b. Special Interrogatories Test To Ensure The Jury's Findings Are Consistent With The Expert's Testimony. 12

2. Dr. Huang's Testimony Does Not Support the Jury's Answer to Special Interrogatory Nos. 1 and 2. 13

a. The Jury Invented Its Own Standard of Care 14

b. The Jury Invented Its Own Causation Hypothesis. 15

3. The Court Speculated In Attempting To Harmonize The Jury's Answers With The General Verdict. 16

B. The Trial Court Should Have Ordered A New Trial Under Civ. R. 59. 18

1. New Trial Is Warranted Under Civ. R. 59(A)(7) Because The Judgment Was Contrary To Law, and Civ. R. 59(A)(1) Because The Proceedings Were Impermissibly Irregular. 19

2. Civ. R. 59(A)(6): The Judgment Is Not Sustained By Weight Of Evidence. 20

Appellants' First Assignment of Error: The trial court erred in denying Appellants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. 21

Appellants' Second Assignment of Error: The trial court erred in entering judgment for Paganini and finding RC 2323.43(A) unconstitutional as applied to Paganini. 21

A. The Trial Court Erred In Finding RC 2323.43(A)(3) Unconstitutional As Applied To Paganini And In Not Capping Paganini's Noneconomic Damages. 21

B. Introduction: A Brief History Of Noneconomic Damages. 21

1. Introduction. 21

2. Noneconomic Damages Are Purely Subjective. 22

3. Historically, Noneconomic Damages Awards Were Typically Modest 22

4. Left Unchecked, Noneconomic Damages Awards Exploded. 23

5. RC 2323.43 Is Enacted Amidst Ohio's Medical Liability Crisis 24

C. The Trial Court Applied The Wrong Standard of Review For A Constitutional Challenges. 26

1. A Statute May Be Challenged "On Its Face" Or "As Applied." 27

a. A Facial Constitutional Challenge Requires "Proof Beyond A Reasonable Doubt." 27

b. With An "As-Applied" Challenge, The Plaintiff Must Present Clear And Convincing Evidence Of An Existing Set of Facts. 27

2. Because Paganini's Challenge Was *Not* "As Applied," The Trial Court Employed The Wrong Standard Of Review. 28

D. The Rational Basis Test. 32

1. Rational Basis Review Requires Deference And Judicial Restraint..........32

2. The Medical Claim Damage Cap Bears A Real And Substantial Relation To The Public's General Welfare..33

3. RC 2323.43 Is Not Unreasonable Or Arbitrary. 35

VI. Conclusion. 39

CERTIFICATE OF SERVICE 40

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Cas. & Sur. Co. v. Niemic, 172 Ohio St. 53 (1961) 13

Arbino v. Johnson & Johnson, 2007-Ohio-6948 .... passim

Barnett v. Hills, 79 N.E.2d 691 (2d Dist. 1947) 23

Benjamin v. Columbus, 167 Ohio St. 103 (1957) 22

Bruni v. Tatsumi, 46 Ohio St.2d 127 (1976) 12

City of North Olmstead v. North Olmstead Land Hold., Ltd., 137 Ohio App.3d 1 (8th Dist. 2000) 11, 21

City of North Olmstead, 137 Ohio App.3d 32

Clements v. Lima Mem. Hosp., 2010-Ohio-602 (3rd Dist.) 15

Coppock v. Horine, 1940 WL 2942 (2d Dist. May 9, 1940) 23

Darnell v. Eastman, 23 Ohio St.2d 13 (1970) 15

Eastley v. Volkman, 2012-Ohio-2179 20

Estate of Cowling v. Estate of Cowling, 2006-Ohio-2418 12

Estate of Hall v. Akron Gen. Med. Ctr., 2010-Ohio-1041 15

Evans v. Dayton Power & Light Co., 2004-Ohio-2183 (4th Dist.) 19

Fed. Communications Comm. v. Beach Communications, 508 U.S. 307 (1993) 32

Freeman v. Norfolk & W. Ry. Co., 69 Ohio St.3d 611 (1994) 13

Gallick v. Baltimore & O. R. Co., 372 U.S. 108 (1963) 16

Grieser v. Janis, 2017-Ohio-8896 (10th Dist.) 14

Harrison v. Horizon Women's Healthcare, LLC, 2019-Ohio-3528 (2nd Dist.) 19

Harrold v. Collier, 2005-Ohio-5334 .... 28, 29

In re D.B., 2011-Ohio-2671 31

Lewis v. Nease, 2006-Ohio-4362 (4th Dist.) 11, 12, 15, 17

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

Maynard v. Eaton Corp., 2008-Ohio-4542 24

Morris v. Savoy, 61 Ohio St.3d 684 (1991) 34, 37, 38

Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971) 23

O'Day v. Webb, 29 Ohio St.2d 215 (1972) 19

Ohio Bell Tel. Co. v. Kassouf Co., 2015-Ohio-3030 (8th Dist.) 11

Oliver v. Cleveland Indians Baseball Co. Ltd. Ptship., 2009-Ohio-5030 (2009) 22, 31, 38

Osman v. Cook, 43 N.E.2d 641 (2d Dist. 1942) 23

Oyer v. Adler, 2015-Ohio-1722 (4th Dist.) 12

Pangle v. Joyce, 76 Ohio St.3d 389 (1996) 19

Phillips v. Dayton Power & Light Co., 111 Ohio App.3d 433 (2nd Dist. 1996) 13

Portsmouth Ins. Agency v. Med. Mut. Of Ohio, 2012-Ohio-2046 (4th Dist.) 12

Reaves v. Healy, 2011-Ohio-1487 (10th Dist.) 19

Rippel v. Rippel, 328 N.E.2d 816 (1st Dist. 1974) 18

Rockwell v. Queen City Bottling Co., 75 Ohio App. 42 (1st Dist. 1943) 15

Ruther v. Kaiser, 2012-Ohio-5686 .... 21, 33

Simpkins v. Grace Brethren Church of Delaware, Ohio, 2016-Ohio-8118 .... passim

State ex rel. Dickman v. Defenbacher, 165 Ohio St. 142 (1955) 32

State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn., 2006-Ohio-5512 27

State v. Hacker, 2020-Ohio-5048 (3rd Dist.), *aff'd*, 2023-Ohio-2535 29

State v. Lowe, 2007-Ohio-606 27

State v. Robb, 88 Ohio St.3d 59 18

State v. Stambaugh, 34 Ohio St.3d 34 (1987) 32

Stolz v. J&B Steel Erectors, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228 32

Teeter v. Ball Jar Corp. 2020-Ohio-6997 (5th Dist.) 12, 20

Wapplehorst v. Kimmett, 30 Ohio App.2d 29 (3rd Dist. 1972) 14

Woessner v. Toledo Hosp., 2016-Ohio-5764 (6th Dist.)............ 15

Wood v. Harborside Healthcare, 2012-Ohio-156 (8th Dist.)............ 19

Wymsylo v. Bartec, Inc., 2012-Ohio-2187............ 27

Yajnik v. Akron Dept. of Health, Hous. Div., 2004-Ohio-357............ 27

STATUTES

R.C. 2315.18............ 29, 34

R.C. 2323.43............ passim

R.C. 2323.43(A)............ 2

R.C. 2323.43(A)(3)............ passim

R.C. 2505.02(B)(6)............ 2

R.C. 2744.05(C)............ 38

R.C. 2907.02(A)(1)(b)............ 31

CONSTITUTIONAL PROVISIONS

Section 16, Article I, Ohio Constitution............ 21

RULES

Civ.R. 49............ 13

Civ.R. 50(A)............ 11

Civ.R. 59............ 18

Civ.R. 59(A)............ 18

Civ.R. 59(A)(1)............ 19

Civ.R. 59(A)(6)............ 20

Civ.R. 59(A)(7)............ 19

RESTATEMENTS

Restatement of the Law 2d, Torts (1965) Section 903, Comment *a*............ 22

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

OTHER AUTHORITIES

Allen and Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century* (2007), 4 J. Empirical Stud. 365, 369 23

AMA Analysis: A Dozen States In Medical Liability Crisis, AMA News Release (June 17, 2002) 26

Ingber, *Rethinking Intangible Injuries: A Focus on Remedy* (1985), 73 Cal.L.Rev. 772, 778 22

Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses* (2006), 34 Cap.U.L.Rev. 554, 560 22

Niemeyer, A*wards for Pain and Suffering: The Irrational Centerpiece Of Our Tort System* (2004), 90 Va.L.Rev.1401 23

Sugarman, C*omparative Look At Pain And Suffering Awards* (2006), 55 DePaul L.Rev. 399 23

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

I. Statement of Assignments of Error.

Appellants' First Assignment of Error: The trial court erred in denying Appellants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Appellants' Second Assignment of Error: The trial court erred in entering judgment for Paganini and finding RC 2323.43(A) unconstitutional as applied to Paganini.

II. Statement of Issues Presented for Review.

1. In a medical malpractice case, which requires expert testimony, may a jury verdict be based on a medical theory to which no expert testified?

2. Can a party challenging the constitutionality of a statute maintain an "as applied" challenge when the party does not demonstrate existing facts (unique to that litigant) that render the statute unconstitutional?

3. Pursuant to RC 2323.43, a plaintiff who brings a medical claim is subject to a $500,000 noneconomic damage cap for certain serious injuries. Given that the General Assembly enacted this statute with the long-term goal of balancing the rights of medical claimants and the accessibility of affordable medical care, did the General Assembly have a rational basis for enacting the medical claim damage cap statute?

III. Statement of The Case.

In this medical malpractice case, the Plaintiff-Appellee John Paganini ("Paganini") alleges that the Defendant-Appellant Gregory Louis, M.D. ("Dr. Louis") failed to diagnose a post-operative eye infection – known as endophthalmitis – following a 2021 cataract surgery.

Paganini filed his complaint against Dr. Louis, The Cataract Eye Center of Cleveland, Inc. ("Corrective Eye"), and CEI Physicians, P.S.C., LLC ("CEI") in November, 2022. Paganini's claims against CEI and Corrective Eye were based solely on alleged vicarious liability. (Cmplt. ¶ 6). CEI was dismissed upon oral motion at trial. (Trans., 759).

Following a five-day trial, the jury returned a $1,487,500 verdict for Paganini. (*Id.*, 1049). The damages awarded were exclusively *noneconomic*. (Verdict Form; Trans. at 1049).

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

Before judgment was entered, Paganini filed his *Motion To Include In Any Judgment The Full Amount Awarded For Non-Economic Damages* on February 6, 2024. With that motion, Paganini asked the trial court *not* to apply RC 2323.43(A)'s $500,000 noneconomic malpractice damage cap for serious injuries because the statute (according to Paganini) is unconstitutional.

On April 16, the court granted Paganini's motion and entered judgment in his favor in the full amount of the verdict. (April 16 Decision or "Dec."). In reaching this decision, the trial court held that RC 2323.43(A)(3)'s noneconomic damage caps were unconstitutional – *as applied* to Paganini. (Dec. at 18).

Dr. Louis filed an immediate interlocutory appeal on April 26. RC 2505.02(B)(6) (permitting interlocutory appeal upon finding that RC 2323.43 is unconstitutional). Paganini subsequently filed an emergency motion to remand so that the trial court could address certain post-trial motions – including Dr. Louis' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (the "JNOV Motion"). This Court granted that motion "for the sole purpose of ruling on pending post trial motions… ." (April 29 Entry). To that limited end, this Court remanded the case to the trial court until May 29, 2024. (*Id.*).

On May 28, 2024, the trial court overruled the JNOV Motion. (May 28 JNOV Dec.). The limited remand expired the following day.

On June 5, 2024, Dr. Louis filed a second appeal. It primarily targeted the denial of the JNOV Motion. This Court subsequently consolidated that second appeal with Dr. Louis' prior appeal from April.

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

IV. Statement of Facts.

A. Paganini's December 9, 2021 Cataract Surgery Is A Success.

Gregory Louis, M.D., is a board-certified ophthalmologist. (Trans., 766-67). He has been in practice since 1988. (*Id.*) He has performed roughly 30,000 cataract surgeries and seen thousands of patients post-operatively. (*Id.*, 767).

Cataracts are caused by an age-related breakdown of protein in the eye's lens. (*Id.*, 562-63). To remove a cataract, a surgeon creates a small wound in the membrane around the lens. (*Id.*, 563-64). Through this incision, the surgeon uses an ultrasound probe to remove the cloudy lens. (*Id.*). A clear, plastic lens is inserted in its place. (*Id.*).

Dr. Louis performed cataract surgery on Paganini on December 9, 2021. The procedure was successful. (*Id.*, 492). Paganini returned home the same day. (*Id.*). He reported optimal vision that evening – with no immediate concerns. (*Id.*, 492, 730-32).

B. Paganini's December 10, 2021 Call Leads To An Appointment

Overnight, Paganini experienced issues with his eye. (*Id.*, 493). Early the next morning, December 10 at 6:38 a.m., Paganini called Dr. Louis' office. Because Paganini made this call so early, it was routed to MAP Communications, an afterhours answering service. (*Id.*, 706, 708, 711). The MAP operator took information from Paganini – including the following: that he was calling regarding an urgent matter; that he was a current patient; and that he was *not* experiencing pain or sudden loss of vision. (*Id.*, 713-715).

Once Paganini communicated this information, the operator provided it to the Corrective Eye on-call physician, Tamar Shafran, M.D. at 6:38 a.m. (*Id.*, 718). Two minutes later, at 6:40 a.m., the call "cleared" – which means it was acknowledged by the service's messaging app. (*Id.*). From there, Paganini made an appointment with Dr. Louis for later that morning. (*Id.*, 96-98).

C. Dr. Louis' December 10, 2021 Examination of Paganini

Around 9:00 a.m. on December 10, Paganini called his son, Raymond, and asked to be taken to the doctor for his appointment. (*Id.*, 732). Paganini told his son his eye hurt; he did not sleep well the night before; and he saw "a whole bunch of dots" in his vision. (*Id.*, 732).

Raymond took Paganini to Dr. Louis' office. (*Id.*, 733). From the time he picked his father up, through his appointment with Dr. Louis and (then) returning home, Raymond reported no redness in Paganini's eye – only that it hurt and that he saw dots in his vision. (*Id.*, 649-50, 733).

When Paganini arrived at Dr. Louis' office, Tammi Dawson, a certified ophthalmic technician, took Paganini to the examination room at 9:48 a.m. (*Id.*, 471, 733). Per her usual routine, Dawson (among other things) obtained information about his complaints; and asked follow up questions to gather the relevant medical history. (*Id.*, 468). Dawson recorded that Paganini described some aching around "OS" (his left eye) and that "OS very blurry and a ton of floaters[.]" (*Id.*, 473-75). Dawson recorded that Paganini could see "hand motion at face[.]" (*Id.*, 471).

Dr. Louis then conducted his exam. He asked Paganini about his complaints and reviewed his history. (*Id.*, 439). Dr. Louis also read Dawson's notes from her preliminary session with Paganini. (*Id.*, 768). Paganini reported to Dr. Louis that his vision was good the day before but that he now had floaters and fog in his vision. (*Id.*, 436, 768). Based on Paganini's explanation, Dr. Louis understood that the "floaters" Paganini reported came on quickly – but remained stationary. (*Id.*, 437).

Paganini mentioned pain in his eye. But this pain was not "a major, or even a minor issue" during those conversations. (*Id.*, 769.) Indeed, Dr. Louis (with approximately 30,000 surgeries under his belt) observed no signs of pain – just normal mild ache from surgery. (*Id.*, 435-36.)

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

During his examination, Dr. Louis dilated Paganini's eye with atropine, a common dilating agent. (*Id.*, 430-31). Once Paganini's pupil was dilated, Dr. Louis observed the clear lens from the surgery and saw that Paganini's cornea was clear. (*Id.*, 772-74). Likewise, Dr. Louis saw no sign of hypopyon – the white blood cells that respond to inflammation. (*Id.*, 773). He observed that Paganini's anterior chamber was "quiet" – which mean there was no excessive swelling or inflammation. (*Id.*, 774).

As part of his differential diagnosis of a patient, Dr. Louis considers infection – even in routine cases. (*Id.*, 767-68, 784). But here, his clinical findings did not support a diagnosis of endophthalmitis. (*Id.*, 767-84). Likewise, Paganini had no "injected" or redness in his eye, and no eyelid swelling. (*Id.*, 777-78). He displayed no signs of infection. (*Id.*, 781).

Paganini *did* see "spots." (*Id.*, 770). But Dr. Louis determined that those "spots" or "floaters" were red blood cells – visible to the patient where a broken blood vessel leaks blood into the vitreous and forms a fog. (*Id.*, 770).

Based upon his extensive firsthand examination, Dr. Louis' diagnosis was vitreous hemorrhage. (*Id.*, 784). A vitreous hemorrhage is a tear in the retina or blood vessels – caused by the vitreous (or gel) in the middle of the eye. (*Id.*, 592). With a vitreous hemorrhage, the patient can see blood and floaters in his eye. (*Id.*, 593). Dr. Louis testified that this condition is common – especially in diabetics. (*Id.*, 784).

D. Paganini's Visit with Dr. Hull

The following day (Saturday, December 11), Dr. Louis received a text message from Paganini's other son who indicated his father was in pain. (*Id.*, 785). Dr. Louis told him "that's not right" and "let's get him to see a retinal specialist[.]" (*Id.* 785).

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

Dr. Louis then made a series of phone calls to the large retinal practices he knew to be open on Saturday (*Id.*, 786). Because those practices closed at noon, Dr. Louis worked quickly. (*Id.*, 786). He finally secured an appointment for Paganini in Akron (*Id.*).

That appointment was with Dr. Hull, a retinal specialist. (*Id.*,786-87). Prior to that appointment, Dr. Louis continued to text with Paganini and his son and offered to speak with Dr. Hull. (*Id.*, 786-87).

During the December 11 appointment, Dr. Hull diagnosed Paganini with acute endophthalmitis. (*Id.*, 502). But of note, during his examination of Paganini, Dr. Hull observed no redness. (*Id.*, 649).

In the days that followed, Dr. Louis continued to communicate with the family. (*Id.*, 789-93). During that time, Paganini began to feel better. (*Id.*, 790). Dr. Louis was optimistic. (*Id.*)

Ultimately, on December 13, Paganini's care was transferred to another practice, Retinal Associates. (*Id.*, 793-94). Paganini had surgery to address the infection. (*Id.*, 504-05). But a December 27 ultrasound showed Paganini's retina had detached. (*Id.*).

Consequently, on November 29, 2022, Paganini filed this lawsuit. It focused entirely on Paganini's December 10 appointment. He asserted that Dr. Louis failed to diagnose endophthalmitis at that appointment; and that during the appointment, he should have referred Paganini to a retinal specialist.

E. Dr. Huang's Testimony and Criticisms of Dr. Louis

At trial, Paganini introduced the expert testimony of ophthalmologist John Huang, M.D. (*Id*, 528:13.) Dr. Huang was Paganini's *sole* expert against Dr. Louis.

In offering his opinions, Dr. Huang admitted infection can occur – even in a sterile environment. Just one microscopic bacterium can enter the small surgical wound at the front of the eye. From there, this bacterium can proliferate and spread to the back of the eye – where it

becomes endophthalmitis. (*Id.*, 565). Dr. Huang explained an infection in the eye is a progression. (*Id.*, 579). The situation does not go "from nothing to severe." (*Id.*). Instead, after the infection begins, there are immediate stages. (*Id.*). According to Dr. Huang, 1 in 1,000 cataract patients will have the symptoms of an infection. (*Id.*, 585).

Untreated, endophthalmitis can result in vision loss. (*Id.*, 578). The condition is very uncommon. (*Id.*, 584). A typical patient will have an inflamed, "infected" or red eye, pain, some vision loss, and hypopyon – a progressive layering of white blood cells. (*Id.*, 570-74).

1. First criticism of Dr. Louis – Not Suspecting Endophthalmitis

At trial, Dr. Huang testified that Dr. Louis deviated from the standard of care in the following ways: (1) not suspecting endophthalmitis during his December 10 (post-operative) examination of Paganini; (2) conducting an inadequate examination of Paganini on that date because he observed a "clear" eye; and relatedly (3) not referring Paganini to a retinal specialist during the December 10 exam. (*Id.*, 597-616).

With respect to this first criticism, Dr. Huang testified that Dr. Louis fell below the standard of care by not recognizing that "pain, red eye and vision loss" are "red flags" of endophthalmitis. (*Id.* at 599). Based on these three symptoms, which were (allegedly) reported to Dr. Louis at the December 10 appointment, Dr. Huang testified that Dr. Louis should have *suspected* an infection. (*Id.*, 598). Elaborating, Dr. Huang explained that Dr. Louis should not have necessarily made the diagnosis of "infection or endophthalmitis." (*Id.*, 599). But he should have at least been suspicious enough to refer Paganini to a specialist. (*Id.*).

Notably, Paganini's medical records do not support Dr. Huang's opinion. Neither Dr. Louis nor Dr. Hull (who saw Paganini on December 11) reported any eye redness. (*Id.* at 649, 777-78.) Likewise, Paganini did not report redness. He did not mention redness in his 6:38 a.m. call to the

answering service on December 10; and he did not report redness later that day at his appointment – when Dawson took his history. (*Id.* 471-73, 713-715).

Likewise, Paganini denied that he was in pain on that 6:38 a.m. call. (*Id.*). And to the extent Paganini reported pain, Dr. Louis testified that it did not appear to be Paganini's primary complaint. In fact, Paganini did not show signs of pain beyond post-surgical achiness. (*Id.* at 435-36, 769). Even Dr. Huang conceded that a patient can have pain from the surgery. (*Id.*, 604).

Finally, Dr. Louis did not observe hypopyon – the proliferation of white blood cells that signal infection. (*Id.*, 605-06). According to Dr. Huang, the absence of hypopyon shows the infection was in its *early* progression when Dr. Louis examined Paganini. But somehow, even without this finding, Dr. Louis was still supposed to know to refer Paganini to a specialist. (*Id.*, 606).

2. Dr. Huang's Second Criticism of Dr. Louis – The Examination

Second, Dr. Huang testified that Dr. Louis' December 10 exam of Paganini fell below the standard of care – because Dr. Louis concluded that the front chamber of Paganini's left eye was "quiet." (*Id.*, 608-609). According to Dr. Huang, Dr. Louis should have observed at least some inflammation – not a "quiet" eye. (*Id.*, 609).

Calling it an "inconsistency," Dr. Huang also criticized Dr. Louis' diagnosis of bleeding in the eye – or a vitreous hemorrhage. (*Id.* at 610). Dr. Huang testified that if Dr. Louis observed red blood cells – as he would with a vitreous hemorrhage diagnosis, those cells would not have dissipated in just one day. Dr. Hull would have also seen them on December 11. (*Id.* 610).

Dr. Huang also questioned whether Dr. Louis actually dilated Paganini's left eye. (*Id.*, 611). But Paganini answered that question. According to Paganini, Dr. Louis *did* dilate his eye. (Id., 903).

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

3. Dr. Huang's Third Criticism of Dr. Louis – No Referral on December 10

Dr. Huang purported to offer a third criticism – that Dr. Louis failed to refer Paganini to a retinal specialist at the December 10 appointment. (*Id.*, 615-16). But this opinion merely repackaged Dr. Huang's first criticism – that Dr. Louis should have "erred on the side of caution" and referred Paganini to a specialist. (*Id.*, 599-606).

F. The Jury Invents Theories On Standard of Care and Causation.

The trial court submitted special interrogatories to the jury with the verdict form. Two of those interrogatories asked the jury to identify (1) the specific deviation(s) from the standard of care and (2) causation in order to test the verdict. (*Id.*, 1039-1041).

The jury's responses to those special interrogatories showed that the jury rejected *all* of Dr. Huang's opinions. For instance, when asked to identify the negligence, the jury did not describe any of his three theories. But despite disbelieving Dr. Huang, the jury still returned a verdict for Paganini. To get there, the lay jury simply invented its own (expertless) medical theory – as described in the jury's responses to the special interrogatories.

The first special interrogatory asked the jury to "describe the act(s) or omission(s) of Dr. Louis that …constitute a deviation from the standard of care." (Verdict Form, Trans. 1047). In response, the jury pinpointed Paganini's 6:38 a.m. call to the answering service. The jury stated that "[t]he breakdown of communication with the Cataract Eye Center of Cleveland, Inc., *et al.*, *to Dr. Louis* constitutes a deviation from the standard of care and thus delayed referral to a specialist." (*Id.*, 1047-48).

The second special interrogatory addressed causation. It asked the jury to "describe the act(s) or omission(s) of Dr. Louis that … proximately caused" Paganini's injuries. In response, the

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

jury (again) improvised. It attempted to connect its *new* standard of care (the 6:38 a.m. communication breakdown "to Dr. Louis") to what the jury thought should have happened.

> The breakdown of communication with the Cataract Eye Center of Cleveland, Inc., *et al*., to Dr. Louis constitutes a deviation from the standard of care. Had Dr. Louis been given more detailed information about the 6:00 a.m. call (no pain, no vision loss, seeing black spots) he may have been able to recognize the progression of sign/symptoms from the 6:00 call to the 10:00 appt. (the Cataract Eye Center documented hand motion at face vision loss, increase in spots, and aching around the eye). This in addition to the vitreous hemorrhage may have aided in Dr. Louis's decision to refer on 12/10/21. We also noted the rarity of vitreous hemorrhage post cataract surgery.

(*Id*., 1048-49).

This narrative speaks for itself. The jury identified the response to the 6:38 a.m. call as the negligence. Furthermore, the jury indicated that the response failed *Dr. Louis*. The jury specifically stated that the "communication breakdown was *to Dr. Louis*;" and that had "more detailed information" been communicated *to Dr. Louis* from the 6:38 a.m. call, he would have seen the infection's progression. Dr. Huang did not testify to this causation theory.

V. Argument.

With his first assignment of error, Dr. Louis appeals the trial court's May 26 denial of his JNOV Motion. This motion argued that the trial court should have granted JNOV in Dr. Louis' favor (or, at the very least, a new trial) because the lay jury created its own (unsupported) theories on standard of care and causation. The JNOV Motion also incorporated Dr. Louis' earlier arguments concerning RC 2323.43 constitutionality.

With the second assignment of error, Dr. Louis challenges the April 18 judgment and the trial court's decision finding RC 2323.43(A)(3) unconstitutional as applied to Paganini. Dr. Louis contends that if the statute is upheld, the noneconomic damages awarded to Paganini should be reduced to $500,000.00.

Because the constitutional question touches both assignments of error, Dr. Louis will address them together. But he will begin with the unmoored jury and the absence of expert testimony in support of the verdict – as revealed by the special interrogatory responses. If this Court reverses on that issue, the Court need not reach the constitutional question. *City of North Olmstead v. North Olmstead Land Hold., Ltd.*, 137 Ohio App.3d 1, 5 (8th Dist. 2000) ("Ohio courts have repeatedly held that courts should … not determine the constitutionality of a statute when other issues exist on the record that will provide a basis for determining the cause on the merits.")

FIRST ASSIGNMENT OF ERROR: The Trial Court Erred In Denying Dr. Louis' Motion For Judgment Notwithstanding The Verdict, Or In The Alternative, New Trial.

A. The Court Must Enter JNOV For Dr. Louis.

Paganini's sole trial expert was Dr. Huang. He offered three theories of negligence. Consequently, when special interrogatories 1 and 2 asked the jury to identify the alleged deviation from the standard of care and proximate cause, the jury had to at least identify one of *his* theories in its narrative response for the verdict to stand. Lay juries may not invent their own medical theories in malpractice cases.

But that is exactly what the jury did here. And because the jury based its verdict on a new theory to which Dr. Huang did not testify, Dr. Louis is entitled to JNOV. *Lewis v. Nease*, 2006-Ohio-4362, ¶ 65 (4th Dist.) (stating that JNOV is appropriate in malpractice cases where the plaintiff lacks competent expert testimony "that the negligence acts of the physician were the direct and proximate result of the patient's injury").

1. Civ. R. 50(B) Requires the Trial Court to Assess the Sufficiency of the Evidence.

An appellate court reviews a trial court's order denying a motion for JNOV *de novo*. *Ohio Bell Tel. Co. v. Kassouf Co.*, 2015-Ohio-3030, ¶ 12 (8th Dist.). The standard for granting JNOV is the same as that for a directed verdict pursuant to Civ. R. 50(A). *Estate of Cowling v. Estate of*

Cowling, 2006-Ohio-2418, ¶ 28. "In reviewing a motion for JNOV, courts do not consider the weight of the evidence or the witness credibility; rather courts consider the much narrower legal issue of whether sufficient evidence exists to support the verdict." *Teeter v. Ball Jar Corp.* 2020-Ohio-6997, ¶ 57 (5th Dist.) "In other words, if there is evidence to support the nonmoving party's side so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Id.* But conversely, if reasonable minds could reach only one conclusion – and that conclusion is adverse to the nonmoving party, the court must grant JNOV. *Portsmouth Ins. Agency v. Med. Mut. Cf Ohio*, 2012-Ohio-2046, ¶ 81 (4th Dist.).

a. To Prevail On A Medical Malpractice Claim, A Plaintiff Must Prove All Elements Through Competent Expert Testimony.

In a medical malpractice case, whether the evidence is sufficient carries one additional burden: it must be in the form of testimony rendered by an expert in the field. *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976). Indeed, a plaintiff is required to demonstrate the following through the testimony of a competent expert:

(1) A standard of care recognized by the medical community;

(2) The failure of the defendant to meet the requisite standard of care; and

(3) A direct causal connection between the medically negligent act and the injury sustained.

Id. A plaintiff's failure to provide competent expert testimony on any element above results in a verdict in the defendant-physician's favor as a matter of law. *Oyer v. Adler*, 2015-Ohio-1722, ¶ 17 (4th Dist.) ; *Lewis*, ¶ 65.

b. Special Interrogatories Test To Ensure The Jury's Findings Are Consistent With The Expert's Testimony.

In a malpractice case, a jury may not substitute its own judgment for an expert's testimony describing a physician's departure from the standard of care. *Bruni*, 346 N.E.2d at 676. To ensure

that the jury does not stray from the expert testimony, the trial court may permit a party to submit special interrogatories under Civ. R. 49. By asking the jury to identify the basis of its verdict in a narrative response, special interrogatories allow the parties and the court to "test" the basis of the jury's verdict. *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St.3d 611, 613 (1994) ("The purpose of an interrogatory is to test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict"): *Phillips v. Dayton Power & Light Co.*, 111 Ohio App.3d 433 (2nd Dist. 1996) (stating that jury interrogatories are a means of ascertaining the jury's true intentions).

And this test is one that *cannot* be flunked. According to the Supreme Court of Ohio, "'*the answering of jury interrogatories is <u>even more important</u> than the general verdict*.'" *Aetna Cas. & Sur. Co. v. Niemic*, 172 Ohio St. 53, 55 (1961) (emphasis added). When a Civ. R. 49 tests a verdict – and (as here) finds that verdict wanting, the trial court has the means (and the duty) to enter JNOV for the defendant-physician or order a new trial.

2. Dr. Huang's Testimony Does Not Support the Jury's Answer to Special Interrogatory Nos. 1 and 2.

Here, the jury's verdict was based on an alleged breakdown in communication *before* Paganini's 10:00 a.m. appointment with Dr. Louis on December 10. In response to special interrogatories 1 and 2, the jury identified Paganini's early morning, pre-appointment call. The jury blamed a "breakdown of communication… to Dr. Louis" – such that he did not have the "detailed information" about that call. According to the jury, if someone had given Dr. Louis that "detailed information," he would have been able to recognize the progression of infection "from the 6:00 call to the 10:00 appointment."

But, Dr. Huang never criticized this jury-invented failure to communicate information (from 6:38 a.m.) to Dr. Louis. Instead, his testimony was limited to Dr. Louis' alleged failure to recognize the infection *at the 10:00 a.m. appointment* and act accordingly. Dr. Huang's testimony

focused entirely on Dr. Louis' care *during* that appointment. Dr. Huang's criticisms had nothing to do with what occurred hours before. As no testimony supports the jury's explanation in their narrative responses to the two special interrogatories, it simply cannot be reconciled with the general verdict.

a. The Jury Invented Its Own Standard of Care

Dr. Huang testified to three criticisms of Dr. Louis: (1) that he failed to suspect endophthalmitis on December 10; (2) that his December 10 examination of Paganini fell below the standard of care because Dr. Louis observed that the eye was "quiet" and made other notes that Dr. Huang disbelieved; and (3) that he failed to refer Paganini to a retinal specialist. The jury rejected each of these criticisms. (In this regard, the jury got it right.)

Ohio courts do not just pay lip service to the critical importance of a jury's interrogatory answers. Indeed, the jury's answer controls over the general verdict. *Grieser v. Janis*, 2017-Ohio-8896, ¶ 34 (10th Dist.) (affirming JNOV in malpractice case where jury's response to special interrogatories not supported by expert testimony). See also, *Wapplehorst v. Kimmett*, 30 Ohio App.2d 29, 31 (3rd Dist. 1972) (finding jury's verdict could not sustain judgment when narrative response described mere negligence on a claim that required wanton misconduct).

This Court must enter JNOV for Dr. Louis. The jury's interrogatory response here reflects a deviation from a standard of care to which Dr. Huang did not testify. Although Dr. Huang offered testimony on the standard of care, this testimony is not reflected in the jury's response that Dr. Louis departed from the standard of care through a "breakdown in communication" between unidentified individuals *to Dr. Louis*.

Likewise, Dr. Huang did not testify that "more detailed information about the 6:00 a.m. call (no pain, no vision loss, seeing black spots)" to Dr. Louis would have aided him in recognizing the progression of the signs of endophthalmitis. For one, Dr. Louis testified that by the time of

Paganini's appointment, he did not perceive Paganini to be in pain – so even equipped with this information, there was no "progression" to note. But ultimately, Dr. Huang did not testify that Dr. Louis fell below the standard of care because he lacked any information about Paganini's complaints.

b. The Jury Invented Its Own Causation Hypothesis.

As with standard of care, the jury also impermissibly formulated its own causation theory. This cannot stand. The standard for proving causation in a medical malpractice case is strict. *Woessner v. Toledo Hosp.*, 2016-Ohio-5764, ¶ 26 (6th Dist.). Under Ohio law, the mere existence of an injury and a deviation from the applicable standard of care are insufficient to establish a causal connection between the two. *Clements v. Lima Mem. Hosp.*, 2010-Ohio-602, ¶ 60 (3rd Dist.) (citing *Rockwell v. Queen City Bottling Co.*, 75 Ohio App. 42 (1st Dist. 1943)). JNOV is appropriate in medical malpractice cases where the plaintiff lacks competent expert testimony "that the negligent acts of the physician were the direct and proximate result of the patient's injury." *Lewis,* 2006-Ohio-4362, ¶ 65.

Juries may not speculate on causation. *Estate of Hall v. Akron Gen. Med. Ctr.*, 2010-Ohio-1041, ¶ 21. "Courts recognize that there may be a variety of causes for an injury in a medical malpractice case, and some procedures are so inherently risky that injuries may occur even when physicians are careful." *Id.* ¶ 22. Thus, without the requisite expert testimony establishing proximate cause, a plaintiff's verdict in a malpractice case cannot stand. Causation is not the place for conjecture, guess, random judgment, or supposition. *Darnell v. Eastman*, 23 Ohio St.2d 13 syllabus (1970).

By these authorities, JNOV is proper. Building on its "new" standard of care, the jury then hypothesized on causation – which, of course, it cannot do. In response to Jury Interrogatory No. 2, in determining whether this alleged deviation caused Paganini's injuries, the jury answered:

> The breakdown of communication with the Cataract Eye Center of Cleveland, Inc., *et al*., to Dr. Louis constitutes a deviation from the standard of care. Had Dr. Louis been given more detailed information about the 6:00 a.m. call (no pain, no vision loss, seeing black spots) he may have been able to recognize the progression of sign/symptoms from the 6:00 call to the 10:00 appt. (the Cataract Eye Center documented hand motion at face vision loss, increase in spots, and aching around the eye). This in addition to the vitreous hemorrhage may have aided in Dr. Louis's decision to refer on 12/10/21. We also noted the rarity of vitreous hemorrhage post cataract surgery.

(*Id*., 1048-49.) By this narrative, the lay jury linked the following events: Dr. Louis did not get certain unspecified details (from unidentified persons) about Paganini's 6:00 a.m. call. Those unspecified details "may have" helped Dr. Louis recognize the progression of Paganini's condition; and "may have aided" in an ultimate decision to refer Paganini to a specialist.

Dr. Huang testified to none of this. He never opined that Dr. Louis lacked information or that if only information from 6:38 a.m. would have made it to Dr. Louis, the outcome would be different. To the contrary, Dr. Huang never identified "missing" information that Dr. Louis should have had. Rather according to Dr. Huang, Dr. Louis had all the information he needed – he just failed to recognize the information in front of him as something more urgent.

3. The Court Speculated In Attempting To Harmonize The Jury's Answers With The General Verdict.

In denying the JNOV Motion, the trial court recognized that the jury's special interrogatory responses were defective – yet still denied the JNOV motion. (JNOV Dec. at 5-6) ("The jury's responses were inarticulate and demonstrate the pitfalls of using passive voice.") In doing so, the trial court impermissibly speculated on what the jury was "*attempting* to communicate." (*Id.*) (emphasis added).

While a trial court should seek to reconcile the jury's answers to the interrogatories with the general verdict, its efforts to do so must be reasonable, and consistent with a "fair reading" of the jury's answers. *Gallick v. Baltimore & O. R. Co.,* 372 U.S. 108, 119 (1963). It is important to

note that "reconciliation" does not mean "rewrite" the narrative response. Likewise, "harmonization" is not a license for a selective reading that favors the verdict. Instead, when undertaking a reasonable, "fair reading" of an interrogatory response, the trial court may not go too far. It may not speculate as to the jury's intention when seeking to harmonize the jury's interrogatories with the general verdict. *See, e.g., Lewis,* 2006-Ohio-4362, ¶ 52 (sustaining assignment of error where trial court disturbed damages award in order to harmonize jury's answers to interrogatories with general verdict).

In its May 28 JNOV Decision, the trial court found the jury's responses "inarticulate" and handicapped by the passive voice. But those statements did not stop the trial court from opining on what (supposedly) the jury was "attempting to communicate." According to the trial court, the jury's focus on information that should have been communicated to Dr. Louis from the 6:00 a.m. call somehow derived from Dr. Huang's testimony "about the importance of obtaining detailed information to properly assess whether there was an emergent and rapidly progression infection." (*Id.*, p. 6.)

But in attempting to translate the jury, the trial court did not read the narrative fairly or reasonably. Instead, the court was determined to hammer the proverbial square peg (the jury's responses) into a round hole (the verdict). As evidence, this Court need only read the words the jury chose – and compare them to Dr. Huang's three alleged deviations from the standard of care. As set forth above, Dr. Huang's sole focus was on Dr. Louis' actions during the 10:00 appointment. But in its narrative response, the jury identified a much earlier "communication breakdown" – a failure to provide Dr. Louis with information about the 6:38 call.

What's more, the jury does not identify Dr. Louis as the cause of Paganini's injury. *Someone* failed to provide information *to Dr. Louis*. The jury did not say that Dr. Louis failed to obtain this information for himself.

The trial court dismissed this argument as merely a pitfall of the passive voice. But this Court cannot permit such a guess to stand. This Court must give the words the jury chose their plain meaning. And just as jurors are presumed to understand the instructions they are given at trial, the converse must also be true. Courts must assume jurors also understand the words they choose in a narrative. *State v. Robb*, 88 Ohio St.3d 59, 86 ("[J]urors are presumed to have followed the court's instructions.") It must work both ways. And in this case, there is a world of difference between what the jury actually said and the trial court's strained and speculative interpretation.

B. The Trial Court Should Have Ordered A New Trial Under Civ. R. 59.

While the trial court should have entered judgment based on the discrepancy between the jury's answers to the interrogatories and Dr. Huang's testimony, it should have, at the very least, ordered a new trial. Generally, Civ.R. 59 "allows [the Court] to order a rehearing of the questions in the trial court under circumstances more favorable than those attending their first investigation." *Rippel v. Rippel*, 328 N.E.2d 816, 819 (1st Dist. 1974). Civ. R. 59(A) sets forth the grounds for a new trial, including, as relevant to this appeal:

> (1) Irregularity in the proceedings of the court, jury … or any order of the court .. by which an aggrieved party was prevented from having a fair trial;
>
> ***
>
> (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;
>
> (7) The judgment is contrary to law;

1. New Trial Is Warranted Under Civ. R. 59(A)(7) Because The Judgment Was Contrary To Law, and Civ. R. 59(A)(1) Because The Proceedings Were Impermissibly Irregular.

The inconsistency between the jury's answers to Interrogatory Nos. 1 and 2, as against the general verdict and underlying expert testimony, rendered the judgment contrary to law under Civ. R. 59(A)(7), and marred the proceedings as "irregular" under Civ. R. 59(A)(1).

A motion under Civ. R. 59(A)(7) presents a question of law which requires a review of facts and evidence, but does not involve a consideration of the weight of the evidence or credibility of the witnesses. See *Pangle v. Joyce*, 76 Ohio St.3d 389, 391 (1996). Thus, the Court must determine whether the trial court erred as a matter of law. *O'Day v. Webb*, 29 Ohio St.2d 215, syllabus, ¶ 1 (1972). The *de novo* standard of review applies. *Harrison v. Horizon Women's Healthcare, LLC*, 2019-Ohio-3528, ¶ 11 (2nd Dist.)

Meanwhile, a motion under Civ. R. 59(A)(1) provides a trial court with discretion to grant a new trial when there is an irregularity in the proceedings that prevents a party from having a fair trial. *Wood v. Harborside Healthcare*, 2012-Ohio-156, ¶¶ 16-18 (8th Dist.). "The rule preserves the integrity of the judicial system when the presence of serious irregularities in a proceeding could have a material adverse effect on the character of and public confidence in judicial proceedings." *Id.* The term "irregularity" in this context is "very comprehensive" and describes "a departure from the due, orderly, and established mode of proceeding therein, where a party, with no fault on his part, has been deprived of some right or benefit otherwise available to him." *Id.* Some courts have evaluated inconsistent interrogatory responses in the context of Civ. R. 59(A)(1). *See, e.g., Reaves v. Healy*, 2011-Ohio-1487 (10th Dist.).

As set forth above, jury interrogatories permit the parties (and the court) to "test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict." *Evans v. Dayton Power & Light Co.*, 2004-Ohio-2183, ¶ 49 (4th Dist.). "The goal is to have the jury return a general

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

verdict and interrogatory answers that complement the general verdict." *Id.* As detailed above, the jury fell short of that goal here. If the Court is hesitant to reverse on JNOV grounds, the Court should order a new trial for the reasons stated above.

2. Civ. R. 59(A)(6): The Judgment Is Not Sustained By Weight Of Evidence.

This Court can also order a new trial because the judgment is not sustained by the weight of the evidence. Under Civ. R. 59(A)(6), "[a] reviewing court is to examine the entire record, and determine 'whether in resolving conflicts in evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.'" *Teeter*, 2020-Ohio-6997, ¶ 41 (quoting *Eastley v. Volkman*, 2012-Ohio-2179).

Dr. Huang testified to three separate (albeit, overlapping) alleged deviations from the standard of care. The jury accepted none of them. While the Court is left to speculate as to what it was about Dr. Huang's testimony that led the jury astray, it nevertheless must conclude it did. The jury wholly rejected Dr. Huang's testimony and crafted its own standard of care, which it deemed Dr. Louis to have breached.

Because no expert testified that Dr. Louis deviated from the standard of care through a "breakdown in communication" nor that "more detailed information" about Paganini's call to the answering service had any nexus to Dr. Louis' decision not to refer Paganini on December 10th, the jury clearly lost its way in rendering the verdict.

<u>Appellants' First Assignment of Error:</u> The trial court erred in denying Appellants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

<u>Appellants' Second Assignment of Error</u>: The trial court erred in entering judgment for Paganini and finding RC 2323.43(A) unconstitutional as applied to Paganini.

A. The Trial Court Erred In Finding RC 2323.43(A)(3) Unconstitutional As Applied To Paganini And In Not Capping Paganini's Noneconomic Damages.

Because the jury invented its own theories of standard of care and causation, the Court should have granted JNOV or a new trial. If the Court reverses on this basis, the Court need not address the next issue – whether RC 2323.43(A)(3) is constitutional as applied to Paganini. *City of North Olmstead*, 137 Ohio App.3d at 5. But if the Court reaches the constitutional issue, the judgment must be reduced to $500,000 pursuant to the statute.

B. Introduction: A Brief History Of Noneconomic Damages.

1. Introduction.

RC2323.43(A)(3) sets a $500,000 cap for noneconomic damages in medical malpractice cases involving certain serious injuries. Following the verdict, the trial court found that this statute (as applied to Paganini) violated the Ohio Constitution's "due course of law" clause. That clause states that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due course of law, and shall have justice administered without denial or delay." Oh. Const. Art. I, §16.

A plain reading of this provision "reveals that it does *not* provide for remedies without limitation or for any perceived injury." *Ruther v. Kaiser*, 2012-Ohio-5686, ¶ 12. Instead, it prohibits "statutes that effectively prevent individuals from pursuing relief for their injuries." *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 44.

Paganini's constitutional challenge triggers "rational basis review" – which generally requires this Court to assess whether the legislature had a rational belief that RC 2323.43(A)(3)

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

was related to a legitimate government interest. *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 2016-Ohio-8118, ¶ 36. To make that assessment, this Court must evaluate the statute prospectively – based on the circumstances that existed when it was enacted. *Benjamin v. Columbus*, 167 Ohio St. 103 (1957) (stating that the proper constitutional inquiry is whether the legislature had a rational belief that its determinations were related to a legitimate government interest at the time the law was enacted).

2. Noneconomic Damages Are Purely Subjective.

Noneconomic compensatory damages are "damages that do not present 'actual loss' to an injured party." *Oliver v. Cleveland Indians Baseball Co. Ltd. Ptship.*, 2009-Ohio-5030, ¶ 4, (2009). These "awards are inherently subjective and difficult to evaluate." *Arbino,* ¶ 69. "There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering." Restatement (Second) of Torts § 903, cmt. a (1965). Juries are "left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy,* 73 Cal. L.Rev. 772, 778 (1985). Consequently, such decisions are "susceptible to influence from irrelevant factors, such as the defendant's wrongdoing" and other extraneous considerations. *Arbino*, ¶ 54.

3. Historically, Noneconomic Damages Awards Were Typically Modest.

Historically, noneconomic damage awards were modest and noncontroversial. Decades ago, the availability of noneconomic damages and the fact finders' inability to objectively measure pain and suffering did not raise serious concern because "personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses,* 34 Cap. U. L. Rev. 554, 560 (2006). In addition, previously, courts often reversed

large noneconomic damage awards. *See*, Ronald J. Allen and Alexia Brunet Marks, *The Judicial Treatment cf Noneconomic Compensatory Damages in the Nineteenth Century,* 4 J. Empirical Stud. 365, 369 (2007).

Early awards in Ohio are consistent with this national experience. *See, e.g.*, *Osman v. Cook*, 43 N.E.2d 641, 645 (2d Dist. 1942) (affirming $11,000 award [about $191,000 today] to a young plaintiff who suffered a brain injury as a result of a collision with an ambulance); *Barnett v. Hills*, 79 N.E.2d 691, 692 (2d Dist. 1947) (affirming $17,500 award [about $208,000 today] to a 24 year-old plaintiff who permanently lost her ability to work or have children); *Coppock v. Horine*, 1940 WL 2942 (2d Dist. May 9, 1940) (remitting $12,000 award to $10,000 [$196,000 today] to a 45 year-old who became totally disabled as a result of a car accident).

4. Left Unchecked, Noneconomic Damages Awards Exploded.

But by the 1970s, pain and suffering awards often constituted the single largest item of recovery in tort lawsuits. *See Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971). This trend continued. As Judge Niemeyer of the U.S. Court of Appeals for the Fourth Circuit observed in 2004, "irrationality [i.e., the lack of "rational criteria for measuring damages"] and awarding [m]oney for pain and suffering… provides the grist for the mill of our tort industry." Paul V. Niemeyer, A*wards for Pain and Suffering: The Irrational Centerpiece Cf Our Tort System,* 90 Va.L.Rev.1401, 1401 (2004). In fact, pain and suffering awards in the United States are often more than 10 times higher than those in the most generous of other nations. *See* Stephen D. Sugarman, C*omparative Look At Pain And Suffering Awards,* 55 DePaul L.Rev. 399, 399 (2006).

Against this backdrop of escalating, unpredictable, and unlimited noneconomic damage awards, Ohio faced a healthcare crisis. In response, the General Assembly considered measures to curtail rising malpractice premiums, the flight of Ohio doctors to other states, and the practice of expensive and unnecessary defensive medicine.

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

5. RC 2323.43 Is Enacted Amidst Ohio's Medical Liability Crisis.

In 2003, the General Assembly enacted S.B. 281 — tort reform measures applicable to medical claims. One of S.B. 281's primary provisions is the statute at issue here – RC 2323.43. That statute, which reads in pertinent part below, provides a two-tiered cap on noneconomic damages – with a higher cap available to those with the most severe injuries:

> (A) In a civil action upon a medical * * * claim to recover damages for injury, death, or loss to a person or property, all of the following apply:
>
> (1) There shall not be any limitation on compensatory damages that represent the economic loss of the person who is awarded the damage in the civil action.
>
> (2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a civil action * * * shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff's economic loss * * * to a maximum of three hundred fifty thousand dollars for each plaintiff or five hundred thousand dollars for each occurrence.
>
> (3) The amount recoverable for noneconomic loss in a civil action under this section * * * may exceed the amount described in division (A)(2) * * * but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:
>
> (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
>
> (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.
>
> * * * * *

In enacting RC 2323.43, the General Assembly made detailed findings and expressed its intent in the statute's "Uncodified Law." *See Maynard v. Eaton Corp.*, 2008-Ohio-4542, ¶ 7. (finding that uncodified law is the law of Ohio). For instance, in the first three findings, the General Assembly identified rising healthcare costs; *dramatic* increases in malpractice verdicts; a vulnerable and teetering healthcare system; and unnecessary defensive medicine by frightened physicians:

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

(A) The General Assembly finds:

(1) Medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio;

(2) The number of medical malpractice claims resulting in payments to plaintiffs has remained relatively constant. However, the average award to plaintiffs has risen dramatically. Payments to plaintiffs at or exceeding one million dollars have doubled in the past three years.

(3) This state has a rational and legitimate state interest in stabilizing the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss award in medical malpractice actions. The overall cost of healthcare to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients. * * *

Further, based upon testimony presented to the General Assembly, the legislature found that many malpractice insurers were fleeing Ohio because they were faced with increasing losses related to rapidly rising noneconomic loss awards. *Uncodified Law,* §3(A)(3)(b). In fact, at the time, the Ohio Department of Insurance reported that there were only six remaining malpractice insurers willing to write insurance in Ohio. *Id.*

To the detriment of all Ohioans, this confluence of events led many doctors and hospitals to have difficulty obtaining affordable insurance. (Fewer insurers resulted in less affordable options.) As a result, many physicians – including a large number of specialists had left Ohio. *Id.*, §3(A)(3)(i). At the time, 15% of Ohio's physicians were considering or had already relocated their practices due to rising medical malpractice insurance costs. *Id.*

After identifying the problems facing the health care industry, the legislature considered evidence that limiting noneconomic damages helped *reduce* rising health care costs. The General Assembly specifically found that limiting noneconomic damages for seriously injured patients "strikes a reasonable balance between potential plaintiffs and defendants in consideration of an award of noneconomic losses," while not limiting the award of actual economic damages. *Id.*,

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

Section 3(A)(4)(a). The legislature found that malpractice premiums were reduced in those jurisdictions that had enacted meaningful limitations on noneconomic losses. *Id.*, §3(A)(3)(e). Specifically, the General Assembly reviewed a report from the United States Department of Health and Human Services which indicated that "practitioners in states with effective caps on noneconomic damages are experiencing premium increases in the 12 to 15% range, as compared to an average 44% increase in states that do not cap noneconomic damage awards." *Id.* The General Assembly also heard testimony from witnesses that the proposed limits on noneconomic damages for catastrophically injured patients were similar to caps on awards adopted by other states. *Id.*; Section 3(A)(4)(b).

Thus, through RC 2323.43's Uncodified Law, the General Assembly articulated its "rational and legitimate state interest" in enacting the statute. Furthermore, the General Assembly's concerns with runaway damage awards, a besieged medical profession, and increased patient costs were justified. See *AMA Analysis: A Dozen States In Medical Liability Crisis*, AMA News Release (June 17, 2002) (identifying Ohio as one of the twelve medical liability "crisis states") (noting that Ohio citizens were losing access to healthcare due to skyrocketing liability insurance premiums and physicians struggling to stay in practice.)

S.B. 281 – and RC 2323.43 – arose from this crisis. Medical costs were out of control, and doctors were leaving Ohio. As one tool to stem the tide, RC 2323.43 was enacted

C. The Trial Court Applied The Wrong Standard of Review For A Constitutional Challenges.

Before we address RC 2323.43 under rational basis review, we raise – as a preliminary matter – the trial court's reliance on the wrong standard of review. Without any basis, the trial court found that Paganini was making an "as applied" challenge. This determination resulted in a

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

"clear and convincing" standard of review – when the court should have used the "beyond a reasonable doubt" standard used in facial constitutional challenges.

1. A Statute May Be Challenged "On Its Face" Or "As Applied."

a. A Facial Constitutional Challenge Requires "Proof Beyond A Reasonable Doubt."

There are two types of constitutional challenges. "A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts." *State v. Lowe*, 2007-Ohio-606, ¶ 17. This distinction between the two types of constitutional challenges is important because the standard of proof is different. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 20.

"To successfully present a [facial] challenge, [a claimant] must demonstrate that there is no set of circumstances in which [the] statute would be valid." *Arbino*, ¶ 26. The mere fact that a statute "might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Id.* "To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.,* 2006-Ohio-5512, ¶ 21.

b. With An "As-Applied" Challenge, The Plaintiff Must Present Clear And Convincing Evidence Of An Existing Set of Facts.

"In an as-applied challenge, the challenger contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, [is] unconstitutional." *Lowe*, ¶ 17. "The practical impact of holding that a statute is unconstitutional as applied to the challenger is to prevent its future application in a similar context, but not to render it utterly inoperative." *Yajnik v. Akron Dept. of Health, Hous. Div.*, 2004-Ohio-357, ¶ 14.

"Where statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts. *Harrold v. Collier*, 2005-Ohio-5334, ¶ 38.

2. Because Paganini's Challenge Was *Not* "As Applied," The Trial Court Employed The Wrong Standard Of Review.

In its April 16, 2024 Decision, the trial court found it "indisputable that Paganini is challenging the application of the cap to a specific set of facts…" From there, the court stated that "Paganini has demonstrated by clear and convincing evidence that applying RC 2323.43(A)(3) to the jury's verdict violates his due course of law…" (Dec. at 3, 20.)

But the court also suggested that the statute was constitutional on its face. The court went so far as to note that "the logic of declaring the cap as-applied to his verdict likely means it is unconstitutional in all circumstances." (Dec. at 3) But even as the trial court hinted at a facial constitutional defect, the trial court circumvented the exceedingly high burden required, in favor of a lower bar.

Paganini's briefing provided little guidance on the appropriate standard – or what he was seeking. He barely mentioned the words "as-applied" in his pleading, and he made no legitimate showing of any specific set of facts unique to him that rendered the application RC 2323.43(A)(3) unconstitutional. In short, the trial court's findings are not supported by the record.

Paganini's filing on the issue was his February, 2024, *Plaintiff's Motion to Include In Any Judgment The Full Amount Awarded For Noneconomic Damages*. There, Paganini hedged his bets. In the beginning of his brief, he attacked RC 2323.43(A)(3) *generally* – a facial challenge. He argued that RC 2323.43 was a "solution in search of a problem" and contended that "[c]aps on catastrophic caps[sic] can only be applied following trial and they necessarily impact claims the

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

jury found to be meritorious." (Motion, pp.7-8.) Only later did Paganini deliver the magic incantation, that "[a]s applied to Mr. Paganini, the noneconomic caps bear no relation to the public health, safety or morals." But merely reciting the phrase – "as applied" – is not enough. Labels are not "clear and convincing" evidence of facts unique to a particular plaintiff.

A proponent of an "as-applied" challenge must identify some set of facts personal and unique to them that renders a challenged statute unconstitutional in that circumstance. "Where statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts." *State v. Hacker*, 2020-Ohio-5048, ¶ 16 (3rd Dist.), *aff'd*, 2023-Ohio-2535, ¶ 16 *quoting Harrold*, 2005-Ohio-5334, ¶ 38.

This point is key – that in an as-applied challenge, the challenger bears the burden of presenting, by clear and convincing evidence, of a "presently existing set of facts" that render the statute unconstitutional. But here, the trial court did not consider whether Paganini demonstrated by clear and convincing evidence a "presently existing set of facts." Instead, the trial court (incorrectly) determined that Paganini demonstrated by clear and convincing evidence that the statute lacks "a real and substantial relationship to general welfare" and determined it "unreasonable and arbitrary." (Dec. at 17-18.)

Between pages 11 and 12 of his Motion, Paganini did no more than pay vague lip service to the phrase, "as-applied." In what sounds like a facial challenge, he argues the statute is "unconstitutional under due process *as applied* to non-economic damages caps in medical claims[,]" (Motion, p. 11 (emphasis added).) Then, comparing the Ohio Supreme Court's *Brand v. Pompa* decision declaring RC2315.18 unconstitutional, Paganini argues that "because

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

RC2323.43 does not allow for limitless non-economic damages for those suffering catastrophic injuries, the constitutional guaranty of due course of law is unjustly withhold for medical negligence plaintiffs *like John Paganini*." (Motion, p. 3.) (emphasis added) Again, this assertion is squarely a facial challenge. Paganini ultimately concludes that "[n]o rational basis exists for treating medical claims under RC 2323.43 differently than other negligence claims under RC2314.18." (Motion, p. 11.) Paganini's arguments present no more than a facial challenge to RC 2323.43, and his use of the phrase "as applied" does not operate to narrow his argument to his specific set of facts. Rather, *he has to actually state what those facts are.* (Which he never does.)

Here, the closest Paganini comes to presenting some set of facts unique him, is on page 8 of his Motion, where he states:

> The jury determined [Paganini is catastrophically injured] and awarded him $1,487,500 in noneconomic damages. This is not a hypothetical set of facts. Enforcing the noneconomic cap in this case would negate the jury's fact-finding, and strip Mr. Paganini of his constitutional guarantees.

By this statement, Paganini still fails to set forth some unique set of facts that renders the statute unconstitutional as applied to him. In fact, what Paganini generically complains of (reduced damages) would be true of every single catastrophically injured plaintiff faced with the damage cap. In short, there is nothing unique about Paganini when every other plaintiff subject to RC 2323.43(A)(3) could also complain about the reduction of a verdict under the statute.

Relying on a 20-year-old article, Paganini concludes that "capping noneconomic damages has an especially adverse effect on seniors, children, women, and the poor…" due to their "lower claims for lost income." (*Id.*, pg. 8.) Having captured the statistical *majority* of plaintiffs (women, children, seniors, the poor, excluding only young, wealthy men), Paganini still has not demonstrated the statue is unconstitutional *as applied to him.*

Paganini's argument can be summarized as follows: RC 2323.43(A)(3) is unconstitutional because it reduces his jury verdict. Paganini can't dispute that this is the crux of his argument because his brief concludes with it: "[v]erdicts subject to damages caps simply aren't that common, but for Mr. Paganini, the outcome of this motion will determine whether he receives the fully value of his noneconomic damages or is stripped of nearly $1,000,000." (*Id.*, pp. 15). But this contention makes him just like any other plaintiff complaining about the damages cap. Paganini never states what is unique about him – what makes RC 2323.43(A)(3) unconstitutional as applied to him.

Successful "as-applied" challengers must establish something unique about their particular circumstances that has some unconstitutional effect when the challenge statute is applied to their special circumstances. For example, in *In re D.B*., the Ohio Supreme Court agreed that the challenged statute, RC 2907.02(A)(1)(b), which held offenders strictly liable for engaging in sexual conduct with children under the age of 13, was unconstitutional as applied to an offender who was also under the age of 13, as it failed to designate which actor is the victim, and which is the offender in the context of those particular circumstances. 2011-Ohio-2671, ¶ 26.

The common thread of a successful challenge is that the challenger offered some set of facts under which the challenged statute was rendered unconstitutional. Paganini has made no such showing here. Thus, where a party (like Paganini) has done no more than challenge the application of the statute on its face, he is left with a higher burden. He must prove the statute is unconstitutional in all circumstances beyond a reasonable doubt. *Oliver,* 2009-Ohio-5030, ¶ 12 (finding plaintiff made facial challenge absent evidence of "as-applied" claim). This Court must apply that standard.

D. The Rational Basis Test.

1. Rational Basis Review Requires Deference And Judicial Restraint.

After misapplying the standard of review, the trial court concluded that RC 2323.43 violated the Ohio Constitution's due course of law (or due process) provision. With a due process challenge, Ohio courts proceed under a rational basis review in the absence of an infringement upon a fundamental right. *Stolz v. J&B Steel Erectors*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 19. When the rational basis test is used, great deference is paid to the state. *Simpkins*, ¶ 36. The United States Supreme Court has recognized that the "deferential rational-basis test is a paradigm of judicial restraint" and "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Fed. Communications Comm. v. Beach Communications*, 508 U.S. 307, 314 (1993).

Adding to Paganini's heavy burden, the Ohio Supreme Court has recognized that "[i]t it is difficult to prove that [a] statute is unconstitutional." *Arbino,* ¶ 25. All statutes have a strong presumption of constitutionality. *Id.* Any doubts must be resolved in favor of the statute. See, e.g., *State v. Stambaugh*, 34 Ohio St.3d 34, 35 (1987).

This Court has stated that "[a] legislative act is presumed in law to be within the constitutional power of the body making it… ." *City of North Olmstead*, 137 Ohio App.3d at 7 (quoting *State ex rel. Dickman v. Defenbacher*, 165 Ohio St. 142, 147 (1955)). "That presumption of validity of such legislative enactment cannot be overcome unless it appears that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution… ." *Id.* "The question, whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Id.*

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

In any constitutional challenge, all courts must be mindful that the legislative branch is "the ultimate arbiter of public policy." *Arbino,* ¶ 21. "The only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom." *Ruther v. Kaiser*, 2012-Ohio-5686, ¶ 9.

Under this deferential, rational basis test, a court looks at whether the statute at issue (1) bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and (2) is not unreasonable or arbitrary. *Simpkins,* ¶ 36 (citing *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274 (1986)).

2. The Medical Claim Damage Cap Bears A Real And Substantial Relation To The Public's General Welfare.

After applying the presumption of constitutionality and the appropriate standard of review, this Court must conclude that RC 2323.43 is constitutional under the due process clause. Under the first prong, "all that is required" is a determination that the "General Assembly acted in the public's interests…." *Arbino*, ¶ 56.

The only way a court can conclude that the General Assembly was not acting in the public's interest (when it enacted RC 2323.43(A)(3)) is to ignore the statute's Uncodified Law. In 2003, the legislature faced a daunting problem. A medical liability crisis threatened the availability of health care. Medical malpractice verdicts had dramatically increased, and liability insurers were fleeing the state. When the statute at issue was enacted, only six malpractice insurers were in the Ohio market.

In response, the General Assembly exercised its police power. It enacted numerous measures – including the RC 2323.43 noneconomic damage cap at issue. The legislature took this step after collecting evidence, hearing testimony, and making other policy assessments that courts are ill-equipped to make.

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

In *Arbino*, the court reviewed RC 2315.18 – which set damage caps in general negligence cases and other (non-medical) torts. In finding that the statute had a "real and substantial relationship to the public's general welfare," the court did not opine on the wisdom of the legislative policy. *Arbino*, ¶ 58 (stating that Ohio courts will not "cross check" the legislative findings). Rather, the court looked to the General Assembly's *process*: the evidence in the record that drove the statute's enactment. *Id.*, ¶¶ 53-55 (citing studies, polling data, and testimony in support of damage caps).

With this appeal, this Court must follow that example. Backed by testimony, studies, and economic data, the General Assembly enacted the $500,000 damage cap for serious injuries in medical cases. The judiciary should not second guess that policy choice under rational basis review.

But with its decision, the trial court abandoned this principle. Even after acknowledging RC 2323.43's Uncodified Law, the trial court still concluded that the legislature faltered "in demonstrating a real and substantial relationship between malpractice insurance rates and capping noneconomic damages for catastrophic injuries." (Dec. at 16). In support of this conclusion, the trial court stated that it was following *Morris v. Savoy*, 61 Ohio St.3d 684 (1991).

This conclusion was error. First, when the trial court found that the legislature had not demonstrated a link between malpractice insurance rates and capping noneconomic damages, the trial court abandoned the principles of judicial deference that are the hallmark of rational basis review. *Arbino*, ¶¶ 70-71 (stating that Ohio courts are not "the forum in which to second guess … legislative choices ….") Furthermore, the trial court ignored that the General Assembly's fact-finding process that linked noneconomic damages with the factors contributing to Ohio's health care crisis. RC 2323.43, Uncodified Law, Section 3(A)(3). As one example, the General Assembly

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

linked liability insurers' abandonment of the Ohio market to "rapidly rising … noneconomic loss awards in medical malpractice actions." *Id.*

Finally, contrary to the trial court's decision, *Morris* is *not* controlling. (Dec. at 15). *Morris* involved legislation from 1975. Comparing the *Morris* statutes (from the Watergate era) with the current legislation ignores the different circumstances under which both sets of statutes were enacted. Broadly, both the *Morris* statutes and the legislation at issue were concerned with rising health care costs. But that is where the comparison ends. Given the rapidly changing face of health care in the United States at the end of the last century, the circumstances that led to the 2003 legislation could not be more different from the environment in the early 1970's – when some physicians could remember house calls. (And others still made them.)

The trial courts reliance on *Morris* also suffers from that case's lack of a legislative record. As observed in *Arbino*, the *Morris* court based its decision on the lack of legislative evidence demonstrating a rational basis for its enactment. *Arbino*, ¶ 56. In rejecting a similar argument that *Morris* controlled, the *Arbino* court stated that (unlike the 1975 legislation), the 2003 statutes drew "a clear connection between limited uncertain and potentially tainted noneconomic damage awards and the economic problems demonstrated in the evidence." *Id.*

In short, any comparison between *Morris* and the 2003 legislation fails. Under the first prong of rational basis review, this Court can conclude that "the General Assembly acted in the public's interests…." *Id.*

3. RC 2323.43 Is Not Unreasonable Or Arbitrary.

Under rational basis review's second prong, the Court must assess whether RC 2323.43's noneconomic damage cap is "unreasonable" or "arbitrary." It is not. The General Assembly identified a valid state interest: The availability of affordable medical care from competent practitioners in Ohio. As shown by the legislative record, RC 2323.43 is one tool that the General

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

Assembly enacted to achieve that interest. *Arbino*, ¶ 61 (measuring "arbitrary" and "unreasonable" against the legislature's ability "to make a policy decision to achieve a public good").

Indeed, in RC 2323.43's Uncodified Law, the General Assembly explained its reasoning – and the distinction it drew when it permitted a higher ($500,000) noneconomic damage cap for the most severely injured. First, the legislature noted the link between health care costs and "compensatory damages representing noneconomic loss awards in medical malpractice actions." Uncodified Law, § 3(A)(3). "Rapidly rising … noneconomic loss awards" had (1) led Ohio physicians to "over prescribe, over treat, and over test their patients;" and (2) caused medical malpractice insurers to leave Ohio. Id.

According to the legislature, the "distinction among claimants with a permanent physical function loss strikes a reasonable balance between potential plaintiffs and defendants in consideration of the intent of an award for noneconomic losses…" *Id.*, § 3(A)(4)(a)-(b). Furthermore, in enacting the legislation, the General Assembly heard testimony that similar noneconomic cap amounts had been adopted in other states – and that in those jurisdictions, premium increases for malpractice insurance had dramatically slowed. *Id.*, § 3(A)(3)(e).

In short, in furtherance of an important public policy, healthcare access and stability in Ohio, the General Assembly took the most subjective component of any award – noneconomic damages – and adopted a two-tiered system. That system, which was enacted after the legislature reviewed studies and heard from experts, created a higher noneconomic damage for the most severe injuries and a lower noneconomic damage cap for less severe injuries. *Simpkins*, ¶ 29 ("The General Assembly has the authority to determine what causes of action the law will recognize, to alter the common law by abolishing defining or limiting those causes of action *and to determine what remedies are available*.") (emphasis added).

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

Finding RC 2323.43(A)(3)'s $500,000 cap unreasonable and arbitrary, the trial court (again) turned to *Morris*. (Dec. at 17). In that case, the court reviewed the 1975 statute that set a $200,000 cap on general damages for any medical claim. 61 Ohio St.3d at 686, 576 N.E.2d at 768. As part of that review, the court carefully noted the hasty circumstances of the statute's enactment and intense lobbying that led to the bill's expedited passage. The court then declared the $200,000 cap unconstitutional because (among other things) "[i]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice… ." *Id.* at 691.

But *Morris* is not a valid comparison. Rejecting that case's applicability to more recent matters, the Ohio Supreme Court has twice commented on RC 2323.43 – which has a detailed legislative record and accompanying Uncodified Law – and the 1975 statute examined by *Morris* – which does not. *Arbino*, ¶ 56 (stating that the Supreme Court had criticized the record in *Morris* "as lacking evidence demonstrating a rational connection between the tort reforms taken and the public good to be achieved"); *Simpkins*, ¶ 40.

For instance, in *Simpkins*, a 2016 case, the court analyzed the 1991 decision in *Morris*. The court linked (if not attributed) its decision in *Morris* to the absence of a legislative record that could have survived rational basis review. The court specifically stated that in *Morris*, it held that the 1975 statute was unconstitutional "*[a]fter* noting the absence of any evidence of a rational connection between damage awards in excess of the caps and malpractice-insurance rates… ." *Simpkins*, ¶ 40 (citing *Morris*, 61 Ohio St.3d at 691, 576 N.E.2d 765) (emphasis added).

The statute at issue does not suffer from the same infirmity. Where the 1975 damage cap in *Morris* had no evidence of a rational basis, RC 2323.43(A)(3) has abundant support in the legislative record. As set forth above, the General Assembly specifically commented on the link

between uncapped noneconomic damages and the dangers of skyrocketing health care costs. In contrast, the *Morris* court observed that while the legislation was "clearly … aimed at malpractice insurance rates," the statute at issue was *not* mentioned among "the statutes that the legislature … believed would have an impact on insurance premiums." *Morris*, 61 Ohio St.3d at 690.

The trial court cited *Morris* as if it created a bright-line rule – that noneconomic damage caps for the most serious medical malpractice injuries are always arbitrary and unreasonable. That is not the case. Instead, the rule from *Morris* is that the legislature will not rubber-stamp a statutory damage cap when the underlying legislative record is (at best) barren.

Finally, on page 18 of its decision, the trial court compared the hypothetical man who loses his leg in surgery versus the same man who loses his leg after an automobile accident. According to the court, it was irrational for that man to be able to recover unlimited noneconomic damages in the automobile accident while having his noneconomic damages capped in the malpractice example.

This is a false equivalency – as Ohio law allows for different damages for the same injury in multiple circumstances. For example, if this same man were to lose his leg in a workplace accident, the workers' compensation system would provide an award under an entirely separate schedule of recovery. The benefits would be strictly tailored and limited to that injury compensation system.

Similarly, if that same man loses his leg as the result of liability of a political subdivision, his noneconomic damages would be capped at $250,000 under RC 2744.05(C) – the noneconomic damage cap applicable to political subdivisions. This statutory cap on noneconomic damages and claims against political subdivisions is based on the public policy of safeguarding taxpayer resources. *Oliver,* 2009-Ohio-5030.

Electronically Filed 08/07/2024 14:47 / FILING OTHER THAN MOTION / CA 24 113867 / Confirmation Nbr. 3240762 / CLDNW

19428197v1

If noneconomic damages can be capped by the legislature for these other public policy reasons, they can likewise be capped by the General Assembly to ensure the accessibility and availability of health care at affordable costs to all Ohioans.

VI. Conclusion.

For the foregoing reasons, the Appellants respectfully request that this Court reverse. In particular, the Appellants are entitled to JNOV (or a new trial) as set forth in their first assignment of error. Furthermore, in the event the Court reaches this appeal's constitutional question, the Court should impose RC 2323.43(A)(3) cap on noneconomic damages.

Respectfully submitted,

/s/Bradley D. McPeek

Bradley D. McPeek (0071137)
Kellie A. Kulka (0095749)
BRICKER GRAYDON LLP
312 Walnut Street, Suite 1800
Cincinnati, OH 45202
Phone: (513) 621-6464
Fax: (513) 651-3836
Email: bmcpeek@brickergraydon.com
kkulka@brickergraydon.com

Christine Santoni, Esq. (0062110)
PEREZ MORRIS
1300 East Ninth Street, Suite 1600
Cleveland, Ohio 44114
Phone: (216) 621-5161
Fax: (216) 621-2399
EMail: csantoni@perez-morris.com

Attorneys for Defendants, The Cataract Eye Center of Cleveland, Inc., and Gregory J. Louis

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by electronic mail this 7th day of August, 2024, upon the following:

Susan E. Petersen, Esq.
Todd E. Petersen, Esq.
PETERSEN & PETERSEN
10680 Mayfield Road
Chardon, OH 44024
sep@petersenlegal.com
tp@petersenlegal.com
Counsel for Plaintiff-Appellee

/s/*Bradley D. McPeek*