

IN THE SUPREME COURT OF OHIO

MELISA ARBINO,

Petitioner,

v.

JOHNSON & JOHNSON, et al.,

Respondents.

: Case No. 2006-1212
:
:
: On Questions Certified by the
: United States District Court for
: Northern District of Ohio,
: Western Division
:
:
: U.S. District Court Case No.
: 3:06 CV 40010
:
:

MERIT BRIEF OF *AMICUS CURIAE* OHIO ALLIANCE FOR CIVIL JUSTICE,
IN SUPPORT OF THE RESPONDENTS

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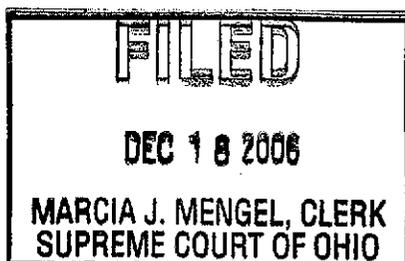
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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Alliance for Civil Justice (“OACJ”) is a group of over 200 small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others.¹ OACJ members, large and small, support a balanced civil justice system that will not only award fair compensation to injured persons, but also impose sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ also supports stability and predictability in the civil justice system in order that Ohio's businesses and professions may know what risks they assume as they carry on commerce in this state.

OACJ strongly supports the General Assembly’s enactment of S.B. 80. In particular, the OACJ believes that the limitations on noneconomic damages in tort actions, codified in R.C. 2315.18, are a desirable and necessary component of Ohio tort law. Noneconomic damages, though theoretically compensatory in nature, are designed to compensate for intangible injury

¹ The following five organizations occupy officer positions with the OACJ and fully support the OACJ’s position in this *Amicus Brief*:

(1) The National Federation of Independent Business/Ohio, with more than 36,000 members, is the state’s largest association dedicated exclusively to the interests of small and independent business owners.

(2) The Ohio Chamber of Commerce is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate

(3) The Ohio Farm Bureau Federation, with over 225,000 members, is Ohio’s largest general farm organization. Farm Bureau members are in every county in the state and serve on boards and committees working on legislation, regulations, and issues that affect agriculture, rural areas, and all Ohio citizens.

(4) The Ohio Manufacturers’ Association is a statewide association of more than 2,000 manufacturing companies that collectively employ the majority of the approximately 800,000 men and women who work in manufacturing in the State of Ohio.

(5) The Ohio Society of Certified Public Accountants was established in 1908 and represents more than 23,000 CPAs in business, education, government and public accounting. Members of the Society embrace the highest standards of professional and ethical performance through a rigorous commitment to continuing education, a comprehensive quality review requirement and compliance with a strict Code of Professional Conduct.

that is inherently incapable of objective measurement. Accordingly, awards of noneconomic damages are largely unpredictable. Thus, while OACJ urges this Court to uphold the constitutionality of S.B. 80 in its entirety, OACJ dedicates the instant *Amicus* Brief solely to a discussion of R.C. 2315.18's limitations on noneconomic damages. For the reasons contained herein, the OACJ urges this Court to declare R.C. 2315.18 to be a constitutionally valid exercise of legislative authority.²

STATEMENT OF FACTS

OACJ concurs in the statement of the case and facts contained in the Respondents' Merit Brief. Additionally, in order for the Court to examine the issues of this case in proper perspective, OACJ submits the following factual information regarding the background and history of how and why S.B. 80, and the noneconomic damage limitation included within its enactment, came into being.

S.B. 80, which became effective on April 7, 2005, was enacted by the General Assembly as legislation designed to reform Ohio's tort laws. More than 30 persons, representing opinions and interests for and against S.B. 80's passage, testified before legislative committees prior to S.B. 80 being enacted. From the testimony given before the House and Senate committees, as well as a multitude of studies considered along with the testimony, the General Assembly issued a number of important findings that illustrated the public policy motivation behind S.B. 80.

² In addition, the following organizations and entities, composed of both members and nonmembers of the OACJ, concur with the position taken by the OACJ in this *Amicus* Brief: The Academy of Medicine of Cleveland & Northern Ohio, American Institute of Architects-Ohio, American Insurance Association, The Independent Insurance Agents of Ohio, Ohio Association of Convenience Stores, Ohio Association of McDonalds Operators, Ohio Association of Wholesaler-Distributors, Ohio Automatic Merchandising Association, Ohio Automobile Dealer's Association, Ohio Bakers Association, Ohio Cleaners Association, Ohio Coal Association, Ohio Construction Suppliers Association, Ohio Council of Retail Merchants, Ohio Dental Association, Ohio Grocers Association, Ohio Jewelers Association, Ohio Propane Gas Association, Ohio Tire Dealers and Retreaders Association, Ohio Trucking Association, Ohio Wholesale Marketers Association, and OHIC Insurance Company.

Among these findings, which the General Assembly specifically enacted in the uncodified law, were:

- Ohio’s economic well-being depends upon “business providing essential jobs and creative innovation.” S.B. 80, Section 3(A)(1). The pre-S.B. 80 civil litigation system presented a “challenge” to that economic well-being. *Id.*
- While understanding the need for our tort system to provide compensation to individuals who have suffered injury, Ohio law was in need of a “fair system of civil justice” that balanced the rights of tort claimants with “the rights of those who have been unfairly sued.” *Id.*, Section 3(A)(2).
- Ohio has a “rational and legitimate state interest” in providing a “fair, predictable system of civil justice” that preserves the rights of those who have been harmed while at the same time “curbing the number of frivolous lawsuits” that inevitably result in unneeded costs to consumers. *Id.*, Section 3(A)(3).
- Noneconomic damages, which include such elements as pain and suffering, emotional distress, and loss of consortium or companionship, “do not involve an economic loss and have, therefore, no precise economic value.” *Id.*, Section 3(A)(6)(a). These types of damages are inherently subjective, and have been unfairly inflated in the civil tort system by, among other factors, “the improper consideration of evidence of wrongdoing.” *Id.*, Section 3(A)(6)(d).
- “Inflated damage awards,” which include the unpredictable awards of noneconomic damages for intangible loss, create an “improper resolution of civil justice claims.” *Id.*, Section 3(A)(6)(e). This “improper resolution” has the negative effect of increasing the cost of litigation, resulting in a rise in insurance premiums. *Id.* These costs are

ultimately borne by the general public “through higher prices for products and services.”

Id.

- As stated in testimony by Bruce Johnson, Ohio Department of Development Director, tort costs put Ohio businesses at a disadvantage via-a-vis foreign competition. *Id.*, Section 3(A)(3)(f). Since 1950, tort costs in the United States have grown from 0.6% to 2% of gross domestic product.

The various findings enacted into the uncodified law were gleaned not only from testimony given before legislative committees, but also from published studies that illustrated the societal (and monetary) costs of excessive tort litigation. For example, a 2002 study from the White House Council of Economic Advisors concluded that the cost of tort litigation in the United States effectively operates as a tax upon the citizenry at large. Specifically, the study determined that this “litigation tax” burden is borne by various individuals through, among other things: (1) job loss or a reduction in wages for workers, (2) an increase in consumer prices, (3) a decline in property values for landowners, or (4) a reduction in profits for owners of capital. See Council of Economic Advisers, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* (April 2002), at p. 13 (“White House Study”). The study quantified the effect of tort litigation as:

- a 2.10% “wage and salary tax,”
- a 1.3% tax on “personal consumption,” and
- a 3.10% tax on “capital investment income.”

Id. at p. 16; S.B. 80, Section 3(A)(3)(b). This “litigation tax” had the great potential of imposing “deadweight losses on the economy in the form of products and services that are never produced as a result of the fear of litigation.” White House Study, at p. 19.

In addition to the White House Study, the General Assembly considered a 2003 Harris Poll conducted by the United States Chamber of Commerce's Institute for Legal Reform. See S.B. 80, Section 3(A)(3)(c). The Harris Poll, which surveyed 928 senior corporate attorneys, found that "eight out of ten respondents claim that the litigation environment in a state could affect important business decisions about their company, such as where to locate or do business." *Id.* In addition, "one in four" senior attorneys consulted in the survey identified limitations on damages as "one specific means for policy makers to improve the litigation environment in their state and promote economic development." *Id.* Indeed, the study found that the "leading two issues" named by senior attorneys were "putting a ceiling on damages" and "tort reform." Harris Interactive, Inc., *2003 U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report* (April 4, 2003), at p. 11. Based on the data gathered from the various respondents, the Harris Poll survey included Ohio among a group of 25 states whose liability system was rated "fair" but below "average." *Id.* at pp. 15-16.³

Yet another study considered by the General Assembly, the Tillinghast-Towers Perrin study of trends and findings on the costs of the U.S. tort system, also suggested the need for the type of tort legislation enacted in S.B. 80. The Tillinghast-Towers Perrin study found that the cost of the tort system grew 14.3% in 2001, the highest increase since 1986. S.B. 80, Section 3(A)(3)(d). This translated into a cost of \$205 billion, which in turn operated as a \$721 per citizen or a 5% tax on wages. *Id.* An update to the study, covering 2002, found a further increase to \$233 billion, or \$809 per person. Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update*. The 2003 update also found that 24% of the tort costs are attributable to awards for noneconomic loss. *Id.* at p. 17.

³ The study grouped the states into categories of "Best," "Very Good," "Good," "Average," "Fair," "Poor," and "Worst."

It is against this backdrop that the General Assembly enacted S.B. 80, which includes, among other things, a statutory limitation on certain noneconomic damages, codified at R.C. 2315.18(B). In enacting the noneconomic damage “cap,” the General Assembly was mindful of the fact that noneconomic damages have “no precise economic value” and are highly subjective. See S.B. 80, Section 3(A)(6). Due to the inherently subjective nature of noneconomic damages, such damages, though intended to be compensatory in nature, had the great potential of being inflated to an amount that was more punitive than compensatory. See *id.*, Section 3(A)(6)(d). The noneconomic damage caps included in R.C. 2315.18(B) were therefore intended to strike an appropriate balance between compensation for injured persons and Ohio’s desire to foster economic growth through development of a predictable and fair civil litigation system.

ARGUMENT

OACJ believes that S.B. 80 is constitutional in its entirety and that this Court should therefore answer each of the certified questions accordingly. The focus of this *Amicus* Brief, however, is on the feature of S.B. 80 that is codified in Section 2315.18 of the Ohio Revised Code.

In R.C. 2315.18, the General Assembly codified limitations to the noneconomic damages that are recoverable in tort actions. Specifically, the General Assembly has capped noneconomic damages at \$350,000 per plaintiff in a tort action or \$500,000 “for each occurrence” that is the basis of a tort action, subject to certain exceptions for plaintiffs suffering specified types of permanent injury. See R.C. 2315.18(B)(2) and (B)(3). The Petitioner and *Amici Curiae* supporting her contend that these noneconomic damage caps violate various provisions of the Ohio Constitution, namely the right to jury trial (Article I, Section 5), the due process clause, (Article I, Section 16), the “open courts” and “right to remedy” provision (also Article I, Section 16), and the separation of powers. A reasoned constitutional analysis, however, would uphold

the noneconomic damage limitations in S.B. 80 as a reasonable and valid exercise of legislative power.

I. The Noneconomic Damage Limitations Contained In R.C. 2315.18 Neither Implicate Nor Violate A Plaintiff's Right To Trial By Jury.

The noneconomic damages caps enacted in S.B. 80 are codified at R.C. 2315.18(B), which states:

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

(1) There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action.

(2) Except as otherwise provided in division (B)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.

(3) There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action to recover damages for injury or loss to person or property if the noneconomic losses of the plaintiff are for either of the following:

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

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

Because this case is before this Court on certified questions from a federal district court, there is no record upon which to conclude that the Petitioner will be subject to the noneconomic damage cap set forth in R.C. 2315.18(B). Rather, Petitioner (and *Amici Curiae* supporting her)

wish to strike R.C. 2315.18(B) as unconstitutional *on its face*.⁴ Of course, Petitioner must overcome the strong presumption of constitutionality enjoyed by each statute and prove “beyond a reasonable doubt” that a challenged statute is unconstitutional. *Beatty v. Akron City Hospital* (1981), 67 Ohio St.2d 483, 593, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142.

Petitioner contends that because R.C. 2315.18(B) may operate to reduce the amount of damages that a jury awards in a tort action it runs afoul of the right to trial by jury granted by Article I, Section 5 of the Ohio Constitution. Petitioner’s constitutional analysis is flawed, however, because: (1) the General Assembly has the authority to place restrictions on the types of legal remedies available, and (2) the legislative restrictions on the remedies available under R.C. 2315.18 do not substantially impair the traditional fact-finding province of the jury.

Article I, Section 5 of the Ohio Constitution states, “the right of trial by jury shall be inviolate ***.” This Court has construed this provision to mean that the jury-trial right granted by Article I, Section 5 is a “fundamental right” accorded to Ohioans. Notwithstanding this interpretation, however, the right to jury trial is not absolute and does not extend to any and all claims brought by a litigant. Rather, the jury-trial guarantee extends only to those causes of action where the right existed at common law at the time the Ohio Constitution was ratified.

Because the cases to which R.C. 2315.18(B) would apply arise from causes of action in tort (*i.e.*, claims recognized at common law), the Petitioner contends that the noneconomic

⁴ A facial constitutional challenge is the most difficult challenge to mount, as “the challenger must establish that no set of circumstances exists under which the [statute] would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *United States v. Salerno* (1987), 481 U.S. 739, 745; see, also, *Banc One Dayton v. Limbach* (1990), 50 Ohio St.3d 163, 170-171 (challenger to constitutionality must “negate every conceivable basis which might support” the statute’s validity).

damage cap necessarily violates the right to jury trial. See Petitioner's Brief, at pp. 11-17. But this analysis is highly simplistic and is not faithful to the true meaning of the Ohio Constitution. With respect to the analogous federal right to jury trial embodied in the United States Constitution, the United States Supreme Court has observed that the right "attaches only to those elements of a trial that are fundamental and essential to the jury system." *Tull v. United States* (1987), 481 U.S. 412, 426. In *Tull*, the Court openly questioned whether the Seventh Amendment even extended to the "remedy phrase of a civil trial," and concluded that the federal right to jury trial did *not* include the right to have the jury determine the amount of civil penalties recoverable under the Clean Water Act. *Id.* at 426 n. 9. "Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." *Colgrove v. Battin* (1973), 413 U.S. 149, 156 n. 11, quoting Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 671 (1918); see, also, *Galloway v. United States* (1943), 319 U.S. 372, 392 (stating that the Seventh Amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements").

Thus, to say that the Article I, Section 5 right to jury trial is "fundamental" is to tell only half the story. The right is only "fundamental" to the extent that it applies to the traditional function of the jury. That traditional function is to serve as the finder of *fact* and, concomitantly, to determine whether liability attaches. The right to jury trial does *not*, however, extend to questions of *law*: while a litigant has the right to have the jury serve as the final arbiter of the facts, there is *no* constitutional entitlement to have the jury decide substantive legal questions. See *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292.

The authority to adopt substantive rules of law includes the authority to establish and/or modify remedies. See *id.*; *Tull*, 481 U.S. at 422. The availability of noneconomic damages as a remedy for intangible loss is therefore a *substantive legal issue* upon which the General Assembly may validly legislate. And because the right to trial by jury does not include a right to have a jury establish substantive rules of law, the right to jury trial is *not* infringed when the court applies the substantive law of remedies after the jury has completed its fact-finding role. Applying a noneconomic damages cap *after* the jury has determined the amount of these intangible losses respects the jury's function of serving as the fact-finder. While a jury may find that a defendant is liable and the amount of damages the plaintiff has suffered, it is beyond the jury's constitutional role to decide the remedy available according to the controlling substantive law. The *legal* import of the amount of damages found by the jury is *not* a matter within the jury's purview, as it is the legislature's prerogative to define the substantive law of remedies. "Juries traditionally do not decide the law or the outcome of legal conflicts. . . . To maintain the traditional role of the jury, the jury must remain the factfinder; a jury may determine what happened, how, and when, *but it may not resolve the law itself.*" (Emphasis added.) *Phillips v. Mirac, Inc.* (2004), 470 Mich. 415, 427, 685 N.W.2d 174, quoting *Charles Reinhart Co. v. Winiemko* (1994), 444 Mich. 579, 6001, 513 N.W.2d 773.

This Court would not be alone in upholding damage caps against constitutional challenges premised upon the right to jury trial. Just last year, the Sixth Circuit Court of Appeals upheld a Michigan statute capping noneconomic damages in medical malpractice cases against, among other things, an argument that the cap violated the Seventh Amendment right to trial by jury. See *Smith v. Botsford Gen. Hosp.* (C.A. 6, 2005), 419 F.3d 513. Adopting the reasoning of a Fourth Circuit case that likewise upheld statutory damage caps, the *Smith* court defined the

jury's role: "the jury's role 'as factfinder [is] to determine the extent of a plaintiff's injuries,' not 'to determine the legal consequences of its factual findings.'" *Id.* at 519, quoting *Boyd v. Bulala* (C.A. 4, 1989), 877 F.2d 1191, 1196; see, also, *Estate of Sisk v. Manzanares* (D. Kan. 2003), 270 F.Supp.2d 1265, 1278 fn. 45 (collecting cases for same rule). Moreover, the *Smith* court rightfully observed that the legislature has the final say on the parameters of a cause of action, including the ultimate power to abolish a cause of action. "If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well." *Id.*, quoting *Boyd*. Utilizing similarly sound reasoning, the Supreme Courts of Michigan and Utah have likewise upheld noneconomic damage caps against recent constitutional challenges premised on the right to trial by jury. See *Phillips v. Mirac, Inc.*, *supra*, 470 Mich. 415; *Judd ex rel. Montgomery v. Drezga* (Utah 2004), 103 P.2d 135, 2004-UT-91.⁵

The General Assembly's limitation on noneconomic damages in R.C. 2315.18 does not violate a plaintiff's right to trial by jury. The legislature is entitled to modify and shape the substantive statutory law in the state of Ohio according to the demands of the electorate and in the best interest of Ohio citizens. The jury's ability to assess the facts and determine liability of a case is in no way hampered by the General Assembly's decision to restrict the legal remedy

⁵ Numerous other state courts have rejected constitutional challenges to similar damage-cap legislation. See *Etheridge v. Medical Center Hospitals* (1989), 237 Va. 87, 376 S.E.2d 525; *Kirkland v. Blaine County Med. Ctr.* (2000), 134 Idaho 464, 4 P.3d 1115, 1119-20; *Murphy v. Edmonds* (Md. App. 1992), 325 Md. 601 A.2d 102, 116-118; *Peters v. Saft* (Me. 1991), 597 A.2d 50, 53-54; *English v. New England Med. Ctr., Inc.* (Mass. 1989), 405 Mass. 423, 541 N.E.2d 329, 331-332; *Adams v. Children's Mercy Hosp.* (Mo. 1992), 832 S.W.2d 898, 906-907; *Wright v. Colleton County Sch. Dist.* (S.C. 1990), 301 S.C. 282, 391 S.E.2d 564, 569-570; *Robinson v. Charleston Area Med. Ctr.* (W. Va. 1991), 186 W. Va. 720, 414 S.E.2d 877, 887-888; *Evans v. State* (Alaska 2002), 56 P.3d 1046, 1050.

available to plaintiffs. R.C. 2315.18(B) provides for such a statutory limitation without violating the right to trial by jury.

II. R.C. 2315.18's Cap on Noneconomic Damages Does Not Violate the Constitutional Separation of Powers.

Section 1, Article II of the Ohio Constitution vests all legislative power in the General Assembly. The General Assembly's legislative power encompasses the power to enact laws, which reflect Ohio public policy. See, e.g., *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 136; *State ex rel. Bryant v. Akron Metropolitan District for Summit County* (1929), 120 Ohio St. 464, 479; *George B. Way and Others v. Hillier, Bush, and Others* (1847), 16 Ohio 105, 107. More than any other branch of Ohio's government, the General Assembly is well-situated to weigh and properly balance the many competing societal, economic, and policy considerations involved in changing the law to meet changing social and economic conditions. *Hardy v. VerMuelen* (1987), 32 Ohio St.3d 45, 49; *Fassig v. State ex rel. Turner* (1917), 95 Ohio St. 232, 248.

Despite Ohio's constitutional designation of the General Assembly as the final arbiter of public policy in this state, Petitioner and her supporting *Amici Curiae* argue that R.C. 2315.18(B) somehow runs afoul of the constitutional "separation of powers." Petitioner argues that the noneconomic damage limitations invade the province of the judiciary by mandating a court's reduction in the amount of noneconomic damages awarded by the jury if the amount exceeds the statutory cap set forth in R.C. 2315.18(B). In reality, however, it is the *Petitioner's* position that is inconsistent with separation-of-powers principles.

A. Damage Caps Fall Within The Legislative Power To Define The Jurisdiction Of Ohio's Courts.

Section 4(B), Article V of the Ohio Constitution provides:

The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

The traditional role of the legislature is to serve as the branch of government that creates the law, and the historical role of the court is to apply the law. But the role of the court in Ohio's constitutional system necessarily depends upon the jurisdiction that has been granted to it by the legislature. As Section 4(B), Article V makes clear, the General Assembly has the ultimate say on the scope of common pleas court jurisdiction in this State.

In addition to prescribing the substantive limitations on noneconomic damages, R.C. 2315.18 also speaks to the jurisdiction of the common pleas courts. R.C. 2315.18(F)(1) expressly states that a court of common pleas “*has no jurisdiction* to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in this section.” (Emphasis added.) Thus, not only has the General Assembly enacted substantive limitations upon the remedies available in tort actions, it has also circumscribed the jurisdiction of the common pleas court to ensure that its legislative will of limiting noneconomic damages is carried out. There can be no “separation of powers” problem with the damage caps, as the limitation on common pleas court jurisdiction is within the power granted to the General Assembly by Section 4(B), Article V of the Ohio Constitution. The noneconomic damages caps in R.C. 2315.18 do not violate the separation of powers any more than any other jurisdictional limitation placed upon the courts of common pleas.

B. Damage Caps Are Consistent With The Legislative Function Committed To The General Assembly.

As this Court has observed, the “separation of powers” principle is embodied in the framework of Ohio's Constitution. *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, at ¶ 114. For example, whereas Article II of the Ohio Constitution specifically delineates

legislative functions and powers vested in the General Assembly, Article IV defines parameters on the *judicial* power vested in the Ohio courts. The powers of these coordinate branches of government are entirely distinct. Indeed, as this Court has recognized, “it is not the function of a reviewing court to assess the wisdom or policy of a statute, but rather, to determine whether the General Assembly acted within its legislative power.” *Austintown Twp. Bd. of Trustees v. Tracy* (1996), 76 Ohio St.3d 353, 356; cf. also, *Evans* 56 P.3d at 1056 (Supreme Court of Alaska held that damages caps did not violate the separation of powers because the legislature had the power to “alter common law remedies,” by enacting damages caps.) It is not within the province of the judicial branch of the government to question the wisdom of legislative enactments or even to question their logic. The primary purpose in the interpretation or construction of statutes is to give effect to the intention of the legislature and to ascertain the legislative will. *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 173.⁶

It is well established that “[i]n construing a statute, a court's paramount concern is the legislative intent in enacting the statute. . . . In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished.” *Id.*, citing *State ex rel. Carter v. Wilkinson* (1994), 70 Ohio St.3d 65, 66. A plain reading of R.C. 2315.18 evidences a

⁶ As aptly stated by the Court of Appeals of North Carolina in undertaking a “separation of powers” analysis of damage caps:

The General Assembly is where public policy is better debated. The General Assembly is where compromise, sometimes the result of years of discussion evolving over numerous sessions can occur. The General Assembly is where lawmakers can consider scenarios broader than just the specific factors attendant to a particular case. Our authority is limited, and the acceptance of that limitation is a public trust we are bound to keep in the promotion of a properly aligned government.

Rhyne v. K-Mart Corp. (2002), 149 N.C. App. 672, 680, 562 S.E.2d 82 (holding that punitive damages caps do not violate the separation of powers).

legislative intent to modify a legal remedy, with the goal of introducing objectivity and a level of predictability into the award of noneconomic damages, which are intangible in nature and virtually without standards in the way they are calculated by a trier of fact. The General Assembly imposed these caps as a public policy choice, and not to abrogate the judiciary's power.

It is the role of the legislature to create statutory law and to modify or abrogate existing statutory or common law as it sees fit. Indeed, “[t]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances.” *Fassig*, 95 Ohio St. at 248. Accordingly, it is inconsistent with the basic tenets of a democratic policy-making system of government to prevent a legislature from making changes to statutory and/or common law and adjusting policy choices as society’s needs change. The General Assembly’s effort to instill some level of predictability into an otherwise unpredictable calculation of noneconomic damages is a legislative choice that should not be second-guessed; indeed, to do so would run afoul of separation-of-powers principles by allowing the judiciary to second-guess a legislature’s evaluation of the wisdom of a particular public-policy choice.

The noneconomic damage caps enacted by S.B. 80 do not offend the constitutional separation of powers. To the contrary, the Petitioner and her supporting *Amici* want nothing more than for this Court to undertake the *legislative* function of reevaluating the General Assembly’s public policy choices. This Court should decline the invitation to legislate from the bench.

III. The Noneconomic Damages Caps In R.C. 2315.18 Do Not Violate The Equal Protection Clause.

In another constitutional challenge to the noneconomic damage limitations, Petitioner and her supporting *amici* contend that the limitations violate plaintiffs’ rights to equal protection

under the laws. See Article I, Section 2, Ohio Constitution. According to the Petitioner, R.C. 2315.18(B)'s damage caps unfairly differentiate between different categories of tort claimants, placing limitations on the recovery for claimants whom a jury may have found to have suffered noneconomic damages beyond the statutory cap. Petitioner's Merit Brief, at p. 27. In addition, Petitioner and her *Amici* ask this Court to apply "strict scrutiny" to the equal protection analysis, arguing that the differing treatment among tort claimants impinges upon the "fundamental right" to a jury trial. *Id.* at p. 26. Petitioners and her *Amici* have identified neither the correct standard of review nor the correct conclusion with respect to the constitutional validity of the damage caps.

A. The Noneconomic Damage Caps Should Be Evaluated Under A "Rational Basis" Standard Of Review.

This Court has deemed the Equal Protection Clause of the Ohio Constitution to be functionally equivalent to the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 59. Accordingly, the mode of analysis is the same: when statutory classifications affect a fundamental constitutional right, the court conducts a "strict scrutiny" analysis to determine whether the classification is narrowly tailored to serve a compelling state interest. *United States v. Playboy Ent. Group, Inc.* (2000), 529 U.S. 803, 813; *State v. Thompson* (2002), 95 Ohio St.3d 264, 267. Absent a classification that affects a "fundamental right" or is based upon a protected classification (*e.g.*, race, sex, national origin), the statute at issue is accorded rational basis review. *Id.* Under this deferential standard, the court will uphold the statutory classification against an equal protection challenge so long as the statutory classification is "rationally related to a legitimate government purpose." *Id.* citing *Clark v. Jeter* (1988), 486 U.S. 456, 461, and *State v. Williams* (2000), 88 Ohio St.3d 513, 530.

Petitioner and her supporting *Amici* argue for “strict scrutiny” because the noneconomic damage caps supposedly interfere with the right to trial by jury. As demonstrated above, however, the application of noneconomic damage limitations are a matter of *substantive* law that is beyond the purview of the jury. Accordingly, the application of damage caps does not impinge on any “fundamental right” to a jury trial. While there may be a “fundamental right” to have a jury serve as the fact finder in a tort action, there is no right—much less a “fundamental” right—to have the jury’s assessment of damages be insulated from modification as a matter of substantive law. See *Phillips, supra*, 470 Mich. at 434. Moreover, as more than one court has observed, a legislature’s placement of substantive limits upon recovery in a common-law cause of action “is a classic example of an economic regulation . . . subject only to limited ‘rational basis’ review.” *Smith v. Botsford Gen. Hosp., supra*, 419 F.3d at 520 (internal quotations omitted), citing *Boyd, supra*, 877 F.2d at 1196.

Further, this Court has not held as matter of constitutional law that damage caps, like those contained in R.C. 2315.18, are subject to “strict scrutiny” analysis under the Equal Protection Clause. See *Morris v. Savoy* (1991), 61 Ohio St.3d 684 (applying rational basis test to hold that the statute limiting damages did not pass constitutional muster). To apply strict scrutiny to the noneconomic damage caps in this case would be an unsound and unwarranted application of a heightened standard of review.⁷

⁷ In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, this Court indicated that former R.C. 2307.43, the statute invalidated in *Morris v. Savoy*, “implicat[ed] the right to trial by jury.” 86 Ohio St.3d at 485, fn. 14. This statement, however, was dicta. *Sheward* did not invalidate noneconomic damage caps on equal protection grounds, much less with an analysis applying a heightened level of scrutiny.

B. The Noneconomic Damage Caps Are Rationally Related To A Legitimate Government Purpose.

Under the rational basis standard of review, courts are duty bound to uphold a statute against a constitutional challenge if the statute is “rationally related to furthering a legitimate state interest.” *Vance v. Bradley* (1979), 440 U.S. 93, 97. As the United States Supreme Court has observed, this standard of review is highly deferential to the legislature:

. . . [C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Id.

Rational-basis review under equal protection principles “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Federal Communications Commission v. Beach Communications, Inc.* (1993), 508 U.S. 307, 313. Challengers to a statute must therefore overcome the strong presumption of constitutionality enjoyed by each statute and prove “beyond a reasonable doubt” that a challenged statute is unconstitutional. *Beatty v. Akron City Hospital* (1981), 67 Ohio St.2d 483, 593, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. at 142. Under the rational basis test, courts will *not* overturn a statute “unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.” *State ex rel. Keefe v. Eyrich* (1986), 22 Ohio St.3d 164, 165, quoting *Vance v. Bradley*, (1979), 440 U.S. 93, 97. When undertaking this inquiry, the asserted basis need not be substantiated with scientific precision. Indeed, the United States Supreme Court has opined:

[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence of empirical data. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

Beach Communications, 508 U.S. at 315 (citations and internal quotations omitted).

Far from being speculative, the legislative history, as documented previously herein, reveals the rational and legitimate bases upon which the General Assembly enacted S.B. 80. In enacting the noneconomic damage caps in R.C. 2315.18, the General Assembly addressed the substantial interest in creating a level of certainty in the award of damages that are intangible, inherently subjective, and not readily ascertainable. The General Assembly had before it testimony and studies suggesting that the tort system operated as a tax upon the citizenry at large, which had the undesirable potential of limiting economic growth in Ohio. See S.B. 80, Section 3(A). By enacting statutory caps to noneconomic damages awardable in civil litigation, the General Assembly was responding to these economic concerns. The General Assembly decided, as a matter of policy, that limits to noneconomic damages were a desirable means of promoting economic growth and stability in Ohio, while also making Ohio more attractive to companies that might seek to do business in this state. See *id.*, Section 3(A)(3)(c) (citing Harris Poll study in which 80% of senior corporate attorneys surveyed identified “litigation environment” as an important factor in deciding where to do business and 25% cited “limits on damages” as a specific means of stimulating economic growth). At the same time, the General Assembly sought to balance the interests of injured tort claimants, choosing to enact exceptions to the damages caps for certain types of permanent injury, including physical deformity or permanent

functional injury that impairs a person's ability to "independently care for self and perform life-sustaining activities." R.C. 2315.18(B)(3).

The General Assembly enacted the cap on noneconomic damages as part of a comprehensive effort to reform the tort system in Ohio, an effort that it deemed desirable to spur economic growth and ensure Ohio's economic well-being. The economic well-being of the state is assuredly a legitimate state interest. And in light of the legislative findings that the civil litigation system has operated as nothing less than an undue tax upon the citizenry at large, the General Assembly's rationale can hardly be characterized as arbitrary or irrational. The General Assembly's public policy choice to enact limits to noneconomic damages, which are by nature subjective and incapable of any reasonable calculation or measure, should not be second-guessed.⁸

IV. The Legislative Cap On Noneconomic Damages Does Not Violate The "Right To Remedy" And "Open Courts" Provision Of The Ohio Constitution.

Article I, Section 16 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 due course of law, and shall have justice administered without denial or delay."

Petitioner and her supporting *Amici* argue that the noneconomic damage caps codified in R.C. 2315.18 violate this constitutional "right to remedy" by depriving aggrieved plaintiffs of

⁸ Along with her equal protection arguments, Petitioner also argues that the damage caps violate the Due Process Clause of the Ohio Constitution, contained at Article I, Section 16. See Petitioner's Brief, at p. 26. Petitioner's equal protection analysis is identical to the due process analysis, demanding strict scrutiny and arguing that the damage caps do not pass constitutional muster under that analysis. OACJ agrees that a due process analysis is identical to an equal protection analysis under the Ohio Constitution, but submits that the rational basis test is the appropriate mode of review. The above arguments relating to the constitutionality of the noneconomic damage caps under the Equal Protection Clause are therefore applicable to any analysis under the Due Process Clause of the Ohio Constitution.

their right to receive a “full remedy” in their tort causes of action. See Petitioner’s Brief, at p. 20. This argument is without legal merit as a matter of constitutional law.

In construing Article I, Section 16 of the Ohio Constitution, this Court has observed: “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.” *Hardy v. VerMeulen, supra*, 32 Ohio St.3d at 47. Accordingly, the purpose of the right-to-remedy provision is to ensure that plaintiffs are not denied legal recourse, but are provided with a meaningful remedy for injury caused to them. *Gaines v. Preterm-Cleveland* (1987), 33 Ohio St.3d 54, 60. But the constitutional right to a “meaningful remedy” does not lead inexorably to a conclusion that there exists a right to unlimited tort damages, much less noneconomic damages. To the contrary, the General Assembly has the ability to narrow or limit damages *without* offending Article I, Section 16 of the Ohio Constitution.

A. The General Assembly Defines What Is A Compensable “Injury” Under Ohio Law.

While Petitioner and her *Amici* decry the noneconomic damage limitations as an improper limitation upon the remedy for plaintiffs’ “injury” in tort, their argument rests upon the premise that the scope of compensable “injury” is beyond the domain in which the General Assembly may legislate. But this is simply untrue under the Ohio Constitution. “[S]tate law determines when rights exist. Section 16 guarantees a ‘remedy by due course of law’ for ‘an injury done,’ but state law determines *what injuries are recognized and what remedies are available.*” (Emphasis added.) *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy* (C.A. 6, 1984), 740 F. 2d 1362, 1370 (applying Ohio law). The General Assembly, whose members are the duly elected final arbiters of public policy, has the authority to shape “state law” by modifying the common law. See *Strock v. Pressnell* (1988), 38 Ohio

St.3d 207, 214. Thus, the General Assembly may make any change in substantive law it deems reasonable, so long as it does not contravene any vested rights. See *Fassig v. State ex rel. Turner*, 95 Ohio St. at 248.

Although compensatory in nature, noneconomic damages are not immune from legislative modification. The law of remedies may be changed through legislative enactment, just as any other common-law rule. Indeed, this Court has upheld the constitutionality of legislative enactments that abolished causes of action that previously existed at common law. See, e.g., *Strock v. Presnell*, *supra* (upholding statute abolishing amatory actions). The legislative power to completely abolish a cause of action certainly (and logically) includes the lesser power to limit compensation for a category of damages that is intangible in nature and incapable of measurement by objective standards. If a legislature has the power to recognize or abolish a cause of action, as the General Assembly does under Ohio's constitutional system, then "it logically follows that the Legislature can also take the less drastic step of leaving the cause of action intact, but limiting the damages recoverable for a particular cause of action from a particular defendant." *Phillips*, 470 Mich. at 430.

The Petitioner's argument fails to take appropriate heed of the General Assembly's role as the final arbiter of Ohio public policy. While Article I, Section 16 certainly guarantees a tort claimant the "right" to "remedy" for an "injury," the General Assembly is the body that defines what is a compensable "injury" to which the right to remedy attaches. The limitation on noneconomic damages contained in R.C. 2315.18(B) is a valid exercise of the General Assembly's constitutional power to define which injuries are compensable and the scope of remedies available.

B. This Court Has Permitted Modifications To Legal Remedies.

As a practical matter, the noneconomic damage limitations imposed by R.C. 2315.18 are not unprecedented in Ohio law. Historically, the modification or restriction of common-law remedies recognized at law has routinely occurred in Ohio's jurisprudence.

For example, the doctrine of political subdivision tort immunity has been embedded in Ohio jurisprudence, first at common law and then by operation of the Political Subdivision Tort Immunity Act in R.C. Chapter 2744. See *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 354. The statute operates to immunize political subdivisions from liability for acts and omissions associated with certain governmental functions. See R.C. 2744.02. Thus, by operation of law, R.C. Chapter 2744 operates to deprive a litigant of a damages remedy against a political subdivision, except under circumstances delineated specifically in the statutory scheme. Despite the effect of R.C. Chapter 2744 upon the plaintiff's ability to obtain a monetary remedy (much less "full" recovery) against a political subdivision, this Court has upheld the constitutionality of the political subdivision immunity statutes against a "right to remedy" challenge. See *Fabrey, supra*.

Another example of this Court's endorsement of remedial limitations has come in the realm of wrongful pregnancy actions. In *Johnson v. Univ. Hosp. Of Cleveland* (1989), 44 Ohio St.3d 49, this Court refused, as a matter of public policy, to allow the full panoply of damages that could theoretically flow from a doctor's failure to properly perform a sterilization procedure. Specifically, this Court recognized a "limited damages rule," which limits "wrongful pregnancy" damages "to the pregnancy itself and does not include child-rearing expenses. The extent of recoverable damages is limited by Ohio's public policy that the birth of a normal, healthy child cannot be an injury to her parents." *Id.* at paragraph two of the syllabus. In essence, this Court fashioned a rule under which an entire category of compensatory damages (*i.e.*, child-rearing

expenses) were *unrecoverable*—in other words, capped at *zero*—even though such damages flowed from liability.

Similarly, just this year, this Court limited the scope of recovery in an action alleging “negligent genetic counseling or a negligent failure to diagnose a fetal defect or disease.” *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 108 Ohio St. 3d 494, 2006-Ohio-942, syllabus. This Court adhered to the “limited damages” rule recognized in *Johnson* and refused to recognize recovery of “consequential noneconomic damages [requiring] a valuation of being versus nonbeing.” *Id.* at ¶ 25. Thus, in both *Johnson* and *Schirmer*, this Court deemed certain types of damages unrecoverable, effectively capping their recovery at *zero* notwithstanding the potential that a jury could deem such damages to be proximately caused by a defendant’s actions.

If a common-law court can limit the scope of recoverable damages as a matter of “public policy,” it stands to reason that the *legislature* can do so in its role as the final arbiter of public policy. Accordingly, there is no constitutional problem with the limitations on noneconomic damages set forth in R.C. 2315.18.

C. There Is A Permissible Legislative Purpose Behind R.C. 2315.18(B)’s Cap On Noneconomic Damages

As noted above, this Court has endorsed the General Assembly’s ability to modify the common law, so long as it “(1) does not interfere with vested property rights and (2) has a permissible legislative objective.” *Strock v. Pressnell*, 38 Ohio St.3d at 214. The first portion of this test is not implicated, as there is “no vested interest, in any rule of common law.” *Id.* As for the second part of the *Strock* inquiry, the presence of a “permissible legislative objective” is plainly evident from the history and motivation behind S.B. 80.

Noneconomic damages traditionally include such components as pain and suffering, loss of society, loss of companionship, and mental anguish. These types of damage are, by their

nature, intangible and nonpecuniary. Due to the imprecise and inherently subjective standard for determining noneconomic loss, such damages are naturally unpredictable and can be widely disparate. Because there is no objective standard for quantifying noneconomic harm, such losses “cannot be easily expressed in dollars and cents.” *Bates v. Hogg* (Kan. Ct. App. 1996), 921 P.2d 249, 252; see, also, *Morris v. Savoy*, 61 Ohio St.3d at 698 (Holmes, J., concurring in part and dissenting in part) (acknowledging the “unpredictability” of jury awards of noneconomic damages). Apart from the inherent difficulty in quantifying them, money damages for noneconomic harm “are at best only imperfect compensation for such intangible injuries” and “are generally passed on to, and borne by, innocent consumers.” *Fein v. Permanente Med. Group*. (1985), 38 Cal.3d 137, 159, 695 P.2d 665.⁹

The General Assembly had a legitimate governmental interest in responding to the lack of an objective standard for calculating and awarding noneconomic damages. In enacting statutory noneconomic damage caps, the General Assembly addressed the unpredictability of such awards and the public policy concerns associated with disproportionate noneconomic damage awards in the absence of such caps. The Petitioner and her supporting *Amici* seek nothing less than the Court’s re-evaluation of the public policy that motivated the legislature.

V. This Court’s Decision in *Sheward* Does Not Require Invalidation Of S.B. 80’s Caps On Noneconomic Damages.

S.B. 80 is not the first time that the General Assembly has enacted some form of limitation upon noneconomic damages in tort cases. Seven years ago, in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, *supra*, this Court invalidated Am. Sub. H.B. 350 in its entirety. That enactment included a provision limiting the amount of noneconomic damages

⁹ *Fein* upheld California’s statutory cap on noneconomic damages in medical malpractice actions. In doing so, the California Supreme Court reiterated the longstanding rule that “the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest.” *Fein*, 38 Cal.3d at 158.

recoverable in a tort action. See *Sheward*, 86 Ohio St.3d at 486-487, citing former R.C. 2323.54.¹⁰ Specifically, this Court stated that H.B. 350's noneconomic damages cap violated the separation of powers because the Court deemed it simply a reenactment of former R.C. 2307.43, which had been declared unconstitutional in *Morris v. Savoy*, *supra*, 61 Ohio St.3d 684. See *Sheward*, 86 Ohio St.3d at 490.¹¹

This Court's decision in *Sheward* does not mandate a similar result in this case. For one thing, the underlying premise of *Sheward* is erroneous: the General Assembly does not "violate" the separation of powers by enacting a statute similar to legislation previously deemed unconstitutional. Simply because the Court deemed noneconomic damage caps unconstitutional in some specific context in the past does not mean, inexorably, that any future legislation on the same subject violates the "separation of powers." While this Court certainly has the power to declare *existing* statutes unconstitutional, it does not follow that it can control *future* legislation enacted by a different General Assembly making different legislative findings. *Sheward*, 86 Ohio St.3d at 528 (Moyer, C.J., dissenting). "[T]his court does not have authority to order the General Assembly to refrain from enacting a similar statute." *Id.* Similarly, in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 135, after declaring a workers compensation subrogation statute unconstitutional, the majority of the Court expressly recognized that the General Assembly was free to enact future legislation on this same subject. *Id.* ("we do not accept the proposition that a workers' compensation subrogation statute is per se

¹⁰ Former R.C. 2323.54 "cap[ped] the amount of noneconomic damages recoverable in any tort action at the greater of \$250,000 or three times the economic loss, to a maximum of \$500,000; or, in the case of certain specified types of permanent injuries, at the greater of \$1 million or \$35,000 times the number of years remaining in the plaintiff's expected life." *Sheward*, 86 Ohio St.3d at 486-487, quoting former R.C. 2323.54.

¹¹ The statute at issue in *Morris v. Savoy* imposed a noneconomic damages cap of \$200,000 in medical malpractice cases. See *Morris*, 61 Ohio St.3d at 686, citing former R.C. 2307.43.

unconstitutional, and nothing in this opinion shall be construed to prevent the General Assembly from ever enacting such a statute.”). Accordingly, the noneconomic damage caps enacted in R.C. 2315.18 are not unconstitutional simply by virtue of similar legislation being invalidated in *Sheward* or *Morris v. Savoy, supra*.

Additionally, *Sheward*'s analysis of the merits of H.B. 350's noneconomic damage caps do not command the same result with regard to S.B. 80's caps. In *Sheward*, a majority of this Court found “no constitutional difference” between former R.C. 2323.54 (invalidated in *Sheward*) and former R.C. 2307.43 (invalidated in *Morris*) because the former “continue[d] 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.” *Sheward*, 86 Ohio St.3d at 490. Thus, the Court concluded that the damage caps in H.B. 350 violated due process, as did the caps in *Morris*, because the caps were “unreasonable and arbitrary, irrespective of whether [they bore] a real and substantial relation to public health or welfare.” *Id.*; see, also, *Morris*, 61 Ohio St.3d at 691. The same cannot be said of current R.C. 2315.18.

In the uncodified law, the General Assembly has amply detailed the public-policy motivation behind S.B. 80. But unlike the statutes at issue in *Morris* and *Sheward*, the General Assembly has carved out an exception to the noneconomic damage caps for certain claimants whom the legislature has deemed to be those most severely injured by tortious conduct. Indeed, there is no damage limitation whatsoever for plaintiffs who have suffered “[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system” or “[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.” R.C. 2315.18(B)(3). Thus, *Sheward*'s reasoning, which was primarily rote reliance upon the rationale in *Morris*, does

little to inform the constitutionality of R.C. 2315.18's noneconomic damage caps. The General Assembly has not only enacted R.C. 2315.18's damage caps with a valid public-policy purpose, but has cured the constitutional infirmity described in *Sheward* and *Morris* by excepting from the caps those whom it has deemed to be the most severely injured.

Simply put, the constitutionality of the damage caps in the current statute must be evaluated anew. R.C. 2315.18 must not be discarded simply because this Court invalidated a different noneconomic damage cap enacted in a different bill at a different time. See *Sheward*, 86 Ohio St.3d at 528-529 (Moyer, C.J. dissenting) ("Adoption of a statute similar to one already struck down does not contradict a prior judgment of this Court invalidating the first statute. The fact remains that two separate statutes are involved passed in different sessions of the General Assembly, by different legislatures and having different effective dates.") To do that would be an even greater affront to the separation of powers than anything this Court deemed objectionable in *Sheward*.

VI. Several Other Jurisdictions Have Upheld The Constitutionality Of Noneconomic Damage Caps.

In enacting limitations on noneconomic damages in R.C. 2315.18, the General Assembly was not operating in a legislative vacuum. Rather, Ohio is one of the many states that have enacted statutes limiting noneconomic damages. While not exhaustive, the list below reflects the noneconomic damage caps in many other jurisdictions, which is indicative of the type of information available to the General Assembly when it considered legislation to limit noneconomic damages. Many of these statutes have been upheld against constitutional challenges.

A. Alaska

Alaska Stat. 09.17.010 limits noneconomic damages awarded for most single injuries or deaths to the greater of \$400,000 *or* \$8,000 multiplied by the injured person's life expectancy in years. The Alaska statute increases these limits to \$1,000,000 or \$25,000 multiplied by the injured person's life expectancy for permanent physical injury or severe disfigurement. The Alaska Supreme Court has upheld the caps against constitutional challenges based upon the separation of powers, equal protection, right to jury trial, and substantive due process. *Evans v. State, supra*, 56 P.3d 1046.

B. California

California Civ. Code § 3333.2 limits noneconomic damages in medical malpractice cases to \$250,000. The California Supreme Court has held that this cap does not violate equal protection or due process provisions of the California or United States Constitutions. *Fein, supra*, 35 Cal.3d 137.

C. Colorado

Colorado Rev. Stat. § 13-21-102.5 limits noneconomic damages in civil actions other than medical malpractice to \$250,000, subject to certain exceptions that could increase the award to a limit of \$500,000. These limitations have been upheld against constitutional challenge. See *Scharrel v. Wal-Mart Stores, Inc.* (Colo. App. 1997), 949 P.2d 89, 95. Colorado Rev. Stat. § 13-64-302 limits noneconomic damages in medical malpractice actions to \$250,000. The Colorado Supreme Court has upheld the medical malpractice damages cap against constitutional challenges. *Garhart v. Columbia/HealthONE, L.L.C.* (Colo. 2004), 95 P.3d 571 (holding that the damage cap does not violate the right to jury trial or separation of powers); *Scholz v.*

Metropolitan Pathologists, P.C. (Colo. 1993), 851 P.2d 901 (upholding damage cap against constitutional due process challenge).¹²

D. Florida

Florida has enacted a number of statutes imposing different caps on noneconomic damages in medical malpractice cases. The particular statutory caps applicable in a given case, which range from \$250,000 to \$1.5 million, depend upon numerous statutory factors, including the severity of a claimant's injury or whether the parties agree or refuse to submit to arbitration. See Fla. Stat. §§ 766.207, 766.209, 766.118.

E. Hawaii

Hawaii limits noneconomic damages for physical pain and suffering to \$375,000, with some specifically delineated exceptions for certain types of torts. See Haw. Rev. Stat. §§ 663-8.7, 663.10.9.

F. Idaho

Idaho Code Ann. § 6-1603 limits the award of noneconomic damages to \$250,000, subject to increases or decreases tied to the Idaho industrial commission's adjustments to the "average annual wage." The Supreme Court of Idaho upheld a prior version of the statutory cap against a constitutional challenge based upon the right to jury trial and the separation of powers. *Kirkland v. Blaine Cty. Med. Ctr.* (2000), 134 Idaho 464.¹³

¹² The Colorado Constitution contains an open courts/right to remedy provision similar to Section 16, Article I of the Ohio Constitution. See Article II, Section 6, Colorado Constitution ("Courts of justice shall be open to every person, and a speedy remedy afforded to every injury to person, property, or character; and right and justice shall be administered without sale, denial or delay.").

¹³ Though not implicated in *Kirkland*, Idaho also has a constitutional provision similar to Ohio's open courts/right to remedy clause. See Article I, Section 18, Idaho Constitution ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice.").

G. Indiana

Indiana statutory law limits the *total amount* recoverable in medical malpractice cases to (1) \$500,000 for acts occurring before January 1, 1990; (2) \$750,000 for acts occurring after December 31, 1989, and before July 1, 1999; or (3) \$1,250,000 for acts occurring after June 30, 1999. See Ind. Code Ann. § 34-18-14-3. The Indiana Supreme Court has previously upheld damage caps against constitutional challenge. *Johnson v. St. Vincent Hosp.* (1980), 273 Ind. 374, 404 N.E.2d 585.

H. Kansas

Kansas Stat. Ann. § 60-19a01 limits noneconomic damages to an award of \$250,000. The Kansas Supreme Court upheld the constitutionality of this limitation in *Samsel v. Wheeler Transport Servs., Inc.* (Kan. 1990), 789 P.2d 541.

I. Maine

Maine Rev. Stat. Ann. 24-A § 4313 limits the award of noneconomic damages against a carrier of a health plan to \$400,000.

J. Maryland

Maryland limits the award of noneconomic damages to \$350,000 for causes of action that arose on or after July 1, 1986, and to \$500,000 for causes of action that arose on or after October 1, 1994. Md. Code Ann., Cts. & Jud. Proc. § 11-108(b). The limit increases by \$15,000 on October 1 of each year beginning on October 1, 1995. *Id.* The Maryland courts have upheld the statute against constitutional challenge. See *Edmonds v. Murphy* (1990), 83 Md. App. 133, *aff'd* (1992), 321 Md. 46; *Potomac Elec. Co. v. Smith* (1989), 79 Md. App. 591.¹⁴

¹⁴ Maryland has a constitutional provision similar to Ohio's Section 16, Article I of the Ohio Constitution. Maryland Declaration of Rights, Article 19 provides in pertinent part: "That every man, for any injury done to him in his person or property, ought to have remedy by the course of

K. Massachusetts

Massachusetts limits the award of noneconomic damages to \$500,000. Mass. Gen. Laws ch. 231, § 60H. The statute contains exceptions for substantial permanent loss, impairment of bodily function or substantial disfigurement, or other “special circumstances” warranting a higher award. *Id.*

L. Michigan

Michigan statutory law limits noneconomic damages in medical malpractice and product-liability cases to \$280,000, subject to certain exceptions for particularly serious injuries. See Mich. Comp. Laws §§ 600.1483, 600.2946a. The damage caps have been upheld against constitutional challenge. See *Phillips, supra*, 470 Mich. 415; *Smith, supra*, 419 F.3d 513.

M. Mississippi

Miss. Code Ann. § 11-1-60 limits noneconomic damages in medical malpractice actions to \$500,000 for any cause of action filed on or after September 1, 2004, subject to certain exceptions for certain types of serious injury. For all other civil actions besides medical malpractice, Mississippi has enacted a statutory cap of \$1 million.

N. Missouri

Mo. Rev. Stat. § 538.210 limits an award of noneconomic damages in medical malpractice cases to \$350,000. The Missouri Supreme Court has held that the \$350,000 limitation does *not* violate the equal protection clauses of the Missouri or federal constitution, or the open courts/right to remedy provisions of the Missouri Constitution. *Adams v. Children's Mercy Hosp.* (Mo. 1992), 832 S.W.2d 898, cert. denied (1992), 506 U.S. 991.¹⁵

the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.”

¹⁵ Missouri’s “right to remedy” provision is similar to Ohio’s. See Section 14, Article I, Missouri Constitution.

O. Nebraska

The Nebraska legislature enacted statutory caps on recoverable damages in medical malpractice actions. See R.R.S. Neb. § 44-2825. The statute provides that the *total* amount recoverable “from any and all health care providers and the Excess Liability Fund” is capped at (1) \$500,000 for any occurrence on or before December 31, 1984, (2) \$1 million for any occurrence after January 31, 1984 and on or before December 31, 1992, (3) \$1.25 million for any occurrence after December 31, 1992 and on or before December 31, 2003, or (4) \$1.75 million for any occurrence after December 31, 2003. See *id.*

P. Nevada

Nevada statutory law limits noneconomic damages in medical malpractice cases to \$350,000. See Nev. Rev. Stat. § 41A.035. The statute contains no exceptions. *Id.*

Q. New Mexico

New Mexico caps the “aggregate dollar amount” (not including punitive damages) recoverable in medical malpractice cases to \$600,000 per occurrence. N.M. Stat. Ann. § 41-5-6. A federal district court has upheld the New Mexico statute against a constitutional equal protection challenge. *Fed. Express Corp. v. United States* (D.N.M. 2002), 228 F. Supp. 2d 1267, 1270.

R. North Dakota

North Dakota law limits an award of noneconomic damages in medical malpractice cases to \$500,000. N.D. Cent. Code, § 32-42-02.

S. Oklahoma

Oklahoma recently enacted Okla. Stat. tit. 63, § 1-1708.1F, which limits noneconomic damages to \$300,000 in medical liability cases under certain circumstances.

T. Utah

Utah statutory law limits an award of noneconomic damages in medical malpractice cases to \$250,000 for causes of action arising prior to July 1, 2002, to \$400,000 for causes of action arising between July 1, 2001 and July 1, 2002. Utah Code Ann. § 78-14-7.1. For causes of action arising after July 1, 2002, the \$400,000 cap is adjusted for inflation. See *id.* Utah's statute has been upheld against constitutional challenge. See *Judd ex rel. Montgomery v. Drezga* (Utah 2004), 103 P.2d 135 (holding that statute does not violate the open courts, uniform operation of laws, due process, separation of powers, or right to jury trial provisions of the Utah Constitution).

U. Virginia

Virginia law caps an award of damages in medical malpractice claims to \$1.5 million for acts occurring on or after August 1, 1999. See Va. Code Ann. § 8.01-581.15.¹⁶ Virginia's caps have been upheld against constitutional challenges based upon, inter alia, the separation of powers, right to jury trial, equal protection, due process, and takings clauses of the state constitution. See *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.* (Va. 1999), 509 S.E.2d 307; see, also, *Etheridge, supra*, 376 S.E.2d 525.

V. West Virginia

West Virginia statutory law limits an award of noneconomic damages in medical malpractice cases to \$250,000 "per occurrence, regardless of the number of plaintiffs or the number of defendants." W. Va. Code § 55-7B-8(a). The West Virginia statute increases the cap to \$500,000 for damages suffered for (1) wrongful death, (2) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or (3) permanent physical or

¹⁶ Virginia's cap increases by \$50,000 each July 1st from 1999 to 2006. Va. Code Ann. § 8.01-581.15. On July 1, 2007, and July 1, 2008, the cap increases by \$75,000. *Id.*

mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities. W. Va. Code § 55-7B-8(b).¹⁷ West Virginia's statutory caps have been upheld against constitutional challenge. *Robinson v. Charleston Area Med. Ctr., Inc.* (1991), 186 W.Va. 720, 414 S.E.2d 877 (holding that former Section 55-7B-8 does not violate the equal protection, due process, or right to remedy clauses of the state constitution); see, also, *Estate of Verba v. Ghaphery* (2001), 210 W. Va. 30, 552 S.E.2d 406 (reaffirming the holding in *Robinson* and upholding constitutionality of statutory caps).¹⁸

It is obvious from the numerous states that have adopted caps on noneconomic damages that such statutes are very much a part of the mainstream and that Ohio is not alone in its determination that such caps are desirable features of the civil litigation system.¹⁹ What's more, numerous states have upheld their damages caps against myriad constitutional challenges similar to the ones asserted by the Petitioner in the instant cause.²⁰ OACJ urges this Court to follow the

¹⁷ West Virginia's noneconomic damage caps are adjusted annually for inflation. W. Va. Code § 55-7B-8(c).

¹⁸ In 2003, the West Virginia legislature amended Section 55-7B-8 to reduce the noneconomic damages cap from \$1 million to the amounts stated above.

¹⁹ In addition, Minnesota also upheld the constitutionality of former Minn. Stat. § 546.23, which limited noneconomic damages to \$400,000 in civil actions. See *Schweich v. Ziegler, Inc.* (Minn. 1990), 463 N.W.2d 722 (finding the damage cap did not violate the state constitution). In *Schweich*, the Minnesota Supreme Court upheld the statute against a challenge based upon the "certain remedy" clause of the Minnesota Constitution, which is similar to Ohio's "right to remedy" clause. Minnesota's statutory cap was subsequently repealed.

²⁰ While the majority of other states that have enacted noneconomic damage caps in some form have had the legislation upheld in the courts, a few states have declared their damage caps unconstitutional. See *Lakin v. Senco Products, Inc.* (1999), 329 Ore. 62, 987 P.2d 463 (declaring Oregon's statutory \$500,000 cap on noneconomic damages an unconstitutional infringement of the right to jury trial granted by the Oregon Constitution); *Best v. Taylor Machine Works* (1997), 179 Ill.2d 367, 689 N.E.2d 1057 (declaring that statutory noneconomic damage cap violated the Illinois Constitution); *Knowles v. United States* (S.D. 1996), 544 N.W.2d 183 (finding South Dakota's statutory cap for general damages in medical malpractice cases violates state constitution); *Ferdon v. Wis. Patients Comp. Fund* (2005), 284 Wis.2d 573 (finding Wisconsin's

lead of these numerous states in rejecting the constitutional challenges to damage caps and to uphold the legislature's prerogative to reform the civil litigation system through the enactment of reasonable damage limitations like the noneconomic damage caps contained in S.B. 80.

CONCLUSION

For all of the foregoing reasons, OACJ urges this Court to answer the certified questions in the negative and uphold the constitutionality of S.B. 80. In particular, OACJ urges this Court to declare R.C. 2315.18's caps on noneconomic damages to be a constitutionally valid exercise of legislative power.

Respectfully submitted,



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statutory cap of \$350,000 for noneconomic damages in medical malpractice cases violates equal protection clause of the Wisconsin Constitution); *Sofie v. Fibreboard Corp.* (1991), 112 Wn. 636 (declaring Washington's variable cap on noneconomic damages in medical malpractice cases violates Washington Constitution's right to jury trial); *Brannigan v. Usitalo* (N.H. 1991), 587 A.2d 1232 (finding \$875,000 cap on noneconomic damages violates equal protection clause of New Hampshire Constitution); *Moore v. Mobile Infirmary Assn.* (Ala. 1991), 592 So.2d 156 (declaring Alabama's \$400,000 statutory cap on noneconomic damages unconstitutional); *Arrington v. ER Physicans Group, APMC* (La. App. 3 Cir. Sept. 27, 2006), La. App. No. 04-1235, 2006 La. App. LEXIS 2164 (Louisiana statute capping medical malpractice damages at \$500,000 found to violate due process, "adequate remedy," and separation of powers clauses of Louisiana Constitution).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Alliance for Civil Justice, in Support of the Respondents, was sent via regular U.S. mail, postage prepaid this 18th day of December 2006, to the following:

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