

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF PETITIONER MELISA ARBINO

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## INTRODUCTION

Petitioner Melisa Arbino comes to this court to seek justice. She comes not as a statistic, symbol or threat to the Ohio economy. She has no “frivolous claim;” the Defendants are not “unfairly sued;” her injuries are not feigned. She is a 24-year-old woman whose doctor prescribed Defendant’s Ortho Evra Patch and who nearly died as a result. She underwent emergency brain surgery, suffered multiple pulmonary emboli in both lungs, and remains under neurologic care. She is at high risk in any future pregnancy due to the blood clots she has suffered from use of the patch and her need for anti-coagulation therapy. And Ms. Arbino is not alone. Hundreds of women from Ohio and throughout the country have suffered blood clots from using the Ortho Evra birth control patch.

Unlike a jury or a judge hearing a case, the legislature knew nothing of Melisa Arbino or any other plaintiff when it passed S.B. 80 and set arbitrary limits on their recoveries. Nor did the legislature know how Defendant Johnson & Johnson rushed Ortho Evra to market to offset its impending loss of market share when its birth control pill, Ortho TriCyclen, came off patent. It did not know that Johnson & Johnson sold Ortho Evra fully aware that it dangerously delivers 60% more estrogen than the birth control pill even though such high estrogen levels cause blood clots. It did not know that the physician Johnson & Johnson put in charge of its clinical studies had lost his medical license and was suspended from conducting federally funded research because he had fabricated medical data in published articles.

In putting its thumb on the scales of justice in favor of a New Jersey corporation over an Ohio woman it harmed, the legislature sought to improve the state’s economic climate by providing a windfall to profiteering tortfeasors on the back of victims. Clearly, limiting the noneconomic and punitive damages that might be awarded in this case – or any other meritorious

case – does not serve the legislature’s stated goals of fairness, balance or economic boosterism. Fortunately, such an ill-conceived program of caps on noneconomic and punitive damages cannot be squared with requirements of the Ohio Constitution or existing Ohio precedent.<sup>1</sup>

No party has asked this Court to overturn its decisions declaring prior noneconomic damage caps unconstitutional. See Defendant-Respondents Br. (hereinafter “J&J Br.”) at 8 (Defendants are “not asking this Court to overturn any of its prior decisions.”)<sup>2</sup> On the other hand, the State has suggested reconsideration is in order of this Court’s punitive-damage jurisprudence, but otherwise appears to agree that existing precedent ordains invalidation of S.B. 80’s punitive limits. Brief of Ohio at 24 [hereinafter “AG Br.”]. Certified questions, however, provide a poor vehicle for overturning precedent. *Scott v. Bank One Trust Co.* (1991), 62 Ohio St. 3d 39, 45-46, quoting with approval *Venezia v. Miller Brewing Co.* (1<sup>st</sup> Cir. 1980), 626 F.2d 188, 192 n.5 (“[t]he certification procedure was not designed so as to allow a party ‘to seek to persuade the state court to change what appears to be present law’”) (citation omitted).

Prior decisions of this Court have invalidated similar attempts by the legislature to deny injured Ohio citizens justice. This case merely represents the latest effort by the legislature to set itself up as a super-judiciary and pre-judge the value of meritorious cases. S.B. 80’s caps fail to pass constitutional muster.

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<sup>1</sup> Plaintiff’s motion for partial summary judgment in the District Court asserted that existing Ohio precedent required the invalidation of these caps. Thus, the certified questions before this Court have a narrow and limited scope. Should existing precedent prove insufficient to mandate the invalidation of the challenged components of S.B. 80, Plaintiff should still have the right to assert the unconstitutionality of those same as well as other provisions of S.B. 80 that are raised in her case on the basis of a fuller evidentiary presentation in federal court and a broader range of arguments than now asserted.

<sup>2</sup> Unlike Defendant, the General Assembly understood that S.B. 80 did not conform with this Court’s prior rulings and specifically asked this Court to reconsider its rulings in three cases. See S.B. 80, § 3(E). Plaintiff submits that far more precedent would require invalidation to sustain S.B. 80. See Petitioner’s Merit Br. at 11-19.

## ARGUMENT

### **Proposition of Law No. 1: Non-economic Damage Caps Violate the Right to a Jury Trial**

Defendants, Intervenor, and *amici* [collectively, “Respondents”] assert that the amount of noneconomic damages are not a fact found by a jury. *See, e.g.*, AG Br. at 12, 16. Both this Court and the U.S. Supreme Court have held otherwise. *See Galayda v. Lake Hosp. Systems, Inc.* (1994), 71 Ohio St. 3d 421, 425 (citation omitted) (“the right to a jury trial includes determination of “the amount of damages to which the plaintiff is entitled.”); *id.* at 436 (Moyer, C.J., dissenting).<sup>3</sup> *See also St. Louis, I.M. & S.R. Co. v. Craft* (1915), 237 U.S. 648, 661 (pain and suffering compensation “involves only a question of fact”).

This Court has explained why such damages are a fact to be determined by a jury:

The fundamental rule of the law of damages is that the injured party shall have compensation for *all of the injuries sustained*. Compensatory damages are intended to make whole the plaintiff for the wrong done to him or her by the defendant. Compensatory damages are defined as those which measure the actual loss, and are allowed as amends therefor. . . . compensatory damages may, among other allowable elements, encompass . . . loss due to the permanency of the injuries, disabilities or disfigurement, and physical and mental pain and suffering. . . . Some of these elements of damages . . . entail only the rudimentary process of accounting to calculate. Other elements such as pain and suffering are more difficult to evaluate in a monetary sense. The assessment of such damage is, however, a matter solely for the determination of the trier of fact because there is no standard by which such pain and suffering may be measured.

*Fantozzi v. Sandusky Cement Prod. Co.* (1992), 64 Ohio St. 3d 601, 612 (emphasis added). The right to that jury determination applies to those matters committed to jury determination under

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<sup>3</sup> *Accord Vilella v. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36, 40 & syllabus, *overruled on other grounds in Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, *cert. denied* (1995), 513 U.S. 1059 (“it is the function of the jury to assess the damages and, generally, it is not for a trial or appellate court to substitute its judgment for that of the trier of fact.”); *Uhlir v. State Farm Ins. Co.* (8<sup>th</sup> Dist. 2005), 164 Ohio App. 3d 71, 75; *Drehmer v. Fylak* (2d Dist. 2005), 163 Ohio App. 3d 248, 254.

the common law or its modern statutory equivalents. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354, 356-57.<sup>4</sup>

Respondents' wrongly claim that federal Seventh Amendment jurisprudence holds otherwise. The U.S. Supreme Court has held that "if a party so demands, a jury must determine the actual amount of . . . damages . . . in order 'to preserve the substance of the common-law right of trial by jury.'" *Feltner v. Columbia Pictures Television, Inc.* (1998), 523 U.S. 340, 355 (emphasis added). The common-law right controls because the federal constitutional right to "trial by jury . . . is the right which existed under the English common law when the Amendment was adopted." *Markman v. Westview Instruments, Inc.* (1996), 517 U.S. 370, 376 (citation omitted).

Significantly, the *Feltner* Court rejected Respondent's argument that relies on *Tull v. United States* (1987), 481 U.S. 412, 426, for the idea that, once a jury's verdict is rendered, trial by jury is satisfied and revision of damages may take place. See J&J Br. at 18-20, AG Br. at 14. *Tull* found the right to a jury trial under the Clean Water Act extended only to a determining liability and not to assessing civil penalties. *Feltner* found *Tull* limited to statutory causes of action without common-law antecedents:

In *Tull*, however, we were presented with no evidence that juries historically had determined the amount of civil penalties to be paid to the Government. Moreover, the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding. Here, of course, there is no similar analogy, and there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff. *Tull* is thus inapposite.

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<sup>4</sup> The U.S. Supreme Court has similarly found that "jury trial guarantee extends even to statutory claims unknown to the common law, so long as the claims can be said to 'sound basically in tort,' and seek legal relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999), 526 U.S. 687, 709 (citation omitted).

*Feltner*, 523 U.S. at 355 (footnotes and citation omitted),

History teaches that the Seventh Amendment's right to trial by jury includes the authority to make a binding determination of damages. *Id.* at 353 ("It has long been recognized that 'by the law the jury are judges of the damages'" (quoting *Townsend v. Hughes* (C.P. 1677), 86 Eng. Rep. 994, 994-95). See also *Lakin v. Senco Prods., Inc.* (Or. 1999), 987 P.2d 463, 470-71 (discussing historical background and declaring noneconomic damage cap violates Oregon Constitution's similar "inviolable" jury-trial right). That same history, which the *Feltner* Court found decisive, impels the same result under Ohio's jury-trial right.

That a right would be hollow and would fail to "preserve the substance of the common law right" if the jury's preeminent and fundamental role in assessing damages were subject to arbitrary revision, as S.B. 80 requires. For that reason, the U.S. Supreme Court held that a recalculation of damages after the jury had set it constitutes the imposition of a remittitur. *Hetzel v. Prince William County* (1998), 523 U.S. 208, 211. It further said that "requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment." *Id.*

*Hetzel* found *Kennon v. Gilmer* (1889), 131 U.S. 22, correctly stated the law. There, the Court said "it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded," *id.* at 26, and a

court has no authority . . . in a case in which damages for a tort have been assessed by a jury at an entire sum, . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party was prejudiced and either, therefore, is entitled to have the judgment reversed by writ of error.

*Id.* at 29-30, cited favorably by *Hetzel*, 523 U.S. at 211.

Ohio's remittitur practice is consistent with this statement of law. This Court recognized long ago that "neither the trial court nor any reviewing court has the power to reduce the verdict of a jury or to render judgment for a lesser amount without the consent of the party in whose favor the verdict was rendered to such reduction." *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, para. 1 of syllabus. *Schulte* explained that there is a "very plain and sufficient reason" for that: "a reduction under such circumstances invades the province of the jury." *Id.* at 287. S.B. 80's caps do as well.

The jury-trial right does not constrain only courts. It applies equally to repel legislative forays into the jury's inviolate province. *See Sorrell v. Thevenir* (1994), 69 Ohio St. 3d. 415, 421 ("the right to trial by jury 'cannot be invaded or violated by either legislative act or judicial order or decree'")(quoting *Gibbs v. Girard* (1913), 88 Ohio St. 34, para. 2 of syllabus); *Work v. State* (1853), 2 Ohio St. 297, 297. Because the jury right includes a right to have the jury determine damages, absent any waiver, the legislature cannot supplant the jury's verdict with one of its own determination.

The State's inapposite response to these forthright holdings is to cite federal cases that refused to invalidate state damage caps on Seventh Amendment grounds. AG Br. at 15-16. These cases are unpersuasive because the Seventh Amendment does not apply to the States. *Minneapolis & St. Louis R. v. Bombolis* (1916), 241 U.S. 211, 217. Respondents also cite dubious decisions from other jurisdictions that apply a lesser jury right than enjoyed in Ohio.<sup>5</sup> *See, e.g., Pulliam v. Coastal Emerg. Servs. of Richmond, Inc.* (Va. 1999), 509 S.E.2d 307, 314 (acknowledging that other courts had found Virginia's limited jury trial right weaker than the

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<sup>5</sup> Respondents have provided this Court with various lists of cases upholding a wide variety of caps, many of which are easily distinguishable from S.B. 80. Petitioner's Appendix lists current cases invalidating state non-economic damage caps on constitutional grounds.

inviolate language found in their constitutions (citing *Moore v. Mobile Infirmary Ass'n* (Ala. 1991) 592 So. 2d 156, 163 and *Sofie v. Fibreboard Corp.* (Wash. 1989), 771 P.2d 711, 724). Ohio's courts have never countenanced such a pale version of this fundamental right, and no Ohio case permits a party to be deprived of a jury to determine damages once the case has been submitted to that panel.

**Proposition of Law No. 2: The Right to Trial by Jury Applies to Punitive Damages**

In *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, *cert. denied* (1995), 516 U.S. 809, this Court held that reassigning the assessment of punitive damages from the jury to another decisionmaker violates the right to trial by jury. *Id.* at para. 2 of syllabus. That conclusion flowed from a single immutable historical fact: "assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury." *Id.* at 557. History confirms the correctness of that conclusion.

Punitive damages originated in the common law.<sup>6</sup> Significantly, both for the right to trial by jury generally and the jury's authority over punitive damages, the story begins in 1763, when an English court held that juries have the power to give punitive damages as "damages for more than the injury received as a punishment to the guilty." *Wilkes v. Wood* (C.P. 1763), 98 Eng. Rep. 489, 498-99.<sup>7</sup> Soon after *Wilkes*, American juries began to award punitive damages. See *Genay v. Norris* (S.C. 1784), 1 S.C.L. 6; *Coryell v. Colbaugh* (N.J. 1791), 1 N.J.L. 77. Ever since then, punitive damages "have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 255.

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<sup>6</sup> 1 Linda L. Schlueter & Kenneth R. Redden, PUNITIVE DAMAGES (4<sup>th</sup> ed. 2000) § 1.0, at 1.

<sup>7</sup> The U.S. Supreme Court has recognized that *Wilkes* had a foundational impact on American liberties, *City of West Covina v. Perkins* (1999), 525 U.S. 234, 247.

In fact, the Supreme Court recognized the jury's dominion over punitive damages as early as 1832. *Conrad v. The Pacific Ins. Co.* (1832), 31 U.S. 262, 272-73. By the time Ohio's Constitution was written, the jury's role in assessing punitive damages was a "well-established principle of the common law." *Day v. Woodworth* (1851), 54 U.S. (13 How.) 363, 371. See also *Roberts v. Mason* (1859), 10 Ohio St. 277, 280 (jury's authority over punitive damages "settled by judicial decision and long and general practice."). Relying on *Roberts* and decisions since then, this Court held that the setting of punitive damages lies at the heart of the jury's responsibilities under the Ohio Constitution. *Zoppo*, 71 Ohio St. 3d at 557.

Recently, the U.S. Supreme Court departed from its own previously consistent holdings along the same lines on the theory that punitive damages had "evolved" and that the jury's role is now one of "moral condemnation," rather than factfinding.<sup>8</sup> *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 432, 437 n.11. Even so, the Court noted that jury factfinding related to a punitive award must still be respected.<sup>9</sup> *Id.* at 439 n.12. The court's conclusion that punitive damages had evolved and serve a different purpose today is neither binding on this Court<sup>10</sup> nor persuasive. Ohio's experience has been different. Noneconomic

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<sup>8</sup> Some scholars have found the Court's conclusion a historical. Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today* (2003), 78 CHI-KENT L. REV. 163 (finding that noneconomic damages were well-established separately from punitive damages at the time of the *Day* decision); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence* (2006), 79 S. CAL. L. REV. 1085.

<sup>9</sup> Thus, for example, when a jury answers interrogatories and finds a course of misconduct highly profitable, identifies that profit, and finds that the misconduct is likely to be repeated in the absence of disgorgement of that profit, these are factual findings that must be respected in federal court under the *Cooper* regime. S.B. 80 makes no provision to respect such findings of fact but instead requires a mechanistic multiplication.

<sup>10</sup> Respondents wrongly claim no other state's jury rights prevent a legislature from revising the jury's role with respect to punitive damages. See **Kentucky** (*Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998) (statutory revision of common law of punitive damages violated jural rights); and

damages have long been a part of state law. *See, e.g., Smith v. Pittsburg, Ft. W. & C. Ry. Co.* (1872), 23 Ohio St. 10 at \*\*6 (“mental or physical pain . . . are proper subjects for the consideration of the jury in their estimate of compensatory damages”).

Meanwhile, punitive have continued to serve a consistent non-compensatory purpose. For example, in *Roberts*, the jury was properly instructed that they may give damages beyond recompense to punish the offender.” 10 Ohio St. at 280. *See also Ehrman v. Hoyt* (Ohio Super. 1858), 3 Ohio Dec. Reprint 308, 1858 WL 4543 at \*2 (the “first effort of a jury should be to make compensation for the actual damage sustained; but beyond this the law allows vindictive damages, or ‘smart money,’ as it is sometimes called, for the sake of preserving the peace of society from malicious wrong.”).

Thus, in Ohio, punitive damages have always been distinct from compensation and have not experienced the evolution presupposed in *Cooper*. Unlike for federal purposes, punitive damages remain within the jury’s province and cannot be the subject of legislative remittitur.

**Proposition of Law No. 3: U.S. Supreme Court Precedent Does Not Require or Justify the Enactment of Damage Caps**

Respondents have misrepresented recent federal punitive-damage decisions in a feeble effort to justify both caps. Contrary to their warped portrayal, the U.S. Supreme Court has not authorized such caps and instead authoritatively rebutted Respondents’ arguments in favor of noneconomic damage caps, precisely because the Court recognizes that such damages are constitutionally committed to the jury’s determination.

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**Oregon** (*Halbasch v. Med-Data, Inc.* (D. Or. 2000), 192 F.R.D. 641 (reduction of punitive damages award based on remedial actions violated Oregon jury-trial right).

**A. Federal Due Process Still Requires Individualized Consideration**

The U.S. Supreme Court has repeatedly rejected arguments, like Respondents', that assert that punitive damages should be governed by an elementary-school exercise in multiplication and has instead insisted that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 425. This Court has similarly found the use of a mathematical straitjacket an insensible approach to assuring that punitive damages are not grossly excessive. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St. 3d 431, 441. S.B. 80's punitive damage cap does not implement these teachings.

**B. Due Process Considerations for Punitive Damages Do Not Justify Noneconomic Damage Caps**

The U.S. Supreme Court has authoritatively stated that the same due-process treatment it employs for punitive damages conflicts with the jury-trial rights applicable to noneconomic damages, *Cooper Indus.*, 532 U.S. at 437 n.11, as would any other attempt to override a jury finding of fact. *Id.* at 440 n.12. Respondents' attempt to justify S.B. 80's non-economic caps on the basis of *State Farm* and *Cooper* must be rejected.

In *Cooper*, for federal purposes, the U.S. Supreme Court recently decided punitive damages no longer serve the compensatory function that noneconomic damages now serve. *Id.* at 437 n.11 ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."). Thus, federal jury-trial rights apply to insulate non-economic damage verdicts from revision in a manner that no longer protects punitive-damage verdicts.

North Carolina's Supreme Court has since adopted the same distinction between punitive and noneconomic damages. It upheld a state punitive-damage cap because its jury-trial right, unlike Ohio's, is limited to cases "respecting property," N.C. Const. art. I, § 25, and does not cover punitive damages. Still, that court recognized that a cap on non-economic damages would violate the state constitution's jury provision. *Rhyne v. K-Mart, Inc.* (N.C. 2004), 594 S.E.2d 1, 12 (distinguishing between "compensatory damages, which represent a type of property interest vesting in plaintiffs [at the time the tort is committed], and punitive damages, which do not"). These cases make clear that Respondents' attempt to import punitive-damage jurisprudence into Ohio's law of noneconomic damages must fail.

**C. The Supreme Court's Holdings on Punitive Damages Do Not Authorize Violation of Rights Guaranteed by the Ohio Constitution**

Respondents correctly state that the United States Supreme Court allows wide deference to the states for federal constitutional purposes in regard to punitive damages. Arguing that the Supreme Court has recognized that some states that do not permit punitive damages and others that have capped them, Respondents suggest approval. The Court's recognition of different states taking different approaches merely reports facts. The Court has also acknowledged that Oregon's Constitution prohibits such a cap because it violates the state jury-trial right. See *Cooper*, 532 U.S. at 437 n.10. The Ohio Constitution does the same. It preserves the right to trial by jury as it existed at common law when the Constitution was enacted, which includes the right to have the jury determine both compensatory and punitive damages.<sup>11</sup> This Court's

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<sup>11</sup> The *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559 line of cases requires that grossly excessive punitive damage awards be reviewed by courts to assure compliance with due process. That any jury award must still pass federal constitutional muster by being evaluated by three guideposts (reprehensibility, proportionality, and comparability) assures defendants that punitive damages will remain proportional to the gravity of the offense and not violate their constitutional rights. No further imposition is necessary or authorized by the Ohio Constitution.

punitive-damage jurisprudence that led to *Zoppo* and, which struck down a state statute that shunted punitive damage-setting from the jury to the judge, was not affected by *Cooper*.

**Proposition of Law No. 4: Noneconomic Damage Caps Violate the Right to a Remedy**

Respondents would give the fundamental right to a remedy, Ohio Const. art. I, § 16 a narrow scope unsupported by the caselaw. They contend that the right is only violated when a vested cause of action is totally obliterated. J&J Br. at 25; AG Br. at 19. This Court has held otherwise, for example, striking provisions that merely changed to presumptions and burdens of proof as conflicting with the right to a remedy. See *Byers v. Meridian Printing Co.* (1911), 84 Ohio St. 408, para. 2 of the syllabus.

In fact, this Court has held that, to constitute an adequate remedy at law, the remedy must be “complete in its nature, beneficial and speedy, and . . . secure[] absolutely and of right relief from the wrong done.” *State ex rel. Merydith Constr. Co. v. Dean* (1916), 95 Ohio St. 108, 123, paragraph three of syllabus. Article 1, § 16 requires no less. Although, for example, the workers’ compensation system demonstrated sensitivity to this requirement and instituted a sufficient *quid pro quo*,<sup>12</sup> S.B. 80 reduces a plaintiff’s compensatory damages without substituting any reasonable and adequate substitute remedy and instead saddles that plaintiff with the burden of helping finance a speculative public benefit while providing a windfall to a tortfeasor. That result violates the constitutional guarantee of a meaningful remedy.

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<sup>12</sup>See *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St. 2d 608, 614 (discussing the trade-offs that employees received lower benefit levels coupled with greater assurance of recovery, while employers received relief from unlimited liability in order to relinquish common-law defenses). Cf. *New York Cent. R. Co. v. White* (1917), 243 U.S. 188, 201 (government may not, “without violence to the constitutional guaranty of ‘due process of law,’ suddenly set aside all common-law rules respecting liability . . . without providing a reasonably just substitute.”) The Supreme Court reached that conclusion even while adhering to the notion that “[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.” *Id.* at 198.

**Proposition of Law No. 5: S.B. 80's Damage Caps Deny Due Process and Equal Protection of the Law**

**A. Strict Scrutiny Applies**

Because S.B. 80 burdens fundamental rights to a jury trial and to a remedy, strict scrutiny review applies. *State v. Ward* (1999), 130 Ohio App. 3d 551, 564 (citing *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 561 (when laws “place burdens upon the exercise of fundamental rights . . . courts” apply strict scrutiny)).

S.B. 80 discriminates between those who receive the full value of their jury verdict or remedy because that verdict is below the cap or within a statutory exception to it and those who do not. Respondents have offered no compelling, let alone rational, basis for discriminating between these sets of plaintiffs, nor could they. By imposing limits one set of seriously injured plaintiffs’ meritorious cases, the General Assembly does not advance Ohio’s economic prospects and does not address frivolous lawsuits. It discriminates arbitrarily without justification.

**B. S.B. 80 Fails the Rational Basis Test**

Even if the Court were to apply the less stringent “rational basis” test, the Court must still find S.B. 80 unconstitutional. Legislation has no rational basis if it bears no real and substantial relationship to public health, safety, morals or general welfare, and is unreasonable and arbitrary. *Morris v. Savoy*, 61 Ohio St. 3d 684, 688 (1991). *See also Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, 274; *Schwan v. Riverside Memorial Hospital* (1983), 6 Ohio St. 3d 300. In applying the rational basis test, this Court held a medical malpractice statute of limitations violated equal protection because it distinguished between minors based on whether they were older or younger than ten. While the Court acknowledged the perceived importance of the medical malpractice crisis that the statute purported to address, it found that the law was not rationally related to reducing malpractice premiums. Subsequently, this Court held that the

medical malpractice statute of limitations also violated due process because it removed the tolling provision for minors. *Mominee*, 28 Ohio St. 3d at 276. Again, this Court noted that while the goal of addressing an alleged medical malpractice crisis was legitimate, defendants “failed to proffer any evidence . . . that minors with malpractice claims even constitute a significant portion of all medical malpractice claimants.” *Id.* at 275.

This Court also used a rational-basis review to find that a cap of \$200,000 for general damages in medical malpractice actions violated due process holding it “unreasonable and arbitrary.” *Morris*, 64 Ohio St. 3d at 691. Again, no evidence established a rational connection between awards in excess of \$200,000 and malpractice insurance rates. *Id.* at 770-71. Similarly, in finding collateral source legislation unconstitutional, this Court found a “paucity of credible empirical evidence that a crisis existed, or that there is a relationship between tort reform legislation and the availability of insurance.” *Sorrell*, 69 Ohio St. 3d at 423.

In *State ex rel. Nyitray v. Industrial Comm’n* (1983), 2 Ohio St. 3d 173, this Court held that denial of workers’ compensation benefits to dependents of a deceased worker simply because the worker died before the check was sent was unconstitutional under the rational-basis test. As the Court stated,

[I]t would appear that the only reason for retaining the alternate compensation scheme and denying compensation to the class represented by Nyitray is to reduce the cost to the workers’ compensation system. However, conserving funds is not a viable basis for denying compensation to those entitled to it.

*Id.* at 177.

While most of the statutes discussed above allege a health-care availability crisis, S.B. 80 makes no claim to address a crisis. Instead, the only purpose suggested for S.B. 80 is to improve the Ohio economy, which the legislature claims has been “challenged” by the civil justice

system. As in *Nyitray*, this interest provides “no viable basis for denying compensation to those entitled to it.”

In *City of Norwood v. Horney* (2006), 110 Ohio St. 3d 353, this Court confronted a related issue and found that economic use alone cannot serve as a basis for depriving a party of their constitutional interest in property.<sup>13</sup> The Court added, “we have never found economic benefits alone to be a sufficient public use for a valid public taking.” *Id.* at 377.

S.B. 80 has a strictly economic purpose. As it fails to demonstrate a proper purpose related to public health, safety, morals or welfare, S.B. 80 is unconstitutional.

**C. Even if Economic Interests Provide Sufficient Justification, Credible Evidence that S.B. 80 Accomplishes its Aims is Absent**

The Ohio legislature assumed that “frivolous lawsuits” plague the system, increase the cost of doing business, threaten jobs, drive up consumer costs, and stifle innovation. Besides showing no association between capping damages in legitimate cases and deterring frivolous cases, the legislature had no data to establish that frivolous cases even exist or affect the economy. It cited no statistics concerning Ohio civil case filings for the causes of action encompassed within S.B. 80 and no statistics concerning frivolous filings. The legislature also cited no examples in Ohio of excessive or repetitive punitive damages awards or inflated non-economic damages. Thus SB 80 becomes a cure in search of an ailment, supported by nothing.

Unbiased national statistics indicate that no tort crisis exists, and that tort litigation in general has declined by 10 percent over the last decade.<sup>14</sup> State jury trials declined by 44 percent

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<sup>13</sup> The Court also cautioned against the risk that “powerful business groups or companies [may] exercise their influence to gain their ends with little corresponding benefit to the public.” *Id.* at 376.

<sup>14</sup> National Center for State Courts, *Examining the Work of State Courts* (2004), available at [www.ncsonline.org/D\\_Research/csp/2004/\\_Files/EW2004\\_Main\\_Page.html](http://www.ncsonline.org/D_Research/csp/2004/_Files/EW2004_Main_Page.html).

from 1992 to 2002, and bench trials dropped 21 percent.<sup>15</sup> The median compensatory award in such trials was \$27,000, and less than 20 percent of those who prevailed received \$250,000 or more.<sup>16</sup> With respect to punitive damages, since 1996, the median award has been \$25,000 for tort cases and \$50,000 for all civil cases.

Rather than consider such credible evidence, the legislature instead quotes self-serving industry sources that treat insurance company internal expenses and payments as “tort costs” or, more rhetorically, a “tort tax.” One such source, Tillinghast-Towers Perrin, an insurance consulting firm, claims that the rate of annual increases in “tort system costs” was by far the lowest in the decade of the 1990s, at 3.3%, compared to rates of 11.6% for the 1950s, 9.8% for the 1960s, 11.9% for the 1970s and 11.7% for the 1980s. See Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System* (2003), at 1. It then reports an anomalous rise for 2001 and 2002, which it attributes to “record jury awards in medical malpractice cases,” as well as increases in Enron-type claims. *Id.* at 3. The trends cited by Tillinghast for 2001 and 2002 have no relationship to the claims of litigants affected by S.B. 80, because the legislation excludes medical malpractice and has no bearing on shareholder derivative claims.<sup>17</sup>

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<sup>15</sup> Brian Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMP. LEGAL STUDIES 770 (2004).

<sup>16</sup> Thomas H. Cohen, Bureau of Justice Statistics, U.S. Dept. of Justice, *Bulletin: Tort Trials and Verdicts In Large Counties, 2001*, 1-6 (2004), available at [www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf).

<sup>17</sup> Moreover, by the following year, Tillinghast claims “U.S. tort costs grew by 5.4% in 2003, representing a dramatic reduction from the double-digit trends experienced in 2001 and 2002,” *Id.* at 4, and by 2005, Tillinghast reported that tort claims grew just 0.5%. Tillinghast-Towers Perrin, *2006 Update on U.S. Tort Cost Trends* (2006) at 3. Nor does Tillinghast’s figures consider any benefit derived from tort actions, admitting: “This study examines only one side of the U.S. tort system: the costs. No attempt has been made to measure or quantify the benefits of the tort system, such as systematic resolution of disputes, and the study makes no conclusions that the costs of the U.S. tort system outweigh the benefits, or vice versa.” Tillinghast Press

Other data cited by the General Assembly contains similar flaws. The 2002 White Paper prepared by the White House Council of Economic Advisors relies entirely on the Tillinghast report. Of similar negligible value, the 1995 study from The National Bureau of Economic Research (“NBER”) entitled, “The Causes and Effects of Liability Reform: Some Empirical Evidence,”<sup>18</sup> treats all tort reforms as equally effective, *id.* at 11, is highlighted by missing data sources (Appendix C does not exist), and concludes with its “hypothesis that reductions in liability from the current common-law levels impose efficiency . . . are also consistent with three other alternative hypotheses,” such as tax cuts or demographics. *Id.* at 28. Finally, the 2003 Harris Poll of corporate attorneys commissioned by the U.S. Chamber of Commerce and entitled, “State Liability Systems Ranking Study,” contains nothing but personal opinions of in-house attorneys about the tort system. While Respondents may urge this Court to permit such speculation to provide a justification for undermining the Ohio Constitution, due process and equal protection demand more.

**D. The Remedies Provided by S.B. 80 are Unreasonable and Arbitrary.**

The premise underlying S.B. 80 is that by excusing corporate wrongdoers from full liability for the harm caused by their misdeeds, the economy of Ohio will improve. Besides the obvious flaws with this strange logic, it also wrongly assumes that relaxed tort liability standards will encourage businesses to relocate to Ohio. However, under choice of law principles, S.B. 80 protects every corporation that harms Ohio citizens, whether the corporation is located in Ohio or not. For example, Respondent Johnson & Johnson is incorporated and headquartered in New

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Release, December 13, 2006, “U.S. Tort Costs Total \$261 Billion, According to Tillinghast Study; Growth Rate for Tort Costs is the Smallest Since 1997,” available at: [http://www.towersperrin.com/tp/jsp/masterbrand\\_webcache\\_html.jsp?webe=Tillinghast/United\\_States/Press\\_releases/2006/20061213/2006\\_12\\_13.htm+selected=press](http://www.towersperrin.com/tp/jsp/masterbrand_webcache_html.jsp?webe=Tillinghast/United_States/Press_releases/2006/20061213/2006_12_13.htm+selected=press).

<sup>18</sup> 2004 Ohio Legis. Serv. at L-1981.

Jersey. Thus no rational connection exists between limiting damages to injured Ohio citizens, and encouraging corporations to locate in Ohio, because the caps on compensatory and punitive damages protect all tortfeasors, regardless of their location. All a tortfeasor needs to do to benefit from S.B. 80 is to be sure to injure a citizen from Ohio.

Equally strained is the argument that the exception for legislatively defined catastrophic injuries removes the due-process defect that rendered the caps on damages unconstitutional in *Morris*. It can hardly be suggested that this Court would distinguish *Morris* by holding: "it is **neither** irrational **nor** arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those **second**-most severely injured." The legislature cannot rationally suggest that a selectively imposed damages caps that arbitrarily denies any class of plaintiffs their full remedy in court passes constitutional muster.

Nor has the legislature established any relationship between depriving a certain class of litigants their full remedy and the goal of promoting the economy. What is the connection between closing the halls of justice to persons whose claims for non-economic damages are found to be in excess of \$250,000, or \$350,000, and the economy of Ohio? As the statistics show, only 20% of the claims result in compensatory damages exceeding \$250,000; fewer yet have noneconomic damages that exceed that figure. Of these, some must undoubtedly be medical malpractice claims, and others wrongful death. Not one shred of evidence establishes a connection between this very select group of claimants affected by S.B. 80 and Ohio's economy.

In "A Modest Proposal," Jonathan Swift suggested that the problem of poverty in Ireland could be solved if Irish parents would sell their children to the wealthy as meat.<sup>19</sup> "A Modest

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<sup>19</sup> Jonathan Swift (1729), "A Modest Proposal: For preventing the children of poor people in Ireland from being a burden to their parents or country, and making them beneficial to the public."

Proposal” was, of course, a satire, written to expose the cynicism of those who turned their backs on people in need. S.B. 80 adopts a similar approach to economic boosterism by victimizing victims a second time on behalf of those who caused their injuries. S.B. 80 fails the rational basis test.

**Proposition of Law No. 6: Violation of the Single-Subject Rule Where the Centerpiece is Unconstitutional Requires Invalidation of the Entire Bill**

S.B.80 violates the Constitution’s single-subject rule by combining items without cogent connection, such as appointments to the Board of Cosmetology, treatment of retired dentists, and caps on damages in products liability cases. Because it is impossible to determine which portions of the statute were included solely to attract the votes needed to secure the statute’s passage, *i.e.* to facilitate impermissible log-rolling, the bill should be struck down in its entirety. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 500-01 (finding it impossible to uphold primary provisions while severing extraneous ones when core provisions were separately unconstitutional).

This Court<sup>20</sup> has heavily relied upon Millard H. Ruud, *No Law Shall Embrace More than One Subject* (1958), 42 MINN. L. REV. 389, for its understandings of the scope of the constitutional limitation. Ruud stated:

It is assumed, without inquiring into the particular facts, that the unrelated subjects were combined in one bill in order to convert several minorities into a majority. The one subject rule declares that this perversion of majority rule will not be tolerated. The entire act is suspect and so it must all fall.

*Id.* 399 n.8. Citing this statement, the Delaware Supreme Court held severing certain parts of a law as extraneous “seriously undermine[s]” the single-subject rule’s purposes. *Evans v. State* (Del. 2005), 872 A.2d 539, 552-53 (citing Ruud). *See also Heggs v. State* (Fla. 2000), 759 So. 2d

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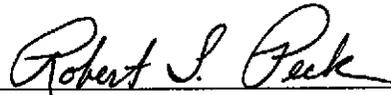
<sup>20</sup> *See, e.g., State ex rel. Dix v. Celeste* (1984), 11 Ohio St. 3d 141, 143, 144, 145.

620, 629 (application of severability clause in statute that contained discordant subjects “would emasculate the ‘one subject’ constitutional provision and thrust the judiciary into the legislative arena.”). This Court should avoid the legislative act of choosing what parts of S.B. 80 survive and strike the entire bill.

### CONCLUSION

For the foregoing reasons, this Court should answer the certified questions in the affirmative or, alternatively, return the matter for further proceedings.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of January, 2007, a true copy of the foregoing *Reply*

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## APPENDIX

## Caps on Noneconomic Damages

The following states either have no medical malpractice or general cap on noneconomic damages like S.B. 80's or have existing precedent declaring such a cap unconstitutional.

**Alabama** - *Moore v. Mobile Infirmary Assoc.* (Ala. 1991), 592 So.2d 156, 158 (Ala. 1991)(\$400,000 noneconomic damage cap in medical malpractice cases violates jury trial and equal protection guarantees).

**Arizona** - Ariz. Const. Art. 2, sec. 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."); *Boswell v. Phoenix Newspapers*, 730 P.2d 186, 194-95 (Ariz. 1986), *cert. denied*, 481 U.S. 1029 (1987)(retraction in lieu of damages in defamation actions violates state "open courts" provision).

**Arkansas** - Ark. Const. Art. 5, sec. 32 ("no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property," except in the case where there is an employer-employee relationship); Op. Ark. Atty. Gen. No. 2001-058 (finding proposed aggregate noneconomic damage cap of \$1,000,000 and an aggregate punitive damage cap of \$500,000 for injuries in long-term care facilities unconstitutional as violation of personal injury guarantee and separation of powers); *St. Louis & N. A. Ry. Co. v. Mathis* (Ark. 1905), 91 S.W. 763 (striking statute that attempted to limit prevailing party's rights to refuse reduction of damages as unconstitutional legislative remittitur).

**Florida** - *Smith v. Department of Insurance* (Fla. 1987) 507 So.2d 1080, 1089-89 (per curiam)(\$450,000 cap on noneconomic damages recoverable in actions for personal injury violates open courts provision and right to jury trial).

**Illinois** - *Best v. Taylor Machine Works* (Ill. 1997), 689 N.E.2d 1057 (Ill. 1997)(\$500,000 cap on noneconomic damages was a legislative remittitur, in violation of the separation of powers doctrine, and constituted impermissible special legislation); *Wright v. Central Du Page Hosp. Ass'n* (Ill. 1976), 347 N.E.2d 736 (\$500,000 cap unconstitutional as denial of equal protection).

**Kentucky** - Kent. Const. sec. 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."); *Waldon v. Housing Authority of Paducah* (Ky.App. 1991), 854 S.W.2d 777 (statute denying any damages resulting from criminal use of a firearm by another person violated open courts, personal injury damages and wrongful death provisions of state constitution).

**Louisiana** - *Arrington v. ER Physicians Group* (La. App. 2006), 940 So.2d 777 (\$500,000 cap on damages for malpractice violated state Constitution's "adequate remedy" provision); *Taylor v. Clement* (La. App. 2006), 940 So.2d 796 (same); *Chamberlain v. State*, 624 So.2d 874, 988 (La. 1993), *superceded by*, La. Const. Art. XII, § 10(c) (\$500,000 ceiling on general damages recoverable in a personal injury suit against State violates right to remedy where sovereign immunity has been waived).

**New Hampshire** - *Trovato v. DeVeau* (N.H. 1999), 736 A.2d 1212 (\$50,000 cap on wrongful death claims where no dependant relative survives violates right to a remedy and equal protection); *Brannigan v. Usitalo* (N.H. 1991), 587 A.2d 1232, 1237 (\$875,000 limitation on noneconomic damages recoverable in actions for personal injury violates equal protection); *Carson v. Mauer* (N.H.1980), 424 A.2d 825, 836-38 (abrogation of collateral source rule and \$250,000 noneconomic damage cap in medical malpractice cases violate equal protection).

**North Dakota** - *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1979) (statute imposing \$300,000 limit on damages recoverable in medical malpractice action and abrogating collateral source rule violated state and federal equal protection and due process guarantees).

**Oregon** - *Lakin v. Senco Products, Inc.*, 987 P.2d 463, *op. clarified*, 987 P.2d 476 (Or. 1999)(\$500,000 cap on noneconomic damages in personal injury and wrongful death actions violates jury trial right); *Tenold v. Weyerhaeuser Co.*, 973 P.2d 413, 419-20 (Or. App. 1994)(same).

**Pennsylvania** - Pa. Const. Art. III, § 18 (in cases other than those involving employers and employees, General Assembly shall have no authority to "limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property"); *Thirteenth & Fifteenth St. Passenger Ry. v. Boudrou*, 92 Pa. 475, 481-82 (1880)(negligence damage cap violates right to a remedy by due course of law); *Central R.R. of N.J. v. Cook*, 1 W.N.C. 319 (Pa. 1873)(same).

**South Carolina** - *Hanvey v. Oconee Memorial Hosp.* (S.C. 1992), 416 S.E.2d 623 (\$100,000 cap on liability of charitable hospitals denied equal protection).

**South Dakota** - *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996), *superseded, in part, by statute as stated in Peterson, ex rel. Peterson v. Burns* (S.D. 2001), 635 N.W.2d 556 (statute limiting medical malpractice compensatory damages to \$1 million violated substantive due process).

**Texas** - *Lucas v. United States*, 757 S.W.2d 687, 690-92 (Tex. 1988), *superceded by* Tex. Const. Art. III, Sec. 66 (statute limiting liability to \$500,000 for damages in medical malpractice actions violated open courts guarantee); *Waggoner v. Presbyterian Medical Center*, 647 F. Supp. 1102 (N.D. Tex. 1986), *superceded by* Tex. Const. Art. III, Sec. 66 (cap on medical malpractice recoveries violates equal protection and open courts guarantees); *Baptist Hosp. of Southeast Texas, Inc. v. Baber* (Tex. App. , 672 S.W.2d 296 (Tex. App. 1984), writ refused, 714 S.W.2d 310 (Tex. 1986), *St. Joseph's Hospital v. Wolff*, 999 S.W.2d 579 (Tex. App. 1999)(statute limiting medical malpractice liability to \$500,000 violates equal protection).

**Utah** - *Condemarin v. University Hosp.*, 775 P.2d 349, 364, 366 (Utah 1989)(statute limiting medical malpractice liability of state hospital to \$100,000 violated jury trial right)

**Washington** - *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989)(statute imposing a cap on noneconomic damages for personal injury at a rate of 0.43 times average annual wage and life expectancy violated jury trial guarantee).

**Wisconsin** - *Ferdon v. Wisconsin Patients Compensation Fund* (Wis. 2005), 701 N.W.2d 440 (cap on noneconomic damages in medical malpractice cases failed rational-relationship test under equal protection, making it unnecessary to reach other arguments or determine applicability of strict scrutiny; statute was not rationally related to legislative objective of lowering medical malpractice insurance premiums, inhibiting increases in annual assessments for patients compensation fund, lowering overall health care costs for consumers of health care, or ensuring quality health care).

Additional states without noneconomic damage caps: **Connecticut, Delaware, Iowa, Minnesota, New Jersey, New York, North Carolina, Rhode Island, Tennessee, and Vermont.**