

In the  
Supreme Court of Ohio

ORIGINAL

DONALD KRIEGER, et al., : Case No. 2008-1463  
: :  
Plaintiffs-Appellees, : :  
: : On Appeal from the  
: : Cuyahoga County  
v. : : Court of Appeals,  
: : Eighth Appellate District  
CLEVELAND INDIANS BASEBALL :  
CO., et al., : :  
: : Court of Appeals Case  
Defendant-Appellant. : : Nos. 89314  
: : 89428  
: : 89463

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REPLY BRIEF OF *AMICUS CURIAE* STATE OF OHIO  
IN SUPPORT OF DEFENDANT-APPELLANT CITY OF CLEVELAND

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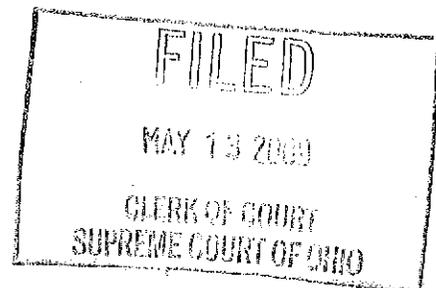
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## INTRODUCTION

Appellees and their amicus, the Ohio Association of Justice (OAJ), claim that a key portion of the Political Subdivision Tort Liability Act is unconstitutional. The Act's \$250,000 cap on non-economic "pain and suffering" awards against municipalities, they say, violates their right to jury trial, equal protection, and due process under the Ohio Constitution. Their arguments are bereft of support. Since 1982, this Court has consistently reaffirmed the General Assembly's authority to immunize political subdivisions from tort liability.

Appellees now concede that their jury trial and equal protection attacks on R.C. 2744.05(C)(1) fail under *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, and they offer no basis for the Court to revisit that recent decision. (Krieger Br. at 7-8.)

For its part, the OAJ claims that *Arbino* is distinguishable, but it offers no credible support for that proposition. Rather, *Arbino* settles this case. First, the Court stated legislative modifications to jury awards like R.C. 2744.05(C)(1) do not invade the jury's factfinding function. The courts "simply apply the limits as a matter of law to the facts found by the jury." 2007-Ohio-6948 at ¶ 40. Second, *Arbino* emphasized that facially neutral laws survive equal protection review so long as they are "rationally related to a legitimate government purpose." *Id.* ¶ 66. R.C. 2744.05(C)(1) more than fits that bill. The State has a valid interest in conserving the fiscal resources of political subdivisions, and a \$250,000 cap on pain and suffering awards advances that interest by limiting the exposure of political subdivisions to "inherently subjective" jury awards. *Id.* ¶ 69.

To defend the judgment below, Appellees now claim that R.C. 2744.05(C)(1) violates their right to due process. They argue that the \$250,000 cap is impermissibly arbitrary because it contains no exception for victims of catastrophic injuries—*i.e.*, the "most severely injured." *Morris v. Savoy* (1992), 61 Ohio St. 3d 684, 691. This argument fails for two reasons. First,

Appellees themselves have not suffered catastrophic injuries. Therefore, they cannot claim that the absence of a catastrophic injury exception violates *their* due process rights. Second, this Court has previously affirmed the General Assembly's authority to immunize political subdivisions from all tort liability. If the legislature can extend full immunity to municipalities without offending the Ohio Constitution, it can also extend partial immunity, as it did in R.C. 2744.05(C)(1).

There is no question that Appellees deserve compensation for their injuries. And they may reasonably believe that \$250,000 is an inadequate amount for their pain and suffering. But that grievance should be put to the legislature, not to this Court. The only issue in this case is whether R.C. 2744.05(C)(1) complies with the dictates of the Ohio Constitution. A straightforward application of this Court's precedents confirms that it does. The Court should affirm the constitutionality of the statute and reverse the Eighth District.

## ARGUMENT

### **A. *Arbino* confirms that a statutory cap on awards for non-economic injuries does not violate the right to jury trial or the guarantee of equal protection.**

In *Arbino*, this Court affirmed the constitutionality of Ohio's general tort-reform statutes. It specifically held that R.C. 2315.18(B)(2)—a statutory cap on the amount of non-economic damages that could be recovered against a private party—did not violate the right to jury trial or equal protection under the Ohio Constitution. In their opening briefs, the City of Cleveland and the State of Ohio argued that *Arbino* controlled this case.

In a candid admission, Appellees now “concede that tort economic damages limitations no longer violate the rights to trial by jury and equal protection” after *Arbino*. (Krieger Br. at 8.) They declare that *Arbino* was “wrongly decided” and “should be reversed,” (*id.* at 5), but they offer no basis to revisit the case. Nor do Appellees offer an analysis of the three *Galatis* factors

for overruling an earlier precedent of this Court. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 48.

Picking up Appellees' baton, OAJ claims that the damages cap in R.C. 2744.05(C)(1) is an unconstitutional infringement on the right to jury trial and the guarantee of equal protection. It asserts that the damages cap does not promote "real and compelling policy justifications." (OAJ Br. at 7.) Further, OAJ argues that the General Assembly did not support the enactment with "comprehensive legislative findings." (*Id.* at 9.) Finally, it suggests that the damages cap is invalid because its purposes can "be achieved in a less burdensome way." (*Id.* at 10.) But these formulations are not, nor have they ever been, the proper judicial inquiries for analyzing a jury trial or equal protection claim.

#### **1. The right to jury trial.**

The right to jury trial prevents "another entity" from "substitut[ing] its own findings of fact" for those of the jury. *Arbino*, 2007-Ohio-6948 at ¶ 35. That being said, jury "awards may be altered *as a matter of law*" without infringing on the right. *Id.* ¶ 37; see, e.g., *id.* ¶ 38 (remitting), ¶ 39 (treble damage awards). The damages cap in *Arbino* passed constitutional muster because it imposed a statutory ceiling on non-economic damages awards against private tortfeasors: "Courts must simply apply the limits as a matter of law to the facts found by the jury; they do not alter the findings of facts themselves, thus avoiding constitutional conflicts" with the right to jury trial. *Id.* ¶ 40.

The cap on jury awards of non-economic damages against political subdivisions in R.C. 2744.05(C)(1) operates in an identical fashion, and the OAJ does not suggest otherwise. The jury issues its findings as to the plaintiff's non-economic injuries, and the courts then apply the \$250,000 cap to those facts. Under the holding of *Arbino*, the cap cannot infringe on Appellees' right to jury trial.

## 2. The guarantee of equal protection.

The inquiry for equal protection claims is also well settled. The Court must first discern whether the disputed law is facially neutral. In this case, the damages cap in R.C. 2744.05(C)(1) does not utilize any suspect category like race, gender, or age. As such, the statute “does not violate the Equal Protection Clause of the Ohio Constitution if it bears a rational relationship to a permissible government objective.” *Wargetz v. Villa Sancta Anna Home for the Aged* (1984), 11 Ohio St. 3d 15, 17.

The damages cap unquestionably implicates a “permissible government objective.” This Court has long recognized the State’s “vital interest in preserving the financial soundness of its political subdivisions.” *Menefee v. Queen City Metro* (1990), 49 Ohio St. 3d 27, 29; accord *Fahnbulleh v. Strahan*, 73 Ohio St. 3d 666, 668-69, 1995-Ohio-295; *Fabrey v. McDonald Village Police Dep’t*, 70 Ohio St. 3d 351, 353, 1994-Ohio-368.

Furthermore, the damages cap in R.C. 2744.05(C)(1) bears a “rational relationship” to that objective. “[N]oneconomic-damage awards are inherently subjective and difficult to evaluate,” leading to a “lack of predictability” and “the occasional influence of irrelevant factors” when the jury deliberates over the proper amount of the award. *Arbino*, 2007-Ohio-6948 at ¶ 69. The damages cap directly reduces that uncertainty and the accompanying fiscal vulnerability for municipalities. *Id.* ¶ 72. It also allows public employees—police, firefighters, paramedics, health officials, and the like—to perform their duties without fear of crippling liability. See John A. Gleason & Kenneth Van Winkle Jr., *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity* (1986), 55 U. Cin. L. Rev. 501, 523 (observing that the cap allows “municipalities to acquire commercial insurance as well as establish self insurance funds.”).

There is no case law to support OAJ's suggestion that statutory damages caps must be supported by a "sufficiently compelling" evidentiary record. (OAJ Br. at 10.) A record may be useful, as in *Arbino*, where the General Assembly sought to link a generalized concern—Ohio's poor economic climate—to runaway tort verdicts. 2007-Ohio-6948 at ¶ 68. The correlation was not obvious. But here, there is a direct connection between the State's interest (conserving the fiscal resources of political subdivisions) and the means employed by the General Assembly to effectuate that interest (a statutory limit on non-economic damages awards). For that reason, R.C. 2744.05(C)(1) bears a "rational relation to [a] legitimate state interest," and it satisfies equal protection. *Id.* ¶ 72.

**B. - A statutory cap on awards for non-economic injuries does not violate Appellees' right to due process.**

Appellees claim that the \$250,000 cap in R.C. 2744.05(C)(1) violates due process. The \$250,000 ceiling is arbitrary, they say, because it does not contain an exception for those plaintiffs who suffer catastrophic injuries. (Krieger Br. at 9-11.) This claim fails for two reasons. First, *these* plaintiffs have not suffered catastrophic injuries. As such, the statute's lack of a catastrophic injury exception cannot violate *their* due process rights. Second, this Court has long recognized the General Assembly's authority to grant full immunity from tort actions to municipalities. The constitutional power to grant full immunity necessarily includes the lesser power to grant partial immunity.

**1. The lack of an exception for catastrophic injuries does not violate Appellees' constitutional rights; they have not suffered catastrophic injury.**

The constitutionality of a statute can be attacked in one of two ways. A party can bring a facial challenge if he can "demonstrate that there is no set of circumstances in which the statute would be valid." *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 26. If the statute operates constitutionally under some set of circumstances, the facial challenge will fail. *Id.*

Alternatively, a party can bring an “as-applied challenge” “based on the specific facts of th[e] case.” *Id.* ¶ 180. He must demonstrate by “clear and convincing evidence” that the disputed statute, when applied to his case, would violate a constitutional provision. *Id.* ¶ 181.

Appellees do not identify the nature of their constitutional challenge with any clarity. They do not appear to raise a facial challenge to R.C. 2744.05(C)(1), nor can they. It is beyond dispute that a \$250,000 damages cap be applied in the vast majority of personal injury cases without violating due process. See *Arbino*, 2007-Ohio-6948 at ¶ 61. Therefore, any request for facial invalidation of the statute would be frivolous.

Rather, Appellees latch on to statements in *Morris* and *Arbino* that damages caps may not “impose[] the cost . . . upon those most severely injured.” *Id.* ¶ 60 (citing *Morris*, 61 Ohio St. 3d at 690-91). They claim that the cap in R.C. 2744.05(C)(1) is arbitrary because, unlike the statute in *Arbino*, it does not contain an catastrophic injury exception. (Krieger Br. at 9.) This is in every respect an as-applied constitutional challenge. Appellees argue that the \$250,000 damages cap in R.C. 2744.05(C)(1) is arbitrary because it does not permit adequate compensation for a narrow class of plaintiffs—victims of catastrophic injuries.

The problem with this argument is that Appellees are not victims of catastrophic injuries. Examples of such injuries include “[p]ermanent and substantial physical deformity,” the “loss of use of a limb,” the “loss of a bodily organ system,” or a “[p]ermanent physical functional injury.” R.C. 2315.18(B)(3)(a)-(b), cited in *Arbino*, 2007-Ohio-6948 at ¶ 60. Plaintiffs that suffer these types of injuries are “the most severely injured” because their “pain and suffering is traumatic, extensive, and chronic.” *Arbino*, 2007-Ohio-6948 at ¶ 60-61. And those plaintiffs could present a colorable claim that the lack of a catastrophic injury exception in R.C. 2744.05(C)(1) violates their right to due process.

By contrast, Appellees effectively admit that their injuries are emblematic of a conventional personal injury case. Krieger has experienced nightmares, received threatening phone calls, and endured unwanted media attention. (Krieger Br. at 4.) Oliver has suffered depression stemming from his discharge from the Marine Corps, his inability to obtain employment, and negative media attention. (*Id.*) Each deserves compensation for his pain and suffering. However, this is not the type of “traumatic, extensive, and chronic” suffering contemplated by *Morris* and *Arbino*.

The issue of whether R.C. 2744.05(C)(1) can be applied constitutionally to a plaintiff who has suffered catastrophic injury can and should wait for such a plaintiff. (State Br. at 13.) The record in this case conclusively establishes that *these* Appellees have suffered conventional injuries. The General Assembly can impose a statutory damages cap on such non-catastrophic injuries without trenching on *their* due process rights. See *Arbino*, 2007-Ohio-6948 at ¶ 61.

**2. The General Assembly has plenary authority to immunize political subdivisions from tort liability.**

Even if this Court looks past the defect in Appellees’ due process claim, R.C. 2744.05(C)(1) passes constitutional muster. The damage cap at issue here was enacted as part of the Political Subdivision Tort Liability Act. The Act was a direct response to *Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St. 3d 26, where this Court abolished the common-law doctrine of sovereign immunity for municipalities, but invited the General Assembly to restore that immunity by statute. *Id.* at 30. The General Assembly did so in R.C. 2744.05(C)(1), allowing all plaintiffs some measure of recovery against municipalities—actual loss plus \$250,000 in non-economic injuries—where they previously had none.

As the State noted in its opening brief, the General Assembly had the constitutional authority to preclude all tort suits against municipalities. If the legislature could have granted

complete immunity to political subdivisions without violating due process, it necessarily had authority to grant partial immunity, as it did in R.C. 2744.05(C)(1). (State Br. at 13-14.)

Appellees offer two brief rejoinders, neither of which has any merit. First, they question whether *Haverlack* “even allow[s] the state legislature to bestow blanket immunity on an incorporated political subdivision.” (Krieger Br. at 11.) This Court has already answered that question. In no uncertain terms, it has said that “[t]he state could have extended sovereign immunity to *all* claims against a political subdivision” without violating the Ohio Constitution. *Menefee*, 49 Ohio St. 3d at 29.

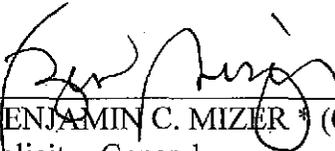
Second, Appellees argue that even if the General Assembly could preclude all tort suits against political subdivisions, it could not take a lesser approach of affording a partial grant of immunity, as it did here. (Krieger Br. at 11.) But it has long been accepted that “the power to do the greater necessarily carries with it the right to do the lesser.” *McClellan v. Chipman* (1896), 164 U.S. 347, 360. Because the General Assembly could have immunized municipalities from all tort suits (including those suits brought by plaintiffs with catastrophic injuries), its decision to do the lesser—to extend partial immunity to municipalities under R.C. 2744.05(C)(1)—was constitutional.

## CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* State of Ohio in Support of Defendant-Appellant City of Cleveland was served by U.S. mail this 13th day of May, 2009, upon the following counsel:

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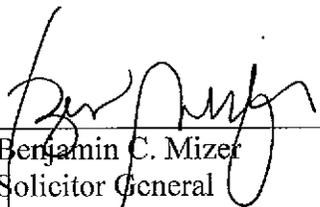
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