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Court of Common Pleas

GENERAL PLEADING
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By: BRADLEY D. MCPEEK 0071137

Confirmation Nbr. 3092677

JOHN PAGANINI

CV 22 971901

vs.

Judge: TIMOTHY MCCORMICK

THE CATARACT EYE CENTER OF CLEVELAND, INC., ET AL.

Pages Filed: 31

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOHN PAGANINI	:	Case No. CV-22-971901
	:	
Plaintiff,	:	(Judge McCormick)
	:	
vs.	:	**DEFENDANTS' RESPONSE TO**
	:	**PLAINTIFF'S MOTION TO INCLUDE**
THE CATARACT EYE CENTER OF	:	**IN ANY JUDGMENT THE FULL**
CLEVELAND INC., *et al.*	:	**AMOUNT AWARDED FOR**
	:	**NONECONOMIC DAMAGES**
Defendants	:	

Now come the Defendants, the Cataract Eye Center of Cleveland, Inc., and Gregory J. Louis (referred to in the singular as "Dr. Louis"), by and through counsel, and for their response to the Plaintiff's *Motion To Include In Any Judgment The Full Amount Awarded For Noneconomic Damages* (referred to as "Mot." or "the Motion"), state as follows:

MEMORANDUM

I. Introduction And Statement Of Pertinent Facts.

A. Introduction.

1. Paganini Challenges Two Decades Of Medical Malpractice Reform.

More than 20 years ago, as part of sweeping medical malpractice reform, the General Assembly enacted R.C. 2323.43(A)(3). That statute established a two tier cap on noneconomic damages in malpractice cases. Generally, the statute provides for a $250,000 cap – except in instances where the injuries are severe or "catastrophic." In those circumstances, a higher $500,000 cap applies. The General Assembly saw this cap as one tool to combat escalating healthcare costs, rising malpractice premiums, and the flight of physicians from Ohio.

With his motion, Paganini asks the Court to unwind these reforms and invalidate that statute. According to Paganini, the statute is unconstitutional (on both due process and equal

protection grounds) because it treats medical malpractice claimants differently than general negligence claimants. (Mot. at 11, 15-16).

In support, Paganini cites R.C. 2315.18 – which is the governing statute in *general* negligence cases. Unlike R.C. 2323.44, it does not cap noneconomic damages for catastrophic injuries. According to Paganini, R.C. 2323.44's different treatment of plaintiffs in malpractice cases, (compared to routine negligence cases) is constitutionally forbidden.

Paganini characterizes his argument – as Ohio law's dirty little Constitutional secret. He asks this Court to believe that plaintiffs and physicians have been tip-toeing around R.C. 2323.43 for decades – with each side content to live with a constitutionally suspect statute and ambiguity. (*Id.* at 1)(contending that "for both sides, there is some value in uncertainty").

This characterization makes for a good story. But, that's it. For one, the medical malpractice plaintiffs' bar is not shy. If they truly thought that there was a legitimate basis to challenge R.C. 2823.44's $500,000 cap, they would have done so a generation ago.

Second, the General Assembly treats many classes of claimants differently, and the legislature is empowered to make these policy choices as long as there is a "rational basis" for doing so. As one example, injured workers are subject to Ohio's workers' compensation laws. They do not get to recover under general negligence principles. The General Assembly made this policy choice decades ago.

The same can be said for R.C. 2323.43 – the statute at issue here. When the General Assembly set the higher $500,000 noneconomic damages cap in medical malpractice cases, the legislature made a policy choice. *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21 (stating that "the legislative branch is the ultimate arbiter of public

policy"). The General Assembly viewed the $500,000 cap as one way (among others) to stabilize healthcare costs in Ohio. R.C. 2323.43, *Uncodified Law*.

2. The General Assembly Treats Medical Claims Differently.

Paganini characterizes his challenge as very limited – a narrow attack on just the medical claim damage cap. (*Id.* at 4) But Paganini knows the consequences of a successful challenge would be sweeping. If the judiciary invalidates R.C. 2323.43(A)(3), entire sections of the Revised Code would similarly fall – because (as a matter of public policy) the General Assembly consistently treats medical claims differently from other general tort claims.

As one example, medical claims have a distinct statute of limitations from other tort claims. The General Assembly has set a one-year statute of limitations for malpractice claims – while premises liability and other torts have a two-year limitations period. See, R.C. 2305.113(A); 2305.10. The legislative purpose behind the shorter limitations period was to lessen the number of medical malpractice claims and thereby reduce the costs to health care providers and malpractice insurance carriers in order to alleviate Ohio's [medical malpractice] crisis. *Grubb v. Columbus Comm. Hosp.* 117 Ohio App.3d 670, 691 N.E.2nd 333, 338 (10th 1997) (reviewing predecessor statute).

As another example, unlike other general tort claims, medical claims are subject to a four-year statute of repose. RC 2305.113(C). That statute bars a plaintiff from pursuing his claims more than four years from the date of the underlying alleged negligence. Further, the medical claims statute of repose is not subject to Ohio's savings statute. *Wilson v. Durrani*, 2020-Ohio-6827, 173 N.E.3d 448 (2020). Instead, the statute of repose presents an ultimate and unassailable bar on the timeframe when a plaintiff can file a medical claim.

Medical claims are also subject to unique pleading requirements under Civ. R. 10(D)(2). That rule requires a plaintiff in a medical claim to present expert testimony (via an affidavit of merit) at the very outset of the case – *before* the plaintiff may proceed in the litigation. There is no similar requirement for other general torts. *Adkins v. Women's Welsh Club of America*, 8th Dist. Cuyahoga No. 106859, 2019-Ohio-70, ¶9 (stating "that the purpose of [the affidavit of merit] is to deter the filing of frivolous medical malpractice claims and to place a heightened pleading requirement on parties bringing medical claims.")

With the statute at issue, R.C. 2323.43, medical claims also have their own dedicated damage cap. That statute is distinct from R.C. 2315.18 – the general tort damage cap statute. R.C. 2323.43 provides two primary caps, and they are dependent on the severity of the plaintiff's injuries.

The General Assembly has made these choices for policy reasons. The legislature's separate treatment of medical claims derives from its judgment that medical claims are unique. By choosing to create a separate statutory scheme for medical claims, the General Assembly balanced patient interests with other considerations – like retaining physicians in Ohio; maintaining access to affordable healthcare; and slowing the rise of malpractice insurance premiums. See, e.g., R.C. 2323.43, *Uncodified Law*. In making these policy changes, the legislature has properly exercised its authority. *Arbino*, ¶21.

3. Paganini's Challenge Triggers Rational Basis Review.

Paganini's challenge to R.C. 2323.43 triggers "rational basis review." The Court must decide if the legislature had some rational basis for enacting R.C. 2323.43 and treating medical claims differently. Conversely, the test is *not* whether the General Assembly had a rational basis to pass some other statute – like R.C. 2315.18 – the general tort statute that Paganini repeatedly

cites as his foil. *Mominee v. Scherbarth*, 28 Ohio St. 3d, 270, 274, 503 N.E.2d 717 (1986) (identifying the inquiry as whether the *statute at issue* bears a real and substantial relation to the public health, safety, morals or general welfare of the public).

Furthermore, the rational basis test recognizes that the legislative branch is the ultimate arbiter of public policy – not the judiciary. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948 ¶21. As the United States Supreme Court held decades ago, courts "[do] not sit as a super legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

Under these principles, rational basis review does not require that the legislature's approach be the only option or the option that this Court would have selected. Instead, rational basis review only requires that there be some rational basis supporting the legislative policy.

In this case, because the General Assembly expressly articulated its rationale, the Court can easily identify the rational basis for R.C. 2323.43. S.B. 281, which promulgated R.C. 2323.43, cited multiple *pressing* reasons for the statute: (1) the need to stabilize the medical malpractice insurance market; (2) the need to stop practitioners from leaving Ohio; (3) data that noneconomic damage caps in other states had stabilized medical malpractice premium rates; and (4) the conclusion that drawing a distinction among claimants strikes a reasonable balance between the interests of plaintiffs and defendants. S.B. 281, Section 3(A)-(B).

Courts must not reexamine these legislative findings. *Arbino*, ¶58. Instead, under rational basis review, Ohio courts must "grant substantial deference to the predictive judgment of the General Assembly." *Id.* (quoting *State v. Williams*, 88 Ohio St. 3d 513, 531 728 N.E.2d 342) (2000). "It is not the function of the courts to substitute their evaluation of legislative facts for that

of the legislature." *Id.* (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981).).

Under these principles, this Court must reject Paganini's challenge to R.C. 2323.43. The legislature had a rational basis for creating the $500,000 noneconomic damage cap when it enacted the statute.

B. Statement of Pertinent Facts.

Given the nature of Paganini's challenge, the many factors that led the General Assembly to enact R.C. 2323.43 are as much a part of the "Statement of Facts" as the medical care in this case. Accordingly, we will focus on those factors.

1. A Brief History of Noneconomic Damages.

a. Noneconomic Damages Are Purely Subjective.

"One cannot deny that noneconomic damages 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).

b. Historically, Noneconomic Damages Awards Were Typically Modest.

Historically, noneconomic damage awards were modest and noncontroversial. Decades ago, the availability of noneconomic damages and 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 of Noneconomic Compensatory Damages in the Nineteenth Century,* 4 J. Empirical Stud. 365, 369 (2007). Early awards in Ohio are consistent with this national experience.[1]

c. 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.[2] 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 Of 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).

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[1] For example (and not by any means an exhaustive list), *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*, 32 Ohio L. Abs. 109, 111, 1940 WL 2942 (2d Dist. 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). All adjustments for inflation in this brief are computed through the U.S. Bureau of Labor Statistics CPI Inflation Calculator, http://www.bls.gov./data/inflation_calculator.htm.

[2] "Nuclear verdicts," generally defined as awards of $10,000,000 or more, often include noneconomic damages that are vastly disproportionate to other damages in the case, are rising in frequency. *See* Shawn Rice, *Nuclear Verdicts Drive Need for Insurers Litigation Change,* Law 360, September 8, 2021 (reporting that between 2010 and 2018, the average size of verdicts exceeding $1,000,000 rose nearly 1,000% from $2,300,000 to $22,300,000 and that nuclear verdicts "encompass awards where the noneconomic damages are extremely disproportionate.")

Against this backdrop of escalating, unpredictable, and unlimited noneconomic damage awards, the General Assembly considered measures to curtail Ohio's growing health care crisis.

2. R.C. 2323.43 Is Enacted Amidst Ohio Medical Liability Crisis.

The General Assembly enacted S.B. 281 — tort reform measures applicable to medical claims — in 2003 in light of a health care crisis in Ohio. One of S.B. 281's primary provisions is the statute at issue here – R.C. 2323.43. That statute caps noneconomic damages for catastrophic injuries arising from medical claims. It reads, in pertinent part, as follows:

> (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.
>
> * * * * *

Hence, R.C. 2323.43 provides a two-tiered cap on noneconomic damages, with a higher cap available to those with the most severe injuries. R.C. 2323.43(A)(3).

In enacting R.C. 2323.43, the General Assembly made detailed findings and expressed its intent in the statute's "Uncodified Law."[3] For instance, the first three findings in the Uncodified Law identified rising healthcare costs; dramatic increases in malpractice verdicts; a vulnerable healthcare system; and unnecessary defensive medicine by frightened physicians:

> (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. * * *

Overall, the General Assembly concluded that medical malpractice litigation represented an increasing danger to the availability and quality of health care in Ohio. *Id.*, Section(A)(1). In support of its conclusion, the General Assembly found that plaintiff's awards in medical malpractice actions had recently and dramatically spiked – despite the number of claims remaining constant. *Id.*, Section 3(A)(2).

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. *Id.*, Section 3(A)(3)(b). In fact, at the time, the

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[3] Uncodified law is the law of Ohio, but it is not assigned a permanent section number in the Revised Code. *See Maynard v. Eaton Corp.*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶ 7.

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 and caused some health care professionals to leave the state:

> As insurers have left the market, physicians, hospitals, and other health care practitioners have had an increasingly difficult time finding affordable medical malpractice insurance. Some health care practitioners, including a large number of specialists, have been forced out of the practice of medicine altogether as a consequence. The Ohio State Medical Association reports that 15% of Ohio's physicians are considering or have already relocated their practices due to rising medical malpractice insurance costs.

Id., Section 3(A)(3)(c).

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 on catastrophically 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.*, Section 3(A)(4)(a). And the legislature found that malpractice premiums were reduced in those jurisdictions that had enacted meaningful limitations on noneconomic losses. *Id.*, Section 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 award adopting 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. In 2002, the American Medical Association identified Ohio as one of 12 medical liability "crisis states." See *AMA Analysis: A Dozen States In Medical Liability Crisis*, AMA News Release (June 17, 2002). Physicians in "crisis states" were facing increasing premiums, patients were losing access to health care, and physicians were struggling to stay in practice. *Id.* Liability insurance rates for the top five medical liability insurance providers increased an average of 30% - with some areas, including northeast Ohio, seeing even higher increases. *Id. at 3.*

S.B. 281 – and RC 2323.43 – arose from this crisis. Medical costs were out of control while doctors were leaving Ohio. As one tool to stem the tide, RC 2323.43 was enacted. (But now, Paganini asks this Court to return Ohio to "the bad old days.")

II. Argument.

A. Standard of Review.

With his constitutional challenge, Paganini faces a heavy burden. "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*, 112 Ohio St. 3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶17. This distinction between the two types of constitutional challenges is important because the standard of

proof is different. *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶20.

1. With This Facial Challenge, Paganini Must Prove A Constitutional Defect "Beyond A Reasonable Doubt".

"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 and Teachers v. State Bd. Of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶21 (citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59, syllabus ¶1 (1955)).

A facial challenge alleges that a "statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate governmental purpose." *Wymsylo*, ¶21 (citing *Jalin Invest., Inc. v. Moreland*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶11). "Facial challenges to the constitutionality of a statute are the most difficult to mount successfully, since the challenger must establish that no set of circumstances exist under which the act would be valid." *Id.* "If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances." *Id.* "When determining whether a law is facially invalid, a court must be careful not to exceed the statute's actual language and speculate about hypothetical or imaginary cases." *Id.*

2. With An "As Applied" Challenge, The Challenger Bears The Burden Of Presenting "Clear And Convincing Evidence."

"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 Department of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶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*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶38.

Finally, the line between facial and as-applied challenges is often blurry. According to federal authority, "the distinction between facial and as-applied challenges is not so well-defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm's.*, 558 U.S. 310, 331 (2010).

3. This Court's Role Is To Assess Legislative Power – "Not Legislative Wisdom."

Either way, Paganini faces a heavy burden. The Ohio Supreme Court has recognized that "[i]t it is difficult to prove that [a] statute is unconstitutional." *Arbino,* ¶ 25. Furthermore, all statutes have a strong presumption of constitutionality. *Id.*; *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 418-19, 1994-Ohio-38, 633 N.E.2d 504 (1994)

Finally, in any constitutional challenge, all courts must be mindful of the following principle: "The only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶9.

B. RC 2323.43 Is Constitutional On Due Process Grounds.

1. This Court Must Apply The Rational Basis Test – While Exercising Judicial Restraint.

Paganini first challenges RC 2323.43 on due process grounds. (Mot. at 7-11). Under 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 rational basis test is used, great deference is paid to the state. The statute passes rational basis review merely upon the showing that the differential treatment is rationally related to some legitimate state interest. *Conley v. Shearer*, 64 Ohio St.3d 284, 1992-Ohio-133, 595 N.E.2d 862, 867.

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).

Under the 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. *Mominee*, 28 Ohio St.3d. at 274, .

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

RC 2323.43's $500,000 noneconomic damage cap is rationally related to a legitimate state interest. As articulated by the General Assembly, the noneconomic damage caps were enacted to stabilize the cost of health care by limiting the amount of compensatory damages representing noneconomic loss awards, to ensure the continued availability of medical malpractice liability insurance in Ohio, and to ensure the continued availability of an adequate supply of general and specialty physicians practicing in Ohio. S.B. 281, Section 3(A)-(B).

In relevant part, the General Assembly stated as follows regarding the distinction it drew in permitting higher noneconomic damages for those most severely injured, in R.C. 2323.43's "Uncodified Law":

> (4)(a) The distinction among claimants with a permanent physical functional loss strikes a reasonable balance between potential plaintiffs and defendants in consideration of the intent of an award for noneconomic losses, while treating similar plaintiffs equally, acknowledging that such distinctions do not limit the award of actual economic damages.
>
> (b) The limit on compensatory damages representing noneconomic loss * * * [as specified in section 2323.43 of the Revised Code] is based on testimony asking the members of the General Assembly to recognize these distinctions and stating that the cap amounts are similar to caps on awards adopted by other states.

Id., Section 3(A)(4)(a) and (b).

In enacting R.C. 2323.43, the General Assembly—after considering differing policy concerns relative to the ongoing medical malpractice crisis—adopted a two-tier system with a higher ($500,000) noneconomic damage cap for the most severe injuries and a lower cap for less severe injuries. This legislative solution meets the rational basis test.

3. R.C. 2323.43 Is Not Unreasonable Or Arbitrary.

Furthermore, R.C. 2323.43's noneconomic damage cap is not unreasonable or arbitrary. The General Assembly has identified a valid state interest: The availability of affordable medical care from competent practitioners in Ohio. R.C. 2323.43 is one tool that the General Assembly enacted to achieve that interest.

Paganini's chief argument is that R.C. 2323.43 does not provide for unlimited economic damages in cases of catastrophic injury arising from medical malpractice – but R.C. 2315.18 does. (MOT at 8). The Ohio Supreme Court addressed a similar argument in *Oliver v. Cleveland Indians Baseball Co. Limited Partnership*, 123 Ohio St.3d 278, 915 NE2d 1205 (2009). That case involved a noneconomic damage cap of $250,000 for political subdivisions. Like Paganini here, the plaintiff

challenging the constitutionality of the underlying statute argued that it was arbitrary because the statute imposes "the cost of the intended benefit to the public…upon the most severely injured…." *Id.* ¶11.

In rejecting that argument, the Court noted that the statute at issue had different policy concerns. R.C. 2744.05(C) was intended to preserve the financial soundness of political subdivisions. Needless to say, that same concern was not present with R.C. 2315.18 – which governs general negligence claims between private litigants.

This same logic applies here. Just as *Oliver* was concerned with the financial soundness of political subdivisions, R.C. 2323.43 is directed at preserving access to affordable healthcare. The statute that Paganini repeatedly uses for his argument, R.C. 2315.18, does not have the same concerns.

In short, each damage cap statute must be viewed on its own merits. The reasons that motivated the General Assembly to impose noneconomic damage caps for medical claims and claims against political subdivisions do not exist in general negligence claims.

In short, there is nothing arbitrary or unreasonable about R.C. 2323.43. That statute was the Legislature's considered response to unchecked damage awards that were threatening healthcare in Ohio.

4. Paganini Fails To Apply The Rational Basis Test.

In his Motion, Paganini fails to apply the rational basis test. In comparing the two-tiered system of noneconomic damage recovery for medical claims found in R.C. 2323.43 to the two-tiered system for other tort cases found in R.C. 2315.18, Paganini has summarily concluded that the statute was "irrational and arbitrary" because there was no rational basis for treating medical negligence claims differently than other negligence claims. But this conclusion ignores R.C.

2343.43's well-documented history. The General Assembly not only gave careful thought to these damage caps, it specifically expressed its rationally based reasons for the damage caps in the Uncodified Law of R.C. 2323.43.

Tellingly, Paganini does not even mention the *Uncodified Law* or the General Assembly's reasons for the $500,000 noneconomic cap for medical claims. His primary argument is that one medical claim statute (R.C. 2323.43) has a $500,000 noneconomic cap while another general negligence statute (R.C. 2315.18) does not. But once again, this argument ignores that the rational basis test does not require the comparison of one legislative enactment to a different legislative enactment on another subject. It simply requires an analysis of whether a legislative enactment (R.C. 2323.43) is rational in its own right.

5. The General Assembly May Revisit RC 2323.43 To Assess The Cap.

On page 9 of his Motion, Paganini argues that time and inflation have rendered RC 2323.43 unconstitutional. But he cites no legal authority. Furthermore, this argument is just a guess. Whether in 2003 or 2024, $500,000 is a significant sum for a subjective award. The General Assembly may have already baked inflation into the cap. Paganini does not know.

Furthermore, the previously cited authorities on rational basis review mandate that this issue is solely for the General Assembly. The legislature is empowered to enact policy at the intersection of damage caps and inflation. Armed with the ability to conduct hearings, consult with experts, and invite public comment, the legislature alone can assess RC 2323.43(A)(3) in the current climate of medical malpractice litigation – to determine the effects of a cap increase.

Chaos is the alternative. Under Paganini's argument, a patchwork of Ohio courts – each with its own opinion on noneconomic damages – would usurp the legislature and come to their own (different) conclusions concerning the proper price tag for a noneconomic damage cap in

2024. And while courts do many things well, enacting medical malpractice policy on such a subjective issue is not one of them.

Paganini's argument also ignores that inflation is inherently factored into objective *economic* damages. Under RC 2323.44, there is no cap on the recovery of those measurable amounts. Instead, the $500,000 cap at issue applies only to subjective noneconomic amounts.

In this way, the General Assembly's scheme for medical malpractice damages is not arbitrary. To the contrary, the legislature drew a line. There is no cap on economic recovery – which necessarily means inflation would be reflected in wages, medical bills, and other objective economic damages. But to strike a balance between affordable healthcare for all Ohioans and patient rights, the General Assembly capped noneconomic damages for serious injuries at $500,000. And if that number needs to be changed, that decision belongs to the legislature.

Finally, in 2015, a California court rejected Paganini's inflation argument in the context of a $250,000 noneconomic damages cap that was enacted in 1975. *Chan v. Curran*, 237 Cal.App.4th 601(2015). In that case, the plaintiff's constitutional argument was based on "the roughly fourfold deviation of the dollar" since 1975. *Id.* at 609 ("Thus, adjusted for inflation, the $250,000 noneconomic damages cap enacted in 1975 was worth $1.06 million in 2012 dollars.")

Declining to invalidate the statute, the court was concerned with the judiciary drawing arbitrary lines. *Id.* at 613-14 ("Too many issues of line drawing make such judicial decisions hazardous. Precisely at what point does a court say that what once made sense no longer has any rational basis?") The court also observed that it should be up to the legislature to address "changed circumstances" – which would include inflation. *Id.* at 614.

C. RC 2323.43 Is Constitutional On Equal Protection Grounds.

1. The Court Must Also Apply Rational Basis Review To Paganini's Equal Protection Challenge.

With respect to Paganini's equal protection challenge, Ohio courts also apply a rational basis analysis – unless the state action impinges on the fundamental interest or a suspect class. *Conley v. Shearer*, 64 Ohio St.3d 284, 289, 1992-Ohio-133, 595 N.E.2d 862 (1992).

Rational basis review under equal protection principles "is not license for courts to judge the wisdom, fairness, or logic of legislative choices." *Federal Comm. Comm'n. v. Beach Communications, Inc.*, 508 U.S. 307, 313, (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.*

Challenges to a statute must therefore overcome the strong presumption of constitutionality enjoyed by each statute and prove "beyond a reasonable doubt" that a challenged statute is unconstitutional. *Beatty v. Akron City Hospital*, 67 Ohio St.2d 483, 593, 424 N.E.2d 586 (1981) (citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St.2d at 142.) Under the rational basis test, courts will *not* overturn a statute "unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *State ex rel. Keefe v. Eyrich*, 22 Ohio St.3d 164, 165, 489 N.E.2d 259 (1986), (quoting *Vance v. Bradley*, 440 U.S. 93, 97, (1979).)

When undertaking this inquiry, the asserted basis need not be substantiated with scientific precision. Indeed, the United States Supreme Court has opined that a legislature does not even have to articulate its reasons for enacting a particular statute and that "legislative choice" on a matter may even be rooted in "rational *speculation* unsupported by evidence:"

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenge distinction actually motivated the legislature. … In other words, a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence of empirical data. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible preserve the legislative branch its rightful independence and its ability to function.

Beach Communications, 508 U.S. at 315 (citations and internal quotations omitted).

2. Under Equal Protection Analysis, RC 2323.43 Passes Rational Basis Review.

The General Assembly painstakingly articulated its basis for RC 2323.43's damage caps – even though it did not have to. *Id.* Far from being speculative, the legislative history (as documented in R.C. 2323.43's Uncodified Law) reveals the rational and legitimate grounds upon which the General Assembly enacted R.C. 2323.43. As set forth more fully above, in enacting the noneconomic damage caps for medical claims, the General Assembly addressed the substantial state interests in creating a level of certainty in the award of damages that are intangible, inherently subjective, and not readily ascertainable. In support, the General Assembly had before it testimony and studies suggesting the many ways that noneconomic damages bore a real, direct and substantial negative effect on the ability of hospitals and physicians to obtain medical malpractice insurance in Ohio, the affordability of such coverage, and the loss of physicians practicing in the state.

The General Assembly decided, as a matter of policy, that limits to noneconomic damages were a desirable means of promoting health care stability in Ohio. The General Assembly sought to balance the interests of injured tort claimants, providing a tiered system with a higher, but still limited cap for certain types of severe permanent injury.

Notably, the General Assembly did not limit awards of *economic* damages for any plaintiff pursuing a medical claim. The lack of an economic damage cap allows all plaintiffs to receive full recovery for past and future medical expenses, past and future care, past and future lost wages, and

other (objective) economic losses. Given the inherent inability to place an *objective* dollar value on noneconomic damages, the General Assembly reasonably and rationally placed limits on those subjective damages. The economic wellbeing of Ohio's healthcare system is most assuredly a legitimate state interest, and the public policy choice to enact limits on noneconomic damages should not be second-guessed.

3. *Metts* Is Inapplicable.

Tellingly, Paganini ignores the General Assembly's rationale. Instead, Paganini cites the Franklin County Court of Common Pleas in *Metts v. Nationwide Children's Hospital*, Franklin C.P. No. 14 CVA-03-2543. (Mot. at 14). In that 2014 decision, the court held that RC 2323.44 violated equal protection because of its similarity to RC 2315.18 – the general tort statute. *Id.* at 12. ("As both statutes address torts and have catastrophic injury distinctions, the Court finds these statutes to be similar.") In particular, the *Metts* court took exception to RC 2323.43's $500,000 cap (for catastrophic injuries in medical claims) when RC 2315.18 had no such catastrophic injury cap. According to *Metts*, "[i]t is not rational to limit the noneconomic damages of one 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." *Id.* at 13.

But in reaching this conclusion, the *Metts* court failed to apply rational review analysis. The court should have focused exclusively on RC 2323.43, the statute at issue, and assessed whether the General Assembly had a rational basis for capping noneconomic damages at $500,000 in catastrophic medical claims. If the court had looked at RC 2323.43's history the General Assembly's rational basis would have been approved.

Instead, the *Metts* court chose to equate RC 2323.44 and 2315.18, but these statutes are apples and oranges. While the statutes have similar wording, they are directed as different types

of claims and (more importantly) different state interests. Skyrocketing medical costs, fleeing doctors, and unaffordable medical insurance premiums drove R.C. 2323.44's $500,000 noneconomic cap for catastrophic medical claims. The General Assembly did not have to address those same concerns in the general tort statute – which governs slip-and-falls; automobile accidents; and other garden variety torts. No one was worried that obstetric care in Ohio would evaporate because a runaway jury awarded $750,000 of noneconomic damages in a slip and fall.

The *Metts* Court also ignored Ohio's long history of treating medical claims differently than other torts. As set forth above, the General Assembly has attempted to reduce the number of malpractice claims through a one-year statute of limitations and a four-year statute of repose. There is also an affidavit of merit requirement. That hurdle does not exist in general tort cases. These provisions are additional evidence that the General Assembly views medical claims very differently. The *Metts* court erred by equating medical claims with other general torts.

As for the *Metts* court's comparison between the man who loses his leg in surgery versus the same man who loses leg after an automobile accident, *Metts* concluded that is was irrational for the hypothetical man to be able to recover unlimited noneconomic damages in the automobile accident while having his noneconomic damages capped in the hypothetical medical 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 compensation 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 the City of Cleveland, his noneconomic damages would be capped at $250,000 under RC 2744.05(C) – which is the noneconomic damage cap applicable to political subdivisions. This statutory cap on noneconomic damages in claims against political subdivisions is based on the public policy of safeguarding taxpayer resources. Furthermore, that cap has been upheld as constitutional by the Ohio Supreme Court. *Oliver v. Cleveland Indians Baseball Co. Limited Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205

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. RC 2315.18 – which has no connection to medical claims – does not factor into the analysis.

Paganini's reliance on *Metts* is misplaced for another reason. In that case, the Common Pleas Court found that there was no other state (like Ohio) where a statute allowed different noneconomic damages, depending on the type of claim. (Decision at 9.) This conclusion was incorrect. Like Ohio, other states have different noneconomic damages caps for medical claims and other personal injury tort cases.

For example, in a case involving a constitutional challenge to noneconomic damage caps, the Colorado Supreme Court noted "most laws differentiate in some fashion between classes of persons…[but] legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Scholz v. Metropolitan Pathologists*, 851 P.2d 901, 906 (Colo. 1993).

The California Supreme Court upheld its $250,000 damage cap for medical claims as far back as 1985. *Fein v. Permanente Medical Group*, 695 P.2d 665, 679, 211 Cal. Rptr. 368 (Ca.

1985). The court noted that the legislature has broad control over the measure as well as the timing of damages and further noted that the legislature can expand or limit damages as long as those actions are rationally related to a legitimate state interest. *Id.* at 383.

Similarly, the Supreme Court of Louisiana upheld the constitutionality of a $500,000 cap on noneconomic damages and reduced the jury's damage award from $6,000,000 to $500,000 pursuant to the cap. *Oliver v. Magnolia Clinic*, 85 So.3d 39 (La. 2012). *Oliver* recognized that the $500,000 cap created a class of persons who were fully compensated as well as a class of persons who were not fully compensated because of the severity of their injuries. *Oliver* explained that the objective defined by the legislature in enacting the medical malpractice cap on damages was to limit damages, thereby lower malpractice insurance costs to help assure accessible and affordable health care for the public. This produced rational and clearly identifiable benefits for malpractice plaintiffs: (1) a greater likelihood that the offending physician or other health care provider has malpractice insurance; (2) a greater assurance of collection from a solvent fund; and (3) payment of all medical care and related benefits. *Id.* at 45, citing *Butler v. Flint Goodrich Hospital of Dillard University*, 607 S.2d 517, 521 (La. 1992)

Oliver noted that this "quid pro quo," describing the balance of interests between noneconomic damage caps and the resulting benefits, had been true when the statute was enacted in 1975, when the *Butler* case was decided in 1992, and remained constitutionally sound in 2012 when *Oliver* was decided.

The same can be said of R.C. 2323.43. The General Assembly articulated very similar reasons for enacting the medical malpractice damage caps. The unfortunate reality is that insurance and litigation costs continue to make it difficult for hospitals and physicians to obtain the affordable insurance necessary to provide care to patients, particularly in underserved areas.

The "quid pro quo" for ensuring access to care is that noneconomic damages must be balanced against the availability and affordability of health care. A single nuclear verdict can bankrupt a hospital or drive the only obstetrician in a rural county to retire or relocate to another state. Reasonable and rational caps on noneconomic damages, with full recovery of the economic losses proven to the jury, strikes the proper balance of the interests of all parties.

The legislature, as the final arbiter of public policy, must be permitted to make difficult policy choices. This Court is not to sit as a super legislature and second guess the policy choices made by the General Assembly. *See Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed.2d. 510 (1965); *Arbino,* ¶ 58. ("In an equal protection context . . . 'we are to grant substantial deference to the predictive judgment of the General Assembly' under a rational basis review."). In enacting the noneconomic damage limits in R.C. 2323.43, the General Assembly struck a balance in an effort to reasonably compensate persons who were injured as a result of medical negligence, including those most severely injured, while trying to ensure that all Ohioans had access to basic and specialized health care.

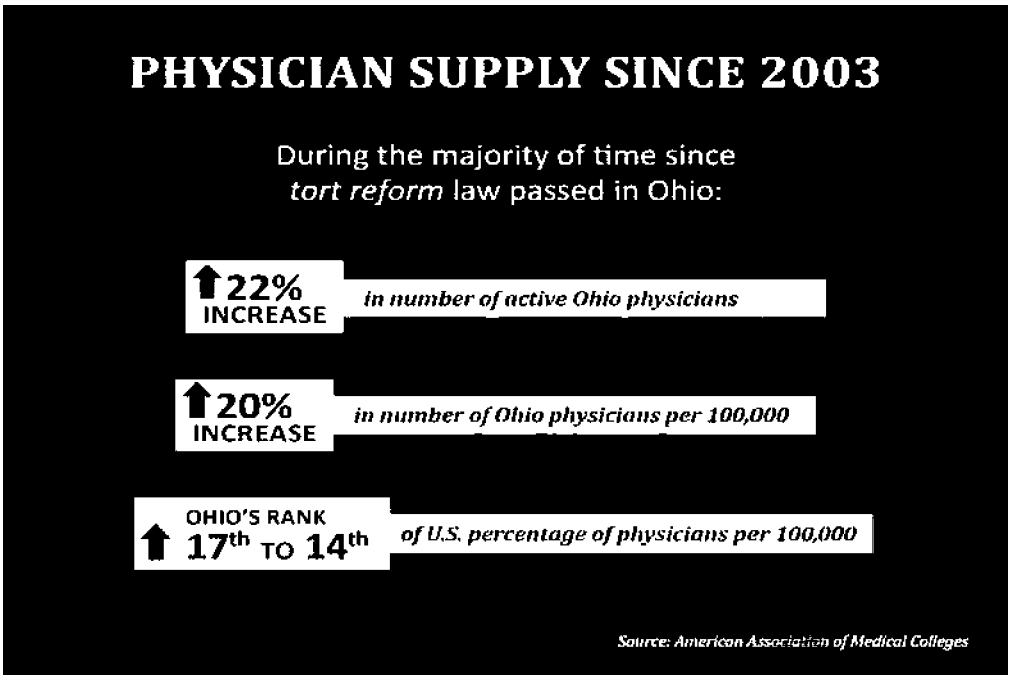
Dr. Louis respectfully submit that R.C. 2323.43 more than meets the rational basis test to survive an equal protection challenge. Just as courts in other jurisdictions have upheld limits on noneconomic damages in medical malpractice cases, this Court must uphold the statute enacted by the General Assembly. Unlimited noneconomic damage awards would put undue and unsustainable financial strain on Ohio's health care system. The noneconomic damage caps are valid when analyzed under the rational basis test utilized for an equal protection challenge.

D. The General Assembly's Decision To Enact The Damage Caps Has Demonstrably Advanced Its Legislative Aims.

Here, the relevant inquiry is not whether hindsight demonstrates the wisdom of legislative prerogatives. Rather, the proper constitutional inquiry is whether the legislature had a rational

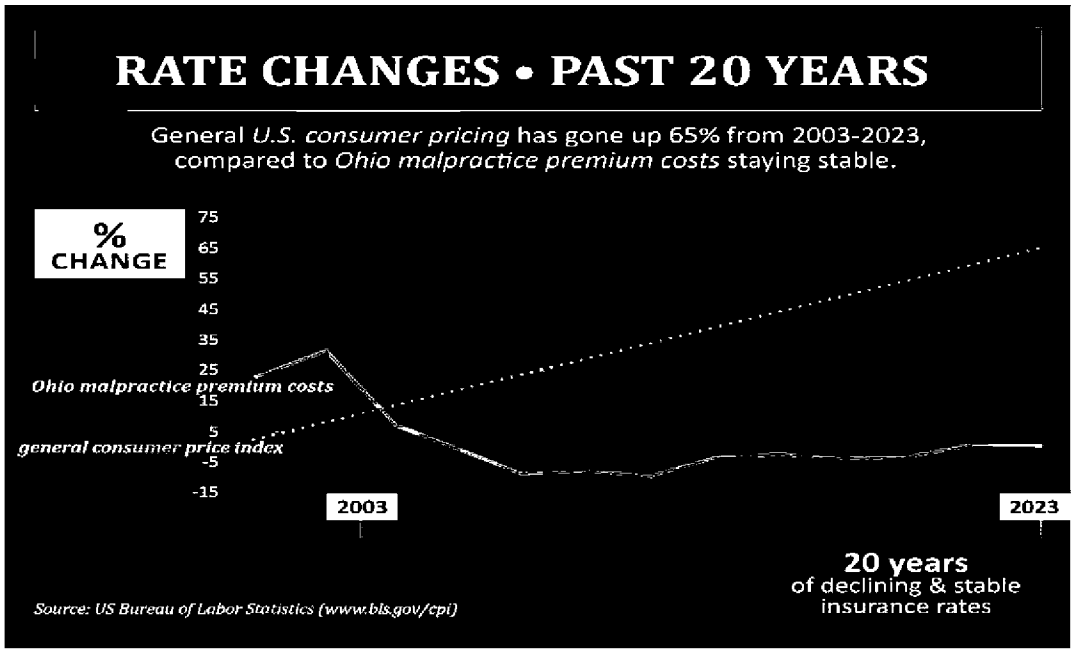
belief that its determinations were related to a legitimate government interest – at the time the law was enacted. *Benjamin v. Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957). As set forth above, limitations on noneconomic damages were rationally related to the legislative effort to address the health care crisis in the state.

But that said, the Ohio State Medical Association has noted that since S.B. 281 was passed in 2003, there was a 22% increase in the number of active Ohio physicians and a 20% increase in the number of Ohio physicians per 100,000:



https://www.osma.org/aws/OSMA/pt/sp/tortreform, last visited February 20, 2024.

Further, according to the OSMA, Ohio's national rank of percentage of physicians per 100,000 rose from 17th to 14th. *Id.* Additionally, Ohio malpractice premium costs declined and stayed stable over the twenty years since 2003:



These are not the only successes that Paganini (now) seeks to undo. "Widely accepted economic principles and the dominance of many medical malpractice insurance markets by non-profit carriers, together with the results of empirical research, indicate that noneconomic damage awards are effective in reducing medical liability insurance costs, thereby reducing health care costs." H.E. Frech III, William G. Hamm, and C. Paul Wazzan, *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law*, 16 Health Matrix 693, 696 (2006). "Limits on noneconomic damage awards reduce the incentive to litigate weak claims and reduce the average size of malpractice awards (i.e., severity) – all important determinants of medical costs." *Id.* "By reducing the cost of medical services – and consequently making health insurance more affordable – such limits increased the public's access to health care." *Id.*

As such, while the statute must be evaluated prospectively, from the time it was enacted, the results speak for themselves. RC 2323.43's medical claim damage caps effectively addressed the concerns about fleeing doctors; defensive medicine; rising health care costs; and soaring

malpractice insurance premiums. In short, the General Assembly identified a problem of profound importance to *all* Ohioans – and successfully addressed it.

E. The Ohio Supreme Court Has Repeatedly Recognized The Validity Of Limitations On Noneconomic Damages.

Paganini cites *Savoy*, *Seward*, or other cases to portray damages caps as constitutionally suspect. But in reality, the Ohio Supreme Court has rejected due process and equal protection challenges to limitations on noneconomic damages and declared similar caps constitutional. *Arbino*, ¶ 12. In so holding, the Court determined that the issues "such as the wisdom of damages limitations and whether the specific dollar amounts available under them best serve the public interests are not for [the court] to decide." *Id.*, ¶ 113. The Court noted that the legislature's "general justification for tort reform" included its "interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives that costs to consumers, and may stifle innovation." *Id.*, ¶ 68.

After reviewing the legislative record, the *Arbino* court concluded that the imposition of caps on noneconomic damages was rationally related to the legislature's desire to rectify concerns of the civil justice system:

> RC 2315.18 is rationally related to the legitimate state interests of reforming the state civil justice system to make it fair and more predictable and thereby improving the state's economy. One cannot deny that non-economic damages awards are inherently subjective and difficult to evaluate. The uncertainty associated with such damages logically leads to a lack of predictability as well as the occasional influence of irrelevant factors such as a defendant's improper actions. While such an certainty in the specter of improper influences are serious concerns on their own, the General Assembly reviewed and cited evidence that these issues have real, deleterious effects on state economies across the nation, including Ohio.

Id., ¶ 69.

The Court also recognized that the General Assembly is charged with making the difficult policy decisions on issues and codifying them into law. Courts are not the forum in which to second-guess such legislative choices; courts simply determine whether those enactments comply with the Constitution. *Id.*, ¶ 71 (citing *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. Of Edn.*, 11 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20.[4]

Similarly, the Supreme Court of Ohio validated the noneconomic damage caps contained in RC 2744.05(C) involving cases against political subdivisions. *Oliver v. Cleveland Indians Baseball Co.*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205. Neither RC 2323.43, the statute at issue, nor RC 2744.05(C) contain an exception to the application of damage caps to persons who suffer catastrophic injury. The Court explicitly rejected the argument that the application of the caps to catastrophically injured plaintiffs created constitutional concerns:

> [The damage statute at issue in *Arbino*] contains an exception to the limits on non-economic damages for those persons who suffer "catastrophic injuries" *** but RC 2744.05 does not. We find this difference between the statutes to be no obstacle to the application of the reasoning of *Arbino* to this case. The difference has no bearing on our analysis of the effect of RC 2744.05 on the constitutional right to a jury trial. Nor does this difference affect our rational basis review of this statute ***

Id., ¶ 6.

The public policy rationale accepted by the Ohio Supreme Court in *Arbino* applies equally to this matter. Indeed, it can be argued that the public-policy foundations of RC 2344.43 are more compelling than those previously examined in *Arbino*.

F. Paganini's Trial Court Decisions.

[4] In *Arbino*, the Court also upheld the constitutionality of damage caps imposed on punitive damages in RC 2315.21. The Court found that the "limitations imposed on the inherently subjective process of calculating punitive damages were rational responses to the negative effects associated with the uncertainty of the civil litigation system." *Id.*, ¶ 106.

Finally, Paganini cites several Ohio Common Pleas decisions in support of his argument. (Mot. at 2-3). That said, of those decisions, he really only discusses *Metts* – which we address above. (Id. at 14-15).

Of those other decision, *Lyons v. Riverside Methodist Hospital* and *Higgins v. Biyani* are both from Franklin County – like *Metts*. And they rely almost entirely on *Metts* for their holdings. Consequently, the Court can dismiss *Lyons* and *Higgins* for the same reasons that it can reject Metts – as discussed above.

This Court should also reject the older cases: *Woessner v. The Toledo Hospital*, *Wells v. Call*, *Sexton v. Medical Oncology*, *Wargo v. Susan White Anesthesia, Inc.*, and *Mead v. Wilt*. With respect to *Woessner*, the court was troubled by a damage cap for catastrophic injuries that would impose the cost of the public benefit on the most injured. But that concern ignores *Oliver* – which affirmed a hard $250,000 cap in the context of political subdivisions and was decided by the Ohio Supreme Court the same year.

In *Oliver*, the Court rejected this concern – that the most injured bear the cost of the public benefit. Oliver instructs that when an Ohio court faces a constitutional challenge to a damage cap, the court must evaluate the statute's purpose independently – without reference to decisions involving caps in other areas of the law. Damage caps in general negligence cases have a different purpose than caps in cases involving medical claims or political subdivisions. *Wells*, *Sexton*, *Wargo*, and *Mead* also fail for the same reason.

III. Conclusion.

For the foregoing reasons, the Defendants respectfully request that the Court overrule the Plaintiff's motion and, instead, enter judgment in accordance with R.C. 2323.43(A)(3).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed via the Court's electronic filing system and served via electronic mail this 20th day of February, 2024 upon:

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