IN THE SUPREME COURT OF OHIO

CASE NO. 06-1212

MELISA ARBINO
Petitioner

-vs-

JOHNSON & JOHNSON, *et al.*
Respondents

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REPLY OF *AMICUS CURIAE*, OHIO ACADEMY OF TRIAL LAWYERS IN SUPPORT OF MELISA ARBINO, PETITIONER

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REPLY

Amicus Curiae, the Ohio Academy of Trial Lawyers (hereinafter "OATL"), offers this brief Reply in support of Petitioner, Melissa Arbino. The OATL is mindful of the heavy volume of briefing that has already been submitted in this proceeding. Given the fundamental and far-reaching interests at stake, however, it is necessary for a few final points to be made for this Court's consideration. Every attempt will be made to avoid re-hashing arguments that have already been presented.

I. WHILE THE LEGISLATURE'S ROLE IN ESTABLISHING POLICY AND DEFINING COMMON LAW DUTIES MUST BE RESPECTED, THE OHIO CONSTITUTION IMPOSES LIMITS UPON ALL THREE BRANCHES OF THE GOVERNMENT WHICH CANNOT BE OVERRIDDEN SHORT OF A FORMAL AMENDMENT.

The *Amicus Curiae* Brief of National Federation of Independent Business Legal Foundation that was filed on December 18, 2006 contains an interesting review of the historical adoption, and subsequent repeal, of "retention statutes" early in Ohio's history. *Id., pp. 4-9.* The OATL is in agreement that, under our tri-parte system of government, the general policy-making function has been, and should be, left to the General Assembly. *In re Wieland* (2000), 89 Ohio St.3d 535, 538, 733 N.E.2d 1127, 1130; *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (superseded by statute R.C. §2317.02(B)(1)(b)). This power includes the ability "unless prohibited by constitutional limitations, [to] modify or entirely abolish common-law actions and defenses." *Thompson v. Ford* (1955), 164 Ohio St. 74, 79, 128 N.E.2d 111. To be sure, the OATL is not suggesting that this Court should undermine the General Assembly's lawful exercise of its policy-making authority.

Noticeably absent from the National Federation's discussion of the history of legislative authority is any meaningful reference to the constitutional limits that Ohio's founding fathers

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decided were necessary for the protection of individual liberties. The earliest versions of this venerable document contained the language, presently set forth in Section 5, Article I, establishing that the "right of trial by jury shall be inviolate". See also, *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 283-284, 188 N.E. 1. Likewise, this State's citizens have long been guaranteed by Section 16, Article I, that "[a]ll courts shall be open" and there will be no legislative interference with the right to a remedy conferred therein. See, *e.g.*, *Williams v. Marion Rapid Trans., Inc.* (1949), 152 Ohio St. 114, 117, 87 N.E.2d 334; *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466, 639 N.E.2d 425. Further, the General Assembly's encroachment upon core functions of the judiciary has been prohibited by Section 5(B) of Article IV. See, *e.g.*, *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 463, 668 N.E.2d 457; *State v. Greer* (1988), 39 Ohio St.3d 236, 244-246, 530 N.E.2d 382.

It is important to note that none of these three basic Constitutional restrictions upon legislative authority provide any exceptions for policy issues that are determined to be of great public concern. The supposed benefits of tort reform that Respondents and their *Amici* have been touting are of no moment when the rights to a jury trial, a meaningful remedy, and separation of powers are implicated. If the supporters of tort reform legitimately believe that overriding societal interests required laws barring juries from imposing compensatory and punitive damage awards above pre-determined levels, only one course was available to them: amend the Ohio Constitution. A plausible explanation has yet to be offered in this case for why the case for tort reform was never submitted to the general electorate for public consideration. Attempting to supersede the Constitution with legislation imploring this Court to "reconsider" established juridical precedents is <u>not</u> a viable option under our system of government.[1]

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[1] In tacit recognition that the damage caps and other onerous provisions cannot be harmonized with controlling Ohio Supreme Court precedent, this Court has been asked by the legislature in Section 3(E) of the uncodified portion of S.B. 80 to overturn *State v. Sheward* (1999), Ohio St.3d 451; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415; and *Brennaman v.*

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An equally vital check upon legislative policy-making authority was imposed by Ohio's founding fathers through Section 16, Article I (Due Process), which targets "unreasonable or arbitrary" enactments. *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 110, 146 N.E.2d 854, 860; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274, 503 N.E.2d 717, 720-721. In similar fashion, any legislation (no matter how well intentioned) that impermissibly discriminates against protected classes, or lacks a rational basis, is flatly prohibited by Section 2, Article I (Equal Protection). *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 198-199, 331 N.E.2d 723; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 57-61, 514 N.E.2d 709. As is the case with the other two branches of government, the prerogative of the General Assembly is far from unfettered.

The OATL is in complete agreement with Respondent's *Amici* when they maintain that: "Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties." *Amici Curiae Brief of National Federation of Independent Business Legal Foundation, p. 11.* This unique ability of the judiciary to fairly and equitably resolve "individual disputes" on a case-by-case basis is precisely what was sought to be safeguarded by the Ohio Bill of Rights. It simply is not possible for "discrete issues" to be justly adjudicated when inflexible limits have been imposed upon the damages that may be awarded irrespective of the actual losses sustained. Mandating that claims for punitive damages must be processed in the same systematic manner likewise divests trial judges of their authority to determine how best to proceed based upon the particular situation at hand. S.B. 80 does nothing to further the General Assembly's legitimate interests in establishing public policy, and seeks only to undermine the ability of the judiciary to adjudicate

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R.M.I. Co. (1994), 70 Ohio St.3d 460. It is readily apparent that the supporters of tort reform have little regard for the vitally important doctrine of *stare decis*, a doctrine of "fundamental importance to the role of law." *Rampler v. Higgins* (2001), 93 Ohio St.3d 111, 120, 752 N.E.2d 962.

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controversies in the manner that Ohio's founding fathers envisioned.

In heaping praise upon S.B. 80, Respondents and their *Amici* gloss over the rudimentary tenet that legislative policy-making authority can only be exercised within the confines of the Ohio Constitution. *Thompson*, 164 Ohio St. 79 at 128 N.E.2d 111; *Johnson v. B.P. Chems.* (1999), 85 Ohio St.3d 298, 303, 707 N.E.2d 1107. Were a bill adopted that limited the tort damages that could be recovered except for claims brought by Caucasian males, there would be no doubt that the enactment was unenforceable on a number of levels. Likewise, any legislation which seeks to "modify" the common law so as to preclude some of the most seriously injured tort victims from recovering the full amounts awarded by juries must be subjected to constitutional scrutiny. The clear and unequivocal promises of a jury trial, a meaningful remedy, and a court system free from inappropriate legislative interference must be respected, no matter how "urgently" some may believe tort reform is needed. No historical examination of the General Assembly's policy-making powers is complete without a careful and thoughtful consideration of these deeply engrained constitutional protections.

II. STATUTORY MAXIMUMS FOR NON-ECONOMIC DAMAGES VIOLATE THE RIGHT TO A JURY TRIAL, AND RESPONDENTS' ARGUMENTS ON THIS POINT ARE NOT ONLY UNPERSUASIVE, BUT ALSO MISUNDERSTAND THE CONSTITUTIONAL INFIRMITY.

Throughout their brief the Respondents quixotically and repeatedly argue that R.C. 2315.18 should be found constitutional because it applies uniformly and does "not give judges the discretion" to assess the evidence independently. Apparently Respondents misunderstand the constitutional infirmity presented by R.C. 2315.18: *it is precisely because* a statutory maximum arbitrarily deprives those with damages greater than the predetermined amount from enjoying one of the essential components of the right to trial by jury – to have damages assessed by the jury – that the statute is unconstitutional.

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Unlike remitter, additur, or the granting of a judgment notwithstanding the verdict or a motion for a new trial, R.C. 2315.18 arbitrarily would impose a maximum without any regard to the specific evidence adduced in a particular case. As noted by both Petitioner and this *Amicus Curiae*, there is no dispute that these judicial procedures were well established by 1851, the year the right to jury trial was last restated as part of the Ohio Constitution. While these procedures permitting judges to assess the validity of verdicts have been well recognized, statutory maximums on non-economic damages were not part of the law, whether common or statutory, as of 1851. This analysis, of course, derives from Section 5, Article I, of the Ohio Constitution which guarantees that the right of trial by jury "shall be inviolate ***."

Resort to dictionary definitions seemed unnecessary at the time of our original Brief, but Respondents' Brief forces us. "Inviolate" is defined as "not violated or profaned; *esp*: PURE." *Merriam-Webster's Collegiate Dictionary* (10 Ed. 1999) 616. Further, the effective synonym "inviolable,"[2] which may very well have been a better word choice for those who drafted Section 5, is defined, in part, as, "secure from assault or trespass: UNASSAILABLE." *Id.*

Thus, Respondents should have directly addressed the following: were statutory maximums on non-economic damages, or any damages for that matter, recognized in the law as of 1851? Not surprisingly, Respondents assiduously avoid addressing this question directly. Respondents' silence on this question should tell this Court all it needs to know about the power of Respondents' argument.

Instead, Respondents unjustifiably set the bar too high by arguing that, "[t]he single word 'inviolate' does not mandate that every jury awarded is exempt from applicable laws."

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[2] See *Garner*, A Dictionary of Modern Legal Usage (2 Ed. 1995) 467 ("[inviolable] suggests that something is incapable of being violated, whereas [inviolate] suggests merely that the thing has not been violated. In practice, however, the words are often used interchangeably.")

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Respondents' Brief, p. 14. True enough, but neither Petitioner nor this *Amicus Curiae* have argued as much.

Again, we do *not* argue that verdicts are per se "exempt" from *any* review. We have noted and do not dispute that remitter, additur, motions for a new trial, and motions for judgment notwithstanding the verdict were all part of the law that was incorporated into Section 5 as of 1851. We further do not dispute that any cause of action *specifically created* by statute from the General Assembly is certainly subject to almost any reasonable provisions delineating the damages awardable, if any.

Neither recognized judicial-review procedures nor statutorily created causes of action are at issue here. Instead, R.C. 2315.18 purports to impose upon a jury's determination of damages an entirely new and unrecognized limitation, and it does so in an entirely arbitrary manner. Put simply, Respondents do not address how a statutory maximum can invade one of the fundamental provinces of the jury while at the same time preserving the right to a jury trial as in essentially the same form as of 1851.

Further, the cases and authorities cited by Respondents are distinguishable or unpersuasive. First, Respondents unduly rely upon *Markota v. East Ohio Gas Co.* (1951), 154 Ohio St. 546, 97 N.E.2d 13. *See Respondents' Brief, pp. 14-20.* They cite *Markota* for the proposition that Section 5 should be interpreted to allow for "improvement and development of jury trials" to preserve "the continued validity of the jury system." *Id. at 16.* Of course, "improvement," like beauty, is in the eye of the beholder.

Unfortunately for Respondents, *Markota* simply does not support the idea of statutory maximums on damages. The language relied upon by Respondents comes from pure dicta provided by Justice Taft: "[t]herefore, the remainder of this opinion represents merely the views of the writer of this opinion and not necessarily those of the other members of the court."

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Markota, 154 Ohio St. at 552-553, 97 N.E.2d at 13. Justice Taft offers a well reasoned opinion regarding additur as an alternative method by which the trial court could resolve the matter after remand. But the idea that additur is an "improvement and development" relating to jury trials *does not* support the proposition that statutory maximums are equally a permissible improvement or development.

The difference between additur and remittiter on the one hand, versus statutory maximums for non-economic damages on the other hand, is that such mechanisms permit trial judges who are intimately familiar with the proceedings to review the verdict on a case-by-case basis. Furthermore, additur and remittiter each require the consent of the party who is actually giving up what otherwise would be the right to a new trial, and that the affected party who consents enjoys at least an equal benefit, if not more, than the verdict rendered by the jury. See *Markota*, 154 Ohio St. at 557, 97 N.E.2d at 13. R.C. 2315.18, on the other hand, certainly does not require the consent of the plaintiff, and by definition applies to deprive the plaintiff of a judgment at least equal to the damages as determined by the jury.

Respondents further rely heavily on several federal cases, but all of those cases are distinguishable because they rely on the specific prohibition that "no fact tried by a jury shall be otherwise *reexamined,*" found in the Seventh Amendment to the United States Constitution. That language, however, is not found in Section 5, Article I, of the Ohio Constitution. The federal cases relied on by Respondents are therefore distinguishable on that basis alone, and it is unnecessary to refute the disingenuous reasoning that Congress can impose statutory maximums because the federal judge entering such a judgment is not "reexamining" any fact.

Respondents also cite to these several federal cases for the proposition that statutory maximums are applied uniformly: we have addressed and shown the frailty of this argument above.

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Finally, Respondents cite the federal cases for the proposition that finding statutory maximums unconstitutional would be contrary to the history permitting legislatures to create statutory or treble damages. But again, Respondents argue both too little and too much: we agree that legislative bodies have the right to create statutory causes of action and to set the damages awardable under those causes, but that concept in no way alters the question of whether *statutory maximums* were part of the law as of 1851.

Respondents reliance on inapplicable federal cases should be contrasted to Petitioner's and our citation to *Galayda v. Lake Hosp. Systems, Inc.*, 71 Ohio St.3d 421, 1994-Ohio-64, 644 N.E.2d 298. In *Galayda,* this Court ruled that it would be an unconstitutional invasion of the right to a jury trial to enter a substantial judgment but then permit the liable defendants to pay that judgment on a court-approved installment plan. *Id.* As it happens, the plaintiff in *Galayda* was awarded $1,396,125 for *future* non-economic damages. *Galayda v. Lake Hosp. Systems, Inc.*, (Sept. 30, 1993), 8th Dist. No. 63151.

Had R.C. 2315.18 been in effect when Mr. Galayda had his day in Court, Respondents would have no doubt argued that his award for non-economic damages should be limited to the single-person, statutory maximum of $350,000.[3] Thus, were *Galayda* now before this Court with R.C. 2315.18 at issue, to find the statute constitutional this Court would be forced to reconcile the following: why is it *unconstitutional* to impose payments by installment on a total verdict of $1,396,125, but at the same time constitutional to flatly reduce that same verdict by over $1,000,000? That is, in effect, the impenetrable conundrum that Respondents effectively ask this Court to ignore.

[3] A careful reading of the decision from the 8th District Court of Appeals shows that Mr. Galayda did not suffer any permanent or substantial physical deformity, the loss of use of a limb, or the loss of a bodily organ system, nor did he suffer permanent physical functional injury that permanently prevented him from being able to independently care for himself. Therefore, it would appear that Mr. Galayda would not have enjoyed the exception to the limitations in R.C. 2315.18(B)(3). It is also true that *Galayda* was a medical-negligence claim, but that fact is irrelevant to the analysis of constitutionality.

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The answer to the question before the Court inexorably flows from the language of Section 5: statutory maximums on non-economic damages should be found unconstitutional because they impermissibly invade a core function of the jury, which is to assess damages, and which damages then must be awarded if supported by the evidence and if comporting with due process. In response to Certified Question No. 1, this Court must find that R.C. 2315.18 is unconstitutional.

III. RESPONDENTS AND THEIR *AMICI CURIAE* HAVE FAILED TO OFFER ANY COGENT BASIS FOR FINDING R.C. 2315.18 CONSTITUTIONAL UNDER THE OHIO CONSTITUTION'S EQUAL PROTECTION CLAUSE, WHETHER ANALYZED UNDER STRICT SCRUTINY OR RATIONAL BASIS.

In OATL's *Amicus Curiae* Brief, OATL argued that Section 2, Article I of the Ohio Constitution (the equal protection clause) was violated by the non-economic damages caps of R.C. 2315.18 because the caps arbitrarily discriminate against seriously injured individuals who do not fall within the statutory exemptions but whose non-economic damages the jury determines to have values exceeding the statutory caps. OATL maintained that this classification is subject to strict scrutiny because, under Ohio Supreme Court precedent, the right to jury trial includes the right to have the jury determine the amount of damages; and that a trial court's subsequently reducing a jury's award of damages violates this right. Even if the constitutionality of this damages restriction is analyzed under a rational basis analysis, the cap violates Ohio's equal protection provision because the articulated legislative justifications are in no rational manner furthered by segregating out this one group of injury victims to have their damages reduced after the jury determines their injuries warrant greater recovery.

Nothing that respondents and their *amici* argue provides a legitimate basis for rejecting OATL's contention that R.C. 2315.18 violates the Ohio Constitution's equal protection clause.

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A. This Court's Precedents Require It To Apply Strict Scrutiny Because The Legislative Classification Affects The Fundamental Right To Jury Trial.

Although respondents and their *amici* would have this Court look to various non-controlling federal or out-of-state cases to determine whether strict scrutiny applies, this Court's own precedents require the heightened standard because the injury victim's right to have the jury determine damages is infringed by the legislative classification. For instance, in *Galayda* this Court stated:

> It is well-established that the right of trial by jury in this state is a fundamental and substantial right guaranteed by the Ohio Constitution. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, 633 N.E.2d 504, 510; *Kneisley v. Lattimer-Steven Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743, 746; and *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1,3. This court has held there is a fundamental constitutional right to a trial by jury in negligence actions. *Sorrell, supra*, 69 Ohio St.3d at 422, 633 N.E.2d at 510; *Kneisley, supra*, 40 Ohio St.3d at 357, 533 N.E.2d at 746. Included in that right is the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled. *Sorrell, supra*, 69 Ohio St.3d at 422, 633 N.E.2d at 510.
>
> R.C. 2323.57 (C) requires a trial judge... to order that any future damages award which exceeds $200,000 be paid in periodic installments rather than in a lump sum upon entry of judgment. Moreover, R.C. 2323.57 (E) (2) provides... that 'the total amount paid shall not exceed the amount of the judgment.'
>
> ****
>
> It is evident that application of R.C. 2323.57 to a jury verdict does not merely mandate the manner in which a judgment shall be paid; rather, it requires the trial court to further reduce the jury's award of damages already once reduced to present value. *Application of the statute quite simply results in a successful plaintiff's receiving less than the jury awarded*, and deprives the most severely injured victims of the benefits of investment.
>
> ****
>
> For the foregoing reasons, we find that R.C. 2323.57(C) invades the jury's province to determine damages, and that *the statute*

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> *violates a plaintiff's right to trial by jury* as guaranteed by Section 5, Article I of the Ohio Constitution.

Id., 71 Ohio St.3d at 425-426, 644 N.E.2d at 298 (emphasis added).

The foregoing precedent is critical to the outcome of the equal protection argument here for four (4) reasons. First, it establishes that, under the Ohio Constitution, the right to jury trial is a fundamental right. Second, it establishes that, under the Ohio Constitution, the fundamental right to jury trial includes the right to have the jury determine the amount of damages. Third, it establishes that, under the Ohio Constitution, legislation that permits the trial judge to reduce the amount of the jury's award *after* the jury returns its verdict violates the plaintiff's right to trial by jury. Fourth, it establishes, by implication, that legislative classifications requiring the trial judge to reduce the jury's damages awards as to some (but not all) accident victims affects those individuals' rights to jury trial in such a way that the classification must be evaluated under a strict scrutiny analysis.

Thus, if this Court's prior precedents – including *Galayda*, *Sorrell*, and *Sheward* – are to be respected and *stare decisis* applied, the legislative classifications created by R.C. 2315.18 must be tested by the strict scrutiny standard because the affected individuals' rights to have the jury determine their damages are impaired by the legislative classifications.

B. Even Under Rational Basis Analysis, R.C. 2315.18 Violates Equal Protection Because Taking From Certain Injury Victims A Portion Of Their Jury Awards Does Not Reasonably Further Any Valid Legislative Objective.

None of the seven (7) briefs filed by the respondents and their *amici* directly address OATL's contentions as to why Ohio's equal protection clause is violated by R.C. 2315.18. Respondents and their *amici* do, however, make certain arguments that *indirectly* attempt to answer the concerns raised by OATL's amicus brief. Upon closer examination, however, those oblique arguments must fail.

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Before addressing those arguments, a word must be stated concerning respondents' and their *amici's* position as to the rational basis analysis. Although rational basis analysis is less stringent than strict scrutiny, it does not mean that the legislature can simply articulate otherwise valid public purposes that are in no sense rationally furthered by the burdens imposed on the affected individuals.

In other words, the mere pretext of a valid police power objective does not satisfy the rational basis test.[4] Even where legislation deals with purely economic interests, this Court has held that the constitutional guarantees protecting those interests "would be hollow if all legislation enacted in the name of public welfare were *per se* valid." *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 121, 748 N.E.2d 1111 (quoting *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 546, 21 Ohio Op. 422, 424-425, 38 N.E.2d 70). Instead, "'[t]o be truly in the public [interest]... and thus superior to private property rights, any legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property.... The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.'" *Id.*

Here, none of the governmental interests discussed by respondents or their *amici* justify taking away a portion of a jury's non-economic damages award from seriously injured individuals whose injuries do not fall within the statutory exemptions.

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[4] See, *e.g., City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006 Ohio 3799, ¶ 69, in which, in the analogous context of takings of private property for alleged public uses, this Court stated: "There can be no doubt that our role – though limited – is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the state... proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose."

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First, as to respondents' argument that the caps make the civil justice system "more fair" because they curb the number of "frivolous lawsuits," there is no rational connection between taking away a portion of an injury victim's jury award and the goal of reducing the filing of frivolous lawsuits. If the jury has returned a verdict for an injury victim and awarded him or her damages, and that verdict is not vulnerable to attack on appeal or via post trial motions, then, *ipso facto*, that lawsuit was not frivolous. How, then, does reducing that injury victim's non-economic damages award deter the filing of frivolous lawsuits? Those litigants and attorneys who pursue baseless lawsuits will undoubtedly be unconcerned that they can "only" recover $250,000.00 in non-economic damages.

The only thing the cap accomplishes is to turn a random class of injury victims into sacrificial lambs on the altar of "tort reform." But, as a practical matter, frivolous lawsuits are not reduced, and nothing is accomplished but reducing the amount of money certain wrongdoers have to pay to satisfy jury verdicts against them. Thus, not only is no valid legislative objective furthered, but a discrete class of wrongdoers is actually benefited, for no legitimate reason, by creating this particular legislative classification.

Second, there is no merit to respondents' argument that the caps are justified under a rational basis analysis because certain catastrophically injured individuals are exempted from their effects. Ironically, this argument illustrates the equal protection problem with this statute. Under R.C. 2315.18, *some* persons who – according to the legislative definition – are catastrophically injured can recover non-economic damages in *any* amount (subject, of course, to the trial court's authority to grant remittiturs). By contrast, under the same statute, *other* persons – who are not fortunate enough to fall within the legislative exemptions, but who have nonetheless sustained serious non-economic losses – *automatically* (and without right of appeal) have their damages award reduced, regardless of what the evidence shows and what the

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jury concludes after hearing the evidence. Thus, although the fact that certain seriously injured persons are exempted from the cap is not a bad thing, it cannot justify imposing the caps on *other* individuals who are *also* seriously injured.

Third, there is no merit to respondents' argument that the caps are justified because statistics show that a large portion of personal injury recoveries goes to costs and attorney fees. Attorneys fees and costs are inherent in the system because wrongdoers and their insurers typically do not voluntarily pay full value on claims without having lawsuits filed against them. Moreover, how reducing damages awards furthers the ostensible goal of ensuring that the claimant gets a greater share of the recovery remains a mystery. If the damages award is reduced due to the cap, the claimant's proportionate share is also reduced. The costs of litigation, meanwhile, remain the same. Indeed, although earlier versions of S.B. 80 contained a provision capping the attorney fees of injury victims' attorneys, that provision was ultimately abandoned. The OATL does not mean to suggest that legislation capping fees would have been constitutional, or desirable. The point is that the legislature did *not* cap fees; and to suggest that it tried to ensure that a greater portion of the recovery would go to injury victims by *capping their damages* is startlingly disingenuous.

Fourth, there is no merit to respondents' and their *amici's* argument that the legislature may cap the non-economic damages awarded to certain personal injury victims because non-economic damages are "inherently subjective" and have a tendency to be inflated by juries to be more punitive than compensatory. Not only does this argument indulge in rampant speculation, but the classifications created by this cap do not rationally further this ostensible objective. If juries have a tendency to inflate non-economic damages, would not this tendency be most prevalent when the victim is catastrophically injured? Yet this category of injury victims is exempted from the caps. Similarly, if juries have a tendency to inflate non-economic

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damages, then how does the cap hinder this tendency with respect to plaintiffs who suffer *the least severe injuries*? Under R.C. 2315.18, the jury can award a person with negligible injuries up to $250,000 in non-economic damages – with no check on this but the traditional power of the court to order remittitur. Yet, a person with truly serious injuries who does not come within the exemptions but whom the jury determines to have non-economic losses exceeding the caps has his or her damages award reduced *automatically and with no right to contest the reduction.* Here, again, there is no rational connection between the statutory classifications and the goal sought to be furthered. There is only a symbolic gesture to appease proponents of the "inherent subjectivity" argument, while harming, in a concrete fashion, persons who have sustained serious injuries at the hands of wrongdoers.

Finally, there is no merit to the argument that the selectively imposed caps in R.C. 2315.18 are valid because they somehow promote Ohio's economic growth. If the legislature enacted a statute requiring all personal injury victims with red hair (*and only them*) to have their non-economic damages capped regardless of what the evidence showed or how the jury valued those damages, could such an absurd classification withstand constitutional scrutiny simply by invoking the specter of economic growth? The arbitrary classification created by R.C. 2315.18 is no less absurd, and cannot be any better justified simply by claiming that the state's business climate will be promoted thereby.

In short, it is telling that not one of the respondents or their *amici* attempted to challenge OATL's equal protection argument head-on. They did not do so because such arguments as they make throughout their briefs do not cure the equal protection problems inherent in R.C. 2315.18. To be sure, OATL does not believe that non-economic damages caps can *ever* be held constitutional unless the Ohio Constitution's rights to jury trial provision, a meaningful remedy, and a separation of powers were amended. However, even if this Court were to

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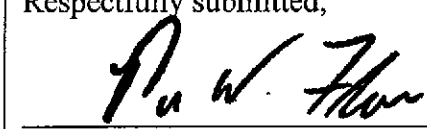
disagree with that position, one thing is clear: the non-economic damages cap in R.C. 2315.18, *as currently drafted*, cannot withstand an equal protection challenge, whether tested under strict scrutiny or rational basis analysis. As such, OATL respectfully submits that R.C. 2315.18 must be held unconstitutional under Section 2, Article I of the Ohio Constitution.

CONCLUSION

For the foregoing reasons, the members of the OATL urge this Court to answer the first and third certified questions in the affirmative. The second certified question should be addressed only once a case arises involving non-subrogated collateral benefits that are potentially subject to the limited abrogation of the collateral source rule.

Respectfully submitted,



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I hereby certify that the foregoing **Reply** was served by regular U.S. Mail on this 25th day of January, 2007 upon:

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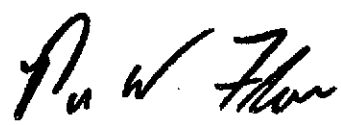

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