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February 6, 2024 10:59

By: SUSAN E. PETERSEN 0069741

Confirmation Nbr. 3080091

JOHN PAGANINI

vs.

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

CV 22 971901

Judge: TIMOTHY MCCORMICK

Pages Filed: 131

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOHN PAGANINI	)	CASE NO. CV-22-971901
	)	
Plaintiff,	)	JUDGE TIMOTHY MCCORMICK
	)	
v.	)	
	)	
THE CATARACT EYE CENTER OF CLEVELAND dba CORRECTIVE EYE CENTER, et al.,	)	**PLAINTIFF'S MOTION TO INCLUDE IN ANY JUDGMENT THE FULL AMOUNT AWARDED FOR NONECONOMIC DAMAGES**
	)	
Defendants.	)	

A jury verdict has been rendered in favor of Plaintiff John Paganini. Throughout trial, the jury received evidence that Mr. Paganini lost vision in his left eye after suffering an urgently dangerous eye infection, which was left undiagnosed and untreated. He will ultimately require enucleation – the removal of his left eye. While Mr. Paganini did not pursue a claim for economic damages, a substantial portion of his case-in-chief was dedicated to establishing his noneconomic damages. It is, therefore, no surprise the jury returned a substantial verdict, the entirety of which was for noneconomic damages.

Defendants will argue the $1,487,500 verdict should be reduced under R.C. 2323.43(A)(3). For the reasons discussed below, any such argument should be rejected. The full amount of the jury's verdict should be included in any final judgment.

Respectfully submitted,

/s/ Susan E. Petersen

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

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

Enter 92 year-old John Paganini. As the Court knows, Mr. Paganini is the victim of medical negligence. A duly empaneled jury (selected and agreed upon by both sides while both had remaining peremptories) heard the testimony and evidence and concluded Mr. Paganini suffered a permanent and substantial physical deformity and the loss of a bodily organ system as a result of Dr. Louis' medical negligence. After significant consideration as the finders of fact, that same jury awarded Mr. Paganini $1,487,500, all of it noneconomic.

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

There is a reason all of this may feel like wandering into the unknown; despite all the talk of caps, situations like this simply don't happen very often. According to the *Ohio Medical Professional Liability Closed Claim Report* issued by the Ohio Department of Insurance there were 47,299 total medical malpractice claims closed during the period running from 2005 to 2019.[1] *Just 30* (yes, just 30) *of those claims resulted in verdicts that were subject to capping.* See Ohio Medical Professional Liability Closed Claim Report attached hereto as Exhibit A, at p.11 (addendums omitted due to volume).

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

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

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

3. *Metts v. Nationwide Children's Hospital*, Franklin C.P. No. 14 CVA-03-2543 (Dec. 11, 2018), at p.16 – Finding a Due Process violation, the court wrote: "R.C. §2315.18 is drafted in compliance with the holdings of the Supreme Court in *Morris*. This means that R.C. §2323.43 is not, as R.C. §2323.43 still

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

burdens those most severely injured by medical malpractice to benefit the general public. Accordingly, the Court finds R.C. §2323.43(A)(3) is irrational and arbitrary and violates the Due Process provision of the Ohio Constitution." *Id.* at p.10. Also comparing R.C. §2315.18 and §2323.43 and finding an Equal Protection violation, the court commented: "It is not rational for the law to limit the non-economic damages of one catastrophically injured party when the other can receive all the damages granted by the jury just because one plaintiff lost their leg in the ER while the other lost it in a car accident." *Id.* at p.13. See Exhibit D.

4. *Woessner v. The Toledo Hospital, et al.*, Lucas C.P. No. CI0201201614 (May 30, 2014), at p.7 – "While the General Assembly used many more words in the catastrophic-injury category of R.C. 2323.43 to limit damage recoveries to $500,000 per person . . . that limit operates the same way as the simple cap in the *Morris* statute; recoveries are securely capped for catastrophically injured patients. [Paragraph] Because both the *Morris* and the *Arbino* courts concluded that such caps violate the due process clause, the Court finds here that R.C. 2323.43 violates Ms. Woessner's due process rights in this case." See Exhibit E.

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

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

7. *Wargo v. Susan White Anesthesia, Inc.*, Cuyahoga C.P. No. CV-08-653779 (Oct. 30, 2009) (*rev'd on other grounds*, 2011-Ohio-6271) – Having compared R.C. §2323.43 to R.C. §2315.18, the court wrote: "The Court further finds that Revised Code §2323.43 is unconstitutional because it violates the Plaintiff's right to equal protection because it unfairly discriminates between medical malpractice victims and victims who suffer similar injuries as a result of tortious conduct not committed in the malpractice arena." *Id.* at p.5. See Exhibit H.

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

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

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

II. LAW AND ARGUMENT: R.C. §2323.43(A)(3) IS UNCONSTITUTIONAL

A. A brief background of noneconomic damage caps.

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

> The Ohio General Assembly and state courts have addressed non-economic damages caps in medical cases many times since 1975. Statutes have been passed by the Ohio General Assembly limiting non-economic damages in 1975, 1997, and

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

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

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

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

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

> [I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice.

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

Arbino v. Johnson & Johnson (2007)

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

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

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

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

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

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

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

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

See Exhibit A, at p.12.

If the General Assembly sees fit to study the impact of tort reform, one would presume the intention is to apply what is learned. In that same 2019 report, the Malpractice Commission reported that just .32% of claims result in a plaintiff's verdict. *Id.* at p.4. Simply put, a plaintiff's election to go to trial makes payment less likely, not more likely. Trial is a means of testing the validity of the claims by putting the testimony and evidence in the

crucible. Caps on catastrophic caps can only be applied following trial and they necessarily impact claims the jury found to be meritorious. As applied to Mr. Paganini, the noneconomic caps bear no relation to the public health, safety or morals.

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

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

John Paganini presents to this Court with a presently existing state of facts that makes R.C. §2323.43(A)(3) unconstitutional and void when applied to those facts. *Harold v. Collier*, 107 Ohio St.3d 44, 50,2005-Ohio-5334, 836 N.E.2d 1165 (2005), citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 349, 55 N.E.2d 629, 28 Ohio Op. 295 (1944), syllabus. Nobody disputes John Paganini is catastrophically injured. The jury determined so and awarded him $1,487,500 in noneconomic damages. This is not a hypothetical set of facts. Enforcing the noneconomic cap in this case would negate the jury's fact-finding, and strip Mr. Paganini of his constitutional guarantees. Moreover, it would echo the research establishing that capping noneconomic damages has an especially adverse effect on seniors, children, women and the poor – plaintiffs whose damages are disproportionately noneconomic due to lower claims for lost income. *See generally*, Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263 (2004).

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

The most recent version of R.C. §2323.43 was passed as part of Senate Bill 281 and became effective April 11, 2003. Over twenty years have passed, and the "hard cap" of $500,000 has not been revisited, revised or updated. The legislature and the judiciary received relief from rising costs in the form of pay raises[2], and rightfully so; the catastrophically injured victims of medical negligence have not received any such form of relief.

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

The earning power of money as the value of money is not a new concept. In *Maus v. New York, C. & St. L. R. Co.*, 165 Ohio St. 281, the Ohio Supreme Court considered a case arising

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

out of Cuyahoga County. Maus, a railroad employee brought suit for injuries sustained in the course of his employment. In its charge to the jury regarding the measure of damages, the trial court in *Maus* stated:

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

Id. at p.256. (Emphasis added). This statement ultimately became the first paragraph of the Supreme Court's syllabus, which reiterated the reference to the "earning power of money," stating, in part: " . . . the jury should take into consideration . . . the *earning power of money*; and the amount awarded for future earnings should be reduced to its *present value* as a lump sum payable at the time of the verdict." *Id.* at para.1 of the syllabus. (Emphasis added).[3]

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

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

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

In *Brandt v. Pompa*, 171 Ohio St.3d 693, 2022-Ohio-4525, the Ohio Supreme Court considered whether R.C. §2315.18 was unconstitutional as applied to child victims of intentional criminal conduct, such as sexual abuse, because it did not include an exception for plaintiffs who suffered permanent and severe psychological injuries. In determining the statute was unconstitutional, as applied, the Supreme Court reflected on a significant aspect of *Arbino*:

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

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

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

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

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

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

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

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

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

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

noneconomic damages.

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

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

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

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

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

Metts, supra, p.9.

In similar fashion, had Dr. Louis met the standard of care on December 10, 2021, saving Mr. Paganini's vision and heading off the loss of his eye, but struck Mr. Paganini with his car that day, costing him that same eye, there would be no cap on the resulting non-economic damages. Same victim, same tortfeasor, same injury, but the damages would be treated differently; as stated in *Metts*, this is neither reasonable nor logical, but it is most certainly arbitrary.

As outlined in *Metts*:

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

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

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

III. CONCLUSION

Verdicts subject to damage caps simply aren't that common, but for Mr. Paganini, the outcome of this motion will determine whether he receives the full value of his noneconomic damages or is stripped of nearly $1,000,000. To date neither the Ohio Supreme Court nor any of Ohio's appellate courts have addressed the constitutionality of R.C. §2323.43, but they have provided the basis for doing so in *Morris* and *Arbino*; and, when the issue has been considered by the trial courts, the resounding determination is that R.C. §2323.43(A)(3) is unconstitutional as applied to noneconomic damage awards for catastrophically injured plaintiffs. That was true in *Lyon*, *Higgins*, *Metts*, *Woessner*, *Wells*, *Sexton*, *Wargo* and *Mead,* and significantly, each was accompanied by a detailed explanation of how the court arrived at its decision. These were not simply "granted" or "denied" entries punting it to the next level for review, each provided substantial analysis.

R.C. §2323.43(A)(3) is unconstitutional as applied to this case; judgment must be entered for Mr. Paganini for the entire amount of the duly empaneled jury's award, i.e. $1,487,500. Doctors who injure people should not be treated differently when they cause injury through medical malpractice instead of by, for example, a motor vehicle accident, and

the select few determined to be catastrophically injured should not be forced to bear such an irrational, arbitrary and unjust portion of the perceived public benefit.

Respectfully submitted,

/s/ Susan E. Petersen

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A copy of the foregoing Motion was filed via the Court's electronic filing system and therefore served this 6th day of January, 2024 to:

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Respectfully Submitted,

/s/ Susan E. Petersen
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Ohio 2019 Medical Professional Liability Closed Claim Report

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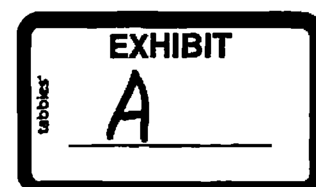

Ohio Medical Professional Liability Closed Claim Report - 2019

I. Introduction

Pursuant to Ohio Revised Code ("ORC") §3929.302 and Ohio Administrative Code ("OAC") 3901-1-64, the Department of Insurance ("Department") hereby submits its fifteenth annual report to the General Assembly summarizing the Ohio medical professional liability closed claim data received by the Department for calendar year 2019. This report also includes comparisons of calendar year 2019 data with the data from the prior fourteen calendar years. Copies of prior annual reports are available on the Department's web site www.insurance.ohio.gov.

II. Overview

ORC §3929.302 requires all entities that provide medical professional liability insurance to health care providers located in Ohio, including authorized insurers, surplus lines insurers, risk retention groups and self-insurers, to report data to the Department regarding medical professional liability claims that close during the year. In addition, each entity must report the costs of defending medical professional liability claims and paying judgments and/or settlements on behalf of health care providers and health care facilities.

The Department is required to prepare an annual report to the General Assembly summarizing the closed claim data on a statewide basis. The data is summarized in this report in order to maintain the confidentiality of the specific data filed by each reporting entity.

Copies of ORC §3929.302 and OAC 3901-1-64 are attached to this report as Appendices A and B.

III. Data Collection

A secured application on the Department's web site has been set up in order to capture the data elements required by OAC 3901-1-64, Medical Liability Data Collection. Companies must submit data by May 1 for each medical, dental, optometric or chiropractic claim closed in the prior calendar year.

IV. Description of Analysis

For the purposes of this report, and based on general practice, when an insurer or other insuring entity opens a file and begins to investigate the circumstances of a demand for compensation due to the alleged malpractice of a health care provider or facility, a claim has occurred, whether or not a lawsuit is ever filed. When the file is closed for one of the many reasons detailed in this report, even when the claimant receives no payment, the claim is considered closed. Multiple closed claim records can be generated from one incident, since a closed claim record must be entered for each health care provider and/or facility from which a demand for compensation is sought.

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In this report, two primary pieces of data are analyzed:

- **Paid Indemnity:** The amount of compensation paid on behalf of each defendant to a claimant.
- **Allocated Loss Adjustment Expense (ALAE):** The expenses incurred by a reporting entity, other than paid indemnity, which relate to a specific claim, such as the costs of investigation and defense counsel fees and expenses. As a business practice, some of the reporting entities do not allocate loss adjustment expenses to a specific claim.

This report organizes and summarizes the data to reflect the types of medical professional liability claims, the age and size of these claims, differences among regions of the state, differences among medical professionals, and several other categories.

V. Limitations of Analysis

The analysis is based entirely on historical closed claim data. That is, claims are reported to the Department and included in this analysis based on the year in which they reach a final outcome of any sort, including a trial verdict, settlement or the passing of the statute of limitations. Some arose from recent medical incidents, but many arose from incidents that occurred several years ago.

This report is not intended to be used to evaluate past or current medical professional liability insurance rates.

In addition, this data does not reflect plaintiffs' attorney fees, which are not collected separately and cannot be identified from this data or from any data available to the Department.

VI. Key Findings for 2019 Closed Claims

- **Total Claims:** For 2019, a total of 2,467 claims were reported by 93 entities. Authorized insurers[1] reported the most claims, 1,120. Self-insured entities also reported 1,120 claims; surplus lines insurers[2] reported 186 claims; and risk retention groups[3] reported 41 claims. (Exhibit 6)

[1] Authorized (admitted) insurers are licensed to write business in the state; are subject to the Department's rate, policy form and solvency regulation; and are backed by the Ohio Insurance Guaranty Fund.
[2] Surplus lines insurers are not authorized and do not have guaranty fund backing, but are allowed to write policies for those doctors and hospitals that cannot obtain coverage from an authorized insurer. These companies must be on a list of eligible surplus lines insurers and are regulated for financial strength by their domiciliary state or country.
[3] Risk retention groups are permitted by federal law to cover the liability insurance risk of the group's members. These groups are not backed by the guaranty fund.

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- **Indemnity Payments:** A large majority of medical professional liability claims resulted in no payment to a claimant. Almost 74% of the claims, or 1,816, had no indemnity payments, while nearly 26.4% of the claims or 651, closed with an indemnity payment. The total amount paid to claimants was $266,078,980, an average of $408,723 per claim in which an indemnity payment was made. (Exhibit 6)

- **ALAE:** While most claims closed with no payments to claimants, nearly all claims generated expenses for investigation and defense. The number of claims reported to have ALAE was 2,116. These expenses totaled $101,253,078, an average of $47,851 per claim. (Exhibit 6)

- **Indemnity Payments and Age of Claim:** The amount paid to claimants typically increases with the age of the claim. Of the claims that closed with an indemnity payment, 158 closed within one year of being reported and had an average paid indemnity of $219,202. That figure rose to $426,662 for 192 claims closing in their second year. Eight claims closed at more than six years but less than seven years after being reported with an average indemnity payment of $1,401,354. (Exhibit 4)

- **ALAE and Age of Claim:** Allocated loss adjustment expense generally increased with the age of the claim. Starting with an average of $25,460 for claims that closed after one year but before the second. This increased to $49,096 for claims that closed in the third year. For claims closing six years but less than seven years after being reported the average ALAE was $132,506. (Exhibit 4)

- **Regional Comparisons:** Over fifty percent of the claims, or 1,248, came from Northeast Ohio. Of these, 25% or 314 resulted in indemnity payments totaling $136,740,685. Over fifty-one percent of the total dollar amount paid to claimants statewide in 2019 arose from Northeast Ohio claims. When the county was identified, Central Ohio had the highest average paid indemnity of $482,141. The breakdown of average paid indemnity for the remainder of Ohio, in descending order, is: Northeast-$435,480; Northwest-$358,308; Southwest-$343,584; and Southeast-$264,096. (Exhibit 8)

- **Specialty Comparisons:** When claims were broken down by medical specialty, Internal Medicine had the most claims at 145 with twelve resulting in paid indemnity averaging $399,591. For those specialties that are broken out, Anesthesiology had the highest average paid indemnity of $766,875 for eight claims with payments, out of 47 reported claims. (Exhibit 10)

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- **Treatment Comparisons:** Medical Treatment, Non-Obstetrical, such as failure to treat, improper treatment, or delay in treatment, produced the highest number of claims of 656 with 140 resulting in paid indemnity. Obstetrics-related claims totaled 103. Of these, 35 resulted in indemnity payments averaging $835,366, the highest average payment for any type of injury. (Exhibit 13)

VII. Detailed Findings and Comparison with Prior Years

Claims by Outcome (Appendix C, Exhibits 1, 2 and 3)

Reporting entities were asked to indicate the method of final disposition for each closed claim:

- Of the 2,467 claims that were closed in 2019, more than 73% closed with no indemnity payment. Included in this figure are five categories:
  - 62.63% of the claims closed when the claim or suit was abandoned or was dismissed without prejudice;
  - 2.55% ended through a settlement;
  - 5.19% were dismissed by summary judgment or a directed verdict;
  - 2.84% ended with a verdict for the defendant;
  - 0.41% ended with alternative dispute resolution.

- Approximately 26% of the claims closed with an indemnity payment. Four categories of claims are included here:
  - 23.15% reached a settlement;
  - 2.59% used alternative dispute resolution;
  - 0.32% had a verdict for the plaintiff;
  - 0.32%[4] ended with a summary judgment or directed verdict for the plaintiff.

Regardless of outcome, all categories of claims had expenses in the form of ALAE. That is, even though a claim may have closed without an indemnity payment, the claim was likely to generate investigation and legal expenses. Exhibit 2 provides the details. Claims/suits abandoned without an indemnity payment had average ALAE of $19,994. The claims that were disposed of by a verdict, without an indemnity payment, had the highest average ALAE of $154,158.

Exhibit 3 provides a comparison of the fifteen years of data collected. The percentage of claims that resulted in an indemnity payment has remained at approximately 20-26%.

[4] Some of these breakdowns may not add up to 100% due to rounding. See Appendix C, Exhibits 1 and 2 for actual figures.

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Age of Claim (Appendix C, Exhibit 4)

This exhibit displays claims by age at the time of closing, and shows that typically average indemnity and average ALAE increased with the age of the claim. Claims that closed in their first year represent 27.6% of the total and had the lowest average indemnity of $219,202, and ALAE of $34,258. Costs tended to grow significantly as the claims aged. The category of greater than 6 and less than 7 years had the largest average indemnity payments of $1,401,354. This same category also had the largest average ALAE of $132,506.

Claims by Size (Appendix C, Exhibit 5)

Of the 2,467 claims reported closed in 2019, approximately 26.3% or 651, generated an indemnity payment. Of these 651 claims, 56 claims or 8.6% generated an indemnity payment greater than $1 million. These 56 claims generated indemnity payments of $135 million or 50.8% of the total indemnity payments for all claims. Another 97 claims, or 14.9%, generated an indemnity payment below $1 million but at least $500,000. These 97 claims generated indemnity payments of $65.4 million or 24.6% of the total indemnity payments for all claims. In 2019, 75.4% of the total paid indemnity was generated by 23.5% of the claims that closed with an indemnity payment.

In comparison, for 2018, 70.4% of the total paid indemnity was generated by 16.4% of the claims that closed with an indemnity payment.

Claims by Insurer Type (Appendix C, Exhibit 6)

A total of 93 entities reported closed claim information to the Department. The reporting entities are categorized as authorized (admitted) insurance companies, surplus lines insurance companies, risk retention groups and self-insurers/captives. Of the 2,467 closed claims that were reported, 45.4% of the claims were reported by admitted insurance companies and 45.4% were reported by self-insurers/captives.

Claims by Region (Appendix C, Exhibits 7, 8 & 9)

Claims were reported by county. However, an exhibit showing details for each individual county would allow for identification of the specific claims in counties with very few claims, violating the requirement of confidentiality. In order to provide meaningful information regarding differences by location, the state is divided into five regions: Central, Northeast, Northwest, Southeast and Southwest. The counties within each region are shown in Exhibit 7, while Exhibit 8 displays claim data for the regions for calendar year 2019 closed claims.

Nearly 51% of the closed claims reported for 2019 were from the Northeast region. However, the claims from the Central region had the largest average indemnity

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payment as well as the largest average ALAE. Exhibit 9 displays the regional data for all fifteen years combined.

Claims by Physician Specialty (Appendix C, Exhibits 10 & 11)

Exhibit 10 displays ten physician and surgeon specialties. All other specialties are grouped together as "Other" to maintain confidentiality. Approximately 15% of the claims resulted in an indemnity payment. Internal Medicine had the most closed claims in 2019.

Of the physician specialties shown, Anesthesiology had the highest average paid indemnity of $766,875. Exhibit 11 displays the physician & surgeons' data for all fifteen years combined for all specialties.

Claims by Medical Provider Type (Appendix C, Exhibit 12)

Exhibit 12 displays the 2019 closed claims experience for all the provider types. Thirty-eight percent of the 2,467 closed claims were reported for Physicians/Surgeons. The largest average paid indemnity was $563,937 for claims reported for Hospitals. The largest average ALAE of $88,546 was for claims reported for Hospitals. While 15% of the claims reported for a Physician/Surgeon resulted in an indemnity payment, 43% of the claims reported for a Hospital resulted in an indemnity payment.

Claims by Type of Injury (Appendix C, Exhibits 13 & 14)

The reporting entities identified the primary complaint or injury that led to the medical professional liability claim. Of the 2,467 claims reported as closed in 2019, approximately 70% of the claims were split between three categories, Diagnosis-Related, Medical Treatment-Non-Obstetrical, and Surgery-Related. Diagnosis-Related includes failure to diagnose, misdiagnosis, and delay in diagnosis. Medical Treatment Non-Obstetrical includes failure to treat, delay in treatment, and improper treatment. Surgery-Related includes delay in surgery and improper performance of surgery. Obstetrics-Related claims had the highest average paid indemnity of $ 835,366. Obstetrics-Related claims include improper delivery method, improper management of pregnancy, and delay in delivery. Blood-Related claims had the highest average ALAE of $168,843. This data includes all medical provider types, including hospitals. Exhibit 14 displays the data for all fifteen years combined for all injury descriptions.

Birth Injury Claims (Appendix C, Exhibit 15)

Reporting entities identified whether the closed claim was due to a birth injury. Of the 2,467 closed claims reported, 98 or 4.0% were identified as birth injury claims. Of these 98 birth injury claims, nearly 33% resulted in an indemnity payment. The

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average indemnity payment of a birth injury claim was $919,457, over twice the overall average indemnity payment of $408,723.

Of the 47,299 closed claims reported for calendar years 2005 through 2019, 2,062 or nearly 4.4% were identified as birth injury claims. Of these 2,062 birth injury claims, nearly 33% resulted in an indemnity payment. The average indemnity payment of the combined data for a birth injury claim was $1,031,173, which is more than three times the overall average indemnity payment of $314,816.

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Severity of Injury (Appendix C, Exhibit 16)

Of the 2,467 claims reported as closed in 2019, 949 or 38.5% of the claims were due to death, with an average paid indemnity of $527,607. For 2019, claims with injuries identified as "permanent major" had the highest average paid indemnity of $1,303,031, an amount three times the overall average indemnity payment. "Permanent major" injuries include paraplegia, blindness or loss of two limbs.

Those claims which identified the injury as "permanent grave" have historically had the highest average paid indemnity. However, for 2019, the average indemnity payment for injuries identified as "permanent grave" was $941,744. "Permanent grave" injuries include quadriplegia and severe brain damage, requiring lifelong dependent care.

Of the 47,299 claims reported as closed for calendar years 2005 through 2019, 15,952 or 33.7% were due to death. For closed claims resulting in death, 20.6% closed with an indemnity payment, which averaged $392,221. Closed claims for injuries identified as "permanent grave" totaled 894 for the fifteen years. For the closed claims that identified the injury as "permanent grave", 31.5% closed with an indemnity payment, which averaged $1,217,356.

Age of Injured Person (Appendix C, Exhibits 17 & 18)

Of the 2,467 claims reported as closed, 62% of the claims identified the injured party as an adult, ages 18 to 64. Adults ages 65 or older represented 30.8% of the claims. Infants and minors together represented 6.6% the claims. The average indemnity payment for infants was the highest for the various age groupings at $969,056. Exhibit 18 displays the data for all fifteen years combined for these groupings.

Gender of Injured Person (Appendix C, Exhibit 19)

Of the 2,467 claims reported as closed, 56% of the claims reported the injured party as female and 44% of the claims reported the injured party as male. When the injured party was a female, the average indemnity payment was $319,105. When the injured party was a male, the average indemnity payment was $533,596.

Of the 47,299 claims reported as closed for calendar years 2005 through 2019, 56% of the claims reported the injured party as female and 44% of the claims reported the injured party as male. When the injured party was a female, the average indemnity payment was $278,606. When the injured party was a male, the average indemnity payment was $364,832. For females, 24.2% of the claims resulted in an indemnity payment, while for males, 22.5% resulted in indemnity payment.

Location of Injury (Appendix C, Exhibits 20 & 21)

Reporting entities identified the geographic location where the primary injury or complaint occurred that led to the medical professional liability claim. As shown on Exhibit 20, the greatest number of claims for 2019 was generated by incidents that occurred in the operating suite, followed by incidents that occurred in the medical professional's office. These two locations represent 39% of the reported claims. The largest average indemnity payment was due to incidents that occurred in the Obstetrics Department (Labor & Delivery, Recovery & Post-Partum). The largest average ALAE amounts were due to incidents that occurred in the Obstetrics Department. Exhibit 21 displays the data for all fifteen years combined.

VII. Impact of Tort Reform (S.B. 281)

Effective April 11, 2003, the 124th General Assembly enacted Senate Bill 281, which included a comprehensive set of tort reforms aimed at reducing the costs of litigation and stabilizing the Ohio medical professional liability insurance market. The following tables provide pre-SB 281 and post-SB 281 data for each year and in total.

A few points should be considered when drawing conclusions from this data. First, as noted above, the typical average indemnity payment increases with the age of the claim. 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. Lastly, the Department is not capturing any data regarding risk management efforts that would possibly impact the number of, or cost of, medical professional liability claims as such data would be beyond the scope of the General Assembly's request in Senate Bill 281. Examples of such efforts would include, but not be limited to, better communications between providers and patients, patient safety and improved treatment protocols or procedures. Any analysis of trends in claims should include information on risk management efforts along with changes in the law.

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Ohio Medical Professional Liability Closed Claim Report - 2019

Closed Claim Year	Total # of Claims	# Claims (pre-SB 281)	Avg Indemnity (pre-SB 281)	Median Indemnity (pre-SB 281)	Avg ALAE (pre-SB 281)
2005	5,051	3,864	$307,899	$101,250	$28,266
2006	4,004	1,939	$342,091	$100,000	$34,470
2007	3,451	1,058	$556,191	$175,000	$67,898
2008	3,080	458	$422,498	$153,000	$111,388
2009	3,344	325	$882,645	$343,750	$88,602
2010	2,988	167	$527,336	$172,000	$83,773
2011	3,094	165	$326,297	$90,000	$72,062
2012	2,773	86	$886,731	$715,000	$72,189
2013	3,019	77	$657,113	$250,000	$81,844
2014	3,154	51	$738,267	$750,000	$105,476
2015	2,800	36	$537,773	$240,954	$124,469
2016	2,645	34	$1,050,000	$575,000	$132,135
2017	2,428	25	$2,321,616	$517,500	$396,023
2018	3,001	16	$2,670,061	$475,000	$147,814
2019	2,467	20	$412,500	$350,000	$135,800
TOTAL	47,299	8,321	$417,381	---	$47,202

Ohio Medical Professional Liability Closed Claim Report - 2019

Closed Claim Year	Total # of Claims	# Claims (post- SB 281)	Avg Indemnity (post-SB 281)	Median Indemnity (post-SB 281)	Avg ALAE (post-SB 281)	# Claims where verdict could have been subject to capping
2005	5,051	1,187	$171,299	$25,000	$9,044	0
2006	4,004	2,065	$235,677	$45,000	$15,768	2
2007	3,451	2,393	$213,065	$45,000	$18,990	3
2008	3,080	2,622	$221,685	$50,383	$28,738	0
2009	3,344	3,019	$271,897	$79,184	$33,448	1
2010	2,988	2,821	$209,071	$50,088	$25,739	4
2011	3,094	2,929	$289,039	$90,000	$31,101	3
2012	2,773	2,687	$290,248	$85,000	$28,192	0
2013	3,019	2,942	$368,106	$110,000	$34,294	8
2014	3,154	3,103	$284,239	$90,000	$40,370	3
2015	2,800	2,764	$410,978	$125,000	$37,913	3
2016	2,645	2,611	$271,260	$75,000	$38,933	0
2017	2,428	2,403	$415,621	$96,500	$41,793	1
2018	3,001	2,985	$286,360	$85,000	$33,091	1
2019	2,467	2,447	$408,676	$150,000	$47,012	1
TOTAL	47,299	38,978	$295,915	---	$32,283	30

VIII. Conclusion

This fifteenth annual report continues to provide insight into the details of Ohio medical professional liability claims. Trends continue to emerge as data for multiple years is gathered. With fifteen years of data the following conclusions can be drawn:

- Most of the claims closed without a payment to the plaintiff. For all fifteen years combined, approximately 77% of the claims closed without an indemnity payment.
- Almost all of the claims had costs in the form of ALAE.
- Higher value claims tended to be older. Conversely, smaller claims closed faster.
- Claims that went to trial were more likely to close with no indemnity payment, while those that settled or went through alternative dispute resolution were more likely to close with paid indemnity.

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

SUSANA LYON, : CASE NO. 16CV-12056

Plaintiff, : JUDGE KIM BROWN

v. :

RIVERSIDE METHODIST HOSPITAL, ET AL., :

Defendants. :

DECISION AND ORDER

DENYING DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT ON JURY VERDICT CONSISTENT WITH JURY INTERROGATORIES AND OHIO LAW, FILED APRIL 28, 2023

AND

GRANTING PLAINTIFF'S MOTION TO DECLARE DAMAGE CAPS UNCONSTITUTIONAL AND MOTION TO ENTER JUDGMENT IN ACCORDANCE WITH THE LAW, FILED MAY 1, 2023

I. Introduction

This case is before the Court on a medical negligence claim where the jury determined that Plaintiff Susana Lyon ("Plaintiff") suffered catastrophic injuries from alleged medical negligence by multiple healthcare providers, including Defendants Raghuram P. Reddy, M.D., Ryan G. Gaible, M.D., and Rohit Makkar, M.D. ("Defendants").

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

EXHIBIT
B

protection, and 3) right to a trial by jury. Plaintiff further claims R.C. 2323.43 is unconstitutionally vague as applied to Plaintiff. The Defendants maintain R.C. 2323.43 is constitutional and must be applied by the Court. The opposing motions are fully briefed and ready for decision.

After review, the Court finds the non-economic damages cap in R.C. 2323.43 as applied to medical claims is unconstitutional because it violates due process of law and equal protection rights, but does not find it unconstitutional as applied to the right to a trial by jury or unconstitutionally vague as applied to Plaintiff.

II. Law and Analysis

a. Brief Background of Non-Economic Damages Caps as Applied to Medical Negligence Cases in Ohio

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

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

damages for those suffering catastrophic injuries." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 480. This exception alleviated the concerns posed in *Morris* and *Sheward*. *See id.* The current version of R.C. 2323.43 has no such exception.

While there is no current appellate decision, several lower courts have ruled on the constitutionality of the non-economic damages cap in R.C. 2323.43, which provides guidance to this Court. Of most relevance, a decision rendered by Judge Schneider at Franklin County Common Pleas Court in 2018 deemed R.C. 2323.43 unconstitutional on both due process and equal protection grounds. *See Metts v. Nationwide Children's Hospital*, 14CV2543, Decision, December 11, 2018 (J. Schneider). Also in the Franklin County Common Pleas Court, in 2008, Judge Hogan ruled R.C. 2323.43 was unconstitutional on due process grounds. *See Mead v. Wilt*, 05CV864, Decision, March 4, 2008 (J. Hogan). Further, decisions from Judge Duhart at Lucas County Common Pleas Court and Judge Gallagher at Summit County Common Pleas Court have also ruled R.C. 2323.43 unconstitutional on due process grounds. *See Woessner v. The Toledo Hospital*, CI0201201614, Opinion and Judgment Entry, May 30, 2014 (J. Duhart); *Wells v. Call*, Judgment Entry, CV2008096782, November 23, 2010 (J. Gallagher).

Notably, while all these lower court decisions ruled the non-economic damages cap in R.C. 2323.43 was unconstitutional on due process grounds, none of the decisions ruled the statute was unconstitutional as to the right to a jury trial.

Id. at 3-5.[1]

Taking this background into consideration, this Court applies the law to the facts of the current case.

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

Ohio's equivalent of federal due process rights under the U.S. Constitution is codified in Oh. Const. Art. I, § 16, which provides "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *See Arbino*, 116 Ohio St. 3d at 478. *Id.*, *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468,

[1] Trial court decisions not available on LEXIS or Westlaw are available on the corresponding county's case information online by case number search.

478, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 48. "When reviewing a statute on due-process grounds" Ohio uses the "rational-basis test." *Id.* at ¶ 49 (internal citations omitted). A statute will pass the rational basis test "if it [1] bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." *Id.* (internal citations omitted).

Here, the Court finds the non-economic damages cap as applied to medical claims in R.C. 2323.43 is unconstitutional on due process grounds. As Judge Schneider reasoned in *Metts*:

> The Ohio Constitution, Article 1, Section 16 states:
>
> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
>
> The Supreme Court of Ohio has recognized the Due Course provision to be the equivalent of the United States Constitution's Due Process provision. *Arbino* at 478. When a statute is challenged on the issue of Due Process, the rational-basis test is applicable. *Id.* A statute is found to be constitutional under the rational-basis test, "[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." *Id.*
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> * * *
>
> In *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), the Supreme Court of Ohio analyzed R.C. §2305.27, a statute passed in 1975 by the General Assembly, "setting a $200,000 cap on general damages that may be awarded for medical malpractice" *Id.* at 686. The Supreme Court found R.C. §2305.27 was unconstitutional under the Due Process provision, holding, "It is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Id.* at 691.
>
> In 2005, the General Assembly passed R.C. §2315.18, setting limits on non-economic damages in a tier structure, as referenced above. Under R.C. §2315.18, the General Assembly "found the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and by setting the

limits for those not as severely injured[.]" *Arbino* at 480-81. The Supreme Court of Ohio addressed the constitutionality of this statute in *Arbino, supra.*

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

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

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

This is what the Supreme Court of Ohio was alluding to when it stated, "the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and by setting the limits for those not as severely injured at either $ 250,000 or $ 350,000." *Id.* at 480-81. R.C. §2315.18 is drafted in compliance with the holdings of the Supreme Court in *Morris*. This means that R.C. §2323.43 is not, as R.C. §2323.43(A)(3) still burdens those most severely injured by medical malpractice to benefit to the general public. Accordingly, the Court finds R.C. §2323.43(A)(3) is irrational and arbitrary and violates the Due Process provision of the Ohio Constitution.

Metts at 8-10; see also *Haggins, Mead, Woessner,* and *Wells, supra.*

The Court notes that the Ohio Supreme Court's recent decision in *Brandt v. Pompa*, 2022-Ohio-4525, 2022 Ohio LEXIS 2571, supports finding the non-economic damages cap on catastrophic injuries in R.C. 2323.43 unconstitutional:

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

Id. at ¶ 31. As R.C. 2323.43 does not allow for limitless non-economic damages for those suffering catastrophic injuries, the constitutional guaranty of due course of law is unjustly withheld for medical negligence plaintiffs.

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

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

Ohio's equivalent of federal equal protection rights under the U.S. Constitution is codified in Oh. Const. Art. I, § 2, which provides "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit." When interpreting this provision, the Ohio Supreme Court ruled "[t]he prohibition against the

denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition *against* the denial of equal protection of the laws." *Conley v. Shearer*, 64 Ohio St.3d 284, 288-289, 595 N.E.2d 862 (1992) (emphasis added) (internal citations omitted). Like the aforementioned due process analysis, the rational basis test also applies to the equal protection analysis in this situation. *See Arbino*, 880 N.E.2d 420, at ¶ 61.

Again, this Court adopts Judge Schneider's analysis as set forth in *Metts*:

> The Court must first determine the standard of review. "When legislation infringes upon a fundamental constitutional right or the rights of a suspect class, strict scrutiny applies. If neither a fundamental right nor a suspect class is involved, a rational-basis test is used." *Arbino*, 116 Ohio St.3d at 481. Here, Plaintiffs are not of a suspect class and a fundamental right is not at issue. Accordingly, the Court must review the matter pursuant to the rational-basis test.
>
> * * *
>
> Under Equal Protection, the Court must ensure the law has an equality of operation on persons according to their relation and are applicable to all persons under like circumstances. *Conley, supra*, at 288. Therefore, the Court is compelled to consider R.C. §2323.43 in comparison to other similarly situated statutes limiting non-economic damages.
>
> The parties each raise comparative statutes. Plaintiffs assert R.C. §2315.18 is most similar to R.C. 2323.43. Defendants argue R.C. §2744.05, a statute limiting non-economic damages against a political subdivision, is similar, as well. Additionally, the Court conducted a review of statutes limiting damages from all 50 states.
>
> Plaintiffs argue R.C. §2315.18 is most like R.C. 2323.43 because both statutes concern tortious conduct and place limitations on non-economic damages, distinguishing the amount of damages recoverable between catastrophic injuries and non-catastrophic injuries. Defendants argue the circumstances of the statutes are not alike, as one statute addresses only

medical malpractice and the other tortious conduct generally. The Court finds this to be the argument of a square is not a rectangle. Medical malpractice is a form of tortious conduct. As both statutes address torts and have catastrophic injury distinctions, the Court finds these statutes to be similar.

In *Arbino*, the Supreme Court reviewed in R.C. §2315.18 and found, "The distinctions the legislature drew in refusing to limit certain injuries were rational and based on the conclusion that catastrophic injuries offer more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations." *Arbino*, 116 Ohio St.3d at 483. As R.C. §2323.43 is identical to R.C. §2315.18, but for the limit imposed on parties with catastrophic injuries, the Court finds the limit under R.C. §2323.43(A)(3) is not rational under the Equal Protection Clause. The Supreme Court has found catastrophic injuries offer more concrete evidence posing a lesser risk of being tainted by improper external considerations when evaluating the case for non-economic damages. This would not be any different if the injury were created by a doctor in his capacity as a medical provider or in operation of a motor vehicle. It is not rational for the law to limit the non-economic damages of one catastrophically injured party when the other can receive all damages granted by the jury just because one plaintiff lost their leg in the ER while the other lost it in a car accident.

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

The Court finds R.C. §2744.05 and *Oliver* to be distinguishable from R.C. §2323.43 and the underlying matter. Revised Code §2744.05 is limited to circumstances concerning political subdivisions versus private parties. The Supreme Court recognized this difference in its decision in *Oliver*. *Id.* at 282 (citations omitted) ("the 'state has a valid interest in preserving the financial soundness of its political subdivisions.'"). The Supreme Court continued to bolster this distinction, pointing out its decision in *Menefee v. Queen City Metro*, 49 Ohio St. 3d 27, 29. In *Menefee*, the Supreme Court found the General Assembly can prohibit all tort actions against political subdivisions. Because of this holding, the Supreme Court in *Oliver* found they could not say R.C. §2744.05 was unreasonable or arbitrary in allowing some recovery in tort actions. Political subdivisions are granted higher protections from liability under the law. This creates an important difference between R.C. §2744.05 and R.C. §2323.43.

Additionally, R.C. §2744.05 does not differentiate between catastrophic and non-catastrophic injuries. The Supreme Court distinguished

> its opinion in *Oliver* from other cases concerning catastrophic injuries, stating, "[T]he damage limits for noneconomic harm in R.C. 2744.05(C)(1) are neither unreasonable or arbitrary, at least with regard to persons suffering noncatastrophic injuries." *Id.* Based on these reasons, the Court cannot find R.C. §2744.05 and R.C. §2323.43 are similarly situated.
>
> Finally, in 2016 when Plaintiffs initially filed their motion for summary judgment, the Court conducted a fifty-state review of all statutes limiting damages and the associated case law. In that review, the Court found no other state has damage limits like those in Ohio, where one statute allows general torts unlimited non-economic damages for catastrophic injuries, but another statute places a strict limit on medical malpractice catastrophic injuries. The only states who have limits including components like Ohio are: California (which limits medical malpractice and car accident damages in separate statutes); Hawaii (which limits medical malpractice and other tort damages in separate statutes); and Michigan (which distinguishes between catastrophic and non-catastrophic injuries in different tort statutes). *See* Exhibit A.
>
> Yet, these statutes each include key differences. California does not include tiered limits pertaining to catastrophic injuries. Hawaii only limits pain and suffering damages, not all non-economic damages, and fails to include catastrophic injury distinctions. And Michigan recognizes catastrophic injuries, but sets the same monetary limits within its statutes. The Court finds these states treat similarly situated plaintiffs the same under their laws.
>
> Through comparing R.C. §2323.43 to similar statutes, the Court finds the limit under R.C. §2323.43(A)(3) is not rational under the Equal Protection Clause. No other state limits similarly situated plaintiffs like Ohio. Additionally, the Supreme Court of Ohio has upheld unlimited non-economic damages for those who have suffered catastrophic injuries. *Arbino*, 116 Ohio St.3d at 483. R.C. §2323.43 as compared to R.C. §2315.18 does not equally operate on persons according to their relation and is not applicable to all persons under like circumstances. Accordingly, the Court finds R.C. §2323.43 violates the constitutional guarantee of equal protection under the law.

Metts at 11-15; see also *Brandt* at ¶ 31.

Here, the Court finds the non-economic damages cap as applied to medical claims in R.C. 2323.43 is unconstitutional on equal protection grounds. The cap is not rational under the equal protection clause because it does not treat similarly situated plaintiffs the same.

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

Ohio's equivalent of the federal right to a jury trial under the U.S. Constitution is codified in Oh. Const. Art. I, § 5, which states "[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Under *Arbino*, a challenge to the right to a jury trial will "succeed only if the statute actually intrudes upon the jury's fact-finding function." *Arbino*, 880 N.E.2d 420, at ¶ 90. The Ohio Supreme Court held "post-*Sheward* precedent conclusively establishes that regulation of punitive damages is discretionary and that states may regulate and limit them as a matter of law without violating the right to a trial by jury." *Id.* at ¶ 95.

As stated in *Metts*:

> * * * Revised Code §2323.43(A)(3) states, "[T]he court shall enter a judgment in favor of the plaintiff for compensatory damages for noneconomic loss. In no event shall a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in divisions (A)(2) and (3) of this section." As previously held, the Court finds the limitation is automatic. No language in the statute requires action from the parties to enforce the statute. Therefore, the Court finds R.C. §2323.43 limits damages as a matter of law.
>
> * * *
>
> As R.C. §2323.43 does not intrude upon the jury's fact-finding function, the Court finds it does not violate Plaintiffs' constitutional right to a jury trial.

Metts at 15-16.

The Court finds the non-economic damages cap as applied to medical claims in R.C. 2323.43 is constitutional as applied to Plaintiffs' right to a trial by jury.

e. The Non-Economic Damages Cap in R.C. 2323.43 is not Unconstitutionally Vague as Applied to Plaintiff

Plaintiff argues R.C. 2323.43 is unconstitutional because the statute fails to define what an "occurrence" is for purposes of setting limits on non-economic damages. The Court finds there is no ambiguity as to the meaning or application of "occurrence" as applied to Plaintiff's injuries. Plaintiff's allegations concern the same course of medical care and treatment for the same underlying complaint, as well as the same resulting injury, regardless of how many other healthcare providers were involved in her care. Accordingly, the Court finds R.C. 2323.43 is not unconstitutionally vague as applied to Plaintiff.

III. Conclusion

For the aforementioned reasons, the Court finds R.C. 2323.43 unconstitutional under the due process and equal protection provisions of the Ohio Constitution as applied to non-economic damages caps in medical negligence claims. However, the statute does not violate Plaintiffs' right to a jury trial and is not unconstitutionally vague as applied to Plaintiff. Accordingly, the Court **DENIES** Defendants' Motion for Entry of Judgment on Jury Verdict Consistent with Jury Interrogatories and Ohio Law, filed April 28, 2023, and **GRANTS** Plaintiffs' Motion to Declare Damage Caps Constitutional and Motion to Enter Judgment in Accordance with the Law.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 05-31-2023

Case Title: SUSANA LYON -VS- RIVERSIDE METHODIST HOSPITAL ET AL

Case Number: 16CV012056

Type: ORDER

It Is So Ordered.

/s/ Judge Kim Brown

Court Disposition

Case Number: 16CV012056

Case Style: SUSANA LYON -VS- RIVERSIDE METHODIST HOSPITAL ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 16CV0120562023-04-2899940000
   Document Title: 04-28-2023-MOTION - DEFENDANT: OHIO GASTROENTEROLOGY GROUP INC - FOR ENTRY OF JUDGMENT ON VERDICT
   Disposition: MOTION DENIED

2. Motion CMS Document Id: 16CV0120562023-05-0199970000
   Document Title: 05-01-2023-MOTION - PLAINTIFF: SUSANA LYON - TO DECLARE DAMAGE CAPS UNCONSTITUTIONAL
   Disposition: MOTION GRANTED

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

Michelle D. Haggins, Ind. And Guardian of Lamontee J.C. Haggins, Person Only, et al.,	:	
Plaintiffs,	:	Case No. 19CV1804
v.	:	
Prachi S. Biyani, M.D., et al.,	:	Judge Serrott
Defendants.	:	

DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Introduction

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

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

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

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

II. Standard of Review

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

(1) No genuine issue as to any material fact remains to be litigated;

(2) the moving party is entitled to judgment as a matter of law; and

(3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made."

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

III. Law and Analysis

a. Brief Statutory and Judicial Background of Non-Economic Damages Caps as Applied to Medical Cases in Ohio

The Ohio General Assembly and state courts have addressed non-economic damages caps in medical cases many times since 1975. Statutes have been passed by the Ohio General Assembly limiting non-economic damages in 1975, 1997, and most recently, 2003. *See* Ohio Medical Malpractice Act of 1975, Am. Sub. H.B. No. 682; Am.

Sub. H.B No. 350; and S.B. 281. The Ohio Supreme Court ruled the non-economic damages cap in the 1975 law as unconsititional on due process grounds in 1991. *See Morris v. Savoy*, 61 Ohio St. 3d 684. After *Morris*, the Ohio General Assembly passed a new cap in 1997, but it was again ruled unconstitutional on due process grounds by the Ohio Supreme Court in 1999. *See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062. After *Sheward*, the Ohio General Assembly again passed a revised cap in 2003, which is currently codified in R.C. 2323.43, but the Ohio Supreme Court has not yet ruled on the constitutionality of this version.

Even so, in 2007, the Ohio Supreme Court ruled on a similar cap codified in R.C. 2315.18. In reviewing this statute under a due process analysis, the high court found the cap was not "arbitrary or unreasonable" because the statute provided an exception allowing "limitless noneconomic damages for those suffering catastrophic injuries." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 480. This exception alleviated the concerns posed in *Morris* and *Sheward*. *See id*. The current version of R.C. 2323.43 has no such exception.

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

4, 2008 (J. Hogan). Further, decisions from Judge Duhart at Lucas County Common Pleas Court and Judge Gallagher at Summit County Common Pleas Court have also ruled R.C. 2323.43 unconstitutional on due process grounds. *See Woessner v. The Toledo Hospital*, CI0201201614, Opinion and Judgment Entry, May 30, 2014 (J. Duhart); *Wells v. Call*, Judgment Entry, CV2008096782, November 23, 2010 (J. Gallagher).

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

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

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

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

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

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

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

Ultimately, like Judge Schneider, the Court finds the statute arbitrary under the rational basis test, thereby deeming R.C. 2323.43 unconstitutional under due process as applied to non-economic damages caps in medical claims. No rational basis exists for treating medical claims with a cap under R.C. 2323 differently than other negligence claims with no cap or non-economic damages under R.C. 2315.18, which is an arbitrary distinction.

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

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

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

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

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

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

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

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

IV. Conclusion

For the aforementioned reasons, the Court finds R.C. 2323.43 unconstitutional under the due process and equal protection provisions of the Ohio constitution as applied to non-economic damages caps in medical claims. However, the statute does not violate Plaintiffs' right to a jury trial. The Court finds there is no genuine issue as to any material fact that remains to be litigated and reasonable minds can come to one conclusion, which is that Plaintiffs are entitled to judgment as a matter of law on this issue. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Partial Summary Judgment.

IT IS SO ORDERED.

Electronically Signed By:
JUDGE MARK A. SERROTT

Franklin County Court of Common Pleas

Date: 07-08-2022

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

Case Number: 19CV001804

Type: DECISION

It Is So Ordered.

/s/ Judge Mark A. Serrott

Court Disposition

Case Number: 19CV001804

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

Motion Tie Off Information:

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

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

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

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

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

Schneider, J.

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

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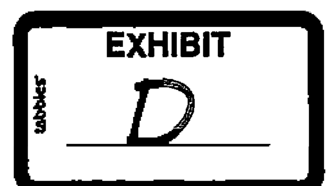

I. Background

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

II. Summary Judgment Standard

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

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

III. Discussion

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

> In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, all of the following apply: . . . (3) In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, all of the following apply:
>
> > (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
> >
> > (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.

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

A. Waiver of Defense

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

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

A. Medical Claim

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

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

Revised Code §2305.113 defines a medical claim as:

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

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

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

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

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

the statute are:

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

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

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

B. Constitutionality of R.C. §2323.43

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

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

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

Plaintiffs assert the discrepancy between the statutes for those suffering catastrophic injuries is facially unconstitutional because it violates the Due Process Clause of the Ohio Constitution, Article 1, Section 16; Equal Protection under the Ohio Constitution, Article 1, Section2; and the right to trial by jury under the Ohio Constitution, Article 1, Section 5. To successfully present a facial challenge, Plaintiffs must demonstrate there is no set of facts in which R.C. §2323.43 would be valid. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 473 (2007). Additionally, "[s]tatutes have a strong presumption of constitutionality. Before a court may declare unconstitutional an enactment

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

i. Due Process

The Ohio Constitution, Article 1, Section 16 states:

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

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

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

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

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

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

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

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

If a man's leg were cut off by a doctor in surgery and he sought non-economic damages for the catastrophic injury, the damages would be limited to $500,000 under R.C. §2323.43(A)(3). Yet, if the same man were to be run over and lose his leg by the same doctor on the way home from the hospital after a successful surgery, that man could

recover all non-economic damages for his catastrophic injury because R.C. §2315.18 has no additional limit. This is not reasonable or logical. The exact same injury inflicted by the exact same person should yield the exact same damages, but under the current statutory scheme it does not.

This is what the Supreme Court of Ohio was alluding to when it stated, "the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and by setting the limits for those not as severely injured at either $ 250,000 or $ 350,000." *Id.* at 480-81. R.C. §2315.18 is drafted in compliance with the holdings of the Supreme Court in *Morris.* This means that R.C. §2323.43 is not, as R.C. §2323.43(A)(3) still burdens those most severely injured by medical malpractice to benefit to the general public. Accordingly, the Court finds R.C. §2323.43(A)(3) is irrational and arbitrary and violates the Due Process provision of the Ohio Constitution.

ii. Equal Protection

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

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

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

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

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

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

a. R.C. §2323.43 Only

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

constitutional.

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

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

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

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

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

improper external considerations." *Arbino*, 116 Ohio St.3d at 483. As R.C. §2323.43 is identical to R.C. §2315.18, but for the limit imposed on parties with catastrophic injuries, the Court finds the limit under R.C. §2323.43(A)(3) is not rational under the Equal Protection Clause. The Supreme Court has found catastrophic injuries offer more concrete evidence posing a lesser risk of being tainted by improper external considerations when evaluating the case for non-economic damages. This would not be any different if the injury were created by a doctor in his capacity as a medical provider or in operation of a motor vehicle. It is not rational for the law to limit the non-economic damages of one catastrophically injured party when the other can receive all damages granted by the jury just because one plaintiff lost their leg in the ER while the other lost it in a car accident.

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

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

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

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

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

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

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

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

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

iii. Right to Trial

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

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

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

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

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

IV. Conclusion

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

IT IS SO ORDERED.

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

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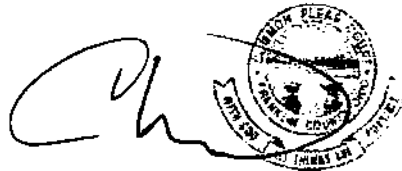
Franklin County Court of Common Pleas

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

It Is So Ordered.



/s/ Judge Charles A. Schneider

Court Disposition

Case Number: 14CV002543

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

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 14CV0025432016-07-2999960000
   Document Title: 07-29-2016-MOTION FOR PARTIAL SUMMARY JUDGMENT - PLAINTIFF: MARK DANIEL METTS II PRNT
   Disposition: MOTION GRANTED

2. Motion CMS Document Id: 14CV0025432018-10-2499970000
   Document Title: 10-24-2018-MOTION - DEFENDANT: ATHENS MEDICAL LABORATORY INC - TO ENFORCE STATUTORY CAP ON PLNTFFS NOE-
   Disposition: MOTION DENIED

3. Motion CMS Document Id: 14CV0025432018-05-1099980000
   Document Title: 05-10-2018-MOTION FOR CONTINUANCE - DEFENDANT: STACI L. JAMES CNP
   Disposition: MOTION RELEASED TO CLEAR DOCKET

4. Motion CMS Document Id: 14CV0025432018-05-1099940000
   Document Title: 05-10-2018-MOTION TO COMPEL DISCOVERY - DEFENDANT: STACI L. JAMES CNP
   Disposition: MOTION RELEASED TO CLEAR DOCKET

5. Motion CMS Document Id: 14CV0025432018-06-1499730000
   Document Title: 06-14-2018-MOTION IN LIMINE - PLAINTIFF: MARK DANIEL METTS II PRNT
   Disposition: MOTION RELEASED TO CLEAR DOCKET

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

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

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

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

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

11. Motion CMS Document Id: 14CV0025432018-09-1099980000
    Document Title: 09-10-2018-MOTION IN LIMINE - PLAINTIFF: MARK DANIEL METTS II PRNT
    Disposition: MOTION RELEASED TO CLEAR DOCKET

12. Motion CMS Document Id: 14CV0025432018-09-1099970000
    Document Title: 09-10-2018-MOTION IN LIMINE - DEFENDANT: ATHENS MEDICAL LABORATORY INC
    Disposition: MOTION RELEASED TO CLEAR DOCKET

13. Motion CMS Document Id: 14CV0025432018-09-1099960000
    Document Title: 09-10-2018-MOTION IN LIMINE - DEFENDANT: ATHENS MEDICAL LABORATORY INC
    Disposition: MOTION RELEASED TO CLEAR DOCKET

14. Motion CMS Document Id: 14CV0025432018-11-1999980000
    Document Title: 11-19-2018-MOTION FOR LEAVE TO FILE - PLAINTIFF: MARK DANIEL METTS II PRNT
    Disposition: MOTION GRANTED

FILED
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2014 MAY 30 P 12: 03
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Catherine Woessner, etc.,

Plaintiff,

vs.

The Toledo Hospital, et al.,

Defendants.

Case No. CI0201201614

OPINION AND JUDGMENT ENTRY

Hon. Myron C. Duhart

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

I. BACKGROUND

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

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EXHIBIT
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II. DISCUSSION

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

As a preliminary matter, the Court notes that "[a]ll statutes have a strong presumption of constitutionality," thus, "[i]t is difficult to prove that a statute is unconstitutional." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶25. A petitioner may attack the constitutionality of a statute in two ways: (1.) by "facial challenge," in which case the petitioner must demonstrate that "there is no set of circumstances in which [the] statute would be valid; or (2.) by "challenge [to] the statute as applied to a specific set of facts." Id. at ¶26. Under the latter approach, the petitioner must show "clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, at ¶38.

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

> (A) In a civil action upon a medical, * * * claim to recover damages for injury, death, or loss to person or property, all of the following apply:
>
> (1) ***There shall not be any limitation on*** compensatory damages that represent the ***economic loss*** of the person who is awarded the damages in the civil action..
>
> (2) Except as otherwise provided in division (A)(3) of this section, ***the amount of compensatory damages that represents damages for noneconomic loss that is recoverable*** in a civil action under this section to recover damages for injury, death, or loss to person or property ***shall not exceed*** the greater of ***two hundred fifty thousand dollars*** or * * * three times the plaintiff's economic loss, ***as determined by the trier of fact***, to a maximum ***of three hundred fifty thousand dollars*** for each plaintiff or a maximum of ***five hundred thousand dollars for each occurrence***.
>
> (3) ***The amount recoverable for noneconomic loss*** in a civil action under this section ***may exceed*** the amount described in division (A)(2) of this section ***but shall not exceed five***

hundred thousand dollars for each plaintiff or ***one million dollars for each occurrence*** if the ***noneconomic losses of the plaintiff are for either of the following***:

(a) ***Permanent and substantial*** physical deformity, loss of use of a limb, ***or loss of a bodily organ system***;.

(b) ***Permanent physical functional injury*** that permanently prevents the injured person from being able to ***independently care for self and perform life sustaining activities***. * * *. (Emphasis added.)

A. DUE PROCESS

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

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

1. *Morris v. Savoy*

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

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

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

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

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

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

As to the second, "unreasonable or arbitrary," prong, the *Morris* court quoted with approval the following: "[I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice "

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

2. *<u>Arbino v. Johnson & Johnson</u>*

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

> (B) In a tort action to recover damages for injury or loss to person or property, all of the following apply:
>
> (1) ***There shall not be any limitation on*** the amount of compensatory damages that represents the ***economic loss*** of the person who is awarded the damages in the tort action.
>
> (2) Except as otherwise provided in division (B)(3) of this section, ***the amount of compensatory damages that represents damages for noneconomic loss*** that is recoverable in a tort action under this section to recover damages for injury or loss to person or property ***shall not exceed*** the greater of ***two hundred fifty thousand dollars*** or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to ***a maximum of three hundred fifty thousand dollars for each plaintiff*** in that tort action ***or a maximum of five hundred thousand dollars for each occurrence*** that is the basis of that tort action..
>
> (3) ***There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss*** that is recoverable in a tort action to recover damages for injury or loss to person or property if the noneconomic losses of the plaintiff are for either of the following:
>
> (a) ***Permanent and substantial physical*** deformity, loss of use of a limb, or ***loss of a bodily organ system;.***
>
> (b) ***Permanent physical functional injury that permanently prevents*** the injured person from being able to ***independently care for self and perform life-sustaining activities***. (Emphasis added.) R.C. 2315.18.

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

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

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

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between the tort reforms taken and the public good to be achieved, ***the record here draws a clear connection between limiting uncertain and potentially tainted noneconomic-damages awards and the economic problems demonstrated in the evidence.***" *Arbino* at ¶56. Thus, the *Arbino* court stated: "Finding that the General Assembly's review of the evidence yielded a statute that bears a real and substantial relation to the general welfare of the public, we need not cross-check its findings to ensure that we would agree with its conclusions." *Id.* at ¶58.

The *Arbino* court then reviewed the arbitrary-or-unreasonable prong. *Id.* at ¶59. " In *Morris,* we found that the damages caps ***violated this prong because they imposed the cost of the intended benefit to the public solely upon those most severely injured.***" (Emphasis added.) *Arbino* at ¶59, citing *Morris,* 61 Ohio St.3d at 690-691. The court then distinguished the statute at issue, R.C. 2315.18, with former R.C. 2307.43 which was at issue in *Morris.* "R.C. 2315.18 alleviates this [most-severely-injured] concern by allowing for ***limitless noneconomic damages for those suffering catastrophic injuries.***" (Emphasis added.) *Arbino* at ¶60. The court then concluded that "[t]he General Assembly's decision is tailored to maximize benefits to the public while limiting damages to litigants. The logic is ***neither unreasonable nor arbitrary.***" (Emphasis added.) *Id.* at ¶61. Thus, the court found no due-process violation. *Id.* at ¶62.

3. <u>This Case -- Due Process Violation</u>

Real and Substantial Relation. In the instant case, the Court finds that unlike the statute at issue in *Morris*, the statute at issue here -- R.C. 2323.43 -- *is* based on evidence. The Court finds that uncodified statutory materials accompanying the enacted statute, R.C. 2323.43, appear to be as thorough as the materials cited with approval by the *Arbino* court. *Compare Arbino* at ¶53 *with* Uncodified Section Notes, 149 v S 281, Sections 3 and 5. Accordingly, as to the real-and-substantial-relation prong, the Court finds R.C. 2323.43 in harmony with the due process clause.

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Unreasonable or Arbitrary. However, a different situation exists with the unreasonable-or-arbitrary prong. The statute in *Morris*, former R.C. 2307.43, contained very simple language for a straight-forward effect; it imposed damage caps on ***all*** litigants including those with the most catastrophic injuries[2] -- "***in no event shall an amount recovered*** for general [noneconomic] damage in any medical claim not involving death ***exceed the sum of Two Hundred Thousand Dollars*** [emphasis added]." While the General Assembly used many more words in the catastrophic-injury category of R.C. 2323.43 to limit damage recoveries to $500,000 per person --

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

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

Because both the *Morris* and the *Arbino* courts concluded that such caps violate the due process clause, the Court finds here that R.C. 2323.43 violates Ms. Woessner's due process rights in this case.

B. EQUAL PROTECTION, RIGHT TO JURY, OPEN COURTS

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

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

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

JUDGMENT ENTRY

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

5/29/14

Myron C. Duhart, Judge

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

KATHLEEN P. WELLS, et al.	)	CASE NO.: CV 2008-09-6782
Plaintiffs,	)	JUDGE PAUL J. GALLAGHER
vs.	)	
DAVID C. CALL, D.O., et al.	)	**JUDGMENT ENTRY**
Defendants	)	

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

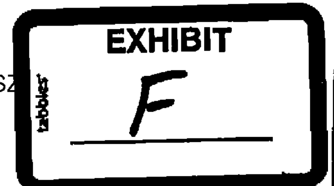
Appearing on behalf of the Plaintiff was Attorney Michael L. Inscore. Representing the Defendants was Attorney Michael Ockerman.

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

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

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

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



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The jury awarded damages to Plaintiff Kathleen Wells as follows:

Non-economic Loss: $1,400,000

Economic Loss: $100,000.

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

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

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

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

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

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

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JURISDICTION

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

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

R.C. §2721.12 provides in relevant part:

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

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

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

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

CONSTITUTIONAL ANALYSIS

Due Process

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

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

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

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

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injured by tortuous conduct." State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St. 3d 451, 715 N.E.2d 1062.[1]

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

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

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

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

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

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

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

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

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

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

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

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

(A) In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, all of the following apply:
(1) There shall not be any limitation on compensatory damages that represent the economic loss of the person who is awarded the damages in the civil action.
(2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a civil action under this section to recover damages for injury, death, or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of three hundred fifty thousand dollars for each plaintiff or a maximum of five hundred thousand dollars for each occurrence.
(3) The amount recoverable for noneconomic loss in a devil action under this section may exceed the amount described in division (A)(2) of this section, but shall not exceed five hundred thousand dollars for either of the following:

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STANDARD OF REVIEW

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

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

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

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a. Permanent and substantial physical deformity, loss of the use of a limb, or loss of a bodily organ system.

b. Permanent physical functional injury that permanently prevents the injured person from being able to independently car for self and perform life-sustaining activities.

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

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

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

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

Right to Trial by Jury

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

Unconstitutionally Vague

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

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PLAINTIFF EXPENSES TAXED AS COURT COSTS

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

The Defendants have responded in opposition.

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

JUDGE PAUL J. GALLAGHER

cc: Michael L. Inscore
Michael Ockerman

PJG:lcb
08-6782b

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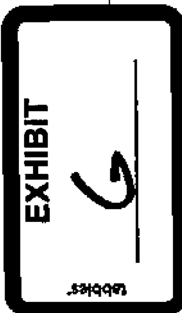
GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO

In the Common Pleas Court of Montgomery County, Ohio

GEORGE N. SEXTON, et al., **Plaintiffs,** **-vs-** **MEDICAL ONCOLOGY/ HEMATOLOGY ASSOCIATES, INC., et al.,** **Defendants.**	:	**Case Nos. 06-785 06-5369** **Judge Jeffrey E. Froelich** **<u>PRELIMINARY DECISIONS REGARDING PRETRIAL MOTIONS</u>**
GEORGE N. SEXTON, et al., **Plaintiff,** **-vs-** **PROVIDENCE MEDICAL GROUP, INC., et al.,** **Defendants.**	:	



The Plaintiff, George Sexton, has made a claim for damages resulting from alleged medical malpractice that resulted in a permanent and substantial physical deformity. Additionally, his wife, adult children, and daughter-in-law are Plaintiffs for loss of consortium.

I. DEPOSITION of DR. REID

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The Plaintiffs have filed a Motion for Protective Order to prohibit the deposition of a treating physician, Dr. Kevin Reid. This situation apparently arose from a "failure to

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

II. CONSTITUTIONALITY OF R.C. 2323.43

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

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

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

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

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

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

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

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

III. STATUTORY LIMITATION

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

R.C. 2323.43 does not limit compensatory damages for economic loss and it is agreed that those exceed $250,000 for George Sexton; there is no allegation of economic loss

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for the family members. Generally, the noneconomic loss a plaintiff may recover "for death or

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

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

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

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

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IV. CLAIM FOR BREACH OF FIDUCIARY DUTY

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

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

V. LAW OF THE CASE

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

The "law of the case doctrine" provides that decisions made by a reviewing court regarding legal questions remain the law of that case for all subsequent proceedings at both the trial and appellate levels. *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1. Other courts have expanded this definition to prohibit relitigation of an issue once it has been decided in an earlier stage of the same litigation. See, e.g., *Hamilton v. Leavy* (3rd Cir., 2003), 322 F. 3d 776, 786. Although the doctrine ensures consistency of results and preserves the structure of superior and inferior courts as designated by the Ohio constitution, the doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust

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results. *Nolan*, supra, at 413, as cited in *Byrd v. Smith*, Twelfth Dist. No. CA2007-08-093,

2008-Ohio-3597.

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

VI. CONCLUSION

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

APPROVED:

HON. JEFFREY E. FROELICH

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

SAM G. CARAS, Attorney for Plaintiffs, 130 West Second Street, Suite 310, Dayton, Ohio, 45402, samcaras@caraslaw.com (937)223-2200
NEIL F. FREUND, Attorney for Defendants Medical Oncology-Hematology Associates, Inc., and Stuart A. Merl, M.D., 1 South Main Street, Suite 1800, Dayton, Ohio, 45402-2017, nfreund@ffalaw.com (937)222-2424
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THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Lauren Wargo
Plaintiff

Vs.

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

CASE NO. CV-08-653779

MEMORANDUM OF OPINION AND ORDER ON POST JUDGMENT MOTIONS

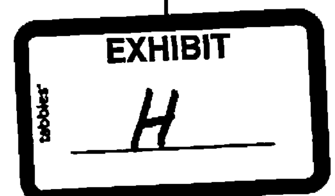
Gaul, D:

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court further finds that Revised Code 2323.43 is unconstitutional because it violates the Plaintiff's right to equal protection because it unfairly discriminates between medical malpractice victims and victims who suffer similar injuries as a result of tortious conduct not committed in the malpractice arena.

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

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

IV. Plaintiff's Motion for Prejudgment Interest.

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

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

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

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

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

V. Defendant's Motion for Remittitur

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

IT IS SO ORDERED

Judge Daniel Gaul

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OCT 30 2009

GERALD E. FUERST

By [signature] Dep.

Dated: 10/27/09

SERVICE

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

Judge Daniel Gaul

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

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

Plaintiff(s), CLERK OF COURTS

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

ROGER WILT, M.D.,

Defendant(s).

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

AND

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

AND

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

AND

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

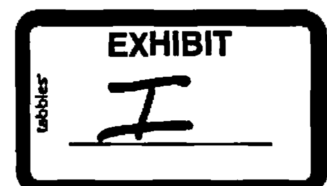
Defendants' 3-15-2007 Motion for Summary Judgment is DENIED.

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

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

Standard of Review applicable to a Motion for Summary Judgment

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



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

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

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

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

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

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

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

Plaintiffs submitted the affidavit of Dr. Leidheiser that says,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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> ... in *George Shima Buick v. Ferencak* (2001), 91 Ohio St. 3d 1211, 2001 Ohio 238, 741 N.E.2d 138, ... we sua sponte dismissed an appeal and certified conflict raising another separation-of-powers issue because we lacked jurisdiction. There, the defendant challenged the constitutionality of a statute allowing certain lay employees to represent their corporate employers in small claims court. But because no one had served the Ohio Attorney General with notice of the constitutional attack, we found a jurisdictional defect, based on *Cicco v. Stockmaster* (2000), 89 Ohio St. 3d 95, 2000 Ohio 434, 728 N.E.2d 1066. Today we find that we applied *Cicco* too zealously in dismissing *Ferencak*.
>
> [**P7] *Cicco* recognizes that R.C. 2721.12 imposes a notice requirement on parties contesting the constitutionality of a statute in a declaratory judgment action filed pursuant to R.C. Chapter 2721. That statute requires that the Attorney General be notified in every such action by service of the pleading in accordance with Civ.R. 4.1. Neither *Ferencak* nor this case is a declaratory judgment action filed pursuant to R.C. Chapter 2721. *Ferencak* began as a small claims action to recover damages stemming from a customer's decision to stop payment on a check for automobile repairs. And this case is an action to enforce our constitutional responsibility to oversee the practice of law in this state. *Cicco*, therefore, does not require service on the Attorney General as a prerequisite to invoking our jurisdiction. For this reason, *Ferencak* is overruled.

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

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

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

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

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

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damage caps pertaining to persons with the most severe injuries are irrational and arbitrary, and are therefore unconstitutional.

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

> ...In Morris, we found that the damage caps violated this prong because they imposed the cost of the intended benefit to the public solely upon those most severely injured. *Morris* 61 Ohio St.3d at 690-691, 576 N.E.2d 765. We repeated this concern in *Sheward*, albeit in dicta. *Sheward*, 86 Ohio St.3d at 490, 715 N.E.2d 1062.
>
> [*P60] R.C. 2315.18 alleviates this concern by allowing for limitless noneconomic damages for those suffering catastrophic injuries. R.C. 2315.18(B)(3)(a) and (b).

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

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

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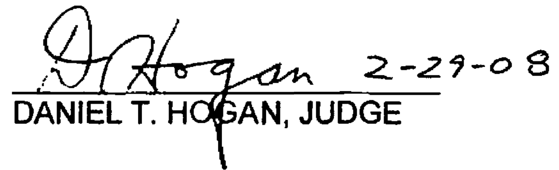
those damage caps do not apply in this case. This Court must deny Defendants' 6-22-2007 and 7-24-2007 Motions for Summary Judgment.



DANIEL T. HOGAN, JUDGE

Copies to:

Eleni A. Drakatos
David I. Shroyer
Daniel N. Abraham
Counsel for Plaintiff(s)

Mark L. Schumacher
Counsel for Defendants Roger Wilt, M.D., Northwest Family Physicians, Central Ohio Primary Care Physicians

Patrick F. Smith
Counsel for Defendants Ohio Gastroenterology Group, Joseph Laney, M.D.

Mark Dann
Ohio Attorney General

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STATE OF OHIO)
) SS
COUNTY OF SUMMIT) **AFFIDAVIT**

I, Alex L. Constable, MBA, ASA, having been duly cautioned and competent to testify, hereby state as follows from my own personal knowledge:

1. I am Founder and Principal of Constable Consulting, LLC, an economic consulting firm specializing in damage analysis for litigated matters. Previously, I was Senior Manager in the Valuation and Litigation Advisory Services practice area at CBIZ Accounting Tax and Advisory Services, a national firm providing expert analysis and consulting in the areas of accounting, tax and valuation. I received an M.B.A. with dual concentrations in Finance and Business Statistics from Cleveland State University in 1997, and a B.A. in Economics from Cleveland State University in 1986. I am also an Accredited Senior Appraiser (ASA) in business valuation as recognized by the International Board of Examiners of the American Society of Appraisers (member # 041670).

2. My professional experience and consulting work over the past 30-plus years has encompassed a wide variety of matters including disputes encompassing a range of industries and a diversity of claims. I have extensive experience in conducting, directing, and evaluating many types of quantitative analyses that have been submitted in federal and state courts.

3. I have submitted expert testimony to courts in the form of personal testimony, affidavits, expert reports, and depositions. On numerous occasions I have been retained as an expert and/or consultant to analyze a wide range of issues and to conduct a variety of analytics that include matters where I was asked to evaluate damages and to ensure that reliable principles and methods were used so that valid inferences could be made.

4. A copy of my *curriculum vitae* is provided as *Exhibit A*. It contains additional information on my professional background, a list of my professional activities, and other information related to my professional credentials.

5. In connection with the attached calculation, I was requested to perform a standard economic analysis of the changing value of money over time. The question: *What is the amount of money needed today to equal the purchasing power of $500,000 in April of 2003?*

6. This analysis utilizes publicly available data from the Bureau of Labor Statistics regarding the change in prices within the Consumer Price Index, a measurement of the average change in price of a market basket of consumer goods and services. The underlying source data is provided as *Exhibit B*.

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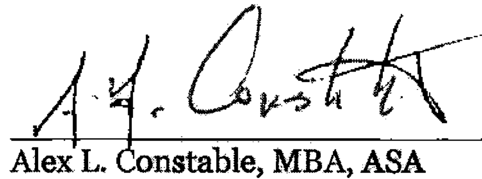
7. Using the source data and requisite methodology utilized by the Bureau of Labor Statistics, $500,000 in April 2003 has the equivalent buying power as $834,455.93 in December 2023. The CPI Inflation Calculator results are provided as *Exhibit C.*

8. The findings and opinions expressed herein are based upon my knowledge, training and experience in economic analysis and assessments in litigated matters. Further, the opinions herein are all expressed to a reasonable degree of professional certainty.

FURTHER AFFIANT SAYETH NAUGHT.



Alex L. Constable, MBA, ASA

SWORN BEFORE ME IN MY PRESENCE this 2 day of February, 2024.

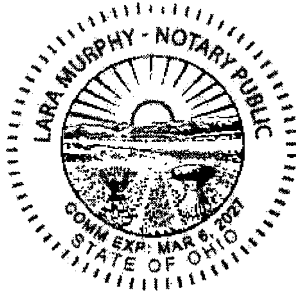


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Exhibit A

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ALEX L. CONSTABLE, MBA, ASA
CONSTABLE CONSULTING, LLC
7332 GRANBY DRIVE
HUDSON, OHIO 44236
aconstable@constableconsulting.com

EXPERIENCE

Mr. Constable is the Principal of Constable Consulting, LLC. Constable Consulting, LLC provides economic consulting and damage assessment in litigated matters.

Mr. Constable has over thirty years of experience with backgrounds in Litigation Support, Valuation and Statistical Analysis. He has authored and contributed to numerous valuation and litigation support reports which have been used in various courts and before the Internal Revenue Service. These include loss of profit margin for business interruption claims, written opinions and testimony assessing reasonable royalty rates for intellectual property claims and personal injury/ lost earning capacity analyses. Mr. Constable has been privileged to submit trial, deposition testimony and/or expert reports in United States District Courts, as well as the Ohio Court of Claims and County Courts of Common Pleas.

Mr. Constable has been responsible for the development of analysis for litigation support and the preparation of valuations of closely held business entities. He has worked on projects for firms in the manufacturing, distribution, retail and service segments in a diverse variety of industries with revenues ranging from under $1 million to over $1 billion. Interests valued include entity value, common equity, partnership interests (including Family Limited Partnerships), LLC interests, and interests subject to various contractual restrictions.

CERTIFICATION

As recognized by the International Board of Examiners of the American Society of Appraisers in March 2009, Mr. Constable was awarded the Accredited Senior Appraiser (ASA) designation in business valuation. This accreditation was the culmination of 10,000 hours of verified appraisal experience, four separate courses totaling over 100 hours of Society training in business valuation theory, completion of a fifteen-hour course on the Uniform Standards

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Certification Continued

of Professional Appraisal Practice (USPAP) of The Appraisal Foundation, five separate examinations covering business valuation theory and the Uniform Standards of Professional Appraisal Practice (USPAP), an examination on the Society's Code of Ethics, and peer review and approval by the Society's International Board of Examiners of actual business valuation/ appraisal work prepared for clients. Mr. Constable continues to participate in the requisite continuing education covering business valuation issues, maintaining his status with the American Society of Appraisers for the Accredited Senior Appraiser designation.

Employment History

- Principal, Constable Consulting, LLC, May 2008 - Current
- Senior Manager, CBIZ Accounting, Tax & Advisory Services, LLC, Nov. 2005 – May 2008
- Senior Associate, Burke Rosen & Associates, May 1991 – Nov. 2005

Education

Mr. Constable was awarded a Bachelor of Arts in Economics from Cleveland State University (December 1986) as well as a subsequent degree of Master of Business Administration with dual concentrations in Finance and Business Statistics (December 1997). Mr. Constable also received membership for academic distinction in the Beta Gamma Sigma international honor society for accredited collegiate schools of business.

Professional Affiliations

Mr. Constable is a member of the following professional and industry/ trade organizations: the American Economic Association, the Society of Labor Economists, the National Association of Forensic Economics, the American Academy of Economic and Financial Experts, and the American Society of Appraisers.

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PRESENTATIONS

December 2013: *Damages 360;* Panel Discussant for the Cleveland Employment Lawyers Association Continuing Legal Education seminar.

May 2010: *Negative Income Tax Effects in a Wrongful Termination Matter*; Caryn Groedel and Associates, LPA.

September 2009: *Economic Damages; the analysis of Lost Earning Capacity in a Wrongful Discharge Matter*; Labor and Employment Group of Brouse McDowell, LPA.

April 2007: *The Basics of Finance: Learn to Read and Understand Balance Sheets, Income Statements and Cash Flow Statements*; Lorman Education Services.

PUBLICATION

"*What is an Appropriate Discount Rate in a Lost Earning Capacity Assessment, and Why is it Important*?" CATA News, Cleveland Academy of Trial Attorneys, Spring 2014, pp. 8 - 9.

CONTINUING EDUCATION

As an Accredited Senior Appraiser, Mr. Constable is obliged to regularly participate in professional continuing education. The following list is a sample of the courses he has attended.

April 2023	Investigating Volatility Haircuts/Caps in Convertible Bonds Valuation
February 2023	The Broader Impacts of Technology Licensing: New Directions for Technology Transfer Indicators
October 2022	Valuation Provisions in Buy-Sell Agreements
September 2022	Convertible Instruments and Valuation
August 2022	Financial Reporting Valuation Guidance
July 2022	Financial Metrics Volatility for Contingent Consideration
February 2022	Valuation Considerations for Tax Receivable Agreements
November 2021	Complex Securities Valuation Modeling and Considerations – Monte Carlo Simulation

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Continuing Education Continued

July 2021	Revenue Based Contingent Consideration Techniques
April 2021	Theory and Calculation of Economic Damages
November 2020	Reasonable Compensation for Shareholder-Employees of S Corps
September 2020	Economic Damages in Light of Covid19
September 2020	Valuation of Complex Financial Instruments & Interests
July 2020	Tax Effecting and its Current Developments
May 2020	Update on International Valuation Standards
April 2020	Impact of Covid19 to Business Interruptions and Lost Profits
April 2020	Covid19 Impacts to Business Valuation and Forensic Accounting
January 2020	Understanding Equity Compensation
February 2020	The Market Derived Blockage Discount Model
October 2019	Accounting, Tax, and Other Emerging Issues in the Cannabis Industry
August 2019	Reasonable Compensation for Closely-held Businesses
July 2019	The Finer Points of Projecting Cash Flows
June 2019	Dealing with Fixed Asset Issues in Business Valuation
May 2019	Business Valuation Report Compliance with USPAP and Statements on Standards for Valuation Services
April 2019	Determining Discounts for Lack of Marketability
March 2019	Valuing a Business via Monte Carlo Simulation
February 2019	Lost Profit Calculations, Methods and Procedures
January 2019	Uniform Standards of Professional Appraisal Practice for Business Valuation
September 2018	Job Ladders and Growth in Earnings, Hours, and Wages
July 2018	Normalizing Owner Compensation
November 2017	Pitfalls in Determining Terminal Value in the DCF Model
October 2017	Valuing Non-Controlling Interests in S-Corps for Federal Tax Purposes
September 2017	Understanding Intangibles: Classification, Identification and Valuation
August 2017	Reasonable Compensation for Owner-Employees
May 2017	Quantifying The Impact of a Key Person

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April 2017	Forensic Financial Analysis
March 2017	Valuing Non-Controlling Interests in Asset-Intensive Companies with Low Earnings
January 2017	Valuation of Patents
December 2016	Measuring Unjust Enrichment
July 2016	Advanced Concepts in Lost Profits Calculations
April 2016	Valuation and Damages Calculations in Cases Involving Internet Infringement and Defamation
March 2016	Forecasts and Projections for Small Companies
March 2016	Tax Issues in Litigation-Based Valuation
November 2015	How Probability Affects Discounts for Lack of Marketability
May 2015	How the IRS Determines Reasonable Compensation
March 2015	Monte Carlo Simulations for Distressed Companies
February 2015	Volatility of Small or Private Companies
February 2015	Other Considerations in Lost Profits Calculations
August 2014	The Perils of Using Survey Data to Forecast Physician Compensation in Medical Practice Business Valuations
August 2014	New Accounting for Private Companies
May 2014	Elements of Lost Profits
April 2013	Valuing Early Stage Companies
August 2012	Relevance, Reliability and the Company-Specific Risk Premium
June 2012	Business Valuation in Litigation
August 2011	Factors of Comparability: Considerations Affecting Market Royalty Rates & Intangible Property Valuations
December 2010	Multi-Attribute Utility Model for Allocating Personal and Enterprise Goodwill
October 2010	Buy-Sell Agreements: How to Know Your Agreement Will Work
September 2010	Valuing Customer Related Intangibles
July 2010	Update on Discount for Lack of Marketability
December 2009	Statistical Implications of Forensic Techniques
November 2009	Forensic Techniques for Analyzing Financial Statements
November 2009	Intellectual Property Economic Damage Analysis
July 2009	Understanding and Valuing Non-Competition Agreements

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Exhibit B

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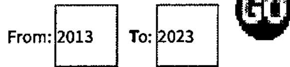
U.S. BUREAU OF LABOR STATISTICS

Databases, Tables & Calculators by Subject

Special Notices 12/05/2023

Change Output Options:



From: 2013 To: 2023 GO

include graphs include annual averages

Data extracted on: February 2, 2024 (11:25:17 AM)

Consumer Price Index for All Urban Consumers (CPI-U)

Series Id: CUUR0000SA0,CUUS0000SA0
Not Seasonally Adjusted
Series Title: All items in U.S. city average, all urban consumers, not seasonally adjusted
Area: U.S. city average
Item: All items
Base Period: 1982-84=100

Download:

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	HALF1	HALF2
2013	230.280	232.166	232.773	232.531	232.945	233.504	233.596	233.877	234.149	233.546	233.069	233.049	232.366	233.548
2014	233.916	234.781	236.293	237.072	237.900	238.343	238.250	237.852	238.031	237.433	236.151	234.812	236.384	237.088
2015	233.707	234.722	236.119	236.599	237.805	238.638	238.654	238.316	237.945	237.838	237.336	236.525	236.265	237.769
2016	236.916	237.111	238.132	239.261	240.229	241.018	240.628	240.849	241.428	241.729	241.353	241.432	238.778	241.237
2017	242.839	243.603	243.801	244.524	244.733	244.955	244.786	245.519	246.819	246.663	246.669	246.524	244.076	246.163
2018	247.867	248.991	249.554	250.546	251.588	251.989	252.006	252.146	252.439	252.885	252.038	251.233	250.089	252.125
2019	251.712	252.776	254.202	255.548	256.092	256.143	256.571	256.558	256.759	257.346	257.208	256.974	254.412	256.903
2020	257.971	258.678	258.115	256.389	256.394	257.797	259.101	259.918	260.280	260.388	260.229	260.474	257.557	260.065
2021	261.582	263.014	264.877	267.054	269.195	271.696	273.003	273.567	274.310	276.589	277.948	278.802	266.236	275.703
2022	281.148	283.716	287.504	289.109	292.296	296.311	296.276	296.171	296.808	298.012	297.711	296.797	288.347	296.963
2023	299.170	300.840	301.836	303.363	304.127	305.109	305.691	307.026	307.789	307.671	307.051	306.746	302.408	306.996

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Exhibit C

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U.S. BUREAU OF LABOR STATISTICS

Bureau of Labor Statistics > Data Tools > Charts and Applications > Inflation Calculator

CPI Inflation Calculator

CPI Inflation Calculator

$ 500,000.00

in April 2003

has the same buying power as

$834,455.93

in December 2023

Calculate

About the CPI Inflation Calculator

The CPI inflation calculator uses the Consumer Price Index for All Urban Consumers (CPI-U) U.S. city average series for all items, no changes in the prices of all goods and services purchased for consumption by urban households.

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