

IN THE SUPREME COURT OF OHIO

CASE NO. 2025-0386

**JOHN PAGANINI,
Plaintiff-Appellee,**

-vs-

**THE CATARACT EYE CENTER OF CLEVELAND d/b/a CORRECTIVE EYE
CENTER, CEI PHYSICIANS, P.S.C., LLC, and GREGORY J. LOUIS, M.D.,
Defendant-Appellants.**

**ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, CASE Nos. CA-24-113867 and CA-24-114019**

MERIT BRIEF OF PLAINTIFF-APPELLEE, JOHN PAGANINI

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INTRODUCTION

Everyone hates a retcon. Short for ‘retroactive consistency,’ it is “a literary device in fictional story telling whereby facts and events established through the narrative itself are adjusted, ignored, supplemented, or contradicted by a subsequently published work that recontextualizes or breaks continuity with the former.” Wikipedia, *Retroactive Continuity* (accessed August 29, 2025).¹ Historically, it was reserved for use in fictional pieces of work—think films and television series—to retrospectively impose a different reality over top of previously described events. The “Dream Season” of Dallas, is an example. When the writers wanted to undo the death of a beloved character in Season 9, they opened Season 10 with his wife waking up from a dream to find him alive. Criticisms flowed naturally, as they often do when writers deploy a retcon:

Although the notorious “dream season” became the butt of legions of jokes, Dallas fans were upset with it because they felt cheated. The series’ continuity was radically undermined when Pam awoke to discover the deceased Bobby alive and well in her shower. Fans invest thought and emotion into following the characters from one plot to the next. When this flow is disturbed, however, the program’s unity is compromised.

Jack Kerwick, *A Review of TNT’s “Dallas”*, BeliefNet (accessed Sept. 26, 2025).²

This appeal presents nothing more than an attempt to retcon the Ohio Constitution and this Court’s precedents enforcing it as though it were a 140-year dream sequence—all to acquire a roughly \$1 million windfall for one doctor and his medical practice. The audience being cheated and disrespected is Ohio’s population of more than eleven million citizens. The People’s investment is the age-old substantive protection of Ohio’s Due

¹ Available online at: https://en.wikipedia.org/wiki/Retroactive_continuity

² Available online at: <https://www.beliefnet.com/columnists/attheintersectionoffaithandculture/2013/03/a-review-of-tnts-dallas.html>

Course of Law provision, Ohio Const., art. I, § 16, which they adopted for themselves to keep the government from hacking away at their rights, persons, and property. And the effort to radically undermine the continuity of the law takes several forms. Defendant-Appellants, The Cataract Eye Center of Cleveland, Inc. and Gregory J. Louis, M.D. (“Dr. Louis” and his “Employer”), make a remarkable ask: ignore the central holdings of this Court’s established precedent, including *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), and *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, and publish a retconned sequel abruptly telling a different story about the validity of statutes capping recovery for catastrophic injuries. The amici supporting them dig even deeper, exhuming part of the Magna Carta with different words than Ohio’s Due Course of Law provision and asking this Court to treat its text as the real star of the show.

But by asking the Court to use its government power to change Ohio’s story of precedent, Dr. Louis, his Employer, and their amici make a quite literally Orwellian request. To them, it would be fine for this Court to say that Ohio’s Due Course of Law provision never gave substantive protection, despite centuries of precedent to the contrary. This sort of abrupt, unexplained switch from one legal reality to another is best exemplified by the actions of the government in George Orwell’s 1984. When “the Party” found it convenient to change reality, it was announced during a rally on the “sixth day of Hate Week” that “Oceania was not after all at war with Eurasia. Oceania was at war with Eastasia. Eurasia was an ally.” George Orwell, *1984*, at 148 (Signet Classic 1960, reprinted). Turning the populus’ attention to a new enemy to hate, the speaker “switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax.” *Id.* at 150. Orwell’s abused protagonist spent the next days working around the clock at the Ministry of Truth changing “the political literature” so

that “no reference to the war with Eurasia, or the alliance with Eastasia, should remain in existence anywhere.” *Id.* Asking for the Court to revise history with “no admission that any change had taken place,” *id.* at 148, rather than through a lawful amendment to the Ohio Constitution, the Defendants and their amici punish Ohioans for paying attention to their own governance in the first place.

Retconning is a tool properly reserved for use in works of fiction. A full merits appeal before the Supreme Court of Ohio is neither the time nor place to endure a season-long dream sequence. This effort to change Ohio’s fundamental law as if it had been different all along is just as arbitrary as the caps placed on recovery for those catastrophically injured by medical malpractice. This Court should do better by the people of Ohio, just as it has consistently done before. Turning to legal authorities, one noted jurist has described the practical reality of our system:

It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

Oliver Wendell Holmes, Jr., *The Common Law*, at 1 (Dover Publications Inc. 1991). In this Court’s venerable experience, Ohio’s Due Course of Law provision *does* carry and *has* carried substantive protection against arbitrary and irrational laws. And it *does* require courts to employ a rational relation test with a bit more teeth than the United States Supreme Court has recently utilized under the Fourteenth Amendment’s Due Process Provision. Precisely because Ohio’s Due Course of Law provision uses different text, it makes a great deal of sense that it should apply differently than the federal analogue. And

by echoing common-law treatise writers who viewed the right to recover for injury as fundamental, the teeth in Ohio’s Due Course of Law provision belong right where this Court decided the people had put them more than a century ago. Moreover, faced with this view of the law, the people of Ohio have left it in place each time they addressed needed amendments to the Ohio Constitution in later years. This Court should affirm the lower court rulings on that basis.

Alternatively, this Court should save the merits for another day and dismiss this appeal as improvidently accepted. Much of the argumentation addressed above started after the trial court’s ruling, which is the wrong time to start. For the same reasons already explained when opposing this Court’s assertion of jurisdiction, the only real risk of judicial activism this Court faces would be to relieve Dr. Louis, his Employer, and their amici of the obligation to make their arguments in the trial court. Innumerable litigants have lost their opportunity to ply this Court with constitutional theories because they forfeited the issue below. It would be conspicuous if the substantive legal issues were reached and decided in this case—when the influential medical and insurance industries have skin in the game—but not in the flood of other cases presenting an identical barrier to review.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee John Paganini (“Paganini”) filed suit against Defendants, ophthalmologist Gregory Louis, M.D., and his practice, claiming that Louis failed to properly diagnose an eye infection called “endophthalmitis” following cataract surgery. *T.d. 1, Complaint filed November 29, 2022, ¶ 12-16.* This lapse led to a loss of vision and, ultimately, the death and inevitable removal of Paganini’s left eye. *Id.* In the Opinion and Order on review, the trial court capably summarized the relevant procedural 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 progressing eye infection in Paganini's left eye following cataract surgery. Because of the failure to timely diagnosis [sic] 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."

T.d. 152, Opinion and Order filed April 16, 2024 ("Trial Op."), p. 2.

I. The trial court properly ruled that the catastrophic noneconomic damages caps in R.C. 2323.43(A)(3) are unconstitutional as applied after noting the Defendants' forfeitures.

After the verdict, Paganini asked the trial court not to apply R.C. 2323.43(A)(3), arguing that, as applied to him, it violated the Due Course of Law provision in Ohio Const., art. I, § 16, consistent with this Court's decisions in *Morris* and *Arbino*. *T.d. 126, Plaintiff's Motion to Include in Any Judgment the Full Amount Awarded for Noneconomic Damages filed February 6, 2024, p. 4-10*. Paganini explained that as a 92-year-old with permanent catastrophic injuries, he belongs to the class of "seniors" for whom "damages are disproportionately noneconomic due to lower claims for lost income." *Id.*, p. 1, 8. He supplied seven rulings from various trial courts throughout Ohio that determined R.C. 2323.43(A)(3) cannot pass muster under rational relation review. *Id.*, p. 2-3. Many of those decisions simply applied the clear ruling in *Morris*. *Id.* And he provided a statutorily mandated government study that discovered only 0.32% of medical malpractice cases resulted in a verdict for the plaintiff after a trial, with only thirty of those lawsuits between 2005 and 2019 resulting in a verdict including substantial noneconomic damages that would trigger this law. *Id.*, p. 2, 7. The Defendants predictably opposed Paganini's as-

applied challenge. *T.d. 136.*

The trial court agreed with Paganini on April 16, 2024, giving a “lengthy history lesson” on the Due Course of Law protections of the Ohio Constitution and showing that “*Morris* constitutes the law of the State of Ohio” and “controls the outcome of this case.” *Trial Op., p. 13.* Importantly, the trial court noted that Defendants “do not cite to *Morris* and explain how it does not control the outcome of this case.” *Id.* Consequently, “the legal tests” applicable to the case were “not in dispute.” *Id., p. 2.* Defendants also did not “take a position on what kind of challenge this is,” leaving the trial court free to confirm this was indeed “an as-applied challenge” based upon “a specific set of facts.” *Id., p. 3.* Under this procedural posture:

[T]his Court is required to do two things when looking at a noneconomic damages cap for medical claims. First, it must determine if the legislative findings demonstrate a real and substantial relationship between the caps and the general welfare of the public. In particular, whether there is actually evidence that the cap for catastrophic injuries will reduce malpractice insurance rates. Second it must determine whether the cap “imposes the cost of the intended benefit to the public solely upon those most severely injured.”

Id., p. 15-16. Under that test, the trial court concluded that “Paganini has shown by clear and convincing evidence that R.C. 2323.43(A)(3) is ‘unreasonable and arbitrary’ and that applying it to him will violate his rights under the due course of law clause.” *Id., p. 18.*

In reaching this ruling, the trial court accepted that “the goal of lowering medical malpractice insurance rates is related to the general welfare of the public” and “there is a substantial relationship between medical malpractice rates and noneconomic damage caps as a general matter.” *Trial Op., p. 16.* The court rejected only that there was “a real and substantial relationship between malpractice insurance rates and capping noneconomic damages for *catastrophic* injuries.” (Emphasis added.) *Id.* While the

General Assembly made a “platitudinal” statement of such a finding, the law did not “explain how capping noneconomic damages for such a small group of highly injured people will effect rates in addition to the cap for other medical claimants.” *Id.*, p. 16-17.

Relying on *Arbino*, the court explained that “the more concrete evidence of noneconomic damage in catastrophic injury cases” recognized when R.C. 2315.18 was enacted, required some explanation “why it was still necessary to limit recovery for this severely injured group to lower malpractice rates.” *Trial Op.*, p. 17. Without such evidence, it was “unclear how applying the cap to Paganini, given his injury, bears a real and substantial relationship to advancing the government interest in lowering malpractice insurance rates.” *Id.* The de minimis statewide impact of R.C. 2323.43(A)(3) was its own downfall: “There is no evidence from the legislature that cutting a plaintiff like Paganini’s award, or the awards of the one or two similarly situated people a year, cuts rates in a meaningful way beyond other reform efforts.” *Id.*

On that record, the trial court ruled that it simply needed to apply *Morris*.³ *Trial Op.*, p. 17-18. There, this Court “held that ‘[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.*, p. 17, quoting *Morris*, 61 Ohio St.3d at 691. And it was no less arbitrary and irrational, according to the trial court, to do so in the context of medical malpractice claims. *Id.*, p. 17-18. Because the trial court was bound to follow *Morris* and *Arbino*, not even “due deference to the considered judgment and factual findings of the General Assembly” could save R.C. 2323.43(A)(3) as applied to the

³ Although Paganini also lodged an equal protection challenge to R.C. 2323.43(A)(3), this part of his motion was rejected. *Trial Op.*, p. 19-20. Paganini did not appeal this aspect of the trial court’s ruling, and it remains undisturbed.

facts of this dispute. *Id.*, p. 18.

II. The Eighth District Court of Appeals faithfully applied this Court's precedents in its unerring decision affirming the trial court.

Defendants appealed to the Eighth District Court of Appeals, assigning as error: “The trial court erred in entering judgment for Paganini and finding R.C. 2323.43(A) unconstitutional as applied to Paganini.” *Paganini v. Cataract Eye Ctr. of Cleveland*, 2025-Ohio-275, ¶ 1 (8th Dist.). Although Defendants had waived any opportunity to assert what kind of challenge this was during the trial court proceedings, the court of appeals considered and rejected their new argument that Paganini really raised a facial challenge all along. *Id.* at ¶ 50. Paganini’s argument was “specific to his unusual circumstances, namely that the statute requires him to forego 66.4% of the damages awarded to him by the jury in order to lower medical-malpractice insurance rates for the public’s benefit.” *Id.* Being “mindful” of the presumption that statutes passed by the General Assembly are constitutional, and applying the “the rational-basis test” given by this Court for due course of law challenges, the court of appeals affirmed. *Id.* at ¶ 51-53, quoting *Arbino*, 2007-Ohio-6948, at ¶ 49. Considering and applying this Court’s numerous precedents declaring which kinds of noneconomic damages caps are and are not valid, including *Morris* and *Arbino*, the court of appeals concluded that R.C. 2323.43(A)(3) violated the Due Course of Law Provision in Ohio Const., art. I, § 16. *Id.* at ¶ 54-67.

The court of appeals echoed the trial court’s concerns. It was “not clear from the legislative findings” or the legislature’s “ongoing study” on the impact of R.C. 2323.43(A)(3) “how the cap on noneconomic damages for catastrophic injuries will have any impact in reducing malpractice insurance rates since there have been so few cases

involving these types of injuries.” *Paganini* at ¶ 63. Since the General Assembly had only discovered thirty cases to which the law could have applied to between 2005 and 2019, and because there was no indication in the legislature’s study “how many of these cases involved catastrophic injuries,” the court of appeals agreed that “the legislative findings fail to demonstrate a real and substantial relationship between the capping of noneconomic damages for catastrophic injuries and malpractice insurance rates.” *Id.* at ¶ 64. Just as the trial court had, the court of appeals applied *Morris* and affirmed the trial court’s ruling. *Id.* at ¶ 65-67.

Defendants then appealed to this Court, which accepted jurisdiction.

ARGUMENT

The Court accepted one proposition of law for review:

PROPOSITION OF LAW: THE “HARD LIMIT” ON RECOVERABLE NONECONOMIC LOSS IN R.C. 2323.43(A)(3) THAT APPLIES TO SERIOUS OR “CATASTROPHIC INJURIES” DOES NOT VIOLATE THE “DUE COURSE OF LAW” PROVISION IN ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND IS, THEREFORE, CONSTITUTIONAL.

Defendant’s Memorandum in Support of Jurisdiction filed Mar. 17, 2025, p. 7; 05/27/2025 Case Announcements, 2025-Ohio-1846, p. 2. The Court should reject this false proposition, which is untethered from history, precedent, and reality. While limits on noneconomic damages have been upheld in the past, those limits enjoyed clear and express legislative findings and made exceptions for the most seriously injured Ohioans. Here, R.C. 2323.43(A)(3) is propped up by a bare legislative record and makes no exception for catastrophic injuries. Having forfeited all the arguments now raised on appeal to this Court, Dr. Louis and his employer did not come close to establishing the purported errors for which they seek mere correction. The lower court followed binding

age-old precedent, and no amount of effort can twist that into the specter of legal error. Consequently, this appeal does not belong before this Court. The Eighth District's scrupulous obedience to precedent should be affirmed if this Court does not take the more procedurally proper step of dismissing the dispute as improvidently allowed.

I. This Court's longstanding precedents were capably applied by the Eighth District Court of Appeals, and the result squarely comports with art. I, § 16 of the Ohio Constitution.

Since the beginning, this Court has drawn on the Due Course of Law Provision, Ohio Const., art. I, § 16, as a source of power to invalidate legislative enactments contrary to the Ohio Constitution. *Rutherford v. McFaddon* (1807) (Tod, J., concurring) in Pollack, *Ohio Unreported Judicial Decisions Prior to 1823*, Part II, 86-87 (1952).⁴ This judicial tradition has transcended centuries and finds its roots in the notion that, "Ohio is a sovereign state and . . . the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality," even in the face of more restrictive federal interpretations of the United States Constitution. *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 545 (1941).

Accordingly, a legislative enactment is invalid on Due Course of Law grounds if (1) it fails to bear a "real and substantial" relation to "health, safety, morals or [the] general welfare of the public" or (2) it is "unreasonable or arbitrary." *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274 (1986); accord *Brandt v. Pompa*, 2022-Ohio-4525, ¶ 28 (2022). In applying the rational relation test, this Court must delve into the legislative record to review the General Assembly's findings. *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 49 ("[W]e must examine the record to determine whether

⁴ Available online at: <https://www.law.csuohio.edu/sites/default/files/lawlibrary/ohioconlaw/SupCtofOHOpinionsHistoricalComment-Rutherfordv.McFaddon.pdf>

there is evidence to support such a relationship.”). Application of a constitutional standard presents “a question of law appropriate for de novo review.” *DuBose v. McGuffey*, 2022-Ohio-8, ¶ 15.

A. Damages caps like R.C. 2323.43(A)(3) have a tempestuous history before this Court.

While this Court has not yet reviewed R.C. 2323.43(A)(3)’s damages cap, it has developed a rich body of applicable precedent by reviewing similar caps enacted by the General Assembly over the years. Thus, this Court—like the Eighth District Court of Appeals below it—must follow a well-trodden path.

The first step on this path was *Morris v. Savoy*, 61 Ohio St.3d 684 (1991). In *Morris*, this Court considered a 1975 law “setting a \$200,000 cap on general damages that may be awarded for medical malpractice.” *Id.* at 686. The Court employed Ohio’s rational relation test and struck the cap down as a violation of the Due Course of Law Provision. *Id.* at 691. The cap, it concluded, violated both prongs of the rational relation test. *Id.* at 691.

First, there was doubt that the law was tethered to its purpose. The Court was “unable to find, either in the amici briefs or elsewhere, any evidence to buttress the proposition that there is a rational connection between awards over \$200,000 and malpractice insurance rates.” *Id.* at 690. Instead, it found persuasive a decision from the Texas Supreme Court that drew on a study showing that “less than .6 percent of all [medical malpractice] claims brought were for more than \$100,000.” *Id.*; see *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988). The majority further relied on a 1987 study by the Insurance Service Organization finding that “savings from various tort reforms, including a \$250,000 cap on noneconomic damages, were ‘marginal to

nonexistent.” *Id.* In the end, this Court opined that, while “evidence may exist” linking damages caps to malpractice insurance rates, the matter “would require a second trip to the General Assembly.” *Id.*

Second, and unrelated to the empirical shortcomings, the *Morris* Court doubted the rationality of the General Assembly’s decision. The Court agreed with an observation by the Ninth District Court of Appeals, that it 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 690-91, quoting *Nervo v. Pritchard*, No. CA-6560, at 8 (9th Dist. June 10, 1985). While the General Assembly may legislate for the common good, it may not sacrifice the wellbeing of the most vulnerable people in our state at the altar of medical (or legislative) convenience. The fact that the General Assembly was ostensibly animated by a desire to respond to the recoveries won by some victims of serious medical malpractice did not justify the legislature in placing a hard limit on recoveries for catastrophic injuries.

What are the takeaways from *Morris*? First, if the General Assembly wants to impose a damages cap, it must support that cap with substantive factual findings. The legislature may not rest comfortably on its laurels, declaring a collective “because we said so.” Second, a damages cap may not target those most severely injured by medical malpractice. The Due Course of Law Provision protects those who suffer catastrophic injuries against the reduction of their noneconomic damages recoveries without good reason.

Move to the second step on the path: *Arbino v. Johnson & Johnson*, 2007-Ohio-6948. With *Morris* on the books, the proponents of damages caps took the “second trip” to the General Assembly that this Court prescribed. *Morris*, 61 Ohio St.3d at 690. The

result was a new law that limited recovery in tort for noneconomic damages to “the greater of (1) \$250,000 or (2) three times the economic damages up to a maximum of \$350,000, or \$500,000 per single occurrence.” *Arbino* at ¶ 28. However, a plaintiff who suffered a catastrophic injury—i.e., “[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system,” or “[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities”—could recover “limitless noneconomic damages.” *Id.* at ¶ 28, 60. Unsurprisingly, this new damages cap made its way before this Court, again on a Due Course of Law challenge. Applying the rational relation test and the principles of *Morris*, this Court ultimately upheld the new cap.

It is critical to understand why the *Arbino* Court reached a different result than the *Morris* Court. First, this Court commended the General Assembly for its extensive factual investigation. Where the legislative record in *Morris* was threadbare, the legislative record supporting the new damages cap in *Arbino* was substantial. *See Arbino* at ¶ 53. Instead of legislating in the dark, the General Assembly compiled “specific evidence” that drew “a clear connection” between the damages cap and the public interest and was “tailored to maximize benefits to the public while limiting damages to litigants.” *Id.* at ¶ 56-57, 61. As such, the damages cap survived the first prong of rational relation analysis. Second, the *Arbino* damages cap allowed for “*limitless noneconomic damages*” for those most severely injured. (Emphasis added.) *Id.* at ¶ 60. This decision rested on a legislative finding that “the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and by setting the limits for those not as severely injured at either \$250,000 or \$350,000.” *Id.* at ¶ 61. That decision created a significant distinction from the damages

cap struck down in *Morris. Arbino* at ¶ 59-60. And this distinction was “rational and based on the conclusion that catastrophic injuries offer more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations.” *Id.* at ¶ 72.

The lessons from *Arbino* are just as clear as those from *Morris*. The General Assembly’s evidence must be specific and it must uncover some reason to believe there is a connection between the means it adopts in limiting noneconomic recovery and the ends it seeks to accomplish with such a law. And the General Assembly avoids enacting an irrational and arbitrary cap on noneconomic damages by permitting catastrophically injured plaintiffs to recover unlimited noneconomic damages.

The most recent step on the path was *Brandt v. Pompa*, 2022-Ohio-4525, which showed how the bedrock authorities enforcing Ohio Const., art. I, § 16, are applied. In *Brandt*, this Court revisited the same damages cap it upheld in *Arbino*, this time on an as-applied challenge to the reduction of a sex-offense survivor’s noneconomic damages recovery. The Court struck down the cap as applied to the “the most severely and permanently psychologically injured” plaintiffs. *Brandt* at ¶ 31. Though the Court considered the same statute with the same legislative findings, it reached the opposite conclusion for this narrow slice of the public. This Court emphasized the fact that “[p]sychological injuries are not included in the permanent-injury exception to the compensatory-damages caps for noneconomic loss.” *Id.* at ¶ 30. That is, individuals who suffer catastrophic psychological injuries were not entitled to recover “limitless noneconomic damages.” *Id.* at ¶ 31, quoting *Arbino* at ¶ 60. That the statute limited the plaintiff’s noneconomic damages recovery to \$250,000 was fatal—the “rational basis of the statute found by this court in *Arbino* [was] eliminated.” *Brandt* at ¶ 31.

Consider what *Morris*, *Arbino*, and *Brandt* teach when read together. *Morris* and *Arbino* hold that the first hurdle a law limiting noneconomic damages must clear to survive rational relation review is the General Assembly's compilation of meaningful evidence to support the real and substantial relationship between the cap and the public interest. *Brandt* teaches that, even when the legislative record contains sufficient evidence that such a law makes rational sense in general, a law may not work irrationally on a subset of Ohio's citizens. The General Assembly's failure to allow the small number of plaintiffs suffering catastrophic psychological injuries to recover complete noneconomic damages was an unreasonable and arbitrary act. The legislature may properly limit tort recoveries for ordinary injuries, but the Due Course of Law Provision limits its power to stand between a catastrophically injured plaintiff and full recovery.

B. Applying the principles of *Morris*, *Arbino*, and *Brandt*, R.C. 2323.43(A)(3) lacks a rational relation and violates Ohio Const. art. I, § 16.

The General Assembly has placed a substantial limit on the recovery of noneconomic damages that applies in the worst-of-the-worst medical malpractice cases. In 2003, the legislature enacted R.C. 2323.43(A)(3). The statute limits noneconomic damages in medical malpractice cases to “five hundred thousand dollars for each plaintiff” when the plaintiff has injuries like those suffered by Plaintiff Paganini—a now 93-year-old man who lost an eye after a physician's error. *R.C. 2323.43(A)(3)*. In the General Assembly's estimation, the pain and suffering that he has experienced and will continue to endure from losing a critical bodily organ is worth not a penny more. Can this stand?

1. R.C. 2323.43(A)(3) fails to bear a real and substantial relationship to the general welfare.

The first step is to consider whether the General Assembly's factual investigation established a real and substantial connection between catastrophic injuries like the one Paganini suffered and medical malpractice insurance rates. To justify R.C. 2323.43, the General Assembly offered three-and-a-quarter pages of factual findings. Am.Sub.S.B. No. 281, Section 3, 149 Ohio Laws, Part II, 3,848-3,851 ("*Uncodified Law*").

These factual findings are better than the blank record in *Morris*, but not by much. Many of the General Assembly's findings are conclusory and only a handful relate to the catastrophic damages cap itself. For example, the record concludes without support that, "Medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio." *Uncodified Law*, § 3(A)(1). Many other findings in the three-and-a-quarter page legislative record have nothing to do with damages caps. *E.g.*, *id.*, § 3(A)(6)(a)-(f) (discussing the statute of repose for medical malpractice claims).

Where there are relevant, evidence-supported findings, they are inapplicable to cases involving *catastrophic* injuries. The bulk of the legislature's findings deal with the mine-run of medical malpractice claims. *See id.*, § 3(A)(3)(a) (ruling out medical malpractice insurers' investments as a source of rate-hikes); *id.*, § 3(A)(3)(b) (assigning blame to high awards in medical malpractice actions); *id.*, § 3(A)(3)(c) (finding that some Ohio physicians were considering leaving the state); *id.* § 3(A)(3)(d) (finding that rates have increased even though "sixty-one per cent" of "claims filed against individual practitioners" are dropped or dismissed); *id.* § 3(A)(3)(e) (noting that states with noneconomic damages caps sometimes have a lower rate of malpractice insurance premium increase). These findings lend some support to R.C. 2323.43(A)(2), which sets

a noneconomic damages cap for cases involving non-catastrophic injuries. But R.C. 2323.43(A)(2) is not at issue in this dispute.

Critically, none of the legislature’s evidence-supported findings touch specifically on the relationship between malpractice insurance rates and recoveries in cases involving the kind of *catastrophic* injuries defined in R.C. 2323.43(A)(3)(a) and (b). For example, take the legislative finding that “the average award to plaintiffs has risen dramatically” despite a “relatively constant” number of such disputes, such that payments to plaintiffs “at or exceeding one million dollars have doubled in the past three years.” *Uncodified Law*, p. 3848, § 3(A)(2). This finding does not parse out the difference between economic and noneconomic damages or say which kind contributed to such seven-figure verdicts, nor does it disaggregate catastrophic injuries from any others. Appellants and their amici gain no ground by relying on such general findings to support the more specific cap on recovery for catastrophic injury cases.

The only finding that relates to the cap on noneconomic damages for catastrophic injury cases is threadbare. The entirety of the General Assembly’s discussion of R.C. 2323.43(A)(3) is as follows:

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.

Uncodified Law, § 3(A)(4)(a). This Court’s holdings in *Morris*, *Arbino*, and *Brandt* cannot be read to allow the General Assembly to enact a damages cap with nothing more than an empty incantation of fact. Indeed, the decisions in *Arbino* and *Brandt* rest upon a contradictory legislative finding, made only two years later in 2005, that this same kind

of rational balance was struck by a law that did not limit noneconomic recovery for catastrophically injured plaintiffs *at all*. *Arbino*, 2007-Ohio-6948, at ¶ 2, 61; *Brandt*, 2022-Ohio-4525, ¶ 31. Having made such contradictory factual findings within such a short timeframe and in directly analogous contexts, the legislature’s claim that a limitation on the noneconomic damages available to the most severely injured medical malpractice victims “strikes a reasonable balance between . . . plaintiffs and defendants” is neither “specific,” “clear,” nor “tailored.” *Arbino*, at ¶ 56-57, 61.

Likely cognizant that it needed additional information to survive a legal challenge, the General Assembly provided for ongoing fact finding. It created the Ohio Medical Malpractice Commission to study the effects of the damages caps, investigate the issues surrounding medical malpractice, and submit a report of its findings to the General Assembly. *Uncodified Law*, § 4(A)-(B). The effect of catastrophic injury recoveries on medical malpractice insurance rates was revealed only after years of inconclusive results and another statute ordering yet another study of the issue. *See Ohio Medical Malpractice Commission, Interim Report of the Ohio Medical Malpractice Commission* (accessed Sept. 10, 2025)⁵ (finding that “the impact of Senate Bill 281 on the Ohio medical liability market cannot be assessed” because many of the malpractice cases that would be impacted were still pending); *R.C. 3929.302* (ordering the Ohio Department of Insurance to collect additional data). In the end, the Ohio Department of Insurance revealed that only 0.32% of medical malpractice cases ended with a plaintiff’s verdict, and of those, only *thirty cases* between 2005 and 2019 in which a jury returned a verdict for a medical malpractice plaintiff were in excess of the damages cap. Ohio Department of Insurance,

⁵ Available online at: <https://dam.assets.ohio.gov/image/upload/insurance.ohio.gov/Documents/03-09-04InterimReport.pdf>

Ohio 2019 Medical Professional Liability Closed Claim Report (accessed Sept. 10, 2025) (“2019 Report”).⁶

Without weighing into the morass of studies that Appellant and amici offer—most of which are not Ohio-specific—this Court should simply conclude that the General Assembly’s bald assertion that “[t]he distinction among claimants with a permanent physical functional loss strikes a reasonable balance between potential plaintiffs and defendants” is not enough to support R.C. 2323.43(A)(3). *Uncodified Law*, § 3(A)(4)(a). On its own, this finding fails to establish a real and substantial relationship between recoveries for catastrophic medical malpractice injuries and medical malpractice insurance rates.

Even if this Court does decide to wade into the statistical thicket, it should weigh heavily the results of the Ohio-specific study that the General Assembly itself mandated. If a law covering 0.6% of all medical malpractice claims had too small an impact upon the medical malpractice insurance market as explained in *Morris*, then the fact that only “.32 percent of medical-malpractice claims result in a plaintiff’s verdict” in Ohio annihilates any justification for capping such verdicts. *See Paganini*, 2025-Ohio-275, at ¶ 64 (8th Dist.); *Morris* at 690. That “there have only been 30 cases between 2005 and 2019 in which a jury returned a verdict for a plaintiff in a medical malpractice action that was in excess of the statutory caps on damages” is fatal. *Id.* The law does nothing but take from the pockets of those few who are most injured by medical negligence, resulting in no noticeable impact on the insurance market.

⁶ Available online at: <https://dam.assets.ohio.gov/image/upload/insurance.ohio.gov/Legal/Reports/Documents/2019ClosedClaimReport.pdf>

2. R.C. 2323.43(A)(3) is unreasonable and arbitrary.

Apart from being supported by an insufficient factual record, R.C. 2323.43(A)(3) is also unreasonable and arbitrary. By targeting a vanishingly small number of severely injured plaintiffs for the economic benefit of the insurance industry, R.C. 2323.43(A)(3) violates the Due Course of Law Provision.

One clear commandment has consistently navigated its way through this Court's damages-cap jurisprudence: it 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." *Morris* at 690-91, citing *Nervo*, No. CA-6560, at 8 (9th Dist.). This Court articulated this principle in *Morris*, carried it through *Arbino*, and applied it just three years ago in *Brandt*. Nothing has changed in the meantime.

The availability of uncapped noneconomic damages for those most seriously injured makes the difference. This Court upheld a damages cap in *Arbino* because the General Assembly left available "limitless noneconomic damages" for catastrophically injured medical malpractice plaintiffs. *Arbino* at ¶ 60. Conversely, this Court struck down a damages cap in *Brandt* as applied to "the most severely and permanently *psychologically* injured" because the General Assembly failed to allow for "limitless noneconomic damages" for them. *Brandt* at ¶ 31. And each of those decisions faithfully followed this Court's ruling in *Morris*, where it was determined that the legislature lacks a rational basis to save the medical and insurance industries from their own problems by sending the bill to those seeking recovery for the worst medical malpractice injuries.

The same result is warranted in this case without declaring any more law or retconning the law after it has already been written in clear terms. The R.C. 2323.43(A)(3) cap limits the noneconomic damages recovery for catastrophically injured medical

malpractice plaintiffs. This Court need not weave itself into analytical knots at the behest of the Defendants and amici. A straightforward application of *Morris*, *Arbino*, and *Brandt* seals the lid on R.C. 2323.43(A)(3)'s coffin firmly shut as applied to this and similar cases.

C. The Defendants forfeited their contrary arguments that this Court's precedents were misapplied.

The Eighth District faithfully applied this Court's precedents when ruling based upon the foregoing considerations that R.C. 2323.43(A)(3) is unconstitutional as applied to Paganini. *Paganini*, 2025-Ohio-275, at ¶ 64 (8th Dist.). The primary thrust of the Defendants' effort here, however, is to argue that the court of appeals "misapplied" various decisions this Court has issued, including *Morris* and *Arbino*. *Defendants' Merit Brief*, p. 22-24. These arguments were notably forfeited in the trial court. The "legal tests" applicable to the case were "not in dispute" because Defendants did not "cite to *Morris* and explain how it does not control the outcome of this case." *Trial Op.*, p. 2, 13.

Failing to make an argument in the lower courts forfeits any opportunity to make that same argument anew in a higher court. *State v. Gwynne*, 2019-Ohio-4761, ¶ 10-11; *State v. Rue*, 2020-Ohio-6706, ¶ 64; *State v. Hickman*, 2024-Ohio-5747, ¶ 23, fn. 2. Not even the State itself can escape that rule. *Id.* And while claims of civil plain error would not be worth this Court's time anyway, the Defendants did not make any to the Eighth District that could be revived here. *Paganini*, 2025-Ohio-275, at ¶ 14, 37, 39-40, 42-43, 46, 48 (8th Dist.) (cataloguing the Defendants' assignments of error and arguments on appeal). This Court should not relieve the Defendants of the cardinal obligation on appeal—to preserve issues below before raising them on review. How *Morris* applies should therefore be "barred from further consideration" in this dispute. *E.g.*, *Rue*, 2020-Ohio-6706, at ¶ 64.

Otherwise, Defendants nitpick the lower court rulings rather than raise any new or novel legal issues. For example, they try to analogize the concerns for subjectivity in noneconomic damages underpinning R.C. 2323.43 to those addressed in *Arbino*. *Defendants' Merit Brief*, p. 17-19. But this effort falls flat because the result in *Arbino* turned in predominant part on the legislative decision to create an exception that allowed full recovery for catastrophically injured plaintiffs. As Chief Justice Moyer explained for the majority, “catastrophic injuries offer more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations.” *Arbino*, 2007-Ohio-6948, at ¶ 72. This was the legislature’s own finding, made merely two years after R.C. 2323.43(A)(3) capped the same class of noneconomic damages, so long as a medical professional caused them. *Id.* at ¶ 61, 72. And yet, when a jury decides the value of catastrophic injuries, that number does not hinge on how the injury was caused.

Defendants further argue that the lower courts could not fairly rely upon the 2019 Report because it says it “is not intended to be used to evaluate past or current medical professional liability insurance rates.” *2019 Report*, p. 2; *see Defendants' Merit Brief*, p. 21. It is simple enough to point out that this document does not say it cannot be used in a court to evaluate the impact of the law by which it was mandated. Put more simply, we are not evaluating insurance rates in this dispute. But what a novel concept—may the author of a document simply say in it, “don’t use me” for any given purpose and expect jurists to pay obeisance? In any case, the Defendants did not lodge such an objection in the trial court, where evidentiary objections are forfeited unless they are expressly made. *E.g.*, *State ex rel. Chuvalas v. Tompkins*, 83 Ohio St.3d 171, 173-174 (1998). Indeed,

Defendants did not respond to the impact of the 2019 Report at all until they filed their brief here. The attack on this evidence, undeveloped below, must be rejected too.

II. Most Ohio courts that have considered the constitutionality of R.C. 2323.43(a)(3) have struck it down for one reason or another.

By affirming the Eighth District, this Court would not be alone. Numerous Ohio judges have held that R.C. 2323.43(A)(3) is constitutionally infirm when applied to catastrophically injured plaintiffs. *Lyon v. Riverside Methodist Hospital*, 2025-Ohio-2991 (10th Dist.); *Bruns v. Beacon Orthopaedics & Sports Medicine, Ltd.*, Hamilton C.P. No. A2300496 (Jul. 2, 2025), attached at Apx. 0001; *Haggins v. Biyani*, Franklin C.P. No. 19CV-1804 (July 8, 2022) attached at Apx. 0006; *Metts v. Nationwide Children's Hospital*, Franklin C.P. No. 14 CVA-03-2543 (Dec. 11, 2018), attached at Apx. 00016; *Woessner v. The Toledo Hospital*, Lucas C.P. No. CIO201201614 (May 30, 2014),⁷ attached at Apx. 00037; *Sexton v. Medical Oncology/Hematology Associates, Inc.*, Montgomery C.P. Nos. 06-785 and 06-5369 (Dec. 4, 2008), attached at Apx. 00045; *Mead v. Wilt*, Franklin C.P. No. 05CVA01-864, p. 9 (Mar. 4, 2008), attached at Apx. 00053; *Wells v. Call*, Summit C.P. No. 2008-09-6782 (Nov. 23, 2010), attached at Apx. 00063; see *Wargo v. Susan White Anesthesia, Inc.*, Cuyahoga C.P. No. CV-08-653779 (Oct. 30, 2009), attached at Apx. 00074. Courts in several other states and territories have likewise declared noneconomic damage caps to be unconstitutional for due process reasons. *N. Broward Hosp. Dist. v. Kalitan*, 219 So.3d 49, 58-59 (Fla. 2017) (rejecting under rational relation review); *Balboni v. Ranger Am. of the V.I., Inc.*, 70 V.I. 1048, 1098-1103 (2019) (same).

⁷ The final judgment in *Woessner* was reversed on alternative grounds in *Woessner v. Toledo Hosp.*, 2016-Ohio-5764 (6th Dist.), without disturbing the constitutional due process analysis that is now pertinent to this dispute.

There is nothing particularly controversial about favorable constitutional rulings like these. And yet, in the few instances where a trial court rejects arguments like Paganini's, the typical decision rejects them without any detailed analysis or explanation. *E.g., Love v. Meadowbrook Healthcare, LLC*, Hamilton C.P. No. A2304456 (Aug. 29, 2025), *attached at Apx. 00081*. This Court should follow the far greater weight of authority permitting those suffering the most profound injuries as a result of medical malpractice to recover full noneconomic damages.

III. Arguments about whether Paganini's constitutional challenge was facial or as-applied were forfeited, and they are beyond the scope of this appeal.

There are three unavoidable problems with the Defendants' argument that Paganini's constitutional arguments were "really a facial attack" because he "challenges the statute's reduction of damages in all circumstances." *Defendants' Merit Brief*, p. 9. They are wrong for one, but Defendants also forfeited these arguments below, and this Court did not consider or accept a proposition of law embracing the line between facial and as-applied attacks on a law. These impediments cut to the heart of the appeal.

Starting with the proper as-applied challenge, the Eighth District reasonably agreed with Paganini and the trial court that his case was unique and did not represent a facial attack on R.C. 2323.43(A)(3). *Paganini*, 2025-Ohio-275, at ¶ 50 (8th Dist.). There is no dispute that Paganini is a permanently and substantially deformed 93-year-old man, who lost a bodily organ system. As he argued at every phase, "the statute requires him to forego 66.4% of the damages awarded to him by the jury in order to lower medical-malpractice insurance rates for the public's benefit." *Id.*; *see T.d. 126, Plaintiff's Caps Mtn.*, p. 1. And as a senior citizen, the statute has an "especially adverse effect" on him, as his "damages are disproportionately noneconomic due to lower claims for lost income."

T.d. 126, p. 8. Consequently, it is quite obviously wrong to argue that “Paganini never identified a particular factual context applicable to him as required.” *Defendants’ Merit Brief, p. 12.* Paganini does not seek to have the statute invalidated for anyone younger, less-seriously injured, or less-significantly burdened. While courts often avoid drawing bright lines in grey areas raising policy concerns, this is anything but a grey area. The Court can easily recognize that losing the greater bulk of recovery due to the specific facts of a case is extreme enough to set this case apart from other instances, where a smaller downward adjustment might not offend any constitutional provisions.

Courts often decline to draw a bright line in this way while nonetheless recognizing that a line has been crossed. For example, when ruling that there must be a meaningful limit on punitive damages under due process principles, the Supreme Court has “consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996); *TXO Prod. Corp. v. All. Resources Corp.*, 509 U.S. 443, 458 (1993). Adopting a basic rule of reasonableness under any given set of circumstances and referencing past cases holding that a ratio between punitive and economic damages of “not more than 10 to 1” had been acceptable, the Court determined that a line had been crossed where “the ratio is a breathtaking 500 to 1.” *Gore* at 582-583. In this same way, the Eighth District did nothing more than recognize a line would be crossed if 66.4% of Paganini’s recovery were denied to him. As the line *would have been* crossed, there was no need to pick a precise dollar amount where the constitutional limits might be violated. And that sets this case apart from others, where the math will be less egregious. Why would constitutional line-drawing suddenly

work any differently than it has for the defense bar when the plaintiffs' bar finally acquires relief in analogous ways?

Quite recently, the Tenth District Court of Appeals reached a similar result when assessing whether R.C. 2323.43(A)(3) was constitutionally valid, both facially and as applied to a discrete set of circumstances. *Lyon v. Riverside Methodist Hosp.*, 2025-Ohio-2991, ¶ 30-35 (10th Dist.). The facial challenge was rejected because the panel could “envision a scenario where the noneconomic damages are close to the \$500,000 cap such that a minimal reduction would be reasonable and not arbitrary to curtail the rising costs of healthcare to benefit the general public.” *Id.* at ¶ 30. But because the plaintiff in that dispute would suffer “a 57.4 percent reduction in damages” if the caps applied, the law was “unreasonable and arbitrary” in her particular case, especially when considering her “age and the severity of her injuries.” *Id.* at ¶ 33-34. The Eighth District was able to set this case apart from the flock in the same way, and it did not err in doing so.

Moreover, this dispute takes place in the present, not the world as it stood in 2003 when R.C. 2323.43(A)(3) was adopted. Paganini’s request to be relieved of the limits imposed by this law was properly decided based upon lessons learned from a legislatively mandated study. In that way, Paganini has not argued and does not assert that the statute could never apply in any other case. It is beyond the scope of this dispute whether the statute could be valid as to those injured by medical negligence before the 2019 Report, and it is conceivable that suits seeking recovery for such injuries are still winding their way through the lower courts. This may not have been the basis for the Eighth District’s ruling that Paganini lodged a facial challenge. *Paganini*, 2025-Ohio-275, at ¶ 50 (8th Dist.). But Ohio courts, including this one, are duty bound to affirm on any “alternative grounds” that may exist. *See State ex rel. Jones v. Hogan*, 2021-Ohio-3567, ¶ 8.

Historically, this Court “will not reverse a correct judgment” even if the lower court reached a proper decision for different reasons. *State ex rel. Neguse v. McIntosh*, 2020-Ohio-3533, ¶ 10; *State ex rel. Green v. Wetzel*, 2019-Ohio-4228, ¶ 6; *State ex rel. Evans v. Scioto Cnty. Common Pleas Court*, 2018-Ohio-4696, ¶ 5; *State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas*, 2010-Ohio-1808, ¶ 1. Paganini’s challenge was based upon new evidence obtained through legislative efforts, which cuts strongly against the economic findings the legislature made without the benefit of its own mandated study. As a result, there are temporal limits to Paganini’s constitutional arguments that distinguish too many earlier cases for this to be a true facial challenge.

Regardless, Defendants forfeited any argument about whether Paganini’s constitutional challenge was facial or as-applied by failing to make one to the trial court. *Trial Op.*, p. 3. They provided lots of authority about the differences between such challenges in the “Standard of Review” section of their memorandum, admitted that “the line between facial and as-applied challenges is often blurry,” and then wholly failed to take a position on which kind this case presented. *T.d. 136*, p. 11-13. They even conceded that a successful as-applied challenge to a law would “prevent its future application in a similar context,” undermining any argument that a constitutional ruling might facially invalidate a law merely by serving as precedent in many, but not all, other cases. *Id.*, p. 12; see *Defendants’ Merit Brief*, p. 13. In these ways, the trial court properly reflected that the Defendants did not “take a position on what kind of challenge this is.” *Trial Op.*, p. 3. The difference between a facial or as-applied challenge should therefore be “barred from further consideration” in this dispute. *E.g., Rue*, 2020-Ohio-6706, at ¶ 64.

Had there been a preserved issue regarding the kind of challenge presented, it is still conspicuous that Defendants never offered a related proposition of law. This is an

indication that they truly seek correction of a perceived error having nothing to do with the accepted proposition of law. That is no reason for review before this Court. If the law is so clear that a facial challenge attacks all applications of a statute while an as-applied challenge merely addresses “the specific plaintiff and particular circumstances of the litigation,” as Defendants argue, then there is nothing new for this Court to do but apply well-settled precedent. *See Defendants’ Merit Brief, p. 9-11.* And what utility will another rehashing of these threshold constitutional standards serve the state of Ohio, especially given the trial court’s faithful recognition and application of the existing precedents? *See Trial Op., p. 2-3.* Moreover, if there was a procedural error in application of the distinction between as-applied and facial constitutional challenges, that would be a reason to avoid the substantive constitutional issue contemplated by the only proposition of law that the Court did accept. This ill-conceived appeal truly does not belong before this Court.

IV. The medical establishment’s flawed amicus effort was highly coordinated, and yet in another more prominent way, wildly uncoordinated.

All of the usual amici have appeared in support of the community of medical tortfeasors. But whatever plans they had for a well-timed attack on the decision below, these interested parties collectively tripped over themselves right out of the starting gate.

Start with the direct tension between the arguments of amici⁸ over the text of Article I, Section 16 of the Ohio Constitution. Retconning it, Ohio Attorney General Dave Yost argued as amicus curiae that the Ohio’s Due Course of Law Provision has never carried any substantive protection against irrational and arbitrary statutes because it

⁸ The amici also argue against the Defendants, who have conceded that for “a due process challenge, in the absence of an infringement on a fundamental right, Ohio courts proceed with rational basis review.” *Defendants’ Merit Brief, p. 14.* Their tepid reaction, offering to “not object to their arguments,” does not minimize the concession. *Id., p. 15, fn. 1.*

strictly enshrined the protections of Clause 40 of the Magna Carta. *AG's Brief*, p. 6-9. Calling on notable common-law scholars Coke and Blackstone, the Attorney General even argued: "When Clause 40's language showed up in Ohio's first Constitution, it carried along these interpretations from legal scholars that all early-nineteenth century lawyers would have been familiar with." *Id.*, p. 8. But as amicus Ohio Association of Civil Trial Attorneys capably explained, Clause 40's language did not actually 'show up' in Ohio's Constitution. *Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys filed Aug. 12, 2025 ("OACTA's Brief")*, p. 10, fn. 2. In reality, Lord Edward Coke "reinterpreted this chapter" to mean something far more substantial. *Id.* In the end, it was Lord Coke's words and theories, not the words of King John at Runnymede, that made it into Ohio's Constitution, in 1802, 1851, and later revisions. *Id.*, p. 7, fn. 1; see *AG's Brief*, p. 6-9.

As the amici forcefully stress, "pedigree matters" for the text of Ohio's fundamental charter. *OACTA's Brief*, p. 10. Yet none of them accept that Ohio turned Lord Coke's understanding of what due course of law meant into fundamental law, not the earlier texts he bravely expanded upon. The Attorney General almost gets there, interjaculating that "all early-nineteenth century lawyers would have been familiar with" the works of Coke and Blackstone. *AG's Brief*, p. 8. That is perhaps the best reason that the "framers of Ohio's second constitution" did not need to discuss or expound upon the substantive protections they retained in Ohio's Due Course of Law Provision. *Id.*, p. 16; see *State ex rel. Diwald v. Bur. of Sentence Computation*, 2024-Ohio-5567, ¶ 21 (DeWine, J., joined by Deters, J., concurring in judgment only.) ("the final-order requirement is silently assumed throughout the debates of the 1912 Constitutional Convention" because it was the key principal "that drove the 1912 judicial amendments"). They would have been self-evident at the time, and that is ample reason to doubt the Attorney General's position.

Lord Coke was well-known as an early activist in support of the judiciary's authority to adjudge the rationality of legislation: "[W]hen an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void." *Bonham v. College of Physicians*, 77 Eng. Rep. 638 (C.P. 1610) (Coke, C.J.). Just as some on this Court understood as early as 1807, Lord Coke thought the phrase 'due course of law' imparted broad powers of judicial review over the conduct of other governmental actors, including to prevent "oppression of the subjects" in general. Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 Boston Coll.L.Rev. 43, 81-82 (1997), quoting *Bagg's Case*, 77 Eng. Rep. 1271, 1277-78 (K.B. 1615); compare *Rutherford* (Tod, J., concurring) in *Pollack*, Part II, at 86-87. This "oppressive" effect of arbitrary and irrational laws has long justified "judicial review" under due course of law principles in this state, fully consistent with Coke. *E.g.*, *Stanton v. State Tax Comm.*, 114 Ohio St. 658, 669-672 (1926); *State Bd. of Health v. City of Greenville*, 86 Ohio St. 1, 21-24 (1912); *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 544-546 (1941).

Frequently relying on the due course of law principle, Lord Coke aimed his effort at keeping the law rational and reasonable:

It cannot be denied, in the end, that Coke acted in the belief that courts could strike down statutes which offended the common law— that is, which the judges in their wisdom found unreasonable. Nor can it be denied that Coke understood fully what he was doing. He wrote out the relevant passage from *Bonham's Case*, in two different manuscripts, in his own hand—a fact that suggests he understood what his words might unleash." (Emphasis added.)

Boyer at 85. And so has this Court, for a very long time. In 1882, the Court deployed Ohio's Due Course of Law Provision as authority when ruling that "it is not within the power of

the legislature to abridge the period within which an existing right may be so asserted as that there shall not remain a reasonable time within which an action may be commenced.” (Emphasis added.) *Lafferty v. Shinn*, 38 Ohio St. 46, 48 (1882). The Court simultaneously recognized a previous case in which it honored the legislature’s power to adopt limitations periods. *Id.* Just as it had been for Lord Coke, due course of law was about whether government power had been deployed rationally and reasonably, not just whether it had been deployed at all. *Accord Direct Plumbing Supply Co.*, 138 Ohio St. at 546 (“[T]he final decision upon these questions of reasonableness and degree of interference-and the final setting of the balance between public welfare and private right-must in any system of constitutional government be the function of the judicial arm of government.”).

These principles hold true to the present era. While the Defendants and their amici have not compiled a list of authorities this Court would have to overrule to hold otherwise, it would at least include rejecting the dissenting opinion in *Brandt*, 2022-Ohio-4525. There, the unanimous Court could all agree that Ohio’s particular form of substantive rational relation review falls within the judicial powers afforded by Article I, Section 16 of the Ohio Constitution. *Id.* at ¶ 28, 35-36; *Id.* at ¶ 55-58 (Kennedy, Fischer, and DeWine, JJ., dissenting.). With such recent clarity in the law, a change is unwarranted.

In these ways, the substantive protections of Ohio’s Due Course of Law Provision are at least on equal footing with the often-applied presumption of constitutionality. Soon after this Court came into existence and first asserted the power of judicial review, it decided to adopt a presumption that statutory law and fundamental law were consistent with one another. *Brandt*, 2022-Ohio-4525, at ¶ 82-83 (Fischer, J., dissenting.). As Ohio’s people amended the Constitution again and again since, they never asserted that this Court should apply anything but a presumption of constitutionality. *See Id.* at ¶ 84-88.

And yet, this Court could have been required by constitutional amendment to apply the exact opposite presumption or no presumption at all. Since the people did nothing of the sort, the Court properly continued on its path, uninterrupted by the citizenry, consistent with precedent. *Id.*

Although the original public meaning of constitutional text certainly matters, so does this kind of interconstitutional acquiescence. Mazzone & Tecimer, *Interconstitutionalism*, 132 Yale L.J. 326, 378-389 (2022). When subsequent amendments to a state constitution retain language that has been given a particular meaning by the judiciary without rejecting that interpretation, the judicial meaning is effectively incorporated. *Id.*; see *Diewald*, 2024-Ohio-5567, at ¶ 17-21 (DeWine, J., joined by Deters, J., concurring in judgment only.) (“[T]he final-order requirement persisted through the 1912 amendments to the Ohio Constitution. There is simply no evidence that those amendments departed from the longstanding final-order requirement.”).

For all of the separation-of-powers arguments lodged by the various amici, none of them pay any lip service to Ohio’s first and primary branch of government: the People. See *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135 (2000). Over centuries now, Ohio’s citizens have amended their fundamental charter time and time again. *AG’s Brief*, p. 16-17. They have never *once* pushed back on the judicial power of rational relation review that this Court recognized in Article I, Section 16 of the Ohio Constitution. After the *Lochner* Era closed following *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937), Ohio *still* did not take action through a constitutional amendment to reject this Court’s views about the judicial authority to invalidate arbitrary and irrational laws. And this state’s population can surely be credited with an awareness of that watershed change, since it was a rejection of legal principles and political views espoused by Cincinnati’s own,

Chief Justice and former President of the United States, William Howard Taft. The Attorney General can argue only that this Court should not “continue linking its substantive-due-process cases to the discredited *Lochner* line of cases” by ignoring the greater historical context in years following “the thirteenth century.” *AG’s Brief*, p. 6, 26.

In the statutory context, this Court would similarly presume from legislative silence that its decisions interpreting the law had been correct all along. *Bulkley v. Stephens*, 29 Ohio St. 620, 622 (1876). When this Court is wrong about the text of a statute, “a response from the legislature” can be expected. *E.g.*, *Shay v. Shay*, 2007-Ohio-1384, ¶ 25. Why would this Court give any less significance to the People’s silence in the face of innumerable judicial decisions exerting substantive rational relation review under Ohio’s Due Course of Law Provision? Even now, Ohio’s citizens and its General Assembly share the authority to trigger various processes to amend the Constitution. *Ohio Const.*, art. XVI, § 1-3; *R.C. 3519.01*. In fact, Ohio recently amended Article I, § 9 of its Constitution through a legislatively initiated ballot issue in reaction to the constitutional ruling in *DuBose*, 2022-Ohio-8, showing that this political process should be trusted to operate without this Court’s intervention. *2022 Sub.H.J.R. No. 2; 2022 H.B. No. 607*. With these well-established and often-utilized powers, which could be used to reject what this Court has said about Article I, Section 16 of the Ohio Constitution, why is this Court the first stop on the amici’s quest instead of the last? Judicial restraint demands better. If the General Assembly dislikes the existing balance of powers, it can ask Ohio for change.

After concluding its dark séance with the attendees at Runnymede, the Attorney General makes too much of the framers’ decision to include a “due course of law” provision instead of a “due process” clause. *AG’s Brief*, p. 9-12. The true explanation for the framers’ choice is much simpler, and it does not involve reference to the annals of the

Magna Carta. Instead, the “best explanation” for the framers’ choice to include a “due course of law” provision instead of a “due process” clause was that “‘due course of law’ was a well-established and familiar provision, and that ‘due process of law’ was not.” See Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, at 120 (2d ed. 2022). When Ohio drafted its first constitution, no other state constitution included a “due process” clause. *Id.* It overreads history to suggest that the decision to mirror those other states’ constitutions reflects a premeditated choice to protect procedure but discard substantive judicial review for rationality. And in any case, this Court rejected the idea that the framers were worried about guaranteeing process alone. The Due Course of Law provision has always been “much broader than the due process clause of the Fourteenth Federal Amendment” precisely because “any arbitrary, oppressive, or unjust act” by the government “gives ground for judicial review.” *Stanton*, 114 Ohio St. at 670-671.

This Court should reject the haphazard effort of amici, which it should be noted again, started here. Any bigger constitutional arguments like those made by amici were likewise forfeited in the trial court, where the Defendants failed to make them. But perhaps most importantly, the conservative approach would be to more carefully wait for those properly empowered to change Ohio’s constitution to do what the amici ask. If this Court has been wrong for decades and centuries about what due course of law has meant, the legislature and citizens could have pushed back. They still could. But they have not. This Court should wait to see whether the People chart out “a better path,” *AG’s Brief*, p. 2, instead of disrupting the political process through abrupt judicial change. Anything else would be to correct perceived mistakes that were made so long ago they now form the bedrock of Ohio’s constitutional story. A sequel that changes the whole story will interfere with the political process, not correct it.

V. This appeal should be dismissed as improvidently allowed.

Finally, this Court should seriously consider rejecting this appeal for many of the reasons expressed above. It would be a seriously impactful event for this Court to turn on a dime after centuries of consistent application of constitutional precedent. But to do so when such arguments were never made in the trial court and the appealing party has asked for error correction at most would be outrageous. The matter should be dismissed as improvidently accepted.

CONCLUSION

For all the foregoing reasons, this Court should dismiss this appeal as improvidently accepted or, in the alternative, affirm the sound decision and judgment of the Eighth District Court of Appeals. Costs should be borne by Defendant-Appellants Dr. Louis and The Cataract Eye Center of Cleveland, Inc.

Respectfully submitted,

/s/ Todd Petersen

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FLOWERS & GRUBE

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The foregoing **Merit Brief** was served by e-mail on October 1, 2025, upon:

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COURT OF COMMON PLEAS
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HON. WENDE C. CROSS
THE CLERK SHALL SERVE NOTICE
TO PARTIES PURSUANT TO CIVIL
RULE 58 WHICH SHALL BE TAXED
AS COSTS HEREIN.

THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION

TYLER BRUNS,

Plaintiff,

v.

BEACON ORTHOPAEDICS &
SPORTS MEDICINE, LTD, et al.

Defendants.

: Case No. A 2300496
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: JUDGE WENDE C. CROSS
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This matter came on for a jury trial on May 19, 2025 and concluded on June 9, 2025. Appearing on behalf of Plaintiff was Attorney Daniel Moore and Attorney Kelly Thy. Representing Defendant Mohab Foad, M.D. and the Beacon Defendants¹ were Attorney David Lockemeyer and Attorney Bill Paliobeis. Attorney Michael Lyon represented Defendants Sai Gundavarpu and Seven Hills Anesthesia, LLC.

The Plaintiff presented evidence and rested their case. The Defendants presented evidence and rested their case.

After deliberation, the jury responded to interrogatories and returned verdicts finding as follows:

- 1) Judgment in favor of Plaintiff Tyler Bruns against Defendants Beacon Orthopaedics Surgery Center, LLC and Beacon Orthopaedics & Sports Medicine, Ltd.;
- 2) Judgment in favor of Defendant Mohad Foad, M.D. against Plaintiff Tyler Bruns;
- 3) Judgment in favor of Defendants Sai Gundavarpu, M.D. and Seven Hills Anesthesia against Plaintiff Tyler Bruns; and

¹ The Beacon Defendants consist of Beacon Orthopaedics Sports Medicine, Ltd. and Beacon Orthopaedics Surgery Center, LLC.



4) The jury awarded damages to Plaintiff Tyler Bruns as follows:

- Noneconomic damages: \$3,000,000.00
- Economic damages: \$661,999.08

Defendants Beacon Orthopaedics & Sports Medicine, Ltd., Beacon Surgery Center, LLC, and Mohad Foad, M.D. moved this Court to reduce the noneconomic damages award to Plaintiff to \$500,000 pursuant to R.C. § 2323.43(A)(3).

Plaintiff argues that Ohio's cap statute under R.C. § 2323.43(A)(3) is unconstitutional as applied to Plaintiff Tyler Bruns, and that the \$3,000,000 noneconomic damages award should not be reduced.

After a thorough review of R.C. § 2323.43(A)(3), this Court finds R.C. § 2323.43(A)(3) is unconstitutional on due process grounds as applied to Plaintiff, Tyler Bruns. Accordingly, the Court **OVERRULES** Defendants' Motion to Enter Judgment in Conformity with R.C. § 2323.43.

JURISDICTION

Before the Court can review the merits of Plaintiff's claim that R.C. § 2323.43(A)(3) is unconstitutional as applied to him, the Court must address Defendants' Motion to Dismiss Plaintiff's Constitutional Claim.

Defendants argue this Court lacks jurisdiction to conduct a constitutional analysis. Defendants state that R.C. § 2721.12 requires Plaintiff to indicate in his complaint his intention to challenge R.C. § 2323.43(A)(3)'s constitutionality and that Plaintiff is required to send a copy of the complaint to the Ohio Attorney General.

R.C. § 2721.12 states:

“...when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding... and, if any statute...is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard.”

Plaintiff's complaint for medical negligence does not contain a count asking for declaratory judgment. The Supreme Court in 2002 made clear that R.C. § 2721.12 only applies to declaratory judgment actions.² Therefore, Plaintiff did state his intention to challenge R.C. § 2323.43 in his complaint, and Plaintiff was not required to serve his complaint on the attorney general. Accordingly, this Court finds it has jurisdiction to rule on Plaintiff's constitutional claims.

STANDARD OF REVIEW AND CONSTITUTIONAL ANALYSIS

There are two types of constitutional analysis to a statute: (1) facial – which seeks to invalidate a statute in all circumstances; and (2) as-applied – which addresses whether a statute is unconstitutional in certain unique circumstances.³ “The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative.”⁴ Clearly, Plaintiff has indicated that he is challenging R.C. § 2323.43(A)(3) as unconstitutional as applied to him, and expressly disclaims any facial challenge to the statute. He seeks to establish only the limits of noneconomic damages are unconstitutional in this instance under these limited and specific circumstances.

Here, Plaintiff's argument is specific to his unusual circumstance, namely the statute requires an 83.33% reduction of the noneconomic recovery and 68.27% of the total recovery.⁵ Plaintiff now argues that the cap on noneconomic damages imposed on Tyler Bruns, a severely injured person, is arbitrary and not reasonably calculated to obtain the legislature's objective of reducing medical malpractice premiums.⁶

² *Cleveland Bar Ass'n v. Picklo*, 2002-Ohio-3995, ¶ 6-7.

³ *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 26; *Simpkins v. Grace Brethren Church of Del.*, 2016-Ohio-8118, ¶ 20.

⁴ *Yajnik v. Akron Dep't of Health, Hous. Div.*, 2004-Ohio-357, ¶ 14, citing *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011, (1992) (Scalia, J., dissenting).

⁵ See Plaintiff's Brief Addressing His Objection to Application of the Unconstitutional Non-Economic Damages Cap at p.7

⁶ See *Id.*

The Court, in using the due process analysis, applies a rational-basis test, unless the constitutional challenge restricts a fundamental right.⁷ The Court finds that no fundamental right is being challenged and thus the rational-basis test applies. In applying the rational-basis test, the Court must determine if R.C. § 2323.43(A)(3), (1) bears a real and substantial relation to the public health, safety, morals or general welfare of the public and (2) if it is not unreasonable or arbitrary.⁸ In this circumstance, for reasons fully set forth in Plaintiff's Brief, the Court finds that the statute is unreasonable and arbitrary as it caps noneconomic damages for a small percentage of the population who are permanently and severely injured.

JUDGMENT

Therefore, this Court finds that the caps set forth in R.C. § 2323.43(A)(3) are unconstitutional on due process grounds. Accordingly, Defendants' Motion to Enter Judgment in Conformity with R.C. § 2323.43 is OVERRULED.

All court costs are taxed to Defendants Beacon Orthopaedics Surgery Center, LLC and Beacon Orthopaedics & Sports Medicine, Ltd.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Judgment be entered in favor of Plaintiff Tyler Bruns against Defendants Beacon Orthopaedics Surgery Center, LLC and Beacon Orthopaedics & Sports Medicine, Ltd. in the amount of \$3,661,999.08.

IT IS FURTHER ORDERED that Judgment be entered in favor of Defendant Mohad Foad, M.D. against Plaintiff Tyler Bruns.

IT IS FURTHER ORDERED that Judgment be entered in favor of Defendants Sai Gundavarpu, M.D. and Seven Hills Anesthesia against Plaintiff Tyler Bruns.

⁷ *Simpkins v. Grace Brethren Church of Del.*, 2016-Ohio-8118, ¶ 35.

⁸ *Id.* at ¶ 36, citing *Mominee v. Scherbarth*, 28 Ohio St.3d 270,274 (1986).

This Entry is a final and appealable judgment of this Court pursuant to Civil Rule 54.

There is no just reason for delay.

IT IS SO ORDERED.

Date: 4/2/2025


JUDGE WENDE C. CROSS

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

Michelle D. Haggins, Ind. And Guardian :
of Lamontee J.C. Haggins, Person Only,
et al., :

Plaintiffs, : Case No. 19CV1804

v. :

Prachi S. Biyani, M.D., et al., : Judge Serrott

Defendants. :

**DECISION AND ORDER GRANTING PLAINTIFFS’ MOTION FOR PARTIAL
SUMMARY JUDGMENT**

I. Introduction

This case is before the Court on a medical negligence claim where Lamontee J.C. Haggins (“Haggins”) suffered catastrophic injuries from alleged medical negligence by Defendants Dr. Prachi S. Biyani and Ohio Gastroenterology Group, Inc. (“Defendants”). Due to his medical incompetence resulting from these injuries, Haggins is represented by Plaintiffs Michelle D. Haggins and Holley L. Fannin (“Plaintiffs”) in this action. Plaintiffs have established Haggins’ condition as a “permanent physical functional injury” as defined in R.C. 2323.43(A)(3)(b), which represents a “catastrophic injury.” Defendants have not disputed this claim.

The issue before the Court is whether the medical negligence non-economic damages cap in R.C. 2323.43 with regards to a catastrophic injury is constitutional. Plaintiffs claim the non-economic damages cap in R.C. 2323.43 is unconstitutional under Ohio law because it violates Plaintiffs’ rights regarding 1) due process of law; 2)

equal protection; and 3) right to a trial by jury. The Defendants oppose the motion and the matter is fully briefed and ready for decision.

After review, the Court finds the non-economic damages cap in R.C. 2323.43 as applied to medical claims is unconstitutional because it violates due process of law and equal protection rights, but does not find it unconstitutional as applied to the right to a trial by jury. Ultimately, because there is no dispute as to any material fact and Plaintiffs are entitled to judgment as a matter of law, the Court **GRANTS** Plaintiffs’ Motion for Partial Summary Judgment.

II. Standard of Review

“Civ. R. 56(C) provides that before summary judgment may be granted, it must be determined that:

- (1) No genuine issue as to any material fact remains to be litigated;
- (2) the moving party is entitled to judgment as a matter of law; and
- (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.”

Davis v. Loopco Industries, Inc., 66 Ohio St. 3d 64, 65-66 (internal citations omitted).

III. Law and Analysis

- a. Brief Statutory and Judicial Background of Non-Economic Damages Caps as Applied to Medical 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. No. 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 as 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” because 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.

While there is no current appellate decision, several lower courts have ruled on the constitutionality of the non-economic damages cap in R.C. 2323.43, which provides guidance to this Court. Of most relevance, a decision rendered by Judge Schneider at Franklin County Common Pleas Court in 2018 deemed R.C. 2323.43 unconstitutional on both due process and equal protection grounds. *See Metts v. Nationwide Children’s Hospital*, 14CV2543, Decision, December 11, 2018 (J. Schneider). Also in the Franklin County Common Pleas Court, in 2008, Judge Hogan ruled R.C. 2323.43 was unconstitutional on due process grounds. *See Mead v. Wilt*, 05CV864, Decision, March

4, 2008 (J. Hogan). Further, decisions from Judge Duhart at Lucas County Common Pleas Court and Judge Gallagher at Summit County Common Pleas Court have also ruled R.C. 2323.43 unconstitutional on due process grounds. *See Woessner v. The Toledo Hospital*, CIO201201614, Opinion and Judgment Entry, May 30, 2014 (J. Duhart); *Wells v. Call*, Judgment Entry, CV2008096782, November 23, 2010 (J. Gallagher).

Notably, while all these lower court decisions ruled the non-economic damages cap in R.C. 2323.43 was unconstitutional on due process grounds, none of the decisions ruled the statute was unconstitutional as to the right to a jury trial. With all this in mind, this Court applies the law to the facts of the current case.

b. The Non-Economic Damages Cap in R.C. 2323.43 Violates Plaintiffs' Due Process Rights Under the Ohio Constitution

Ohio's equivalent of federal due process rights under the U.S. constitution is codified in Oh. Const. Art. I, § 16, which provides "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *See Arbino*, 116 Ohio St. 3d at 478. "When reviewing a statute on due-process grounds" Ohio uses the "rational-basis test." *Id.* (internal citations omitted). A statute will pass the rational basis test "if it [1] bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." *Id.* (internal citations omitted).

Here, the Court finds the non-economic damages cap as applied to medical claims in R.C. 2323.43 is unconstitutional on due process grounds. Rather than “reinvent the wheel” or simply reproduce the opinion herein, this Court incorporates by reference Judge Schneider’s excellent decision and analysis in *Metts*. This decision is attached hereto as an exhibit and shall constitute this Court’s legal analysis. The Court also finds the decisions reached by Judge Hogan in *Mead*, Judge Duhart in *Woessner*, and Judge Gallagher in *Wells* persuasive, but finds Judge Schneider’s opinion the most compelling. Further, this Court finds its decision in this case follows the overarching principles laid forth in *Morris* and *Sheward*.

The Court also addresses Defendants’ argument, which cites to this Court’s 2016 decision in *Thompson v. Knobloch*, that Judge Serrott acknowledged challenges to the constitutionality of R.C. 2323.43 “for all intents and purposes have already been decided and rejected by the Ohio Supreme Court.”” *See Thompson v. Knobloch*, 2016 Ohio Misc. LEXIS 6364, *4. The Court finds Defendants have taken this citation out of context and is distinguishable from the case at bar.

The *Thompson* case addressed whether the plaintiff had “life impairing psychological injuries.” *Id.* This Court ruled there was “no testimony which might warrant a finding the statute was unconstitutional as applied to this case (i.e. permanent life functionally impairing psychological injuries).” *Thompson*, 2016 Ohio Misc. LEXIS 6364, *5. In the current case, there are credible allegations that Haggins’ condition is a “permanent physical functional injury,” which is exactly the type of situation this Court deemed would be worthy of analyzing under constitutional grounds. *See id.* Indeed, as stated in *Thompson*, “[t]his Court might agree that the statute as applied to this Plaintiff

[Thompson] was unconstitutional if she suffered permanent life impairing psychological injuries. This Court would be of the opinion that permanent life impairing psychological injuries should be treated the same as permanent life impairing physical injuries.” *Id.* (emphasis in original). As a result, as applied to this Court’s due process analysis here, as well as equal protection, the Court finds Defendants’ argument unavailing.

Ultimately, like Judge Schneider, the Court finds the statute arbitrary under the rational basis test, thereby deeming R.C. 2323.43 unconstitutional under due process as applied to non-economic damages caps in medical claims. 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.

c. The Non-Economic Damages Cap in R.C. 2323.43 Violates Plaintiffs’ Equal Protection Rights Under the Ohio Constitution

Ohio’s equivalent of federal equal protection rights under the U.S. constitution is codified in Oh. Const. Art. I, § 2, which provides “[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit.” When interpreting this provision, the Ohio Supreme Court ruled “[t]he prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.” *Conley v. Shearer*, 64 Ohio St. 3d 284, 288-289 (internal citations omitted). Like the

aforementioned due process analysis, the rational basis test also applies to the equal protection analysis in this situation. *See Arbino*, 116 Ohio St. 3d at 481.

Here, the Court finds the non-economic damages cap as applied to medical claims in R.C. 2323.43 is unconstitutional on equal protection grounds. Again, this Court adopts Judge Schneider’s analysis in its entirety as set forth in *Metts*. The cap is not rational under the equal protection clause because it does not treat similarly situated plaintiffs the same.

d. The Non-Economic Damages Cap in R.C. 2323.43 Does Not Violate Plaintiffs’ Right to a Jury Trial Under the Ohio Constitution

Ohio’s equivalent of the federal right to a jury trial under the U.S. constitution is codified in Oh. Const. Art. I, § 5, which states “[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.” Under *Arbino*, a challenge to the right to a jury trial will only “succeed only if the statute actually intrudes upon the jury’s fact-finding function.” *Arbino*, 116 Ohio St. 3d at 486. The Ohio Supreme Court held “post-*Sheward* precedent conclusively establishes that regulation of punitive damages is discretionary and that states may regulate and limit them as a matter of law without violating the right to a trial by jury.” *Id.* at 487.

Here, the Court finds the non-economic damages cap as applied to medical claims in R.C. 2323.43 is constitutional as applied to Plaintiffs’ right to a trial by jury. The Court adopts Judge Schneider’s analysis in *Metts* on this issue. As Judge Schneider mentioned, the Ohio Supreme Court in *Arbino* found that the state of Ohio can limit

non-economic damages like punitive damages without violating a plaintiff's right to a trial by jury.

IV. Conclusion

For the aforementioned reasons, the 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 claims. However, the statute does not violate Plaintiffs' right to a jury trial. The Court finds there is no genuine issue as to any material fact that remains to be litigated and reasonable minds can come to one conclusion, which is that Plaintiffs are entitled to judgment as a matter of law on this issue. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Partial Summary Judgment.

IT IS SO ORDERED.

**Electronically Signed By:
JUDGE MARK A. SERROTT**

Franklin County Court of Common Pleas

Date: 07-08-2022
Case Title: LAMONTEE HAGGINS ET AL -VS- MOUNT CARMEL HEALTH SYSTEM ET AL
Case Number: 19CV001804
Type: DECISION

It Is So Ordered.

A handwritten signature in black ink, appearing to read "Mark A. Serrott", is written over a circular, textured electronic signature stamp.

/s/ Judge Mark A. Serrott

Court Disposition

Case Number: 19CV001804

Case Style: LAMONTEE HAGGINS ET AL -VS- MOUNT CARMEL
HEALTH SYSTEM ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 19CV0018042022-02-2599980000
Document Title: 02-25-2022-MOTION FOR PARTIAL SUMMARY
JUDGMENT - PLAINTIFF: LAMONTEE HAGGINS
Disposition: MOTION GRANTED

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

MARK DANIEL METTS II PRNT, et al., :
Plaintiffs, :
v. : Case No. 14CVA-03-2543
NATIONWIDE CHILDRENS : Judge SCHNEIDER
HOSPITAL, et al., :
Defendants. :

**ENTRY AND DECISION GRANTING PLAINTIFFS’ PARTIAL SUMMARY JUDGMENT
MOTION, FILED JULY 29, 2016; AND**

**DENYING DEFENDANT’S MOTION TO ENFORCE STATUTORY CAP ON
PLAINTIFFS’ NON-ECONOMIC DAMAGES, FILED OCTOBER 24, 2018**

Schneider, J.

The matter is before the court on the motion of Plaintiffs for partial summary judgment, filed July 29, 2016, on the issue of the unconstitutionality of Ohio Revised Code §2323.43(A)(3) as applied to the underlying matter, and the motion of Defendant Athens Medical Lab, Inc., (hereinafter “AML”) to enforce R.C. §2323.43, filed October 24, 2018. After reviewing all documentation and relevant law, the Court finds the underlying case is not a medical claim and, therefore, is not subject to the limitations of R.C. §2323.43. Yet, even if the case contained medical claims, the Court finds R.C. §2323.43 violates the Ohio Constitution on the basis of Due Process and Equal Protection. Accordingly, the Court GRANTS Plaintiffs’ motion for partial summary judgment, and DENIES Defendant AML’s motion to enforce statutory cap on Plaintiffs’ non-economic damages.

I. Background

In 2013, Bradley Metts suffered a severe brain injury, which Plaintiffs alleged was due to delayed diagnosis and treatment of an ear infection. Plaintiffs' Complaint, ¶¶14-15. This severe brain injury has caused severe and permanent injuries including "muscle atrophy, and immobility, impaired cognition, and incontinence[.]" *Id.* at ¶15. Plaintiffs filed suit against Defendants, Bradley's former health care providers, in March 2014. In July 2016, Plaintiffs moved for summary judgment on the matter of the constitutionality and applicability of the damages cap put forth under R.C. §2323.43(A)(3). As the matter was not ripe until damages were granted in favor of Plaintiff over the \$500,000 limitation placed by R.C. §2323.43(A)(3), the Court withheld its ruling. In September 2018, the case came before the Court for trial. The jury found in favor of the Plaintiffs, awarding \$20 million in non-economic damages. The Court finds Plaintiffs' motion for summary judgment is now ripe. Additionally, Defendant AML moves to enforce R.C. §2323.43(A)(3) and reduce Plaintiffs' non-economic damages.

II. Summary Judgment Standard

Under Civ.R. 56(C), summary judgment is appropriate when the moving party is entitled to judgment as a matter of law because there is no dispute of material fact. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). The party moving for summary judgment must inform the trial court of the basis for the motion and point to parts of the record that demonstrate the absence of a genuine issue of material fact, *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93 (1996), and it must do so in the manner required by Civ.R. 56(C). *Castrataro v. Urban*, 10th Dist. No. 03AP-128, 2003-Ohio-4705, ¶ 14. Once the moving party has met this burden, the non-moving party's

reciprocal burden to point to parts of the record demonstrating an issue of material fact is triggered. *Dresher* at 293. Additionally, “[s]ummary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party.” *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 358-59 (1992).

III. Discussion

The parties raise three issues regarding if the Court should enforce a reduction of non-economic damages, pursuant to R.C. §2323.43. Under R.C. §2323.43(A)(3):

In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, all of the following apply: . . . (3) In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, all of the following apply:

- (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.

First, Plaintiffs assert Defendant cannot utilize the statute as a defense, because such a limitation was not plead in the Defendant’s answer. Next, Plaintiffs argue the underlying claim is not a medical claim and is not subject to R.C. §2323.43. Finally, Plaintiffs assert R.C. §2323.43 is facially unconstitutional.

A. Waiver of Defense

In their motion for summary judgment, Plaintiffs asserted Defendant AML waived its defense of set-off and statutory damage limitation pursuant to R.C. §2323.43, as Defendant AML did not include this defense in its original pleading. Revised Code §2323.43 states, “[T]he court shall enter a judgment in favor of the plaintiff for compensatory damages for noneconomic loss. In no event shall a judgment for

compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in divisions (A)(2) and (3) of this section.” Under the statute, the limitation is automatic. No language is included requiring motion of the parties or some other action to enforce the statute. The Court finds, if R.C. §2323.43 is applicable, Defendant AML’s failure to plead the limitation as a defense is not a waiver, as the Court is bound by statute to reduce non-economic damages.

A. Medical Claim

In response to Defendant’s motion to enforce R.C. §2323.43, Plaintiffs raise the issue that their claims against Defendant AML do not fulfill the requirement that the action is “a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property[.]” R.C. §2323.43. Defendant AML asserts the history of the case bars the Court from finding the claims adjudicated at trial are anything but medical claims. Defendant supports this by pointing to Plaintiffs’ complaint, amended complaint, and second amended complaint; Plaintiffs’ motion for summary judgment filed in 2016; Plaintiffs’ proposed jury instructions; and the final set of jury instructions approved and read by the Court.

When the matter was originally filed, Plaintiffs raised medical claims within their complaint, seeking recovery for injuries from Nationwide Children’s Hospital, Staci L. James, CNP, University Medical Associates, Inc., Dr. Amy Zidron, DO, and Defendant AML. Plaintiff’s Complaint.

Revised Code §2305.113 defines a medical claim as:

[A]ny claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical

therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person.

Medical claims clearly existed when Plaintiffs filed their complaint, as claims were pending against physicians, nurses, and a hospital arising out of the medical diagnosis, care, or treatment of Plaintiff Bradley Metts. Yet, four years later, the physicians, nurses, and hospital all settled, leaving only Defendant AML, a medical laboratory, at trial.

Defendant is correct that Plaintiffs' various complaints assert medical claims against the Defendants. However, a case is determined not by the form in which it is plead but by "the true nature or subject matter of the acts giving rise to that claim[.]" *Brown v. Holiday Inn Express & Suites*, 10th Dist. Franklin No. 17AP-477, 2018-Ohio-3281, ¶ 9 (citing *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 536 (1994); *Love v. Port Clinton*, 37 Ohio St.3d 98, 99 (1988)). Additionally, Plaintiffs' summary judgment motion and proposed instructions have no bearing on the stature of the case. Finally, the Court has reviewed the final jury instructions and cannot find any evidence posturing the case as a medical malpractice matter. The jury instructions are neutral on the medical nature of the case. Accordingly, the Court must look to the statutory definition of "medical claim" to determine whether the underlying matter against Defendant AML is medical or general negligence, subject to the restrictions of R.C. §2323.43.

The Supreme Court of Ohio has held, "The term 'medical claim' as defined in R.C. 2305.113(E)(3) has two components that the statute states in the conjunctive: (1) the claim is asserted against one or more of the specifically enumerated medical providers and (2) the claim arises out of medical diagnosis, care, or treatment." *Estate of Stevic v. Bio-Medical in re Ohio, Inc.*, 121 Ohio St.3d 488, 490 (2009). The medical providers listed in

the statute are:

[P]hysician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic[.]

R.C. §2305.113(E)(3). A medical lab is not a physician, podiatrist, hospital, home, or residential facility, nor is it a nurse, physical therapist, physician assistant, or emergency medical technician. This leaves the category of agent of a physician, podiatrist, hospital, home, or residential facility the only possibility a medical lab could fulfill within the statute. The Tenth District has held, “an agency relationship ‘is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf *and subject to his control*, and consent by the other so to act.” *Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 301 (10th Dist.1999) (emphasis added). Although Defendant AML is instructed by physicians, nurses, and hospitals to process labs, Defendant AML is not an agent as it is not subject to the control of the physician, nurse, or hospital. Therefore, Defendant AML was not an agent of the other Defendants when processing Plaintiff Bradley Metts’ labs.

Based on the above, the Court finds the underlying action against Defendant AML is not a medical claim, as it does not fulfill the first required component of R.C. §2305.113(E)(3). Therefore, the limitations on non-economic damages under R.C. §4343.23 do not apply.

B. Constitutionality of R.C. §2323.43

Although the Court has held the underlying case is not a medical claim and, therefore, is not subject to the limitations of R.C. §2323.43, the Court feels it is prudent to

review the constitutionality of the statute, in the event a higher court determines the underlying matter is a medical claim.

In their motion for summary judgment, Plaintiffs compare R.C. §2323.43 to a similarly situated statute, R.C. §2315.18. Both statutes place limitations on non-economic damages and distinguish the amount of damages recoverable by plaintiffs based on the type of injury sustained. Injuries that are a permanent and substantial physical deformity, the loss of use of a limb, or loss of a bodily organ system; or a permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities are determined to be “catastrophic injuries,” and have a limit of \$500,000 per plaintiff or \$1,000,000 for each occurrence, under R.C. §2323.43, and no limit for non-economic damages, under R.C. §2315.18. Yet, the statutes treat all non-catastrophic injuries the same, limiting non-economic damages to \$250,000 or an amount that is equal to three times the plaintiff’s economic loss, to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence.

Plaintiffs assert the discrepancy between the statutes for those suffering catastrophic injuries is facially unconstitutional because it violates the Due Process Clause of the Ohio Constitution, Article 1, Section 16; Equal Protection under the Ohio Constitution, Article 1, Section 2; and the right to trial by jury under the Ohio Constitution, Article 1, Section 5. To successfully present a facial challenge, Plaintiffs must demonstrate there is no set of facts in which R.C. §2323.43 would be valid. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 473 (2007). Additionally, “[s]tatutes have a strong presumption of constitutionality. Before a court may declare unconstitutional an enactment

of the legislative branch, ‘it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.’” *Id.* (citations omitted).

i. Due Process

The Ohio Constitution, Article 1, Section 16 states:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

The Supreme Court of Ohio has recognized the Due Course provision to be the equivalent of the United States Constitution’s Due Process provision. *Arbino* at 478. When a statute is challenged on the issue of Due Process, the rational-basis test is applicable. *Id.* A statute is found to be constitutional under the rational-basis test, “[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.” *Id.*

Plaintiffs do not address the initial prong of the rational-basis test, and, instead, focus wholly on the second prong. Accordingly, the Court shall address the second prong and determine whether R.C. §2323.43 is unreasonable and arbitrary.

In *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), the Supreme Court of Ohio analyzed R.C. §2305.27, a statute passed in 1975 by the General Assembly, “setting a \$200,000 cap on general damages that may be awarded for medical malpractice” *Id.* at 686. The Supreme Court found R.C. §2305.27 was unconstitutional under the Due Process provision, holding, “It is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice.” *Id.* at 691.

In 2005, the General Assembly passed R.C. §2315.18, setting limits on non-

economic damages in a tier structure, as referenced above. Under R.C. §2315.18, the General Assembly “found the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and by setting the limits for those not as severely injured[.]” *Arbino* at 480-81. The Supreme Court of Ohio addressed the constitutionality of this statute in *Arbino, supra*.

In *Arbino*, the Supreme Court analyzed R.C. §2315.18 under the two-prong, rational-basis test. *Arbino*, 116 Ohio St.3d 468. As described previously, R.C. §2315.18 is drafted similarly to R.C. §2323.43, but excludes any cap on catastrophic injuries. The plaintiff in *Arbino* argued imposing the cost of the intended benefit to the general public upon those “second-most severely injured” was irrational, as well. *Id.* at 480. The Court did not agree, finding, “The General Assembly’s decision is tailored to maximize benefits to the public while limiting damages to litigants. The logic is neither unreasonable nor arbitrary.” *Id.* at 481.

Here, Plaintiffs assert R.C. §2323.43(A)(3) is unreasonable and arbitrary because it contains a hard limit like the unconstitutional provision in *Morris*. Defendant AML argues the cap in R.C. §2323.43(A)(3) is not unreasonable or arbitrary, because it includes tiers like R.C. §2315.18. The Court finds this hard to believe when such a great disparity exists between §2323.43(A)(3) and R.C. §2315.18.

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.

This is what the Supreme Court of Ohio was alluding to when it stated, “the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and by setting the limits for those not as severely injured at either \$ 250,000 or \$ 350,000.” *Id.* at 480-81. 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(A)(3) still burdens those most severely injured by medical malpractice to benefit to 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.

ii. Equal Protection

Next, Plaintiffs raise the issue that R.C. §2323.43 violates the Equal Protection clause. Under Article 1, Section 2 of the Ohio Constitution, “All political power is inherent in the people. Government is instituted for their equal protection and benefit.” The Supreme Court of Ohio has held:

The prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it serves the constitutional prohibition against the denial of equal protection of the laws.

Conley v. Shearer, 64 Ohio St.3d 284, 288 (1992). Plaintiffs argue catastrophically injured parties governed by R.C. §2323.43 are treated differently than catastrophically injured

parties governed by R.C. §2315.18. The Defendant argues that people injured in medical malpractice are not similarly situated to those injured by a car accident, and, therefore, it is not a violation of the Equal Protection clause.

The Court must first determine the standard of review. “When legislation infringes upon a fundamental constitutional right or the rights of a suspect class, strict scrutiny applies. If neither a fundamental right nor a suspect class is involved, a rational-basis test is used.” *Arbino*, 116 Ohio St.3d at 481. Here, Plaintiffs are not of a suspect class and a fundamental right is not at issue. Accordingly, the Court must review the matter pursuant to the rational-basis test.

Under the rational-basis test, R.C. §2323.43 will be upheld if it is rationally related to a legitimate government purpose. *Id.* While reviewing the statute, the Court’s analysis changes when looking at the statute as self-contained versus reviewing it in comparison to all other laws with like circumstances.

a. R.C. §2323.43 Only

The General Assembly made the following findings when reviewing and enacting R.C. §2323.43, stating the State had an “interest in stabilizing the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss awards in medical malpractice actions.” S.B. 281, §3(A)(3) (2001). The General Assembly reviewed several studies and other forms of evidence to reach this conclusion. *Id.* at §3(A)(3)(a)-(e). The Court finds the Legislature articulated a legitimate government interest, stabilizing the cost of health care. This legitimate government interest is rationally related to limiting non-economic damages in medical malpractice cases. Accordingly, when the Court reviews the statute alone under equal protection, it finds R.C. §2323.43 is

constitutional.

b. R.C. §2323.43 as Compared to Other Laws Limiting Non-Economic Damages

Under Equal Protection, the Court must ensure the law has an equality of operation on persons according to their relation and are applicable to all persons under like circumstances. *Conley, supra*, at 288. Therefore, the Court is compelled to consider R.C. §2323.43 in comparison to other similarly situated statutes limiting non-economic damages.

The parties each raise comparative statutes. Plaintiffs assert R.C. §2315.18 is most similar to R.C. 2323.43. Defendants argue R.C. §2744.05, a statute limiting non-economic damages against a political subdivision, is similar, as well. Additionally, the Court conducted a review of statutes limiting damages from all 50 states.

Plaintiffs argue R.C. §2315.18 is most like R.C. 2323.43 because both statutes concern tortious conduct and place limitations on non-economic damages, distinguishing the amount of damages recoverable between catastrophic injuries and non-catastrophic injuries. Defendants argue the circumstances of the statutes are not alike, as one statute addresses only medical malpractice and the other tortious conduct generally. The Court finds this to be the argument of a square is not a rectangle. Medical malpractice is a form of tortious conduct. As both statutes address torts and have catastrophic injury distinctions, the Court finds these statutes to be similar.

In *Arbino*, the Supreme Court reviewed in R.C. §2315.18 and found, “The distinctions the legislature drew in refusing to limit certain injuries were rational and based on the conclusion that catastrophic injuries offer more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by

improper external considerations.” *Arbino*, 116 Ohio St.3d at 483. 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. §2323.43(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 operation of a motor vehicle. It is not rational for the law to limit the non-economic 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.

Defendant AML asserts the Court should consider R.C. §2744.05. Under Revised Code §2744.05, non-economic damages are limited to \$250,000 in an action against a political subdivision. R.C. §2744.05(C)(1). In *Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship*, 123 Ohio St. 3d 278, the Supreme Court reviewed R.C. §2744.05, holding the statute did “not violate the constitutional guarantee of equal protection under the law.” *Id.* at 283.

The Court finds R.C. §2744.05 and *Oliver* to be distinguishable from R.C. §2323.43 and the underlying matter. Revised Code §2744.05 is limited to circumstances concerning political subdivisions versus private parties. The Supreme Court recognized this difference in its decision in *Oliver. Id.* at 282 (citations omitted) (“the ‘state has a valid interest in preserving the financial soundness of its political subdivisions.’”). The Supreme Court continued to bolster this distinction, pointing out its decision in *Menefee v. Queen City Metro*, 49 Ohio St. 3d 27, 29. In *Menefee*, the Supreme Court found the General Assembly

can prohibit all tort actions against political subdivisions. Because of this holding, the Supreme Court in *Oliver* found they could not say R.C. §2744.05 was unreasonable or arbitrary in allowing some recovery in tort actions. Political subdivisions are granted higher protections from liability under the law. This creates an important difference between R.C. §2744.05 and R.C. §2323.43.

Additionally, R.C. §2744.05 does not differentiate between catastrophic and non-catastrophic injuries. The Supreme Court distinguished its opinion in *Oliver* from other cases concerning catastrophic injuries, stating, “[T]he damage limits for noneconomic harm in R.C. 2744.05(C)(1) are neither unreasonable or arbitrary, at least with regard to persons suffering noncatastrophic injuries.” *Id.* Based on these reasons, the Court cannot find R.C. §2744.05 and R.C. §2323.43 are similarly situated.

Finally, in 2016 when Plaintiffs initially filed their motion for summary judgment, the Court conducted a fifty-state review of all statutes limiting damages and the associated case law. In that review, the Court found no other state has damage limits like those in Ohio, where one statute allows general torts unlimited non-economic damages for catastrophic injuries, but another statute places a strict limit on medical malpractice catastrophic injuries. The only states who have limits including components like Ohio are: California (which limits medical malpractice and car accident damages in separate statutes); Hawaii (which limits medical malpractice and other tort damages in separate statutes); and Michigan (which distinguishes between catastrophic and non-catastrophic injuries in different tort statutes). See Exhibit A.¹

Yet, these statutes each include key differences. California does not include tiered

¹ As a caution, the Court notes that the materials contained within this exhibit have not been updated since 2016. The Court did research California, Hawaii, and Michigan to ensure cited law is up-to-date.

limits pertaining to catastrophic injuries. Hawaii only limits pain and suffering damages, not all non-economic damages, and fails to include catastrophic injury distinctions. And Michigan recognizes catastrophic injuries, but sets the same monetary limits within its statutes. The Court finds these states treat similarly situated plaintiffs the same under their laws.

Through comparing R.C. §2323.43 to similar statutes, the Court finds the limit under R.C. §2323.43(A)(3) is not rational under the Equal Protection Clause. No other state limits similarly situated plaintiffs like Ohio. Additionally, the Supreme Court of Ohio has upheld unlimited non-economic damages for those who have suffered catastrophic injuries. *Arbino*, 116 Ohio St.3d at 483. R.C. §2323.43 as compared to R.C. §2315.18 does not equally operate on persons according to their relation and is not applicable to all persons under like circumstances. Accordingly, the Court finds R.C. §2323.43 violates the constitutional guarantee of equal protection under the law.

iii. Right to Trial

Finally, Plaintiffs assert R.C. §2323.43 is unconstitutional because it infringes on Plaintiffs' right to trial by jury. Under the Ohio Constitution, Article 1, Section 5, "The right of trial by jury shall be inviolate[.]" The Supreme Court of Ohio has held matters of law do not violate a plaintiff's right to a jury trial. *Conley v. Shearer*, 64 Ohio St.3d 284, 292 (1992). Plaintiffs argue the alteration of damages is an issue of fact to be determined by the jury and upheld by the Court. Defendants oppose this argument, stating jury awards may be altered as a matter of law.

To determine if R.C. §2323.43 infringes upon Plaintiffs' right to a jury trial, the Court must determine if the statute intrudes upon the jury's fact-finding function. *Arbino*, 116

Ohio St.3d at 486. Revised Code §2323.43(A)(3) states, “[T]he court shall enter a judgment in favor of the plaintiff for compensatory damages for noneconomic loss. In no event shall a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in divisions (A)(2) and (3) of this section.” As previously held, the Court finds the limitation is automatic. No language in the statute requires action from the parties to enforce the statute. Therefore, the Court finds R.C. §2323.43 limits damages as a matter of law.

The Ohio Supreme Court has held, “[P]ost-*Sheward* precedent conclusively establishes that regulation of punitive damages is discretionary and that states may regulate and limit them as a matter of law without violating the right to a trial by jury.” *Id.* at 487.

As R.C. §2323.43 does not intrude upon the jury's fact-finding function, the Court finds it does not violate Plaintiffs' constitutional right to a jury trial.

IV. Conclusion

Based on the foregoing analysis, the Court finds the underlying case is not a medical claim and, therefore, is not subject to the limitations of R.C. §2323.43. Yet, even if the case contained medical claims, the Court finds R.C. §2323.43 violates the Ohio Constitution on the basis of Due Process and Equal Protection. Accordingly, the Court GRANTS Plaintiffs' motion for partial summary judgment, filed July 29, 2016, and DENIES Defendant AML's motion to enforce statutory cap on Plaintiffs' non-economic damages, filed October 24, 2018.

IT IS SO ORDERED.

This is a final, appealable order. There is no just reason for delay.

Copy via electronic filing:

Craig S. Tuttle, Esq.
Gerald S. Leeseberg, Esq.
Counsel for Plaintiffs

Andrew Good, Esq.
Michael Hudak, Esq.
Counsel for Defendant:
Athens Medical Laboratory Inc.

Franklin County Court of Common Pleas

Date: 12-11-2018
Case Title: MARK DANIEL METTS II PRNT ET AL -VS- NATIONWIDE CHILDRENS HOSPITAL ET AL
Case Number: 14CV002543
Type: ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink, which appears to be 'C.A. Schneider'. To the right of the signature is a circular official seal, likely the seal of the Franklin County Court of Common Pleas, though the details are somewhat faded.

/s/ Judge Charles A. Schneider

Court Disposition

Case Number: 14CV002543

Case Style: MARK DANIEL METTS II PRNT ET AL -VS-
NATIONWIDE CHILDRENS HOSPITAL ET AL

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 14CV0025432016-07-2999960000
Document Title: 07-29-2016-MOTION FOR PARTIAL SUMMARY
JUDGMENT - PLAINTIFF: MARK DANIEL METTS II PRNT
Disposition: MOTION GRANTED
2. Motion CMS Document Id: 14CV0025432018-10-2499970000
Document Title: 10-24-2018-MOTION - DEFENDANT: ATHENS
MEDICAL LABORATORY INC - TO ENFORCE STATUTORY CAP
ON PLNTFFS NOE-
Disposition: MOTION DENIED
3. Motion CMS Document Id: 14CV0025432018-05-1099980000
Document Title: 05-10-2018-MOTION FOR CONTINUANCE -
DEFENDANT: STACI L. JAMES CNP
Disposition: MOTION RELEASED TO CLEAR DOCKET
4. Motion CMS Document Id: 14CV0025432018-05-1099940000
Document Title: 05-10-2018-MOTION TO COMPEL DISCOVERY -
DEFENDANT: STACI L. JAMES CNP
Disposition: MOTION RELEASED TO CLEAR DOCKET
5. Motion CMS Document Id: 14CV0025432018-06-1499730000
Document Title: 06-14-2018-MOTION IN LIMINE - PLAINTIFF:
MARK DANIEL METTS II PRNT
Disposition: MOTION RELEASED TO CLEAR DOCKET

6. Motion CMS Document Id: 14CV0025432018-06-1499670000
Document Title: 06-14-2018-MOTION FOR SUMMARY
JUDGMENT - PLAINTIFF: MARK DANIEL METTS II PRNT
Disposition: MOTION RELEASED TO CLEAR DOCKET

7. Motion CMS Document Id: 14CV0025432018-06-1699980000
Document Title: 06-16-2018-MOTION FOR SUMMARY
JUDGMENT - DEFENDANT: ATHENS MEDICAL LABORATORY INC
Disposition: MOTION RELEASED TO CLEAR DOCKET

8. Motion CMS Document Id: 14CV0025432018-07-2099980000
Document Title: 07-20-2018-MOTION IN LIMINE - DEFENDANT:
ATHENS MEDICAL LABORATORY INC
Disposition: MOTION RELEASED TO CLEAR DOCKET

9. Motion CMS Document Id: 14CV0025432018-07-2099970000
Document Title: 07-20-2018-MOTION TO STRIKE - DEFENDANT:
ATHENS MEDICAL LABORATORY INC
Disposition: MOTION RELEASED TO CLEAR DOCKET

10. Motion CMS Document Id: 14CV0025432018-07-2099950000
Document Title: 07-20-2018-MOTION FOR LEAVE TO FILE -
DEFENDANT: ATHENS MEDICAL LABORATORY INC
Disposition: MOTION RELEASED TO CLEAR DOCKET

11. Motion CMS Document Id: 14CV0025432018-09-1099980000

Document Title: 09-10-2018-MOTION IN LIMINE - PLAINTIFF:
MARK DANIEL METTS II PRNT

Disposition: MOTION RELEASED TO CLEAR DOCKET

12. Motion CMS Document Id: 14CV0025432018-09-1099970000

Document Title: 09-10-2018-MOTION IN LIMINE - DEFENDANT:
ATHENS MEDICAL LABORATORY INC

Disposition: MOTION RELEASED TO CLEAR DOCKET

13. Motion CMS Document Id: 14CV0025432018-09-1099960000

Document Title: 09-10-2018-MOTION IN LIMINE - DEFENDANT:
ATHENS MEDICAL LABORATORY INC

Disposition: MOTION RELEASED TO CLEAR DOCKET

14. Motion CMS Document Id: 14CV0025432018-11-1999980000

Document Title: 11-19-2018-MOTION FOR LEAVE TO FILE -
PLAINTIFF: MARK DANIEL METTS II PRNT

Disposition: MOTION GRANTED

FILED
LUCAS COUNTY

2014 MAY 30 P 12: 09

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Catherine Woessner, etc.,

Plaintiff,

vs.

The Toledo Hospital, et al.,

Defendants.

*

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Case No. CI0201201614

OPINION AND JUDGMENT ENTRY

Hon. Myron C. Duhart

This medical malpractice action is before the Court on the post-trial amended motion for entry of judgment filed by the plaintiff. Upon review of the pleadings, evidence, arguments presented, and applicable law, the Court finds that it should grant the motion in part and deny it in part.

I. BACKGROUND

In her amended motion for entry of judgment, the plaintiff, Catherine Woessner, makes two requests. First, she asks the Court to find that the statutory cap contained in R.C. 2323.43 on noneconomic-loss damages in the survivorship claim is unconstitutional as applied in this case. Second, she asks the Court to enter an interim judgment entry on the verdict, before the Court rules on the also-pending motion for prejudgment interest, so the parties may move toward appellate review.

(The Court intentionally leaves the remainder of this page blank.)

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II. DISCUSSION

In her motion, Ms. Woessner argues that R.C. 2323.43 is unconstitutional as applied in this case. Ms. Woessner observes that the jury determined that Ms. Woessner was entitled to \$1,500,000 in non-economic damages. Further, she accurately states that, if her recovery of those damages is capped at \$500,000 -- as called for by both the statute and the defendants -- she would be deprived of the damages awarded to her by the jury. Ms. Woessner contends that R.C. 2323.43 is constitutionally infirm on due-process, equal-protection, right-to-jury, and open-courts grounds.

As a preliminary matter, the Court notes that "[a]ll statutes have a strong presumption of constitutionality," thus, "[i]t is difficult to prove that a statute is unconstitutional." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶25. A petitioner may attack the constitutionality of a statute in two ways: (1.) by "facial challenge," in which case the petitioner must demonstrate that "there is no set of circumstances in which [the] statute would be valid; or (2.) by "challenge [to] the statute as applied to a specific set of facts." *Id.* at ¶26. Under the latter approach, the petitioner must show "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, at ¶38.

R.C. 2323.43 reads in pertinent part as follows:

(A) In a civil action upon a medical, * * * claim to recover damages for injury, death, or loss to 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 damages 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 under this section to recover damages for injury, death, or loss to person or property ***shall not exceed*** the greater of ***two hundred fifty thousand dollars*** or * * * three times the plaintiff's economic loss, ***as determined by the trier of fact***, to a maximum of ***three hundred fifty thousand dollars*** for each plaintiff or a maximum of ***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) of this section ***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***.

* * *. (Emphasis added.)

A. DUE PROCESS

The parties use two Supreme Court of Ohio cases as their primary legal authorities:

Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, and *Morris v. Savoy*, 61 Ohio St.3d 684, 686-687, 576 N.E.2d 765 (1991). In *Arbino*, the court upheld the constitutionality of R.C. 2315.18 which limits (places "caps" on) the noneconomic damages in general (not medical) tort cases. *Id.* at paragraph one of the syllabus. The *Arbino* court reviewed the statute on many bases: "the right to a trial by jury, the right to a remedy, the right to an open court, the right to due process of law, the right to equal protection of the laws, [and] the separation of powers." *Id.* In *Morris*, the court held R.C. 2307.43 to be unconstitutional on due process grounds but not equal protection grounds. *Id.* at 691, 692. The statute at issue in *Morris*, former R.C. 2307.43, was a predecessor to the current statute at issue here, R.C. 2323.43 -- both statutes were enacted to limit noneconomic damages recoveries in medical malpractice cases. *Morris*, at 686.

In both *Arbino* and in *Morris*, the Supreme Court of Ohio applied the rational-basis test. See *Arbino*, at ¶49 ("Because we have already concluded that R.C. 2315.18 violates neither the right to a jury trial nor the right to a remedy, we [apply] the rational-basis test"); *Morris*, at 689 ("did not involve a fundamental right or suspect class"). In this case, the Court also will use that test rather than a strict-scrutiny analysis.

1. *Morris v. Savoy*

The statutory language at issue in *Morris* reads as follows:

"*In no event shall an amount recovered for general [noneconomic] damage in any medical claim not involving death exceed the sum of Two Hundred Thousand Dollars.*" (Emphasis added.) Former R.C. 2307.43.

Under the rational-relation test, "[a] legislative enactment will be deemed valid on due process grounds ' * * * [1] if it bears a *real and substantial relation to the public health*, safety, morals or general welfare of the public and [2] if it is *not unreasonable or arbitrary.*" (Emphasis added.) *Morris v. Savoy*, 61 Ohio St. 3d at 687-688, quoting *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 503 N.E.2d 717 (1986). *Id.* at 690.

The *Morris* court observed that the General Assembly had "aimed at malpractice insurance rates, which had been rising rapidly." *Morris v. Savoy*, 61 Ohio St. 3d at 690. The court noted that the legislature was attempting to "shift[] the risk from the health care providers to the health care recipients in response to the 'crisis' in medical care. The *merits of such a shift are for the legislature* to decide. [However, the] court's function is * * * to *determine whether the method employed bears a 'real and substantial relationship'* to public health or welfare or whether it is *'unreasonable or arbitrary.'*" *Id.* at 689.

As to the first prong, the *Morris* concluded that the General Assembly failed to make any finding that would establish a "real and substantial relation." *Id.* And see *id.* at 691 (so stating).

We are *unable to find*, either in the amici briefs or elsewhere, *any evidence to buttress the proposition that there is a rational connection between awards over \$ 200,000 and malpractice insurance rates.* There is evidence of the converse, however. * * * *Neither respondent nor any of the amici who argued in favor of the statute has offered evidence that the damage cap has been a factor in medical malpractice insurance rate setting.* Conceivably, such evidence may exist, but that would require a second trip to the General Assembly. (Emphasis added.) *Id.* at 690.

As to the second, "unreasonable or arbitrary," prong, the *Morris* court quoted with approval the following: "[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 "

Morris at 691, quoting *Nervo v. Pritchard*, 5th Dist. No. CA-6560, 1985 Ohio App.Lexis 7986 (June 10, 1985). Based on the plain and clear language of the statute,¹ the court held the statute to be offensive in that manner -- imposing the cost on the most severely injured. *Morris* at 691. Thus, the *Morris* court held "that R.C. 2307.43 is unconstitutional because it does not bear a **real and substantial relation** to public health or welfare and further because it is **unreasonable and arbitrary**." (Emphasis added.) *Id.*

2. Arbino v. Johnson & Johnson

The relevant language at issue in *Arbino* reads as follows:

(B) In a tort action to recover damages for injury or loss to person or property, all of the following apply:

(1) **There shall not be any limitation on** the amount of compensatory damages that represents the **economic loss** of the person who is awarded the damages in the tort action.

(2) Except as otherwise provided in division (B)(3) of this section, **the amount of compensatory damages that represents damages for noneconomic loss** that is recoverable in a tort action under this section to recover damages for injury or loss to person or property **shall not exceed** the greater of **two hundred fifty thousand dollars** or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to **a maximum of three hundred fifty thousand dollars for each plaintiff** in that tort action **or a maximum of five hundred thousand dollars for each occurrence** that is the basis of that tort action..

(3) **There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss** that is recoverable in a tort action to recover damages for injury or loss to person or property 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**. (Emphasis added.) R.C. 2315.18.

In *Arbino*, the court began its due-process analysis by following the two-pronged, rational-relation approach from *Morris*. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶49.

As to the real-and-substantial-relation prong, the *Arbino* found that "[u]nlike the record[] in *Morris* * * *, which we criticized as lacking evidence demonstrating a rational connection

¹"In no event shall an amount recovered for general [noneconomic] damage in any medical claim not involving death exceed the sum of Two Hundred Thousand Dollars" Former R.C. 2307.43.

between the tort reforms taken and the public good to be achieved, ***the record here draws a clear connection between limiting uncertain and potentially tainted noneconomic-damages awards and the economic problems demonstrated in the evidence.***" *Arbino* at ¶156. Thus, the *Arbino* court stated: "Finding that the General Assembly's review of the evidence yielded a statute that bears a real and substantial relation to the general welfare of the public, we need not cross-check its findings to ensure that we would agree with its conclusions." *Id.* at ¶158.

The *Arbino* court then reviewed the arbitrary-or-unreasonable prong. *Id.* at ¶159. " In *Morris*, we found that the damages caps ***violated this prong because they imposed the cost of the intended benefit to the public solely upon those most severely injured.***" (Emphasis added.) *Arbino* at ¶159, citing *Morris*, 61 Ohio St.3d at 690-691. The court then distinguished the statute at issue, R.C. 2315.18, with former R.C. 2307.43 which was at issue in *Morris*. "R.C. 2315.18 alleviates this [most-severely-injured] concern by allowing for ***limitless noneconomic damages for those suffering catastrophic injuries.***" (Emphasis added.) *Arbino* at ¶160. The court then concluded that "[t]he General Assembly's decision is tailored to maximize benefits to the public while limiting damages to litigants. The logic is ***neither unreasonable nor arbitrary.***" (Emphasis added.) *Id.* at ¶161. Thus, the court found no due-process violation. *Id.* at ¶162.

3. This Case -- Due Process Violation

Real and Substantial Relation. In the instant case, the Court finds that unlike the statute at issue in *Morris*, the statute at issue here -- R.C. 2323.43 -- *is* based on evidence. The Court finds that uncodified statutory materials accompanying the enacted statute, R.C. 2323.43, appear to be as thorough as the materials cited with approval by the *Arbino* court. *Compare Arbino* at ¶153 with Uncodified Section Notes, 149 v S 281, Sections 3 and 5. Accordingly, as to the real-and-substantial-relation prong, the Court finds R.C. 2323.43 in harmony with the due process clause.

Unreasonable or Arbitrary. However, a different situation exists with the unreasonable-or-arbitrary prong. The statute in *Morris*, former R.C. 2307.43, contained very simple language for a straight-forward effect; it imposed damage caps on *all* litigants including those with the most catastrophic injuries² -- "***in no event shall an amount recovered*** for general [noneconomic] damage in any medical claim not involving death ***exceed the sum of Two Hundred Thousand Dollars*** [emphasis added]." 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 --

(3) The amount recoverable for noneconomic loss in a civil action under this section may exceed the amount described in division (A)(2) of this section 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. (Emphasis added.)

-- that limit operates in the same way as the simple cap in the *Morris* statute; recoveries are securely capped for catastrophically injured patients.

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.

B. EQUAL PROTECTION, RIGHT TO JURY, OPEN COURTS

Equal Protection. In both *Arbino* and in *Morris* the respective courts found no equal violations. *Arbino* at ¶76; *Morris* at 692. This Court finds the reasoning supporting those decisions to be well-taken, and the Court will adopt the same result.

² The *Arbino* court used the phrase "catastrophic injuries" synonymously with the "permanent and substantial physical deformity" and the "permanent physical functional injury" language employed by the General Assembly in both R.C. 2305.18 and R.C. 2323.43. *Arbino* at ¶60. The Court will use the term "catastrophic" on occasion, also.

Right to Jury/Open Courts. The Court also finds the analysis of the *Arbino* court on the right-to-jury and the open-courts questions well-taken. Thus, the Court will find no such violations in this case.

JUDGMENT ENTRY

The Court hereby ORDERS that the plaintiff's amended motion for entry of judgment is granted in part and denied in part. The Court further ORDERS that R.C. 2323.43 is unconstitutional as applied in this case.

5/29/14

M. Duhart
Myron C. Duhart, Judge

DISTRIBUTION: Robert M. Scott
Jeffrey T. Stewart
John S. Wasung/Anne M. Brossia

communicate” between very experienced attorneys who have worked together professionally as adversaries for many years. The perpetuation deposition of Dr. Reid by the Defendants may proceed; the Motion to Protective Order is DENIED.

II. CONSTITUTIONALITY OF R.C. 2323.43

The current version of R.C. 2323.43 places a maximum, or damage cap, on the amount a Plaintiff may be compensated by a jury for injuries sustained as the result of medical malpractice.

The Supreme Court has held that a previous law, R.C. 2307.43, which placed a cap on general malpractice damages was unconstitutional. *Morris v. Savoy* (1991), 61 Ohio St. 3d 684. A somewhat-related former statute, R.C. 2323.57, which required trial courts to order awards of future damages in excess of a certain amount in medical malpractice actions to be paid in a series of periodic payments upon the motion of any party, was held unconstitutional in *Galayda v. Lake Hospital Systems, Inc.*, 71 Ohio St. 3d 421, 1994-Ohio-64. Subsequent to these decisions, the General Assembly passed legislation which, among other things, capped noneconomic damages, with higher limits for permanent injuries. Those laws were found to be unconstitutional in toto as a violation of the separation of powers and the single-subject clause of the Ohio constitution. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 1999-Ohio-123.

Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, dealt with the limits on noneconomic damages established by R.C. 2315.18; in doing so, the Court specifically noted that this statute does not apply to actions for medical malpractice. *Id* at ¶27, fn. 3. The Court held the limits established by R.C. 2315.18 to be constitutional.

In making this finding, and allowing the limitation of noneconomic damages, the Court observed that the General Assembly made a policy choice that noneconomic damages exceeding the set amounts are not in the best interest of the citizens of Ohio. The Court indicated, under the rational-basis test, that there must be a “real and substantial relation [of the statute] to the public health, safety, morals or general welfare of the public and that it is not unreasonable or arbitrary.” *Id* at ¶49. The Court went on to “examine the record to determine whether there is evidence to support such a relationship,” and the Court accepted the General Assembly’s findings that “the current state of the civil litigation system represents a challenge to the economy of the State of Ohio.” *Id* at ¶53.

Based on these findings, the Court held that “unlike the records in *Morris* and *Sorrell*, which we criticized as lacking evidence demonstrating a rational connection between the tort reform taken and the public good to be achieved, there is a clear connection drawn between limiting uncertain and potentially tainted economic damage awards and the economic problems demonstrated in the evidence,” and therefore that the General Assembly acted in the public’s interest which is all that is required under the first prong of the due process analysis. *Id* at ¶56. For these reasons, *Arbino* Court found that R.C. 2315.18 did not violate the due process protections provided by the Ohio Constitution in Section 16, Article I.

Somewhat similarly, the Court held that the statute did not violate Section 2, Article I of the Ohio constitution which provides that “government is instituted for their [the people’s] equal protection and benefit.” *Id* at ¶63. Again using the rational-basis test, the Court found a rational relationship of the cap to a legitimate government purpose including the curbing of lawsuits which increase “the cost of doing business, threatens Ohio jobs, drives up costs to

consumers, and may stifle innovation.” *Id* at ¶68.

The Supreme Court has held in the previous medical malpractice statute that caps are unconstitutional in medical claims. Explicitly, *Arbino* does not address medical claims, but rather specifically finds no violation of the due process or equal protection provisions of the Ohio Constitution based on R.C. 2315.18’s rational relationship to the legislature’s legitimate concern about the business climate in Ohio. To successfully present a facial challenge to the statute, the Plaintiffs must demonstrate that there is no set of circumstances in which the statute would be valid. *Harold v. Collier*, 107 Ohio St. 3d 44, 2005-Ohio-5334, citing *United States v. Salerno* (1987), 481 U.S. 739, 745. To find caps on damages in medical malpractice cases constitutional, and depart from *Savoy*, this Court would have to make a factual finding concerning the delivery of quality health care services for the citizens of Ohio and its rational relationship to noneconomic damage caps in medical malpractice cases. There is no such record, and the Court cannot take judicial notice of the relationship or presume the legislature’s rationale. Based on the record, or lack of record, before the Court, the statute is facially unconstitutional.

III. STATUTORY LIMITATION

Assuming that the statute is unconstitutional, the various maximums set by statute are irrelevant. However, assuming the current statute to be constitutional, a question remains as to whether the total maximum recoverable by all Plaintiffs is \$500,000 or \$1,000,000.

R.C. 2323.43 does not limit compensatory damages for economic loss and it is agreed that those exceed \$250,000 for George Sexton; there is no allegation of economic loss for the family members. Generally, the noneconomic loss a plaintiff may recover “for death or

loss to personal property may not exceed the greater of \$250,000 or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of \$350,000 for each plaintiff, for a maximum of \$500,000 for each occurrence."

George Sexton would be able to recover approximately \$750,000 (three times his economic loss) and the other Plaintiffs, having suffered no economic loss, could not receive an award of greater than \$250,000. However, since there is only one "occurrence," the maximum recoverable by all Plaintiffs is \$500,000.

R.C. 2323.43(A)(3) expands the damages in the case of a "deforming injury" such as was sustained by Mr. Sexton. In such a situation, "the amount recoverable for noneconomic loss...shall not exceed \$500,000 for each Plaintiff or \$1,000,000 for each occurrence for the noneconomic losses of the Plaintiff..." Therefore, the maximum recoverable by Mr. Sexton is increases from \$350,000 to \$500,000 and the maximum for each occurrence increases from \$500,000 to \$1,000,000.

The Defendants argue that a noneconomic loss "must result from an injury to themselves" (Memorandum, Page 5), but the statute speaks of noneconomic loss a plaintiff may recover "for death or loss to person or property..." The statutory definition of "noneconomic loss" includes nonpecuniary harm which ultimately results from injury, death or loss to person or property that is a subject of a civil action upon a medical claim, including, but not limited to loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education..." supports the plaintiff's position. The Plaintiffs other than Mr. Sexton allege that they sustained such noneconomic loss.

IV. CLAIM FOR BREACH OF FIDUCIARY DUTY

In addition to the claim for medical malpractice, the Plaintiffs have sued the Defendants for breach of their fiduciary duty for denying that they committed negligence.

A patient's actions for breach of contract arising out of his physician's negligence is one based on malpractice and not contract. *Lykins v. Miami Valley Hospital*, Second Dist. No. 19784, 2004-Ohio-2732, ¶141. The Plaintiffs' claim for breach of fiduciary duty by a physician is a medical claim and is subsumed in that cause of action. *Id* at ¶141.

V. LAW OF THE CASE

The Plaintiffs filed suit against Dr. Heyd as well as Dr. Merl; each was represented by separate counsel. On February 15, 2008, the Court granted Dr. Heyd's Motion for Summary Judgment finding that Dr. Heyd provided evidence that he did not breach the standard of care and that Plaintiffs failed to rebut the evidence offered by Dr. Heyd, and Dr. Heyd was entitled to judgment dismissing the claim against him.

The "law of the case doctrine" provides that decisions made by a reviewing court regarding legal questions remain the law of that case for all subsequent proceedings at both the trial and appellate levels. *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1. Other courts have expanded this definition to prohibit relitigation of an issue once it has been decided in an earlier stage of the same litigation. See, e.g., *Hamilton v. Leavy* (3rd Cir., 2003), 322 F. 3d 776, 786. Although the doctrine ensures consistency of results and preserves the structure of superior and inferior courts as designated by the Ohio constitution, the doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. *Nolan*, supra, at 413, as cited in *Byrd v. Smith*, Twelfth Dist. No. CA2007-08-093,

2008-Ohio-3597.

The Plaintiffs' argument is that Dr. Heyd has been found not to have been negligent and therefore the Defendants are not permitted to argue that he was negligent, let alone that his negligence was a cause of the Plaintiffs' injuries. However, the granting of summary judgment, especially to a party no longer in the litigation, does not find, as a matter of law, that a defendant was not negligent, merely that there was insufficient evidence submitted, in the face of evidence to the contrary, to create a genuine issue of material fact as to whether he was negligent; this definitional distinction is crucial. The Defendants can argue that someone else's negligence, including Dr. Heyd's, caused the injuries if they produce the appropriate quality and quantity of competent evidence as to both Dr. Heyd's deviation from the standard of care and its causal connection to the Plaintiffs' injuries.

VI. CONCLUSION

Many of these issues are deserving of much more lengthy and detailed decisions, but the questions were raised by the attorneys mostly at the last moment. Regardless, they are sure to be reviewed by a court of different jurisdiction in much more detail.

APPROVED:



HON. JEFFREY E. FROELICH

COPIES (VIA E-MAIL, PRIOR TO FILING, NOVEMBER 26, 2008):

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

WARREN K. MEAD, et al. AM 8:33

Plaintiff(s), CLERK OF COURTS

v.

Case No. 05CVA01-864 (Hogan, J.)

ROGER WILT, M.D.,

Defendant(s).

DECISION AND ENTRY DENYING MOTION OF DEFENDANTS ROGER WILT, M.D. AND NORTHWEST FAMILY PHYSICIANS, INC. FOR SUMMARY JUDGMENT FILED 3-15-2007

AND

DECISION AND ENTRY DENYING MOTION OF PLAINTIFFS WARREN K. MEAD, ET AL FOR SUMMARY JUDGMENT FILED 5-16-2007

AND

DECISION AND ENTRY DENYING MOTION OF DEFENDANTS ROGER WILT, M.D. AND NORTHWEST FAMILY PHYSICIANS, INC. FOR SUMMARY JUDGMENT FILED 06-22-2007

AND

DECISION AND ENTRY DENYING MOTION OF DEFENDANTS JOSEPH LANEY, M.D. AND OHIO GASTROENTEROLOGY, INC. FOR SUMMARY JUDGMENT FILED 07-24-2007

Defendants' 3-15-2007 Motion for Summary Judgment is DENIED.

Plaintiffs' 5-16-2007 Motion for Summary Judgment is DENIED.

Defendants' 6-22-2007 and 7-24-2007 Motions for Summary Judgment are DENIED.

Standard of Review applicable to a Motion for Summary Judgment

Summary judgment may be awarded only if (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds, construing the evidence most strongly in favor of the nonmoving party, can come to but one conclusion which is

adverse to the nonmoving party. *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298. Because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. *Id.* Doubts must be resolved in favor of the nonmoving party. *Id.*

The Ohio Supreme Court has ruled that “* * * the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent’s case.” *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The moving party must point to Civ.R. 56(C) evidence in the record (i.e., pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence or stipulations of fact) that demonstrates the absence of any genuine issues of material fact. *Id.* at 293. *State ex rel. Leigh v. State Emp. Relations Board* (1996), 76 Ohio St.3d 143, 146. If the moving party meets this test, the nonmoving party must rebut the motion with specific facts and/or affidavits showing a genuine issue of material fact that must be preserved for trial. *Id.*

Analysis of Defendants’ 3-15-2007 Motion for Summary Judgment

In Defendants’ 3-15-2007 Motion for Summary Judgment, Defendants argued that Plaintiffs cannot establish that decedent’s death was directly and proximately caused by Dr. Wilt’s alleged negligence and that, therefore, Defendants are entitled to summary judgment. The argument is based on the decedent’s autopsy report and Dr. Radtke’s deposition.

The autopsy report indicated that the cause of death was Coronary Atherosclerotic Disease (narrowing of the arteries). Dr. Radtke, Plaintiff’s expert, testified that the cessation of Coumadin therapy caused the decedent’s stroke, and that

the stroke "... did contribute to the shortening of his life." However, when questioned, it appeared that Dr. Radtke was relying on actuarial data and did not have an opinion about how the stroke would have caused the decedent to die earlier from Coronary Atherosclerotic Disease.

At most, all that Defendants have demonstrated is that Dr. Radtke's testimony is not sufficient, by itself, to prove that the stroke caused the shortening of the decedent's life. However, that testimony does suggest that the stroke *may* have contributed to the shortening of the decedent's life. In other words, the testimony shows that a genuine issue of material fact exists. Defendants do not point to any other evidence that would demonstrate that Plaintiff will be unable to come forward with additional evidence to show that the stroke hastened the decedent's death by Coronary Atherosclerotic Disease. Defendants have failed to meet their initial burden, for purposes of the motion for summary judgment, of pointing to evidence that demonstrates the absence of a genuine issue of material fact. Therefore, this Court must deny Defendant's Motion for Summary Judgment.

Plaintiffs submitted the affidavit of Dr. Leidheiser that says,

It is my opinion to a reasonable degree of medical certainty that the stroke that Mr. Mead suffered on March 8, 2004 was a direct and substantial contributing cause to his death on July 15, 2006.

This evidence provides a second reason for concluding that the motion for summary judgment must be denied because of the existence of genuine issues of material fact.

Analysis of Plaintiffs' 5-16-2007 Motion for Summary Judgment

In Plaintiffs' 5-16-2007 Motion for Summary Judgment, Plaintiffs argued that Northwest Family Physicians, Inc., was negligent since at least one of its employees fell

below the standard of care: either Nurse Rogers failed to tell Dr. Wilt that Plaintiff would not be taking Coumadin or Dr. Wilt failed to prescribe bridge therapy or take other appropriate measures when he knew or should have known (or should have inquired further to learn), that Plaintiff would not be taking Coumadin.

The motion is denied on this issue because, construing the evidence as required in favor of Northwest Family Physicians, reasonable minds could reach different conclusions as to whether at least one of its employees fell below the appropriate standard of care.

With regard to Nurse Rogers, Dr. Wilt indicates that her communication with him was adequate for him to determine that Mr. Mead would be off his Coumadin for four or five days. While she does not have any specific memory of exactly what she told Dr. Wilt, she testifies that she thinks she would have told Dr. Wilt that Mr. Mead would not be on any other medication. While Dr. Wilt testifies that she did not provide him with this information, his testimony merely serves to create an issue of credibility as between their conflicting testimony. It is inappropriate to resolve issues of credibility when deciding a motion for summary judgment. Accordingly, a genuine issue of material fact exists with regard to whether Nurse Rogers' conduct fell below the appropriate standard of care.

With regard to Dr. Wilt, Plaintiff does not point to the testimony of an independent expert regarding the appropriate standard of care, but instead relies upon Dr. Wilt's own testimony that if the nurse had told him that Mr. Mead was going off his Coumadin for four days it would have thrown up red flags and he would have taken action to make sure something was used in its place. This falls short of unambiguous testimony that a

failure by Dr. Wilt to prescribe a bridge therapy would amount to a failure to satisfy the appropriate standard of care. The mere fact that a person testifies they would do a certain thing under certain circumstances does not entail that they believe the standard of care requires them to do that thing in those circumstances.

Dr. Wilt elaborated on the "red flags" comment explaining that it should have raised red flags for Mr. Mead who had repeatedly been advised about the dangers of going off Coumadin. It is not clear that Dr. Wilt would have meant that the "red flags" would have created a situation in which it would fall below the standard of care for him to fail to prescribe a bridge therapy.

In another part of his deposition, Dr. Wilt testifies that when he makes a referral to a specialist for some procedure, he relies upon that specialist to manage the patient's medication. Construed in favor of Northwest Family Physicians, that testimony can be read to imply that Dr. Wilt believes that the appropriate standard of care permits such reliance. Reasonable minds could reach different conclusions as to whether the standard of care would have, under the circumstances, required Dr. Wilt to ensure that Mr. Mead received bridge therapy.

Also Plaintiffs argued that Mr. Mead suffered a stroke several hours after his colonoscopy as a result of being off his Coumadin for four days without benefit of any bridge therapy. Plaintiffs allege in their memorandum that Dr. Radtke has testified that this was the proximate cause of his stroke, and Defendants have not presented convincing evidence that the stroke was due to any other cause. However, Plaintiffs have not provided citations for Dr. Radtke's alleged testimony. Thus, Plaintiffs have failed to point to evidence that demonstrates the absence of a genuine issue of material

fact that the moving party is entitled to Summary Judgment as a matter of law. Therefore, this Court must DENY Plaintiffs' Motion for Summary Judgment.

**Analysis of Defendant's 6-22-2007 and 7-24-2007
Motions for Summary Judgment**

In Defendants' 6-22-2007 and 7-24-2007 Motions for Summary Judgment, Defendants argued that R.C. § 2323.43(A)(3) should apply to the injuries suffered by Mr. Mead prior to his death because Plaintiffs' cause of action accrued after the effective date of the statute. Ohio Revised Code § 2323.43(A)(3) states:

The amount recoverable for noneconomic loss in a civil action under this section may exceed the amount described in division (A)(2) of this section but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:

- (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
- (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.

In Plaintiffs' memorandum contra filed on 07-18-2007, Plaintiffs argued that the damage cap pursuant to R.C. 2323.43 is unconstitutional. The Supreme Court of Ohio in *Cicco v. Stockmaster* (2000), 89 Ohio St.3d 95, 97, held that

[A] party who is challenging the constitutionality of a statute must assert the claim in the complaint (or other in initial pleading) or an amendment thereto, and must serve the pleading upon the Attorney General in accordance with methods set forth in Civ.R. 4.1 in order to vest a trial court with jurisdiction under R.C. 2721.12.

In this case, Plaintiffs have challenged the constitutionality of R.C. 2323.43 without notifying the Attorney General. However, the Supreme Court has determined that *Cicco* applies only to declaratory judgment actions since it is based upon RC 2721.12.

... in *George Shima Buick v. Ferencak* (2001), 91 Ohio St. 3d 1211, 2001 Ohio 238, 741 N.E.2d 138, ... we sua sponte dismissed an appeal and certified conflict raising another separation-of-powers issue because we lacked jurisdiction. There, the defendant challenged the constitutionality of a statute allowing certain lay employees to represent their corporate employers in small claims court. But because no one had served the Ohio Attorney General with notice of the constitutional attack, we found a jurisdictional defect, based on *Cicco v. Stockmaster* (2000), 89 Ohio St. 3d 95, 2000 Ohio 434, 728 N.E.2d 1066. Today we find that we applied *Cicco* too zealously in dismissing *Ferencak*.

[**P7] *Cicco* recognizes that R.C. 2721.12 imposes a notice requirement on parties contesting the constitutionality of a statute in a declaratory judgment action filed pursuant to R.C. Chapter 2721. That statute requires that the Attorney General be notified in every such action by service of the pleading in accordance with Civ.R. 4.1. Neither *Ferencak* nor this case is a declaratory judgment action filed pursuant to R.C. Chapter 2721. *Ferencak* began as a small claims action to recover damages stemming from a customer's decision to stop payment on a check for automobile repairs. And this case is an action to enforce our constitutional responsibility to oversee the practice of law in this state. *Cicco*, therefore, does not require service on the Attorney General as a prerequisite to invoking our jurisdiction. For this reason, *Ferencak* is overruled.

Cleveland Bar Ass'n v. Picklo, 96 Ohio St. 3d 195, 2002 Ohio 3995, P5-P7. Since the current case does not include a claim for declaratory judgment regarding the constitutionality of RC 2323.43, *Cicco* does not apply. Consequently, in spite of the fact that Plaintiffs did not notify the Attorney General of the constitutional issue in this case, this Court has jurisdiction to consider that issue.

Plaintiffs argue that R.C. 2323.43(A)(3) is unconstitutional because it violates due-process rights. Specifically, Plaintiffs contend that the medical negligence damage cap contained in R.C. 2323.43(A)(3) cannot survive rational basis review since the cap is an "irrational and arbitrary attempt to impose the cost of [an] intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." This Court agrees.

When reviewing a statute on due-process grounds, we apply a rational-basis test unless the statute restricts the exercise of fundamental rights. *Morris*, 61 Ohio St.3d at 688-689, 576 N.E.2d 765; *Sorrell* at 423, 633 N.E.2d 504... we must find it valid under the rational-basis test "[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274, 28 OBR 346, 503 N.E.2d 717, quoting *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 4 O.O.2d 113, 146 N.E.2d 854, 146 N.E.2d 854, paragraph five of the syllabus.

Arbino v. Johnson & Johnson (2007), 2007 Ohio 6948, P50. Pursuant to the second prong of the rational-basis test, a court must ask whether the statute is arbitrary or unreasonable. In *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 691, the Supreme Court of Ohio reviewed damage caps for medical malpractice claims. Those caps were meant to curb rapidly rising medical malpractice insurance rates and their deleterious consequences. The Supreme Court of Ohio found that the damage caps in that case were arbitrary and unreasonable because they imposed the cost of the intended benefit to the public solely upon those most severely injured.

In this case, R.C. 2323.43(A)(3) sets non-economic damage limits for those who have suffered the injuries resulting in permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system. The limits are \$500,000 for each plaintiff or \$1,000,000 for each occurrence. These damage caps are imposed upon the persons who have been most severely injured by medical malpractice in order to secure certain public benefits. Pursuant to *Morris* and *Sheward*, it is irrational and arbitrary to "impose the cost of [an] intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Morris v. Savoy* (1991) 61 Ohio St.3d 684, 691. 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.

This case is distinguishable from the recently decided case *Arbino v. Johnson & Johnson* (2007), 2007 Ohio 6948. In *Arbino*, the Supreme Court of Ohio held that the non-economic damage caps in R.C. 2315.18 are constitutional. However, the RC 2323.43(A)(3) damage caps at issue in the current case are significantly different from those found to be constitutional in *Arbino*. R.C. 2315.18 does not limit the recovery of damages by those who are most severely injured. *Arbino* explicitly relied upon that fact in order to distinguish the R.C. 2315.18 damage caps from the damage caps that were found unconstitutional in *Morris*.

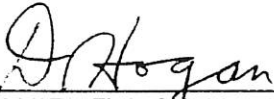
...In *Morris*, we found that the damage caps violated this prong because they imposed the cost of the intended benefit to the public solely upon those most severely injured. *Morris* 61 Ohio St.3d at 690-691, 576 N.E.2d 765. We repeated this concern in *Sheward*, albeit in dicta. *Sheward*, 86 Ohio St.3d at 490, 715 N.E.2d 1062.

[*P60] R.C. 2315.18 alleviates this concern by allowing for limitless noneconomic damages for those suffering catastrophic injuries. R.C. 2315.18(B)(3)(a) and (b).

Arbino v. Johnson & Johnson (2007). 2007 Ohio 6948, P59-P60. Unlike the damage caps considered in *Arbino*, the damage caps in R.C. 2323.43(A)(3) do limit the recovery of damages by those who are most severely injured. Thus, they possess the same constitutional defect as the damage caps that were struck down in *Morris*.

For the above reasons, this Court finds that the non-economic damage limitations described in R.C. 2323.43(A)(3) are unconstitutional. Accordingly,

those damage caps do not apply in this case. This Court must deny Defendants'
6-22-2007 and 7-24-2007 Motions for Summary Judgment.

 2-29-08
DANIEL T. HOGAN, JUDGE

Copies to:

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DANIEL M. HOPRIGAN

2010 NOV 23 PM 1:45

SUMMIT COUNTY CLERK OF COURTS IN THE COURT OF COMMON PLEAS SUMMIT COUNTY, OHIO

KATHLEEN P. WELLS, et al.

Plaintiffs,

vs.

DAVID C. CALL, D.O., et al.

Defendants

) CASE NO.: CV 2008-09-6782
)
) JUDGE PAUL J. GALLAGHER
)
)
)
) JUDGMENT ENTRY
)
)
)

This matter came on for a jury trial on October 19, 2010 to October 27, 2010.

Appearing on behalf of the Plaintiff was Attorney Michael L. Inscore. Representing the Defendants was Attorney Michael Ockerman.

The Plaintiffs presented evidence and rested their case. The Defendants presented evidence and rested their case. The Plaintiffs presented rebuttal evidence.

After deliberation, the jury responded to interrogatories and returned verdicts finding as follows:

Judgment in favor of Plaintiffs Kathleen P. Wells and David Wells and against Defendants Hitesh Makkar, M.D., and Northeast Ohio Pulmonary, Critical Care and Sleep Associates, Inc. ("Northeast Ohio Pulmonary")

Judgment in favor of Defendant Dr. Matthew Krauza, M.D., and against Plaintiffs Kathleen P. Wells and David Wells.

The jury awarded damages to Plaintiff Kathleen Wells as follows:

Non-economic Loss: \$1,400,000

Economic Loss: \$100,000.

The jury also awarded damages to the Defendant David Wells for Loss of Consortium in the amount of \$25,000.

Defendants Dr. Makkar and Northeast Ohio Pulmonary then moved the Court to reduce the non-economic damages award to Plaintiff Kathleen Wells to \$300,000 in keeping with R.C. §2323.43 (A)(2).

Plaintiffs argue that Ohio's cap statute is unconstitutional as applied to Plaintiff Kathleen Wells and that the \$1,400,000 non-economic damage award should not be reduced at all.

Alternatively, Plaintiffs argue that if the Court disagrees and decides to reduce the non-economic damage award, the award should be reduced to \$500,000 in keeping with R.C. §2323.43 (A)(3), not R.C. §2323.43 (A)(2), because Plaintiff Kathleen Wells suffered a "permanent and substantial physical deformity" and/or "the loss of use of a limb."

The Court agrees with the Plaintiffs that R.C. §2323.43 (A)(3), not R.C. §2323 (A)(2) applies in this case and that Plaintiff Kathleen Wells' non-economic damage award should be capped at \$500,000, if the cap statute is found to be constitutional.

However, after a thorough review of R.C. §2323.43(A)(3), this Court finds R.C. §2323.43(A)(3) unconstitutional on due process grounds. The Court, therefore, **OVERRULES** Defendants' motion asking the Court to reduce the noneconomic damages award against them.

JURISDICTION

Before it can review the merits of Plaintiffs' claim that R.C. §2323.43(A) is unconstitutional, this Court must first address Defendants' claim that this Court lacks jurisdiction to conduct a constitutional analysis.

Defendants claim that R.C. §2721.12 requires Plaintiffs to indicate in their complaint or amended complaint their intention to challenge R.C. §2323.43(A)'s constitutionality and must also send a copy of the complaint or amended complaint to the Ohio Attorney General. Plaintiffs claim that compliance with R.C. §2721.12 is required for the Court to have jurisdiction.

R.C. §2721.12 provides in relevant part:

"...when declaratory relief is sought under this chapter in an action of proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding...and, if any statute ...is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard."

Plaintiffs' medical negligence complaint does not contain a count asking for declaratory judgment. However, Plaintiffs relies on a 2001 Second District Court of Ohio decision for the proposition that R.C. §2721.12 applies broadly to any challenge of a statute "because every constitutional challenge to a statute is deemed a request for a court declaration." In Re Adoption of Coppersmith, 145 Ohio App.3d 141, 145, 2001-Ohio-1484, 761 N.E.2d 1163.

However, in 2002, the Ohio Supreme Court made clear that R.C. §2721.12 only applies to declaratory judgment actions. Cleveland Bar Association v. Picklo, 96 Ohio St.3d 195, 2002-Ohio-3995, 772 N.E. 2d 195. Therefore, Plaintiffs were not required to include their constitutional challenge in their complaint or serve their complaint on the attorney

general. This Court, therefore, finds that it has jurisdiction to rule on Plaintiffs' constitutional claims.

CONSTITUTIONAL ANALYSIS

Due Process

During the past 35 years, the Ohio Supreme Court has reviewed a number of "tort-reform" statutes that attempted to give relief from large noneconomic damage awards in tort cases, awards which were blamed for sharp increases in medical malpractice insurance premiums and damage to business and the overall economy in Ohio.

One of the Ohio General Assembly's first efforts was the Ohio Medical Malpractice Act of 1975, Am. Sub. H.B. No 682. It established a flat \$200,000 cap on noneconomic damage awards in medical negligence cases, with no exceptions for those suffering severe injuries. The Supreme Court struck that statute down on due process grounds in 1991. Morris v. Savoy (1991), 61 Ohio St.3d 684, 576 N.E.2d 765.

In so doing, the Court noted that "(i)t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." Id. at 691.

Another major effort by the General Assembly was Am.Sub.H.B. No 350 that took effect in 1997. House Bill 350 set caps for noneconomic damage awards for serious injuries at one million dollars or thirty-five thousand dollars times the number of years remaining in the Plaintiff's expected life. The Supreme Court found the statute unconstitutional on due process and other grounds and noted that the statute "continues to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely

injured by tortuous conduct." State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St. 3d 451, 715 N.E.2d 1062.¹

The Court in Sheward did not dispute that the General Assembly had provided grounds for believing that the cap bore a rational relationship to a legitimate public purpose. But the Court cited Morris, supra, and said the statute "is invalid on due process grounds because it is unreasonable and arbitrary, irrespective of whether it bears a real and substantial relation to the public health or welfare." Seward Id at 490

The legislature tried again to address the problem of high noneconomic damage jury awards with the passage of Senate Bill 281 in 2003 and with the passage of Senate Bill 80 in 2005.

Senate Bill 80 established caps for noneconomic damage awards in personal injury and other tort cases (not including medical negligence cases), but exempted from the caps persons who were most severely injured.

In 2007, the Supreme Court upheld Senate Bill 80 in Arbino v Johnson & Johnson, 116 Ohio St.3d 468, 880 N.E.2d 420. But the Court cited Morris and Sheward and noted that it had previously struck down statutes that "imposed the cost of the intended benefit to the public solely upon those most severely injured". The Court said S.B. 80 "eliminates this concern by allowing for limitless noneconomic damages for those suffering catastrophic injuries."

¹ The language of House Bill 350 pertaining to caps on awards for noneconomic damages was designated R.C. 2323.54. It did not expressly provide that it applied to medical negligence cases. It provided that it applied to "tort actions" and the definition of "tort action" did not specifically include or exclude language about medical negligence cases.

That R.C. 2323.54 did indeed apply to medical negligence cases, though, was made clear by the Ohio Supreme Court in Sheward Id. at 490 where the Court said: "By replacing former R.C. 2307.43 (Edit note: the statute struck down in Morris) with R.C. 2323.54, the General Assembly has merely expanded the scope of a statute declared unconstitutional by this Court in the context of medial claims to include all tort claims, medical and otherwise." Seward Id. 490. (Edit note added).

Meanwhile, the General Assembly adopted S.B. 281 which once again establishes caps for noneconomic damage awards for the severely injured in medical negligence cases.

In fact, it sets caps for persons severely injured in medical negligence cases while Senate Bill 80 --the statute upheld in Arbino v Johnson & Johnson-- allows unlimited noneconomic damage awards for persons severely injured in personal injury and other non-medical negligence tort cases.

In addition, Senate Bill 281 set caps for medical negligence cases involving severe injury that are lower than the caps for such damages that were found unconstitutional in Seward.

More specifically, the caps for noneconomic damage awards in medical negligence cases involving seriously injured persons is \$500,000 in Senate Bill 281, whereas the cap for similar noneconomic damage awards in Seward was one million dollars or thirty-five thousand dollars times the number of years remaining in the Plaintiff's expected life.

It is the caps on noneconomic damage awards for severely injured persons in medical negligence cases set forth in Senate Bill 281 (more specifically in R.C. 2323.43 (A)(3)) that the Plaintiffs claim are unconstitutional as applied in this case.²

² R.C. 2323.43, Limits on compensatory damages representing noneconomic loss

- (A) In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to 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 damages 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 under this section to recover damages for injury, death, or loss to person or property 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, as determined by the trier of fact, to a maximum of three hundred fifty thousand dollars for each plaintiff or a maximum of 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) of this section, but shall not exceed five hundred thousand dollars for either of the following:

STANDARD OF REVIEW

In addressing the constitutionality of R.C. §2323.43 (A)(3), this Court is keenly aware that "(i)t is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality. Arbino v. Johnson & Johnson, supra at 473 quoting Sorrell v. Thevenir (1994) 69 Ohio St.3d 415, 419-420, 633 N.E.2d 504. Before a court may declare unconstitutional an enactment of the legislative branch, 'it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" Id. quoting State ex. rel. Dicman v. Defenbacher (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus.

In reviewing a challenge to a statute on due-process grounds, this Court must use a rational-basis test where the statute, as in this case, does not restrict the exercise of a fundamental right. Id. at 478. In such a case the statute must be found valid (1) if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and (2) if it is not unreasonable or arbitrary.

When the Ohio Supreme Court reviewed then House Bill 682 in the late 1980's and early 1990's, the Court found that the statute failed to bear a real and substantial relation to the goal of reducing the sharp increases in medical malpractice insurance premiums that were a matter of concern. Morris v. Savoy, supra at 690-691. However, when the Supreme Court reviewed then House Bill 350 twenty years later, the Court focused on the second prong of the rational basis test: the requirement that the statute not be arbitrary or irrational. As noted above, the Court found that the cap in House Bill 350 on noneconomic damage awards for the

-
- a. Permanent and substantial physical deformity, loss of the 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.

most severely injured persons were unreasonable and arbitrary under the second prong of the rational relation test, "irrespective of whether it bears a real and substantial relation to the public health of welfare." Seward at 490.

This Court is aware of the Ohio Supreme Court's admonition in Arbino v. Johnson & Johnson supra. at 433-434 that the Court's rulings in Morris and Sheward do not create a "bright-line" rule that no cap on noneconomic damages in cases involving the most severely injured persons will be upheld.

However, this Court cannot escape the logic that if a cap on noneconomic damage awards of one million dollars or thirty-five thousand dollars times the number of years remaining in the Plaintiff's expected life in cases involving the most severely injured persons is invalid (Sheward), then a posteriori a cap of \$500,000 is also invalid.

The Court, therefore, finds that the cap set forth in R.C. §2323.43 (A)(3) is unconstitutional on due process grounds. Accordingly, Defendants' motion to have the cap imposed is OVERRULED.

Right to Trial by Jury

Plaintiffs also argue that the cap on noneconomic damage awards contained in R.C. 2323.43 is unconstitutional as an infringement on Plaintiffs' right to a trial by jury. The Court disagrees for same reasons outlined by the Ohio Supreme Court in Arbino at 473-475. The Court finds that the statute is not unconstitutional for infringing on jury trial rights.

Unconstitutionally Vague

Plaintiffs also claim that the cap statute is void for vagueness. The Court finds that the phrase "permanent and substantial physical deformity as use in statute is not impermissively vague. Therefore, the Court finds the statute is not void for vagueness.

PLAINTIFF EXPENSES TAXED AS COURT COSTS

Plaintiffs have also filed a Motion to assess various deposition and videography expenses as court costs in this case. Plaintiffs have itemized a total of \$5,009.84 in such expenses and have attached itemized invoices to their motion.

The Defendants have responded in opposition.

Sup. R. 13(D) governs the assessing of such expenses as court costs.

Upon review of the expenses and for good cause shown, the Court grants Plaintiffs' motion to assess as court costs the following expenses: the \$1,103.15 in expenses billed by Skutas Ltd, Legal Video and Media Productions; the \$680 in expenses billed by Sargents Court Reporting Service; and the \$590 in expenses billed by Mirror Image Video and Photography; for a grand total of \$2,373.15 in expenses.

The Court overrules Plaintiffs motion with respect to the remaining itemized bills.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Plaintiff Kathleen P. Wells and against Defendants Hitesh Makkar, M.D. and Northeast Ohio Pulmonary, Critical Care and Sleep Associates, Inc. in the amount of \$1,500,000.

IT IS FURTHER ORDERED that Judgment be entered in favor of David Wells and against Hitesh Makkar and Northeast Ohio Pulmonary, Critical Care and Sleep Associates in the amount of \$25,000.

IT IS FURTHER ORDERED that Judgment be entered in favor of Matthew Krauza, M.D., and Northeast Ohio Pulmonary, Critical Care and Sleep Associates against Plaintiffs Kathleen P. Wells and David Wells.

Costs to Defendants Hitesh Makkar, M.D. and Northeast Ohio Pulmonary, Critical Care and Sleep Associates, Inc. including \$2,373.15 as discussed above.

This is a final, appealable Order. There is no just cause for delay.

IT IS SO ORDERED.

JUDGE PAUL J. GALLAGHER

cc: Michael L. Inscore
Michael Ockerman

PJG:lcb
08-6782b

CASE NO. 653779

ASSIGNED JUDGE Gaul

Lauren Wargo

vs Susan White Anesthesia, et al

- 02 REASSIGNED
- 03 REINSTATED (C/A)
- 04 REINSTATED
- 20 MAGISTRATE
- 40 ARBITRATION
- 65 STAY
- 69 SUBMITTED

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- 81 JURY TRIAL
- 82 ARBITRATION DECREE
- 83 COURT TRIAL
- 85 PRETRIAL
- 86 FOREIGN JUDGMENT
- 87 DIS. W/O PREJ
- 88 BANKRUPTCY/APPEAL STAY

- 89 DIS. W/PREJ.
- 91 COGNOVITS
- 92 DEFAULT
- 93 TRANS TO COURT
- 95 TRANS TO JUDGE
- 96 OTHER

NO. JURORS _____
 START DATE ___/___/___
 END DATE ___/___/___

COURT REPORTER _____
 START DATE ___/___/___
 END DATE ___/___/___

- PARTIAL
- FINAL
- POST CARD

DATE 10/29/09 (NUNC PRO TUNC ENTRY AS OF & FOR ___/___/___)

CLERK OF CO

Memorandum of Opinion and Order

OSJ

JUDGE

CV08653779
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THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Lauren Wargo
Plaintiff

CASE NO. CV-08-653779

Vs.

SUSAN WHITE ANESTHESIA, INC., et al.
Defendants.

MEMORANDUM OF
OPINION AND ORDER ON
POST JUDGMENT
MOTIONS

Gaul, D:

**I. Defendant's Motion for Judgment Notwithstanding the Verdict on Plaintiff's
Claims for Punitive Damages and Defendant's Motion for New Trial**

After review, the Court finds Defendants' Motions for New Trial and Judgment notwithstanding the Verdict not well taken and therefore denied.

The Court properly considered the issue of bifurcation under Rule 42(B) of the Ohio Rules of Civil Procedure which places the issue of bifurcation within the Court's discretion. Defendants' reliance on Revised Code 2315.21(B) is misplaced because bifurcation is a procedural matter and therefore Rule 42(B) controls. See Barnes v. Univ. Hosp. of Cleveland, 2006-Ohio-6266 (Ohio App 8th Dist. 2006). Because the issues of Defendant Michelow's malpractice, fraud, and concealment were factually intertwined in this case, the Court finds that it exercised appropriate discretion in denying the Motion to Bifurcate.

The Court further finds that the jury verdict of \$425,000 in punitive damages was based upon sufficient evidence of fraud, deceit and conduct which demonstrated actual malice on the part of defendant Michelow. The Court, therefore, denies Defendants' Motion for New Trial.

The Court also denies Defendants' Motion for Judgment Notwithstanding the Verdict. The Court finds that the Plaintiff provided sufficient proof at trial of all the elements of fraud and concealment in that Defendant Michelow concealed material facts regarding the cause of the fire in an effort to avoid liability. This conduct supported the jury's finding set forth in the jury's answers to the interrogatory in which the jury concluded that Defendant Michelow acted with actual malice and thereby awarded punitive damages.

II. Defendant's Motion to Reduce Punitive Damages Pursuant to R.C. 2315.21

The Court now considers Defendants' Motion to Apply the Statutory Cap on Punitive Damages set forth in Revised Code 2315.21(D)(2). This statute purports to cap punitive damages in an amount limited to two times the amount of compensatory damages awarded to the Plaintiff. However, where the Defendant is a small employer or an individual the statute further limits the amount of punitive damages to "the lesser of two times the amount of compensatory damages awarded to the Plaintiff from the Defendant or ten percent of the employer or individual's net worth when the tort was committed up to a maximum of \$350,000.00."

The statute denies the right to jury trial of Plaintiffs who sue "small employers or individuals" and violates the Plaintiff's right of equal protection. Because the right to jury trial is inviolate, the jury's award of punitive damages should not be disturbed unless it fails to meet the constitutional standards set forth by the United States Supreme Court. This statute, however, totally ignores the finding of the jury which in this case awarded less than half of the compensatory damages which it awarded in

rendering its verdict for punitive damages. The Court finds that this statute violates the Plaintiff's right to a jury trial.

The Court further finds that a review of the legislation resulting in the enactment of Revised Code 2315.21(D)(2) does not reveal any factual or rational support for treating small employers different from large employers. The Court notes that for large employers the cap is two times compensatory damages whereas for small employers the cap is lesser of two times compensatory damages, or ten percent of the Defendants' net worth not to exceed \$350,000.00. The General Assembly's statement regarding the rationale for the limits set forth in Revised Code 2315.21(D)(2) fails to establish the distinction between large and small employers or individuals created by this subsection. By creating a distinction based upon whether the Defendant is a small employer or an individual rather than a large employer, Revised Code 2315.21(D)(2) is broader than necessary to accomplish the legislature's perceived goals and, therefore, does not survive the strict scrutiny review required in addressing equal protection issues. The Court further finds that it also fails under a rationale basis review and, therefore, holds that the application of the statute is unconstitutional when applied to the jury's verdict in this case. See Conley v. Shearer 64 Ohio St. 3d 284 (1992); Morris v. Savoy, 61 Ohio St. 3d 684 (1991).

The Court, therefore, denies Defendants' Motion to Vacate the May 8, 2009 Judgment Entry regarding punitive damages and denies Defendants' Motion to Reduce the Punitive Damage Verdict.

III. Defendant's Motion to Enforce Cap on Non-Economic Damages

After review, the Court finds Defendants' motion to enforce Cap on non-Economic Damages not well taken and therefore denied.

In Defendants' Motion to Vacate the May 8, 2009 Judgment Entry in favor of Plaintiff, Defendants seek to reduce the jury's award of non-economic damages in the amount of \$830,000.00 to the "\$500,000.00 statutory cap on non-economic damages." In response Plaintiff argues that Revised Code 2323.43, the statutory provision which caps non-economic damages in medical malpractice cases at \$500,000.00, is unconstitutional as applied to the Plaintiff.

The Court finds that the duly empanelled jury in this case after hearing all of the evidence awarded Plaintiff the exact sum which her counsel requested for non-economic damages for the injuries that she sustained. The sum of \$830,000.00 is not argued by the Defendants to be unreasonable or excessive or against the manifest weight of the evidence. Rather, the Defendants are simply requesting that this Court reduce the jury's award to the statutory cap.

The Court notes that the issue of the constitutionality of the statutory cap on non-economic damages and its application to the jury verdict in this case has not previously been decided in this case. While the Plaintiff requested in a pretrial motion that the cap be declared to be unconstitutional prior to the jury verdict, the Court could not have addressed at that time whether a jury's verdict of non-economic compensatory damages in excess of the cap is constitutionally permissible.

The Court finds that Revised Code 2323.43 is unconstitutional as applied to the Plaintiff's jury verdict for non-economic damages in this case. The statutory cap as

applied to the Plaintiff violates Article I, Section V of the Ohio Constitution which mandates that the right to by jury shall be inviolate. See Sorrell v. Thevenir, 69 Ohio St.3d 415, 421 (1994), and State ex rel. Ohio Academy of Trial Lawyers v. Sheward 86 Ohio St.3d 451, 492 (1999).

The Court recognizes that in Arbino v. Johnson & Johnson, 116 Ohio St.3d 468 (2007) the Ohio Supreme Court concluded that Revised Code 2315.18, the non-economic damage cap statute which applies to non-medical malpractice tort cases was constitutional and did not violate the right to a jury trial. But Arbino only addressed the issue of whether the non-economic damage cap was facially unconstitutional and did not reach the issue of whether it could pass constitutional muster as applied to a particular jury verdict, which is the issue in this case.

Furthermore, the Court finds that the statutory cap applied to non-medical malpractice tort cases, Revised Code 2315.18, is different from the medical malpractice statutory cap contained in Revised Code 2323.43 in that Revised Code 2315.18 does not cap non-economic damages which are awarded to the Plaintiff for permanent or catastrophic injuries.

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.

The Court, therefore, finds that the application of Revised Code 2323.43 to the Plaintiff is an unconstitutional denial of a right to jury trial and a denial to the right of equal protection and therefore denies Defendants Motion to vacate the May 8, 2009

judgment entry and further denies Defendants' Motion to Enforce the Cap on Non-Economic Damages.

IV. Plaintiff's Motion for Prejudgment Interest.

After review, the Court hereby grants plaintiff's motion for prejudgment Interest. From the testimony adduced at the evidentiary hearings on 07/02/2009 and 08/25/2009 and the respective motions of the parties, the Court awards prejudgment interest in the amount of \$45,941.56.

An award of Prejudgment interest is within trial court's sound discretion. Central Trust Co. v. Warburg, 104 Ohio App.3d 186 (Ohio App. 1st Dist. 1995); Cincinnati Ins. Co. v. First Natl. Bank, 63 Ohio St.2d 220, 226 (Ohio 1980); Huffman v. Hair Surgeon, Inc., 19 Ohio St.3d 83, 87 (1985).

The Supreme Court of Ohio in Kalain vs. Smith, 25 Ohio St.3d 157 (1986) held "a party has not 'failed to make a good faith effort to settle' under R.C 1343.03 (C) if they have (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings and (4) made a good-faith monetary settlement offer or responded in good faith to an offer from the other party."

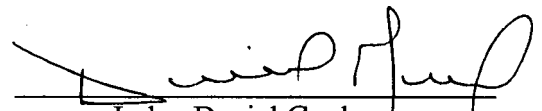
The Court finds that Defendants Contemporary Cosmetic Surgery, Inc. and Bryan Michelow, M.D. through their counsel, and as orchestrated by The Doctor's Company, failed to timely respond to Plaintiff's reasonable settlement demands and failed to adequately and in good faith evaluate this claim and thereby failed to communicate a good faith offer or to negotiate a settlement in this case in good faith.

The Court, therefore, finds that pursuant to the criteria set forth in Kalain vs. Smith, 25 Ohio St.3d 157 (1986) and Moskovitz v. Mt. Sinai Medical Center, 69 Ohio St.3d 638 (1994) the Plaintiff is entitled to prejudgment interest of \$45,941.56 from 01/08/2007, the date defendants and insured had notice of the claim, to 05/08/2009, the date of judgment.

V. Defendant's Motion for Remittitur

Finally, the Court addresses the Defendants' Motion for Remittitur. This motion requests that the Court reduce the jury's finding of economic loss from \$41,359.02 to \$11,359.02. The Court finds that the Plaintiff presented evidence of past medical bills of \$11,359.02 and also presented evidence that the Plaintiff would be required to seek future medical care for her injuries. The jury, therefore, properly awarded the sum of \$30,000.00 for her future medical costs and, therefore, the Court denies Defendants' Motion for Remittitur.

IT IS SO ORDERED

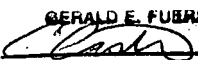


Judge Daniel Gaul

RECEIVED FOR FILING


Dated: 10/29/09

OCT 30 2009

By  Dep.

SERVICE

Copies of the foregoing Order were sent via U.S. mail to all counsel of record this date: 10/29/09



Judge Daniel Gaul



COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
AUG 29 2025

PAM LOVE, ADMINISTRATOR
OF THE ESTATE OF JANENE
ROBERSON, DECEASED,

Plaintiff,

-v-

MEADOWBROOK HEALTHCARE,
LLC, et al,

Defendants.

:
: CASE NO. A2304456
:
:
: JUDGE LEAH DINKELACKER
:
:
: ENTRY GRANTING CO-
: DEFENDANTS GERIATRIC
: PROVIDERS AND
: HOSPITALISTS, INC. AND
: ALEXANDRA MAE KOEHN
: C.N.P.'S MOTION TO ENTER
: JUDGMENT IN
: CONFORMITY WITH R.C.
: 2323.43
:

This matter is before the Court on Co-Defendants Geriatric Providers and Hospitalists, Inc. and Alexandra Mae Koehn C.N.P.'s July 21, 2025 post-trial Motion to Enter Judgment in Conformity with R.C. 2323.43. In ruling on this motion, the Court considered the oral arguments of counsel and the arguments of both parties as detailed in the following filings: (1) the Co-Defendants' Motion itself; (2) the Plaintiff's August 4, 2025 Combined Brief in Opposition and Motion to Include the Full Amount of Noneconomic Damages Awarded by the Jury; (3) the Co-Defendants' August 18, 2025 Combined Reply Brief in Support and Memorandum in Opposition to Plaintiff's Motion to Include the Full Amount of Noneconomic Damages; (4) the Plaintiff's Notice of Supplemental Authority filed on August 21, 2025; and (5) the Co-Defendant's August 28, 2025 Motion to Strike and Response to Plaintiff's Supplemental Authority.

After considering these filings and the oral arguments of counsel, the Court hereby **GRANTS** the Co-Defendants' Motion to Enter Judgment in Conformity with R.C. 2323.43; **OVERRULES** Plaintiff's Motion to Include the Full Amount of Noneconomic Damages; and **OVERRULES** Co-Defendants' Motion to Strike. The Court finds the Plaintiff's argument that the limitations on noneconomic damages as stated in R.C. 2323.43 are unconstitutional unpersuasive; accordingly, the jury award of \$4,000,000 for noneconomic damages¹ is hereby reduced to \$500,000 pursuant to R.C. 2323.43(A)(3).

SO ORDERED.

ENTERED
Leah Dinkelacker
~~LEAH DINKELACKER, Judge~~
HON. LEAH DINKELACKER

¹ See Jury Interrogatory #7.