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

Court of Appeals

APPELLEE'S BRIEF FILED
August 27, 2024 23:18

By: TODD PETERSEN 0066945

Confirmation Nbr. 3258117

JOHN PAGANINI — CA 24 113867

vs.

Judge:

THE CATARACT EYE CENTER OF CLEVELAND, ET AL.

Pages Filed: 44

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

JOHN PAGANINI, Plaintiff-Appellee, v. THE CATARACT EYE CENTER OF CLEVELAND, INC., et al., Defendants-Appellants.	: : : : : :	Appeal Nos: CA-24-113867 CA-24-114019 Trial No. CV-22-971901 On Appeal from the Cuyahoga County Court of Common Pleas

---

BRIEF OF APPELLEE JOHN PAGANINI
(Oral Argument Requested)

Susan E. Petersen, Esq. (#0069741)
Todd Petersen, Esq. (#0066945)
PETERSEN & PETERSEN, INC.
10680 Mayfield Road
Chardon, OH 44024
Tel. (440) 279-4480
Fax (440) 279-4486
sep@petersenlegal.com
tp@petersenlegal.com

Counsel for Plaintiff-Appellee,
John Paganini

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

Christine Santoni, Esq. (#0062110)
Matthew Turkalj, Esq. (#0097974)
PEREZ MORRIS
1300 East Ninth Street, Suite 1600
Cleveland, OH 44114
Tel. (216) 621-5161
Fax (216) 621-2399

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Constitutional Provisions

Other Authorities

Rules

I. Assignments of Error

Assignment of Error No. 1 – Appellants claim the Trial Court erred in denying Appellants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Assignment of Error No. 2 – Appellants claim the Trial Court erred in entering judgment for John Paganini and finding R.C. 2323.43(A) unconstitutional as applied to Paganini.

II. Statement of Issues Presented for Review

1. Appellants' trial counsel drafted and submitted two jury interrogatories. At the close of trial, the Trial Court read the verdict aloud in open court, including a verbatim reading of the jury's responses to those interrogatories. The Trial Court then asked Appellants' counsel if she wished to poll the jury, at which point Appellants' counsel declined, asking only to "look at the forms at some point." The jury was then discharged. At issue in this case is whether Appellants' counsel's failure to object to any irregularity or inconsistency in the jury's responses prior to discharge of the jury resulted in the waiver of that objection.

2. Appellants maintain the jury's interrogatory responses are inconsistent and, as such, require that this matter be remanded for a new trial. Appellee believes the responses are consistent. At issue in this case is (1) whether apparent inconsistencies exist; and, (2) if so, whether, while entertaining "all reasonable hypotheses" and utilizing "any reasonable view of the evidence," the answers are "absolutely irreconcilable" with the general verdict.

3. Appellants maintain this Court can somehow utilize Civil Rule 59(A)(1), (6) or (7) as vehicles to order a new trial. At issue in this case is whether the verdict awarding John Paganini noneconomic damages for the loss of vision in and death of his eyeball as the result of Dr. Louis' failure to timely recognize the infection and refer him out to a retinal specialist somehow represents a "manifest miscarriage of justice."

4. Appellants maintain R.C. 2323.43(A)(3) is constitutional and the verdict should be reduced. Appellee believes it is unconstitutional as applied to him. The Trial Court agreed. At issue in this case is whether the Trial Court erred in applying long-standing Ohio Supreme Court precedent, i.e. *Morris v. Savoy*, 61 Ohio St.3d 684, in finding that R.C. 2323.43(A)(3) is unconstitutional as applied to John Paganini because it violates his due course of law rights under Ohio Constitution Article I, Section 16.

III. Statement of the Case

In terms of the procedural background, Appellee concurs in Appellants' recitation. There may, however, be some benefit to clarifying the appeals by number or name for purposes of later discussion: CV-24-113867 is the appeal of the Trial Court's decision granting Appellee's *Motion To Include In Any Judgment The Full Amount Awarded For Non-Economic Damages*, while CV-24-114019 is the appeal of the Trial Court's denial of Appellant's motion seeking a judgment notwithstanding the verdict or, alternatively, a new trial. For purposes of this Brief of Appellee, they will be referred to as the "Due Process Appeal" and the "JNOV Appeal."

IV. Statement of the Facts

A. The Due Process Appeal

The facts relevant to the Due Process Appeal are fairly limited: John Paganini filed suit against his ophthalmologist, Gregory Louis, M.D. and his practice, claiming he failed to properly diagnose an eye infection (endopthalmitis), leading to a loss of vision and, ultimately, the death and inevitable removal of Mr. Paganini's left eye. (Complaint, T.d. 1). Discovery commenced and the pushback and evasion was palpable, leading to a Show Cause Hearing and sanctions against the defense. (Judgment Entry, Opinion and Order, T.d. 79). In its Opinion and Order, the Trial Court referred to Defendants' discovery objections as "mostly baseless" and the discovery answers as tending to be "obfuscatory ad unhelpful." Id. Referencing the "delays and obfuscation," the Trial Court noted the discovery shortcomings had the most impact on Mr. Paganini's ability to investigate and proceed against Dr. Tamar Shafran, Dr. Louis' colleague who, it was ultimately discovered, spoke to Mr. Paganini following his call to the practice's answering service in the early morning hours of December 10, 2021. Id. Summarizing its findings, the Trial Court declared "the Defendants

did not participate in discovery in a forthright and timely fashion. Their conduct included violations of both the letter and spirit of the civil rules." Id. To combat Defendants' misconduct, the Trial Court authored an explanatory instruction intended to explain Dr. Shafran's absence and prohibited any "empty chair" defense. Id.

All the while, this matter marched to trial. The Judgment Entry, Opinion and Order regarding the Show Cause Hearing was entered on January 8, 2024, just sixteen (16) days before the scheduled trial date. 92 year-old John Paganini had no real choice but to proceed with trial, which he did. From there, the Opinion and Order entered by the Trial Court that is at issue here sums up the relevant facts:

> Plaintiff John Paganini prevailed on a medical negligence claim tried to a jury. The jury found that the Defendants, Dr. Gregory Louis, M.D. and Cataract Eye Center of Cleveland, Inc. were liable for negligently failing to diagnose and treat a progressive eye infection in Paganini's left eye following cataract surgery. Because of the failure to timely diagnose this, Paganini lost vision in his left eye. Paganini only sought noneconomic damages for the loss of sight in his left eye. The jury's verdict in favor of Paganini was for $1,487,500 in past and future noneconomic damages. The jury also found that Paganini's injury constituted a loss of a "bodily organ system" and a "substantial physical deformity."

(Opinion and Order, T.d. 152).

B. The JNOV Appeal

Stymied by the Trial Court's determination that Ohio Revised Code 2323.43(A)(3) violated John Paganini's right to due process, Defendants moved to their last option and filed their *Motion For Judgment Nothwithstanding The Verdict Or, In The Alternative, New Trial* just eight (8) days later. (Motion, T.d. 158). That motion, too, was denied (on May 28, 2024). (Order, T.d. 172). The decision was then appealed, resulting in the JNOV Appeal.

Unlike the Due Process Appeal, the JNOV Appeal requires a more direct reflection on the testimony and evidence contained within the Transcript of Proceedings. Rather than set forth and entire recitation of factual references here, it makes more sense to integrate certain of the more particularized references directly into the response to Defendants-Appellants' First Assignment of Error. However, given that the most basic recitation of settled law is "Objection to inconsistent answers by a jury to interrogatories is waived unless the party raises the objection prior to the jury's discharge," the conduct of Defendants' counsel is squarely in the crosshairs and the best means of understanding that conduct is to review and digest the following portion of the proceedings:

THE COURT: You can give the verdict forms to my bailiff. Thank you.

Interrogatory Number 1: "Do you find by a preponderance of the evidence that Dr. Gregory Louis deviated from the standard of care in his care and treatment of John Paganini? Circle your answer."

It's "Yes."

Signed by six jurors.

Next: How did he deviate? "The breakdown of communication within 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."

Interrogatory Number 2: "If you found by a preponderance of the evidence that Dr. Gregory Louis deviated from the standard of care, do you find by a preponderance of the evidence that any such deviation proximately caused John Paganini's injuries? Circle your answer."

Six said "Yes."

Response on the next page: "The breakdown of communication within 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 a.m. call (no pain, no vision loss, seeing black spots) he may have been able to recognize the progression of signs/symptoms from the 6 a.m. call to the 10 a.m. appointment. (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 the vitreous hemorrhage postcataract surgery."

* * *

All of these have been signed by six jurors.

The general verdict form is for the plaintiff.

Counsel, do you wish to have the jury polled?

MS. SANTONI: No. I would just like to look at the forms at some point.

THE COURT: You may look at them right now, please.

MS. SANTONI: Thank you, Your Honor.

Thank you. Appreciate it.

THE COURT: Ladies and gentlemen, I want to thank you for your service in this matter. Somewhat of a lengthy trial, but we got through it, and I appreciate your hard work, dedication, and promptness.

I will address you separately back in the jury room.

THE BAILIFF: All rise for the jury.

(Transcript of Proceedings ("Trans."), 1047:12). (Emphasis added).

V. Law and Argument

A. Response to Assignment of Error No. 1

In the JNOV Appeal, Appellant alleges the jury's responses to the interrogatories are inconsistent and cannot be reconciled. Appellant also urges the Court to somehow utilize Civil Rule 59 to grant a new trial, offering a smorgasbord of subsections as possible vehicles. Appellee believes (1) any objection to the interrogatory responses was waived; (2) the responses are consistent or, at the very least, can be reconciled, particularly when utilizing the standards required of this Court when considering such issues; and, (3) Appellant has wholly failed to identify, let alone support, any meaningful challenge to the verdict arising under Civil Rule 59(A)(1), (6) or (7).

i. Appellants' counsel's failure to object to any irregularity or inconsistency in the jury's responses prior to discharge of the jury resulted in the waiver of that objection.

When the goal is locating longstanding law, like the kind that literally has not been dusted off or challenged in years, Ohio Jurisprudence is the go-to. Often, the cites are almost laughably old, dating back into the 1800s. Still, if its settled law, it is a good place to find a stepping off point. Ohio Jurisprudence has the following to say about waiver in this scenario:

> **Objection to inconsistent answers by a jury to interrogatories is waived unless the party raises the objection prior to the jury's discharge.** A party moreover waives an objection to an alleged inconsistency between a special interrogatory and a general verdict, or an inconsistency in jury interrogatories, if he or she does not raise the issue before the trial court dismisses or discharges the jury. Moreover, where the appellant does not object to the trial court's alleged misinterpretation of the jury's verdict at a time when the jury could have been polled as to the apparent inconsistency between the general verdict and the interrogatories, the appellant waives this issue for appeal. However, a plaintiff does not waive a claim of error in the alleged inconsistency of the jury's answers to interrogatories by failing to object before the jury is discharged, where discovery of the alleged inconsistency requires protracted examination and comparison of the actual interrogatory forms.

4 Ohio Jur. 3d Appellate Review § 170. (Emphasis added). As detailed below, that paragraph fairly, accurately and completely summarizes the law of the State of Ohio relative to the waiver issue before this Court.

Before going any further, it is important to consider the context of Appellants' counsel's conduct relative to the jury interrogatories. As spelled out in the Statement of Facts, Appellants' counsel did not object. We know that. But it is important to understand the context of that decision: **These are jury interrogatories proposed *by the defense* <u>for the singular purpose of testing the verdict</u>.** The answers were read into the record in open court, and neither upon that reading nor at any other time prior to discharge of the jury – not even upon a specific inquiry from the Court asking "Counsel, do you wish to have the jury polled?" – did the defense raise any protest. Instead, she simply said she would like to look at the forms "at some point." (Trans., 1048:6).

ii. There was no need for "protracted examination and comparison of the actual interrogatory forms" or "plain error," so the *O'Connell* exceptions to waiver do not apply.

Failure to object constitutes a waiver except in the presence of exceptional circumstances and even then only to prevent a manifest miscarriage of justice. Recognizing this particular argument – as wrong as it is – within hours of summarizing the entire case in closing statement did not require any particularly extensive contemplation. The responses were read aloud and, understanding that counsel had submitted them *for the very purpose of testing the verdict*, the alleged inconsistency raised now did not require extensive analysis of the forms. There were only two questions and two answers. Counsel may have had an "ah-hah moment" sometime after trial, but that is not the test.

The arguments in favor of the finality of verdicts far outweigh the considerations now raised by Appellant, most especially in the absence of plain error. Compare, for example, *O'Connell v. Chesapeake & Ohio Railroad Company*, 58 Ohio St.3d 226. In *O'Connell*, the court and counsel agreed a general verdict form would not be used. Instead, the court would render a verdict based on the jury's answers to six interrogatories. When the jury returned its responses to the interrogatories, the court read those responses into the record. Each time, however, the court read the response and then, when referring to it being signed by the requisite number of jurors, it would state the number of jurors signing the interrogatory *but not the names* of those jurors. That led to a situation where -- without subsequent review of the forms and a comparison of which jurors signed which interrogatories – it would not be immediately apparent that the same six, seven or eight jurors signed the necessary interrogatories.

As stated by the majority in *O'Connell*:

> Considering the atmosphere of a long, involved trial, and given that there was little chance of uncovering the inconsistencies without a protracted examination and comparison of the interrogatory forms themselves, appellant cannot be said to have waived her challenges to the jury's answers.

Id. at 229. It was that need for a "protracted examination and comparison of the interrogatory forms" that formed the underpinnings of the "no waiver" holding and *similar circumstances do not exist here*: There were two interrogatories – just two – and, at least according to the appellant's own arguments, one need only read the first of those two interrogatory responses to understand the error upon which they seek to skip past the waiver rule, return this matter to the trial court and start from scratch, all of which is contrary to the very purpose of the rule, i.e. to promote efficiency of trials by permitting reconciliation of inconsistencies without the need for a new presentation of the

evidence to a different trier of fact. *Haehnlein v. Henry* (1987), 41 Ohio App.3d 233, 234, 535 N.E.2d 343, 344.

In the clear absence of any need for any "protracted examination and comparison of the interrogatory forms," there is only one other situation in which this verdict can be reviewed and that situation – plain error – does not exist. The plain-error doctrine permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant. Id. citing *State v. Eiding* (1978), 57 Ohio App.2d 111. However, as cautioned by the *O'Connell* court, its predecessors and successors, "implementation of the plain-error doctrine is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. citing *State v. Long* (1978), 52 Ohio St.2d 91, para.3 of syllabus. It is, as stated by the Ohio Supreme Court, only invoked in "extremely rare situations" where the complained of error "would have a material adverse effect [sic] on the character and public confidence in judicial proceedings." Id. citing both *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223 and *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 209.

In *Avondet v. Blankenstein* (1997), 118 Ohio App.3d 357, the Eighth District considered an appeal based upon inconsistent interrogatory responses and its ruling was simple: In the absence of any need for "protracted examination and the comparison" or plain error, failure to object to the inconsistencies constituted waiver. In support of its decision, the Eighth District cited *Cooper v. Metal Sales Mfg. Corp.* (11th Dist. 1995), 104 Ohio App.3d 34, which, among other things, provided a solid explanation of why a timely objection is required, i.e. "If such an objection is timely made, then the trial judge has an opportunity to correct an inconsistency by '(1) return[ing] the jury for further

consideration of its answer; (2) enter[ing] judgment in accordance with the answer; or, (3) order[ing] a new trial.'" Id. at 42, citing *Haehnlein v. Henry* (1987), 41 Ohio App.3d 233, at syllabus.

The Eighth District also cited *Greynolds v. Kurman* (9th Dist. 1993), 91 Ohio App.3d 389, *Haehnlein v. Henry* (9th Dist. 1987), 41 Ohio App.3d 233 and *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (9th Dist. 1988), 42 Ohio App.3d 6, cases that together confirmed the well-settled nature of the "waiver rule." See e.g. *Greynolds*, supra, at 395, specifically referring to the "apparently well-settled case law in this area . . ." In *Haehnlein*, the Ninth District did a particularly good job of crystallizing the issue, stating:

> To allow a new trial after the objecting party failed to seek a proper remedy at the only possible time would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures . . . by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them.

See *Haehnlein*, supra, at 234.

Avondet remains good law, so does *O'Connell*, and together they cover the entire range of possibilities – from inconsistencies that are apparent on their face to those that require "protracted examination and comparison" or otherwise constitute "plain error." Here, we know (1) that Appellant never objected prior to discharge of the jury, therefore failing to qualify for relief under *Avondet*; and, (2) there was no need for "protracted examination and comparison" or "plain error" – those phrases do not even appear in the Brief of Appellant – failing to qualify for relief under *O'Connell*.

Ultimately, there is the simple fact that defense counsel, at the close of trial and with the jury still empaneled, having just heard the testimony and evidence over the course of four to five days and, most significantly, having presented just two interrogatories ***for the very purpose of testing the verdict*** should have taken the time to consider the interrogatory responses and raise an objection;

knowing what we know about the argument now, which is neither complex nor sophisticated, it is clear that argument – however incorrect – should have been evident to the defense right then and there. Nothing required a retreat to the office, stewing over the verdict, reviewing the transcript or even conferring with colleagues.

The argument submitted by the defense – as incorrect as it is – should have been raised prior to the jury's discharge, and the fact that it wasn't was due directly to defense counsel's nonchalant attitude regarding the very interrogatories crafted by the defense to test the verdict:

THE COURT: Counsel, do you wish to have the jury polled?

MS. SANTONI: No. I would just like to look at the forms at some point.

THE COURT: You may look at them right now, please.

MS. SANTONI: Thank you, Your Honor.

(Trans., 1050:4).

Interestingly, Justice Wright's dissent in *O'Connell* is instructive. Questioning the majority's use of the plain error doctrine and reference to the need for a "protracted examination," he made several comments that ought to give pause here. Regarding counsel's (un)timely review of the verdict forms, he wrote: "Given the significance of those forms, I would have thought that plaintiff's counsel would have been at least mildly curious about examining them." He reasoned that "after eight days of trial, what is a few more minutes, or even an hour?" Most significantly, though, he crystallized his criticism, stating:

> Failure to object constitutes a waiver. *The fact that it would have taken some alertness to catch the problem does not, in my mind, rise to the level of an "exceptional circumstance" warranting a finding of plain error.*

See *O'Connell*, supra, at 899. (Emphasis added). His opinion did not make the syllabus, but the reasoning is sound, nonetheless.

iii. Appellee cannot demonstrate the jury's responses are "absolutely irreconcilable" with or "necessarily repugnant" to the verdict under any reasonable view of the evidence.

Under Ohio law before this court can apply one of the options in Civ.R. 49(B), it would have to conclude that apparent inconsistencies exist between the interrogatory answers and the general verdict and the two are *irreconcilable*. See *Lynch v. Greenwald*, 9th Dist. Summit No. 26083, 2012-Ohio-2479, 2012 WL 2023145, ¶ 7, quoting *Capital Control, Inc. v. Sunrise Point, Ltd.*, 6th Dist. Erie Nos. E-03-046, 2004-Ohio-6309, 2004 WL 2691070, ¶ 34. However, "[a] court should attempt to reconcile the general verdict and interrogatory answer *whenever possible*." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 9th Dist. Summit No. 25632, 2017 WL 4287804, ¶ 9, (Emphasis added) citing *Otte v. Dayton Power & Light Co.*, 37 Ohio St.3d 33, 41 (1988). See *Chambers v. Admr., Ohio Bur. of Workers' Comp.*, 164 Ohio App.3d 397 (9th Dist.), quoting *Klever v. Reid Bros. Express, Inc.*, 151 Ohio St. 467, 474 (1949); *Ragone v. Sentry Ins. Co.,* 121 Ohio App.3d 362, 370, (8th Dist.1997); *Gregg v. The Kroger Co.*, 2d Dist. Champaign No. 90 CA 12, 1991 WL 64985, *4 (Apr. 19, 1991). This requires the trial court to examine the interrogatories and answers as a whole and to *entertain all reasonable hypotheses* that would reconcile the interrogatory answers and the general verdict. *Id.*, quoting *Wells v. Baltimore & Ohio RR. Co.*, 58 Ohio Laws Abs. 225, 227 (2d Dist.1949); *Larch v. Athens*, 4th Dist. Athens No. CA-954, 1978 WL 214288, *4 (Dec. 12, 1978). This includes construing the interrogatory answers in conjunction with the jury instructions. See *Becker v. BancOhio Natl. Bank*, 17 Ohio St.3d 158, 160-161, 478 N.E.2d 776 (1985). See *also First Natl. Bank of Omaha v.*

iBeam Solutions, LLC, 10th Dist. Franklin, 2016-Ohio-1182, 61 N.E.3d 740, ¶ 51, 54. In *Smith v. Pennsylvania RR. Co.*, 35 Ohio Law Abs. 257 (2d Dist.1941), which explained:

> General verdict should stand unless the special findings are necessarily repugnant to it; * * * All special interrogatories and answers must be considered before general verdict is supplanted, and any reasonable hypothesis indulged to reconcile answers with it; * * * Special findings of fact override the general verdict only when both cannot stand together, and when the special findings *can not by any hypothesis be reconciled* with the general verdict.

(Emphasis added). Only when the answers are both inconsistent with and "absolutely irreconcilable" with the general verdict under any reasonable view of the evidence can the interrogatories supersede the verdict. *Otte v. Dayton Power & Light Co.*, 37 Ohio St.3d 33, 41 (1988).

Here, when assessed under this deferential standard, the jury's responses to Interrogatory Nos. 1 and 2 are readily harmonized with the general verdict. Construed in the context of the trial evidence and the court's instructions on the dynamic standard of care, the interrogatories reflect the jury's finding that Dr. Louis breached his personal duty to ensure proper communication of critical information within his practice, leading to a negligent delay in specialist referral. This determination is fully supported by the expert testimony and is not "absolutely irreconcilable" with a verdict against Dr. Louis.

In its Opinion and Order denying Appellants' motion for a new trial, the Trial Court stated, in part:

> Paganini responds that while the jury's responses could have been articulated better, they can still be squared with the expert testimony and Dr. Louis's testimony of his actions during Paganini's treatment.
>
> The jury's responses were inarticulate and demonstrate the pitfalls of using passive voice. Nonetheless, what they were attempting to communicate is in line with the evidence at trial. Dr. Huang testified about the importance of obtaining detailed information to properly assess whether there was an emergent and rapidly progressing infection. This is consistent with the dynamic standard of care that the Court instructed the jury on. He did not testify that the only source of information that would be relevant in the care of Paganini was what was gained from direct examination. As Pagaini explains, "the jury reasonably concluded that had Dr. Louis gathered the key data points from the early-morning calls and properly contextualized them, he would have understood the urgency of the situation and referred Mr. Paganini without delay, possibly preventing catastrophic vision loss."
>
> Therefore, Defendants' motion for a judgment notwithstanding the verdict is denied.

(Opinion and Order, T.d. 172).

Gathering information is key to properly assessing whether there was an infection. A failure to gather the available information led to a lack of information. A lack of information leads to bad decision making and a breach of the standard of care. That not only summarizes the Jury's responses to the interrogatories, it directly tracks with the Trial Court's Opinion and Order and the testimony presented by Dr. Huang.

After discussing the concept of differential diagnosis, Dr. Huang concluded by stating:

> So when we kind of look at differential, we factor in all these factors. So we always want to take the most serious disease that's on the differential and rule it out, make sure that that's not the disease that basically we are kind of actually dealing with.

(Trans., 556). Building on that idea, he was asked the following:

Q. Can you give us your lesson on **how <u>meticulous history-taking</u>** and asking the right questions to patients, **what role that plays in meeting the standard of care as to ruling out and especially when there's an urgent danger**?

Id. at 556:23. (Emphasis added). He responded:

A. So all of us are basically patients. All of us obviously have our own doctors and obviously when we see our doctor, part of it is to be able to tell them what's going on with our body. And so as the physician, when we're interacting with the patient, it's critical, especially in basically a patient that has pain, where a patient has significant vision loss, in Mr. Paganini's situation, to really kind of thoroughly dig into what's going on, meaning, like, if you have a vision loss, you want to know, especially if you're talking about a patient that had surgery – the purpose of the surgery was to get the patient seeing better – and when you have a patient the next day come in with essentially a significant decrease in vision, really to kind of figure out what is going on, why the decreased vision is going on, and in terms of the symptoms, really try to figure out what is going on, why the decreased vision is going on, and in terms of the symptoms, really try to figure out, aside from being just floaters or hemorrhage, really to figure out how quickly they appeared, is there pain associated with it, and basically really, like, do additional testing that we can do in patients where there is, you know, basically no view of the retina in the situation. So we have ultrasounds or Mr. Paganini can be referred to a specialist that has ultrasounds to assess what's going on inside the eye as well.

So all of these things, <u>the initial history of digging into the presentation, the pain, kind of the initial symptoms</u> helps to basically decide whether additional tests should be done in the office or the patient should be referred.

Id. at 557:3. (Emphasis added).

When asked whether Dr. Louis met the standard of care in not even suspecting endopthalmitis as a possible urgent danger for Mr. Paganini on the morning of December 10th, Dr. Huang testified "He did not meet the standard of care." Id. at 597:25. More specifically, he was asked:

Q. Based upon your education, training and experience, where we have a man who presents the day after cataract surgery where he had good vision and then he has signs and symptoms that the jury has heard about in the records and described by him which

include pain, red eye, and vision loss, just taking those, in and of itself, how far below the standard of care is it for an ophthalmologist not to know that those are the red flags of possible urgent danger?

Id. at 599:17. His answer was: "It completely deviates from the standard of care. It's completely below the standard of care." Id. at 600:6.

Significant to the issue before this Court, the very next question directly incorporated the "digging into the presentation, the pain . . . the initial symptoms" testified to by Dr. Huang and the information that was available to Dr. Louis, much of which, *including the 6:38 a.m. phone call to his practice's answering service and Mr. Paganini's subsequent discussion with Dr. Louis' colleague Dr. Shafran,* he never sought out:

Q. Let's dig into the details of that in terms of what we know from the records and what was reported – and I would like the jury to understand from your expert testimony – we have heard testimony about spots as reported by Mr. Paganini, and then we have seen written in some of the records at the defendants' medical practice the word "floaters" being used, and I want to bring that up to show you.

So at 6:38 a.m. that morning, the answering service documented that Mr. Paganini told the person on the other end of the phone call: I am seeing black spots. And then at 8:50 – and I don't know what that writing is – 8:50 something in the morning on December 10th, the surgical center does their post-op call: How are you doing? I'm seeing a bunch of spots.

Then when he gets to the defendant medical practice and the staff of Corrective Eye Centers, the language changes and gets put into their Exhibit 28 on their daily schedule, and someone documents: Patient having major floats.

And then we have over here on Exhibit 12 the documentation from that morning that the patient is having a ton of floaters.

What is your expertise in helping us to understand, to someone who has proper training, who is educated about the signs and recognizing what is there to be seen, what is the significance of spots versus floaters when it comes to recognizing what the possible condition is?

Id. at 600:8. (Emphasis added). While the difference between floaters and spots may seem an insignificant point of inquiry or merely one of semantics to a layperson, Dr. Huang's response demonstrated that is not the case:

> A. Sure. So, you know, like, Mr. Paganini, so like we talked about before, the vitreous floaters and what we call the posterior vitreous detachment, that liquid gel liquifying inside the eye, that's what creates the symptoms of the floaters. So naturally that gel liquifies as we age. So if you look at anybody who is young, the gel is completely solid. You look at somebody who is Mr. Paganini's age, a 90-year-old gentleman, basically the gel is pretty much completely liquified, so he already has floaters as a baseline. So it's not something that he doesn't know that there is floaters. *And when you have basically now somebody with a dramatic change where somebody who knows at a baseline they have floaters and then suddenly now there are black spots that are popping up, that tells you something is clearly different.*
>
> *So the main thing is, in this kind of situation, where you have these black spots, these black spots are most likely basically, in this kind of scenario, you have to think that it could be something that's a drastic change, especially with eye pain, basically, infection going on.*

Id. at 601:13. (Emphasis added). In short, and as testified to by Dr. Huang, that is where an "important history-taking and a meticulous history-taking comes into play . . ." Id. at 602:11, 602:25.

As this line of questioning continued -- counsel specifically incorporated information available to Dr. Louis that was obtained prior to his actual visit with and examination of Mr. Paganini:

> Q. Can you explain progression of *when a patient reports at 6:30 a.m. in the morning black spots and then black spots at 8 in the morning, 8:50 something*, and then by the time that they come in, they are having a ton of floats, instead of a bunch of spots, now it's a ton, how does the progression of this – is this what you taught us about the bacterial explosion that happens?
>
> A. Right. And it's like you can imagine. ***If there is a progression, it certainly is more concerning for something that's much more serious*** and especially when we're talking about the eye in this kind of situation where the patient is losing vision, and as we kind of talked about, the bacterial multiplication inside the eye is rapid and so when things are progressing, it is much more concerning in this kind of scenario.

Id. at 604:15. (Emphasis added). Again, the thrust of Dr. Huang's testimony is that you have to understand the progression of symptoms. More to the point, when asked what the standard of care requires where a patient presents with just three things: pain, redness, and vision loss that has gone from black spots, a bunch to a ton by the time that patient gets to the office, Dr. Huang testified the standard of care requires that patient to be referred out. Id. at 606:11.

That goes directly to the point – in order to understand the progression of the vision loss, one needs know *how it was described over the course of the morning*. Dr. Louis did not, because he did not seize upon the information available to him. He knew early intervention impacts prognosis and visual outcome. Id. at 380:7. He knew to ask about pain and any changes. Id. at 383:1. He knew endopthalmitis is an eye emergency, that it needs to be treated for patient safety, and that even if it's just suspected, immediate and aggressive treatment is required to preserve vision because it is that dangerous. Id. at 379:1. He knew taking a good history was important. Id. at 382:11. He knew "You got to look at the whole picture, correct." Id. at 396:8. Yet, somehow, he relied on a technician whose last name he did not know to "ask [Mr. Paganini] what's going on that day." Id. at 393:15; 408:1. And he did all this without any knowledge of what Mr. Paganini told the answering service in the 6 o'clock hour that morning. Id. at 411:20. And he did so without so much as a little curiosity over what was said to or understood by Dr. Shafran when she spoke to Mr. Paganini following his call to the answering service.[1] He didn't even know she was involved. Id. at 410:16.

[1] Even through the course of this entire litigation, Dr. Louis did not inquire of Dr. Shafran regarding the information reported to her by Mr. Paganini, what may have been on her differential, who she talked to, what actions she took nothing. At trial he testified he had not spoken to her about any of that. Id. at 413:25.

Fortunately, Dr. Louis does not deny that he is the one responsible for obtaining, reviewing and interpreting all the available information. When questioned regarding his failure to disclose his technician's involvement in Mr. Paganini's care, he testified:

> I considered Tammi basically part of me, and part of my team. So I was interpreting that question as me having firsthand knowledge of Mr. Paganini's care because it was between me and Mr. Paganini coming up with the diagnosis.

Id. at 798:20. Notably, he said the same thing when defending his decision to withhold any mention of Dr. Shafran's involvement, stating, in part, "so this comes down to between me and Mr. Paganini as far as my decision on December 10th." Id. at 414:18.

When construed in this context, the jury's interrogatory responses are properly reconciled with Dr. Huang's testimony and the verdict. The reference to a communication breakdown "to" Dr. Louis fairly encompasses his own failure, as the treating doctor, to procure complete information on Mr. Paganini's course. As the physician in charge, Dr. Louis bore ultimate responsibility for ensuring effective transmission of key clinical data within the Cataract Eye Center. The interrogatories confirm the jury's determination that Dr. Louis's personal lapses in this regard - occurring within the scope of his role at the practice - delayed proper care. This is reinforced by the jury's finding that the communication breakdown, coupled with the vitreous hemorrhage and rarity of that condition after cataract surgery, "may have aided" in a December 10, 2021 referral. (Int. No. 2). The interrogatories thus reflect the jury's conclusion, per Dr. Huang, that promptly referring Mr. Paganini considering the high-risk situation was critical, and that Dr. Louis's negligent inaction caused a delay. While perhaps inarticulate, the responses are substantively consistent with the expert opinions and general verdict when fairly construed.

Here, as detailed above, ample record evidence exists to support a reasonable interpretation of the interrogatory responses that is consistent with Dr. Huang's opinions, the jury instructions, and the general verdict. The jury's answers can be readily understood as a finding that Dr. Louis's personal failure -- as a leader at the Cataract Eye Center -- to facilitate the flow of critical information within his practice "to" him fell below the applicable standard of care and negligently delayed Mr. Paganini's referral to a specialist.

iv. Appellants are no more entitled to a new trial than they are to a JNOV.

In full disclosure, this section of the JNOV Appeal seems like a throw-in request for a consolation prize. Appellants are no more entitled to a new trial than they are to a JNOV and the request must be denied. The trial court properly exercised its discretion in denying a new trial and Appellant has failed to demonstrate any error of law or abuse of discretion that would warrant reversal.

Before addressing Appellant's specific arguments, it is crucial to clarify the applicable standards of review. The Eighth District has established clear guidelines for reviewing Civ. R. 59 motions in *Riedel v. Akron General Health System*, 2018-Ohio-840, 97 N.E.3d 508 (8th Dist.). Motions for a new trial under Civ. R. 59(A)(1) and (6) are reviewed for an abuse of discretion. Id. at para.12. An abuse of discretion implies that the Trial Court's attitude was unreasonable, arbitrary, or unconscionable. Id., citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Civ. R. 59(A)(7) motions involve a two-step process: (1) the underlying legal question is reviewed *de novo*, but (2) the ultimate decision to grant or deny a new trial remains within the trial court's discretion. *Riedel*, supra, at paras.59-60. This Court must determine whether the Trial Court abused

its discretion in denying the motion for a new trial, even when reviewing the underlying legal question *de novo*.

Appellant's Civ. R. 59(A)(1) argument merely recites the legal standard without identifying any specific irregularity in the proceedings that prevented a fair trial.[2] Under the abuse of discretion standard established in *Riedel*, Appellant must show that the Trial Court's denial of a new trial on this ground was unreasonable, arbitrary, or unconscionable. Appellant has failed to do so. Further, Appellant's claim that "the jury fell short of that goal here" is conclusory and unsupported by any specific evidence or argument. This vague assertion does not demonstrate an abuse of discretion by the trial court in denying a new trial under Civ. R. 59(A)(1).

Under the abuse of discretion standard applicable to Civ. R. 59(A)(6) motions, Appellant must demonstrate the trial court's denial of a new trial was unreasonable, arbitrary, or unconscionable. Appellant has failed to meet this burden. Contrary to Appellant's assertion, the jury's verdict was supported by competent, credible evidence. The Eighth District in *Riedel* held that "We will not overturn the trial court's decision where there is 'some competent credible evidence going to all the essential elements of the case.'" *Riedel* at para.29. Appellant has not shown that this standard was not met. Appellant's claim that the jury "crafted its own standard of care" mischaracterizes the jury's findings. Finally, Appellant has not shown that the jury's verdict resulted in a manifest miscarriage of justice.

Then there is the matter of Civil Rule 59(A)(7). While Appellant's brief header claims a new trial is warranted under Civ. R. 59(A)(7) because the judgment was contrary to law, Appellant

---

[2] If we are to assume the alleged irregularity is merely a repeat of the allegations regarding the jury interrogatories, the law does not contemplate one set of standards for relief in the form of a JNOV, but a somehow lesser standard for a new trial. Appellant is not entitled to relief in any form on the basis of the alleged irregularities in the jury's responses.

provides absolutely no support for this argument. Appellant merely recites the standard of review without offering any explanation of how the Trial Court's judgment was legally erroneous. Even if Appellant had identified a legal error, which they have not, Appellant has failed to demonstrate how the Trial Court abused its discretion in denying the motion for a new trial. Under *Riedel*, the ultimate decision remains within the trial court's discretion, and Appellant has not shown that the Trial Court's decision was unreasonable, arbitrary, or unconscionable.

B. Response to Assignment of Error No. 2

The Due Process Appeal was filed first, but specifically argued last. Its location in the Brief of Appellant and its focus on the Trial Court allegedly applying the wrong standard of review speak volumes: Appellant is (1) hoping to avoid the issue, altogether; or (2) structurally invalidate the opinion because it cannot substantively attack it. Fortunately, the Trial Court's Opinion and Order is extremely well-reasoned and cogent.

i. Paganini's challenge is an as-applied challenge.

As stated by the Trial Court:

> This is an as-applied challenge. No matter the logical implications that flow from a decision in his favor, it is indisputable that Paganini is challenging the application of the cap to a specific set of facts. He does not need the statute declared invalid in all circumstances to obtain relief. The Court does not need to impose a higher burden on him simply because the logic of declaring the cap as-applied to his verdict likely means it is unconstitutional in all circumstances.

(Opinion and Order, T.d. 152, p.3).

ii. R.C. 2323.43(A)(3) is unconstitutional as-applied to John Paganini.

As this Court is aware from the record before it, this issue was briefed at length. Fortunately, what followed that briefing was thoughtful consideration by the Trial Court and a resulting twenty

(20) page Opinion and Order. We could have been left with a one-line entry. Fortunately, that is not the case; there is full transparency on the law and the reasoning.

To the extent it is helpful to this Court, Appellee's post-trial briefing on the issue is set forth below. However, were this Court to defer entirely to the Trial Court's Opinion and Order, Appellee has no objection.

The current cap on noneconomic damages in medical cases was established in 2003. For the last twenty years, it avoided review in the twelve appellate districts and the Ohio Supreme Court. Not that it isn't talked about; it is talked about all the time. Plaintiffs believe it is unconstitutional, but have an overwhelming fear of what will happen on review in today's climate – nobody wants to be the one to "set bad law." Defendants maintain it is constitutional, but despite a significant number of trial court decisions declaring and explaining its unconstitutionality, no defendant has taken the issue up for review either. For both sides, there is some value in uncertainty – they can rattle sabers during negotiations with the sort of "yes it is, no it isn't, yes it is, no it isn't" argument one might hear in an elementary school lunchroom.

Enter 92 year-old John Paganini. As the Court knows, Mr. Paganini is the victim of medical negligence. A duly empaneled jury (selected and agreed upon by both sides while both had remaining peremptories) heard the testimony and evidence and concluded Mr. Paganini suffered a permanent and substantial physical deformity and the loss of a bodily organ system as a result of Dr.

Louis' medical negligence. After significant consideration as the finders of fact, that same jury awarded Mr. Paganini $1,487,500, all of it noneconomic.

Now, the defense wants this Court to cap Mr. Paganini's recovery at $500,000, stripping him of $987,500 – 66.4% of the jury's award. Graciously, the Trial Court hit pause for consideration of the constitutional and legal questions, ultimately ruling in favor of Mr. Paganini.

There is a reason all of this may feel like wandering into the unknown; despite all the talk of caps, situations like this simply don't happen very often. According to the *Ohio Medical Professional Liability Closed Claim Report* issued by the Ohio Department of Insurance there were 47,299 total medical malpractice claims closed during the period running from 2005 to 2019.[3] *Just 30* (yes, just 30) *of those claims resulted in verdicts that were subject to capping*. (See Ohio Medical Professional Liability Closed Claim Report attached to the original motion as Exhibit A, at p.11 addendums omitted due to volume, T.d. 126).

It would stand to reason the limited number of verdicts that could be capped would result in a corresponding dearth of constitutional and legal analysis. In one respect, that is true; there are no opinions from any of the twelve appellate districts or the Ohio Supreme Court addressing the situation now before the Court. However, there are a substantial number of trial court decisions declaring the application of R.C. §2323.43's catastrophic injury cap unconstitutional, each of which provides this Court with tremendous guidance:

1. *Lyon v. Riverside Methodist Hospital, et al.*, Franklin C.P. No. 16CV-12056 (May 31, 2023) at p.11 -- "[T]he Court finds R.C. §2323.43 unconstitutional under the due process and equal protection provisions of the Ohio Constitution as applied to non-economic damages caps in medical negligence claims."

[3] The report was compiled between 2005 and 2019. Why the reporting stopped is unknown. To Appellee's knowledge the 2005-2019 period is all that is available.

2. *Higgins v. Biyani*, Franklin C.P. No. 19CV1804 (July 8, 2022) at p.6 – No rational basis exists for treating medical claims with a cap under R.C. §2323 differently than other negligence claims with no cap or non-economic damages under R.C. §2315.18, which is an arbitrary distinction.

3. *Metts v. Nationwide Children's Hospital*, Franklin C.P. No. 14 CVA-03-2543 (Dec. 11, 2018), at p.16 – Finding a Due Process violation, the court wrote: "R.C. §2315.18 is drafted in compliance with the holdings of the Supreme Court in *Morris*. This means that R.C. §2323.43 is not, as R.C. §2323.43 still burdens those most severely injured by medical malpractice to benefit the general public. Accordingly, the Court finds R.C. §2323.43(A)(3) is irrational and arbitrary and violates the Due Process provision of the Ohio Constitution." *Id*. at p.10. Also comparing R.C. §2315.18 and §2323.43 and finding an Equal Protection violation, the court commented: "It is not rational for the law to limit the non-economic damages of one catastrophically injured party when the other can receive all the damages granted by the jury just because one plaintiff lost their leg in the ER while the other lost it in a car accident." *Id*. at p.13.

4. *Woessner v. The Toledo Hospital, et al.*, Lucas C.P. No. CIO201201614 (May 30, 2014), at p.7 – "While the General Assembly used many more words in the catastrophic-injury category of R.C. 2323.43 to limit damage recoveries to $500,000 per person . . . that limit operates the same way as the simple cap in the *Morris* statute; recoveries are securely capped for catastrophically injured patients. [Paragraph] Because both the *Morris* and the *Arbino* courts concluded that such caps violate the due process clause, the Court finds here that R.C. 2323.43 violates Ms. Woessner's due process rights in this case." See

5. *Wells v. Call*, Summit C.P. No. 2008-09-6782 (Nov. 23, 2010) – "The Court [having commented on *Morris*, *Savoy* and *Sheward*], therefore, finds that the cap set forth in R.C. §2323.43(A)(3) is unconstitutional on due process grounds." *Id*. at p.8. (Commentary added).

6. *Sexton v. Medical Oncology/Hematology Associates, Inc.*, Montgomery C.P. Nos. 06-785 and 06-5369 (Dec. 4, 2009) – "Based on the record, or lack of record [regarding the relationship between the delivery of quality health care services and noneconomic damage caps], before the Court, the statue is facially unconstitutional." *Id*. at p.4.

7. *Wargo v. Susan White Anesthesia, Inc.*, Cuyahoga C.P. No. CV-08-653779 (Oct. 30, 2009) (*rev'd on other grounds*, 2011-Ohio-6271) – Having compared R.C. §2323.43 to R.C. §2315.18, the court wrote: "The Court further finds that Revised Code §2323.43 is unconstitutional because it violates the Plaintiff's right to equal protection because it unfairly discriminates between medical malpractice victims and victims who suffer similar injuries as a result of tortious conduct not committed

in the malpractice arena." *Id*. at p.5.

8. *Mead v. Wilt*, Franklin C.P. No. 05CVA01-864, at p. 9 (Mar. 4, 2008) – "Pursuant to Morris, this Court must conclude that these damage caps pertaining to persons with the most severe injuries are irrational and arbitrary, and are therefore unconstitutional." Id. at pp.8-9.

John Paganini asks this Court to reach the same conclusion as the courts in *Lyon*, *Higgins*, *Metts*, *Woessner*, *Wells*, *Sexton*, *Wargo* and *Mead* i.e. that R.C. §2323.43 is unconstitutional on both equal protection and due process grounds. Here, the jury returned a verdict in favor of Plaintiff John Paganini in the amount of $1,487,500, all of which represented noneconomic damages. Crucial to this constitutional inquiry, the jury determined Mr. Paganini suffered a serious and catastrophic injury, answering the appropriate interrogatory that his injury constituted (both) a permanent and substantial physical deformity and the loss of a bodily organ system. Absent Court intervention on these constitutional questions Mr. Paganini stands to lose $987,500 to an application of R.C. §2323.43(A)(3) – over 66% of the damages he was determined to have suffered by a duly empaneled jury.

To be clear, this motion does not ask the Court to opine on the constitutionality of an entire statutory scheme; *the only portion of the statute to be addressed here is the portion capping noneconomic damages in cases where the jury determines the injured party has been catastrophically injured* by virtue of suffering a permanent and substantial physical deformity and/or the loss of a bodily organ system.

a. A brief background of noneconomic damage caps.

In *Haggins v. Biyani*, Franklin County Common Pleas Case No. 19CV1804 (July 8, 2022), the court provided a brief background of non-economic damage caps as applied to medical negligence cases in Ohio:

> The Ohio General Assembly and state courts have addressed non-economic damages caps in medical cases many times since 1975. Statutes have been passed by the Ohio General Assembly limiting non-economic damages in 1975, 1997, and most recently, 2003. See Ohio Medical Malpractice Act of 1975, Am. Sub. H.B. 682; Am. Sub. H.B. No. 350; and, S.B. 281. **The Ohio Supreme Court ruled the non-economic damages cap in the 1975 law was unconstitutional on due process grounds in 1991.** See *Morris v. Savoy*, 61 Ohio St.3d 684. After *Morris*, the Ohio General Assembly passed a new cap in 1997, but **it was again ruled unconstitutional on due process grounds by the Ohio Supreme Court in 1999.** See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062. After *Sheward*, the Ohio General Assembly again passed a revised cap in 2003, which is currently codified in R.C. 2323.43, but the Ohio Supreme Court has not yet ruled on the constitutionality of this version.
>
> Even so, in 2007, the Ohio Supreme Court ruled on a similar cap codified in R.C. 2315.18. In reviewing this statute under a due process analysis, the high court found the cap was **not "arbitrary or unreasonable" <u>because</u> *the statute provided an exception allowing "limitless noneconomic damages for those suffering catastrophic injuries.*"** *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 480. This exception alleviated the concerns posed in *Morris* and *Sheward*. *See id*. **The current version of R.C. 2323.43 has no such exception.**

Id. at p.3. (Emphasis added).

Morris and *Arbino* form the heart of the inquiry, so it is necessary to understand each to understand the issue before this Court:

<u>*Morris v. Savoy* (1991)</u>

In *Morris*, the Supreme Court considered a 1975 law setting a $200,000 cap on noneconomic damages in medical claims, employing the rational-relation test to determine due process. Under that test, a legislative enactment will be deemed valid on due process grounds if (1) it bears a real and substantial relationship to the public health, safety, morals or general welfare; and (2) is not unreasonable or arbitrary. *Morris, supra*, at pp.687-688. The *Morris* court concluded the General Assembly failed to make any findings that would establish the "real and substantial relation" between medical malpractice rates and awards over $200,000. Relative to the "unreasonable and arbitrary" second prong, the *Morris* court declared:

> [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 p.691. **Based upon the clear language of the statute, the court held the statute to be offensive to due process in that manner – <u>imposing the cost on the most severely injured</u>.** *Id*.

<u>*Arbino v. Johnson & Johnson* (2007)</u>

As referenced above, the General Assembly passed another medical malpractice cap following *Morris*. It was held unconstitutional on due process grounds in 1999 (*Sheward*). In 2003, it passed the cap at issue here. In 2005, it passed a cap applicable to torts generally. That legislation took the form of R.C. 2315.18. R.C. 2323.43 has never been considered by the Ohio Supreme Court, but R.C. 2315.18 has.

It may seem odd to cite a case upholding damage caps in support of an argument to declare another unconstitutional, but understanding why the statute at issue in *Arbino* -- R.C. 2315.18 – was held to be constitutional is key to understanding why the cap here is not.

In *Arbino*, the court employed the same rational-relation test for due process it used in *Morris*. This time, the court determined, the General Assembly filled in some of the evidentiary blanks. The court concluded the record drew a "clear connection between limiting uncertain and potentially tainted noneconomic-damages awards and the economic problems demonstrated in the evidence. *Arbino, supra*, at p.56. Moving to the second prong, the court distinguished R.C. 2315.18 from the statute at issue in *Morris*, stating: "R.C. 2315.18 *alleviates this [most-severely-injured] concern by allowing for limitless noneconomic damages* for those suffering catastrophic injuries." *Id*. at p.60.

b. Capping noneconomic damages pursuant to R.C. §2323.43(A)(3) would deprive John Paganini of the due process of law.

i. R.C. §2323.43(A)(3) bears no real or substantial relation to public health, safety or morals.

Time has borne out that R.C. §2323.43 is a solution in search of a problem. While enacting the statute at issue, the General Assembly also provided for ongoing study of its effects. R.C. §2323.43 was enacted in 2003 by Senate Bill 281. Sections 4 and 5 of the uncodified portion of the Act created the Ohio Medical Malpractice Commission. Together with the Superintendent of Insurance, the Commission was created to study the effects of the Act, investigate the issues surrounding medical malpractice, and report its findings. Quickly recognizing the reviews would not allow enough time or data to gather meaningful information, the General Assembly followed up by enacting R.C. §3929.302, which provides for the Malpractice Commission.

In its 2019 report, the Malpractice Commission wrote in its Conclusion:

> Claims that went to trial were more likely to close with no indemnity payment, while those that settled or went through alternative dispute resolution were more likely to close with paid indemnity.

(See Ohio Medical Professional Liability Closed Claim Report attached to the original motion as Exhibit A at p. 12, T.d. 126).

If the General Assembly sees fit to study the impact of tort reform, one would presume the intention is to apply what is learned. In that same 2019 report, the Malpractice Commission reported that just .32% of claims result in a plaintiff's verdict. *Id*. at p.4. Simply put, a plaintiff's election to go to trial makes payment less likely, not more likely. Trial is a means of testing the validity of the claims by putting the testimony and evidence in the crucible. Caps on catastrophic caps can only be applied following trial and they necessarily impact claims the jury found to be meritorious. As applied to Mr. Paganini, the noneconomic caps bear no relation to the public

health, safety or morals.

ii. R.C. §2323.43(A)(3) is irrational and arbitrary as applied.

The *Arbino* court was clear – the exception allowing uncapped noneconomic damages for those determined to be catastrophically injured is the reason R.C. §2315.18 survived constitutional scrutiny. R.C. §2315.18 and R.C. §2323.43 employ identical language in determining who qualifies as catastrophically injured, but R.C. §2323.43 still caps the resulting damages. Without the uncapped noneconomic damages – the very reason *Arbino* survived the due process analysis – R.C. §2323.43 is unconstitutional.

John Paganini presents to this Court with a presently existing state of facts that makes R.C. §2323.43(A)(3) unconstitutional and void when applied to those facts. *Harold v. Collier*, 107 Ohio St.3d 44, 50,2005-Ohio-5334, 836 N.E.2d 1165 (2005), citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 349, 55 N.E.2d 629, 28 Ohio Op. 295 (1944), syllabus. Nobody disputes John Paganini is catastrophically injured. The jury determined so 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. Moreover, it would echo the research establishing that capping noneconomic damages has an especially adverse effect on seniors, children, women and the poor – plaintiffs whose damages are disproportionately noneconomic due to lower claims for lost income. *See generally*, *Lucinda M. Finley*, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263 (2004).

iii. *Morris* magnified: The irrational and arbitrary nature of the nearly 21 year-old noneconomic cap is exacerbated by the lack of any upward adjustment; due to inflation, the net earning power of a capped award today is hundreds of thousands of dollars less than it was in 2003.

The most recent version of R.C. §2323.43 was passed as part of Senate Bill 281 and became

effective April 11, 2003. Over twenty years have passed, and the "hard cap" of $500,000 has not been revisited, revised or updated. The legislature and the judiciary received relief from rising costs in the form of pay raises[4], and rightfully so; the catastrophically injured victims of medical negligence have not received any such form of relief.

In the meantime, due to the effects of inflation, the net earning power of the full $500,000 hard cap has fallen precipitously since 2003. As detailed in the affidavit of economic expert Alex Constable, MBA, ASA, **the purchasing power of $500,000 *received in April 2003* is now $834,455.93**. (*See* Affidavit of Alex L. Constable, MBA, ASA, attached to the original Motion as Exhibit J, T.d. 126). As it applies to Mr. Paganini, the hard cap has, in practicality, reduced the earning power, i.e. the value, of his verdict by more than 40% compared to the same verdict received the year the cap was first imposed. This arbitrary result is precisely the sort of thing that renders a statute unconstitutional.

The earning power of money as the value of money is not a new concept. In *Maus v. New York, C. & St. L. R. Co.*, 165 Ohio St. 281, the Ohio Supreme Court considered a case arising out of Cuyahoga County. *Maus*, a railroad employee brought suit for injuries sustained in the course of his employment. In its charge to the jury regarding the measure of damages, the trial court in *Maus* stated:

In determining the amount you have a right to and should take into consideration

---

[4] Ohio Supreme Court Justices, for instance, earned an annual salary of $125,500 in 2003. See Ohio Judicial Conference, Judicial Compensation Committee, Judicial Compensation in Perspective, 2014 Report (July 15, 2014). In 2024, that annual salary is $187,805, an increase of 49.6% as compared to 2003. See www.supremecourtofohio.ohio.gov/judge/judicial-salary-chart. As for the legislature, historic data is not as easy to find; however, in 2018, the legislature passed Senate Bill 296, which amended R.C. 101.27 and increased non-leadership senate salaries from $51,674 in 2018 to $63,007 in 2019 (a 21.9% increase) and provided for itemized annual increases through 2028 which will ultimately result in an *additional* 28% growth. See S.B.296, 132nd General Assembly, and as enacted in R.C. 101.27(B).

> plaintiff's loss of earnings up to the present time caused by and resulting from the accident and injuries, and the loss of such future earnings which you find with reasonable certainty he will suffer, and I say to you that in considering the loss of future earnings, **the earning power of money** should be taken into account by you and the amount awarded for future earnings should be reduced to its value as a lump sum payable at present.

Id. at p.256. (Emphasis added). This statement ultimately became the first paragraph of the Supreme Court's syllabus, which reiterated the reference to the "earning power of money," stating, in part: " . . . the jury should take into consideration . . . the *earning power of money*; and the amount awarded for future earnings should be reduced to its *present value* as a lump sum payable at the time of the verdict." *Id*. at para.1 of the syllabus. (Emphasis added).[5]

While *Maus* dealt specifically with economic loss, verdicts for both economic and noneconomic loss are paid in the very same US dollars; there is no reason to deviate from the reasoning underlying the decision – it is the *earning power* of money that matters and that *earning power*, that *value*, changes over time. The legislature failed to account for changes in the earning power of money and now, with more than twenty years having passed, it is clear the value of $500,000 is not what it once was. The net result is an arbitrary and irrational impact on injured persons, with the most disproportionate impact being heaped on those who are most severely injured; it is, in essence and impact, *Morris* magnified.

iv. The Ohio Supreme Court's decision in *Brandt v. Pompa* (March 2022) is further evidence that R.C. §2323.43(A)(3) is unconstitutional.

In *Brandt v. Pompa*, 171 Ohio St.3d 693, 2022-Ohio-4525, the Ohio Supreme Court considered whether R.C. §2315.18 was unconstitutional as applied to child victims of intentional

[5] Consider, for a moment, the necessity of having economists testify at trial; they do not opine on liability or entitlement to any particular type of damages, they are present for the purpose of taking assumed facts and performing calculations to arrive at *present value*.

criminal conduct, such as sexual abuse, because it did not include an exception for plaintiffs who suffered permanent and severe psychological injuries. In determining the statute was unconstitutional, as applied, the Supreme Court reflected on a significant aspect of *Arbino*:

> * * * [I]n light of the unavailability of the exception to the compensatory-damages cap for the most severely and permanently psychologically injured, we cannot say, as we did in *Arbino*, that R.C. 2315.18 allows "for limitless noneconomic damages for those suffering catastrophic injuries," *Arbino* at ¶60, because those suffering catastrophic psychological injury are excluded from that class of injured plaintiffs. Thus, the rational basis of the statute found by this court in *Arbino* is eliminated as applied to Brandt and similarly situated plaintiffs. For this limited class of litigants – people like Brandt who were victimized at a very young age and who bring civil actions to recover damages from the persons who have been found guilty of those intentional criminal acts – the constitutional guarantee of due course of law is unjustly withheld.

Id. at ¶31. In directly analogous fashion, because R.C. §2323.43 does not allow for limitless non-economic damages for those suffering catastrophic injuries, the constitutional guaranty of due course of law is unjustly withheld for medical negligence plaintiffs like John Paganini.

The statute is irrational and arbitrary under the rational basis test and, thereby, unconstitutional under due process as applied to non-economic damage caps in medical claims. No rational basis exists for treating medical claims under R.C. §2323.43 differently than other negligence claims under R.C. §2315.18.

c. Capping noneconomic damages pursuant to R.C. 2323.43(A)(3) would deprive John Paganini of equal protection under the law.

The Ohio Constitution prohibits different treatment of similarly situated individuals when the different treatment is arbitrary. Ohio's Equal Protection Clause provides:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Ohio Const. art. I, §2. Equal protection claims arise when the government treats similarly situated individuals differently on an arbitrary basis. See *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-89, 595 N.E.2d 862.

A fundamental purpose of equal protection is simple, yet powerful: "Equal protection of the laws requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class." *Morris* v. *Savoy*,61 Ohio St.3d 684, 691, 576 N.E.2d 765 (1991). In this case, any application of R.C. §2323.43 to reduce the $1,487,500 noneconomic damages award violates Mr. Paganini's right to equal protection.

i. R.C. §2323.43 and R.C. §2315.18, both of which attempt to limit damages for noneconomic loss, unconstitutionally create two different classes of plaintiffs, subjecting them to disparate treatment.

The *Arbino* court determined that R.C. §2315.18 eliminated the due process violation called out by the *Morris* court by providing uncapped noneconomic damages for those satisfying the catastrophic injury exception. That very provision is now at the heart of this equal protection issue, because R.C. §2323.43 does not provide for those same uncapped noneconomic damages.

R.C. §2323.43 and its corollary in non-medical malpractice cases, R.C. 2315.18, combine to create two classes of plaintiffs. The statutes are similar and, therefore, appropriate for comparison on equal protection grounds. Medical malpractice is a form of tortious conduct, and both statutes deal with tortious conduct. Both statutes place limits on recovery of damages for "noneconomic loss." *Compare* R.C. §2323.43(A)(2) *with* R.C. §2315.18(B)(2). Likewise, both statutes carve out an exception for those plaintiffs who have sustained either a "permanent and substantial physical deformity" or "loss of a bodily organ system." *Compare* R.C. §2323.43(A)(3)(a) *with* R.C. §2315(B)(3)(a). *At that point, however, the statutes begin treating plaintiffs very differently.*

In tort cases not involving medical malpractice, the exceptions eliminate any cap on "noneconomic loss." *See* R.C. §2315.18(B)(3) ("There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss [if any of the exceptions in subparagraphs (a) or (b) apply]."). *In medical malpractice cases, however*, the cap is not eliminated if any of the exceptions apply; the cap simply increases, *but an artificial limit on noneconomic damages is still imposed*. *See* R.C. §2323.43(A)(3). The increased cap is still a cap and, ironically, simply means that an even smaller portion of the most severely injured persons will bear a disproportionate share of the burden intended to create a public benefit.

The effect of the two statutes is to create two classes of plaintiffs who seek recovery for serious harm: Those who seek recovery for damages caused by medical malpractice, whose claims are governed by R.C. §2323.43, and those who seek recovery for damages caused by other torts, whose claims are governed by R.C. §2315.18.

In the 2018 Entry and Decision in *Metts* declaring the unconstitutionality of R.C. §2323.43 on both equal protection and due process grounds, the court made use of the following illustration, which is incredibly helpful in understanding the constitutional problem with R.C. 2323.43. It is worth considering here:

> If a man's leg were cut off by a doctor in surgery and he sought non-economic damages for the catastrophic injury, the damages would be limited to $500,000 under R.C. §2323.43(A)(3). Yet, if the same man were to be run over and lose his leg by the same doctor on the way home from the hospital after a successful surgery, that man could recover all non-economic damages for his catastrophic injury because R.C. §2315.18 has no additional limit. This is not reasonable or logical. The exact same injury inflicted by the exact same person should yield the exact same damages, but under the current statutory scheme it does not.

Metts, supra, p.9.

In similar fashion, had Dr. Louis met the standard of care on December 10, 2021, saving Mr.

Paganini's vision and heading off the loss of his eye, but struck Mr. Paganini with his car that day, costing him that same eye, there would be no cap on the resulting non-economic damages. Same victim, same tortfeasor, same injury, but the damages would be treated differently; as stated in *Metts*, this is neither reasonable nor logical, but it is most certainly arbitrary.

As outlined in *Metts*:

> As R.C. §2323.43 is identical to R.C. §2315.18, but for the limit imposed on parties with catastrophic injuries, the Court finds the limit under R.C. §23223.43(A)(3) is not rational under the Equal Protection Clause. The Supreme Court has found catastrophic injuries offer more concrete evidence posing a lesser risk of being tainted by improper external considerations when evaluating the case for non-economic damages. This would not be any different if the injury were created by a doctor in his capacity as a medical provider or in the operation of a motor vehicle. It is not rational for the law to limit the non-economic damages of the catastrophically injured party when the other can receive all damages granted by the jury just because one plaintiff lost their leg in the ER while the other lost it in a car accident.

Metts, *supra*, at p.13; see also, *Lyon*, supra, adopting the court's analysis in *Metts*, at pp.7-9.

The noneconomic cap in R.C. §2323.43(A)(3) is not rational under the equal protection clause because it does not treat similarly situated plaintiffs the same.

VI. Conclusion

There is no basis upon which to strip John Paganini of his verdict. There is no basis upon which to overturn the verdict or send this matter back for a new trial. The jury interrogatories are consistent with the general verdict and, even in the event an inconsistency were found, the burden on Appellant is extremely high and the measures to be taken by this Court are substantial, and the answers can be reconciled with the general verdict. Appellants' JNOV Appeal (CA-24-114019) must be denied.

Similarly, the Due Process Appeal (CA-24-113867) must be denied. The underlying basis for constitutional relief is too clear and the reasoning – based entirely upon Ohio Supreme Court precedent – too strong for there to be any question.

Respectfully submitted,

/s/ Todd Petersen
SUSAN E. PETERSEN (0069741)
TODD PETERSEN (0066945)
PETERSEN & PETERSEN
10680 Mayfield Road
Chardon, OH 44024
Phone: (440) 279-4480
Fax: (440) 279-4486
sep@petersenlegal.com
tp@petersenlegal.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was filed via the Court's electronic filing system and therefore served this 27th day of August, 2024 to:

Bradley D. McPeek, Esq.
Kellie A. Kulka, Esq.
BRICKER GRAYDON, LLP
312 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
bmcpeek@brickergraydon.com
kkulka@brickergraydon.com

Attorneys for Defendants The Cataract Eye Center of Cleveland dba Corrective Eye Center, CEI Physicians, P.S.C., LLC and Gregory J. Louis, M.D.

Christine Santoni, Esq.
Matt Turkalji, Esq.
PEREZ MORRIS
1300 East Ninth Street, Suite 1600
Cleveland, Ohio 44114
csantoni@perez-morris.com
mturkalj@perez-morris.com

Respectfully Submitted,

/s/ Todd Petersen
SUSAN E. PETERSEN, ESQ. (0069741)
TODD E. PETERSEN, ESQ. (0066945)
Counsel for Plaintiff