

IN THE SUPREME COURT OF OHIO

ORIGINAL

CASE NO. 2008-1463

DONALD KRIEGER; CLIFTON OLIVER
Plaintiff-Appellees

-vs-

CITY OF CLEVELAND
Defendant-Appellant

On Appeal from the
Eighth Judicial District Court of Appeals, Cuyahoga County
Case Nos. 89314, 89428, and 89463

BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION OF JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLEES

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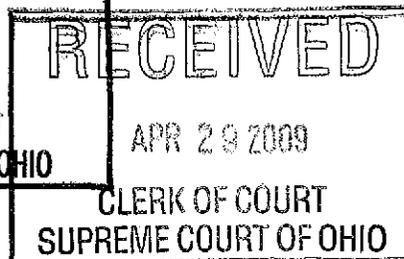
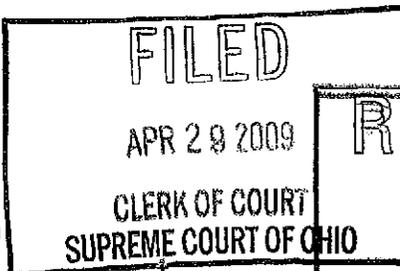


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STATEMENT OF AMICUS INTERESTS

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”), formally known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately two thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The OAJ urges the Court to recognize that the General Assembly’s constitutional authority to restrict the damage awards which may be assessed by juries is not unbridled. The ruling which was issued last year *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E. 2d 420, certainly did not confer limitless discretion upon the legislature to override the core judicial responsibility of fully compensating those who have been injured by tortious wrongdoing. Only in those instances where sufficient public exigencies have been objectively identified should there be any toleration of legislative interference the jury’s prerogative to assess damages. While such a demonstration had been recognized in *Arbino* with respect to 2004 S.B. 80, the same cannot be said of 1985 H.B. 176. Affirmance of the Eighth District’s sound reasoning is thus in order.

ARGUMENT

PROPOSITION OF LAW NO 1: R.C. §2744.05(c)(1)'S LIMITATION ON THE AWARD OF NON ECONOMIC DAMAGES AGAINST A POLITICAL SUBDIVISIONS [sic] IS A CONSTITUTIONAL LEGISLATIVE ENACTMENT THAT DOES NOT IMPAIR THE RIGHT TO A JURY TRIAL UNDER ARTICLE I, SECTION 5 OF THE OHIO CONSTITUTION AND DOES NOT VIOLATE EQUAL PROTECTION GUARANTEES.

A. CONSTITUTIONAL STANDARDS

1. The Right to a Jury Trial

Defendant, City of Cleveland, initially contends that the damages caps imposed by R.C. §2744.05(C)(1) are consistent with the constitutional right to a jury trial, even though the objective of the enactment is to ensure that no jury will ever assess an award against a political subdivision exceeding \$250,000.00 regardless of the nature or extent of the non-economic harm inflicted. Section 5, Article I, of the Ohio Constitution guarantees citizens that:

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. [emphasis added]

The venerable right to a trial by jury in a civil action has long been recognized in Ohio. As early as 1853, this Court stated that “it is beyond the power of the General Assembly to impair the right [to a trial by jury] or materially change its character.” *Work v. State* (1853), 2 Ohio St. 296 (syllabus, at 2); *see also Gibbs v. Village of Girard* (1913), 88 Ohio St. 34, 102 N.E. 299, (syllabus, at 2) (“The right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree”.)

This Court has interpreted the constitutional protection as affording a substantive right, rather than a merely procedural entitlement:

The right to a jury trial does not involve merely a question of procedure. The right to jury trial derives from [sic] Magna Carta. It is reasserted both in the Constitution of the United States and in the Constitution of the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege.

Cleveland Ry. Co. v. Halliday (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3; See also *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d at 356, 533 N.E.2d at 746. Chief Justice Rehnquist has commented that:

The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co., Inc. v. Shore (1979), 439 U.S. 322, 343-344, 99 S.Ct. 645, 658, 58 L.Ed.2d 552 (Rehnquist, J., dissenting). Similarly, Justice Maureen O'Connor has described the jury system as the "crown jewel of our liberty," and has recognized that it applies to "claims for injury arising from negligence or intentional torts":

The right to a trial by jury is a venerable one derived from Magna Carta, embodied first in the federal Constitution, then in the Northwest Ordinance of 1787, and thereafter in the Ohio Constitution.... Designed to prevent government oppression and to promote the fair resolution of factual issues..., trial by jury is "the crown jewel of our liberty," the "most cherished institution of free and intelligent government," and the "best institution for the administration of justice...." **It is well understood that the right is "fundamental," "substantial,"... and "inviolable."** Section 5, Article I, Ohio Constitution. [emphasis added]

* * *

Claims for injuries arising from negligence or intentional

torts...were recognized at common law. Today, those claims typically retain a right to trial by jury.

Arrington v. Daimler Chrysler Corp., 109 Ohio St. 3d 539, 545, 2006-Ohio-3257, 849 N.E.2d 1004 ¶ 24. Perhaps the United States Supreme Court has most succinctly and repeatedly made the point that the right is not to be trifled with:

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry (1990), 494 U.S. 558, 565, 110 S.Ct. 1339, 1344-45, quoting *Dimick v. Schiedt* (1935), 293 U.S. 474, 486, 55 S.Ct. 296, 301.

There can be no serious dispute that the right to jury specifically applies to all phases of the fact-resolution process, most notably the determination of damages:

This court has held that there is a fundamental constitutional right to a trial by jury in negligence actions. *** 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.

Galayda v. Lake Hosp. Systems, Inc., 71 Ohio St.3d 421, 425, 1994-Ohio-64, 644 N.E.2d 298, 301, citing *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 1994-Ohio-38, 633 N.E.2d 504, 510; See also *Seth v. Capitol Paper Co.* (Aug. 29, 1990), 2nd Dist. No. 11539, 1990 W.L. 125724, p. *9. Chief Justice Moyer has written that: "I agree with the majority that the right to a trial by jury includes a determination by the jury of all questions of fact, as well as the amount of compensatory damages to which the plaintiff is entitled." *Galayda*, 71 Ohio St.3d at 436, 644 N.E.2d at 308.

The fundamental right to trial by jury was recognized in *Sorrell*, 69 Ohio St.3d 415, which involved former R.C. §2317.45. That statute had abrogated the collateral

source rule and required trial judges to reduce jury verdicts by any payments the plaintiff was entitled to receive from insurance or other third parties. *Id.*, 69 Ohio St.3d at 420. Just as with the limits that had been imposed upon general tort recoveries by S.B. 80, the legislation had been passed for the avowed purpose of “reducing the causes of the current insurance crisis and preventing future crises, and ensuring the availability and affordability of insurance coverages required by charitable nonprofit organizations, public organizations, political subdivisions, individual proprietors, small businesses, and commercial enterprises.” *Id.*, at 419-420. In finding that the statute was unenforceable, the majority reasoned that:

The statute merely directs the trial court to deduct the amount of the collateral benefit from the total jury award. In this respect, courts may, consistent with R.C. §2317.45, enter judgment in disregard of the jury’s verdict and thus violate the plaintiff’s right to have all facts determined by the jury, including damages. [citation omitted]

Id., at 422.

The sanctity of the constitutional right to a jury trial was re-affirmed in *Galayda*, 71 Ohio St.3d 421, 694 N.E.2d 298. At issue in that instance was another tort reform enactment that allowed health care providers to pay judgments entered against them in periodic installments over time. While the typical tort plaintiff would be entitled to immediately pursue collection of the full award, the victim of medical malpractice had to wait years before the jury’s verdict was satisfied. *Id.*, 71 Ohio St.3d at 425-426. The majority concluded that:

*** [W]e find that R.C. §2323.57(C) invades the jury’s province to determine damages, and that the statute violates a plaintiff’s right to a trial by jury as guaranteed by Section 5, Article I of the Ohio Constitution.

Id., at 426.

2. Equal Protection of the Law

The guarantee of equal protection has also been implicated in Defendant's Proposition of Law, which is preserved in Section 2, Article I of the Ohio Constitution. *Kinney v. Kaiser Alum. & Chem. Corp.* (1975), 41 Ohio St.2d 120, 322 N.E.2d 880. All laws are subject to the limitations imposed by this fundamental right. *State ex rel. Doersam v. Industrial Commn. of Ohio* (1988), 40 Ohio St.3d 201, 202, 533 N.E.2d 321, 323. This Court has recognized that "[w]hile the General Assembly also has the power to define the contours of the state's liability, it must operate within the confines of equal protection ***." *Adamsky v. Buckeye Loc. Sch. Dist.*, 73 Ohio St.3d 360, 361-362, 1995-Ohio-298, 653 N.E.2d 212, 214.

The equal protection clause imposes varying levels of protection. When the legislation at issue creates classifications involving a "fundamental right," courts must apply the "strict scrutiny test." *Sorrell*, 69 Ohio St.3d at 424-425; *Crowe v. Owens Corning Fiberglas* (Oct. 29, 1998), 8th Dist. No. 73206, 1998 W. L. 767622. Such a standard is required in the instant case since the constitutional guarantees of a right to a remedy and a jury trial are at stake. In *Beatty v. Akron City Hosp.* (1981), 67 Ohio St.2d 483, 492, 424 N.E.2d 586, 592, the Court explained that:

If the discrimination infringes upon a fundamental right, it becomes the subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest. That is, once the existence of a fundamental right or a suspect class is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional. [citations omitted].

Even when the complaining party is not a member of a specifically protected group, legislation creating class differences must still be rationally based upon legitimate governmental interests. *Adamsky*, 73 Ohio St.3d at 362, 653 N.E.2d at 214.

The equal protection clause generally requires that all similarly situated individuals be treated in a similar manner. *State ex rel. Patterson v. Industrial Commn. of Ohio*, 77 Ohio St.3d 201, 204, 1996-Ohio-263, 672 N.E.2d 1008, 1011; *Doersam*, 45 Ohio St.3d 115, 119; *State ex rel. Nyitray v. Industrial Commn. of Ohio* (1983), 2 Ohio St.3d 173, 175, 443 N.E.2d 962, 964.

B. DISTINGUISHING THE *ARBINO* DECISION

Defendant and its *Amici* appear to be under the impression that *Arbino*, 116 Ohio St. 3d 468, is the final word on the constitutionality of damage limitations and Ohio courts must now succumb to even the most arbitrary and unwarranted caps. But *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, 576 N.E. 2d 765, has never been overruled and thus remains alive and well. A majority of that Court had concluded that a prior legislative attempt to cap damages in medical malpractice actions violated the Ohio Constitution, although no four justices adopted the same reasoning.

A careful review of *Arbino* reflects that this Court's approval of the limits which are now in place for general tort recoveries was not as casually granted as has been intimated. The legislature's demonstration of real and compelling policy justifications for protecting business and insurance interests was a necessary precondition for a judicial finding that the rights established in the Ohio Constitution were being preserved by the tort reform effort.

2004 Am. Sub. S.B. 80 was replete with legislative "findings" and specific references to a variety of studies, polls of business officials, and the testimony of numerous witnesses who appeared before the General Assembly. *Id.*, Section 3(A). This Court was specifically urged in the uncodified portion of the enactment to reconsider several decisions interpreting the Ohio Constitution. *Id.*, Section 3(E). In rendering the

ensuing decision in *Arbino*, 116 Ohio St.3d 468, ¶ 53-55, 68-69 & 100-101, a majority of this Court repeatedly emphasized that an evidentiary record had been developed by the legislature before caps were imposed upon noneconomic and punitive damages in tort actions. Indeed, Chief Justice Moyer's opinion specifically observed that:

Unlike the record in *Morris [v. Savoy* (1991), 61 Ohio St.3d 684, 576 N.E.2d 765] and *Sorrell [v. Thevenir*, 69 Ohio St.3d 415, 1994-Ohio-38, 633 N.E.2d 504], which we criticized as lacking evidence demonstrating a rational connection between the tort reforms taken and the public good to be achieved, the record here draws a clear connection between limiting certain and potentially tainted noneconomic-damages awards and the economic problems demonstrated in the evidence. ***

Id., 116 Ohio St.3d at 479-480 ¶ 56. Logically, when such "evidence" is lacking then *Morris* and *Sorrell* will remain controlling. These seminal decisions have long stood for the proposition that the Supreme Court will not blindly accept unproven and unverifiable assertions that "public policy" is being advanced.

Neither Defendant nor its *Amici* have identified any comparable legislative findings in 1985 Am. H.B. 176. That legislation was adopted nearly 20 years before 2004 Am. Sub. S.B. 80 and thus cannot be salvaged, as a matter of simple logic, upon the record which justified the *Arbino* decision. That evidence pertained almost entirely to the business and insurance industry, and has little bearing upon political subdivisions. Juries are extremely solicitous of governmental entities, and runaway verdicts rarely (if ever) are imposed against local agencies and officials. Faceless corporations and insurers which appear to possess bottomless pockets are an entirely different matter. The jurors have no reason to fear that taxes will be raised in response to an onerous verdict.

After citing a 1996 law review article, Defendant has proclaimed that:

The preamble to the Tort Liability Act further confirms the General Assembly's desire to protect public funds stating: "[t]his act is hereby declared to be an emergency measure necessary for the immediate preservation of public peace, health, and safety." [footnote omitted].

Defendant's Merit Brief, pp. 10-11. Such common boilerplate language hardly rises to the level of the comprehensive legislative findings which were cited by this Court in *Arbino*, 116 Ohio St. 3d 468 ¶ 53-55, 68-69 & 100-101. And this Court has previously recognized that "conserving funds is not a viable basis for denying compensation to those entitled to it." *Nyitray*, 2 Ohio St. 3d at 177.

Even if it were conceivable that an evidentiary record accompanied H.B. 176 which justified the flat \$250,000.00 cap in 1986, that restriction upon jury awards has remained unchanged over the last 23 years. No adjustment has been made for inflation and unavoidable increases in the cost of living. Accordingly, there still is no objective and verifiable proof has been identified confirming that limiting the instant Plaintiffs' recovery to an arbitrary figure which was selected over two decades ago will advance any legitimate public objectives.

C. Upholding *Krieger*

The Eighth District's opinion below was based squarely upon *Gladon v. Greater Cleveland Reg. Transit* (March 10, 1994), 8th Dist. No. 64029, 1994 W.L. 78468¹, which - in turn - had been predicated upon *Morris*, 61 Ohio St. 3d 684. In the absence of any credible legislative findings within 1985 Am. H.B. 176, the Eighth District reasoned that:

¹ This decision was overturned on other grounds. *Gladon v. Greater Cleveland Reg. Trans. Auth.*, 75 Ohio St. 3d 312, 1996-Ohio-137, 662 N.E. 2d 287.

[R.C. §2744.05(C)(1)] is invalid because it violates Section 5, Article I of the Ohio Constitution's mandate that the jury trial right shall be inviolate. It impairs the fundamental jury trial right and as such it fails because there is no showing that its legislative objective cannot be achieved in a less burdensome way and that its legislative objectives are compelling. Finally, it fails because it is unreasonable and arbitrary, and under *Morris vs. Savoy*, a statute is unreasonable and arbitrary if there is no real and substantial reason for the statute, which in this case is the restriction to \$250,000 for non-economic damages. [emphasis added]

Id., *3. Current U.S. District Court Judge Donald Nugent concurred in the ruling. *Id.* Also, the same sound result was reached in *Richardson v. Board of County Commrs.* (December 4, 1996), 7th Dist. No. 95-AP-110114, 1996 W.L. 753188.

Until Defendant can point to an evidentiary record as sufficiently compelling and concrete as that which accompanied S.B. 80, then *Arbino* cannot save the day. The opinion which was rendered in *Morris* remains controlling and R.C. §2744.05(C)(1) must be held to be an unconstitutional exercise of legislative authority.

CONCLUSION

For the foregoing reasons, the OAJ urges this court to reject the Proposition of Law which has been accepted for review and affirm the Eighth District's sound ruling in all respects.

Respectfully submitted,



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