

IN THE SUPREME COURT OF OHIO

MELISA ARBINO, : Case No. 2006-1212
: :
Plaintiff-Petitioner, : On Review of Certified Question from the
: : United States District Court for the Northern
v. : District of Ohio, Western Division
: :
JOHNSON & JOHNSON, *et al.*, : District Court Case
: : No. 1:05-CV-534
Defendants-Respondents. :
: :

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL'S AMICUS CURIAE
BRIEF IN SUPPORT OF RESPONDENTS

Janet G. Abaray (0002943)
Calvin S. Tregre, Jr. (0073454)
Melanie S. Bailey (0075821)
Burg Simpson Eldredge Hersh & Jardine
312 Walnut St., Suite 2090
Cincinnati, Ohio 45202-4028
Telephone: (513) 852-5600
Facsimile: (513) 852-5611

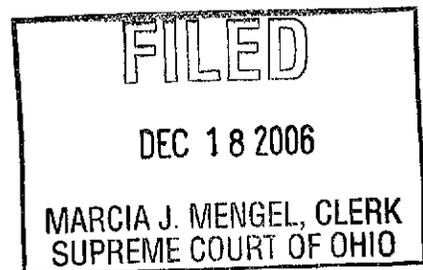
Robert S. Peck (*pro hac vice*)
Stephen B. Pershing (*pro hac vice*)
(Pro Hac Vice Pending)
CENTER FOR CONSTITUTIONAL LITIGATION
1050 31st Street, NW
Washington, DC 20007-4499
202-944-2874
202-965-0920 fax

Counsel for Petitioner Melisa Arbino

Joseph W. Ryan, Jr. (0023050)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-2244
Facsimile: (614) 227-2100
E-mail: jryan@porterwright.com

Colleen L. Marshall (0077855)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-2073
Facsimile: (614) 227-2100
E-mail: cmarshall@porterwright.com

*Attorneys for Amicus Curiae
International Association of Defense Counsel*



Julie A. Callsen (0062287)
Benjamin C. Sasse (0072856)
TUCKER ELLIS & WEST LLP
925 Euclid Avenue
Cleveland, OH 44115-1475
Telephone: (216) 592-5000
Facsimile: (216) 592-5009

*Counsel for Respondents Johnson & Johnson,
Ortho-McNeil Pharmaceutical, Inc., and
Johnson & Johnson Pharmaceutical*

Jim Petro
Attorney General
Frank M. Strigari (0078377)
Holly J. Hunt (0075069)
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Telephone: (614) 466-2872
Facsimile: (614) 728-7592

*Counsel for Respondent,
State of Ohio*

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INTRODUCTORY STATEMENT

In this products liability case, the United States District Court for the Northern District of Ohio certified four questions to this Court. Specifically, the certification requests this Court's opinion on whether the following provisions of the Ohio Revised Code violate provisions of the Constitution of the State of Ohio and the Constitution of the United States: (1) Section 2315.18 (non-economic damages cap for non-catastrophic injuries); (2) Section 2315.19 (post-judgment review of non-economic damage awards); (3) Section 2315.20 (admissibility of collateral source evidence); and (4) Section 2315.21 (punitive damages cap). The Petitioner alleges the Senate Bill 80 amendments violate constitutional guarantees of trial by jury, open courts, due process and equal protection. This Court agreed to review questions 1, 3 and 4 – regarding Sections 2315.18, 2315.20, and 2315.21.

Amicus curiae the International Association of Defense Counsel (“IADC”) supports the Respondents' position that the amendments are constitutional; that the Petitioner fails to show the amendments violate any state or federal constitutional guarantees; and, that the three questions before this Court should be answered in the negative.

This amicus brief limits its focus to the single issue of the constitutionality of the punitive damages cap provided by amendments to R.C. 2315.21. The International Association of Defense Counsel respectfully submits that the Senate Bill 80 amendments to 2315.21 are proper and appropriate statutory modifications of the common law, and that the punitive damages cap is constitutionally *required* by the Due Process Clause of the Fourteenth Amendment. Additionally, the United States Supreme Court has held the Seventh Amendment jury-trial right is not implicated by awards of punitive damages, and federal decisions regarding the Seventh Amendment are persuasive when applied to Ohio's jury-trial provision. The Petitioner has failed

to show that R.C. 2315.21 violates either the United States Constitution or the Constitution of the State of Ohio.

The General Assembly has absolute legislative authority and is constitutionally charged with declaring public policy and developing legislation to carry out that policy. Tort reform is a critical issue that has widespread implications for the state's economy. Limitations on punitive damages are an essential element in the tort reform effort undertaken by Ohio lawmakers, and the IADC fully supports the provisions of R.C. 2315.21: (1) punitive damages limited to two times the compensatory damages; and (2) a small business cap on punitive damages of two times the compensatory damages or 10% of a defendant's total worth, up to \$350,000.

THE INTEREST OF THE AMICUS CURIAE

The International Association of Defense Counsel ("IADC") is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

LAW AND ARGUMENT

I. The Punitive Damages Limit Provided in R.C. 2315.21 Is Constitutional.

This Court should uphold R.C. 2315.21 because the creation of a punitive damages cap fully complies with the United States Constitution and the Ohio Constitution.

A. Background: The Constitutional Evolution of Punitive Damages.

The role of punitive damages in constitutional jurisprudence is ever-evolving and can trace its roots as far back as the Magna Carta.¹ Punitive damages allow juries to punish wrongdoers for willful or malicious conduct, and are a common-law concept regarded as settled in Ohio. *Roberts v. Mason* (1859), 10 Ohio St. 223, 225. In *Roberts*, the court expounded on jury's role in meting-out punishment for a moral wrong: "[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 any 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.* However, even as the punitive damages system developed, its constitutionality was challenged. *Dan v. Woodworth* (1852), 54 U.S. 363, 371, 14 L.Ed. 181, is regarded as the first decision to affirm the constitutionality of punitive damages, and was decided 16 years before the Fourteenth Amendment was enacted. In 1885, the United States Supreme Court affirmed the constitutionality of punitive damages under the due process requirements of the Fourteenth

¹ Punitive damages were part of a system of sanctions known as "amercements," and like the right to a trial by jury, derived from the Magna Carta. In Ohio there is a constitutional right to have a jury determine both liability and punitive damages. *Cleveland Ry. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3.

Amendment in *Missouri Pacific Railway v. Hume* (1885), 115 U.S. 512, 6 S.Ct. 110, 29 L.Ed. 463, a decision that successfully invalidated Fourteenth Amendment challenges of punitive damages for nearly a century. However, as that century progressed, the unintended consequences of the punitive damages system began to emerge: skyrocketing punitive damage awards resulting in a tort system that costs \$205 billion annually;² America's small businesses disproportionately bearing 68 percent of business and tort liability costs while taking only 25 percent of business revenue;³ and, an unpredictable jury system that often results in inexplicably excessive awards that bear no apparent relation to actual damages.⁴ By the 1980s state legislatures, concerned that excessive and unpredictable punitive damage awards were having crippling economic consequences, began to adopt tort reform legislation.⁵

As America's states sought to blunt the impact of tort liability costs through legislative reform the nation's highest court began to refine the judicial approach to punitive damages by providing guidelines and limitations. In *Pacific Mutual v. Haslip* (1991), 499 U.S. 1, 111 S.Ct. 1032, although the United States Supreme Court concluded punitive damages do not constitute a per se violation of the Due Process Clause, it simultaneously declared a need for court review of punitive damage findings to guard against grossly excessive awards. *Haslip*, 499 U.S., at 24. Subsequently, in *BMW North America, Inc., v. Gore* (1996), 517 U.S. 559, 568, 116 S.Ct. 1589,

² Tillinghast-Towers Perrin Study, February 2003, cited in S.B. 80 Section 3(A)(3)(d).

³ Pendell, Judyth W., Hinton, Paul J., *Liability Costs for Small Business*, NERA Study (June 8, 2004) available at http://www.nera.com/publication.asp?p_ID=2107

⁴ Some scholars question whether juries are capable of following the instructions they receive. See, e.g., Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damages Reform*, 46 Am. U. L. REV. 1573 (1997); Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook L. REV. 1003 (1999).

⁵ Congressional Budget Office, *The Effects of Tort Reform: Evidence from the States* (June 2004). The Congressional Budget Office reports that 38 states have adopted some level of tort reform, while 34 states have adopted specific controls on punitive damages.

the Court formulated a judicial test for punitive damage awards that considers reprehensibility, the level of harm, and penalties in comparable cases. Then, in *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, the Court declared that the ratio of punitive to compensatory damages should rarely, if ever, exceed single digits. (These decisions will be discussed more fully below.) Most recently, the Court vacated a nearly \$80 million dollar punitive judgment against tobacco giant, Philip Morris, in a common law fraud case in which compensatory damages amounted to only \$800,000. *Williams v. Philip Morris, Inc.* (2003), 540 U.S. 801, 124 S.Ct. 56, 2003 U.S. LEXIS 5437.

With each successive decision the Court has demonstrated its resolve to tighten the reins on excessive punitive damage awards. The increasing level of Court approved controls and limitations also demonstrates the evolutionary nature of punitive damage law. The Court's rulings mirror the statutory tort controls instituted in states across the country.

Recognizing the need to stabilize Ohio's economy by addressing this critical issue, the General Assembly approved Senate Bill 80 (the "2004 Tort Reform"), which is an appropriate and constitutional approach to tort reform.

B. The Punitive Damages System Is Unpredictable and Leads to an Arbitrary Deprivation of Property.

The one constant in the evolving punitive damages system is its unpredictability. Punitive damage awards are notorious for being erratic and without standards, often resulting in windfalls for plaintiffs that bear no relation to actual damages. A recent analysis of nearly 300 jury awards that included punitive damages showed a range of awards from 710 times compensatory damages to .0001 times compensatory damages. In one notable case, a defendant

who was not assessed *any* compensatory losses was nevertheless ordered by the jury to pay \$92,000 in punitive damages.⁶

This unpredictability may be due to the nature of the task assigned to jurors in tort cases, which often swirl around human suffering, or even death. Tort cases are said to have a human face, pitting an individual at a point of personal loss or crisis against a corporation, which is viewed as an unsympathetic, faceless entity - with deep pockets. Jurors are far more likely to empathize with an individual who has suffered an injury, or the loss of a loved one, than to feel a kindred spirit to a Fortune 500 Company perceived to have an insurance company guarding its back and an army of attorneys at its side. Jury members can picture themselves at the plaintiff's table, but they do not project themselves onto the defense team. Additionally, in a society that views human life as beyond value how can we ask jury members to put a price tag on the loss of life or limb? Indeed, the most difficult and unpredictable job a civil litigation jury performs is assigning a specific dollar amount to a punitive damage award. Impassioned jurors cannot restore life or repair a physical deformity so they must respond to the emotional aspect of the case through the only avenue that remains open to them, which is the defendant's checkbook. Even in cases where liability is limited to property loss jurors more easily identify with the person who claims to be a victim. The result is a punitive damages system with jackpot awards that outpaced the growth of the Gross Domestic Product (in a twenty-year period) at an alarming

⁶ The Pacific Research Institute for Public Policy analyzed 539 punitive damage awards for the period of 1984-1994 and discovered the average punitive damage award grew from less than \$1 million to \$6.6 million in the span of a decade. *Available at:* www.pacificresearch.org/pub/sab/entrep/punitive1/punitive.html

rate of more than 56 to one, with business defendants four times more likely to face punitive damages.⁷

Colossal punitive awards may also be linked to the bias or prejudice of the jury, however subliminal it may be. Just as jury members empathize with the injuries of the victim because of their own personal life experiences, they are influenced by public perceptions of big business. As an example, decisions on how to allocate and spend limited health care funds are generally made by employers and their insurance companies. Consequently, the public is increasingly suspicious of their motives and increasingly convinced that corporations and third party payors are more concerned with the bottom line than with the health or safety of insured workers.⁸ Jurors may carry their prejudices and personal histories into the jury room with them, and jury instructions on punitive damages typically leave the jury with wide discretion to choose an amount that may reflect bias and prejudice.

Critics say the weakness of the punitive damages system is the potential to bestow windfalls on undeserving plaintiffs. However, the real peril of the undeserved punitive award is not its impact, but its fallout. Jurors who reward arbitrary and capricious damages to an undeserving individual in a single case may not consider the cost to society as a whole. Health care costs, for example, account for more than fifteen percent of the nation's economy.⁹ An excessive award against a health care provider or a third party payor inevitably burdens the system and impacts the costs of care and service for all. Excessive, multi-million dollar

⁷ The Washington Legal Foundation study compared punitive awards in business related cases in four of the largest states (California, Texas, Illinois and New York) between 1968-1971 and 1988-1991 and discovered total punitive awards in those states grew from less than \$800,000 to more than \$312 million. In the same period that punitive awards grew 117 times the GDP had only doubled.

⁸ Norman Daniels et al., *Benchmarks of Fairness for Health Care Reform* 15 (Oxford Press 1996), at 57.

⁹ See Mike McNamee et al., *Health-Care Inflation: It's Baaack!*, *Bus. Wk.*, Mar. 17, 1997, at 28.

malpractice or product liability awards are also more likely to grab headlines than are reasoned settlements that reflect actual losses. Repeated media coverage of colossal awards creates the impression that those awards are acceptable and just, and may also play a role in the out of court settlement process where the vast majority of cases are resolved. Punitive damage demands in filings are used to generate larger settlements, even from defendants who may have no liability but are eager to avoid the pitfalls of an erratic and unpredictable system.¹⁰ Additionally, punitive damages pose an acute danger of arbitrary deprivation of property, which the United States Supreme Court finds to be violative of due process. *See, Tumey v. Ohio* (1927), 273 U.S. 510, 47 S.Ct. 437.

The tort reforms presented in Senate Bill 80 provide a reasonable alternative to the arbitrary and capricious nature of liability awards that have evolved in the punitive damages process. R.C. 2315.21 guards against erratic and excessive punitive awards while simultaneously protecting the rights of injured parties to just compensation for genuine injuries and loss.

C. Establishing a Punitive Damages Limit Is Within the Province of the Ohio Legislature.

The General Assembly of the State of Ohio has plenary legislative authority, as the Ohio Constitution grants duly elected lawmakers absolute legislative power. Ohio Const. Art II § 1.

The General Assembly's power is unquestioned:

Under the Constitution the lawmaking function is assigned exclusively to the General Assembly. It includes all legislative power which the object and purposes of the state government may require, and extends to every legitimate purpose of legislation pertaining to civil government.

16 Oh Jur Constitutional Law § 238.

¹⁰ *Supra*, n.7. The Washington Legal Foundation study shows 78% of all punitive damage demands were filed against a business defendant.

Once the power to legislate on a particular subject is found to exist in the General Assembly the wisdom of its exercise is not a judicial question. *State ex rel Michaels v. Morse* (1956), 165 Ohio St. 599, 602, 138 N.E.2d 660. Thus, in inquiring into the constitutionality of a statute “the inquiry is not whether the statute is wise or desirable because misguided laws may, nonetheless, be constitutional.” *Russell v. Wolford* (Franklin 1978), 60 Ohio App.2d 134, 136, 395 N.E.2d 904. The judiciary may intervene only when it is convinced that the legislative act is incompatible with the provisions of the constitution. *State v. Parker* (1948), 150 Ohio St. 22, 24, 80 N.E. 2d 490.

It is well settled in Ohio law that the legislature is in the best position to determine public policy and create statutes that reflect the needs of the people. “When the legislature, within the powers conferred by the constitution, has declared the public policy, and fixed the rights of the people by statute, the courts cannot declare a different policy or fix different rights. In this regard the legislature is supreme, and the presumption is that it will do no wrong, and will pass no unjust laws. The remedy, if any is needed, is with the people and not with the courts.” *Hopkins v. Kissinger* (Mahoning 1928), 31 Ohio App. 229, 234, 166 N.E. 916, 917, see also; *State v. Doe*, 2002-Ohio-4966; 2002 Ohio App. LEXIS 5006 (“A court is not free to substitute its judgment for legislative expression of public policy.”) In shaping the policies and practices that govern the state, the General Assembly is within its constitutionally granted authority to promote reforms that remove barriers to commerce and stimulate economic growth. Founding authorities of the state long ago characterized the legislative power as “the vital function which animates, directs and controls the whole operation of civil authority.” *Milan & Richland Plank-Road Co. v. Husted* (1854), 3 Ohio St. 578, 581.

The civil litigation system within Ohio is a keystone of the state's economy, inseparable from the price of health care, insurance, goods, and services.¹¹ The cost of litigation affects every Ohioan, whether or not they are a party to such litigation, therefore tort reform is a critical issue for the entire citizenry. Recognizing its fundamental duty to strike an essential balance between a fair system of justice for those who have been legitimately harmed and those who have been unfairly sued, the legislature sought to create a predictable and rational recovery process:

This state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation.

S.B. 80 Section 3(A)(3).

The intent of the legislature in reforming Ohio tort law was to resolve inequities within the civil litigation system since the economy is “dependent on business providing essential jobs and creative innovation.” S.B. 80 Section 3(A)(1). Indeed, the litigation environment in a state affects not only where companies *do* business, but where they *locate* their business. In a 2006 Harris Poll, commissioned by the United States Chamber of Commerce's Institute for Legal Reform (“ILR”), more than 1,400 senior corporate attorneys were asked how a state's litigation system might impact corporate policies. A sizeable majority, 70%, reported a state's litigation environment affects important decisions within their companies, including where to locate and where to conduct business. The majority, 55%, gave an overall ranking of only fair or poor to

¹¹ The Tillinghast-Towers Perrin Study (*see n. 2*) concludes the \$205 billion dollar annual price tag for the tort liability system translates to \$721 per American citizen and equals a 5% tax on wages.

America's state court liability system.¹² This was the fourth annual study of the cost of the nation's tort system undertaken by the ILR. The studies' results demonstrate a consistent mistrust of the civil court system on the part of the nation's corporations, coupled with a continuing erosion of state economies. In direct response to such data Ohio's legislature concluded that reform to the punitive damages system was "urgently needed to restore balance, fairness, and predictability to the civil justice system." S.B. 80 Section 3(4)(a). The General Assembly is carrying out its obligations to promote the health and welfare of Ohio's citizens. In reforming Ohio's tort system, the General Assembly acted within its Constitutionally guaranteed legislative authority.

D. Ohio Law Recognizes the Need to Control Grossly Excessive Punitive Damage Awards.

Under Ohio law, punitive damages are not meant to compensate a plaintiff but to punish and deter certain conduct. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651, Ohio 324, 635 N.E.2d 331. This Court recognizes that the focus of the award should be on the defendant and what it will take to bring about the twin aims of punishment and deterrence. *Wightman v. Conrail* (1999), 86 Ohio St.3d 431, 439, 715 N.E.2d 546. The purpose of punitive damages is "not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval." *Davis v. Wal-Mart Stores, Inc.* (2001), 93 Ohio St.3d 488, 493, 756 N.E.2d 657. Writing for the majority in *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77, 102, 781 N.E.2d 121, 145, a wrongful death action, Justice Pfeifer clarified the goals of Ohio's punitive damages awards:

¹² *The 2006 State Liability Systems Ranking Study* Harris Poll, available at <http://www.instituteforlegalreform.com/harris/index.html>, was conducted for the U.S. Chamber Institute for Legal Reform, and was a sample of in-house general counsel or other senior litigators to explore how reasonable and fair the tort liability system is perceived to be by U.S. businesses.

We do not require, or invite, financial ruination of a defendant that is liable for punitive damages. While certainly a higher award will always yield a greater punishment and a greater deterrent, the punitive damages award should not go beyond what is necessary to achieve its goals. The law requires an effective punishment, not a draconian one.

In *Dardinger*, the Court subjected a jury's punitive damages award to remittitur, and the remitted punitive award to further conditions, including that a designated charitable portion of the award go to cancer research facilities in the decedent's name. Justice Pfeifer also explained that the punitive award is meant to demonstrate society's disapproval, and that "[a]t the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society..." *Id.*, at 104. To ensure society's interests are protected the Court noted that some state legislatures have stepped into the punitive damage award process:

There is a philosophical void between the reasons we award punitive damages and how the damages are distributed. The community makes the statement, while the plaintiff reaps the monetary award. Numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. In some states, the state's portion goes to a special fund, in others, to the general fund.

Id.

In practice, however, the retributive goal of courts often is not aligned with the economic rationale of the jury, and studies show it is mere chance that a jury awards damages that match the cost to society of certain harms.¹³ In the *Dardinger* decision the Court acknowledged that courts have a central role to play in distribution of punitive damages.

¹³ See Daniel Kahneman, David Schkade, and Cass R. Sunstein, "Shared Outrage and Erratic Awards: The Psychology of Punitive Damages," *Journal of Risk and Uncertainty*, vol. 16, no. 1 (1998), pp. 49-86. In this case study, mock juries were asked to evaluate fabricated scenarios then recommend findings, including punitive damages awards. There was substantial consensus on judgments, and shared indignation at a defendant's actions. The mock juries also agreed on the appropriate level of compensatory payments. However, the act of assigning a dollar amount to the punitive award led to erratic and unpredictable results.

However, this decision also highlights the community's stake in punitive damages awards and the expanding role of state legislatures in protecting the interests of society through tort reform. If the distribution of punitive funds is to be examined in light of the community's interest, and if legislatures are to adopt a role in the process, then it follows that it is the province of the General Assembly to attempt to control unreasonable tort expenses to advance the needs of the community. To date, Ohio is one of 38 states¹⁴ that have adopted some form of tort reform in the interest of protecting constitutional due process guarantees, creating a balanced and predictable system of justice, and fostering a litigation environment that does not deter business investment in the state's economy. Additionally, 34 states have adopted reforms aimed specifically at controlling punitive damages.¹⁵

¹⁴ Congressional Budget Office, *The Effects of Tort Reform: Evidence from the States* (June 2004). The Congressional Budget Office Study finds modification of Joint-and-Several Liability Rules are the most common tort reform. 38 states have adopted such formulas, which differ substantially from state to state, and may apply to specific types of torts. 25 states have modified the Collateral-Source Rule, to either permit evidence of collateral source payments to be admitted at trial, allow awards to plaintiffs to be offset by other payments, or both. 23 states have voted to limit non-economic damages, with caps ranging from \$250,000 to \$750,000. More than half the reforms apply to torts involving medical malpractice.

¹⁵ Congressional Budget Office, *The Effects of Tort Reform: Evidence from the States* (June 2004). Ohio is one of 34 states to adopt tort reforms aimed at limiting excessive punitive damage awards. The reforms range from outright bans to fixed dollar caps ranging from \$250,000 to \$10 million. Additionally, some states have adopted caps that equal a fixed multiple of the compensatory award. These states have enacted such punitive damage reforms: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin.

II. The Punitive Damages Limit Provided in R.C. 2315.21 Does Not Violate Constitutional Guarantees.

This court should uphold R.C. 2315.21 because the Petitioner fails to demonstrate the punitive damages cap violates any guarantees of the United States Constitution or the Ohio Constitution, including the jury-trial rights of the Seventh Amendment. Additionally, controls on punitive damages comport with the Due Process Clause of the Fourteenth Amendment.

A. The United States Supreme Court Holds That Grossly Excessive Punitive Damage Awards Violate The Due Process Clause of the Fourteenth Amendment.

The United States Supreme Court recognizes the proper use of punitive damages to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition. *Haslip*, 499 U.S., at 34. Although the U.S. Supreme Court held in *Haslip* that the specific punitive damages award before the Court was constitutional, it expressed serious concerns that punitive damage awards in general had "run wild". *Haslip*, 499 U.S., at 19. In *Haslip*, the Court held a punitive damages award against an insurance company, that was more than four times the amount of compensatory damages, nonetheless did not cross the line into constitutional impropriety. *Id.*, at 24. The Petitioner will likely use this decision to bolster arguments in support of limitless awards for unlawful conduct. However, even in upholding the punitive award against a company that had engaged in a pattern of fraud, the Court made clear it is gravely concerned about grossly excessive awards, and cautioned that such awards may not be upheld if a jury is blinded by emotion or prejudice. "[I]t is not disputed that a jury award may not be upheld if it was the product of bias or passion, or was reached in proceedings lacking the basic elements of fairness." *Id.* (citing *Browning-Ferris of Vt., Inc. v. Kelco Disposal, Inc.* (1989), 492 U.S. 257, 276.) In *Haslip*, the Court laid the groundwork for subsequent rulings that more clearly demonstrate its intent to curtail excessive punitive damage findings.

In the wake of *Haslip*, and the issues it raised, the Court acknowledged the necessity of a court-review to determine whether a punitive damages award is appropriate. In *BMW North America, Inc., v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, the Court formulated its first judicial test for punitive damages awards. The Court instructed trial courts to review such awards under the Due Process Clause of the Federal Constitution's Fourteenth Amendment, and in so doing to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. In *BMW*, a jury awarded \$2 million in punitive damages to a consumer who suffered an economic loss of \$601. The Court recognized that when a punitive damages award can fairly be categorized as "grossly excessive" in relation to the State's interests it enters the zone of "arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW*, 517 U.S., at 568.

Since *BMW*, the Court has not wavered in its resolve to restore balance to a punitive damages system that had "run wild." In 2003, the Court expanded *BMW's* punitive damages guideposts by more specifically discussing an acceptable ratio of punitive damages to compensatory damages. In *State Farm v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, the Court overturned a \$145 million dollar punitive damages award to a plaintiff whose full compensatory damages were only \$1 million dollars. Although the Court declined to impose a bright-line ratio for punitive damages, the Court noted that the ratio should rarely exceed the single digits. "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or in this case, of 145 to 1." *State Farm*, 538 U.S., at 425. Additionally, the Court

demonstrated its resolve to control grossly excessive awards by expanding on the “reprehensibility” factor identified in *BMW*. The Court delineated five subparts to the reprehensibility test that must be considered in any court review of punitive damages: (1) whether the harm caused was physical or economic; (2) whether the tortious conduct evinced a reckless indifference to health or safety of others; (3) whether the target was financially vulnerable; (4) whether the conduct was single and isolated or involved repeated actions; and (5) whether the harm was the result of intentional malice, trickery, deceit, or mere accident. *State Farm* 538 U.S., at 419.

These key federal decisions demonstrate the Court’s intent to *require* limits on punitive damage awards as a matter of due process. State courts *must* now review and control grossly excessive punitive damage decisions, and by extension a legislative effort to restrict unlimited awards should be deemed constitutional. R.C. 2315.21 comports with these judicial guidelines and considerations, and advances the legitimate state interest in establishing a balanced and predictable system of civil justice.

**B. Limitations on Punitive Damage Awards
Do Not Violate Fundamental Rights to Trial by Jury.**

The United States Supreme Court has held that the Seventh Amendment right to a trial by jury is not implicated by awards of punitive damages. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.* (2002), 121 S. Ct. 1678. *Cooper* is a seminal case, in which the United States Supreme Court found the Seventh Amendment does not apply to punitive damages awards since the punitive awards are not findings of fact “found” by a jury. *Id.* at 1686-87. The Court explains this ruling in a footnote of the decision:

Nor does the historical material upon which respondent relies so extensively... conflict with our decision to require de novo review. Most of the sources respondent cites merely stand for the proposition

that, perhaps it is a fact-sensitive undertaking, determining the amount of punitive damages should be left to the discretion of the jury....

In any event, punitive damages have evolved somewhat since the time of respondent's sources. Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time. See Haslip, 499 U.S. at 61 (O'CONNOR, J., dissenting); ... As the types of compensatory damages available to plaintiffs have broadened the theory behind punitive damages has shifted toward a more purely punitive (therefore less factual) understanding...

Id. at 1686 n.11. The Court, in *Cooper*, finds that punitive damages awards today are purely punishment as opposed to the fact-based compensation formula they once were. Id. The ruling is a further demonstration of the evolving nature of the punitive damages system. Additionally, *Cooper* applies to Ohio since federal court decisions regarding the Seventh Amendment's jury-trial right are persuasive here. See *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 560 n.2. Therefore, the Petitioner's Seventh Amendment challenge to punitive damages must fail.

C. Constitutional Jurisprudence Demands Fair Notice.

Elementary notions of fairness enshrined in constitutional jurisprudence dictate that a person receive fair notice, not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose. *Miller v. Florida* (1987), 482 U.S. 423, 430, 107 S.Ct. 2446. As demonstrated in *BMW*, when a defendant is denied fair notice, and there is also an absence of the basic guideposts of reasonable control, the result can be a grossly excessive punitive damages award that bears no reasonable relationship to the harm that occurred. In *BMW*, the Court held \$2 million for a scratched car is a grossly excessive award that "transcends the constitutional limit." *BMW* 517 U.S., at 586. Notably, the court emphasized that fair notice is an absolute right, and:

The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.

BMW 517 U.S., at 585.

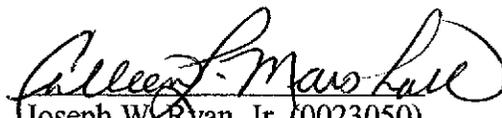
In *BMW*, the court acknowledged that while each state has powers to protect its own consumers, none may use the punitive damages deterrent as a means of imposing regulatory policies on the entire nation. *Id.*

The Court recognized that by fashioning an open-ended punitive damages system, with no outer limit, a state may side-step constitutional requirements for fair notice. *Id.* States should not have the power to impose demands or penalties that are shrouded in mystery. The specter of a grossly excessive punitive award, that may be influenced by the bias or passions of a jury, may artificially inflate settlement negotiations and ultimately increase the cost of the civil litigation system for all Ohioans. By denying parties to civil litigation the fair notice they constitutionally deserve, the system exposed them to the unfettered whims and unpredictable rationales of juries, and denied them fair notice of the penalty the state may impose against them.

The constitutionally valid amendments to Senate Bill 80 provide essential reforms to the tort system and represent the General Assembly's irrefutable right to legislate in a manner that removes barriers to commerce and stimulates economic growth. "The current civil litigation system represents a challenge to the economy of the state of Ohio, which is dependent on business providing essential jobs and creative innovation." S.B. 80 Section 3(A)(1). Limitations on punitive damages awards are an essential element of the critical tort reform effort in Ohio, and as demonstrated above, amendments to R.C. 2315.21 are valid under both the United States Constitution and the Constitution of the State of Ohio.

CONCLUSION

For the foregoing reasons, amicus curiae the International Association of Defense Counsel respectfully submits R.C. 2315.21 does not violate the United States Constitution or the Ohio Constitution, and is a constitutionally sound approach to tort reform. The IADC therefore respectfully urges the Court to answer certified question 4 in the negative.



Joseph W. Ryan, Jr. (0023050)

PORTER WRIGHT MORRIS & ARTHUR
LLP

41 South High Street

Columbus, Ohio 43215

Telephone: (614) 227-2244

Facsimile: (614) 227-2100

E-mail: jryan@porterwright.com

Colleen L. Marshall (0077855)

PORTER WRIGHT MORRIS & ARTHUR
LLP

41 South High Street

Columbus, Ohio 43215

Telephone: (614) 227-2073

Facsimile: (614) 227-2100

E-mail:

cmarshall@porterwright.com

*Attorneys for Amicus Curiae
International Association of Defense
Counsel*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Curaie Brief of the International Association of Defense Counsel in Support of the Respondents was served by regular U.S. Mail, postage prepaid, this 18th day of December, 2006, on the following:

Janet G. Abaray, Esq.
Calvin S. Tregre, Jr., Esq.
Melanie S. Bailey, Esq
Burg Simpson Eldredge Hersh & Jardine
312 Walnut St., Suite 2090
Cincinnati, Ohio 45202-4028

Robert S. Peck (*pro hac vice*)
Stephen B. Pershing (*pro hac vice*)
(Pro Hac Vice Pending)
CENTER FOR CONSTITUTIONAL LITIGATION
1050 31st Street, NW
Washington, DC 20007-4499
Counsel for Petitioner Melisa Arbino

Julie A. Callsen, Esq.
Benjamin C. Sasse, Esq.
TUCKER ELLIS & WEST LLP
925 Euclid Avenue
Cleveland, OH 44115-1475
*Counsel for Respondents Johnson & Johnson,
Ortho-McNeil Pharmaceutical, Inc., and Johnson & Johnson
Pharmaceutical*

Jim Petro
Attorney General
Frank M. Strigari, Esq
Holly J. Hunt, Esq.
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
*Counsel for Respondent,
State of Ohio*


Colleen L. Marshall (0077855)