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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

JOHN PAGANINI  
Plaintiff

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

Case No: CV-22-971901

Judge: TIMOTHY MCCORMICK

**JOURNAL ENTRY**

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

*Timothy McCormick*

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Judge Signature

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Date

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CUYAHOGA COUNTY

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**JOHN PAGANINI,**  
PLAINTIFF;

-v.-

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

CASE No. CV 22 971901

**TIMOTHY P. McCORMICK,**  
JUDGE

**OPINION AND ORDER**

**BACKGROUND**

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

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

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

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

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

## ANALYSIS

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

### I

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

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

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

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

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

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

## II

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

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

Unless the challenged statute restricts a fundamental right, the statute is analyzed under the rational basis test. Here, there is no dispute that the statute does not restrict or affect a fundamental right. In Ohio, a statute survives rational basis review under the due course of law guarantee if it, “[1] bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.” *Brandt* at ¶ 28.

## A

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

### 1

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

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

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

765 (1991), the Court held that that cap was unconstitutional under Ohio's due course of law clause. Applying a rational basis analysis, it concluded that the Act did not establish a substantial relationship between general damage caps for medical malpractice and medical insurance rates. It further held that "[i]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Morris* at 691 (quoting *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8). The Supreme Court will continually reference and approvingly cite this language in subsequent cases addressing damage caps.

2

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

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

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

process grounds because it is unreasonable and arbitrary, irrespective of whether it bears a real and substantial relation to public health or welfare. There is simply no constitutional difference between R.C. 2323.54 and former R.C. 2307.43. By replacing former R.C. 2307.43 with R.C. 2323.54, the General Assembly has merely expanded the scope of a statute declared unconstitutional by this court in the context of medical claims to include all tort claims, medical and otherwise. *Sheward* at 490 (citing *Morris*).

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

3

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

- (1) There shall not be any limitation on compensatory damages that represent the economic loss of the person who is awarded the damages in the civil action.
- (2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a civil action under this section to recover damages for injury, death, or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff’s economic loss, as determined by the trier of fact, to a maximum of three hundred fifty thousand dollars for each plaintiff or a maximum of five hundred thousand dollars for each occurrence.

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

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

- “The state has a rational and legitimate state interest in stabilizing the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss awards in medical malpractice actions. The overall cost of health care to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients.” S.B. 281 Section 3(A)(3).
- “Many medical malpractice insurers left the Ohio market as they faced increasing losses, largely as a consequence of rapidly rising compensatory damages and noneconomic loss awards in medical malpractice actions. The Department of Insurance re-

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

- “As insurers have left the market, physicians, hospitals, and other health care practitioners have had an increasingly difficult time finding affordable medical malpractice insurance. Some health care practitioners, including a large number of specialists, have been forced out of the practice of medicine altogether as a consequence. The Ohio State Medical Association reports fifteen per cent of Ohio’s physicians are considering or have already relocated their practices due to rising medical malpractice insurance costs.” S.B. 281 Section 3(A)(3)(c).
- “The U. S. Department of Health and Human Services published a report in 2002 stating that health care practitioners in states with effective caps on noneconomic damages are experiencing premium increases in the twelve to fifteen per cent range, as compared to an average forty-four per cent increase in states that do not cap noneconomic damage awards.” S.B. 281 Section 3(A)(3)(e).
- “A report from the U. S. Department of Health and Human Services, (Sept. 25, 2002), states that among states that have adopted a two hundred fifty thousand dollar cap on noneconomic damages are: Indiana, Colorado, California, Nebraska, Utah, and Montana. These states, as well as others that have imposed meaningful caps on noneconomic damages, report significantly lower increases in average premium rates than those states without caps.” S.B. 281 Section 3(A)(4)(d).

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

origins of the term “catastrophic injury.”) In explaining why this distinction exists, the General Assembly stated that “[t]he distinction among claimants with a permanent physical functional loss strikes a reasonable balance between potential plaintiffs and defendants in consideration of the intent of an award for noneconomic losses, while treating similar plaintiffs equally, acknowledging that such distinctions do not limit the award of actual economic damages.” S.B. 281 Section 3(A)(4)(a).

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

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

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

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

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

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

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

In *Morris*, we found that the damages caps violated this prong because they imposed the cost of the intended benefit to the public solely upon those most severely injured. We repeated this concern in *Sheward*, albeit in dicta. R.C. 2315.18 alleviates this concern by allowing for limitless noneconomic damages for those suffering catastrophic injuries. R.C. 2315.18(B)(3)(a) and (b).

At some point, though, the General Assembly must be able to make a policy decision to achieve a public good. Here, it found that the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and

by setting the limits for those not as severely injured at either \$ 250,000 or \$ 350,000. Even [plaintiff] acknowledges that the vast majority of noncatastrophic tort cases do not reach that level of damages. The General Assembly's decision is tailored to maximize benefits to the public while limiting damages to litigants. The logic is neither unreasonable nor arbitrary. *Arbino* at ¶¶ 59-61 (citations omitted).

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

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

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

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

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

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

5

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

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

aware of at least three more, involving catastrophic injuries.<sup>2</sup> Still, the number of cases is quite small.

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

## B

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

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

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

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

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

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

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

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

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

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

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

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

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

Given this, this Court is required to do two things when looking at a noneconomic damages cap for medical claims. First, it must determine if the legislative findings demonstrate a real and substantial relationship between the caps and the general welfare of the public. In particular, whether there is actually evidence that the cap for catastrophic

injuries will reduce malpractice insurance rates. Second it must determine whether the cap “imposes the cost of the intended benefit to the public solely upon those most severely injured.”

1

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

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

Where the legislature falters, however, is in demonstrating a real and substantial relationship between malpractice insurance rates and capping noneconomic damages for catastrophic injuries. It merely states, in a platitudinal way, that “[t]he distinction among claimants with a permanent physical functional loss strikes a reasonable balance between potential plaintiffs and defendants in consideration of the intent of an award for noneconomic losses, while treating similar plaintiffs equally, acknowledging that such distinctions do not limit the award of actual economic damages.” S.B. 281 Section 3(A)(4)(a). It does

not explain how capping noneconomic damages for such a small group of highly injured people will effect rates in addition to the cap for other medical claimants.

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

Given this lack of explanation, it is unclear how applying the cap to Paganini, given his injury, bears a real and substantial relationship to advancing the government interest in lowering malpractice insurance rates. There is no evidence from the legislature that cutting a plaintiff like Paganini's award, or the awards of the one or two similarly situated people a year, cuts rates in a meaningful way beyond other reform efforts.

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

2

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

As this Court has emphasized perhaps ad nauseam: the Court in *Morris* held that “[i]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice.” *Morris* at 691 (quoting *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8). That is exactly what R.C. 2323.43(A)(3) does to plaintiffs like Paganini.

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

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

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

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

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

Therefore, Paganini has shown by clear and convincing evidence that R.C. 2323.43(A)(3) is “unreasonable and arbitrary” and that applying it to him will violate his rights under the due course of law clause.

### III

Paganini also makes a challenge under the equal protection clause.

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

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

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

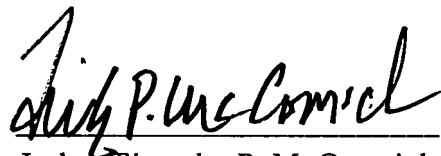
Given this, it is at least *conceivable* that the legislature's policy, despite being arbitrary and irrational in its allocation of burdens and benefits could advance this objective by placing caps on all medical claimants and a higher one for catastrophic

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

### **Conclusion and Order**

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

*It is so ordered.*

  
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Judge Timothy P. McCormick