

IN THE SUPREME COURT OF OHIO

MELISSA ARBINO,

Petitioner,

-vs-

JOHNSON & JOHNSON, et al.,

Respondents.

Case No. 2006-1212

AMICUS BRIEF OF THE OHIO CHAPTER OF THE  
AMERICAN BOARD OF TRIAL ADVOCATES  
IN SUPPORT OF CERTIFIED QUESTION NO. 1

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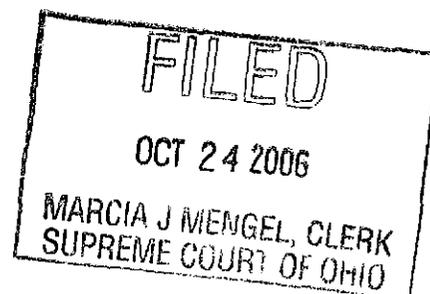
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IN SUPPORT OF CERTIFIED QUESTION NO. 1**

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**STATEMENT OF THE FACTS**

*Amicus Curiae*, the Ohio Chapter of the American Board of Trial Advocates, adopts the statement of the facts as presented by the Petitioner, Melissa Arbino, as its statement of the facts.

**ARGUMENT**

The year was 1957. The jury system was under fierce attack by the press, legislators, judges and scholars. California's Governor, Edmund "Pat" Brown, even suggested a commission to hear workers' compensation, liability and other civil cases. It was this dark cloud – the potential death sentence for the civil jury system that provided the seeds for the birth of the American Board of Trial Advocates ("ABOTA").

The preservation of the civil jury trial, "Justice by the People," is the primary purpose of ABOTA.

ABOTA seeks attorneys – plaintiff and defense trial advocates – who display skill, civility and integrity, to help younger attorneys achieve a higher level of trial advocacy and to educate the public about the vital importance of the Seventh Amendment.

Nationally, ABOTA recognizes more than 5,000 attorneys from both sides of the courtroom as members.

*Amicus Curiae*, the Ohio Chapter of the American Board of Trial Advocates, has about 100 members who have demonstrated their skill as advocates through documentation of their jury trials and otherwise demonstrated their fitness to be a member by a vote of the membership.

Among the specific purposes contained in the Mission of ABOTA is the following:

To aid in further education and training of trial lawyers; **to work for the preservation of our jury system**; to improve methods of procedure of our present trial court system; to serve as an informational center; to discuss and study matters of interest to trial lawyers; to advance the skill of its members as trial attorneys; to honor the members of the Association who have the requisite qualifications; to provide a forum for the expression of interests common to trial lawyers and to act as an agency through which trial lawyers in general, and members of the Association in particular, shall have a voice with which to speak concerning matters of common and general interest;

Consistent with its mission to preserve the jury system, ABOTA has passed a resolution opposing "any attempt to place mandatory limits on a jury award for non-economic damages." ABOTA Resolution No. 10.

To the extent that R.C. 2315.18, as amended by Senate Bill 80, effective April 7, 2005, imposes mandatory limits on jury awards for noneconomic damages, it is unconstitutional.

**PROPOSITION OF LAW NO. I: R.C. 2315.18, as amended by Senate Bill 80, effective April 7, 2005, violates Sections 5 and 16 of Article I of the Ohio Constitution.**

In relevant part, R.C. 2315.18 provides that:

(A) As used in this section and in section 2315.19 of the Revised Code:

\* \* \*

(4) "Noneconomic loss" means nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

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

\* \* \*

(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.

\* \* \*

(E) (1) After the trier of fact in a tort action to recover damages for injury or loss to person or property complies with division (D) of this section, the court shall enter a judgment in favor of the plaintiff for compensatory damages for economic loss in the amount determined pursuant to division (D)(2) of this section, and, subject to division (F)(1) of this section, the court shall enter a judgment in favor of the plaintiff for compensatory damages for noneconomic loss. Except as provided in division (B)(3) of this section, 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 division (B)(2) of this section. Division (B) of this section shall be applied in a jury trial only after the jury has made its factual findings and determination as to the damages.

Thus, damages determined to be noneconomic in nature are limited to the greater of \$250,000 or three times economic losses per person, to a maximum of \$350,000, and a maximum of \$500,000 in total for all persons involved in a single occurrence. R.C. 2315.18(B)(2). However, there is no limitation on noneconomic damages recoverable for certain classes of injuries arbitrarily selected by the General Assembly. R.C. 2315.18(B)(3).

Furthermore, the trial court is required to reduce any award of noneconomic losses to conform to the statutory scheme, without regard to the actual noneconomic losses suffered by a party. R.C. 2315.18(E)(1).

This is the same codification contained in Am.Sub. H.B. 350 which was declared to be unconstitutional by this Court as a usurpation of judicial power and a violation of the one-subject provision of the Ohio Constitution in *State, ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451.

Article I, Section 5 of the Ohio Constitution preserves the right to trial by jury. It provides that:

The right to 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.

In relevant part, Article I, Section 16 of the Ohio Constitution provides that "every person . . . shall have remedy by due course of law . . . ."

This is not the first time legislative attempts to limit damages recoverable in tort actions have been before this Court.

In *Morris v. Savoy* (1991), 61 Ohio St.3d 684, this Court was asked to determine whether a \$200,000 cap on noneconomic damages in medical malpractice cases was unconstitutional. The statute was declared to be unconstitutional on due process grounds. Writing for the majority, Justice Wright stated:

We hold, therefore, 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.

*Id.* at 691.

In *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, this Court determined that a reduction in damages awarded to a plaintiff for collateral benefits received violated Sections 2,<sup>1</sup> 5 and 16 of Article I of the Ohio Constitution.

In *Galayda v. Lake Hospital Systems, Inc.* (1994), 71 Ohio St.3d 421, this Court held that:

R.C. 2323.57, which requires a trial court upon motion of a party to order that any future damages award in excess of \$ 200,000 be paid in a series of periodic payments, is unconstitutional in that it violates the Right to Jury Trial Clause (Section 5, Article I) and the Due Process Clause (Section 16, Article I) of the Ohio Constitution.

Syllabus 1.

In *Zoppo v. Homestead Insurance Company* (1994), 71 Ohio St.3d 552, this Court held that a legislative attempt to limit punitive damages recoverable in civil actions "violates the right to trial by jury under Section 5, Article I of the Ohio Constitution." Syllabus 2.

Though not controlling, note 14 in *State, ex rel. Ohio Academy of Trial Lawyers v. Sheward, supra*, summarizes where this Court began and where it stood at the time of the decision regarding limitations on the right to trial by jury through the legislative artifice of limiting damages in civil cases.

The majority in *Morris* found that R.C. 2307.43 "did not involve a fundamental right or suspect class." *Id.*, 61 Ohio St.3d at 689, 576 N.E.2d at 769-770. This finding seems to suggest that the right to a jury trial guaranteed by Section 5, Article I of the Ohio Constitution was not implicated, although the majority did not conduct any specific analysis into this issue. This is significant for two reasons. First, the denial of a right to trial by jury would invalidate the statute irrespective

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<sup>1</sup> This section of the Ohio Constitution provides for equal protection and is not being urged by the Ohio Chapter of the American Board of Trial Advocates as a basis for declaring R.C. 2315.18 unconstitutional.

of whether due process was accorded. Second, a finding that the right to trial by jury was implicated would have invoked a higher level of judicial scrutiny for purposes of the due process analysis. "Under this 'strict scrutiny' standard for reviewing legislation which restricts the exercise of fundamental rights, a statute will be considered unconstitutional unless it is shown to be necessary to promote a compelling governmental interest." *Id.*, 61 Ohio St.3d at 704, 576 N.E.2d at 780. (Sweeney, J., concurring in part and dissenting in part.) While *Morris* may have generated some confusion over whether R.C. 2307.43 implicates the right to trial by jury, our decisions subsequent to *Morris* clearly hold that the right to a jury trial includes the right to have the jury determine the amount of damages to be awarded. See *Zoppo*; *Galayda*; *Sorrell*, *supra*.

*Id.* at 486.

The observations of the majority of the Supreme Court of Washington also bear consideration when reviewing this suspect statute.

Respondents also contend that the damages limit affects only the judgment as entered by the court, not the jury's finding of fact. This argument ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents essentially are saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function.

*Sofie v. Fibreboard Corporation* (Wash. 1989), 112 Wn.2d 636, 655, 771 P.2d 711, 721.

### CONCLUSION

For the foregoing reasons, R.C. 2315.18, as amended by Senate Bill 80, effective April 7, 2005, should be declared to violate Sections 5 and 16 of Article I of the Ohio Constitution and Certified Question No. 1 should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2006, a copy of the foregoing was forwarded by ordinary U.S. mail, postage prepaid, to:

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