

In the
Supreme Court of Ohio

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

BRIEF OF RESPONDENT STATE OF OHIO

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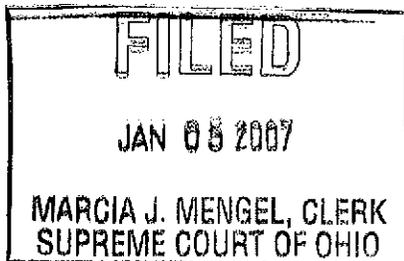


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INTRODUCTION

Tort reform affects all Ohioans. Of course, every year thousands of Ohioans become plaintiffs or defendants in tort lawsuits. Beyond that, tort law affects every Ohioan, even those who are never in a lawsuit, as the price of insurance, health care, and all other goods and services includes a premium to cover the costs of our system of civil justice. And these costs have skyrocketed. In 2001 alone, the cost of the United States tort system grew 14.3 %, vastly outpacing overall economic growth for the same period, which was 2.6 %. Indeed, the tort system costs \$205 billion dollars annually, or \$721 per American citizen—equaling a 5 % tax on wages. But of this “tax,” less than half goes to compensate people who are injured.¹ Not surprisingly, in response to the continually rising costs, the General Assembly has reformed certain aspects of Ohio tort law. In doing so, the legislature has fulfilled its constitutional role of making policy choices on behalf of all Ohioans, while properly heeding this Court’s guidance regarding the scope of the constitutional rights of the participants in the system.

Three specific statutes, enacted in Senate Bill 80 (the “2004 Tort Reform Law”), are currently at issue. Those three statutes include (1) limits on non-economic damages in certain cases, (2) limits on punitive damages awards, and (3) a provision allowing the introduction of evidence of collateral benefits. Arbino’s challenges to these statutes include that each one allegedly violates the right to a jury trial, the right to a remedy, the due process clause, the equal protection clause, the doctrine of separation of powers, and the single subject clause. Arbino’s arguments on each of these points, however, rely on a handful of previous decisions from this Court, without analyzing the substantial differences between the previous statutes and the new 2004 Tort Reform Law, and without considering changes in the caselaw since then. When each

statute is carefully scrutinized under the appropriate standard of review, Arbino cannot meet her burden of demonstrating, in this facial challenge, that there is no conceivable set of circumstances under which these statutes are constitutional.

Most state courts that have considered similar issues have upheld limits on noneconomic damages and limits on punitive damages. They have done so because these limits do not invade the fact-finding province of the jury and because these limits are a reasonable means of managing the costs of our tort system. So, too, with Ohio's new statutes. They are rationally related to the State's interest in controlling excessive and disproportionate damages awards, and address concerns raised previously by this Court. For example, the limit on noneconomic damages does not apply at all to cases involving catastrophic injuries, thus meeting the concerns this Court identified in *Morris v. Savoy* (1991), 61 Ohio St. 3d 684 and *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. Further, the United States Supreme Court has, over the past several years, made clear that the right to jury trial does not prohibit limits on the amount of punitive damages, thus providing good reason for this Court to revisit its rulings on this point. See *Cooper Indus. v. Leatherman Tool Group* (2001), 532 U.S. 424. Indeed, the U.S. Supreme Court has not only *allowed* limits on punitive damages; it has held that due process *requires* courts to review and limit punitive damages. *State Farm Mutual Insurance v. Campbell* (2003), 538 U.S. 408. Accordingly, Ohio's limits on noneconomic and punitive damages satisfy the due process clause and the equal protection clause, and do not infringe upon a plaintiff's right to a remedy or right to trial by jury.

Nor does the new collateral benefits statute violate any constitutional provision. It provides that a jury may consider evidence of certain collateral benefits, and is designed to ensure that that

¹ Tillinghast-Towers Perrin Study, February 2003, cited in §3(A)(3)(d), (e) of SB 80.

evidence be used only to eliminate duplicate recoveries, which is constitutionally acceptable. See *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 122. Accordingly, this statute, like the limits on noneconomic and punitive damages, is fully constitutional.

Having failed to make a convincing argument under any of the above constitutional provisions, Arbino attacks the entire bill as enacted in violation of separation of powers and the single subject clause. Nothing about the General Assembly's enactment of a statute, however, violates the doctrine of separation of powers, nor is an affront to the dignity of this Court. Legislative initiatives may change with each new General Assembly, which "is free to act upon its own judgment of its constitutional powers." *Sheward*, 86 Ohio St.3d at 528 (C.J., Moyer, dissenting), citing *Pfeifer v. Graves* (1913), 88 Ohio St. 473, 487.

Nor can Arbino mount a successful single subject challenge by merely pointing to a laundry list of provisions included in the bill. Instead she must demonstrate that the challenged provisions are not related to the subject of the bill, which she has failed to do. Limits on noneconomic damages, limits on punitive damages, and a collateral benefits statute are all related to the topic of tort reform.

In sum, Arbino's challenges lack merit, so this Court should answer the certified questions, "No."

STATEMENT OF THE CASE

Plaintiff-Petitioner Melisa Arbino ("Arbino") originally filed this diversity jurisdiction action in federal district court, seeking damages for injuries allegedly caused by her use of the Ortho Evra Birth Control Patch, which is manufactured by Defendant-Respondent, Johnson & Johnson Pharmaceutical Research. As part of her action, Arbino moved for partial summary judgment, asking the District Court to declare certain provisions of Ohio's 2004 Tort Reform Law (Senate Bill 80) unconstitutional.

The case is now before this Court on certified questions from the U.S. District Court for the Northern District of Ohio. That court issued an order certifying four questions to this Court, three of which this Court accepted for review:

1. Is Ohio Revised Code § 2315.18 (limits on noneconomic damages in certain cases), as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?
2. Is Ohio Revised Code § 2315.20 (permitting introduction of evidence of collateral benefits), as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?
3. Is Ohio Revised Code § 2315.21 (limits on punitive damages awards), as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

Arbino alleges that these statutes violate certain federal constitutional provisions (the Seventh Amendment right to jury trial and the Fourteenth Amendment rights to due process and equal protection) and the following Ohio constitutional provisions:

- Article 1, Section 5 right to trial by jury
- Article 1, Section 16 right to remedy
- Article 1, Section 16 due process of law
- Article 1, Section 2 equal protection of laws
- Article 2, Section 32 limiting General Assembly's powers
- Article 2, Section 15(D) single subject clause

See Amended Complaint; Merit Brief of Melisa Arbino ("Arbino Brief"). Because these issues are raised in a pretrial motion for summary judgment, these challenges are by necessity limited to facial challenges to the statutes. For ease of organization, this brief both re-states and re-orders the legal questions.

STATEMENT OF FACTS

A. The general assembly acted based upon a comprehensive legislative record and set forth specific findings regarding the need for the challenged reforms.

Senate Bill 80 was introduced in the Ohio Senate on May 1, 2003. It was passed by the legislature on December 8, 2004, and signed by the Governor on January 6, 2005. During this eighteen month legislative process, members heard testimony and received information from many interested parties, which culminated in several findings that were included in the Bill. See S.B. 80, Section 3. For example, the General Assembly cited a National Bureau of Economic Research Study, the 2002 White House Council of Economic Advisors' Study, a 2003 Harris Poll conducted by the U.S. Chamber of Commerce's Institute for Legal Reform, a February 2003 study published by Tillinghast-Towers Perrin, and the testimony of the Director of the Ohio Department of Development.

The General Assembly cited the following facts from these sources:

- States that have adopted abuse reforms have experienced employment growth between 11 and 12 percent, productivity growth of 7 to 8 percent, and total output growth between 10 and 20 percent.
- The cost of tort litigation is equal to a 2 and 1/10th percent wage and salary tax, a 1 3/10th percent tax on personal consumption, and a 3 and 1/10th percent tax on capital investment income.
- The cost of the United States tort system grew at a record rate in 2001. The system, however, failed to return even fifty cents for every dollar to people who were injured. 54 percent of the total cost accounted for attorney's fees, both for plaintiffs and defendants, and administration. Only 22 percent of the tort system's cost was used to directly reimburse people for the economic damages associated with injuries and losses they sustain.
- The cost of the United States tort system grew 14 and 3/10th percent in 2001, the highest increase since 1986, greatly exceeding overall economic growth of 2 and 6/10th per cent. As a result, the cost of the United States tort system rose to 205 billion dollars total or 721 dollars per citizen, equal to a 5 % tax on wages.

See S.B. 80, Sections 3(A)(3)(a)-(f). Based upon this evidence, as well as testimony, the General Assembly made the following findings:

- Ohio's economic well-being depends upon business providing essential jobs and creative innovation, and the civil litigation system then in place presented a challenge to that economic well-being.
- [A] fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued.
- Ohio has an 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 increase the cost of doing business, threaten Ohio jobs, drive up costs to consumers, and may stifle innovation.
- Inflated damage awards create an improper resolution of civil justice claims. The resulting increased cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.

See S.B. 80, Section 3 (A)(2), (3), (6)(d), and (6)(e).

In addition to these findings, the General Assembly also made findings specific to certain statutory changes, and explained its intent regarding some of these changes. For example, the General Assembly made the following findings regarding the need for a limit on noneconomic damages:

- Noneconomic damages cannot be precisely calculated and are inherently subjective. They are intended to be distinct from punitive damages, which serve the purpose of punishing a defendant for wrongful conduct. Noneconomic damages are not intended to punish a defendant for wrongful conduct.
- With respect for noneconomic loss for either: (1) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; or (2) permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities, the evidence that juries may consider in awarding pain and suffering damages for these type of injuries is different from evidence courts may consider for punitive damages.

- Generally, however, pain and suffering awards are inherently subjective, and the inflation of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.

See S.B. 80, Section 3(A)(6)(a), (c), and (d).

The General Assembly likewise made specific findings regarding the need to limit punitive damages. Members of the business community testified regarding the economic impact of occasional large punitive damages awards. S.B. 80, Section 3(A)(4)(d). Based on this testimony and other evidence, the General Assembly found that on occasion juries enter awards of punitive or exemplary damages that have no rational connection to the wrongful actions or omissions of the tortfeasor. Further, the General Assembly concluded that the United States Supreme Court provided the States with guidance regarding the need to limit irrational awards in *State Farm Mutual Insurance v. Campbell* (2003), 123 S.Ct. 1513. S.B. 80, Section 3(A)(4)(c). In addition, the General Assembly noted that a number of other states impose limits on punitive or exemplary damage awards. *Id.* at Section 3(A)(6)(d).

Finally, with regard to the collateral benefits statute, the General Assembly noted that 21 states have abolished or modified the collateral source rule. *Id.* at Section 3(A)(7).

B. The statutes at issue were designed to meet the General Assembly's specific concerns.

In response to the concerns noted above, the General Assembly enacted Senate Bill 80. Three statutes from that Bill are currently before this Court. The first is a limit on noneconomic damages in certain cases. The limits do not apply to plaintiffs that suffer catastrophic damages, such as (1) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; or (2) permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities. See R.C. 2315.18(B)(1) and (3). In addition, the limits do not apply to certain types of

cases, including tort actions against political subdivisions subject to Chapter 2744, wrongful death actions, medical claims, or breach of contract claims. R.C. 2315.18(H), 2315.18(A)(7).

Generally, however, the statute limits noneconomic damages to \$250,000 or an amount equal to three times the economic loss, as determined by the trier of fact, up to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence. See R.C. 2315.18(B)(2).

At the same time, the General Assembly placed certain limitations on punitive damages awards. If and when civil damages are awarded by a jury, the Ohio Revised Code requires that the jury specify the amount of compensatory damages. See R.C. 2315.21(B)(2) – (B)(3). Once the compensatory damages are specified by the jury, and punitive damages are awarded under R.C. 2315.21(C) and (E)(1), the court must follow certain requirements regarding any award of punitive or exemplary damages:

- (a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.
- (b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

See R.C. 2315.21(D)(1)(a), (b). Thus, awards must not exceed twice the specified compensatory awards as stated in (a), and awards may be further limited when the defendant is a small employer or individual. *Id.*

Finally, the General Assembly enacted a collateral benefits statute that provides:

- (A) In any tort action, the defendant *may* introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, *except* if

the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.

(B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

(C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

R.C. 2315.20 (emphasis added). Thus, both plaintiffs and defendants are now permitted to introduce evidence related to amounts that were payable as a benefit to the plaintiff. Evidence of collateral benefits that result from a statutory or contractual subrogation agreement, life insurance payment or a disability payment are not subject to the new statute, however, and therefore generally remain inadmissible. R.C. 2315.20(A). Life insurance and disability payments are admissible, however, if the policies were purchased by an employer and the action is against the employer. R.C. 2315.20(A).

STANDARD OF REVIEW

The Court applies a “strong presumption in favor of the constitutionality of legislation,” thus carrying out “the judicial obligation which exists to support the enactment of a law-making body if this can be done.” *State v. Beckley* (1983), 5 Ohio St.3d 4, 6-7. See also *State ex rel. Congress of Parents and Teachers v. State Bd. of Educ.* (2006), 111 Ohio St.3d 568, 2006-Ohio-5512, ¶20; *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142. And that presumption carries even more force in a case, like this one, that mounts a facial challenge to a statute. “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which

the Act would be valid. The fact that [a 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. Accordingly, this court does not find a law facially unconstitutional unless it holds “that under no reasonable set of circumstances could the statute operate constitutionally.” *Beckley*, 5 Ohio St.3d at 7. See also *State ex rel. Congress of Parents and Teachers v. State Bd. of Educ.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶21. Because Arbino cannot demonstrate that no set of circumstances exists under which the challenged statutes would be valid, her facial challenge must fail, and the Court should answer the certified questions in the negative.

ARGUMENT

Respondent State of Ohio’s Proposition of Law No. 1:

The current limits on noneconomic damages, which do not apply to those suffering catastrophic injuries, fully comply with all provisions of the Ohio Constitution.

Ohio’s limit on noneconomic damages is fully constitutional. First, the General Assembly, by excluding catastrophic injuries from the limits, has enacted a statute readily distinguishable from previous statutes. Second, limits on noneconomic damages do not implicate the right to trial by jury or the right to a remedy. Third, Arbino’s due process and equal protection claims must be evaluated under rational basis review, not strict scrutiny, and the General Assembly has enacted a statute that is rationally related to its goals of reforming the civil justice system. Accordingly, Ohio’s limits on noneconomic damages are fully constitutional.

A. By excluding plaintiffs who have suffered catastrophic injuries from its scope, the statute is materially distinguishable from previous tort reform efforts.

The 2004 Tort Reform Law established a limit to noneconomic damages, while creating a specific exemption from the limits for those that suffer catastrophic injuries. Noneconomic damages in cases involving non-catastrophic injuries are limited to the greater of \$250,000 or

three times economic damages, up to a total of \$350,000 per plaintiff, with a maximum limit of \$500,000 per occurrence. See R.C. 2315.18(B)(2). However, those who suffer catastrophic injuries do not have their noneconomic damages limited in any way. Catastrophic injuries are defined in R.C. 2315.18(B)(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.

Thus, those who suffer the most severe injuries will not have their damages limited by R.C. 2315.18.

The exemption for catastrophic injuries separates R.C. 2315.18 from other laws previously considered by this Court. In *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, the Court considered former R.C. 2307.43, which capped noneconomic damages in medical malpractice cases at \$200,000. In that case, the Court found that R.C. 2307.43 violated due process because the Court found no evidence of a rational connection between awards of over \$200,000 and malpractice insurance rates. *Morris*, 61 Ohio St. 3d at 690. The Court found that the statute was irrational and arbitrary because it imposed the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice. *Id.* at 691.

Then, in *Sheward*, the Court considered former R.C. 2323.54, which limited noneconomic damages to the greater of \$250,000 or three times the economic loss, up to a maximum of \$500,000. In the case of certain types of permanent injuries, the limits were set at \$1,000,000 or

\$35,000 times the plaintiff's remaining life expectancy. *Sheward*, 86 Ohio St.3d at 487. The Court invalidated this statute on the basis of its earlier ruling in *Morris v. Savoy*. *Id.* at 490.

Both of these cases, then, involved statutes distinguishable from R.C. 2315.18. The statute at issue in *Morris v. Savoy* set a much lower limit than the current statute (\$200,000 versus a possible total per plaintiff of \$350,000) and made no provision for greater compensation for those with severe physical injuries, which assumedly sometimes warrant large noneconomic damages awards. Indeed, it is this latter feature that the Court found arbitrary and unreasonable, in *Morris* and again in *Sheward*.² Under these circumstances, R.C. 2315.18 is distinguishable from the statutes evaluated in *Morris* and *Sheward* and deserves to be considered anew. And, upon consideration, this Court will find that the current limit on noneconomic damages fully complies with all provisions of the Ohio and U.S. Constitutions.

B. Limits on noneconomic damages do not violate the right to trial by jury.

Limits on noneconomic damages do not violate the right to trial by jury because the limits do not intrude upon any of the traditional core functions of a jury, namely the obligation to find facts and weigh the evidence. As such, these limits are not distinguishable for these purposes from other statutes that affect the tort system. For example, the General Assembly can create and abolish causes of action and can choose to authorize double or treble damages for certain violations of statutory rights. See, e.g., *Morris*, 61 Ohio St.3d at 697 (“[T]he General Assembly may limit, modify or abolish common law causes of action.”); see also R.C. 1345.09(B) (treble damages permitted for violations of Ohio Consumer Sales Practices Act); R.C. 1331.08 (treble damages permitted for violations of Ohio's Valentine Act); R.C. 4905.61. (treble damages

² Although the statute in *Sheward* addressed this concern by creating a heightened limit that applied to those with permanent injuries, the statute did not go as far as R.C. 2315.18, which completely exempts catastrophic injuries from its limits. Nor did the *Sheward* decision provide

permitted for violations of Ohio's public utilities laws); R.C. 901.51 (treble damages permitted in tort action for unauthorized removal of timber from private property); R.C. 2307.61 (treble damages in tort action for willful damage or theft to a property owner; R.C. 2923.31 (treble damages permitted for engaging in a pattern of corrupt activity). No precedent supports the argument that any statute that affects a plaintiff's ability to recover is protected by the right to trial by jury, which is essentially the position that Arbino urges here.

The right to a trial by jury is embodied in both the United States Constitution and the Ohio Constitution. In Ohio, the right to a trial by jury is manifested in Section 5, Article I of the Ohio Constitution, which provides:

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

When interpreting the right to a trial by jury under the Ohio Constitution, this Court follows the United States Supreme Court's interpretation of the parallel right granted by the United States Constitution, so decisions from that Court, as well as this Court, are persuasive authority. See *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 560 n.2 (citing *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 662 n.1.

Ohio's right to a trial by jury is designed to prevent government oppression and promote the fair resolution of *factual issues*. *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 544, 2006-Ohio-3257, ¶ 21, citing *Colgrove v. Battin* (1973), 413 U.S. 149, 157. Although the right to a trial by jury cannot be invaded by either legislative act or judicial decree, *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, that right is not absolute, and the Ohio Constitution does not entitle every civil litigant to a trial by jury. *Arrington*, 2006-Ohio-3257, at ¶ 22.

any detailed analysis regarding this aspect of the statute, instead treating the statute as

“Instead, [the constitutional provision] preserves the right only for those civil cases in which the right existed before the adoption of the constitutional provision providing the right.” *Id.* at ¶ 22, citing *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356; *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 396. “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.” *Tull v. United States* (1987), 481 U.S. 412, 426 (citations omitted); see also *Galloway v. United States* (1943), 319 U.S. 372, 392 (“[T]he [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements”). Therefore, the right to a trial by jury applies only in those cases in which the right existed before Section 5, Article I was adopted, and only to those attributes of the system of trial by jury that are considered fundamental to that system.

An unfettered right to determine the amount of damages, particularly noneconomic or punitive damages, is not a fundamental part of the right to trial by jury. This is true for two reasons, as further set forth below. First, if this were so, then courts would not be able to direct verdicts or to use the power of remittitur or additur to revise excessive or inadequate damages awards. Second, the statutes at issue do not allow a court to substitute its fact-finding for that of the jury, but merely set a legislative limit that the court applies to the jury award as part of its role of applying the law to the case. It is fact-finding that is the fundamental role of the jury. A statutory limit does not intrude upon this role, so the statute here is constitutional.

Not every aspect of the calculation of damages is protected by the right to jury trial. If so, then the courts could not engage in the well-established practices of directing a verdict or remittitur or additur without infringing upon the right to jury trial. Obviously, this is not the case.

indistinguishable from the statute at issue in *Morris*.

As the U.S. Supreme Court has stated, “the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.” *Galloway v. United States* (1943), 319 U.S. 372, 392 (upholding practice of directed verdict). For similar reasons, this Court has upheld the practice of additur because the practice was not “inconsistent with the right to a jury trial” even though that practice was not part of the common law. See, e.g., *Markota v. East Ohio Gas Co.* (1951), 154 Ohio St. 546, 555-556 (lengthy discussion of additur and remittitur in dicta). Accordingly, “inviolable” does not mean that every aspect of damages must be determined by the jury, free from the application of law, whether that law is in the form of common law or rules of judicial procedure or statutes.

Further evidence that the amount of damages can be subject to statutory determination is the fact that statutes sometimes mandate double or treble damages. *Hemmings v. Tidyman’s, Inc.* (9th Cir. 2002), 285 F.3d 1174, 1202. If a limit on the amount of damages violates the right to trial by jury, then so too would a statutory provision that increases the amount of damages. See *id.*; *Browning-Ferris Ind. of Vermont, Inc. v. Kelco Disposal Inc.* (1989), 492 U.S. 257, 274.

So why is it that statutes increasing or decreasing the amount of damages do not implicate the right to trial by jury? Quite simply, it is because the statutes in question are drafted in such a way that they do not interfere with the jury’s fundamental role as factfinder. In fact, the federal courts have routinely upheld statutory damages limits on this basis in the face of challenges pursuant to the Seventh Amendment. See, e.g., *Smith v. Botsford* (6th Cir. 2005), 419 F.3d 513, 519 (concluding that the State of Michigan’s limits on noneconomic damages neither implicates nor offends the Seventh Amendment because 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’”).

See also *Estate of Sisk v. Manzanares* (D. Kan. 2003), 270 F.Supp.2d 1265, 1277-78 (noting that federal courts have routinely held that statutory damages limits do not violate the Seventh Amendment); *Davis v. Omitowoju* (3d Cir. 1989), 883 F.2d 1155, 1161-1163; *Franklin v. Mazda Motor Corp.* (D. Md. 1989), 704 F.Supp. 1325, 1331; *Hemmings*, 285 F.3d at 1202.³

Likewise, other State courts have upheld noneconomic damages limits because they do not involve a reexamination of the factual question of damages. See *Evans v. State* (Alaska 2002), 56 P.3d 1046, 1051; *Kirkland v. Blaine County Med. Ctr.* (Idaho 2000), 4 P.3d 1115, 1120; *Guzman v. St. Francis Hosp., Inc.* (Wis. App. 2000), 240 Wis. 2d 559, 575-578, rev. denied, 242 Wis. 2d 543 (2001); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.* (1999), 257 Va. 1, 10-11; *Murphy v. Edmonds* (Md. 1992), 601 A.2d 102, 117; *Peters v. Saft* (Me. 1991), 597 A.2d 50, 53-54; *Robinson v. Charleston Area Med. Ctr.* (1991), 186 W. Va. 720, 730-731; *English v. New England Med. Ctr., Inc.* (1989), 405 Mass. 423, 426-427; *Etheridge v. Med. Ctr. Hosps.* (Va. 1989), 237 Va. 87, 95-97.⁴

Ohio's statute is constitutional for the same reason. Ohio's limits on noneconomic damages do not infringe on the jury's fundamental role as factfinder. The jury still hears the evidence in the case, determines whether there is liability, and determines the amount of the economic and noneconomic damages. Only after all of these steps have been taken, and the jury's fact-finding

³Arbino cites several decisions allegedly holding that limits on damages are unconstitutional. Arbino Brief at 28, n.21. Each is, upon closer examination, distinguishable, either on the contents of the statute at issue or the strength of the record upon which the legislature acted. Notably, virtually none of these decisions are recent, so those courts did not have the opportunity to consider the growing evidence of the costs that our civil justice system is imposing upon our country.

⁴ Other decisions rejecting this argument include the following: *Moore v. Mobile Infirmary Ass'n* (Ala. 1991), 592 So. 2d 156; *Smith v. Dep't of Ins.* (Fla. 1987), 507 So. 2d 1080; *Kansas Malpractice Victims Coalition v. Bell* (1988), 243 Kan. 333; *Lakin v. Senco Prods., Inc* (1999), 329 Ore. 62; *Sofie v. Fibreboard Corp.* (Wash. 1989), 112 Wash.2d 636, 647-648.

has concluded, does the judge compare the amount of noneconomic damages to economic damages and ensure that the amount of noneconomic damages complies with the statute. Thus, this statutory limitation on noneconomic damages does not implicate those functions that are protected by the right to trial by jury.

Arbino's arguments to the contrary are mistaken. First, *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, did not hold that a limit on noneconomic damages violates the right to trial by jury. In that case, the court found that a collateral source rule that allowed the judge to eliminate the *entire* jury award violated the right to trial by jury. Also, in that case, the collateral benefits received from the workers compensation system would have entirely eliminated the plaintiff's award for pain and suffering, even though the workers compensation benefits did not contain a pain and suffering component. Thus, the provision violated the right to jury trial not because, as is the case here, it limited the amount of damages recoverable, but because it completely eliminated the jury award, even though the jury award and collateral benefits were not duplicative. Similarly, *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 421 is inapposite. In that case, a statute granted the defendant the option to pay over time. The Court held that the delayed-payment option arbitrarily and unreasonably discounted the judgment because Ohio law already requires that judgments be reduced to their present value.

Nor do either *Morris v. Savoy* or *Sheward* support Arbino's view. In *Morris v. Savoy*, the Court did not issue a majority opinion on the right to trial by jury. Instead, Arbino cites a concurring opinion. And *Sheward* addressed a limit on punitive damages, not noneconomic damages. And even that ruling, has since been, as detailed below, seriously undercut by more recent case law holding that awards of punitive damages are not protected by the Seventh Amendment. See *Cooper Indus. v. Leatherman Tool Group* (2001), 532 U.S. 424. And *Cooper*

distinguishes another case relied upon by Arbino, *Hetzel v. Prince William County* (1998) 523 U.S. 208, on the basis that *Hetzel* concerned compensatory damages. Thus, the United States Supreme Court has recognized that not all types of damages are created equal for purposes of the Seventh Amendment, and has completely undercut *Hetzel* as authority for Arbino's arguments regarding punitive damages.

Finally, those cases that state the proposition that remittitur requires the plaintiff's consent do not establish that across-the-board limits on noneconomic damages necessarily violate the right to trial by jury. A statutory limit by definition lacks the arbitrariness that could occur if courts, on a case-by-case basis, were to independently re-weigh the evidence and reduce the amount of damages. A statutory limit on noneconomic damages is much closer to the many other statutes that already govern tort actions. For example, Ohio has statutory causes of action for products liability, and Arbino's claim coincidentally is based on products liability. See R.C. 2307.71, *et. seq.* In the end, Arbino cannot point to a mountain of authority supporting her, as she claims to provide. Rather, this question has not yet been considered by this Court, and the Court should now join the many courts that have concluded that limits on noneconomic damages do not implicate the right to trial by jury.

C. Limits on noneconomic damages do not violate the right to a remedy provision.

The limits on noneconomic damages do not violate the right to a remedy. That right comes from Article I, Section 16 of the Ohio Constitution, which provides:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

As such, this is also the provision that guarantees the right to due process, and the concept of "right to a remedy" is almost indistinguishable from the concept of due process, in that those statutes that this Court has found violate the right to a remedy provision also violate due process.

See, e.g., *Sorrell*, 69 Ohio St.3d at 422-424, 426-427. As interpreted by this Court, “[t]he right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution ‘requires an opportunity [for a remedy] granted at a meaningful time and in a meaningful manner.’” *State ex rel. Sysco Food Serv. of Cleveland, Inc. v. Indus. Comm.* (2000), 89 Ohio St.3d 612, 614, quoting *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 62.

The right to a remedy can be violated only by statutes that completely foreclose any relief at all, and all of the cases that Arbino relies upon by can be distinguished on this basis. See, e.g., *Sorrell*, 69 Ohio St.3d at 426 (invalidating a statute that could operate to deprive victims of any judgment for damages); *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59 (striking a statute concerning the accrual date of a cause of action for specific injuries); *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45 (striking a four-year statute of limitations for malpractice claims because the victim did not know or should not have known of injury). Such is not the case regarding a limit on noneconomic damages.

Under R.C. 2315.18, a plaintiff can receive a judgment of up to \$350,000 for noneconomic damages. And plaintiffs with catastrophic damages will not be limited at all in recovering noneconomic damages. And economic damages are not limited in any way at all. Under these circumstances, this statute does not foreclose a plaintiff’s right to a remedy for his or her injuries, because a plaintiff has a meaningful opportunity to pursue an action against the wrongdoer, which is the nature of the right protected here.

D. Limits on noneconomic damages do not violate the right to due process.

Article I, Section 16 of the Ohio Constitution also protects Ohioans’ rights to due process of law, and the limits on noneconomic damages do not violate that right. “A legislative enactment will be deemed valid on due process grounds . . . [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not

unreasonable or arbitrary.” *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274. And the Court has previously explained that limits on noneconomic damages are to be evaluated pursuant to this standard. *Morris*, 61 Ohio St.3d at 688-689. Under that standard, Ohio’s limit on noneconomic damages does not violate due process, as the limit bears a real and substantial relation to the general welfare of the public and is not unreasonable or arbitrary.

First, the limit is related to the general welfare of the public, because the imposition of reasonable limits on noneconomic damages will reduce the costs that all Ohioans pay (whether through product costs, health insurance, or other insurance costs) to compensate plaintiffs. This, in turn, will help create a more favorable environment for business and thus for jobs and prosperity for all Ohioans. And these limits are not unreasonable or arbitrary, in that they properly balance the need for reform against the rights of plaintiffs, who can recover unlimited economic damages, a reasonable award for noneconomic damages, and a reasonable award of punitive damages. And, unlike earlier versions of these limits, the cost savings are not achieved by imposing these costs on those with the most serious of injuries. Instead, those plaintiffs are eligible for noneconomic damages that are not limited by the new law, but are limited only by a Court’s already-existing ability to determine that the award is excessive.

Accordingly, nothing on the face of this statute renders it unreasonable or arbitrary, and R.C. 2315.18 should be upheld on its face. Should the limit operate inequitably under some unforeseen set of circumstances, those circumstances can be addressed on an as-applied basis.

E. Limits on noneconomic damages do not violate the right to equal protection.

Arbino also asserts that the limit on noneconomic damages violates the equal protection clauses of the Ohio and U.S. Constitutions, but she is wrong. Again, like the right to a jury trial and the Seventh Amendment, these two clauses are interpreted in tandem. See *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, ¶ 7 citing *Am. Assn. of Univ. Professors, Cent.*

State Univ. Chapter v. Cent. State Univ. (1999), 87 Ohio St.3d 55, 60, reversed on other grounds (1999), 526 U.S. 124. Ohio's limit on noneconomic damages does not violate Arbino's equal protection rights.

First, Arbino incorrectly states the standard of review. It is only "[i]f the challenged legislation impinges upon a fundamental constitutional right [or a suspect class], [that] courts must review the statutes under the strict-scrutiny standard." *Harrold v. Collier*, 107 Ohio St.3d 44, 50, 2005-Ohio-5334, ¶ 39. On the other hand, "[a] statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or United States Constitutions if it bears a rational relationship to a legitimate governmental interest." *McCrone*, 2005-Ohio-6505, ¶ 8, quoting *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29. In this case, strict scrutiny does not apply because the limit on noneconomic damages does not affect a suspect class or impinge upon a fundamental right.

Arbino asserts that strict scrutiny applies because the statute infringes upon the right to a jury trial, but her effort to bolster her equal protection claim with her jury-trial claim fails. As explained above, her jury-trial claim is without merit. Consequently, that claim provides no basis to upgrade the standard of review for her equal protection claim. In the absence of a separate infringement upon a fundamental right, this statute must be evaluated pursuant to rational basis review, and easily satisfies that standard.

Under rational basis review, a statute "must be upheld if there exists any conceivable set of facts under which the classification rationally further[s] a legitimate legislative objective." *Morris v. Savoy*, 61 Ohio St.3d at 689 (quoting *Schwan v. v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300, 301). "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because

in practice it results in some inequality.” *McCrone*, 2005-Ohio-6505, ¶ 8 (citations omitted). In fact, states are not required “to produce evidence to sustain the rationality of a statutory classification.” *American Ass'n of Univ. Professors v. Central State Univ.*, 87 Ohio St.3d at 58 (citations omitted).

Ohio’s limit on noneconomic damages balances society’s interests, as it is designed to curb the sometimes excessive costs imposed by our current system of civil justice, while simultaneously protecting the interests of injured parties in being fully compensated. And the current law better balances those interests than did the statute at issue in *Morris v. Savoy*, because this statute excludes catastrophic injuries from its coverage. Accordingly, if that former statute, with no exemption and a lower limit than this statute, did not violate the equal protection clause, neither does this new and improved version. See *Morris v. Savoy*, 61 Ohio St.3d at 692 (“using the ‘any conceivable set of facts’ test of *Schwan* supports a rational-basis argument for the distinctions made” in former 2307.43).

Arbino’s authorities to the contrary are distinguishable. See Arbino Brief at 28-29, n. 21. In each case in which a state has struck down its noneconomic damages limits, that case can be distinguished from the provisions in R.C. 2315.18. Most recently, Wisconsin’s highest court held that its \$350,000 cap on noneconomic damages in medical malpractice actions violated the equal protection provision of the Wisconsin Constitution. See *Ferdon v. Wisconsin Patients Comp. Fund* (Wis. 2005), 701 N.W.2d 440. However, like the statute at issue in *Morris v. Savoy*, and unlike the statute now before this Court, the statute in *Ferdon* did not contain a provision allowing for those limits to increase in cases involving severe injuries. See also *Best v. Taylor Machine Works, Inc.* (Ill. 1997), 689 N.E.2d 1057 (which likewise contained a single limit that applied no matter how severe the injuries suffered).

The State of Ohio has a rational and legitimate state interest in ensuring 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. Such lawsuits increase the cost of doing business, threaten Ohio jobs, drive up costs to consumers, and may stifle innovation. Therefore, R.C. 2315.18, which is designed to ensure that noneconomic damages are limited to a multiple of economic damages, serves that interest and is constitutional on its face.

Respondent State of Ohio's Proposition of Law No. 2:

Reasonable limits on punitive damages fully comply with the Ohio Constitution.

The time has come for the Court to reconsider the constitutionality of limits on punitive damages. Two reasons support such reconsideration. First, since this Court previously concluded that limits on punitive damages awards are unconstitutional, the United States Supreme Court has significantly changed the legal landscape surrounding the award of punitive damages. In particular, the United States Supreme Court has limited the scope of awards of punitive damages by acknowledging that 1) the constitutional right to a jury is *not* implicated by limits on punitive damages; 2) the constitution *requires* limits on the amounts awarded as punitive damages; and 3) state legislatures are permitted to set limits on punitive damages awards. As a result, the limit on awards of punitive damages enacted in R.C. 2315.21 (twice the amount of compensable damages, or 10% of the small employer or individual's net worth up to a maximum of \$350,000) fully comports with the right to trial by jury.⁵ Finally, these limits are also reasonable and not arbitrary, and thus equally comport with the right to a remedy, due

⁵ Arbino also mentions R.C. 2315.21(C)(1), which requires proof that a defendant knowingly authorized, participated in, or ratified the actions of its agent or servant in order to assess punitive damages against that defendant. But Arbino makes no real effort to explain how this particular provision violates the right to a jury trial, the right to remedy, due process, or equal protection. Consequently, she provides no sound reason to invalidate this provision.

process, and the equal protection clause. Accordingly, this Court should hold that this statute is constitutional on its face.

A. Limits on Punitive Damages Do Not Violate The Right To Trial By Jury.

- 1. This Court should reconsider its earlier decisions based upon changed circumstances, which include clarifying decisions of the United States Supreme Court.**

The Court has previously held that limits on punitive damages violate the right to trial by jury, albeit in a case readily distinguishable from this one. In *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, 557, the Court concluded that a provision enabling courts to set punitive damages, instead of juries, violated the right to trial by jury under Section 5, Article I of the Ohio Constitution because “the assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury.” Citing to *Zoppo* five years later, in *Sheward*, this Court again noted (in dicta because the Court struck the entire bill as unconstitutional under the single subject clause) that limits on punitive damages are unconstitutional on the basis of the right to have a jury determine punitive damages. 86 Ohio St.3d at 485.

Since this Court’s rulings on the issue of punitive damages in *Zoppo* and *Sheward*, the United States Supreme Court has definitively held that the Seventh Amendment does not apply to awards of punitive damages, and it has expressly recognized states’ ability to maintain limits on such awards. Because this Court interprets the scope of Ohio’s right to trial by jury in tandem with the Seventh Amendment, it is appropriate for this Court, despite its decisions in *Zoppo* and *Sheward*, to now revisit whether limits on punitive damages violate the right to trial by jury.

Although *stare decisis* is an important principle that provides continuity and predictability in our legal system, the Court has never hesitated to re-examine its earlier precedents when changes in the law or circumstance dictate the need to do so. See *Westfield Ins. Co. v. Galatis*,

100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 42. The Court “not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors.” *Id.* at ¶¶ 42, 44. “Thus, in Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or *changes in circumstances no longer justify continued adherence to the decision*, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Id.* at ¶ 48 (emphasis added). And this Court has previously overruled its own decisions based on U.S. Supreme Court precedent concerning parallel constitutional provisions. See *State v. Murrell*, 94 Ohio St.3d 489, 495-496, 2002-Ohio-1483 (overruling the Court’s previous decision regarding the interpretation of the Ohio Constitution based upon the U.S. Supreme Court’s decision regarding its interpretation of the Fourth Amendment).

Yet another factor that weighs in favor of revisiting this Court’s earlier decisions is the fact that the decisions in question were issued by a sharply divided court. See *Gallimore v. Children’s Hosp. Med. Ctr.* (1993), 67 Ohio St.3d 244 (overruling earlier decision by deeply divided Court); *Cincinnati Ins. Co. v. Phillips* (1990), 52 Ohio St.3d 12 (questioning validity of ruling by sharply divided Court). The Court’s plurality opinion regarding punitive damages in *Zoppo*, was written by Justice F. Sweeney, and that opinion was joined by only two other justices, with Justice A. Sweeney’s concurring in the syllabus and judgment only). And the *Sheward* decision was a 4-3 decision. Thus, in this case, the significant changes in the law, in the form of decisions of the U.S. Supreme Court regarding punitive damages, warrant that this Court re-examine these earlier controversial and closely-divided decisions regarding the scope of Ohio’s right to trial by jury. The time has come to bring Ohio law back in line with the Seventh Amendment.

2. The U.S. Supreme Court has definitively held that the Seventh Amendment does not prevent adjustments to punitive damages awards.

In 1996, the United States Supreme Court took the first step towards authorizing limits on punitive damages awards when it established certain guidelines that courts should consider when reviewing these awards. In *BMW of North America v. Gore* (1996), 517 U.S. 559, an automobile distributor moved to set aside a jury verdict rendered against it for \$4,000 in actual damages and \$4,000,000 in punitive damages. *Id.* at 565. On appeal, the Court remanded the case and held that the 500-to-1 ratio of punitive damages to compensatory damages was not reasonable and violated the due process rights of the defendant. *Id.* at 574-575. Most notably, the Court held that courts are to consider the following factors when determining whether a punitive damages award is grossly excessive: (1) the degree of reprehensibility of the defendant's actions; (2) the disparity between the harm or potential harm suffered and the punitive damages award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *Id.*

Then, in 2001, two years after this Court's decision in *Sheward*, the U.S. Supreme Court limited the scope of punitive damages even further. In *Cooper Indus. v. Leatherman Tool Group* (2001), 532 U.S. 424, a jury awarded a manufacturer \$50,000 in compensatory damages and \$4.5 million in punitive damages against a competitor. *Id.* at 426. The Court remanded the judgment and verdict, and expressly delineated the distinct purposes served by compensatory and punitive damages. Compensatory damages "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," while punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." *Id.* at 432 (citations omitted). As

a result, the Court held that appellate courts are required to apply the *BMW* factors *de novo* to a jury's award of punitive damages. *Id.* at 436.

Most importantly, the Court also concluded in *Cooper Industries* that “[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, *the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.*” *Id.* at 437 (emphasis added). “Because *the jury’s award of punitive damages does not constitute a finding of ‘fact,’* appellate review of the District Court’s determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its amicus.” *Id.* (emphasis added). And, relying on the fact that “[a] good many States have enacted statutes that place limits on the permissible size of punitive damages awards,” the Court stated that just as “[l]egislatures have extremely broad discretion in defining criminal offenses,” *** legislatures [also] enjoy broad discretion in authorizing and limiting permissible punitive damages awards.” 532 U.S. at 433. Accordingly, the Court determined that both judicial and legislative limits on punitive damages awards do not run afoul of the Seventh Amendment.

Finally, in 2003, the Court again confirmed that “[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.” *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 416 (reversing a jury’s award of \$145 million in punitive damages upon an award of \$1 million in compensatory damages as being grossly excessive and in violation of due process rights of defendants) (citations omitted).

The end result of the decisions in *Cooper Industries* and *State Farm v. Campbell* is that the United States Supreme Court has clarified that punitive damages awards are not part of the essential fact-finding mission of a jury, and that the courts and legislatures may impose limits on

these awards without violating the Seventh Amendment. Indeed, where legislatures do not limit these awards, the courts will have the duty to do so when an award is so disproportional that it violates the due process rights of the defendant. Under these circumstances, this Court's earlier decisions on this same subject warrant reconsideration.

3. A limit on punitive damages does not violate Ohio's right to trial by jury.

Ohio's right to a trial by jury is designed to prevent government oppression and promote the fair resolution of *factual issues*. *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, ¶ 21, 544, citing *Colgrove v. Battin* (1973), 413 U.S. 149, 157. As is true in the case of noneconomic damages, “[o]nly 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.” *Tull v. United States*, 481 U.S. 412, 426 (1987) (citations omitted); see also *Galloway v. United States*, 319 U.S. 372, 392 (1943) (“[T]he [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements”). In *Cooper Industries*, the United States Supreme Court held that “unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.” *Cooper Indus.*, 532 U.S. at 437, quoting *Gasperini v. Center for Humanities, Inc.* (1996), 518 U.S. 415, 459 (Scalia, J., dissenting) (citation omitted). And the Court made this determination after a careful consideration of the historical rule of punitive damages at common law as compared to the modern day, in which the primary purpose is to punish the defendant. *Id.* at 437-438, n. 11. Accordingly, this decision (and more importantly the change in the purpose of punitive damages recognized by this decision) also supports a finding that a limit on punitive damages does not violate the right to trial by jury.

As is true of noneconomic damages, as explained above, an unfettered right to determine the amount of damages is not a fundamental part of the right to trial by jury. See *Dardinger v.*

Anthem Blue Cross & Blue Shield, 98 Ohio St.3d 77, 2002-Ohio-7113, (upholding the power of the courts to reduce awards of punitive damages through remittitur). See also *Board of Comm'r's of Champaign County v. Church* (1890), 62 Ohio St. 318, 346 (upholding right of General Assembly to set damages that are penal or corrective in nature). Because R.C. 2315.21 does not allow a court to substitute its fact-finding for that of the jury, but merely sets a legislative limit that the court applies as part of its role of applying the law to the case, its limits are fully constitutional.

4. If R.C. 2315.21 is upheld, Ohio would be joining the majority of states that limit punitive damages.

Because the United States Supreme Court has expressly recognized that states are empowered to limit awards of punitive damages, the majority of states have now enacted limits on punitive damages. Therefore, if the limits in R.C. 2315.21 are upheld, Ohio law will be consistent with the recent decisions from the United States Supreme Court and almost every other state court who has considered the issue. See, e.g., *Gilbert v. Sec. Fin. Corp. of Okla., Inc.*, 2006-OK-58, at ¶ 42 citing *Cooper Indus.*, 532 U.S. at 433 (holding that a bright-line ratio imposed on a punitive damages award is a matter of public policy for the state legislatures because “[t]he United States Supreme Court has tacitly approved of a legislatively imposed dollar cap on punitive damages”).

Since the Supreme Court’s decision in *State Farm v. Campbell* in 2003, Arkansas, Colorado, Idaho, Montana, Mississippi, and Texas have instituted new limitations on punitive damages, none of which has been held to be unconstitutional. In all, thirty-four states, including Ohio, have limits on awards of punitive damages. See Summary of Limits on Punitive Damages, Exhibit (attached). These limits include outright bans, fixed dollar limits, limits based on multiples of compensatory damage awards, and evidentiary requirements.

Additionally, this Court's sister courts have upheld limits on punitive damages based upon their determination that the right to a jury trial does not include an unlimited right to punitive damages. For example, the Alaska Supreme Court has upheld statutes generally limiting the amount of punitive damages to the greater of three times compensatory damages, or \$500,000. *Reust v. Alaska Petroleum Constrs., Inc.* (Alaska 2005), 127 P.3d 807; *Evans v. State*, 56 P.3d 1046. The court upheld the imposition of these limits, finding that "the decision to place a cap on [punitive] damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury." *Reust*, 127 P.3d at 822; *Evans*, 56 P.3d at 1051. Specifically, limits on punitive damages awards "did not intrude on the jury's fact-finding function, because the cap was a 'policy decision' applied after the jury's determination, and did not constitute a re-examination of the factual question of damages." *Id.* at 1050-1051; see also *Gilbert v. Sec. Fin. Corp. of Okla., Inc.*, 2006-OK-58 (holding that Oklahoma's \$500,000 limit on punitive damages is fully constitutional); *Rhyne v. K-Mart Corp.* (2004), 358 N.C. 160 (holding that North Carolina's limits on punitive damages did not violate the North Carolina Constitution's protections of the right to jury trial).⁶

⁶ These recent decisions are in addition to a host of earlier state court decisions upholding limits on punitive damages. See *Smith v. Printup* (Kan. 1993), 866 P.2d 985 (affirming the constitutionality of limitations on punitive damages because a party had no vested right to punitive damages, and the legislature could modify the method of how punitive damages were determined); *Bernier v. Burris* (1986), 113 Ill.2d 219, 246-247 (upholding elimination of punitive damages in medical malpractice cases because it served the legitimate legislative goal of reducing damages against the medical profession); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.* (Tex. Ct. App. 1998), 979 S.W.2d 730 (affirming limitation of punitive damages to the amount of \$200,000); *Arnesano v. State* (Nev. 1997), 942 P.2d 139 (upholding limits on damages and a prohibition of punitive damages in certain tort cases); *Gordon v. State* (Fla. 1992), 608 So.2d 800 (upholding a statutory requirement limiting the percentage of recoverable punitive damages to plaintiffs, who have no vested rights in punitive damages); *Etheridge v. Medical Ctr. Hosps.* (Va. 1989), 376 S.E.2d 525 (concluding that limits on damage awards in medical malpractice actions did not violate due process, right to a jury trial, equal protection

Indeed, other than Ohio, only one State court has invalidated limits on punitive damages. See *Henderson v. Alabama Power Co* (Ala. 1993), 627 So. 2d 878. However, the soundness of that decision has very limited precedential value, in either Ohio or Alabama, since the Alabama Supreme Court acknowledged eight years later that “*Henderson ... was wrongly decided*” and that a cap on punitive damages does not violate the right to a trial by jury under the Alabama Constitution. *Ex parte Apicella* (Ala. 2001), 809 So. 2d 865, 874; see also, *Mobile Infirmary Med. Ctr. v. Hodgen* (Ala. 2003), 884 So.2d 801, 813.

Accordingly, this Court should recognize the wisdom set forth in both the decisions of the United States Supreme Court and its sister courts and hold that a limit on punitive damages does not violate the right to a jury trial.

B. Limits on punitive damages do not violate the right to remedy or right to due process.

A limit on punitive damages does not violate the right to a remedy or the right to due process and this is so for many of the same reasons that apply to limits on noneconomic damages. First, a limit on punitive damages does not deprive a plaintiff of a meaningful opportunity to obtain a remedy, and thus does not violate the right to a remedy provision. And, because a limit on punitive damages bears a real and substantial relation to the general welfare of the public, and is not unreasonable or arbitrary, it does not violate the right to due process. *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274.

The General Assembly enacted R.C. 2315.21 in order to “restore balance, fairness, and predictability to the civil justice system.” S.B. 80, Section 3(A)(4)(a). This goal was prompted by the General Assembly’s recognition of the guidance provided by the United States Supreme Court in the *State Farm* decision, which noted “the imprecise manner in which punitive damages

guarantees, the separation of powers doctrine and prohibitions against special legislation under the Virginia Constitution).

systems are administered.” *State Farm*, 538 U.S. at 417; see also Senate Bill 80, § 3(A)(4)(c). Based on the recent guidance from the U.S. Supreme Court, as well as continually developing evidence regarding the costs associated with the tort system, the General Assembly has a legitimate interest in striving to ensure that punitive damages awards are reasonable, and implemented that interest in a manner that is neither unreasonable nor arbitrary. Accordingly, the limit on punitive damages does not violate either the right to a remedy or the due process clause.

First, the limit is related to the general welfare of the public, because the imposition of reasonable limits on punitive damages will reduce the costs that all Ohioans pay (whether through product costs, health insurance, or other insurance costs) while still preserving the deterrent effect of an award of punitive damages. And the chosen limits are not unreasonable or arbitrary, in that they properly balance the need for reform against the rights of plaintiffs, who can recover unlimited economic damages, a reasonable award for noneconomic damages, and a reasonable award of punitive damages. Accordingly, there is nothing on the face of R.C. 2315.21 that renders it unreasonable or arbitrary; therefore, this statute should be upheld on its face.

C. Limits on punitive damages do not violate the equal protection clause.

Limits on punitive damages also fully comply with the equal protection clause. First, these limits are not subject to strict scrutiny, as Arbino claims, but to rational basis review. And, when rational basis review is applied to these reasonable limits, they pass muster.

Arbino asserts two different bases in support of her argument that limits on punitive damages are subject to strict scrutiny, neither of which is applicable. First, she asserts that strict scrutiny applies because these limits implicate the fundamental right to a jury trial. Arbino Brief at 33. However, as set forth above, these limits do not infringe upon the fundamental right to trial by jury, and hence this argument fails. Second, Arbino asserts that strict scrutiny applies because the statute allegedly impacts women, the elderly, and children to a greater impact than other tort

victims. *Id.* at 30-33. However, no matter what arguments may be made regarding who the statute impacts, the legal question raised by the equal protection clause is whether the statute draws a classification based upon membership in a suspect class, not whether a plaintiff can hypothesize that the neutral classification made by a statute somehow affects members of a suspect class differently, despite its facial neutrality. In this case, the statute applies equally to all tort plaintiffs, and if it makes any classification at all, that classification is one between plaintiffs with jury awards of punitive damages over the amounts of the limits, and those with awards less than that amount. There is no conclusive evidence that this distinction is in any way based on gender, nor does it make sense that punitive damage awards should be greater or lesser based on the gender of the plaintiff. Under these circumstances, Arbino has failed to demonstrate that strict scrutiny applies to the limits on punitive damages.

Accordingly, the limit on punitive damages satisfies equal protection if “it bears a rational relationship to a legitimate governmental interest.” *McCrone*, 2005-Ohio-6505, ¶ 8. In this instance, the General Assembly has a legitimate governmental interest in ensuring that tort awards not violate the rights of defendants, that Ohio have an environment conducive to business, and that the tort system fairly compensates injured individuals without imposing undue costs on Ohioans. Correspondingly, the means utilized by the General Assembly to reform Ohio’s civil justice system and set reasonable limits on awards of punitive damages are rational.

Arbino’s argument that the General Assembly lacked evidence regarding the need for limits, and that the General Assembly failed to cite a single excessive award, completely misses the mark. See Arbino Brief at 36-37. First, the General Assembly cited numerous compelling studies, and it is not this Court’s role to review the policy choices made by the General

Assembly, certainly not under the guise of conducting rational basis review.⁷ Second, the General Assembly had to go no farther than recent decisions from this Court to find examples of punitive damages awards that this Court has deemed excessive. In *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, ¶ 183, this Court found that the trial court's punitive damages award of \$49,000,000 was excessive under Ohio law, and subsequently reduced the award by 39 percent. And in *Wightman v. Conrail* (1999), 86 Ohio St.3d 431, this Court upheld a trial court's reduction of a jury's punitive damages award by 40 percent, from \$25 million to \$15 million. The General Assembly certainly had adequate evidence to determine that some Ohio juries were awarding excessive punitive damages awards.

And limiting punitive damages awards is rationally related to the goal of ensuring that defendants are not subject to excessive awards, while still permitting awards sufficient to achieve the deterrent effect served by punitive damages awards. By placing limits on awards of punitive damages, the General Assembly sought to protect the general welfare of the public by restoring balance and predictability to Ohio's civil justice system. As this Court has seen in cases like *Dardinger* and *Wightman*, and the United States Supreme Court has seen in *State Farm* and *BMW*, arbitrary and excessive awards of punitive damages are becoming an increasing problem. Most likely, this is why thirty-five states have enacted some form of limits on awards of punitive damages. As a corollary, it was neither unreasonable nor arbitrary for the General Assembly to logically conclude that placing limits on such awards would help restore the integrity of Ohio's civil justice system. Therefore, Arbino is unable to satisfy her heavy burden of establishing that

⁷ Regarding Plaintiff's criticisms of the studies cited by the General Assembly, the State refers the Court to Johnson & Johnson's Brief, which does a thorough job of summarizing the scope of the debate surrounding these and other studies, and refuting Arbino's criticism. See Merit Brief of Johnson & Johnson's Brief, at 34-37.

no reasonably conceivable set of facts provides a rational basis for the limits placed on awards of punitive damages in R.C. 2315.21.

Respondent State of Ohio's Proposition of Law No. 3:

Ohio's collateral benefits statute is constitutional.

In Arbino's motion for partial summary judgment in the District Court, she alleged that R.C. 2315.20 was unconstitutional in light of this Court's opinion in *Sheward*. However, in her Merit Brief, Arbino has chosen not to address this question because, as she explains, she now lacks standing to challenge R.C. 2315.20 since "discovery has ascertained that Ms. Arbino's medical insurance contract contains a subrogation clause...[w]hich removes her case from the ambit of amended R.C. § 2315.20..." Arbino Brief at 4, n. 3. However, Arbino still asserts multiple arguments in which she urges this Court to strike Senate Bill 80 in its entirety. Accordingly, she has hardly dropped her challenges to this statute. Furthermore, this same argument could just as easily be made regarding limits on noneconomic damages and punitive damages, because at this point the Court has no way of knowing whether, and to what extent, a jury will award these damages to this plaintiff. Nevertheless, Arbino's facial challenge to these statutes is appropriately before this Court via certified questions. Accordingly, this Court should address the issue of whether the collateral benefits statute set forth in R.C. 2315.20 is facially unconstitutional. And because the statute operates constitutionally, it should be upheld.

The relevant portions of Ohio's collateral benefits statute, as enacted in Senate Bill 80, state that:

- (A) In any tort action, the defendant *may* introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, *except* if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance

payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.

(B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

(C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

R.C. 2315.20 (emphasis added). Thus, both plaintiffs and defendants are now permitted under Ohio law to introduce evidence related to amounts that were payable as a benefit to the plaintiff, unless the source of the collateral benefit results from a statutory or contractual subrogation agreement, life insurance payment or a disability payment. Accordingly, the primary circumstance under which this statute will apply is in permitting evidence of payments under life insurance and disability policies, paid for by an employer, in suits filed against the employer.

Ohio law does not currently preclude all evidence of collateral benefits. Most notably, this Court has recently begun to recognize that there are limitations on the collateral source rule as it exists at common law, and that its application today no longer necessarily serves its original purpose. To fully understand this shift, it is necessary to review the applicable case law dealing with the common law collateral source rule.⁸

First, it is beyond doubt that the state has a legitimate interest in preventing double recoveries, which is the goal of modifying the common law collateral source rule. See *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 122 ("it is constitutionally permissible for the state to prevent a tort victim from recovering twice for the same item of loss or type of damage, once from the collateral source and again from the tortfeasor."). At the same time, statutes that

are designed to prevent double recoveries, but in reality reduce a plaintiff's tort recovery irrespective of whether double recovery has actually occurred, are arbitrary and unreasonable, and thus unconstitutional. *Id.* at 122 (citations omitted); *Sorrell v. Thevenir*, 69 Ohio St.3d at 423-424; *Sheward*, 86 Ohio St.3d at 482.

The collateral source rule was first identified as a common law rule by this Court in *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 107. In *Pryor*, this Court concluded that the collateral source rule is an exception to the general rule regarding compensatory damages in a tort action, which requires the measure of damages to make the plaintiff whole. *Id.* After *Pryor*, the General Assembly began enacting statutory limits on the application of the common law collateral source rule.

These statutory limits have sometimes passed constitutional muster, and at other times, have not. In *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 693, the Court upheld the constitutionality of R.C. 2305.07, which eliminated duplicate recoveries in medical malpractice actions. Then, in *Sorrell*, 69 Ohio St.3d 415, this Court considered former R.C. 2317.45, which *required* courts to deduct the amount of collateral benefits from a plaintiff's jury award. Because the *required* deduction infringed upon the jury's fundamental role as factfinder by potentially eliminating the plaintiff's entire damages award even if that award did not include elements compensated by the payment of the collateral source, this Court concluded that the statute violated the right to trial by jury, and the due process and equal protection clauses. *Id.* at 422-427.

Then, in *Sheward*, the Court once again, in dicta, noted that House Bill 350's provision modifying the collateral source rule was likewise unconstitutional because it failed "to take into

⁸ For a thorough analysis on the history of the common law collateral source rule in Ohio, and its

account whether the collateral benefits held against the general verdict are within the damages actually found by the jury.” *Sheward*, 86 Ohio St.3d at 482. Finally, in *Holeton*, this Court concluded that deductions for collateral benefits *are permitted* if the loss for which the collateral benefit compensates is actually included in the award. *Holeton*, 92 Ohio St.3d at 122, citing, among other authorities, *Sheward*, 86 Ohio St.3d at 479-482, and *Sorrell v. Thevenir*, 69 Ohio St.3d 415. Accordingly, this Court has previously recognized the constitutionality of certain statutory modifications to the collateral source rule.

R.C. 2315.20 is distinguishable from its predecessors and should be upheld. First, Ohio’s collateral source rule no longer suffers from the defect found by the Court in *Sorrell*. Specifically, the statute does not encroach on the jury’s role as factfinder because it does not *require* judges to deduct the amount of collateral benefits from the jury’s verdict. Instead, Ohio’s collateral source rule simply enables a jury to consider collateral benefits when determining the appropriate amount of damages to be awarded to plaintiffs. R.C. 2315.20(A) (“[T]he defendant *may* introduce evidence of any amount payable as a benefit to plaintiff.” (emphasis added)). Because juries are fully capable of considering all relevant evidence when determining liability of defendants in a case, they are similarly capable of determining whether or not to consider any evidence that is introduced in regards to collateral benefits. Additionally, whether or not the jury is even instructed to consider the collateral benefits evidence will ultimately be a determination of the trial court judge.

Second, the General Assembly has also ensured that the statute will “take into account whether the collateral benefits held against the general verdict are within the damages actually

impact, please see brief of *Amicus* Ohio Association of Civil Trial Attorneys.

found by the jury,” thus curing the deficiency noted in *Sheward*. *Id.* at 482. Specifically, R.C. 2315.18(D) states that:

If a trial is conducted in a tort action to recover damages for injury or loss to person or property and a plaintiff prevails in that action, the court in a nonjury trial *shall make* findings of fact, and the jury in a jury trial *shall return* a general verdict accompanied by answers to interrogatories, that *shall specify* all of the following:

- (1) The total compensatory damages recoverable by the plaintiff;
- (2) The portion of the total compensatory damages that represents damages for economic loss;
- (3) The portion of the total compensatory damages that represents damages for noneconomic loss

(Emphasis added). Thus, unlike at the time of *Sheward*, during which the jury was required to return only a total compensatory damages amount, the jury is now required to specifically break down the amount of total compensatory damages into economic *and* noneconomic damages. R.C. 2315.18(D). This requirement will help ensure that the collateral benefits statute “take[s] into account whether the collateral benefits held against the general verdict are within the damages actually found by the jury.” *Sheward*, 86 Ohio St.3d at 482. Accordingly, R.C. 2315.20 cannot be used to improperly reduce a damages award because the jury’s breakdown of the damages award will specifically show whether the plaintiff’s award and the collateral source actually compensated plaintiff for the same damages.

Finally, this Court has recently indicated, in dicta, a willingness to have the General Assembly make some of the policy choices inherent in collateral benefits statutes. In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, the Court held that the difference between the amount billed for medical services and the amount actually paid by the plaintiff’s health insurance is not a collateral benefit, and thus is admissible despite the collateral source rule. In its discussion of the collateral source rule, the Court recognized the enactment of R.C. 2315.20 and

that the General Assembly “intended to limit the collateral-source rule in Ohio,” just as other states have, by enacting this statute. *Id.* at ¶ 14. After recognizing this fact, this Court concluded that “[i]t may well be that the collateral-source rule itself is out of synch with today’s economic realities of managed care and insurance reimbursement for medical expenses. However, whether plaintiffs should be allowed to seek recovery for medical expenses as they are originally billed or only for the amount negotiated and paid by insurance *is for the General Assembly to determine.*” *Id.* at ¶ 19.

Recognizing that twenty-one states have modified or abolished the common law collateral source rule, see Senate Bill 80, Section 3(A)(7)(b), the General Assembly has exercised its authority to determine what type of evidence may be introduced in order to prevent double recoveries, while simultaneously respecting the jury’s fundamental role as factfinder. While evidence of limited types of collateral benefits may now be admitted, neither the judge nor the jury is under a mandatory duty to offset them. If a jury does, it is now required to specifically break down the amount of total compensatory damages into economic *and* noneconomic damages so that courts will be able to determine whether the collateral sources were fairly deducted. As a result, Ohio’s collateral benefits statute furthers the State’s legitimate goal of preventing double recoveries, but no longer suffers from the flaws of the previous versions. Accordingly, this Court should find that Ohio’s collateral benefits statute is constitutional on its face.

Respondent State of Ohio’s Proposition of Law No. 4:

The General Assembly does not violate the authority of other branches by enacting statutes that address the damages available in tort lawsuits.

Section 1, Article II of the Ohio Constitution vests the legislative power of the State in the General Assembly. In accordance with this authority, all statutes enjoy a strong presumption of

constitutionality and a statute will be declared unconstitutional only if it appears beyond a reasonable doubt that the legislation and pertinent constitutional provisions are clearly incompatible. See *Austintown Township Bd. of Trustees v. Tracy* (1996), 76 Ohio St.3d 353; *State v. Stambaugh* (1987), 34 Ohio St.3d 34; *State ex rel. Taft v. Campanella* (1977), 50 Ohio St.2d 242; *Dickman v. Defenbacher* (1955), 164 Ohio St. 142. “The necessity for a court adhering to this time-honored presumption is that it prohibits one branch of state government from encroaching on the duties and prerogatives of another.” *State v. Renalist, Inc.* (1978), 56 Ohio St.2d 276, 278.

The statutes at issue in this case, designed to limit awards of noneconomic and punitive damages in certain tort cases, do not violate the separation of powers. The limits on noneconomic and punitive damages do not interfere with the courts’ ability to determine liability and damages. Instead, much like a statute of limitations, these statutes make a policy choice that benefits the State of Ohio’s citizens as a whole, while inuring to the detriment of certain individual plaintiffs in order to enable the system to operate equitably to all stakeholders. Such line-drawing is clearly within the bounds of the authority of the General Assembly.

Arbino argues that these statutes violate the separation of powers established in the Ohio Constitution in two ways. First, Arbino argues that a limit on damages intrudes upon the functions granted to the judicial branch by the Ohio Constitution. Arbino Brief at 42. Second, Arbino argues that the re-enactment of statutes sharing some characteristics of previously stricken statutes also intrudes upon the power of the Court. *Id.* at 44. Neither of these arguments, however, has merit.

There is nothing about a limit on the amount of damages that violates the power of the judiciary as granted by the Constitution. Section 1, Article IV of the Ohio Constitution vests the

judicial power of the State in “a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.” Other provisions of the Constitution then grant specific jurisdiction to the Ohio Supreme Court, the Courts of Appeals, and the Courts of Common Pleas. For example, Courts of Common Pleas 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.” Section 4(B), Article IV. Notably, nothing in this Article textually supports a determination that the Ohio Constitution, as a matter of separation of powers, requires that courts have unlimited discretion to award damages.

Nevertheless, the courts undeniably “possess all powers necessary to secure and safeguard the free and untrammelled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government.” *State v. Thompson* (2002), 95 Ohio St.3d 264, quoting *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph two of the syllabus. The question then is whether the limits on noneconomic and punitive damages intrudes on a judicial function.

No court has ever held that the General Assembly cannot enact statutes regarding the calculation of certain types of damages. Although “it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment,” that function does not necessarily include untrammelled discretion regarding all aspects of damages. *Thompson*, 95 Ohio St.3d at 586, quoting *Fairview v. Giffie* (1905), 73 Ohio St. 3d 183, 190. Nor do the cases applying this proposition support the conclusion that the judiciary’s authority necessarily includes the right to set noneconomic or punitive damages free from any limits. For example, in *State ex rel. Bray v. Russell* (2000), 89

Ohio St.3d 132, the Court held that a statute which permitted the Department of Corrections to add “bad time” sentences to inmate sentences for prison misconduct intruded on the role set for the judiciary by allowing an executive agency to determine guilt and sentence a defendant in a criminal matter.

Here, however, the statutory limits at issue are not analogous to permitting an executive agency to adjudicate guilt and sentence inmates, but instead are analogous to sentencing guidelines, which have been upheld in the face of challenges based upon separation of powers. *State v. Gonzales* (1st Dist.), 151 Ohio App.3d 160, 2002-Ohio-4937, ¶ 63 (“mandatory sentencing laws enacted pursuant to [legislative authority to define criminal conduct and to determine appropriate punishment] do not usurp the judiciary’s power to determine the sentence of individual offenders.”) citing *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 560; see also *State v. Thompson* (2001), 92 Ohio St.3d 584 (statute providing guidelines for determining whether an offender is a sexual predator did not violate separation of powers by listing the factors to be considered by the Court).

Further evidence that not every aspect of a damages award falls within the authority of the courts are cases like *Doran v. Northmont Bd. of Educ.* (2nd Dist.), 153 Ohio App.3d 499, 2003-Ohio-4084, ¶ 19, in which the court found that it does not violate judicial authority for the General Assembly to provide that the Courts *shall* issue a statutory injunction upon a determination that a violation has occurred. This is so, because laws that do not intrude upon the trial court in its fact-finding authority do not violate the separation-of-powers doctrine.

Likewise, a limit on awards for noneconomic and punitive damages does not intrude upon a court’s authority to hear the evidence in the case, and to determine the liability of the defendant, and to make determinations as to the damages awardable. R.C. 2315.18 simply limits the amount

of noneconomic damages in cases not involving catastrophic injuries. The application of these limits to the facts of any particular case will, of course, be reviewable by the courts, and should a plaintiff allege that the limits violate their individual rights under a particular set of circumstances, this Court may review that case to determine if the limits are unconstitutional as applied to that plaintiff. Although, of course, the State of Ohio does not believe that the statutes will prove unconstitutional in their application. For purposes of this discussion, however, the bottom line is that the mere existence of a statutory limit on damages does not violate the separation of powers.

In support of her argument to the contrary, Arbino relies on: (1) dicta from a Circuit Court decision, *Mitchell's Administrator v. Champaign Co. Commissioners* (Ohio Cir. Ct. 1899), 10 Ohio C.D. 801, *aff'd*, *Board of Comm'r's of Champaign County v. Church* (1890), 62 Ohio St. 318; and (2) cases based on the right to jury trial. Neither of these arguments hold up to scrutiny.

First, *Mitchell's Administrator* did not hold, or even address, whether a limit on damages was constitutional. Rather, the courts considered whether the General Assembly could provide that a county had to pay \$5,000 under the Mob Violence Suppression Act for the death of a man by lynching. What the Court actually held is that the payment did not violate the Constitution because it was penal or corrective in nature. Where this is so, “[i]t makes no difference whether in the statute it be called penalty, or compensation, or damages. Nor does it alter the case that the amount is fixed, that is, determined by the statute, as in this case; or that it is to be found by a jury.” *Board of Comm'r's of Champaign County v. Church* (1890), 62 Ohio St. 318, 346. Accordingly, this case definitely does not support a conclusion that a limit on one type of damages violates separation of powers, and indeed could be argued to support the conclusion that punitive damages, which are penal in nature, *can* be limited by the General Assembly.

Arbino's remaining cases on this point likewise do not support her separation of powers argument because these cases were all decided based upon the right to a jury trial, which is a separate argument that fails for the reasons addressed above. See *Lance v. Leohr* (9th Dist. 1983), 9 Ohio App.3d 297, 298 (unconditional remittitur offends jury trial guarantee); *Zoppo*, 71 Ohio St.3d 552 (statute providing that the court set the amount of punitive damages violates right to jury trial); *Gibbs v. Girard* (1913), 88 Ohio St. 34 (right to trial by jury dictates standard disfavoring directed verdicts). Nothing in these cases supports the determination that a statutory limit on noneconomic or punitive damages in certain cases unconstitutionally intrudes on the powers of the judiciary.

Arbino's argument that the statutes enacted in S.B. 80 violate the doctrine of separation of powers because they are an attempt to re-enact previous statutes is likewise misplaced. The Constitution lodges the authority to enact legislation with the General Assembly, and the General Assembly cannot violate its authority simply by enacting legislation. As Justice Moyer stated in *Sheward*, legislative initiatives may change with each new General Assembly, which "is free to act upon its own judgment of its constitutional powers." *Sheward*, 86 Ohio St.3d at 528 (J. Moyer, dissenting), citing *Pfeifer v. Graves* (1913), 88 Ohio St. 473, 487. Further, the factual premise underlying this argument, that the General Assembly has simply re-enacted the same statutes this Court has previously found unacceptable, is also flawed. As set forth above, in each instance these statutes are materially different than those at issue in *Sheward* or this Court's other decisions. Nor is this result accidental, instead the General Assembly applied this Court's decisions and re-enacted statutes that it believes satisfy this Court's concerns as identified in those decisions. This is, indeed, the proper role of the legislature, just as it is now appropriate for this Court to review these statutes.

Nothing in these statutes affects this Court's ability to fulfill its constitutional role, which is to interpret the Ohio Constitution and all other laws. As a result, the enactment of these three statutes does not implicate separation of powers concerns.

Respondent State of Ohio's Proposition of Law No. 5:

The challenged statutes, which share a common subject of calculation of damages in personal injury suits, comply with the single subject clause.

The enactment of these three statutes in a single bill does not offend the single subject clause of the Ohio Constitution. That rule appears at Section 15(D), Article II and is specifically directed at the General Assembly. It provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title." As this Court has stated many times, "[t]he one-subject provision is not directed at plurality but at disunity in subject matter." *Dix*, 11 Ohio St.3d at 146. Thus, "[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics." *Sheward*, 86 Ohio St.3d at 496 (citing *Hoover v. Bd. of Cty. Comm'rs* (1985), 19 Ohio St.3d 1, 6; *AFL-CIO v. Voinovich*, 69 Ohio St.3d at 229). A bill violates the law only where there is a disunity of subject matter such that there is "no discernible practical, rational, or legitimate reasons for combining the provisions in one act." *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62; *Simmons-Harris* (1999), 86 Ohio St.3d 1, 14. Or stated differently, only a "manifestly gross and fraudulent violation" of the single-subject provision authorizes a court to pronounce a law unconstitutional. *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, paragraph 1 of the syllabus. In this case, each of the three statutes at issue is related to the subject of tort reform in general, as well as more specifically to the question of damages awards. Thus, this is a natural combination of provisions that all address a single subject, which is set forth in the title of the bill.

Arbino argues that Senate Bill 80 violates the single subject clause for two separate reasons. First, she argues that the Bill contains unrelated provisions, such as the qualifications of members of the Board of Cosmetology and applications for dental licenses. Arbino Brief at 47. Second, she asserts that this Bill shares the same flaws, from the perspective of the single-subject clause, as did *Sheward's* House Bill 350, and likewise violates the single-subject clause. *Id.* at 47-48. Neither of these arguments has merit.

First, the question before this Court is not whether every provision included in Senate Bill 80 is related to the others. The question is whether the challenged statutes, R.C. 2315.18, 2315.20, and 2315.21, share a common purpose or relationship to each other. This Court does not use the single subject clause to invalidate an entire Bill, but instead addresses only those statutes at issue in the case before it. As the Court stated in *Sheward*, “[e]very presumption in favor of the enactment’s validity should be indulged” and courts should give “the General Assembly great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.” *Sheward*, 86 Ohio St. at 496.

For this reason, where the inclusion of a particular provision in a bill is found to violate the single subject clause, that provision is almost always severed from the remainder of the bill, which remains in effect. See *In re Nowak*, 104 Ohio St.3d 466 (Court severed statute regarding mortgages from appropriations bill); *State ex rel. OCSEA v. SERB* (2004), 104 Ohio St.3d 122 (Court severed provision excluding employees of the School Facilities Commission from the definition of public employees from the remainder of a budget bill); *Simmons-Harris v. Goff*, 86 Ohio St.3d 1 (Court severed vouchers statute from remainder of budget bill). Thus, Arbino

cannot prevail simply by isolating one or two sections of Senate Bill 80, which do not affect her, and claiming that they are not related to the subject of tort reform.

The statutes at question do share a common purpose and relationship. All three of the statutes challenged here relate generally to the topic of tort reform, and more specifically to each other on the topic of the calculation of damages in a tort suit. See *AFL-CIO v. Voinovich*, (1994), 69 Ohio St.3d 225 (finding number of different topics related to the single subject of workers compensation). Likewise, many of the provisions cited by Arbino as unrelated to these statutes are in fact related to the topic of tort reform. Immunity for volunteers, the scope of responsibility of property owners for premises liability, and limits on damages in certain cases are all related to the topic of addressing the spiraling societal costs of runaway tort litigation.

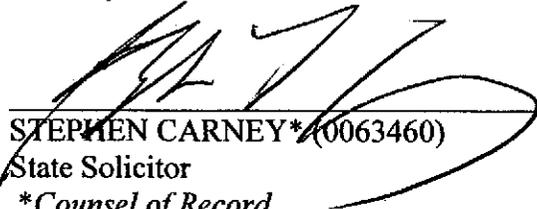
Further, S.B. 80 is distinguishable from H.B. 350 in two ways: 1) the relationship between the provisions at issue, and 2) because the General Assembly has clearly expressed its intent that the statutes are severable. First, the three statutes currently at issue before this Court are all related to the question of damages in a personal injury suit and to each other. By way of contrast, as the Court found in *Sheward*, HB 350 addressed not only the calculation of damages, but also diverse topics such as sovereign immunity for political subdivisions and racial discrimination claims, as well as others. Second, § 5 of S.B. 80 is a severability clause, which provides that “[t]he items of law of which the sections of this act are composed, and their applications, are independent and severable.” Thus, this case is distinguishable from *Sheward*, in which the Court invalidated the entire bill for lack of ability to determine the General Assembly’s intent regarding severability. *Sheward*, 86 Ohio St.3d at 500-501. For all of these reasons, this Court should hold that the statutes before it were not enacted in violation of the single subject clause.

CONCLUSION

For all of the reasons above, this Court should answer "no" to each of the three certified questions in this case.

Respectfully submitted,

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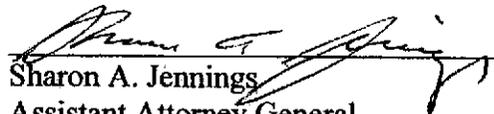

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Exhibit – Summary of Limits on Punitive Damages¹

1. Alabama

- Ala. Code 6-11-21(a)-(b), (d) (2006) (greater of three times compensatory damages or \$500,000, or \$1,500,000 million for physical injuries; for small businesses, greater of \$50,000 or 10% of net worth);

2. Alaska

- Alaska Stat. 09.17.020(f)-(g) (2006) (greater of \$500,000 or three times compensatory damages; where defendant was motivated by financial gain, greatest of four times compensatory damages, four times financial gain, or \$ 7,000,000);

3. Arizona

- *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332 (Ariz. 1986) (“recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind”);

4. Arkansas

- Ark. Code Ann. 16-55-208 (2006) (a punitive damages award for each plaintiff not to exceed the greater of \$250,000 or three times the amount of compensatory damages, not to exceed \$1,000,000);

5. California

- Cal. Civ. Code § 3294(a) (2006) (punitive damages only recoverable upon proof, by clear and convincing evidence, that the defendant acted with oppression, fraud or malice);

6. Colorado

- Colo. Rev. Stat. 13-21-102(1)(a) (2006) (exemplary damages shall not exceed actual damages);

7. Connecticut

- Conn. Gen. Stat. 52-240b (2006) (punitive damages in product liability cases shall not exceed twice the compensatory damages awarded);

8. Florida

- Fla. Stat. Ann. 768.73 (1)(a)-(b) (2006) (greater of three times the amount of compensatory damages or \$500,000, or, in certain cases, greater of four times the amount of compensatory damages or \$ 2,000,000);

9. Georgia

- Ga. Code Ann. 51-12-5.1(g) (2006) (\$250,000 unless harm results from products liability or substance abuse);

¹ Current as of January 5, 2007.

10. Idaho

- Idaho Code § 6-1604(3) (2006) (No judgment for punitive damages shall exceed the greater of \$ 50,000 or an amount which is three times the compensatory damages contained in such judgment; 735 ILCS 5/2-1115 (2006) (punitive damages not recoverable in legal, medical, hospital, or other healing art malpractice cases);

11. Indiana

- Ind. Code 34-51-3-4 (2006) (greater of three times compensatory damages or \$ 50,000);

12. Iowa

- Iowa Code § 668A.1(1)(a) (punitive damages only available by a preponderance of clear, convincing and satisfactory evidence of defendant's willful and wanton disregard for the rights or safety of another);

13. Kansas

- Kan. Stat. Ann. 60-3702(e)-(f) (2006) (lesser of defendant's annual gross income, 50% of net worth, or \$ 5 million; if profit from defendant's misconduct exceeds this measure, capped at 150% of such profit);

14. Kentucky

- Ky. Rev. Stat. Ann. 411.184(2) (2006) (punitive damages only recoverable upon proving, by clear and convincing evidence, that the defendant acted toward the plaintiff with oppression, fraud or malice);

15. Louisiana

- La. R.S. 9:3552; La. R.S. 3:4116; La. R.S. 22:657-658 (only permitting punitive damage claims where specifically provided for by statute)
- See also Louisiana Civil Code Art. 2315.3; Art. 2315.4; Art. 2315.7 (only providing for punitive damages in three situations);

16. Minnesota

- Minn. Stat. 549.20 (2005) (punitive damages allowed only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others);

17. Mississippi

- Miss. Code Ann. 11-1-65 (2006) (different caps relative to net worth of defendant);

18. Missouri

- Mo. Rev. Stat 537.675(3) (2006) (requiring 50% of the punitive damages final judgment to be forwarded to the State of Missouri);

19. Montana

- Mont. Code Ann. 27-1-220(3) (2006) (Award for punitive damages may not exceed the lesser of \$10,000,000 or 3% of a defendant's net worth, whichever is less, except in class action lawsuits);

20. Nevada

- Nev. Rev. Stat. 42.005 (2006) (greater of three times compensatory damages if such damages are \$100,000 or more, or \$300,000 if compensatory damages are less than \$100,000);

21. New Hampshire

- N.H. Rev. Stat. Ann. 507:16 (2006) (prohibiting any awards of punitive damages, unless otherwise provided by statute);

22. New Jersey

- N.J. Stat. Ann. 2A:15-5.14 (2006) (greater of five times compensatory damages or \$350,000);

23. North Carolina

- N.C. Gen. Stat. 1D-25(b) (2006) (greater of three times compensatory damages or \$250,000);

24. North Dakota

- N.D. Cent. Code 32-03.2-11(4) (2006) (greater of two times compensatory damages or \$250,000);

25. Ohio

- Ohio Rev. Code Ann. 2315.21(D) (2006) (not to exceed two times compensatory damages; if small employer or individual, not to exceed lesser of two times compensatory damages or 10% of employer's or individual's net worth, up to \$350,000);

26. Oklahoma

- Okla. Stat. Ann. tit. 23, 9.1(B) (Supp. 2005) (different caps relative to egregiousness of conduct);

27. Oregon

- Or. Rev. Stat. 31.740 (2006) (awards of punitive damages prohibited against specific health practitioner);

28. Pennsylvania

- 40 P.S. § 1303.505(d) (2006) (except in cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of compensatory damages);

29. South Carolina

- S.C. Code Ann. 15-33-135 (2006) (punitive damages available only if plaintiff proves such damages by clear and convincing evidence);

30. South Dakota

- S.D. Codified Laws § 21-1-4.1 (2006) (punitive damages available only if plaintiff proves by “clear and convincing” evidence that a defendant acted with “willful, wanton, or malicious” conduct);

31. Texas

- Tex. Civ. Prac. & Rem. Code Ann. 41.008(b) (2006) (greater of \$ 200,000 or two times economic damages plus amount equal to non-economic damages not to exceed \$ 750,000);

32. Utah

- Utah Code Ann. § 78-18-1(1), (3) (2006) (punitive damages available only if compensatory damages awarded and plaintiff establishes by clear and convincing evidence that defendant’s acts were willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others; requiring 50% of punitive damages in excess of \$20,000 to be remitted to the state treasurer);

33. Virginia

- Va. Code Ann. 8.01-38.1 (2006) (In no event shall the total amount for punitive damages exceed \$350,000)

34. Wisconsin

- Wis. Stat. 895.043(3) (punitive damages recoverable if evidence shows that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff).