

IN THE SUPREME COURT OF OHIO

Melisa Arbino, : On Questions Certified by
 : the United States District Court
 Petitioner, : for the Northern District
 : of Ohio, Western Division
 v. :
 : Case No. 06-1212
 Johnson & Johnson, *et al.*, :
 : U.S. District Court Case No.
 Respondents. : 3:06 CV 40010

AMICUS CURIAE BRIEF OF MOTHERS AGAINST DRUNK DRIVING (MADD)
IN SUPPORT OF PETITIONER

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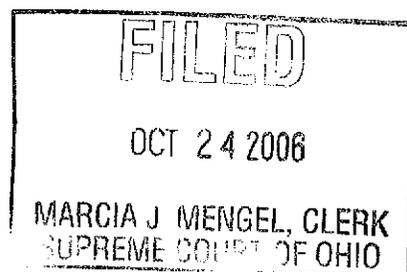
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SUPPORTING PETITIONER ON BEHALF
OF AMICUS CURIAE MADD

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I. IDENTIFICATION AND INTEREST OF AMICUS CURIAE MOTHERS AGAINST DRUNK DRIVERS

Mothers Against Drunk Driving (“MADD”) is a non profit grass roots organization with more than four hundred entities nationwide. MADD is the nation’s leader in the fight against drunk driving and in support of victims’ rights. Candy Lightner founded MADD in 1980 following the death of her 13-year-old daughter Cari in Fair Oaks, Calif. Cari was walking to a school carnival when a drunk driver struck her from behind. The driver had three prior drunk driving convictions and was out on bail from a hit-and-run arrest two days earlier.

MADD was started by a handful of grieving mothers and has now grown to approximately 600 affiliates and 2 million members and supporters nationwide. MADD consists of mothers, fathers, daughters, sons, uncles, friends, and neighbors of all ages and from all walks of life who have been touched by the carelessness of a drunk driver. MADD works to stop drunk driving, support the victims of this violent crime and prevent underage drinking. Nationally, drunk driving remains the nation’s most frequently committed violent crime. Nearly 17,000 people are killed and about a half million others injured in alcohol related traffic crashes each year, and underage drinking is America’s number one youth problem, killing more young people than all other illicit drugs combined.

Nationally, in 2004, an estimated 16,694 people died in alcohol-related traffic crashes— an average of one every 31 minutes. These deaths constitute 39 percent of the 42,636 total traffic fatalities.¹ In 2001, more than half a million people were injured in crashes where police

¹ National Highway Traffic Safety Administration. “Traffic Safety Facts 2004: Alcohol.” DOT 809 905. Washington DC: National Highway Traffic Safety Administration, 2005

reported that alcohol was present — an average of one person injured almost every minute.² About three in every ten Americans will be involved in an alcohol-related crash at some time in their lives.³ The impact of alcohol involvement increases with injury severity. Alcohol-involved crashes accounted for 10 percent of property damage only crash costs, 21 percent of nonfatal injury crash costs; and 46 percent of fatal injury crash costs.⁴

In 1999, an estimated total of 119,350 crashes in Ohio involved alcohol which killed 497 people and injured an estimated 44,200 people. Alcohol is a factor in 23% of Ohio's crash costs. Alcohol related crashes in Ohio cost the public an estimated \$5.1 billion in 1999, including \$2.6 billion in monetary costs and almost \$2.5 billion in quality of life losses. People other than the drinking driver paid \$3.3 billion of the alcohol related crash bill.

Surveys conducted between 1993 and 2002 show that respondents admitting to alcohol-impaired driving is on the rise.⁵ This trend is most troubling, especially when compared to the contemporaneous trend of state legislation to restrict remedies for victims of alcohol-impaired drivers.

Alcohol related crashes are also deadlier and more serious than other crashes. The average alcohol related fatality in Ohio costs \$3.5 million, \$1.1 million in monetary costs and \$2.4 million in quality of life losses. The estimated cost per survivor of an alcohol related crash average \$101,000.00, \$49,000.00 in monetary costs and \$52,000.00 in quality of life losses.

² Blincoe, Lawrence, et al. "The Economic Impact of Motor Vehicle Crashes 2000." Washington, DC: National Highway Traffic Safety Administration, 2002. <http://www.nhtsa.dot.gov/people/economic/EconImpact2000/>; Miller, Ted, Diane Lestina, and Rebecca Spicer. "Highway Crash Costs in the United States by Driver Age, Blood Alcohol Level, Victim Age, and Restraint Use," *Accident Analysis and Prevention*, 30, no. 2 (1998): 137-150.

³ National Highway Traffic Safety Administration. "The Traffic Stop and You: Improving Communications between Citizens and Law Enforcement." National Highway Traffic Safety Administration, March 2001, DOT HS 809 212. http://www.nhtsa.dot.gov/people/injury/enforce/Traffic%20Stop%20&%20You%20HTML/TrafficStop_index.htm.

⁴ National Highway Traffic Safety Administration. "The Economic Impact of Motor Vehicle Crashes 2000," DOT HS 809 446. Washington, DC: National Highway Traffic Safety Administration, May 2002.

⁵ Quinlan, Kyran P., et al. "Alcohol-Impaired Driving Among US Adults, 1993-2002." *American Journal of Preventive Medicine* 28(4) (2005):346-50.

It has been estimated that alcohol related crashes accounted for an estimated 23% of Ohio's insurance payments. Reducing alcohol related crashes by 10% would save \$86 million in claims payments and loss adjustment expenses.

About one-third of all drivers arrested or convicted of driving while intoxicated or driving under the influence of alcohol are repeat offenders.⁶ The risk of a driver who has one or more DWI convictions becoming involved in a fatal crash is about 1.4 times the risk of a driver with no DWI conviction.⁷

MADD files this Amicus Brief as part of its mission to support the rights of victims of alcohol-related traffic crashes. Among these rights, MADD believes that victims should be able seek full financial recovery. MADD believes that fundamental fairness demands no less, and that any attempt to limit these rights is contrary to the United States and Ohio Constitutions. As a result of the carnage, death and injury, including the financial costs, caused by drunk drivers in this state, MADD strenuously opposes any diminution in the laws that require full compensation for victims and full and severe punishment for drunk drivers. Senate Bill 80, which places caps on compensatory damages and punitive damages, directly contravenes MADD's commitment to ensure that drunk drivers in Ohio fully understand and accept the consequences of their actions and that their victims are fully and fairly compensated.⁸

Therefore, MADD supports Melissa Arbino in her constitutional challenge of S.B.80, particularly as it relates to Certified Questions 1, 2, and 4.

⁶ Fell, Jim. "Repeat DWI Offenders in the United States." Washington, DC: National Department of Transportation, National Highway Traffic Safety Administration Traffic Tech No. 85, February 1995.

<http://www.nhtsa.dot.gov/people/outreach/traftech/1995/TT085.htm>

⁷ National Highway Traffic Safety Administration. "Repeat DWI Offenders Are an Elusive Target." Washington, DC: National Department of Transportation, National Highway Traffic Safety Administration Traffic Tech No. 217, March 2000.

<http://www.nhtsa.dot.gov/people/outreach/traftech/pub/tt217.html>

⁸ *Id.* All of the facts on the Ohio related costs are from the National Highway Traffic Safety Administration Contract DNTH22-98-D-3507979 Task Order 79 and can be found at the following link: <http://www.nhtsa.dot.gov/people/injury/alcohol/impaired-drivingusa/OH.pdf>

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Amicus curiae Mothers Against Drunk Drivers agree with and concur in the statement of facts and statement of the case as set forth in the Merit Brief of Petitioner Melisa Arbino.

III. ARGUMENT AND AUTHORITIES

Certified Question No. 1:

Is Ohio Revised Code 2315.18 [non-economic damage cap], as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

Ohio's version of tort reform is a reflection of the national trend toward the prospect of uncompensated losses for victims of drunk drivers. Specifically, R.C. 2315.18 imposes caps on *non-catastrophic non-economic* damage claims in *tort actions*. Non-economic loss under the statute is defined as follows:

[N]onpecuniary harm that results from an injury or loss to person or property that is the 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.

R.C. 2315.18(A)(4).

“Tort action” is also defined under the statute to include all civil actions “for damages for injury or loss to person or property”, which would include claims for alcohol related motor vehicle collisions. R.C. 2315.18(A)(7).

In a “tort action” as defined by the bill, a victim of an alcohol related collision with a non-catastrophic non-economic damage claim is limited to the greater of \$250,000.00, or three times the economic loss (with an absolute ceiling of \$350,000 per person, or \$500,000 per occurrence). R.C. 2315.18(B)(2).

Ohio's uncompensated loss structure, in the end, will inevitably be borne by the innocent victims and society as a whole, rather than by the alcohol-impaired driver. This notion is contrary to the purpose of tort law, and contrary to centuries of common law precedent. It is also contrary to Ohio's Constitution, and the decisions of this Court which have consistently upheld that most sacred document.

1. Due Process Clause and Open Courts Provision:

SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION 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 the due course of law, and shall have justice administered without denial or delay."

In *Morris v. Savoy* (1991) 61 Ohio St. 3d 684, this Court held that a damage cap of \$200,000.00 on a medical malpractice award was unconstitutional pursuant to SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION, as well as the Fourteenth Amendment to the U.S. Constitution. This Court in *Savoy* was called upon to consider the constitutionality of an early version of medical malpractice reform legislation, which had come under criticism for the way in which it shifted the risk of loss from potentially negligent physicians to their innocent victims. *Savoy* at 688 ("...Judge Contie's opinion was harshly critical of what he saw as shifting the risk from the health care providers to the health care recipients in response to the "'crisis'" in medical care.") (citation omitted). This Court went on to decide that the legislation under consideration violated the due process clause of the Ohio Constitution because it did "not bear a real and substantial relation to public health or welfare and further because it [was] unreasonable and arbitrary." *Savoy* at 691.

This Court reiterated that position in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 489-90, 715 N.E.2d 1062, 1095 ("In addition, RC. 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.”).

Quality of life, or non-economic damage, restrictions are just as offensive to the Ohio Constitution now as they were in 1991 when this Court decided *Savoy*, and in 1999 when this Court decided *Sheward*. When such caps are evaluated in the not-so-unlikely scenario of a car collision caused by an alcohol-impaired driver, the deprivation of the due process is easily understood in human terms. Consider Mrs. Jones, a victim of an alcohol related car collision who is a stay-at-home mom, who because of her injuries must be hospitalized for several weeks, and is unable to care for three young children for several months. Her medical bills are paid by a collateral source as defined by R.C. 2315.20, so she has virtually no economic damage claim whatsoever.

Because of her injuries, Mrs. Jones has pain every day that her doctors are not able to relieve through surgery or otherwise, and as a result her quality of life and her family’s quality of life suffers. She has a life expectancy of 62.9 years; but it is a life of pain and misery. Under S.B. 80, Mrs. Jones’ quality of life claim is limited to \$250,000.00. Such deprivation of an adequate remedy is precisely the type of loss-shifting that Judge Contie, and this Court, determined to be “unreasonable and arbitrary”, if not more so given the fact that the loss is being shifted from the alcohol abuser to an innocent victim. See also *Sheward* at 490.

2. Equal Protection:

SECTION 2, ARTICLE 1 OF THE OHIO CONSTITUTION 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 deem it necessary; in those special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly." In *Sorrell v. Thevenir* (1994), 69 Ohio St. 3d 415, this Court held,

In our view the ostensible 2 purposes of R.C. 2317.45 do not withstand equal protection scrutiny under a strict scrutiny analysis. Given that one of the purposes of R.C. §2317.45 is to limit double recoveries, the different treatment for medical malpractice tort victims with regard to collateral recovery is not necessary to promote a compelling governmental interest, especially where the statutory classifications are established in response to a crisis that has not clearly been established to have existed....

Moreover, a statutory classification violates equal protection clause of the Ohio Constitution if it treats similarly situated people differently based on an illogical and arbitrary basis....

Sorrell at 425.

Returning to the likely scenario described above, it is easy to conceive how Mrs. Jones will be treated much differently than her husband. Because Mrs. Jones has no outside employment, she has no wage loss claim that would enhance her claim under the three-times pecuniary loss cap under R.C. 2315.18(B)(2); her husband on the other hand amasses a very sizable wage loss claim. Thus, his non-economic damage award could potentially be as much as \$350,000; two different people (a man and a woman), identical injuries, vastly different results. It is hard for anyone to countenance an uncompensated loss under any scenario; but a likely scenario as outlined above demonstrates how because of the statutory classification set forth in R.C. 2315.18, that Mrs. Jones is treated much *more unfairly* than Mr. Jones.

3. Right to Remedy:

SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION provides, “Every person, for any 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.”

In *Hardy v. VerMeulen* (1987), 32 Ohio St. 3d 45, this Court stated, “When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner.” When the General Assembly enacted legislation requiring a post-verdict adjustment to the damage award, this Court held that such an adjustment was a rebate to the tortfeasor for damages he or she caused, thus transforming the victims’ right to a jury trial from a meaningful remedy to a hollow right “hardly worth exercising.” See *Sorrell*, *supra* at 426 (citing *Savoy*, *supra* at 710). Like the legislation under review in *Hardy*, *Sorrell*, and *Savoy*, the legislation at issue here makes hollow the remedy available for victims of drunken drivers.

Certified Question No. 2:

Is Ohio Revised Code 2315.19 [post-judgment review], as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

The mechanics of the limitations imposed by S.B. 80 require the jury to return a general verdict accompanied by answers to interrogatories that specify the total compensatory damages awarded to Plaintiff, with a breakdown of compensatory damages for economic loss and compensatory damages for non-economic loss. R.C. 2315.18(D). Thereafter, the judge performs a reduction, if necessary, to the non-economic damages awarded according to the limitations set forth above. R.C. 2315.18(E)(1). Jurors are specifically precluded from knowing that their award of non-economic damages could be reduced following the trial. R.C. 2315.18(F).

SECTION 5, ARTICLE 1 OF THE OHIO CONSTITUTION provides, "The 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".

In *Sorrell*, *supra* this Court considered a constitutional challenge to a collateral benefit statute that required a trial judge to perform a post-verdict set-off commensurate with the collateral benefit. This Court began by recounting the historical precedence of the right to trial by jury in Ohio:

As this court stated in *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3: "The right to a jury trial does not involve merely a question of procedure. The right to jury trial derives from Magna Charta. It is reasserted both in the Constitution of the United States and in the Constitution of the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege." Accord *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743, 746. It has also been held that "the right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree." *Gibbs v. Girard* (1913), 88 Ohio St. 34, 102 N.E. 299, paragraph two of the syllabus.

Sorrell at 421.

Because of the post-verdict adjustment required by R.C. 2317.45, this Court found that the claimants would not be fully compensated for their injuries, and as such that the statute violated the claimants' right to trial by jury:

"We hold that R.C. 2317.45 encroaches upon the fundamental and inviolate right to trial by jury, and therefore is unconstitutional under Section 5, Article I of the Ohio Constitution."

Sorrell at 422.

In *Zoppo v. Homestead Insurance Company* (1994), 71 Ohio St. 3d 552, this Court was called upon to decide the constitutionality of R.C. 2315.21(c)(2) because it required a trial judge to make a post-verdict adjustment of a punitive damage award. Recognizing that in almost all

circumstances, a citizen of Ohio has a fundamental right to a trial by jury (deriving from the Magna Carta, and guaranteed by the Ohio Constitution) this Court held that R.C. 2315.21(c)(2) violated a plaintiff's right to trial by jury. A post-verdict adjustment, this Court held, impairs "the traditional function of the jury in determining the appropriate amount of damages." *Zoppo* at 557.

R.C. 2317.19, enacted as part of S.B. 80, likewise violates the right to trial by jury because of the mandatory post-verdict adjustment that will no doubt deprive many innocent victims of the quality of life remedies to which they are entitled.

Certified Question No. 4:

Is Ohio R.C. §2315.21 [Punitive Damage Restrictions], As Amended By Senate Bill 80, Effective April 27, 2005, Unconstitutional On The Grounds As Stated By The Plaintiffs?

Revised Code 2315.21, as amended and effective on April 27, 2005, drastically and violently rewrote Ohio's law regarding punitive damages. That section of the Code, which excludes civil actions for damages for breach of contract or other agreement between persons, divests the jury of awarding punitive damages until there has been an initial trial where the jury or trier of fact determines the plaintiff is entitled to recover compensatory damages.

The court is then obligated to hold a second phase of the trial during which the plaintiff has the burden of proving, by clear and convincing evidence, that the actions or omissions of the defendant demonstrated malice or aggravated or egregious fraud or that the defendant acted as a principal or master and knowingly authorized, participated in or ratified such actions.

Once that burden has been overcome, R.C. 2315.21(D) limits the total amount of punitive damages to a maximum cap of \$350,000.00. Against a "small employer or individual", the award is capped at the lesser of two times the amount of compensatory damages or 10% of the

employer's or individual's net worth. The statute also exempts punitive or exemplary damages from any award of prejudgment interest under 1343.03 of the Revised Code.

The defendant in any action covered by this section can escape a punitive damage award assessment completely if he or she files with the court a certified judgment showing that punitive or exemplary damages have already been awarded and been collected in any court in the United States against that defendant based upon the same course of conduct. Such a defendant is entitled to a set off for any other such judgments even if the plaintiff proves that there is new, unconsidered evidence regarding defendant's behavior and even where a court determines that the previous judgments were not sufficient punishment for defendant's conduct.

The only exception to this statute is found in the final section where plaintiff must demonstrate, again by clear and convincing evidence, that there is substantial evidence of previously undiscovered additional behavior on the part of the defendant or that the prior punitive damages awards were totally insufficient to punish the defendant's behavior. In either event, the court is required to reduce the amount of punitive or exemplary damages by any awards previously rendered against the defendant in any other state or federal court.

1. The Punitive Damage Statute Violates the Constitutional Right to a Trial by Jury

In *Zoppo v. Homestead Insurance Company* (1994), 71 Ohio St.3d 552, this Court considered a similar legislative enactment, prior R.C. 2315.21(C)(2). That section required that once a jury determined that a defendant was liable for punitive or exemplary damages, the amount of those damages were to be determined by the court.

In considering whether or not this statute violated the fundamental right to a jury trial guaranteed to all Ohio citizens by SECTION 5, ARTICLE 1 OF THE OHIO CONSTITUTION, this

Court's first analysis was whether or not the cause of action was one where the right existed at common law. In its analysis this court noted:

[T]he English courts first recognized punitive damages in [***12] *Wilkes v. Woods* (1763), 98 *Eng.Rep.* 489. Thereafter, as early as 1791, American juries began awarding punitive damages and assessing their amount. *Corvell v. Collbaugh* (1791), 1 *N.J.I.* 77. In 1859, the common law right to have juries award punitive [*557] damages was regarded as "settled" in Ohio. *Roberts v. Mason* (1859), 10 *Ohio St.* 223, 225. In *Roberts* this court emphasized the importance of the jury's role in determining punitive damages when it stated: [T]welve intelligent and impartial men, acting under oath and subject, in a proper case to the control of the court are not likely to do great wrong; and it seems to us that the power which this rule confers upon a jury, may, in practice, operate as a salutary restraint upon the evil passions of bad men." *Id.*

Prior to the 1987 enactment of *R.C. §2315.21(C)(2)*, 142 Ohio Laws, Part 1, 1661, 1691, juries in this state had the integral role of determining not only when punitive damages were justified but also of assessing the amount of such damages. Clearly the assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury. However, the [***13] legislature, by enacting *R.C. §2315.21(C)(2)* and by permitting only the court to determine the amount of punitive damages, has in effect abrogated the commonlaw right of the jury to assess the amount of punitive damages. *Zoppo, supra* at 556 – 557. (emphasis supplied)

The right to a trial by jury, is recognized by this Court, as a fundamental constitutional right which has its earliest origins from the Magna Carta. *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284. The right is guaranteed by SECTION 5, ARTICLE 1 OF THE OHIO CONSTITUTION. It is well settled that the right to a trial by jury "cannot be invaded or violated by either legislative act or judicial order or decree." *Sorrell v. Thevenir* (1994), 69 Ohio St.3d. 415, quoting *Gibb v. Girard* (1913), 88 Ohio St. 34, paragraph two of the Syllabus. Thus, this Court concluded in *Zoppo* that then *R.C. 2315.21(C)(2)* violated the right to trial by jury guaranteed by

the Ohio Constitution because it “impairs the traditional function of the jury in determining the appropriate amount of damages.” *Zoppo, supra at 557.*

Revised Code 2315.21 here impairs the traditional function of the jury to assess the appropriate amount of damages. Juries are not even permitted to consider any evidence on the issue of punitive damages unless, and until, an award of compensatory damages is made. R.C. §2315.21(B)(1)(a). Thereafter, juries are limited and restricted to punitive damages that are subject to a maximum cap of \$350,000.00.⁹ These limitations and restrictions are mandatory and retained no matter how reprehensible the jury may find the defendant’s conduct.

Revised Code 2315.21, after imposing a series of roadblocks and hurdles, sets the maximum punitive damage award that may be rendered as the sum of \$350,000.00.¹⁰ The effect of this aspect of the Code is a legislatively imposed remittitur upon the court and the jury. In *Galayda v. Lake Hospital Systems* (1994), 71 Ohio St.3d 421, this Court considered a statute that required any future damage awards on medical malpractice cases in excess of \$200,000.00 to be paid in a series of periodic payments. This court found that this statute violated both SECTION 5, ARTICLE I OF THE OHIO CONSTITUTION respecting the right to a jury trial as well as the due process clause, SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

With regard to the right to a jury trial, the court again reaffirmed the “inviolable” nature of this fundamental right to a jury trial:

It is well established that the right of trial by jury in this state is a fundamental and substantial right guaranteed by the Ohio Constitution. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, 633 N.E.2d 504, 510; *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743, 746; and *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3. This court has held there is a fundamental constitutional right to a trial by jury

⁹ The statute prohibits the jury from being told that there is a cap on the limits of punitive damages that will be awarded or from being advised when a jury award of punitive damages as has been reduced by the court.

¹⁰ The narrow exception to this section of the statute will be discussed *infra*.

in negligence actions. *Sorrell, supra, 69 Ohio St.3d at 422, 633 N.E.2d at 510; Kneisley, supra, 40 Ohio St.3d at 357, 533 N.E.2d at 746.* Included in that right is the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled. *Sorrell, supra, 69 Ohio St.3d at 422, 633 N.E.2d at 510.*

Rejecting the argument that the statute merely regulated the manner in which a judgment was to be paid, the court noted that "it requires the trial court to further reduce the jury's award advantages once reduced to present value. Application of the statute quite simply results in a successful plaintiff's receiving less than the jury awarded, and deprives them of severely injured victims of the benefits of investment."

Like the statute involved in *Galayda*, R.C. 2315.21 reduces any jury award of punitive damage in excess of \$350,000.00 and deprives the plaintiff of what the jury, based upon the facts and the law, deemed to be appropriate. It also has the converse and perverse effect of reducing the punishment found to be appropriate to a given defendant since it exceeds the statutory cap. This statute, as in *Galayda*, "invades the jury's province to determine damages, and . . . violates a plaintiff's right to trial by jury as guaranteed by SECTION 5, ARTICLE 1 OF THE OHIO CONSTITUTION." *Id at 426.*¹¹

Lastly, in *State ex rel Ohio Academy of Trial Lawyers v. Sheward* (1998), 86 Ohio St. 3d 451, this Court again held that "a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance." *Id.* In addition, this Court found the amount of the cap (three times the

¹¹ Legislatively imposed remittiturs may well violate the Doctrine of Separation of Powers. See *Murphy v. Edmonds* (Md 1992), 325 Md. 324, 380, 601A.2d 102, 120 (Chasanow, J. dissenting), citing *Sofie v. Fiberboard Corp.* (1989), 112 Wash. 2d 636, 652-654, 771 P.2d. 711, 720-721

compensatory damages) unreasonable given that the Court previously found a punitive damage award that was ten times greater than the compensatory damage award constitutional.

Thus, on many occasions, the Ohio Supreme Court has declared that the right to have punitive damages assessed by a jury is a right guaranteed by the Ohio Constitution, and any legislative attempt to infringe upon or impede that right will fail. The changes that S.B. 80 makes to the punitive damage aspect of the Revised Code not only mirror earlier unconstitutional punitive damage caps, but are also more restrictive than the earlier caps. (In *Sheward*, the Court found that instituting a cap at three times the compensatory damages was an arbitrary distinction.) The current cap prohibits courts from awarding punitive damages in an amount greater than two times the compensatory damages regardless of a jury's determination. In S.B. 80, the legislature has simply ignored repeated judicial precedents.

Drunken drivers surely head the list of all of the defendants that juries feel should be punished and deterred. This State spends enormous amounts of money in enforcing strict O.M.V.I. laws, imposing traffic checks, buying media advertisement and educating citizens to prevent drinking and driving. Protecting such defendants from the full and fair punitive damage awards that juries deem appropriate to the conduct is diametrically opposed to how drunken drivers are treated by Ohio.

Lastly, the "escape clause" of Revised Code 2315.21(D)(6) is an illusion, at best. That section purportedly exempts tort actions from this law where the injury or death"... resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section..."

(emphasis added). Purposely is defined by R.C. 2901.22 as when a person acts with a “specific intention to cause a certain result.” Knowingly requires that the actor “is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” These mental states will have no application to most convictions for drunk driving because the O.M.V.I. statute, 4511.19 contains no required mental state, much less a purposefully or knowingly requirement. The O.M.V.I. statute simple prohibits the operation of a motor vehicle by persons with a certain blood alcohol concentration. Convictions for D.U.I., O.M.V.I., physical control and the like will not satisfy the requirements of Revised Code 2315.21(D)(6), and therefore, will be subject to caps on any punitive damages in subsequent civil proceedings against the impaired drivers.

2. The Punitive Damage Statute Violates the Constitutional Right to a Remedy for Every Injury

SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION provides:

"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." (Emphasis added.)

In *Kintz v. Harriger* (1919), 99 Ohio St. 240, this Court held:

1. The Constitution of Ohio, Bill of Rights, Section 16, provides, among other things, 'Every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law.
2. It is the primary duty of courts to sustain this declaration of right and remedy, wherever the same has been wrongfully invaded. *Id.* at paragraphs one and two of the syllabus.

This “right to a remedy” provision of Ohio’s Constitution has invalidated numerous legislative attempts that imposed procedural hurdles, without altering substantive law. See, *e.g.*, *Hardy v. Vermeulen* (1987), 32 Ohio St. 3d 45 (invalidating statutes of repose that barred claims before injured parties were aware of their injuries); *Byers v. Meridian Printing Co.* (1911), 84 Ohio St. 408, paragraph two of the syllabus (a legislative enactment changing the

presumption and burden of proof as to malice in defamation cases was found unconstitutional and void under Section 16, Article I); *Williams v. Marion Rapid Transit, Inc.* (1949), 152 Ohio St. 114 (denial of remedy to an unborn viable child violated Section 16, Article I); *Primes v. Tyler* (1975), 43 Ohio St. 2d 195, 205 (the Ohio Guest Statute was found in violation of Section 16, Article I, " * * * in that it closes the courts and denies a remedy by due course of law to some but not all the people of this state * * *")

R.C. 2315.21 imposes numerous procedural roadblocks to victims of drunken drivers from obtaining a meaningful remedy from their assailants. In fact, the most meaningful remedy for punitive damages is capped at \$350,000, no matter how reprehensible the defendant's conduct may have been to a jury. More significantly, R.C. 2315.21(D)(5)(a) also provides such defendants with immunity from punitive damages for repeated conduct or multiple injuries or fatalities. That section states that if a defendant files evidence of a previous judgment where punitive damages have been awarded and paid based upon the "same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages", then no further punitive damages may be assessed against that defendant. Although it is not clear, this section may well immunize the repeated drunken driver from multiple punitive damage awards once the first award has been returned and paid.

What is clear is that this section will immunize drunken drivers that cause multiple injuries or death in a single wreck. Consider the church bus collision in Kentucky a few years ago where many children and adults were killed and injured when an impaired driver crossed the center line and slammed head on into their church van. The defendant had multiple prior drunken driving convictions. Even if this driver was not protected from punitive damage awards by previous awards against him in prior collisions, he would be limited to one award against him in

the church van collision, provided that the award exceeded the statutory cap. The cap could also be satisfied by multiple awards whose sum exceeded the maximum amount in the statute. After that occurred, all of the other victims, be they living or dead, would not be able to obtain further punitive damage awards against him unless they met the “clear and convincing” evidentiary burden imposed by R.C. 2315.21(D)(5)(b). Likewise, if an Ohio defendant distributes a defective product in several states with blatant disregard of its safety, and an Ohio citizen is harmed along with four other out-of-state consumers, if the four out-of-state plaintiffs sue and recover punitive damages, the Ohio plaintiff will not be able to recover any punitive damages if the sum of the four previously adjudicated punitive damage awards is greater or equal to the statutory cap in Ohio. In short, they would be denied a meaningful remedy for civil monetary damages. This essentially creates a “lottery” system in punitive damage awards, a practice this Court has previously rejected.

3. The Punitive Damage Statute Violates Due Process and Equal Protection Guarantees

R.C. 2315.21 creates several classes of Ohio victims of defendants whose actions merit punitive damage awards. First, it creates a differentiation between the class of individuals suing on a “tort claim” which is subject to this statute, and individuals suing on other claims such as breach of contract, which are not subject to this statute. Within that classification, it creates another classification, namely, people with punitive damage claims above the cap limit and people with punitive damage claims below it. The class that is clearly disadvantaged by such a cap consists of all those with damages above the cap and, the higher one’s damages are beyond the cap, the more significant the impact of this statutorily imposed cap.

This court has already found this type of arbitrary division to be a violation of equal protection. *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, 691. This Court in *Morris* held that it

was “irrational and arbitrary to subsidize a supposed public benefit of damage caps on the backs of the most severely injured victims, who this court identified as those with damages affected by the cap.” *Id.* at 691. (“The statute treats the most seriously injured malpractice victims differently from the rest of the class” of all such victims). In this case and under this statute, the individuals who are, in the opinion of a jury, most seriously injured by flagrant, egregious and reprehensible conduct, are limited in the recovery against those individuals by the cap and the statute.

Amicus Curiae Mothers Against Drunk Driving supports Petitioner Melisa Arbino in her conclusion that evidence must be first heard before rendering judgment on her claims of violation of Due Process and Equal Protection. MADD further agrees with Ms. Arbino that a cursory review of the statute itself reveals lurking infirmities. According to the Ohio Advanced Legislative Service and the comments to R.C. 2315.21, the General Assembly specifically adopted a cap on punitive damages which bore a ratio to the compensatory damages awarded to “restore balance, fairness and predictability to the civil justice system of Ohio.” Even if the statute achieved that dubious goal, it does so by sacrificing the rights of the individual victims of the defendants whose behavior is now immunized by the statute.

Moreover, this Court has previously examined punitive damage awards to assess whether they should be determined on a case by case basis, or based upon some formula or ratio. In *Wightman v. Consolidated Rail Corp.* (1998), 86 Ohio St.3d 431, the Court considered a fifteen million dollar punitive damage award where Mrs. Wightman’s property loss was \$240.00. Consolidated Rail Corporation argued that this ratio of punitive damages was so disproportionate to the compensatory damages that it was grossly excessive and violated Ohio law and the United States Constitution. This court responded that “Conrail’s attempted use of ratios exemplifies why

the determination of punitive damages is not a mathematical process.” *Wightman, supra* at 438. See, also, *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 479 – 480.

This Court noted that “the purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.” *Moskovitz v. Mount Sinai Medical Center* (1994), 69 Ohio St.3d. 638, 651. Finding that Conrail’s action produced a substantial harm, a continuing risk, and the assessed damages provided a deterrent effect to an economically viable company, this Court found that the punitive damages award was not excessive and did not violate Conrail’s rights. *Id.* at 439.

Moreover, this court has adopted the balancing test set forth in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559¹², in an effort to set forth elemental notions of fairness. *Dardinger v. Anthem Blue Cross & Blue Shield*, 2002 Ohio 7113, ¶152. The guideposts set forth in *BMW* include the degree of reprehensibility of the defendant’s conduct, the disparity between the harm suffered by the plaintiff and the amount of punitive damage awards, and the difference between the punitive damage award and civil and/or criminal penalties authorized or imposed in similar cases. *BMW*, 517 at U.S. at 574-575. This Court noted that the United States Supreme Court in *BMW* described the degree of reprehensibility of the defendant’s conduct as “perhaps the most important indicium of the reasonableness of a punitive damage award.” 517 U.S. at 575.

The statute at issue in fact completely ignores the degree of reprehensibility of the defendant’s conduct and instead focuses entirely upon the amount of compensatory damages awarded, the net value or worth of the defendant, or the total cap on punitive damages. This

¹² The Court’s decision in *BMW* was not changed by *State Farm Mutual Auto. Insurance Co. v. Campbell*, (2003) 538 U.S. 408, 425 In that case, the U.S. Supreme Court indicated that while the benchmark of per se reasonableness of punitive damages is a 9:1 ratio of punitive to compensatory damages, damages above this may still be reasonable but would fall under more exacting scrutiny. While the Court may have recognized that there are upper limits on reasonable punitive damages, the inquiry into those limits is fact specific and cannot be qualified by a hard and fast rule.

statute takes away the flexibility afforded by *BMW, supra*, and this court's prior analysis and instead establishes a bright line mathematical formula for the computation of the reasonableness of punitive damage awards. Such a rigid, mathematical approach was rejected by both the United States Supreme Court in *BMW* and this court in *Wightman*. See, e.g., 517 U.S. at 581; 86 Ohio St.3d. 441. This important principle was reiterated in *Wightman*: "[a] punitive damage award is more about defendant's behavior than the plaintiff's loss. . . . [T]he focus of the award should be on the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant." *Dardinger, supra* ¶ 178. (emphasis supplied).

4. This Court is the Protector of the Constitutional Rights Threatened by Senate Bill 80

The Ohio Constitutional rights involved here, namely the right to a jury trial, the right to a remedy and the right to Due Process and Equal Protection of the laws belong to the people of the state of Ohio. SECTION 2 ARTICLE I OF THE OHIO CONSTITUTION. Being guaranteed by the Constitution, those rights may not be violated or reduced by the General Assembly or the Executive, whose members depend upon changing political majorities. However, these rights are not self protecting. They depend upon and require this Court to uphold their vitality despite the changing majorities in the other branches of government over the years.

When the political majority of this Court changed several years ago, some tort reform groups cheered, believing that the newly appointed justices would reverse the Court's earlier holdings regarding many of the issue now before this Court. See e.g. American Tort Reform Association, *Election 2004: A Win for Civil Justice Reform*, <http://www.atra.org/show/7836> (accessed Dec. 31, 2005); Institute for Legal Reform, *Chamber Highlights Successful Pro-Business Election Effort, Business Drive to Get-out-the-Vote behind Election Victories*.

http://www.instituteforlegalreform.com/newsroom/display_release_110304.html (accessed Dec. 31, 2005). In fact, whether this Court's decisions will be subject to the changing political majorities may well be the principal, underlying issue in this case. Such a change would effectively amend the state constitution, which does not and should not change with electoral victories. As one commentator has noted, the embedded principles of our Constitution are not the spoils of political wars. TORT REFORM ARTICLE: VIOLATING THE INVIOATE: CAPS ON DAMAGES AND THE RIGHT TO TRIAL BY JURY (2006), 31 DAYTON L. REV. 307; see, also, NOTE & COMMENT: BROKEN RECORD LAWMAKING AND STARE DECISIS: THE UNCONSTITUTIONALITY OF OHIO'S LATEST TORT REFORM EFFORT (2006), 37 U. TOL. L. REV. 1087.

The United States Supreme Court has noted that "[a] basic change in the law upon a ground no firmer than a change in [a court's] membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (quoting *Planned Parenthood*, 505 U.S. at 864).

In this vein, this case differs from the situation this Court confronted in *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849. In that case, the Court was confronted with two prior decisions, decided only eight years before that had been roundly and strongly criticized by legal commentators and courts. See, e.g., *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660 and *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557. These cases had created a morass of decisions and turmoil throughout the Ohio judicial system, as noted by Chief Justice Moyer in his concurring opinion in *Galatis*:

The court today stands at a crossroads. The court may follow the doctrine of stare decisis and attempt to minimize the impact of

Scott-Pontzer by creating a patchwork of exceptions to and limitations of the holding therein. Alternatively, the court may depart from a rigid application of the doctrine and, in a single pronouncement, right that which is clearly wrong. See *State ex rel. Lake Ct y. Bd. of Commrs. v. Zupancic* (1991), 62 Ohio St.3d 297, 300, 581 N.E.2d 1086. For the reasons stated in the majority opinion, I believe that the latter charts the better course toward restoring order to insurance law in Ohio. *Id.*

In order for this Court to uphold the contested provisions of S.B. 80 at issue in this case, this Court would have to undo and rewrite judicial precedents stretching back for centuries, even to the common law of England. Unlike *Galatis*, this case presents essentially a constitutional crisis over whether the Ohio Constitution or the politicians in the majority at the moment control the rights of Ohio citizens. This Court is, therefore, faced with the challenge of respecting years, if not decades, of established judicial precedent or ignoring that precedent, and creating a constitutional cacophony that will resound well into the future.

CONCLUSION

Mother Against Drunk Driving (MADD) supports Petitioner Melisa Arbino and urges this Court to answer Certified Questions 1, 2 and 4 as follows:

Certified Question No. 1:

Is Ohio Revised Code 2315.18 [non-economic damage cap], as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

Yes

Certified Question No. 2:

Is Ohio Revised Code 2315.19 [post-judgment review], as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

Yes

Certified Question No. 4:

Is Ohio R.C. §2315.21 [Punitive Damage Restrictions], As Amended By Senate Bill 80, Effective April 27, 2005, Unconstitutional On The Grounds As Stated By The Plaintiffs?

Yes

Respectfully submitted,

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I hereby certify that the foregoing Amicus Curiae Brief of Mother Against Drunk Driving (MADD) in support of Petitioner Brief was served by regular U.S. Mail on this 23rd day of October, 2006 upon:

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