IN THE SUPREME COURT OF OHIO

JOHN PAGANINI,	:	Case No. 2025-0386
	:	
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga County Court
	:	of Appeals,
v.	:	Eighth Appellate District
	:	
THE CATARACT EYE CENTER OF	:	Court of Appeals
CLEVELAND, et al.,	:	Case Nos. CA-24-113867,
	:	CA24-114019
Defendants-Appellants.	:	

MERIT BRIEF OF THE APPELLANTS, THE CATARACT EYE CENTER OF CLEVELAND, INC. AND GREGORY J. LOUIS, M.D.

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STATEMENT OF FACTS

This appeal arises from a medical malpractice case. The Plaintiff-Appellee John Paganini alleges that the Defendant-Appellant Gregory Louis, M.D. ("Dr. Louis") failed to diagnose endophthalmitis following a December 9, 2021 cataract surgery. Endophthalmitis is an aggressive eye infection that can lead to vision loss. Trans., 379-80. Paganini claims that he ultimately lost his left eye because of the delay in diagnosis. *Id.*, 506-07 515.

At trial, the primary focus was a postoperative appointment on December 10, 2021. Paganini presented with complaints of pain and eye floaters. (*Id.*, 493-94). After examining Paganini, Dr. Louis concluded that he suffered from a vitreous hemorrhage – which is a relatively innocuous tear in the retina or surrounding blood vessels. (*Id.*, 592).

But according to Paganini's expert at trial, Dr. Huang, Dr. Louis should have at least suspected endophthalmitis and referred Paganini to a retina specialist. (*Id.*, 565-616). Dr. Huang opined that if Dr. Louis had made a timely referral on December 10, a specialist could have managed the infection. (*Id.*)

Siding with Paganini, the jury returned a $1,487,500 verdict. (Jury Interrog. No. 3; Trans., 1049). These damages were exclusively *noneconomic*. (*Id.*). Furthermore, in response to a jury interrogatory, the jury also affirmatively found that Paganini had suffered (1) permanent and substantial physical deformity; and (2) loss of a bodily organ system. Jury Interrog. No. 4; Trans. at 1049.

Before judgment was entered, Paganini asked the trial court not to apply R.C. 2323.43(A)(3) on the grounds that the statute is unconstitutional. *2/6/24 Mot. Include Full Amt.* That statute is the noneconomic damage cap for medical claims. It generally provides for a $250,000 noneconomic damage cap except in cases (like this one) where there is a finding of a

specified serious injury under the statute. R.C. 2323.43(A)(3). In the event of a such an injury, the noneconomic damage cap is generally $500,000 – instead of $250,000.

In his February 6, 2024 *Motion to Include In Any Judgment The Full Amount Awarded For Noneconomic Damages*, Paganini made several constitutional arguments. Relevant here, he claimed R.C. 2323.43(A)(3) is unconstitutional under the Ohio Constitution's due course of law provision because it reduced his noneconomic damages. 2*/6/24 Mot. Inc. Full Amt.* at 7-11.

Paganini further claimed (and continues to claim) that he was challenging the statute "as-applied" to him – and not contending that the statute was constitutionally invalid on its face (for all claimants in all circumstances.) *Id.* at 8. But regardless of how Paganini chooses to characterize his argument, his filings in the trial court show that he was making a broad facial challenge to R.C. 2323.43. He never identified a unique set of facts specific to him that rendered RC 2323.43 unconstitutional. To the contrary, he attacked the statute generally – with the same arguments any other seriously injured claimant could make. *Id.* at 7-8. He complained that R.C. 2323.43 was unconstitutional "as-applied to him simply because the statute stripped him of all of the damages awarded by the jury. *Id.* ("Enforcing the noneconomic cap in this case would negate the jury's fact-finding, and strip Mr. Paganini of his constitutional guarantees.")

Ultimately, the trial court found R.C. 2323.43 unconstitutional on due course of law grounds as applied to Paganini. 4/16/24 J. Entry. As a result, the trial court entered judgment in Paganini's favor for the full amount of the verdict. *Id.*

Pursuant to R.C. 2505.02(B)(6), Dr. Louis filed an immediate interlocutory appeal. *4/26/24 Not. Appeal*. The Eighth District then remanded the case so it could decide Paganini's motion for prejudgment interest and Dr. Louis' motion for judgment notwithstanding the verdict/new trial (the "JNOV Motion"). *4/29/24 Entry*. The trial court subsequently overruled the JNOV Motion,

and the limited remand ended. *5/28/24 Entry Deny. Mot. JNOV*. Dr. Louis then filed a second appeal. *6/05/24 Not. Appeal*. The Eighth District consolidated it with Dr. Louis' prior interlocutory appeal. On January 30, 2025, the Court issued its decision ("Decision"). This appeal followed.

ARGUMENT AND PROPOSITION OF LAW

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.

The statute at issue, R.C. 2323.43, is a crucial pillar of legislation that successfully reformed medical malpractice law more than twenty years ago. The General Assembly enacted that statute in 2003 as part of Senate Bill 281 ("SB 281"). That legislation introduced sweeping reforms to Ohio medical malpractice law intended to check out-of-control healthcare costs, fleeing physicians, and other threats to affordable healthcare.

R.C. 2323.43 was one of SB 281's primary provisions. It governs the economic and noneconomic damages that a plaintiff can recover in a malpractice case. Under the statute, there is no limit on economic damages. R.C. 2323.43(A)(1). But with *noneconomic* damages, there are limits. The statute provides for two tiers of caps on noneconomic damages.

One Ohio court has referred to the first (lower) tier as the "basic cap." *Guiliani v. Shehata*, 2014-Ohio-4240, ¶17 (1st) (Fischer, J). This "basic cap is the larger of $250,000.00 or three times the economic damages, subject to a maximum of $350,000.00 per plaintiff and a maximum of $500,000.00 per occurrence." *Id.* (citing R.C. 2323.43(A)(2)). This portion of the statute – which pertains to the "basic cap" – reads as follows:

> (A) In a civil action upon a medical * * * claim to recover damages for injury, death, or loss to a person or property, all of the following apply:
>
> * * *
>
> (2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is

> recoverable in a civil action * * * shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff's economic loss * * * to a maximum of three hundred fifty thousand dollars for each plaintiff or five hundred thousand dollars for each occurrence.

The second (higher) tier of damages is set forth in division (A)(3) of R.C. 2323.43. There, "[t]he statute provides for a higher cap of $500,000.00 per plaintiff and $1,000,000.00 per occurrence." *Id.* But this higher cap applies *only* if the jury determines that the plaintiff has sustained certain specified serious injuries. *Id.* These injuries are set forth in the statute which reads, in pertinent part, as follows:

> (3) The amount recoverable for noneconomic loss in a civil action under this section * * * may exceed the amount described in division (A)(2) * * * but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:
>
> (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
>
> (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities. * * *

The medical claim noneconomic damage cap statute is *jurisdictional*. According to R.C. 2323.43(D)(1), a court "has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits" set forth in R.C. 2323.43(A). "In no event shall a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss" identified in the medical claim damage cap statute. R.C. 2323.43(C)(1).

A. The General Assembly Enacts R.C. 2323.43 To Combat Existential Threats to Ohio Healthcare.

The General Assembly enacted R.C. 2323.43 (and reformed noneconomic damages) to address existential threats to affordable healthcare in Ohio. Furthermore, when it enacted the statute, the legislature was transparent. Through R.C. 2323.43's "Uncodified Law," the General

Assembly stated its intent and described its process for achieving that result. *See Maynard v. Eaton Corp.*, 2008-Ohio-4542, ¶ 7. (finding that uncodified law is the law of Ohio).

For instance, the General Assembly identified multiple threats to medical care in this state: rising costs; dramatic increases in malpractice verdicts; a vulnerable and teetering healthcare system; and unnecessary defensive medicine by frightened physicians. After identifying these threats, the General Assembly announced its intent to stabilize the cost of healthcare delivery by limiting awards for noneconomic damages:

> (A) The General Assembly finds:
>
> (1) Medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio;
>
> (2) The number of medical malpractice claims resulting in payments to plaintiffs has remained relatively constant. However, the average award to plaintiffs has risen dramatically. Payments to plaintiffs at or exceeding one million dollars have doubled in the past three years.
>
> (3) This state has a rational and legitimate state interest in stabilizing the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss award in medical malpractice actions. The overall cost of healthcare to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients. * * *

SB 281, *Uncodified Law*, §3(A).

To address these issues, the General Assembly proceeded deliberately and intentionally. The legislative process (which included hearings and expert testimony) revealed that many malpractice insurers were fleeing Ohio because they were faced with increasing losses. *Id.* §3(A)(3)(b). Relevant here, these losses were related to rapidly rising noneconomic loss awards. *Id.* At the time of the statute's enactment in 2003, the Ohio Department of Insurance reported that there were only six remaining malpractice insurers still willing to write insurance in Ohio. *Id.*

To the detriment of all Ohioans, fewer insurers meant less affordable options for doctors and hospitals. As a result, many physicians – including a large number of specialists – left Ohio. *Id*., §3(A)(3)(i). Other practitioners were similarly assessing relocation to other states in order to escape rapidly rising medical malpractice insurance costs. *Id.* (finding that 15% of Ohio's physicians were considering or had already relocated their practices to escape unsustainable medical liability insurance costs).

After identifying these problems, the legislature considered solutions. Evidence before the General Assembly showed that limiting *noneconomic* damages helped reduce rising health care costs. For instance, the legislature saw the example from other states. That analysis showed that malpractice premiums were reduced in those jurisdictions that had enacted meaningful limitations on noneconomic losses. *Id.*, §3(A)(3)(e). Based upon evidence gathered in the legislative process, the General Assembly specifically found that capping noneconomic damages for injured patients "strikes a reasonable balance between potential plaintiffs and defendants in consideration of an award of noneconomic losses," while not limiting the award of actual economic damages. *Id.*, §3(A)(4)(a).

Various sources supported this finding. For instance, the General Assembly reviewed a report from the U.S. Department of Health and Human Services. It showed that "practitioners in states with effective caps on noneconomic damages [were] experiencing premium increases in the 12 to 15% range, as compared to an average 44% increase in states that do not cap noneconomic damage awards." *Id.*, §3(A)(3)(e). The General Assembly also heard testimony from witnesses that the proposed limits on noneconomic damages for catastrophically injured patients in Ohio were similar to caps on awards adopted by other states. *Id.*, §3(A)(4)(b).

The General Assembly's concerns with runaway damage awards, a besieged medical profession, and increased patient costs were justified. In 2002, just one year before SB 281, the American Medical Association had identified Ohio as one of a dozen medical liability "crisis states." See *AMA Analysis: A Dozen States In Medical Liability Crisis,* AMA News Release (June 17, 2002) (noting that Ohio citizens were losing access to healthcare due to skyrocketing liability insurance premiums and physicians struggling to stay in practice.)

In short, the early 2000's were the bad old days, and SB 281 arose from this crisis. Medical costs were out of control, and doctors were fleeing. Escalating costs jeopardized access to affordable healthcare. As one tool to stem the tide, the General Assembly enacted R.C. 2323.43. That statute specifically targeted a driver of Ohio's medical liability crisis – noneconomic damages arising from medical claims.

The General Assembly focused on noneconomic damages for a reason. Unlike economic damages, noneconomic losses are subjective. *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶69 (recognizing that noneconomic damages "are inherently subjective and difficult to evaluate"). They are "damages that do not present 'actual loss' to an injured party." *Oliver v. Cleveland Indians Baseball Co. Ltd. Ptship.*, 2009-Ohio-5030, ¶ 4, (2009). "There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering." Restatement (Second) of Torts § 903, cmt. a (1965).

Because of this subjectivity, juries are "left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L.Rev. 772 (1985). Consequently, such decisions are "susceptible to influence from irrelevant factors, such as the defendant's wrongdoing" and other extraneous considerations. *Arbino*, ¶ 5*4.*

By capping noneconomic awards, the General Assembly was also responding to a dangerous and destabilizing trend. Historically, noneconomic damage awards were modest and noncontroversial. Decades ago, the availability of noneconomic damages and the fact finders' inability to objectively measure pain and suffering did not raise serious concern because "personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 554, 560 (2006). But by the 1970's, pain and suffering awards often constituted the single largest item of recovery in tort lawsuits. *See*, *Nelson v. Keefer*, 451 F.2d, 289, 294 (3rd Cir. 1971). In Ohio, the General Assembly specifically found that the average plaintiff's verdict had risen dramatically – even as the number of successful claims was steady. SB 281, *Uncodified Law*, §3(A)(2) (stating that "[p]ayments to plaintiffs at or exceeding one million dollars [had] doubled in the past three years"). With noneconomic damage awards rapidly rising, "[m]any medical malpractice insurers left the Ohio market . . .." *Id.*, §3(A)(3)(b).

Against this backdrop of escalating, unpredictable, and unlimited noneconomic damage awards, Ohio faced a healthcare crisis. In response, the General Assembly considered measures to curtail rising malpractice premiums, the flight of Ohio doctors to other states, and the practice of expensive and unnecessary defensive medicine. In enacting R.C. 2323.43, the General Assembly moved "to stem the exodus of medical malpractice insurers from the Ohio market" and "to ensure the availability of quality healthcare" – all while preserving "the right of patients to seek legal recourse for medical malpractice" and continuing "to hold negligent healthcare providers accountable . . .." *Id.*, §3(B)(1)-(4).

B. Paganini's Challenge is Facial – Not As Applied.

As an initial matter, the Court must first apply the proper legal standard. Neither the trial court nor the Eighth District did. Those courts determined (1) that Paganini was making a narrow "as-applied" constitutional challenge; and (2) that as a result, Paganini's burden of proof was only "clear and convincing."

This was error. As set forth below, Paganini's broadside against R.C. 2323.43(A)(3) is a facial challenge. He attacks the statute solely because it reduces his damages. But that is what R.C. 2323.43(A)(3) does in all cases – with all plaintiffs subject to the statute. By challenging the reduction of damages as to him, Paganini challenges the statute's reduction of damages in *all* circumstances. This is really a facial attack – which means the rigorous "beyond a reasonable doubt" standard applies. *Doe v. Reed*, 561 U.S. 186, 194 (2010); *Arbino*, ¶25.

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

There are two types of constitutional challenges. "A statute may be applied as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts." *State v. Lowe*, 2007-Ohio-606, ¶17. Thus, when ruling on a claim that a statute is unconstitutional, courts must first determine what type of challenge is being made – an as-applied *or* a facial challenge. This distinction is crucial because the two different challenges have very different standards of proof. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶20.

For a successful facial challenge, the task is daunting. "[The claimant] must demonstrate that there is no set of circumstances in which the statute would be valid." *Arbino*, ¶26. The mere fact that a statute "might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid. *Id.* "To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also

used in criminal cases, proof beyond a reasonable doubt." *State ex rel. Ohio Congress of Parents and Teachers v. State Bd. of Edn.,* 2006-Ohio-5512, ¶21.

An as-applied challenge is more limited and the burden is less severe. (That is why Paganini has claimed this route.) With "an as-applied challenge, the challenger contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, [is] unconstitutional." *Lowe*, ¶17. An "as-applied" challenge places the burden on the plaintiff to present "clear and convincing evidence" of a "presently existing set of facts" that make the statute at issue unconstitutional. *State v. Hacker*, 2020-Ohio-5048, ¶ 16, *aff'd*, 173 Ohio St. 3d 219, 2023-Ohio-2535, ¶ 16, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 349 (1944); see also *Harrold v. Collier*, 2005-Ohio-5334, ¶ 38. "'The practical impact of holding that a statute is unconstitutional as applied to the challenger is to prevent its future application in a similar context, but not to render it utterly inoperative.'" *Yajnik v. Akron Dept. of Health, Hous. Div.*, 2004-Ohio-357, ¶14, quoting *Ada v. Guam Soc. of Obstetricians and Gynegologists*, 506 U.S. 1011, 113 (1992) (Scalia, J., dissenting).

2. A Plaintiff Makes A Facial Challenge When It Exceeds The "Particular Circumstances" Of The Litigation.

The United States Supreme Court has commented on the line between "as-applied" and facial challenges. The relief requested in an "as-applied" challenge must be limited to the specific plaintiff and particular circumstances of the litigation; if the relief would reach beyond that point, the plaintiff must satisfy the more rigorous standards for a facial challenge. See *Doe v. Reed*, 561 U.S. 186, 194 (2010) ("Because plaintiffs'… claim and the relief that would follow… reach beyond the particular circumstances of these plaintiffs, they must satisfy this Court's standards for a facial challenge to the extent of that reach."); see also *U.S. v. Stevens*, 559 U.S. 460, 472-473 (2010) (recognizing a general constitutional argument as raising a facial challenge).

As further explained in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331, (2010), the distinction between facial and as-applied challenges is both "instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." Unlike facial relief, as-applied relief must contest "a specific application of a law" and seek "a narrow remedy." See *Benezet Consulting LLC v. Secy. Commonwealth of Pennsylvania*, 26 F.4th 580, 585 (3d Cir. 2022); see also *U.S. v. Treasury Employees*, 513 U.S. 454, 477–478, (1995) (contrasting "a facial challenge" with "a narrow remedy").

In contrast to a facial challenge, as-applied relief is a request for an exemption from a statute. The challenger is asking a court to consider it to be an "exception to the rule" – meaning his or her circumstances are so uniquely different from all of the other plaintiffs affected by the statute. See e.g., *Yajnik v. Akron Dept. of Health, Hous. Div*., 2004-Ohio-357, ¶ 14. Whereas facial relief seeks to invalidate the rule for all (or nearly all) persons affected by the statute.

To properly categorize a challenge as facial or as-applied, courts must look to see whether the plaintiff's claim and the relief that would follow reach beyond the particular circumstances of the plaintiff. *Doe*, 561 U.S. at 194. If the requested relief is far-reaching, regardless of how the challenge is initially labeled, the plaintiff must then satisfy the exacting legal standard for a facial challenge. *Id*., citing *Stevens*, 559 U.S. at 472-473.

3. Paganini Fails To Identify Particular Facts That Make R.C. 2323.43(A)(3) Unconstitutional As-Applied Specifically To His Circumstances.

Paganini contends that his challenge to R.C. 2323.43(A)(3) is as-applied because the statute operates to reduce his damages. For instance, to the trial court, he argued that enforcing the R.C. 2323.43(A) noneconomic damage cap would "strip [him] of nearly $1,000,000." *2/6/2024 Mot. Include Full Amt.* at 15. On appeal, the Eighth District accepted this argument when it concluded that Paganini's challenge as as-applied because "the statute requires him to forego 66.4% of" his

damages. *Decision*. ¶50. According to the court, this reduction constituted "unusual circumstances" that made his claim as-applied. *Id.*

But by attacking how the statute works in *all* cases – in that it requires the reduction of damages in excess of the caps, Paganini makes a facial argument. He is describing how the statute affects *all* plaintiffs. In all such instances, by its plain language in all cases, the statute operates "to strip" a plaintiff of noneconomic damages in excess of the R.C. 2323.43(A)(3) cap. Paganini may complain about being "stripped." But so could every other plaintiff with noneconomic damages in excess of $500,000.

These are not "unusual circumstances," and Paganini's challenge is not as-applied. He implicitly admitted as much in his filing in the trial court – where he concluded that R.C. 2323.43(A)(3) is unconstitutional as to all seriously injured persons. *2/6/24 Mot. Inc. Full Amt.* at 15-16 (stating that the statute "is unconstitutional *as applied to noneconomic damage awards* for catastrophically injured plaintiffs") (emphasis added). Since the seriously injured are the only persons contemplated by the statute, Paganini makes a facial challenge.

To proceed with a successful as-applied challenge, Paganini must "present clear and convincing evidence of a presently existing set of facts" that make R.C. 2323.43(A)(3) "unconstitutional and void when applied to those facts." *Groch v. Gen. Motors Corp.*, 2008-Ohio-546, ¶181. He must show that the statute as applied to him in a "particular context" is unconstitutional. *Ruther v. Kaiser*, 2012-Ohio-5686, ¶9, quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 2004-Ohio-357, ¶14. But Paganini never identified a particular factual context applicable to him as required. Neither did the Eighth District. By complaining solely of how R.C. 2323.43(A)(3) operates to reduce damages, Paganini challenges the statute in all contexts. Paganini

has made a facial challenge, and this Court must evaluate his constitutional challenged accordingly.

4. Paganini Requests Broad Relief Extending To *All* Plaintiffs Within The Scope Of R.C. 2323.43(A)(3)'S Damages Cap.

Furthermore, as set forth above, with an as-applied challenge, the relief must be narrow and confined to the plaintiff's specific circumstances. By this standard, the Eighth District's determination that Paganini made an as-applied challenge is incorrect. *Decision* ¶50. The Court based that conclusion on the statute's 66.4% reduction of Paganini's damages, but there is nothing unique to Paganini about his requested relief – the restoration of all "stripped" damages. By tying a constitutional due process issue to the very reduction in damages contemplated by the statute in all cases, Paganini is making a broad argument that applies to all plaintiffs. He is not seeking narrow relief confined to himself – based upon narrow facts. Further, the relief he seeks would render R.C. 2323.43(A)(3) inoperative *as to all*. Regardless of the labels Paganini uses, his challenge is facial. *Reed*, 561 U.S. at 194 (recognizing that the challenger's "label is not what matters" when distinguishing between facial and as-applied arguments).

Because Paganini has failed to raise an appropriate as-applied challenge, the Court's analysis of constitutionality can stop here. This is not an as-applied challenge, and Paganini has not preserved a facial challenge. But if the Court elects to proceed, Paganini's attack on R.C. 2323.43(A)(3) must be assessed for what it really is: a broad facial challenge to an established pillar of medical malpractice reform.

C. R.C. 2323.43(A)(3), As Applied To Paganini, Does Not Violate His Right To Due Process Of Law Under Article 1, Section 16 Of The Ohio Constitution.

After misconstruing the legal standard of review, the Eighth District held that R.C. 2323.43(A)(3) (as-applied to Paganini) violated the Ohio Constitution's "due course of law" provision. *Decision*, ¶67. That provision states that "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." *Ohio Const. art.* I, §16. This right has been considered the functional equivalent of the "due process of law" protections in the Fourteenth Amendment of the U.S. Constitution. *Arbino*, ¶48.

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

Under these principles, this Court has previously validated statutes limiting noneconomic damages in cases involving general (non-medical) torts. *Arbino*, ¶54, 55-62; *Simpkins v. Grace Brethren Church*, 2016-Ohio-8118, ¶38. In those cases, the Court determined that the operative statute rationally advanced state interests – such as "economic concerns" about the detrimental effect of large, unpredictable, and subjective noneconomic awards. *Id.*

1. Under Rational Basis Review, Statutes Enjoy A Strong Presumption of Constitutionality and Courts Must Exercise Restraint.

With a due process challenge, in the absence of an infringement on a fundamental right, Ohio courts proceed with rational basis review. *Stolz v. J&B Steel Erectors*, 2018-Ohio-5088, ¶ 19. No fundamental right exists here. *Decision*, ¶53. Accordingly, under rational basis review, a statute is constitutionally valid and comports with due process (1) if the statute 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. *Brandt v. Pompa*, 2022-Ohio-4525, ¶28. This Court has also stated that

a statute "is constitutional if it is reasonably related to a legitimate governmental interest." *Simpkins*, ¶34.[1]

Under rational basis review, courts must defer to the legislature. See, e.g., *Simpkins*, ¶ 36. A reviewing court "must remember that legislative enactments enjoy a *strong presumption* of constitutionality." *Brandt*, ¶80 (Fischer, J., dissenting) (emphasis in original) (citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59, syllabus, ¶1 (1955)). This "deferential rational-basis test is a paradigm of judicial restraint" and "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Fed. Communications Comm. v. Beach Communications*, 508 U.S. 307, 314 (1993). "Policy considerations raised by members of the judicial branch have no place in this analysis." *Brandt*, ¶90 (Fischer, J. dissenting) (citing *State ex rel Bishop v. Mt. Orab Village School Dist. Bd. of Edn.*, 139 Ohio St. 427, 438, 40 N.E.2d 913 (1942)).

In any constitutional challenge, all courts must be mindful that the legislative branch is "the ultimate arbiter of public policy." *Arbino*, ¶ 21. Only "[t]he General Assembly has plenary power to enact legislation." *Bd. of Trs. of the Tobacco Use Prevention & Control Found. v. Boyce*, 941 N.E.2d 745, ¶10. Accordingly, "[t]he only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom." *Ruther v. Kaiser*, 2012-Ohio-5686, ¶ 9. "When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power." *State ex rel Bishop*, 40 N.E.2d at 919.

[1] OACTA and Ohio Attorney General Dave Yost have filed *amicus* briefs in this case. The *amici* contend that the provision at issue in this appeal, the Open Courts Clause, Ohio Const. art. I, §16 does not contain a substantive due process provision that parallels the 14th Amendment's due process clause in the United States Constitution. Dr. Louis does not object to their arguments. But he will not address them. Instead, he will proceed with the rational basis test as applied below.

These principles recognize the different roles of the legislature and the judiciary – and the legislature's superior position relative to public policy. According to one Ohio court, "[a]lthough courts are often urged to step in where legislature's fear to tread, public policy is best left to the legislative branch, where it was entrusted by our Constitution makers." *State v. Babcock*, 454 N.E.2d 556, 560 (10th Dist. 1982). The court stated that while legislatures "may not be perfect," they have more tools than the judiciary when it comes to the legislative process. *Id.* Furthermore, "their deliberations are conducted in public, and citizens may petition legislatures throughout the lawmaking process." *Id.*

This Court has previously recognized the legislature's preeminence in matters of policy. For instance, as just one example, in *Arbino*, which involved a constitutional challenge to R.C. 2315.18, the noneconomic damage cap for general torts, the Court defined the judiciary's limited role. In particular, in validating those caps, the Court stated that "[i]ssues such as the wisdom of damages limitations and whether the specific dollar amounts available under them best serve the public interest" are not for the judiciary. *Arbino*, ¶113.

Since all statutes have a strong presumption of constitutionality, under hyper-deferential rational basis review, "[i]t is difficult to prove that [a] statute is unconstitutional." *Arbino*, ¶ 25. Any doubts must be resolved in favor of the statute. See, e.g., *State v. Stambaugh*, 34 Ohio St.3d 34, 35 (1987).

As set forth below, the Eighth District missed these lessons. Far from deferential, the court became a mini-legislature when the panel invalidated R.C. 2323.43(A)(3). *Decision*, ¶¶63-64.

2. R.C. 2323.43(A)(3) Bears A Real And Substantial Relation To The Public Health, Safety, Morals and General Welfare Of The Public.

After applying the strong presumption of constitutionality, this Court must turn to rational basis review and conclude that R.C. 2323.43(A)(3) comports with the Ohio Constitution's due

course of law provision. Under the first prong, the Court must assess if the statute bears a real and substantial relation to the public health, safety, morals, or general welfare of the public. *Brandt*, ¶28. This is an easy showing. According to this Court, this prong is satisfied merely if "the General Assembly acted in the public's interests . . .." *Arbino*, ¶ 56.

There can be no other conclusion. The only way a court can find that the General Assembly was not acting in the public's interest is to ignore R.C. 2323.43(A)(3)'s extensive *Uncodified Law*. There, with step-by-step transparency, the legislature explained that it faced a daunting problem. In 2003, a medical liability crisis threatened the availability of health care in Ohio. Medical malpractice verdicts had dramatically increased, and liability insurers were fleeing the state. When the statute at issue was enacted, only six malpractice insurers remained in the Ohio market.

The General Assembly responded. It enacted numerous measures – including the R.C. 2323.43 noneconomic damage cap at issue. The legislature took this step after collecting evidence, hearing testimony, and making other policy assessments that courts *cannot* make. *Babcock*, 454 N.E.2d at 560 ("Legislatures may not be perfect, but at least their processes are better suited to lawmaking than ours . . ..")

From that process, the General Assembly heard evidence that (1) medical costs were skyrocketing; (2) verdicts in malpractice cases had dramatically escalated; (3) doctors and insurers were fleeing Ohio for other more balanced and predictable jurisdictions; *but that* (4) limitations on subjective noneconomic damages helped reduce rising healthcare costs. Based upon those findings, the General Assembly enacted R.C. 2323.43(A)(3) in order to strike "a reasonable balance between potential plaintiffs and defendants in consideration of an award of noneconomic losses," while not limiting the award of actual economic damages. SB 281, *Uncodified Law*, §3(A)(4)(a).

In evaluating this showing of acting in the "public interest," *Arbino* is instructive. There, this Court reviewed R.C. 2315.18 – which sets damage caps in general negligence cases and other (non-medical) torts. In finding that the statute had a "real and substantial relationship to the public's general welfare," the Court did not opine on the wisdom of the legislature's policy. *Arbino*, ¶ 58 (stating that Ohio courts will not "cross-check" the legislative findings). Rather, the Court looked to the General Assembly's *process*: the legislature's deliberate consideration of the evidence that drove the statute's enactment. *Id.*, ¶¶ 53-55 (citing studies, data, and testimony in support of damage caps).

In fact, in *Arbino*, the Court made several "acting in the public interest" findings that are also applicable here – such as the need to curb uncertain and subjective noneconomic damages because of their potential for economic harm:

> Viewing these findings as a whole, we conclude that R.C. 2315.18 bears a real and substantial relation to the general welfare of the public. The General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic affect of the tort system.

Id., ¶55.

These same considerations apply to R.C. 2323.43(A)(3) and noneconomic damages in medical malpractice cases. To address unsustainable costs and to restore access to affordable medicine, the General Assembly enacted a number of measures. One of them was R.C. 2323.43(A)(3). It targeted "inherently subjective" noneconomic damages in an effort to restore stability and halt the healthcare crisis for the benefit of all Ohioans.

In short, backed by testimony, studies, and economic data, the General Assembly acted in the public interest when it set the $500,000 damage cap for serious injuries in malpractice cases.

Under rational basis review, which is hyper-deferential to the legislature, the judiciary should not second-guess that policy choice.

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

Under rational basis review's second prong, the Court must next assess whether R.C. 2323.43's noneconomic damage cap is "unreasonable" or "arbitrary." It is not. The General Assembly identified a valid state interest: Restoring and maintaining the availability of affordable medical care from competent practitioners in Ohio while balancing the interests of potential plaintiffs. SB 281, *Uncodified Law*, §3(A)(3)-(4). As shown by the legislative record, R.C. 2323.43 is one tool that the General Assembly enacted to achieve that interest.

The Eighth District criticized that tool in its Decision. But in enacting policy, the legislature does not have to be perfect – or even correct. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (stating that "litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislation was mistaken"). As this Court has previously observed in the face of judicial second-guessing, "[a]t some point, though, the General Assembly must be able to make a policy decision to achieve a public good." *Arbino*, ¶61. The legislature cannot fulfill that duty if courts and litigants can undermine those decisions – simply because there might be other ways to achieve that interest.

In short, in furtherance of an important public policy, healthcare access and stability, the General Assembly made deliberate policy decisions. It took the most subjective component of any award – noneconomic damages – and adopted a two-tiered system of damage caps. That system, which was enacted after the legislature reviewed studies and heard from experts, created a higher noneconomic damage cap for the most severe injuries and a lower noneconomic damage cap for less severe injuries. As shown by SB 281's *Uncodified Law*, the legislature acted reasonably and within its broad powers when it took these steps. *Simpkins*, ¶ 29 ("The General Assembly has the

authority to determine what causes of action the law will recognize, to alter the common law by abolishing defining or limiting those causes of action *and to determine what remedies are available*.") (emphasis added).

D. The Activist Eighth District Did Not Defer To The Legislature And, Instead, Enacted Policy.

In its *Decision*, the Eighth District briefly mentioned the judiciary's subordinate role in matters of policy. *Decision*, ¶51. But this was mere lip service. If rational basis review is the paradigm of judicial restraint, the *Decision* is the pinnacle of judicial activism.

Paragraphs 63 and 64 of the *Decision* illustrate this point. There, the unrestrained Eighth District made its own policy judgment. The court declared that "it was not clear from the legislative findings how [R.C. 2323.43(A)(3)] will have any impact in reducing malpractice insurance rates since there has been so few cases involving these types of injuries." *Decision*, ¶63.

In support of this statement, the Court cited an Ohio Department of Insurance report from 2019 (the "2019 Report"). The Court found certain sentences from that 2019 Report persuasive in its evaluation of a 2003 statute even though the report was written more than 14 years after R.C. 2323.43(A)(3)'s enactment. *Id.*, ¶¶63-64.

Citing just a few lines of data from this 2019 Report, the activist court dove headfirst into policy-making. It concluded that (1) because only .32% of medical malpractice claims result in a plaintiff's verdict; and (2) because only 30 cases between 2005 and 2019 resulted in verdicts that exceeded the statutory caps, "the legislative findings failed to demonstrate a real and substantial relationship between the capping of noneconomic damages for catastrophic injuries and malpractice insurance rates." *Id.*, ¶64. The Eighth District invalidated R.C. 2323.43(A)(3) on this basis.

With the Eighth District's reliance on the 2019 Report – to the exclusion of relevant evidence in SB 281's *Uncodified Law*, there is much to unpack. For one, the report specifically states that it "is not intended to be used to evaluate past or current medical professional liability insurance rates." *2/6/24 Mot. Inc. Full Amt.*, Ex. A at 2. But the Eighth District ignored this disclaimer. It used statistics (that it was warned *not* to use) in order to make a three-judge snap assessment of R.C. 2323.43(A)(3)'s efficacy. The Court then improperly linked its perception of that efficacy with a finding of unconstitutionality.

If the Eighth District was an elected legislative body, it could have called the authors of the 2019 Report to testify. They could have been questioned about the data – and any legitimate conclusions to be drawn from it. But ignoring principles of judicial restraint, the Court took cherry-picked sentences from the 2019 Report at face value and reached its own policy conclusion. (Even though the 2019 Report expressly warned that it shouldn't.) This was error.

Second, courts must not "cross check" legislative findings. *Arbino*, ¶58. But that is exactly what the Eighth District did here. The Court ignored SB 281's *Uncodified Law* – which showed that the General Assembly considered extensive evidence that limiting noneconomic damages helped reduce rapidly rising medical costs. SB 281, *Uncodified Law*, §3(A)(3)(e). The legislature even cited a U.S. Department of Health and Human Services Report that compared insurance premium increases in states with noneconomic damage caps and those without them. *Id.*

Instead, disregarding this evidence from the statute's enactment, the Court trumpeted the 2019 Report as evidence that R.C. 2323.43(A)(3) was constitutionally defective. But under rational basis review, courts should not be able to pick and choose due process winners by citing extraneous evidence (that the General Assembly did not even consider) and making policy judgments.

Third, with its *Decision*, the Eighth District seems to introduce a new standard. The Court declares that "it is not clear" how the cap on noneconomic damages impacts malpractice insurance rates. *Decision*, ¶63. But courts must not assess whether a statute comports with due process based upon the judiciary's perception of a statute's efficacy. That is not rational basis review.

In conclusion, the Eighth District's invalidation of R.C. 2323.43(A) was error. And the Court's reliance on the 2019 Report was the original sin that led to that error.

E. The Eighth District Misapplied *Morris, Arbino,* and *Sheward*.

In invalidating R.C. 2323.43(A)(3), the Eighth District relied on *Morris v. Savoy*, 61 Ohio St.3d, 684 (1991). In that case, this Court reviewed a 1975 statute that set a $200,000 cap on general damages for any medical claim. *Id.* at 686. The Court concluded that this flat cap – which did not have tiers to differentiate between injuries – offended due process. In particular, the Court found that the legislative record in 1975 did not support the legislature's claim of a health care crisis. Citing an unreported Fifth District decision, *Morris* concluded 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, citing *Nervo v. Pritchard*, Stark Cty. App. No. CA-6560, (5th Dist. June 10, 1985).

The Eighth District treated this statement as a bright-line rule – applicable to all damage cap statutes everywhere. But it is not. And *Morris* is *not* controlling. Rejecting *Morris'* applicability to more recent matters involving R.C. 2315.18, this Court has twice commented favorably on that statute's detailed legislative record and accompanying *Uncodified Law* versus the 1975 statute examined by *Morris* – which has no such record. *Arbino*, ¶ 56 (stating that this Court had criticized the record in *Morris* "as lacking evidence demonstrating a rational connection between the tort reforms taken and the public good to be achieved"); *Simpkins*, ¶ 40.

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

In *Arbino*, this Court seemingly applauded R.C. 2315.18's legislative record – which is extensive as in this case with R.C. 2323.43(A)(3). *Arbino*, ¶ 56. The Court stated that unlike *Morris*, where there wasn't even kindling for the most cursory rational basis review, the General Assembly had drawn "a clear connection between limiting uncertain and potentially tainted noneconomic-damages awards and the economic problems demonstrated in the evidence." *Id.* The legislature has drawn that same "clear connection" here – with respect to R.C. 2323.43(A)(3).

Both the trial court and the Eighth District cited *Morris* as if it created a rigid rule – that noneconomic damage caps for the most serious medical malpractice injuries are always arbitrary and unreasonable. That is not the case. Instead, a rule from *Morris*, *Simpkins*, and *Arbino* is that even under rational basis review, the legislature will not rubber-stamp a statutory damage cap when the underlying legislative record is (at best) barren.

Furthermore, *Morris* involved legislation from 1975 – and the statute did not provide for two tiers of damage caps. Comparing the *Morris* statutes (from fifty years ago) with the current legislation ignores the different circumstances under which both sets of statutes were enacted. Broadly, both the *Morris* statutes and the legislation at issue were concerned with rising health care costs. But that is where the comparison ends. Given the rapidly changing face of health care in the United States at the end of the last century, the circumstances that led to the 2003 legislation

could not be more different from the environment in the early 1970's – when physicians could remember house calls.

In support of its Decision, the Eighth District also cited *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (1999), which declared an earlier effort at damages caps (and tort reform generally) unconstitutional *in toto*. Citing *Morris*, the *Sheward* Court commented unfavorably on the damage caps in the legislation. But as the Eighth District conceded, this Court later observed that any criticism of those caps on due process grounds was dicta. *Arbino*, ¶ 59.

F. The Eighth District's Reliance on *Metts* Is Misplaced.

Finally, in finding R.C. 2323.43 unconstitutional, the Eighth District cited *Metts, II v. Nationwide Childrens Hospital*, 2018 WL 7050355 (C.P. 2018), a Franklin County Court of Common Pleas decision. *Decision*, ¶ 66. The Eighth District observed that *Metts* had found R.C. 2323.43's noneconomic damage cap arbitrary and unreasonable because it contains a "hard limit" on noneconomic damages "like the unconstitutional provision in *Morris*." *Id.* (citing *Metts II*, at 5).

From there, the Eighth District commented (favorably) on the *Metts* court's amputated leg argument. To illustrate the supposedly arbitrary nature of R.C. 2323.43's cap on noneconomic damages, *Metts* compared how that statute would cap a hypothetical plaintiff's recovery due to a doctor's negligent amputation of a leg; but R.C. 2315.18, the statute that pertains to general torts, would have no such a limit if the same doctor caused an amputation in a car accident. *Id.*, ¶ 66. According to both *Metts* and the Eighth District, it should not matter if amputation arose because of a car wreck or a botched surgery. Instead, in all cases, "[t]he exact same injury inflicted by the same person should yield the same damages…." *Id.* (citing *Metts* at 5).

In response, first, both *Metts* and the Eighth District were wrong to conclude that *Morris* created a bright-line prohibition against caps on noneconomic damages for severe injuries. As set

forth above, *Morris* involved a different flat cap statute from approximately 50 years ago. And unlike present R.C. 2323.43(A)(3), the legislation from that era did not link the intended public good to a cap on noneconomic damages.

Second, in *Oliver v. Cleveland Indians Baseball Co. Limited Partnership*, this Court previously rejected the conclusion that the same injury caused by the same defendant must yield the same damages. *Oliver*, 2009-Ohio-5030, ¶¶14-15. *Oliver* teaches that when faced with a constitutional challenge to a damage cap, the court must evaluate the statute's purpose independently – without reference to decisions involving caps on other types of claims. For instance, R.C. 2323.43(C)'s two-tiered damage cap approach for medical claims has different policy concerns then the statutes governing general torts (R.C. 2315.18) or political subdivisions (R.C. 2744.05). An uncapped, unhinged, subjective noneconomic award arising from a slip-and-fall at a dry cleaner or a rear-end motor vehicle accident on I-71 is not going to have the same effect on those insurance markets as it would in healthcare. (Even if it did, the General Assembly can view the availability of medical care to be more important to Ohioans than dry-cleaning). Legislatures are empowered to make these types of decisions.

Finally, with respect to *Metts'* amputated leg argument, Ohio law restricts damages for the same injury in multiple circumstances. For example, if the hypothetical man from *Metts* were to lose his leg in a workplace accident, the workers' compensation system would provide an award under an entirely separate schedule of recovery. The benefits would be strictly tailored and limited to that injury compensation system. This was a policy choice – just like R.C. 2323.43(A)(3).

Similarly, if that same man from *Metts* loses his leg as the result of a county employee's negligence, his noneconomic damages would be capped at $250,000 under R.C. 2744.05 – the noneconomic damage cap applicable to political subdivisions. This statutory cap on noneconomic

damages and claims against political subdivisions is based on the public policy of safeguarding taxpayer resources. *Oliver,* 2009-Ohio-5030. This is another policy choice – just like R.C. 2323.43(A)(3).

In short, if noneconomic damages can be capped by the legislature for these other public policy reasons, they can likewise be capped by the General Assembly to ensure the accessibility and availability of health care at affordable costs to all Ohioans. This Court must disregard *Metts.*

CONCLUSION

Based on the foregoing, the Appellants, the Cataract Eye Center of Cleveland, Inc. and Gregory J. Louis, M.D., respectfully request that this Court reverse the determination of the lower court; find R.C. 2323.43(A)(3) constitutional; and provide for the entry of judgment consistent with such a finding.

Alternatively, the Appellants respectfully request that this Court reverse the determination that they are not entitled to a new trial pursuant to Civ.R. 59 due to an error of law and order a new trial that recognizes that R.C. 2323.43 is constitutional under the due course of law provision of the Ohio Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by electronic mail this 12th day of August, 2025, upon the following:

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APPENDIX

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JAN 30 2025

JOHN PAGANINI, :

Plaintiff-Appellee, :

Nos. 113867 and 114019

v. :

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

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: January 30, 2025

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-22-971901

Appearances:

Petersen & Peterson, Susan E. Petersen, and Todd E. Peterson, *for appellee.*

Bricker Graydon LLP, Bradley D. McPeek, and Kellie A. Kulka; Perez Morris and Christine Santoni, *for appellants.*

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendants-appellants, Dr. Gregory J. Louis ("Dr. Louis") and The Cataract Eye Center of Cleveland, Inc. ("Cataract Eye Center") (collectively "appellants"), appeal a judgment denying their motion for judgment

notwithstanding the verdict ("JNOV"), following a jury verdict in favor of plaintiff-appellee, John Paganini ("Paganini"), in the amount of $1,487,500.00. Appellants also appeal a judgment finding that R.C. 2323.43(A)(3), a statutory provision placing a cap on noneconomic damages, is unconstitutional as applied to Paganini. They claim the following errors:

> 1. The trial court erred in denying appellants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.
>
> 2. The trial court erred in entering judgment for Paganini and finding R.C. 2323.43(A) unconstitutional as applied to Paganini.

{¶ 2} We find that the denial of appellants' motion for JNOV was reasonable due to their waiver of any irregularities in the jury interrogatories and because the jury's answers to the interrogatories are easily reconciled with the evidence and general verdict. We also find that the cap on noneconomic damages provided in R.C. 2323.43(A)(3) is unconstitutional as applied to Paganini. Accordingly, we affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} On December 9, 2021, Dr. Louis performed cataract surgery on Paganini. The surgery went well, and Paganini returned home the same day. Paganini experienced some pain that evening that he attributed to the surgery. (Tr. 493-494.) And, when Paganini awoke early the next morning, he saw black dots and the number of black dots was increasing. (Tr. 494.)

{¶ 4} Paganini called Dr. Louis's office to report his symptoms, and the call was routed to Dr. Louis's afterhours answering service. The answering service

operator asked Paganini questions to which he replied that he was a current patient, that he was calling about an urgent matter, and that he was seeing black dots that he had not seen before. (Tr. 494-495, and 713-715.) The operator provided Paganini's information to the on-call physician, Dr. Tamar Shafran, at 6:38 a.m. Based on his conversation with Dr. Shafran, Paganini made an appointment to see Dr. Louis later that morning. (Tr. 96-98.)

{¶ 5} When Paganini arrived at Dr. Louis's office on the morning of December 10, 2021, Tammi Dawson ("Dawson"), a certified ophthalmic technician, took Paganini to an examination room where she obtained information about his complaints. Paganini reported that he had aching around his left eye, that his vision was blurry, and that he had "a ton of floaters[.]" (Tr. 475.) Dr. Louis then entered the examination room and asked Paganini about his complaints. He also read Dawson's notes. Paganini told Dr. Louis that his vision was good the day before but that he now had black spots and fog in his vision. (Tr. 392, 498, 600.) Paganini also reported pain in his left eye.

{¶ 6} Dr. Louis examined Paganini's eye. The eye was not red, but Dr. Louis observed some inflammation and signs of a vitreous hemorrhage. (Tr. 394-395.) He admitted at trial that these signs indicate possible endophthalmitis. (Tr. 395-396.) Endophthalmitis is an aggressive eye infection that can lead to vision loss and, ultimately, to loss of the eye itself. (Tr. 379-380.) On December 10, 2021, Dr. Louis did not suspect endophthalmitis because Paganini's symptoms were common among patients after cataract surgery. (Tr. 396-397.)

{¶ 7} Dr. Louis saw "a few white cells," but no evidence of a hypopyon, a medical condition that occurs when white blood cells accumulate in the anterior chamber of eye. (Tr. 402.) A hypopyan is indicative of infection. (Tr. 774.) If Dr. Louis had suspected endophthalmitis, he would have referred Paganini to a retina specialist that same day. (Tr. 398.) Instead, Dr. Louis diagnosed Paganini with a vitreous hemorrhage, i.e., bleeding in the eye from a tear in the retina or blood vessels. (Tr. 394, 592.) However, Dr. Louis could see there was no tear in Paganini's retina and that his retina was still attached at that time. (Tr. 772.) Following the diagnosis, Dr. Louis sent Paganini home.

{¶ 8} The following day, December 11, 2021, Dr. Louis received a message from Paganini's son, John Paganini ("John"), stating that Paganini was experiencing worse pain. Dr. Louis then referred Paganini to Dr. Thomas Hull ("Dr. Hull"), a retina specialist in Akron, Ohio. (Tr. 785-786.) Dr. Hull diagnosed Paganini with acute endophthalmitis. (Tr. 443.) Dr. Hull injected Paganini's eye with two vials of antibiotics. He also prescribed drops for pain and additional antibiotics. (Tr. 501-502.)

{¶ 9} Paganini followed up with another retina specialist the following Monday, December 13, 2021. (Tr. 504.) Paganini also had surgery to treat the infection. However, an ultrasound performed on December 27, 2021, showed that Paganini's retina had detached. (Tr. 506.) At that point, Paganini understood that his loss of vision was permanent. (Tr. 506.) Thereafter, he lost his eye, which

became permanently deformed and requires a future surgery to replace it with a glass eye. (Tr. 507 and 515.)

{¶ 10} On November 29, 2022, Paganini filed a complaint for medical malpractice against appellants. He alleged that Dr. Louis failed to diagnose endophthalmitis during his December 10, 2021 appointment and that Dr. Louis should have referred him to a retina specialist at that time. He also alleged that he sustained permanent substantial injury as a result of appellants' negligence. Finally, he asserted that R.C. 2323.43(A)(3), which places a cap on noneconomic damages, is unconstitutional as applied to Paganini personally.

{¶ 11} The case proceeded to a jury trial, and the jury awarded damages to Paganini in the amount of $1,487,500 for past and future noneconomic damages. The jury further found that Paganini's injury constituted a loss of a "bodily organ system" and a "substantial physical deformity."

{¶ 12} Before the judgment was entered, Paganini filed a motion to include in any judgment the full amount awarded for noneconomic damages. Paganini asked the court not to apply R.C. 2323.43(A)(3), which places a cap of $500,000 on noneconomic damages that may be recovered for serious injuries resulting from medical malpractice, on grounds that the statute is unconstitutional as applied to him. The court granted the motion and entered judgment in Paganini's favor for the full amount of the jury's verdict. In reaching this decision, the trial court determined that the cap on noneconomic damages in R.C. 2323.43(A)(3) violates his due course of law rights under the Ohio Const., art. I, § 16.

{¶ 13} Dr. Louis filed an immediate interlocutory appeal on April 26, 2024, pursuant to R.C. 2505.02(B)(6), which allows interlocutory appeals of judgments finding that R.C. 2323.43 is unconstitutional. Paganini filed a motion to remand the case to the trial court to allow the trial court to rule on certain post-trial motions, including Dr. Louis's motion for JNOV or, in the alternative, for a new trial. This court granted the motion for remand, and the trial court denied appellants' JNOV motion. Thereafter, appellants filed another notice of appeal, appealing the denial of their JNOV motion. The second appeal was consolidated with appellants' first appeal.

II. Law and Analysis

A. JNOV

{¶ 14} In the first assignment of error, appellants argue the trial court erred in denying their motion for JNOV. They argue the jury's responses to special interrogatories are not supported by Paganini's expert testimony and are, therefore, not consistent with the evidence and the general verdict. Appellants assert that Dr. John Huang testified to three separate alleged deviations from the standard of care and that the jury did not accept any of them. They further contend that the jury impermissibly invented its own standard of care and that the court should have, therefore, entered a judgment in favor of appellants.

{¶ 15} Civ.R. 49(B) governs jury verdicts and interrogatories and provides, in relevant part:

> The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. . . . . The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.
>
> . . .
>
> When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

{¶ 16} At appellants' request, the court submitted two interrogatories to the jury to test the general verdict. Counsel did not object to the jury's responses despite the fact that the trial court specifically directed counsel to examine the interrogatories before the jury was discharged. (Tr. 1047.)

{¶ 17} It is well-established that "a party must object to an inconsistency between an answer to a special interrogatory and a general verdict before the jury is discharged" or the issue is waived. *Avondet v. Blankstein*, 118 Ohio App.3d 357, 368 (8th Dist. 1997) ("An objection to an inconsistent answer by a jury to an interrogatory is waived unless the party raises the objection prior to the jury's discharge."), citing *Cooper v. Metal Sales Mfg. Corp.*, 104 Ohio App.3d 34, 42 (11th Dist. 1995) ("A failure to enter a timely objection at a time when the jury has not yet been discharged has been held to be a waiver to any inconsistent answer."); *Telecom Acquisition Corp. I v. Lucic Ents.*, 2016-Ohio-1466, ¶ 45 (8th Dist.) ("The law is clear that where the inconsistencies between a general verdict and an interrogatory are

apparent before the jury is discharged, the inconsistency is waived unless a party raises an objection prior to the jury's discharge."); *Briere v. Wheeler*, 1998 Ohio App. LEXIS 3842, *4-5 (8th Dist. Aug. 20, 1998) ("A party's failure to object to alleged inconsistencies in the jury's interrogatories must, therefore, be raised while the jury is still empaneled and the trial court possesses a full range of options before it."); *Richard L. Bowen & Assocs. v. Kassouf*, 1995 Ohio App. LEXIS 2605, *9 (8th Dist. Jun. 22, 1995) ("[A] party must object to an inconsistency between an answer to a special interrogatory and a general verdict before the jury is discharged.").

{¶ 18} There are two policy rationales for this "waiver rule": (1) to promote the efficiency of trial by permitting the reconciliation of inconsistencies without the need for a new presentation of evidence to a different jury panel, and (2) to prevent jury shopping by litigants who might wait to object to an inconsistency until after the original jury is discharged. *Kassouf* at *9, citing *Greynolds v. Kurman*, 91 Ohio App.3d 389 (9th Dist. 1993); *Haehnlein v. Henry*, 41 Ohio App.3d 233, 234 (9th Dist. 1987); *see also O'Connell v. Chesapeake & O.R. Co.*, 58 Ohio St.3d 226, 229 (1990), quoting *Haehnlein* at 344 ("'The purpose of the [waiver] rule is to promote the efficiency of trials by permitting reconciliation of inconsistencies without the need for presentation of the evidence to a different trier.'").

{¶ 19} In *Haehnlein*, the court further explained that

> "[t]o allow a new trial after the objecting party failed to seek a proper remedy at the only possible time would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures . . . by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them."

Haehnlein at 234, quoting *Skillin v. Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981) (applying virtually identical federal rule).

{¶ 20} In *O'Connell*, the Ohio Supreme Court recognized an exception to the general waiver rule where the inconsistencies in the interrogatories are not apparent until after the jury has been discharged. *O'Connell* was a comparative negligence case in which the jury found that the plaintiff was 70 percent negligent, and the court entered judgment for the defendant. The plaintiff moved for JNOV after the court had excused the jury, arguing that not all the jurors who signed the interrogatory finding negligence and proximate cause signed the interrogatories apportioning fault. For example, one of the jurors did not respond to the proximate-cause interrogatory but nevertheless participated in apportioning fault between the two parties. Another juror did not respond to the interrogatory regarding whether one of the parties was negligent but nevertheless found the party 30 percent negligent in another interrogatory apportioning the percentage of fault. The jury had responded to six interrogatories, and the parties had agreed there would be no general verdict form.

{¶ 21} In addressing the inconsistencies in the jury's interrogatory responses, the court applied the general waiver rule and held that, generally, an objection to inconsistent interrogatory answers is waived unless the party raises it before the jury is discharged. *Id.* at 229. However, the court held that the plain-error doctrine applied in that particular case because the failure to apply the plain-error doctrine would have created a manifest miscarriage of justice. *Id.* at 230. In finding plain

error, the court adopted the "same-juror rule," which holds that, in comparative-negligence cases, only those jurors who find liability (i.e., breach of duty and proximate cause) may participate in the decision apportioning liability among the parties. *Id.* at 235-236. Moreover, the court concluded that the appellant in that case could not be said to have waived her challenges to the jury's answers because the inconsistencies in the jurors' responses to the interrogatories could not have been discovered "without a protracted examination and comparison of the interrogatory forms." *Id.* at 229. The inconsistencies were not readily apparent in that case.

{¶ 22} The interrogatories at issue in this case are distinguishable from those at issue in *O'Connell*. Whereas there were six jury interrogatories and no general verdict form in *O'Connell*, the issue in this case involves two interrogatories designed to test the general verdict form. The first interrogatory asked whether Dr. Louis deviated from the standard of care and, if so, to provide a narrative response explaining how he deviated from the standard of care. The second interrogatory asked the jury if, having found that Dr. Louis deviated from the standard of care, whether the deviation from the standard of care was the proximate cause of Paganini's injury. The second interrogatory further asked the jury that if it answered the interrogatory in the affirmative, to provide narrative response explaining how the deviation from the standard of care proximately caused Paganini's injury. It was immediately apparent from the jury's narrative responses that there was a potential inconsistency between the answers and the expert testimony needed to support the

general verdict because the narrative responses did not specifically restate any of the three theories of medical malpractice testified to by Paganini's expert, Dr. Huang.

{¶ 23} This problem could have been easily rectified by returning the matter to the jury for further consideration of its answers and verdict or by ordering a new trial as provided in Civ.R. 49(B). But since appellants failed to object to the interrogatory answers before the jury was excused, the parties and the court lost the opportunity to cure the alleged error by referring it for further consideration by the jury that heard the evidence presented over the course of the five-day trial. The well-established "waiver rule" requires an objecting party to raise any objection to inconsistent interrogatories before the jury is discharged or the matter is waived, save for some exceptional circumstances that are not present in this case. Therefore, appellants waived any objection to the alleged inconsistency in the interrogatory responses.

{¶ 24} Furthermore, the jury's answers to the interrogatories are reconcilable with Dr. Huang's testimony and the general verdict. Before a trial court may apply one of the options in Civ.R. 49(B), the trial court must make an effort to reconcile the general verdict and interrogatory answers whenever reasonably possible. *Woyma v. Begovic*, 1994 Ohio App. LEXIS 3124, *20 (8th Dist. July 14, 1994), citing *Otte v. Dayton Power & Light Co.*, 37 Ohio St.3d 33 (1988); *see also Woodside Mgt. Co. v. Bruex*, 2020-Ohio-4039, ¶ 109 (9th Dist.), citing *Lynch v. Greenwald*, 2012-Ohio-2479, ¶ 7 (9th Dist.) ("Before applying one of the options in

Civ.R. 49(B), the trial court must determine that apparent inconsistencies between the interrogatory answers and the general verdict are irreconcilable.").

{¶ 25} "[W]here there is a view of the case that makes the jury's answers to special interrogatories consistent, it must be resolved that way before this court is free to disregard the jury's verdict and remand the case for a new trial." *Woyma* at *20, citing *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963) (construing Ohio law); *Klever v. Reid Bros. Express, Inc.*, 151 Ohio St. 467 (1949); *see also Woodside Mgt.* at ¶ 109, quoting *Gregg v. The Kroger Co.*, 1991 Ohio App. LEXIS 1829, *4 (2d Dist.) ("The trial court is tasked with 'mak[ing] every reasonable effort to reconcile' the inconsistent interrogatory answers and the general verdict.").

{¶ 26} In attempting to reconcile interrogatory answers with the general verdict, the trial court must "examine the interrogatories and answers as a whole" and "entertain all reasonable hypotheses that would reconcile the interrogatory answers and the general verdict." *Woodside Mgt.* at ¶ 109, citing *Gregg* at *4. "As the reviewing court, we must analyze all of the questions and answers in the light of the totality of the circumstances and determine whether the trial court reasonably interpreted such answers in order to reconcile them with the general verdict." (Cleaned up.) *Id.* at ¶ 110. Our review also includes construing the interrogatory answers in conjunction with the jury instructions. *Id.*, citing *Becker v. BancOne Natl. Bank*, 17 Ohio St.3d 158, 160-161 (1985).

{¶ 27} We review the trial court's efforts to reconcile interrogatory answers with the general verdict for an abuse of discretion. *Id.*, citing *Lewis v. Nease*, 2006-Ohio-4362, ¶ 48 (4th Dist.). An abuse of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35. This court has also held that an abuse of discretion may be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 2008-Ohio-1720, ¶ 15 (8th Dist.).

{¶ 28} In the general verdict, the jury found that appellants committed medical malpractice and awarded Paganini noneconomic damages in the amount of $1,487,500. Appellants contend the general verdict is inconsistent with the jury's responses to interrogatory Nos. 1 and 2, because they found the malpractice was due to a breakdown in communication between members of Dr. Louis's office and Dr. Louis on the morning of December 10, 2021. They contend that because Dr. Huang never criticized the failure of communication on the morning of December 10, 2021, and that his testimony focused solely on Dr. Louis's failure to recognize Paganini's eye infection during his 10:00 a.m. follow-up appointment, the jury's responses to the interrogatories conflict with the general verdict and the evidence.

{¶ 29} In response to the first interrogatory on whether Dr. Louis violated the standard of care, the jury responded that "the breakdown of communication with the Cataract Eye Center of Cleveland, et al., to Dr. Louis constitutes a deviation from the standard of care and thus delayed referral to a specialist." In response to

the second interrogatory, which asked whether deviating from the standard of care proximately caused Paganini's injuries, the jury stated, in relevant part:

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

{¶ 30} Dr. Huang testified that in order to properly diagnosis Paganini's condition, it was important to understand the history and progression of his symptoms. (Tr. 556-557.) Dr. Huang explained:

> And so as the physician, when we're interacting with the patient, it's critical, especially in basically a patient that has pain, where a patient has significant vision loss, in Mr. Paganini's situation, to really kind of thoroughly dig into what's going on, meaning, like, if you have a vision loss, you want to know, especially if you're talking about a patient that had surgery — the purpose of the surgery was to get the patient seeing better — and when you have a patient the next day come in with essentially significant decreased vision, really to kind of figure out what is going on, why the decreased vision is going on, and in terms of the symptoms, really try to figure out, aside from being just floaters or hemorrhage, really to figure out how quickly they appeared, is there pain associated with it, and basically really, like, do additional testing that we can do in patients where there is, you know, basically no view of the retina in the situation. So we have ultrasounds or Mr. Paganini can be referred to a specialist that has ultrasounds to assess what's going on inside the eye as well.
>
> So all of these things, the initial history of digging into the presentation, the pain, kind of the initial symptoms helps to basically decide whether additional tests should be done in the office or the patient should be referred.

{¶ 31} Regarding the specifics of Paganini's case, Dr. Huang testified as follows:

> Q: Based on your education, training and experience, where we have a man who presents the day after cataract surgery where he had good vision and then he has signs and symptoms that the jury has heard about in the records and described by him which include pain, red eye, and vision loss, just taking those, in and of itself, how far below the standard of care is it for an ophthalmologist not to know that those are the red flags of possible urgent danger?
>
> . . .
>
> A: It completely deviates from the standard of care. It's completely below the standard.
>
> Q. Let's dig into the details of that in terms of what we know from the records and what was reported — and I would like the jury to understand from your expert testimony — we have heard testimony about spots as reported by Mr. Paganini, and then we have seen written in some of the records at the defendants' medical practice the word "floaters" being used, and I want to bring that up to show you.
>
> So at 6:38 that morning, the answering service documented that Mr. Paganini told the person on the other end of the phone call: I am seeing black spots. And then at 8:50 — and I don't know what that writing is — 8:50 something in the morning on December 10th, the surgical center does their post-follow call: How are you doing? I'm seeing a bunch of spots.
>
> Then when he gets to the defendant medical practice and the staff of Corrective Eye Centers, the language changes and gets put into their Exhibit 28 on their daily schedule, and someone documents: Patient having major floats.
>
> And then we have over here on Exhibit 12 the documentation from that morning that the patient is having a ton of floaters.
>
> What is your expertise in helping us to understand, to someone who has proper training, who is educated about the signs and recognizing what is there to be seen, what is the significance of spots versus floaters when it comes to recognizing what the possible condition is?

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

So the main thing is, in this kind of situation, where you have these black spots, these black spots are most likely basically, in this kind of scenario, you have to think that it could be something that's a drastic change, especially with eye pain, basically, infection going on.

{¶ 32} As this line of questioning continued, counsel asked Dr. Huang specific questions about the information Paganini provided to the afterhours answering service and to Dr. Shafran and how this information was necessary for a proper diagnosis:

Q. Can you explain [the] progression of when a patient reports at 6:30 in the morning black spots and then black spots at 8 in the morning, 8:50 something, and then by the time that they come in, they are having a ton of floats, instead of a bunch of spots, now it's a ton, how does the progression of this — is this what you taught us about the bacterial explosion that happens?

A. Right. And it's like you can imagine. If there is a progression, it certainly is more concerning for something that's much more serious and especially when we're talking about the eye in this kind of situation where the patient is losing vision, and as we kind of talked about, the bacterial multiplication inside the eye is rapid and so when things are progressing, it is much more concerning in this kind of scenario.

(Tr. 604-605.)

{¶ 33} In sum, Dr. Huang explained that in order to make a proper diagnosis, the doctor must understand the progression of symptoms, which requires knowledge of Paganini's condition over the course of the morning of December 10, 2021, including the time he called the answering service and spoke with Dr. Shafran. Dr. Louis conceded that "[y]ou got to look at the whole picture[.]" (Tr. 396.) Paganini told the answering service and Dr. Shafran that he was seeing "black spots." (Tr. 392.) Yet, Dr. Louis did not know that Paganini provided this information to his office until after the litigation commenced. (Tr. 91, 96, 105, and 410.)

{¶ 34} Dr. Huang testified that the information Paganini provided to the answering service, Dr. Shafran, and Dawson would have helped Dr. Louis in properly diagnosing Paganini with endophthalmitis, a serious eye infection that requires prompt treatment in order to save the eye. Dr. Huang further opined that where a patient presents with pain, redness, and vision loss following black spots, the standard of care requires that that the patient be referred to a specialist without delay. (Tr. 606.)

{¶ 35} When the jury interrogatories are considered in the context of Dr. Huang's testimony regarding the progression of the infection and the lack of communication about Paganini's complaints in the early morning of December 10, 2021, they are easily reconciled with Dr. Huang's testimony and the general verdict. The jury's reference to a "breakdown in communication" encompassed an implicit

finding that Dr. Louis failed to obtain all the information necessary to identify the progression of symptoms necessary for an accurate diagnosis.

{¶ 36} The interrogatory responses reflect the jury's conclusion that based on the progression of Paganini's symptoms as reported to members of Dr. Louis's office, the standard of care required Dr. Louis to promptly refer Paganini to a specialist without delay in order to treat the eye infection. The jury concluded that Dr. Louis failed to properly diagnose Paganini with the serious eye infection during the 10:00 a.m. appointment because he lacked the critical information regarding Paganini's symptoms that he reported to members of Dr. Louis's office earlier that morning. Therefore, although the interrogatory responses did not restate any of Dr. Huang's theories of liability verbatim, they are consistent with his expert opinion that Dr. Louis failed to properly diagnose Paganini's eye infection and with the general verdict finding him liable for medical malpractice.

B. New Trial

{¶ 37} Appellants argue, in the alternative, that the trial court should have granted a new trial because of the jury's irregular responses to the special interrogatories. They contend that the inconsistency between the jury's answers to interrogatory Nos. 1 and 2 and the general verdict rendered the judgment contrary to law. They also argue that the jury's responses to interrogatory Nos. 1 and 2 are against the manifest weight of the evidence.

{¶ 38} Civ.R. 59 governs new trial and post-trial motions and provides, in relevant part, that a new trial may granted where the trial court finds:

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

{¶ 39} The standard of review we apply to a trial court's ruling on a Civ.R. 59 motion for a new trial depends upon the grounds for the motion. *Rigo v. Liberty Mut. Group, Inc.*, 2023-Ohio-1033, ¶ 25 (8th Dist.), citing *Robinson v. Turoczy Bonding Co.*, 2016-Ohio-7397, ¶ 23 (8th Dist.). In this case, appellants moved for a new trial pursuant to Civ.R. 59(A)(1), (4), (6), and (7). However, on appeal they only argue for a new trial based on the grounds stated in Civ.R. 59(A)(1), (6), and (7).

{¶ 40} A motion for a new trial, claiming irregularities in the proceeding or that the judgment is against the manifest weight of the evidence under Civ.R. 59(A)(1) or (6), is reviewed for an abuse of discretion. *Id.*, citing *Gateway Consultants Group, Inc. v. Premier Physicians Ctrs., Inc.*, 2017-Ohio-1443, ¶ 12-13 (8th Dist.). As previously stated, an abuse of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson*, 2021-Ohio-3304, at ¶ 35. An abuse of discretion may also be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas*, 2008-Ohio-1720, at ¶ 15.

{¶ 41} A motion for a new trial claiming the judgment is contrary to law under Civ.R. 59(A)(7) is reviewed de novo. *Riedel v. Akron Gen. Health Sys.*, 2018-Ohio-840, ¶ 13 (8th Dist.). In a de novo review, we review the merits of the case independently, without any deference to the trial court. *Sosic v. Stephen Hovancsek & Assocs., Inc.*, 2021-Ohio-2592, ¶ 21 (8th Dist.).

{¶ 42} Appellants first argue that the inconsistency between the jury's answers to interrogatory Nos. 1 and 2 and the general verdict rendered the judgment contrary to law and marred by an irregular proceeding. However, as previously discussed, the jury's interrogatory answers are easily reconciled with the expert testimony of Dr. Huang and the general verdict entering judgment in favor of Paganini. There is, therefore, no material inconsistency between the interrogatory responses and the general verdict and thus no irregularity in the proceedings.

{¶ 43} Appellants nevertheless argue that the jury's answers to interrogatory Nos. 1 and 2 are against the manifest weight of the evidence. In ruling on a motion for a new trial on the basis of manifest weight, the trial court

> "must weigh the evidence and pass upon the credibility of the witnesses, not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the manifest weight of the evidence."

Eastley v. Volkman, 2012-Ohio-2179, ¶ 27, quoting *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970), paragraph three of the syllabus.

{¶ 44} In seeking a new trial based on the manifest weight of the evidence, appellants again assert that the jury rejected Dr. Huang's testimony regarding three separate alleged deviations from the standard of care and that the jury invented its own standard of care that was not based on the expert testimony. But again, as previously explained, the jury concluded, based on Dr. Huang's testimony, that the standard of care required Dr. Louis to promptly refer Paganini to a specialist without delay in order to treat the eye infection. They also implicitly concluded that Dr. Louis failed to properly diagnose Paganini with the serious eye infection during the 10:00 a.m. appointment because he lacked the critical information regarding Paganini's symptoms that he reported to members of Dr. Louis's office earlier that morning. Their conclusions are supported by Dr. Huang's testimony as set forth in our earlier discussion on appellants' claim for JNOV.

{¶ 45} Therefore, the first assignment of error is overruled.

C. Cap on Noneconomic Damages

{¶ 46} In the second assignment of error, appellants argue the trial court erred in finding that R.C. 2323.43(A)(3), which places a cap on noneconomic damages, is unconstitutional as applied to Paganini.

{¶ 47} A party may challenge the constitutionality of a statute by asserting either a facial challenge or an as-applied challenge to the statute. *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 26. A facial challenge asserts that there are no conceivable circumstances in which the statute would be valid. *Simpkins v. Grace Brethren Church of Delaware*, 2016-Ohio-8118, ¶ 20, citing *Arbino* at ¶ 26. An as-

applied challenge alleges that the statute is unconstitutional when applied to a plaintiff under a specific set of circumstances. *Id.*, citing *Yajnik v. Akron Dept. of Health, Housing Div.*, 2004-Ohio-357, ¶ 14, citing *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting). A holding that a statute is unconstitutional as applied to a particular party prevents future application of the statute under the same set of circumstances, but it does not render the statute wholly inoperable. *Id.*, citing *Yajnik* at ¶ 14, citing *Ada* (Scalia, J., dissenting).

{¶ 48} The trial court found R.C. 2323.43(A)(3) unconstitutional as applied to Paganini. Appellants argue that Paganini's challenge was not "as applied" and that by treating it as an "as applied" challenge, the court employed the wrong standard of review.

{¶ 49} A party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statute is unconstitutional when applied to his or her set of particular facts. *Id.*, citing *Groch v. Gen. Motors Corp.*, 2008-Ohio-546, ¶ 181. "To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 2006-Ohio-5512, ¶ 21, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus.

{¶ 50} Despite appellants' argument to the contrary, it is clear from Paganini's motion to include in any judgment the full amount awarded for noneconomic damages that he was making an "as applied" challenge to the statute. (*See* plaintiff's motion to include in any judgment the full amount awarded for noneconomic damages, p. 4, 8, 11, and 15.) Indeed, Paganini's argument is 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. Paganini argued in the trial court, as he does now on appeal, that the cap on noneconomic damages imposed on one of the most severely injured people is arbitrary and not reasonably calculated to obtain the legislature's objective of reducing medical-malpractice insurance premiums. Therefore, the trial court properly concluded that Paganini's argument is an "as applied" challenge to the statute.

{¶ 51} In evaluating the constitutionality of a statute, courts must remain mindful that "statutes are presumed to be constitutional and . . . courts have a duty to liberally construe statutes in order to save them from constitutional infirmities." *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 2009-Ohio-1970, ¶ 12, citing *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538 (1999).

{¶ 52} The trial court found R.C. 2323.43(A)(3) unconstitutional as applied to Paganini under the "due course of law" clause in the Ohio Const., art. I, § 16. This clause 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.

Ohio Const., art. I, § 16. The Ohio Constitution's "due course of law" provision is equivalent to the Due Process Clause in the United States Constitution. *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544 (1941).

{¶ 53} "When reviewing a statute on due-process grounds, we apply a rational-basis test unless the statute restricts the exercise of fundamental rights." *Arbino* at ¶ 49. It is undisputed that the statute at issue here does not restrict or affect a fundamental right. Under the rational-basis test, we will uphold a statute under the due-course-of-law guarantee if (1) it bears a real and substantial relation to the public health, safety, morals, or general welfare of the public, and (2) it is not unreasonable or arbitrary. *Brandt v. Pompa*, 2022-Ohio-4525, ¶ 28, quoting *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274 (1986), quoting *Benjamin v. Columbus*, 167 Ohio St. 103 (1957), paragraph five of the syllabus.

{¶ 54} The issue regarding the constitutionality of R.C. 2323.43(A)(3) is an issue of first impression. However, the Ohio Supreme Court has ruled on the constitutionality of similar statutes and those cases are relevant to our analysis here. For example, in *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), the Court held that a $200,000 cap on general damages that could be awarded for medical malpractice was unconstitutional because it did not bear a real and substantial relation to public health or welfare and because it was unreasonable and arbitrary. *Id.* at 691. The Court explained: "'[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.*, quoting *Nervo v. Pritchard*, 1985 Ohio App. LEXIS 7986, * 8 (5th Dist. June 10, 1985).

{¶ 55} In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999), the Ohio Supreme Court held that Am.Sub.H.B. No. 350, of the 121st Ohio General Assembly, 146 Ohio Laws, Part II, 3867 ("H.B. 350"), was unconstitutional "in toto." *Id.* at syllabus. H.B. 350 enacted several statutory provisions including R.C. 2323.54. R.C. 2323.54 placed a cap on "the amount of noneconomic damages recoverable in any tort action at the greater of $ 250,000 or three times the economic loss, to a maximum of $ 500,000; or, in the case of certain specified types of permanent injuries, at the greater of $ 1 million or $35,000 times the number of years remaining in the plaintiff's expected life." *Id.* at 487-488. The court found that H.B. 350 was unconstitutional because it violated the Ohio constitutional doctrine of separation of powers and because it violated the one-subject provision of the Ohio Const., art II, § 15(D). *Id.* at syllabus. However, with respect to the cap on noneconomic damages provided in R.C. 2323.54, the Court further found pursuant to *Morris* that "R.C. 2323.54 is invalid on due process grounds because it is unreasonable and arbitrary, irrespective of whether it bears a real and substantial relation to public health or welfare." *Id.* at 490. The Court explained:

> In addition, R.C. 2323.54 continues to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by tortious conduct. Thus, like former R.C. 2307.43,

> R.C. 2323.54 is invalid on due process grounds because it is unreasonable and arbitrary, irrespective of whether it bears a real and substantial relation to public health or welfare. *Morris*, 61 Ohio St. 3d at 691, 576 N.E.2d at 771. There is simply no constitutional difference between R.C. 2323.54 and former R.C. 2307.43. By replacing former R.C. 2307.43 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 medical claims to include all tort claims, medical and otherwise.

Id.

{¶ 56} Although the Court later characterized this section of *Sheward* as "dicta" because it was not relevant to the ultimate holding in the case, it continued to apply the same language and reasoning in *Arbino*, 2007-Ohio-6948, ¶ 59, a case involving a broad challenge to the $250,000 cap on noneconomic damages provided in R.C. 2315.18(B)(2). In *Arbino*, the plaintiff made a facial challenge to the cap on damages under several constitutional theories. The Court rejected the plaintiff's claims that the statute violated Ohio's open courts and right-to-a-remedy guarantee, the right to a jury trial, the separation of powers, and the single-subject rule. It also held that the cap on damages in R.C. 2315.18 did not violate the plaintiff's right to due process or equal protection. In reaching these conclusions, the Court reviewed the legislative findings made when enacting the statute and found that "R.C. 2315.18 bears a real and substantial relation to the general welfare of the public." *Id.* at ¶ 55.

{¶ 57} The *Arbino* Court found that R.C. 2315.18 passed the second prong of the rational-basis test, which requires the court to determine whether the statute is arbitrary or unreasonable. In doing so, it compared R.C. 2315.18 to the statute at issue in *Morris*, stating that, in *Morris*, the Court found that the caps on damages 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." *Id.*, citing *Morris*, 61 Ohio St.3d at 690-691; *Sheward*, 86 Ohio St.3d at 490. By contrast, the statute at issue in *Arbino* "alleviate[d] this concern by allowing for limitless noneconomic damages for those suffering from catastrophic injuries." *Id.* at ¶ 60.

{¶ 58} The plaintiff in *Arbino* nevertheless argued that the statute was arbitrary and unreasonable despite the exception for catastrophic injuries. *Id.* She argued "it is irrational to strike a statute for imposing the costs of a public benefit on the most severely injured, but not the 'second-most severely injured.'" The Court rejected this argument, stating:

> At some point, though, the General Assembly must be able to make a policy decision to achieve a public good. Here, it found 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. Even Arbino acknowledges that the vast majority of noncatastrophic tort cases do not reach that level of damages. *Id. 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.

(Emphasis added.) *Arbino* at ¶ 60.

{¶ 59} As previously stated, the trial court found that R.C. 2323.43(A)(3) is unconstitutional as applied to Paganini because the cap on noneconomic damages for catastrophic injuries does not have a real and substantial relationship to the general welfare. The trial court also found that the cap on noneconomic damages in R.C. 2323.43(A(3) is unreasonable and arbitrary because, as in *Morris*, it imposes

"the cost of lowering medical malpractice insurance rates on a small group of individuals with catastrophic physical injuries stemming from medical malpractice[.]"

{¶ 60} R.C. 2323.43(A) creates a two-tiered system imposing limits on the award of noneconomic damages depending on the severity of the plaintiff's injury. Under the first tier, a cap of $250,000 applies to certain types of injuries. R.C. 2323.43(A)(2). Under the second tier, the limit is increased to $500,000 if the plaintiff establishes that he or she sustained a "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system" and/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." R.C. 2323.43(A)(3). The Ohio Supreme Court has described these kinds of injuries as "catastrophic." *Arbino*, 2007-Ohio-6948, at ¶ 59.

{¶ 61} The term "noneconomic damages" in R.C. 2323.43 refers to

> nonpecuniary harm that results from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

R.C. 2323.43(H)(3).

{¶ 62} In enacting R.C. 2323.43, the General Assembly expressly stated that the statute was designed to "stabiliz[e] the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss awards in

medical malpractice actions." R.C. 2323.43, Editor's notes SECTION 3(A)(3). They found, among other things, that "[t]he overall cost of health care to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients." The reduced risk of large noneconomic damage awards is aimed at keeping medical malpractice insurers in Ohio and thus also keeping good doctors in Ohio. Obviously, the goal of lowering medical-malpractice insurance rates is related to the general welfare of the public.

{¶ 63} However, it is not clear from the legislative findings 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. When the General Assembly enacted R.C. 2323.43, it also provided for the ongoing study of its effects. R.C. 2323.43 was enacted in 2003 by 2001 Am.Sub.S.B. 281 ("S.B. 281"). Sections 4 and 5 of the uncodified portion of the Act created the Ohio Medical Malpractice Commission. In 2005, the General Assembly also enacted R.C. 3929.302, which requires the Ohio Department of Insurance to provide the General Assembly with an annual report summarizing Ohio medical malpractice claims.

{¶ 64} In its 2019 report, the Ohio Department of Insurance concluded that "[c]laims that went to trial were more likely to close with no indemnity payment, while those that settled or went through alternative dispute resolution were more likely to close with paid indemnity." In the same report, the commission found that

.32 percent of medical-malpractice claims result in a plaintiff's verdict. Thus, a plaintiff's decision to go to trial makes payment less likely than if the plaintiff settles the claim before trial. The 2019 report further found 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. And, the report does not show how many of these cases involved catastrophic injuries. Therefore, the legislative findings fail to demonstrate a real and substantial relationship between the capping of noneconomic damages for catastrophic injuries and malpractice insurance rates. The legislature has failed to demonstrate how capping noneconomic damages for a very small group of highly injured people, which includes Paganini, will have any impact on malpractice insurance rates beyond those provided by the cap on less severe injuries. Therefore, Paganini has overcome the presumption of constitutionality and established, by clear and convincing evidence, that applying the cap on noneconomic damages set forth in R.C. 2323.43(A)(3) to him does not bear a real and substantial relationship to medical-malpractice insurance rates.

{¶ 65} The $500,000 cap on noneconomic damages for catastrophic injuries is also arbitrary and unreasonable. As previously stated, the Court in *Morris*, 61 Ohio St.3d at 691, held "'[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, quoting *Nervo v. Pritchard*, 1985 Ohio App. LEXIS 7986, * 8 (5th Dist. June 10, 1985).

{¶ 66} In *Metts, II v. Nationwide Childrens Hosp.*, 2015 Ohio Misc. LEXIS 12751 (C.P. 2018), a Franklin County common pleas court found that R.C. 2323.43(A)(3) is arbitrary and unreasonable because "it contains a hard limit like the unconstitutional provision in *Morris*." *Id.* at 9. To illustrate the arbitrary nature of R.C. 2323.43(A)(3)'s cap on noneconomic damages, the court compared it to R.C. 2315.18, the statute at issue in *Arbino* that does not include a limit on noneconomic damages for catastrophic injuries. The court stated, in relevant part:

> If a man's leg were cut off by a doctor in surgery and he sought non-economic 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 same person should yield the exact same damages, but under the current statutory scheme it does not.

Id. at 10. The court went on to explain that this is what the *Arbino* Court was referring to when it stated 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.*, quoting *Arbino* at 480-481. The court further observed that R.C. 2315.18 is drafted in compliance with the holding of the Supreme Court in *Morris*. *Id.* However, because R.C. 2323.43(A)(3) still burdens those most severely injured by medical malpractice in order to provide some unrealized benefit to the general public, it is arbitrary and unreasonable according to the reasoning provided in *Morris*.

{¶ 67} Therefore, Paganini has shown by clear and convincing evidence that R.C. 2323.43(A)(3)'s cap on noneconomic damages is arbitrary and unreasonable and that applying that cap to him violates his rights under the due course of law clause in the Ohio Constitution.

{¶ 68} The second assignment of error is overruled.

{¶ 69} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Eileen T. Gallagher

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOHN PAGANINI
Plaintiff

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

Case No: CV-22-971901

Judge: TIMOTHY MCCORMICK

JOURNAL ENTRY

PLAINTIFF'S MOTION TO INCLUDE IN ANY JUDGMENT THE FULL AMOUNT AWARDED FOR NONECONOMIC DAMAGES IS GRANTED. ORDER AND OPINION SEE JOURNAL.

Judge Signature Date

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04/15/2024

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOHN PAGANINI, PLAINTIFF;	CASE NO. CV 22 971901
-V.-	**TIMOTHY P. MCCORMICK,** JUDGE
THE CATARACT EYE CENTER OF CLEVELAND, INC., ET AL., DEFENDANTS.	**OPINION AND ORDER**

BACKGROUND

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 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."

Ordinarily, such a verdict would be entered as a judgment but, "[u]nder R.C. 2323.43(A) noneconomic damages are capped at $250,000 unless the injury involves the "[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system." For those "catastrophic" injuries, noneconomic damages are capped at $500,000. R.C. 2323.43(A)(3).

Paganini has moved the Court to enter a judgment reflecting the full amount of the jury verdict. He argues that the damage cap in R.C. 2323.43(A)(3) is unconstitutional under Ohio's due course of law and equal protection guarantees as applied to the

verdict in his case. The Defendants argue that the cap is constitutional and that the Court should enter a judgment for $500,000 consistent with the R.C. 2323.43(A)(3).

For the following reasons, Paganini's motion is granted.

ANALYSIS

Organizing a judicial opinion can occasionally be a tricky task. There are many ways to organize things with pros and cons to each approach. Often courts will put relevant legal history first and then go into the tests used and their application. Here, the legal tests are not in dispute and the legal history only makes sense within the context of those tests. Therefore, the analysis will proceed as follows. First, the Court will explain the standard of review to be applied. Then it will explain the test it must apply for a due course of law challenge. Then it will outline the history of such challenges to various damage cap schemes in Ohio. In particular, it will focus on the application of *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991), Finally, the Court will address Paganini's equal protection argument.

I

The first issue for the Court is to determine what kind of constitutional challenge Paganini is making.

"Legislation is entitled to a strong presumption of constitutionality." *State v. Hacker*, 2023-Ohio-2535, ¶ 11. The challenger bears a heavy burden to demonstrate that a statute is unconstitutional and can do it in one of two ways.

In a "facial challenge," the challenger alleges that a statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate governmental purpose." *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21. The challenger has the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *Id.* (citing *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006 Ohio 5512, 857 N.E.2d 1148, ¶ 21). By contrast, in an "as-applied constitutional challenge" the burden is slightly lower and

bound to the facts of a particular case. "'[T]he party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that [renders the statute] unconstitutional and void when applied to those facts.'" *Brandt v. Pompa*, 171 Ohio St.3d 693, 2022-Ohio-4525, 220 N.E.3d 703, ¶ 27 (quoting *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 181).

Paganini contends he is only challenging the application of the cap for catastrophic injuries to the verdict in his specific case. Defendants do not appear to take a position on what kind of challenge this is and merely note that "'"the distinction between facial and as-applied challenges is not so well-defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." (Def. Br. at 13)(quoting *Citizens United v. Fed. Election Comm's.*, 558 U.S. 310, 331 (2010)).

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

II

Paganini's first challenge to R.C. 2323.43(A)(3) is under the Ohio Constitution's "due course of law" clause. The clause states that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Oh. Const. Art. I, § 16. Ohio courts recognize that the "due course of law" clause provides substantive guarantees equivalent to those guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 48 (citing *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 633 N.E.2d 504 (1994)). Nonetheless, neither the parties, nor the authorities they rely

upon, have framed these cases in terms of the Fourteenth Amendment. This is strictly a matter of Ohio constitutional law.

Unless the challenged statute restricts a fundamental right, the statute is analyzed under the rational basis test. Here, there is no dispute that the statute does not restrict or affect a fundamental right. In Ohio, a statute survives rational basis review under the due course of law guarantee 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." *Brandt* at ¶ 28.

A

Due course of law challenges to noneconomic damage caps have a lengthy history in Ohio. This history is essential for understanding the state of the law today and how it applies to Paganini.

1

Beginning in the 1970s, policymakers and courts across the country began expressing concern about the size of damage awards in tort actions. There were several reasons for this concern, but in the context of medical malpractice, policymakers believed that large damages awards were driving up medical malpractice insurance rates and making doctors difficult to insure. This in turn led to higher costs for patients and less access to care as doctors became less willing to work in states where juries were awarding large verdicts.

Ohio was among several states that passed statutes limiting tort damages in addition to other measures as part of a larger project popularly labeled "tort reform." In Ohio, these efforts led to a decades long back and forth between the General Assembly and the Ohio Supreme Court over the constitutionality of such measures.

The General Assembly passed the Medical Malpractice Act of 1975. This statute contained a $200,000 cap on all "general damages" arising from medical malpractice claims codified at R.C. 2307.43. In *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d

765 (1991), the Court held that that cap was unconstitutional under Ohio's due course of law clause. Applying a rational basis analysis, it concluded that the Act did not establish a substantial relationship between general damage caps for medical malpractice and medical insurance rates. It further 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.'" *Morris* at 691 (quoting *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8). The Supreme Court will continually reference and approvingly cite this language in subsequent cases addressing damage caps.

2

In response to this decisions, the General Assembly passed Am.Sub.H.B. No. 350. This statute set caps on all tort damages, not just medical malpractice damages. The General Assembly made several factual findings as part of the legislation that purported to address the concerns of the Court in *Morris*. Nonetheless, in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), the Ohio Supreme Court held that this statute was unconstitutional "in toto." In its syllabus the Court announced its holding that, "Am.Sub.H.B. No. 350 usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers and, therefore, is unconstitutional." *Sheward* at 451 (syllabus). Further, "Am.Sub.H.B. No. 350 violates the one-subject provision of Section 15(D), Article II of the Ohio Constitution, and is unconstitutional in toto." *Id.*

Although it was decided on separation of powers and one-subject rule grounds, the *Sheward* Court continued to express the concern from *Morris* regarding the arbitrary nature of caps on noneconomic damages:

> In addition, R.C. 2323.54 continues to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by tortious conduct. Thus, like former R.C. 2307.43, R.C. 2323.54 is invalid on due

> process grounds because it is unreasonable and arbitrary, irrespective of whether it bears a real and substantial relation to public health or welfare. There is simply no constitutional difference between R.C. 2323.54 and former R.C. 2307.43. By replacing former R.C. 2307.43 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 medical claims to include all tort claims, medical and otherwise. *Sheward* at 490 (citing *Morris*).

Although the Court would later describe this section of *Sheward* as "dicta" because it was not relevant to the ultimate holding, it did not disavow the language used. *Arbino* at ¶ 52.

3

The General Assembly tried once again to limit noneconomic damages in tort claims. It addressed medical claims first. It passed 2001 Ohio SB 281 which became effective on January 10, 2003. This act addressed several aspects of medical malpractice claim, including limitations periods and the collateral source rule. On the subject of damage caps, it set forth the following scheme, now codified at R.C. 2323.43(A):

> (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 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 an attempt to be consistent with *Morris*, the General Assembly included its legislative findings in the act. While these are "uncodified" and not part of the Revised Code, they nonetheless constitute part of the law. See *Maynard v. Eaton Corp.*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶ 7. According to the General Assembly:

- "The state has a rational and legitimate state interest in stabilizing the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss awards in medical malpractice actions. The overall cost of health care to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients." S.B. 281 Section 3(A)(3).

- "Many medical malpractice insurers left the Ohio market as they faced increasing losses, largely as a consequence of rapidly rising compensatory damages and noneconomic loss awards in medical malpractice actions. The Department of Insurance re-

ports that only six admitted carriers continue to actively write coverage in Ohio at this time." S.B. 281 Section 3(A)(3)(b).

- "As insurers have left the market, physicians, hospitals, and other health care practitioners have had an increasingly difficult time finding affordable medical malpractice insurance. Some health care practitioners, including a large number of specialists, have been forced out of the practice of medicine altogether as a consequence. The Ohio State Medical Association reports fifteen per cent of Ohio's physicians are considering or have already relocated their practices due to rising medical malpractice insurance costs." S.B. 281 Section 3(A)(3)(c).

- "The U. S. Department of Health and Human Services published a report in 2002 stating that health care practitioners in states with effective caps on noneconomic damages are experiencing premium increases in the twelve to fifteen per cent range, as compared to an average forty-four per cent increase in states that do not cap noneconomic damage awards." S.B. 281 Section 3(A)(3)(e).

- "A report from the U. S. Department of Health and Human Services, (Sept. 25, 2002), states that among states that have adopted a two hundred fifty thousand dollar cap on noneconomic damages are: Indiana, Colorado, California, Nebraska, Utah, and Montana. These states, as well as others that have imposed meaningful caps on noneconomic damages, report significantly lower increases in average premium rates than those states without caps." S.B. 281 Section 3(A)(4)(d).

The General Assembly created a two-tiered structure where the $250,000 cap would not apply to certain types of injuries. For the injuries listed in R.C. 2323.43(A)(3) noneconomic damages are capped at $500,000. The Supreme Court would eventually refer to these kind of injuries as "catastrophic." *Arbino* at ¶ 49; see also *Brandt* at ¶ 119 (Fischer, J. dissenting)(explaining the

origins of the term "catastrophic injury.") In explaining why this distinction exists, the General Assembly stated that "[t]he 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." S.B. 281 Section 3(A)(4)(a).

After addressing medical claims, the General Assembly then addressed other tort claims. It passed 2003 Ohio SB 80 which created a similar two-tiered cap structure for noneconomic damages. This is now codified at R.C. 2315.18. Like R.C. 2323.43(A)(2), noneconomic damages are generally capped at $250,000 for most tort claims. Critically, however, the General Assembly did not impose a noneconomic damages cap for the "catastrophic" injuries like those listed in R.C. 2323.43(A)(3). Instead, R.C. 2315.18(B)(3) states that "there shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss" for those injuries. In their uncodified findings the General Assembly explained that,

> [w]ith respect to noneconomic loss for [the injuries listed in R.C. 2323.43(A)(3)], the General Assembly recognizes that evidence that juries may consider in awarding pain and suffering damages for these types of injuries is different from evidence courts may consider for punitive damages. For example, the amount of a plaintiff's pain and suffering is not relevant to a decision on wrongdoing, and the degree of the defendant's wrongdoing is not relevant to the amount of pain and suffering. S.B. 80 Section (A)(6)(c).

The statutory findings of the General Assembly for both statutes is a key factor in the constitutional analysis.

4

The Defendants insist that a comparison to R.C. 2315.18 is neither necessary nor appropriate in determining the constitutionality of R.C. 2323.43(A)(3). But, they point to no authority

for the proposition that a court cannot compare one statutory scheme to another in constitutional analysis or apply cases on a similar topic (in fact, they also make such comparisons in support of their argument).In any event, the background is essential to understanding Paganini's arguments and the constitutional reasoning that the Court must apply to R.C. 2323.43(A)(3).

The Supreme Court heard a broad challenge to the $250,000 noneconomic damage cap in R.C. 2315.18(B)(2) in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. In that case, the plaintiff made a facial challenge to the cap under multiple constitutional theories. The *Arbino* Court rejected challenges to the statute on the theories that it violated Ohio's open courts and right to a remedy guarantee, the right to a jury trial, the separation of powers, and the single-subject rule.

The *Arbino* Court further held that the cap in R.C. 2315.18 did not violate a plaintiff's right to due process or equal protection. It concluded that the General Assembly had adequately demonstrated a relationship between limiting noneconomic damages and the economic effects of high tort damages. It further found that the policy addressed the concern in *Morris* about placing the burden of benefiting the public solely on the most severely injured because it allowed for unlimited noneconomic damages in some circumstances. It stated:

> 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. We repeated this concern in *Sheward*, albeit in dicta. 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).
>
> At some point, though, the General Assembly must be able to make a policy decision to achieve a public good. Here, it found 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. Even [plaintiff] acknowledges that the vast majority of noncatastrophic tort cases do not reach that level of damages. 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. *Arbino* at ¶¶ 59-61 (citations omitted).

The Court rejected arguments that it was also irrational and arbitrary to place the burden on "the second-most-severely injured." *Id.* at ¶ 60.

The Court evaluated the cap in R.C. 2315.18 two more times. First, in *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122 and then again in *Brandt v. Pompa*, 171 Ohio St.3d 693, 2022-Ohio-4525, 220 N.E.3d 703. In *Simpkins*, a plurality of the Court turned aside a challenge to the cap in R.C. 2315.18(B)(2) as-applied to plaintiffs who were sexual assault victims as minors. Like the facial challenge in *Arbino*, the Court assessed the constitutionality of the cap in light of *Morris*. It concluded that the General Assembly's policy decision to exclude from the damage caps only those awards to plaintiffs who suffer catastrophic physical damages did not place upon Simpkins and those similarly situated "an undue portion of the cost of ameliorating the deleterious economic effects of the tort system, as the damage cap in *Morris* did." *Simpkins* at ¶ 40.

Then in *Brandt*, a majority of the Court concluded that a plaintiff's due process rights were violated when the cap on noneconomic damages was applied to a plaintiff suffering extreme psychological injuries after being repeatedly sexually assaulted as a minor. The Court held that that R.C. 2315.18(A)(2) is "unconstitutional as applied to Brandt and similarly situated plaintiffs (i.e., people like Brandt who were child victims of intentional criminal conduct and who bring civil actions to recover damages from the persons who have been found guilty of those intentional criminal acts) to the extent that it fails to include an exception to its compensatory-damages caps for noneconomic loss for plaintiffs who have suffered permanent and severe psychological injuries." *Brandt* at ¶ 46. In doing so, it

again emphasized the arbitrary nature of excluding a small group of severely harmed individuals from obtaining full recovery of their noneconomic damages. It quoted with approval Justice Pfeifer's dissent in *Arbino*, which touched on a similar theme as the holding in *Morris*:

> There is no rational reason to 'improve' the tort system in Ohio at the sole expense of a small group of people who are able to prove that they suffered damage significant enough to exceed the damages caps imposed by the General Assembly. Whatever improvement the tort system in Ohio needs, the Ohio Constitution should remain inviolate, unless properly amended. *Brandt* at ¶ 36 (quoting *Arbino* at ¶ 185 (Pfeifer, J., dissenting)).

While the joint dissent and the dissent of Justice Fischer were strident in their criticisms of the majority in *Brandt*, they did not call into question *Morris's* holding that it is irrational and arbitrary to place the cost on the most severely injured, at least with respect to physical injuries. *Id.* at ¶ 69 (Joint Dissent).

5

The caps on medical malpractice damages have, somewhat surprisingly, not only not been reviewed by the Supreme Court, but also have not been reviewed by any court of appeals. Yet it is perhaps not so surprising given how few times this situation has arisen in the last twenty years. According to the *Ohio Medical Professional Liability Closed Claim Report*, there have only been 30 cases between the years 2005-2019 in which a jury returned a verdict for a plaintiff in a medical malpractice action that could be subjected to the caps.[1] These data do not show how many cases involved catastrophic injuries. This Court is

1. *Ohio Medical Professional Liability Closed Claim Report* 9-11. ("Second, few claims have reached a trial or jury verdict that required separate detail of economic and non-economic damages and the potential for capping. The Department is sensitive to issues of confidentiality; therefore, it cannot release any specific information regarding these claims.")

aware of at least three more, involving catastrophic injuries.[2] Still, the number of cases is quite small.

Paganini points to several trial court opinions that have determined that the cap for catastrophic injuries is unconstitutional under the due course of law clause or the equal protection clause. While Defendants have tried to distinguish those holdings, they share a similar theme: *Morris* controls the outcome of challenges to R.C. 2323.43(A)(3).

B

The lengthy history lesson above demonstrates that *Morris* controls the outcome of this case. The *Morris* Court explained how to apply rational basis analysis under the due course of law clause to noneconomic damage caps for medical claims. In the 30-plus years since *Morris*, the Supreme Court has not only declined to overrule that decision, it has never indicated that any of its holding should be scaled back or repudiated. The *Arbino* Court did not repudiate it, and indeed evaluated R.C. 2315.18 for its consistency with *Morris*. The plurality opinion in *Simpkins* also approvingly cited *Morris* and reaffirmed its holding. Even the joint dissent in *Brandt*, which was highly critical of finding the cap unconstitutional as-applied to claims arising from sexual assaults against minors did not suggest that *Morris* was wrongly decided or should be overruled. The holding in *Morris* constitutes the law of the State of Ohio.

The Defendants for their part do not cite to *Morris* and explain how it does not control the outcome of this case. Instead they have drawn analogies to other times that the General Assembly has limited recovery or actions to demonstrate that R.C. 2323.42(A)(3) is likewise constitutional.

Defendants first point to R.C. 2305.113 which contains a one-year statute of limitations and a four year statute of repose for medical claims. They contend that because the General Assembly has treated

2. *Higgins v. Biyani*, Franklin C.P. No. 19-CV-1804 (July 8, 2022); *Lyon v. Riverside Methodist Hospital, et al.*, Franklin C.P. No. 16-CV-12056 (May 31, 2023); *Hance v. Clevealnd Clinic*, Cuyahoga C.P. No. CV-20-929034 (July 25, 2023).

medical claims differently than tort claims for other purposes it follows that there is no constitutional infirmity when it comes to damages caps.

This comparison misses the mark for two reasons. First, the policy goals for limitations and repose periods are different from those of damage caps. In the broadest possible sense both policies are designed to bring more certainty to litigation. But the limitations and repose periods are premised on balancing the rights of plaintiffs and defendants by giving the plaintiff sufficient time to diligently pursue a claim and making sure defendants do not have endless clouds of liability hanging over them. By contrast, damage caps are explicitly connected to economic factors. Second, Paganini's claim is not simply about treating medical claimants differently from other tort claimants. It is about the specific decision to cap damages for catastrophic injuries arising from medical claims. Or as *Morris* put it: to place the burden upon the most severely injured to achieve the public benefit. The statutes of limitations and repose do not make such a distinction and do not impose such a burden.

Defendants next point to Ohio's workers compensation scheme. They argue that this system limits the recovery of severely injured workers compared to what they might receive in a traditional lawsuit. It would follow then that the legislature is also permitted to limit the recovery of medical claimants compared to a traditional tort.

This is an inapt comparison given the unique nature of workers' compensation. As the Court has explained "Ohio's workers' compensation system is the result of a unique compromise between employees and employers, in which employees give up their common-law remedy and accept possibly lower monetary recovery, but with greater assurance that they will receive reasonable compensation for their injury. In recognition of this compromise, we have upheld various aspects of the workers' compensation system in the face of due-process challenges...We [have] found the contention that the scheme was unconstitutional to be particularly mystifying, given the fact that its very adoption would abrogate the provision of the Ohio Constitution authorizing the creation of the workers' compensation fund." *Stolz v. J & B Steel Erectors*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 20 (citing Ohio Constitution, Article II, Section 35)(other citations and quotations omitted.) Unlike in workers' compensation schemes, injured medical malpractice claimants have not gained a corresponding benefit from a damages cap. They simply have their potential recovery limited by statute.

Finally, Defendants point to the Supreme Court's holding in *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205. This case is the most helpful one for Defendants because it actually involves a hard cap on recovery. In *Oliver*, the plaintiff made a facial challenge to R.C. 2744.05(C) which placed a $250,000 cap on noneconomic damages awarded against political subdivisions. The statue does not distinguish between plaintiffs who have "catastrophic" injuries; all claims are subject to the same cap. The Court held that such a cap was constitutional and did not run afoul of any of its prior decisions.

Paganini argues that *Oliver* is sufficiently distinguishable and inapplicable to this case. The Court agrees. Indeed, the *Oliver* Court itself explained how that case was distinguishable from its prior precedents.

First, a suit against a public entity involves unique constitutional considerations compared to suits between private parties. *Oliver* at ¶ 14. It noted that it had already determined that the legislature could eliminate any tort recovery from subdivisions if it so chose. *Id.* at ¶ 15 (citing *Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 550 N.E.2d 181 (1990)). Therefore a damages cap for claims against a subdivision is perfectly permissible. This Court is not aware of any authority that something similar could happen with medical claims between private parties.

Second, unlike here, the *Oliver* Court was addressing a facial challenge to the cap based on injuries that were not catastrophic. *Id.* at ¶ 12. In light of this the Supreme Court noted that the hard cap was "neither unreasonable nor arbitrary, at least with regard to persons suffering noncatastrophic injuries. Therefore, the statute *has at least some valid application* and will survive the facial challenge." *Oliver* at ¶ 13 (emphasis added). The plaintiff in *Oliver* faced a higher burden than Paganini and did not present a situation where damages were capped for a catastrophic injury.

In short, none of Defendants' cases or arguments demonstrate why *Morris* is not controlling in this case or why this Court does not have an obligation to apply it to R.C. 2323.43(A)(3) and Paganini's verdict.

Given this, this 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."

1

In *Morris*, the Court held that the $200,000 cap on all general damages in medical malpractice cases did not have a "real and substantial relationship" to the general welfare. It concluded that the legislative findings did not demonstrate a rational connection between the damage cap and medical malpractice insurance rates. The Court noted that "[c]onceivably, such evidence may exist, but that would require a second trip to the General Assembly." *Morris* at 690.

There is no dispute that the goal of lowering medical malpractice insurance rates is related to the general welfare of the public. The General Assembly's detailed findings that are quoted above demonstrate that there is a substantial relationship between medical malpractice rates and noneconomic damage caps as a general matter. The Court is not in a position to re-evaluate this finding. Whether the legislative branch is ultimately right or wrong in their judgment that putting caps on noneconomic damages leads to lower insurance rates, "'it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.'" *Arbino* at ¶ 58 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)). Furthermore, "[u]nder the rational basis standard, [courts] are to grant substantial deference to the predictive judgment of the General Assembly." *State v. Williams*, 88 Ohio St.3d 513, 531, 728 N.E.2d 342 (2000).

Where the legislature falters, however, is in demonstrating a real and substantial relationship between malpractice insurance rates and capping noneconomic damages for catastrophic injuries. It merely states, in a platitudinal way, that "[t]he 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." S.B. 281 Section 3(A)(4)(a). It does

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.

By contrast, in R.C. 2315.18, the General Assembly, at least implicitly according to the ***Arbino*** Court, was able to articulate a reason for its $250,000 cap for most claims and why it permitted unlimited recovery for catastrophic injuries. *Arbino* at ¶ 72. Given the more concrete evidence of noneconomic damage in catastrophic injury cases, the General Assembly needed to articulate why it was still necessary to limit recovery for this severely injured group to lower malpractice rates. It did not provide such an explanation.

Given this lack of explanation, it is 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. 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.

Therefore, Paganini is able to overcome the presumption of constitutionality and show by clear and convincing evidence that applying R.C. 2323.43(A)(3) to him does not have a real and substantial relationship to the general welfare.

2

Paganini also argues that the $500,000 noneconomic damages cap for catastrophic injuries is unconstitutional because it is unreasonable and arbitrary.

As this Court has emphasized perhaps ad nauseam: the Court in *Morris* 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.'" *Morris* at 691 (quoting *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8). That is exactly what R.C. 2323.43(A)(3) does to plaintiffs like Paganini.

The opinion of the Franklin County Court of Common Pleas in *Metts, II v. Nationwide Childrens Hosp.*, 2018 WL 7050355,

(Ohio Com.Pl.) is illustrative. In that decision the court explained how the cap was unreasonable and arbitrary when compared to the lack of cap for noneconomic damages for other tort claims resulting in "catastrophic injuries." It gave the following example and explanation:

> If a man's leg were cut off by a doctor in surgery and he sought non-economic damages for the catastrophic injury, the damages would be limited to $500,000 under R.C. 2323.43(A)(3). Yet, if the same man were to be run over and lose his leg by the same doctor on the way home from the hospital after a successful surgery, that man could recover all non-economic damages for his catastrophic injury because R.C. 2315.18 has no additional limit. This is not reasonable or logical. The exact same injury inflicted by the exact same person should yield the exact same damages, but under the current statutory scheme it does not. *Metts, II* at *5.

Citing *Morris* and *Arbino*, it held that unlike R.C. 2315.18 the R.C. 2323.43 cap "still burdens those most severely injured by medical malpractice to benefit to the general public." *Id.* The Court finds this reasoning persuasive and consistent with *Morris* and *Arbino*.

While this Court must give due deference to the considered judgment and factual findings of the General Assembly, as a trial court, it is bound by the rules of decision articulated by the Supreme Court. Unless and until the Supreme Court reverses itself and declares that it is actually rational and non-arbitrary to place the cost of lowering medical malpractice insurance rates upon the small group of individuals with catastrophic physical injuries stemming from medical malpractice, this Court has an obligation not to impose that cost upon a plaintiff like Paganini. And while it is often perilous for a lower court to get too far ahead of the Supreme Court and make predictive judgments, there has been absolutely no indication that the Court would consider departing from this holding. Indeed, *Arbino* and *Brandt* demonstrate that the application of the irrational and arbitrary test to noneconomic caps for severely harmed plaintiffs is the guiding principle of analysis.

Therefore, 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.

III

Paganini also makes a challenge under the equal protection clause.

Under Ohio's Constitution, "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly." Oh. Const. Art. I, § 2.

Like the due course of law clause, when a statute does not restrict a fundamental right or involve a suspect classification, courts use a rational basis analysis. The parties agree that the statute does not involve a "suspect classification." The equal protection clause's rational basis test is a slightly different (and more forgiving) test than the due course of law test. It requires that a statute be upheld, "if it is rationally related to a legitimate government purpose." *Arbino* at ¶ 66.

Once again, the Court must turn to *Morris*. This time, however, application of *Morris's* equal protection holding to this case compels the Court to conclude that R.C. 2323.43(A)(3) does not violate the equal protection clause as-applied to Paganini. In *Morris*, the Court took guidance from its prior holding in *Schwan v. Riverside Methodist Hosp.*, 6 Ohio St.3d 300, 452 N.E.2d 1337 (1983). That Court explained that when there is an equal protection challenge, "a statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective." *Schwan* at 301. Applying that logic to the cap in *Morris*, the Court concluded that there were a conceivable set of facts where the classifying medical claimants differently from other tort claimants furthered the legitimate government objective of lowering insurance rates.

Given this, it is at least *conceivable* that the legislature's policy, despite being arbitrary and irrational in its allocation of burdens and benefits could advance this objective by placing caps on all medical claimants and a higher one for catastrophic

injuries. Therefore, R.C. 2323.43(A)(3) does not violate the equal protection clause as-applied to Paganini.

Conclusion and Order

Paganini has demonstrated by clear and convincing evidence applying the cap in R.C. 2323.43(A)(3) to the jury's verdict violates his due course of law rights under Oh. Const. Art. I, § 16. Paganini's motion is granted and the Court will enter a judgment consistent with the jury verdict through a separate entry.

It is so ordered.

Judge Timothy P. McCormick

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article I. Bill of Rights (Refs & Annos)

OH Const. Art. I, § 16

O Const I Sec. 16 Redress for injury; due process

Currentness

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. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-1913; 1851 constitutional convention, adopted eff. 9-1-1851)

Notes of Decisions (6014)

Const. Art. I, § 16, OH CONST Art. I, § 16
: Current through Files 11 and 15 through 25 of the 136th General Assembly (2025-2026), the immediately effective sections of 2025 H 96 (budget bill), and 2025 Statewide Issue 2 (May election)(2024 H.J.R. No. 8).

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