IN THE SUPREME COURT OF OHIO

JOHN PAGANINI,	:	
	:	**Case No. 2025-0386**
Plaintiff-Appellee,	:	
	:	**On appeal from the**
v.	:	**Eighth District Court of Appeals**
	:	**Cuyahoga County, Ohio**
THE CATARACT EYE CENTER OF	:	
CLEVELAND, INC., et al.,	:	**Court of Appeals Case No. CA-24-113867**
	:	**CA-24-114019**
Defendants-Appellants.	:	

AMICUS BRIEF OF AMICUS CURIAE, OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION, OHIO ALLIANCE FOR CIVIL JUSTICE, AND ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLANTS

Anne Marie Sferra (0030855)
BRICKER GRAYDON LLP
100 S. Third Street
Columbus, Ohio 43215
(614) 227-2300
asferra@brickergraydon.com

Counsel for Amici Curiae, Ohio Hospital Association, Ohio State Medical Association, Ohio Osteopathic Association, Ohio Alliance for Civil Justice, and Academy of Medicine of Cleveland & Northern Ohio

Sean M. McGlone (0075698)
Senior Vice President and General Counsel
Ohio Hospital Association
155 E. Broad Street, Ste. 301
Columbus, Ohio 43215
(614) 384-9139
Sean.mcglone@ohiohospitals.org
Counsel for Amici Curiae, Ohio Hospital Association

Bradley D. McPeek (0071137)
Kellie A. Kulka (0095749)
BRICKER GRAYDON LLP
312 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
(513) 621-6464
bmcpeek@brickergraydon.com
kkulka@brickergraydon.com
Counsel for Defendant-Appellants, The Cataract Eye Center of Cleveland, Inc. and Gregory J. Louis, M.D.

Louis E. Grube (00913367)
FLOWERS & GRUBE
Terminal Tower, 40th Floor
50 Public Square
Cleveland, Ohio 44113
leg@pwfco.com
Counsel for Plaintiff-Appellee, John Paganini

DAVE YOST
Attorney General of Ohio
Mathura J. Sridharan (0100811)
Michael J. Hendershot (0081842)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
Mathura.sridharan@ohioago.gov
Counsel for Amicus Curiae,
Ohio Attorney General Dave Yost

Susan E. Petersen (0069741)
Todd E. Petersen (0066945)
PETERSEN & PETERSEN
10680 Mayfield Road
Chardon, Ohio 44024
(440) 279-4480
sep@petersenlegal.com
tp@petersenlegal.com
Counsel for Plaintiff-Appellee,
John Paganini

Benjamin C. Sassé (0072856)
Elisabeth C. Arko (0095895)
Razi S. Lane (0105334)
TUCKER ELLIS LLP
950 Main Avenue, Ste. 1100
Cleveland, Ohio 44113-7213
(216) 696-3715
Benjamin.sasse@tuckerellis.com
Elisabeth.arko@tuckerellis.com
Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Hospital Association ("OHA") is a private, non-profit trade association established in 1915 as the first state-level hospital association in the United States. For more than 100 years, the OHA has provided a mechanism for Ohio's hospitals to come together and advocate for health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of 252 hospitals and 15 health systems. OHA's member hospitals directly employ more than 430,000 employees in Ohio.

The Ohio State Medical Association ("OSMA") is a non-profit professional association established in 1835 and is comprised of physicians, medical residents, and medical students in the State of Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine. The OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

Established in 1898, the Ohio Osteopathic Association ("OOA") works to advance the distinctive philosophy and practice of osteopathic medicine and promote public health. The OOA, a non-profit professional association and divisional society of the American Osteopathic Association, advocates for the more than 7,500 licensed osteopathic physicians ("DOs") in Ohio as well as approximately 1,000 medical students who attend Ohio University Heritage College of Osteopathic Medicine.

The Ohio Alliance for Civil Justice ("OACJ") is a group of small and large businesses, trade and professional associations, non-profit organizations, local government associations, and others. The OACJ leadership includes members from the Ohio Manufacturers Association, Ohio Council of Retail Merchants, NFIB Ohio, Ohio Chamber of Commerce, Ohio Association of Certified Public Accountants, Ohio Hospital Association, Ohio State Medical Association, and

other organizations. OACJ members support a balanced civil justice system that provides sufficient safeguards to ensure that defendants are not unjustly penalized and plaintiffs are fairly compensated, but not unjustly enriched.

The Academy of Medicine of Cleveland & Northern Ohio ("AMCNO"), founded in 1824, is the region's professional medical association and the oldest professional association in Ohio. The AMCNO is a non-profit representing over 7,200 physicians and medical students from Northern Ohio. The mission of the AMCNO is to support physicians and medical students in being strong advocates for all patients and to promote the practice of the highest quality medicine. The AMCNO is proud to be the stewards of Cleveland's medical community of the past, present, and future.

Together, the OHA, the OSMA, OOA, the OACJ, and AMCNO (referred to herein as "Amici Curiae") support reasonable compensation for injuries caused by alleged medical negligence. However, noneconomic "pain and suffering" damage awards that are unpredictable, unlimited, and virtually impossible to reverse are inconsistent with a fair civil justice system, as they unjustly enrich some while unjustly penalizing others. That is why Amici Curiae were strong proponents of the carefully constructed tort reform measures contained in Am.Sub. Senate Bill 281 ("SB 281"). One of the critical components of SB 281 was the cap on noneconomic damages codified in R.C. 2323.43 and which is the subject of this appeal.

In 1991, this Court addressed a different legislative enactment involving noneconomic damage caps. *See Morris v. Savoy*, 61 Ohio St.3d 684 (1991). The statute considered in *Morris* provided a flat cap on noneconomic damages regardless of the injury sustained and did not include any legislative findings in support of the enactment.

In contrast (and in response to *Morris*), in adopting SB 281, the General Assembly carefully crafted a two-tier noneconomic damage cap which applies a $250,000 cap for all medical malpractice claims except those that result in certain types of severe injuries as described in the statute. *See* R.C. 2323.43(A)(3). Where these specified types of injuries occur, the noneconomic damage cap increases to $500,000, thereby providing for additional noneconomic damages. Importantly, the General Assembly included detailed legislative findings in SB 281 that supported adoption of the noneconomic damage caps for medical malpractice claims.

Paganini argues the statutory limitations are unconstitutional as applied to him because the amount of noneconomic damages awarded by the jury exceeded the $500,000 cap. The trial court and the court of appeals agreed, unraveling statutory reform which has been in existence for more than 20 years. In reaching its conclusion, the Court of Appeals disregarded this Court's more recent constitutional jurisprudence and failed to consider that, during the past 20 years, professional liability insurance rates for medical providers in Ohio stabilized, in large part as a result of the tort reform measures enacted in SB 281. The Court of Appeals also disregarded the sound public policy rationale for the noneconomic damage caps specifically articulated by the Ohio legislature, which is the appropriate branch of government to make such policy decisions.

STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt the Statement of the Case and Facts set forth in the merit brief of Appellants.

LAW AND ARGUMENT

Proposition of Law: The "hard limit" on recoverable noneconomic loss in R.C. 2323.43(A)(3) that applies to serious or "catastrophic" injuries does not violate the "due course of law" provision in Article I, Section 16 of the Ohio Constitution and is, therefore, constitutional.

A. Introduction

At the outset, it's important to understand the backdrop against which R.C. 2323.43 was enacted and why it is so important to health care providers and maintaining the availability of health care services for Ohioans throughout the state.

1. Unlimited medical malpractice damage awards contributed to a health care crisis, resulting in less accessible and affordable health care for Ohioans

Ohio faced a significant health care crisis in the late 1990s and early 2000s, in large part due to medical malpractice litigation and out of control noneconomic damage awards. During that crisis, more than half the state's medical liability insurance carriers left the market, and physicians and hospitals faced significant increases in insurance premiums.[1] (attached hereto as Exhibit 1, excerpts from Report of Ohio Medical Malpractice Commission, April 2005, at 4, including Exhibits D and E thereto.) As a result, numerous hospitals closed maternity wards, ceased providing services to high risk patients, and eliminated other hospital services. Many hospitals and medical practices closed their doors entirely.[2] Because Ohio's medical malpractice insurance rates were out of control and often unaffordable, it became increasingly more difficult to recruit and retain talented physicians.[3] And it became increasingly more difficult for Ohioans to access needed health care, especially in rural areas.

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[1] *See* Report of the Ohio Medical Malpractice Commission, April 2005. Similar information is well documented in other publications and served as the basis for many of the General Assembly's findings underlying SB 281.

[2] The Ohio Hospital Association's records show that from 1994-2003, approximately 32 different hospitals were closed.

[3] *See* Ohio Department of Insurance Survey, attached as Exhibit E to Report of Ohio Medical Malpractice Commission, April 2005 (which is attached hereto as Exhibit 1).

This led to less accessible and affordable health care throughout the State. While there was an especially severe shortage of primary care physicians and obstetricians in rural parts of Ohio, urban providers were not spared. Prominent Ohio health care centers, such as Ohio State University and the Cleveland Clinic, struggled to recruit and retain specialists, impeding access to and innovation for their nationally and internationally renowned teams of clinical and research physicians. The effect — lack of accessibility and diminished health care for Ohioans.

As Ohio was becoming a less desirable state for health care providers due to escalating medical malpractice premiums, an unstable insurance market, and an increasing number of unpredictable and unlimited jury verdicts, the General Assembly recognized that many other states had enacted noneconomic damage caps in order to ensure (or restore) more predictability and fairness in the civil justice system. In not having noneconomic damage caps, Ohio less competitive in attracting health care providers and medical practice insurers.

2. Noneconomic damage awards are inherently subjective, unpredictable, unlimited, and extremely difficult to overturn

Desiring to be competitive in the heath care industry, especially with its neighboring states, and to provide accessible and affordable health care services to Ohioans, the General Assembly enacted a number of tort reform measures including a statutory limitation on noneconomic damages for medical malpractice claims. Generally, "noneconomic damages" are "[d]amages that cannot be measured in money." Black's Law Dictionary, 11th Ed. 2019, Damages, "noneconomic damages."[4] It is well-established that "noneconomic damages awards are inherently subjective and difficult to evaluate." *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 69. As such, in determining noneconomic damages, juries are "left with nothing but their consciences to guide

[4] Economic damages, on the other hand, are quantifiable.

them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L.Rev. 772, 778 (1985).

Historically, noneconomic damage awards were modest and noncontroversial. Many decades ago, the availability of noneconomic damages and fact finders' inability to objectively measure pain and suffering did not raise serious concern because "personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 554, 560 (2006). In addition, prior to the twentieth century, courts often reversed large noneconomic damage awards.[5] *See*, Ronald J. Allen and Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Stud. 365, 369 (2007). But that changed.

By the 1970s, however, pain and suffering awards often constituted the single largest item of recovery in tort lawsuits. *See Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971). This trend continues.[6] As Judge Niemeyer of the Fourth Circuit observed, "irrationality [i.e., the lack of

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[5] Early awards in Ohio are consistent with this national experience. For example (and not by any means an exhaustive list), *see, e.g.*, *Osman v. Cook*, 43 N.E.2d 641, 645, (2d Dist. 1942) (affirming $11,000 award [about $191,000 today] to a young plaintiff who suffered a brain injury as a result of a collision with an ambulance); *Barnett v. Hills*, 79 N.E.2d 691, 692 (2d Dist. 1947) (affirming $17,500 award [about $208,000 today] to a 24 year-old plaintiff who permanently lost her ability to work or have children); *Coppock v. Horine*, 1940 WL 2942 (2d Dist. May 9, 1940) (remitting $12,000 award to $10,000 [$196,000 today] to a 45 year-old who became totally disabled as a result of a car accident).
All adjustments for inflation in this brief are computed through the U.S. Bureau of Labor Statistics CPI Inflation Calculator, http://www.bls.gov./data/inflation_calculator.htm.

[6] "Nuclear verdicts" (generally defined as awards of $10,000,000 or more), which often include noneconomic damages that are vastly disproportionate to other damages in the case, are rising in frequency. *See* Shawn Rice, *Nuclear Verdicts Drive Need for Insurers Litigation Change*, Law 360, September 8, 2021 (Reporting that between 2010 and 2018, the average size of verdicts exceeding $1,000,000 rose nearly 1,000% from $2,300,000 to $22,300,000 and that nuclear verdicts "encompass awards where the noneconomic damages are extremely disproportionate.")

"rational criteria for measuring damages"] and awarding [m]oney for pain and suffering… provides the grist for the mill of our tort industry." Paul V. Niemeyer, A*wards for Pain and Suffering: The Irrational Centerpiece of our Tort System*, 90 Va.L.Rev.1401, 1401 (2004). In fact, pain and suffering awards in the United States are often more than 10 times higher than those in the most generous of other nations. *See* Stephen D. Sugarman, C*omparative Look at Pain and Suffering Awards*, 55 DePaul L.Rev. 399, 399 (2006). Despite the growing size of noneconomic damage awards, they remained extremely difficult to overturn on appeal. Because there are no defined standards for awarding noneconomic damages, appellate review has historically been deferential to the trier of fact and based on whether the verdict is the result of passion and prejudice or "shocks the conscience." *See Gateway Construction Group, Inc. v. Premier Physicians Centers, Inc.* 2017-Ohio-1443 (8th Dist.) (noting it has long been held in Ohio that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's award absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive), citing *Toledo, Columbus & Ohio Rive RR. Co. v. Miller*, 108 Ohio St. 388 (1923); *Hitch v. Ohio Dept. of Mental Health*, 114 Ohio App.3d 229 (10th Dist.) ("[U]nless an award 'shocks the conscience,' reviewing courts generally defer to the trier of fact's determination with respect to noneconomic damages.")

It was against this backdrop of escalating, unpredictable, and unlimited noneconomic damage awards that the General Assembly considered measures to curtail Ohio's growing health care crisis.

3. The General Assembly carefully balanced all parties' interests in R.C. 2323.43

In 2003, the General Assembly enacted S.B. 281 — tort reform measures applicable to medical claims —to confront the health care crisis in Ohio. One of the main provisions of S.B. 281 is the cap on noneconomic damages in R.C. 2323.43, which provides in relevant part:

(A) In a civil action upon a medical * * * claim to recover damages for injury, death, or loss to a person or property, all of the following apply:

(1) ***There shall not be any limitation on compensatory damages*** that represent the economic loss of the person who is awarded the damage in the civil action.

(2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a civil action * * * shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff's economic loss * * * to a maximum of three hundred fifty thousand dollars for each plaintiff or five hundred thousand dollars for each occurrence.

(3) The amount recoverable for noneconomic loss in a civil action under this section * * * may exceed the amount described in division (A)(2) * * * but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:

(a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

(b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.

* * * * *

(Emphasis added.)

Notably, R.C. 2323.43 does not limit quantifiable economic damages in any way; they are fully recoverable, as they are intended to compensate victims for measurable loss, such as lost wages, medical bills, and the like. The statute only limits what otherwise would be purely subjective, unpredictable, and unlimited noneconomic damages. It does so by providing a two-tiered cap on noneconomic damages, with a higher cap available to those with certain types of severe injuries as set forth in R.C. 2323.43(A)(3).[7] The higher cap allows those with specified severe injuries to recover up to twice as much as other medical malpractice claimants.

[7] The statute allows the higher cap where a plaintiff suffers a "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system" or "permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities." R.C. 2323.43(A)(3)(a) and (b). Often, when

In enacting R.C. 2323.43, the General Assembly conducted several hearings, made detailed findings, and expressed its intent in uncodified law.[8] For instance, the first three findings in the uncodified law are as follows:

> (A) The General Assembly finds:
>
> (1) ***Medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio***;
>
> (2) The number of medical malpractice claims resulting in payments to plaintiffs has remained relatively constant. However, the average award to plaintiffs has risen dramatically. ***Payments to plaintiffs at or exceeding one million dollars have doubled in the past three years.***
>
> (3) ***This state has a rational and legitimate state interest in stabilizing the cost of health care delivery*** by limiting the amount of compensatory damages representing noneconomic loss award in medical malpractice actions. The overall cost of healthcare to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients. * * * (Emphasis added.)

The unpredictability of unlimited noneconomic damages (*i.e.*, the potential for runaway damage awards) threatened the economic stability of the medical profession, the affordability of liability insurance for health care providers, and resulted in both diminished access to health care and increased costs for patients. To address these issues, the General Assembly crafted a statute that carefully balanced the interests of health care providers, all patients, and those harmed by medical negligence. Those harmed by medical malpractice are entitled to recover (1) the full amount of their economic damages and (2) noneconomic damages subject to caps based on the

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discussing this part of the statute, these injuries have been described as "catastrophic" even though that term is not used in the statute itself. *See Brandt v. Pompa*, 2022-Ohio-4525 (Fischer, J. dissenting), ¶ 119-120 (Fischer, J. dissenting) ("The term 'catastrophic injury' appears nowhere in the statute. Rather the *Arbino* court coined the term 'catastrophic' injury to easily describe the injuries that were exempt from capped damages in R.C. 2315.18.")

[8] Uncodified law is the law of Ohio, but it is not assigned a permanent section number in the Revised Code. *See Maynard v. Eaton Corp.*, 2008-Ohio-4542, ¶ 7.

extent of their injury. This eliminates "roll-the-dice" verdicts and, instead, ensures that all medical malpractice plaintiffs get full compensation for their economic loss and compensation for noneconomic loss based on their injury. At the same time, it serves the public interest by minimizing the risk that a hospital or other health care provider will have to close its doors due to an exorbitant noneconomic damages award, thereby continuing access to health care services.

4. Although *Morris v. Savoy* is not controlling, R.C. 2323.43 is a response to it

In *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), this Court addressed whether a $200,000 flat cap on general (i.e., noneconomic) damages was unconstitutional under the Ohio Constitution's due process and equal protection provisions. It concluded that the damage cap violated the right of due process but not equal protection. *Morris* began its analysis by stating:

> A legislative enactment will be deemed valid on due process grounds '* * * [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.'"

Id. at 688-689, citing *Mominee v. Scherbath*, 28 Ohio St.3d 270 (1986) (quoting *Benjamin v. Columbus*, 167 Ohio St. 103 (1957). The Court also recognized that "the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective." *Id*. at 770.

To determine whether the first prong of the rational basis test was met, *Morris* relied heavily on the legislative record leading to the enactment of the statute to determine whether there is a rational relationship between medical malpractice damage awards and medical malpractice insurance rates.[9] It found there was nothing in the record to show that noneconomic damages would

[9] Although the General Assembly is not required to create a legislative record to support its policy determinations, if it chooses to do so, it need not create a record with mathematical precision. *See Sherman v. Ohio Pub. Emp. Retirement Sys*., 2020-Ohio-4960, ¶ 15; *Arbino*, 2007-Ohio-6948, ¶ 66 ("[A] statute will not be invalidated if it is grounded on a reasonable justification, even if its classifications are not precise.'").

have any impact on reducing medical malpractice insurance rates. In reaching this conclusion, the Court first noted that the damage cap statute at issue was not one of the statutes the General Assembly had identified to be included in an annual report from the State Superintendent of Insurance on "the effectiveness" of reducing medical malpractice insurance rates. Because the damage cap statute was not one of the statutes to be included in this annual report, the Court concluded the legislature "did not believe" the statute would have an impact on insurance premiums. *Id*. at 690.

Next, the Court found "evidence of the converse"— that there is no relationship between insurance rates and the cap — citing to an independent study referenced in a Texas case.[10] The Court then acknowledged that supportive evidence may exist to show that limiting noneconomic damages reduces medical malpractice premiums, but since "no evidence" was in the legislative record to this effect, "a second trip to the General Assembly" would be required. *Id*.

To determine if the second prong of the rational basis test was met — whether the statute was unreasonable or arbitrary — the *Morris* Court, "note[d] with approval" an excerpt from an unreported decision of the Fifth District:

> " * * * [I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice. * * * *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8.

Id. at 691.

Without any further analysis, *Morris* concluded "therefore [the damage cap statute] is unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary."

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[10] *Morris* cites to *Lucas v. United States*, 747 S.W.2d 687, 691 (Tex. 1988) (referring to a 1979 study indicating that less than .6% of medical malpractice claims seek over $100,000).

Years later, when the General Assembly was facing the health care crisis of the late 1990's and early 2000's, it was aware of *Morris*. Regardless of whether *Morris* was correctly decided, the General Assembly did not like the result and, as the legislative body responsible for making public policy decisions, crafted a statute limiting noneconomic damages that was substantially different from the one found unconstitutional in *Morris*. Not only is the new statute itself different than the one in *Morris*, so is the legislative record in support of it. The new noneconomic damages cap statute for medical claims (R.C. 2323.43) is not a flat cap; it has two-tiers which allows those with certain specified severe injuries to obtain more noneconomic damages than other claimants. In enacting SB 281, the General Assembly made a clear legislative record to show a real and substantial relation to the public health, safety, morals or general welfare of the public. Whether it agreed with *Morris* or not, the General Assembly did not disregard it. Instead, it designed a noneconomic damage cap in light of *Morris*.

B. Paganini's "As Applied" Constitutional Challenge Completely Eviscerates the Difference Between Facial and As Applied Constitutional Challenges

As this Court is well aware, there are two types of constitutional challenges: facial and as applied. In a facial challenge, the party must prove beyond a reasonable doubt that "there exists no set of circumstances under which the statute would be valid." *Harrold v. Collier*, 2005-Ohio-5334, ¶ 37; *see also State ex re. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus; *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 2016-Ohio-8118, ¶ 22. For an as-applied challenge, the party must prove by clear and convincing evidence that the statute is unconstitutional when applied to a particular set of facts. *Harrold* at ¶ 38; *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus.

Paganini asserted, and the Court of Appeals concluded, that this case presents an as applied challenge to R.C. 2323.43(A), which requires Paganini to show by clear and convincing evidence

that the statute is unconstitutional when applied to facts particular to him. But Paganini did not identify any existing set of facts which rendered the statute unconstitutional as applied to him. Instead, Paganini argued, and the Court of Appeals found, that Paganini's "unusual circumstances" were that the noneconomic damage statute "requires him to forego 66.4% of the damages awarded to him…" Opinion, ¶ 50. But there is nothing "unusual" about these circumstances. This rationale is applicable to every single Ohio medical malpractice plaintiff awarded noneconomic damages in excess of the statutory cap — ***every single medical malpractice plaintiff affected by any statutory cap on noneconomic damages can make this very same constitutional challenge.*** In other words, under this analysis, any time a jury awards more than the statutory noneconomic damage cap — regardless of whether under the first or second tier — there are "unusual" circumstances allowing recovery of the entire amount awarded by the jury. It is nonsensical to characterize this as an applied constitutional challenge given that the outcome he seeks invalidates every application of the statute.

Accepting Paganini's challenge as an "as applied" constitutional challenge based on his "unusual" circumstance guts the entire purpose of the statute (*i.e.*, limit noneconomic damages). The Court of Appeals' decision, in practice, renders R.C. 2323.43(A) unconstitutional in every conceivable set of circumstances in which it applies. This outcome makes it clear that Paganini's challenge is squarely a facial one. As a facial challenge, Paganini should have been required to meet a higher burden of proof and show that the statute is unconstitutional in all applications beyond a reasonable doubt. Paganini did not do, or even attempt to do, this. Hence, the decision of the Court of Appeals must be reversed as it effectively found R.C. 2323.43 unconstitutional on its face without applying the rigorous test required to reach this conclusion.

C. R.C. 2323.43 Meets the Rational Basis Test

1. The damage caps set forth in R.C. 2323.43(A) bear a real and substantial relation to public health and welfare

Although Paganini challenged the constitutionality of R.C. 2323.43 on multiple grounds, the Court of Appeals found only one violation — that R.C. 2323.43 violates the "due course of law" clause of Article I, Section 16 of the Ohio Constitution. This Court has held that the due course of law provision under the Ohio Constitution is equivalent to the due process clause under the United States Constitution. *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544 (1941).[11] (According when due process is used herein, it refers to the due course of law provision in the Ohio Constitution.)

All statutes enjoy a "strong presumption" that they are constitutional. *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 25. Indeed, in order to reach the conclusion that a statute is unconstitutional, this Court must conclude that, "beyond a reasonable doubt[,] [ ]the legislation and constitutional provisions are clearly incompatible." *Id*., citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, paragraph one of the syllabus. A plaintiff challenging the constitutionality of a statute bears this high burden of proof.

A legislative enactment will be deemed valid on due process grounds "if it bears a real and substantial relationship to the public's health, safety, morals or general welfare and it is not unreasonable or arbitrary." *Mominee,* 28 Ohio St.3d at 274 quoting *Benjamin*, 167 Ohio St. 103, paragraph five of the syllabus; *Arbino*, ¶ 49. This Court has examined the legislative record "to

[11] Amicus curiae briefs filed herein by the Ohio Attorney General and the Ohio Association of Civil Trial Attorneys make compelling arguments that the due course of law provision under the Ohio Constitution is not equivalent to the due process clause under the U.S. Constitution. Should the Court adopt their arguments, it is even harder for Paganini to prove that the statute at issue is unconstitutional.

determine whether there is evidence to support such a relationship." *Arbino*, ¶ 49; *see also Morris*, 61 Ohio St.3d at 690.

In *Arbino*, for instance, the Court examined the legislative record and found that it demonstrated a "rational connection" between the reforms implemented — damages caps for general tort cases — and the General Assembly's desire to limit "uncertain and potentially tainted noneconomic damages awards" and for economic improvement. *Id*. at ¶ 56. According to the *Arbino* Court, "[i]n seeking to correct these problems, the General Assembly acted in the public's interests, ***which is all that is required under the first prong of the due-process analysis***." *Id*. (emphasis added.) Of course, as in all constitutional challenges, the *Arbino* Court emphasized that its review of the record is marked with deference toward the General Assembly's judgment. *Id*. at ¶ 58. Drawing on the words of the United States Supreme Court, the *Arbino* Court noted "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Id*. quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981).

Notwithstanding this framework, the Court of Appeals' analysis of this prong improperly focused on this Court's *Morris* decision, which analyzed a previous version of the statute —***one without the challenged provision and with an entirely different legislative record***. In *Morris*, this Court found that a singular $200,000 cap on damages for all plaintiffs was unreasonable and arbitrary because it "impose[d] the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Morris*, 61 Ohio St. 3d at 691 (quotation from unreported case omitted). As previously noted, *Morris* reached its conclusion, in large part, on two bases related to the legislative record. First, *Morris* found the record lacked any evidence showing a relationship between damage awards and malpractice insurance rates. *Id.* at 690. Second, *Morris* found there was "converse" evidence showing that there is no relationship

between damage awards and malpractice insurance rates. *Id.* In contrast, neither of these findings can be made here.

In enacting SB 281, the General Assembly was well aware of *Morris* and, thus, created (1) a two-tier damage cap designed to allow additional noneconomic damages to those most severely injured by medical malpractice, and (2) a detailed legislative record with findings supporting its public policy decisions and specifying its goals. To be clear, these findings and goals are related to Ohio's health and welfare. For example, in its first two findings stated in the Editor's Notes of Uncodified Law, the General Assembly found that: (1) ***"[m]edical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio***; and (2) "the number of medical malpractice claims resulting in payments to plaintiffs has remained relatively constant. However, the average award to plaintiffs has risen dramatically. ***Payments to plaintiffs at or exceeding one million dollars have doubled in the past three years."*** SB 281, Uncodified Law, Section 3(A)(1) and (2)). The General Assembly's first two goals include: (1) "stem[ming] the exodus if medical malpractice insurers from the Ohio market; and (2) "increas[ing] the availability of medical malpractice insurance to Ohio's hospitals, physicians, and other health care practitioners, thus ensuring the availability of quality health care for the citizens of this state." SB 281, Uncodified Law, Section 3(B)(1) and (2)).

R.C. 2323.43 is designed to "stabiliz[e] the cost of healthcare delivery by limiting the amount of compensatory damages representing noneconomic loss awards in medical malpractice actions." Opinion, ¶ 62, quoting SB 281, Uncodified Law, Section 3(A)(3). *See also Maynard v. Eaton Corp.*, 2008-Ohio-4542, ¶ 7 (finding that uncodified law is the law of Ohio).

The General Assembly went on to make specific findings about these costs, including that malpractice insurers left the Ohio market — in part due to the "rapidly rising" noneconomic loss

awards in medical malpractice actions. SB 281, Uncodified Law, Section 3(A)(3)(b). The General Assembly also included data reported from sister states with similar statutory caps on noneconomic damages which showed "significantly lower increases in average premium rates" than in states without such statutes. SB 281, Uncodified Law, Section 3(A)(4)(d). The General Assembly also made the explicit finding that "[t]he distinction among claimants with a permanent physical functional loss strikes a reasonable balance between potential plaintiffs and defendants in consideration of the intent of an award for noneconomic losses, while treating similar plaintiffs equally, acknowledging that such distinctions do not limit the award of actual economic damages." *Id*., SB 281, Uncodified Law, Section 3(A)(4)(a).

Despite these express findings by the General Assembly, the Court of Appeals drew a contrary conclusion that "it is not clear from the legislative findings how the noneconomic damages for catastrophic injuries will have any impact in reducing malpractice insurance rates since there have been so few cases involving these types of injuries." Opinion, ¶ 63. According to the Court of Appeals, data from 2019 demonstrates that there were only 30 cases between 2005 and 2019 in which a jury returned a verdict for a medical malpractice plaintiff in excess of the statutory caps. *Id*., ¶ 64 (citing to a report from Ohio Department of Insurance, titled "2019 Medical Professional Liability Closed Claim Report"). From this premise, the Court of Appeals speculates to conclude this means not many cases covered by the higher noneconomic damages cap exist. The Court of Appeals was wrong to rely on this report for several reasons.

First, it was wrong for the Court of Appeals to rely on data from 2019 to find there was no rational relation to the statute enacted in 2003 and the goals it sought to achieve. The proper constitutional inquiry is whether the legislature had a rational belief that its determinations were related to a legitimate government interest ***at the time the law was enacted***. *Benjamin v.*

Columbus, 167 Ohio St. 103 (1957). Thus, the Court of Appeals' reasoning is backward — the inquiry is not whether some future data might skew the "real and substantial" impact of the statutory scheme on Ohio's public health and welfare, but rather whether the connection was there when the statute was enacted.

Second, it was wrong for the Court of Appeals to rely on data from the 2019 report to show precisely what the report itself said it could not be used for. More specifically, the report itself states that "it is ***not intended*** to be used to evaluate past or current medical professional liability insurance rates." *See* 2019 Medical Professional Liability Closed Claim Report, Section 5 (emphasis added). Thus, this report cannot possibly constitute "clear and convincing evidence" that there is no rational relationship between the statute and stabilizing the medical malpractice insurance market (and thus ensuring access to health care for all Ohioans) as the Court of Appeals determined.

Third, the Court of Appeals' reliance on this 2019 data to the exclusion of everything in the legislative record completely ignores the fundamental principle that courts must give legislative findings "substantial deference." *State v. O'Malley*, 2022-Ohio-3207, ¶ 24. Hence, when there is "evidence before the legislature reasonably supporting the [legislative] classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." *Minnesota v. Clover Leaf Creamery*, 449 U.S.456, 464 (1981).[12]

[12] In fact, within a few years after R.C. 2323.43 was adopted, the Ohio Department of Insurance released information indicating that the statutory noneconomic damage caps did have an impact on stabilizing medical malpractice insurance rates and keeping health care providers in Ohio as intended. *See* "Docs Find Relief at Last; Tort Reform Helps Apply Brakes to Steep Malpractice Insurance Hikes: More Physicians Staying in Ohio," Crain's Cleveland Business, September 11, 2006 (attached as Exhibit 2 hereto).

Fourth, the 2019 data showing only 30 cases where jury awards exceeded the statutory caps could actually be proof that the noneconomic damages caps have had their intended effect – increasing predictability by promoting settlement of cases, stability in the malpractice insurance market, and sensitizing juries to limit outrageous awards.

In sum, neither *Morris* nor the 2019 report the Court of Appeals relied on supports the conclusion that Paganini showed, by clear and convincing evidence, that the medical malpractice noneconomic damage cap statute does not bear a real and substantial relation to public health and welfare.

2. The damage caps set forth in R.C. 2323.43(A) are not unreasonable or arbitrary

The Court of Appeals concluded R.C. 2323.43(A) to be unreasonable and arbitrary based upon this Court's *Morris* analysis — notwithstanding that the present version of the statute was carefully drafted to resolve the issues that rendered the old statute unconstitutional.

In *Arbino*, the appellant attempted to shoehorn the *Morris* reasoning to argue that even with the exception for catastrophic injuries, the noneconomic damage limitations remain unreasonable and arbitrary by imposing the cost of the public benefit upon the "second-most severely injured." *Arbino*, ¶ 60. The *Arbino* Court expressly rejected this argument noting that the statue alleviated the concerns expressed in *Morris*. *Id.*, ¶ 61. "At some point, though," the Court explained, "the General Assembly must be able to make a policy decision to achieve a public good." *Id*. While the statute here, R.C. 2323.43(A), does limit recovery of individuals with certain severe injuries, it does so at a much higher threshold. The statute is not unreasonable and it is not arbitrary; it effectively accomplishes the articulated goals set forth by the General Assembly, while balancing the interests of all parties to achieve the public good.

In concluding that the $500,000 cap on noneconomic damages in R.C. 2323.43 is arbitrary and unreasonable (Opinion at ¶ 65), the Court of Appeals relied on *Metts, II v. Nationwide Children's Hospital*, 2015 Ohio Misc. LEXIS 12751 (Franklin Cty. C.P. 2018). In *Metts, II*, the trial court attempted to illustrate the "arbitrary nature" of R.C. 2323.43 by comparing the noneconomic damage cap for general torts (R.C. 2315.18) with the noneconomic damages cap for medical practice (R.C. 2323.43) with a hypothetical man who lost a leg. The *Metts, II* court concluded that R.C. 2323.43 was arbitrary because the hypothetical man would be limited to $500,000 in noneconomic damages if a doctor cut off his leg during surgery, but could receive unlimited noneconomic damages if that same doctor hit him with a car and he lost his leg. This is a false equivalency as Ohio law permits different damages for the same injury in multiple circumstances.

For example, if this same man were to lose his leg in a workplace accident, the worker's compensation system would provide compensation under an entirely separate schedule of recovery, with benefits strictly tailored and limited to that injury compensation system. Similarly, if that same man lost his leg as a result of liability of the City of Columbus, his noneconomic damages would be capped at $250,000 under R.C. 2744.05(C) (the noneconomic damage cap applicable to political subdivisions). The flat $250,000 statutory cap on noneconomic damages in claims against political subdivisions — which has been upheld as constitutional by this Court[13] — is based on the public policy of safeguarding taxpayer resources. In deciding *Oliver*, this Court has already determined that a hard cap on noneconomic damages does not render a statute unconstitutional. If noneconomic damages can be capped by the legislature for the sound policy

[13] *See Oliver v. Cleveland Indians Baseball Company, Ltd. Partnership*, 2009-Ohio-5030.

reason in *Oliver*, they can likewise be capped by the legislature to ensure the accessibility and availability of health care at affordable costs to all residents of Ohio.

Here, the General Assembly enacted the cap on noneconomic damages before it enacted the cap on noneconomic damages for general torts. It made an extensive record to support its policy decisions in both instances. While there is some overlap in the articulated rationale for each statute (based on the purely subjective nature of noneconomic damages), the relationship of each statute to the public's health, safety, morals or general welfare are not identical. While data supported a hard limit for noneconomic damages for medical malpractice claims, there may not have been the same data to support a hard limit for general tort claims. That doesn't make R.C. 2323.43 arbitrary. Rather, it shows that the General Assembly made carefully crafted policy decisions when it enacted Ohio's multiple statutory noneconomic damage caps.

And Ohio is not alone in allowing different damages based on the type of claim. Several states have damage caps for only medical malpractice claims and some have damage caps for medical malpractice claims that differ from damage caps for other types of claims (such as general tort claims or product liability claims). *See* Exhibit 3 attached hereto.[14]

For instance, in Louisiana, there is a cap on damages (economic and noneconomic) for medical malpractice claims but not for general tort claims. The Supreme Court of Louisiana upheld the constitutionality of a $500,000 cap on all compensatory damages and reduced the jury's damage award from $6,000,000 to $500,000 pursuant to the cap statute. *Oliver v. Magnolia Clinic*, 85 So.3d 39 (La. 2012). *Magnolia Clinic* recognized that the $500,000 cap created a class of persons who were fully compensated as well as a class of persons who were not fully compensated

[14] Exhibit 3 is a current compilation of state laws limiting noneconomic damages from the American Tort Reform Association.

because of the severity of their injuries. The *Magnolia Clinic* court explained that the objective defined by the legislature in enacting the medical malpractice cap on damages was to limit damages, thereby lower malpractice insurance costs to help assure accessible and affordable health care for the public. This produced rational and clearly identifiable benefits for malpractice plaintiffs: (1) a greater likelihood that the offending physician or other health care provider has malpractice insurance; (2) a greater assurance of collection from a solvent fund; and (3) payment of all medical care and related benefits. *Id*. at 45, citing *Butler v. Flint Goodrich Hospital of Dillard University*, 607 S.2d 517, 521 (La. 1992)

The *Magnolia Clinic* court noted that this "quid pro quo," describing the balance of interests between noneconomic damage caps and the resulting benefits, had been true when the statute was enacted in 1975, when the *Butler* case was decided in 1992, and remained constitutionally sound in 2012 when *Magnolia Clinic* was decided. *Id*. at 45.

The same can be said of R.C. 2323.43. The General Assembly articulated very similar reasons for enacting the medical malpractice damage caps. The unfortunate reality is that insurance and litigation costs continue to make it difficult for hospitals and physicians to obtain the affordable insurance necessary to provide care to patients, particularly in underserved areas. The "quid pro quo" for ensuring access to care is that noneconomic damages must be balanced against the availability and affordability of health care. A single nuclear verdict can bankrupt a hospital or drive the only obstetrician in a rural county to retire or relocate to another state. Reasonable and rational caps on noneconomic damages, with full recovery of the economic losses proven to the jury, strikes the proper balance of the interests of all parties.

As the United States Supreme Court and the Ohio Supreme Court have made clear, courts do not to sit as super-legislatures — deference must be given to the legislature's policy decisions,

which in this case are not only well-articulated in the promulgated statute, but also in the legislature's statements of findings and goals expressed in the uncodified law. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 58.

CONCLUSION

The General Assembly had valid and reasonable grounds to make the public policy choices it made in enacting R.C. 2323.43(A). This statutory scheme ensures that health care providers have access to insurance coverage and maintain their medical practices in Ohio while Ohioans continue to have access to quality health care. For all of the reasons set forth herein, R.C. 2323.43 (A) is not unconstitutional as applied to Paganini or otherwise.

Respectfully submitted,

/s/ Anne Marie Sferra
Anne Marie Sferra (0030855)
BRICKER GRAYDON LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

Counsel for Amici Curiae,
Ohio Hospital Association, Ohio State Medical Association, Ohio Osteopathic Association, Ohio Alliance for Civil Justice, and Academy of Medicine of Cleveland & Northern Ohio

Sean M. McGlone (0075698)
Senior Vice President and General Counsel
Ohio Hospital Association
155 E. Broad Street, Ste. 301
Columbus, Ohio 43215
(614) 384-9139
Sean.mcglone@ohiohospitals.org
Counsel for Amici Curiae,
Ohio Hospital Association

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via email transmission on August 12, 2025 to the following:

Susan E. Petersen
Todd E. Petersen
PETERSEN & PETERSEN
sep@petersenlegal.com
tp@petersenlegal.com
Counsel for Appellee,
John Paganini

Louis E. Grube
FLOWERS & GRUBE
leg@pwfco.com
Counsel for Appellee,
John Paganini

Bradley D. McPeek
Kellie A. Kulka
BRICKER GRAYDON LLP
bmcpeek@brickergraydon.com
kkulka@brickergraydon.com
Counsel For Appellants,
The Cataract Eye Center Of Cleveland, Inc.
And
Gregory J. Louis, M.D.

Benjamin C. Sasse
Elisabeth C. Arko
Razi S. Lane
TUCKER ELLIS LLP
Benjamin.sasse@tuckerellis.com
Elisabeth.arko@tuckerellis.com
Razi.lane@tuckerellis.com
Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys

DAVE YOST
Attorney General of Ohio
Mathura J. Sridharan
Michael J. Hendershot
Mathura.sridharan@ohioago.gov
Counsel for Amicus Curiae,
Ohio Attorney General Dave Yost

/s/ Anne Marie Sferra
Anne Marie Sferra (0030855)

EXHIBIT 1

FINAL REPORT AND RECOMMENDATIONS

OF THE

OHIO MEDICAL MALPRACTICE COMMISSION

APRIL 2005

Commission Members

Ann Womer Benjamin, Esq.
Director
Ohio Department of Insurance
Columbus, Ohio
Chairman of the Commission

Steve Collier, Esq.
Connelly, Jackson & Collier LLP
Toledo, Ohio

George F. Dunigan II
Director of Government Relations
Ohio University COM/OOA
Columbus, Ohio

Ray Mazzotta
President & CEO
OHIC Insurance Co.
Columbus, Ohio

Frank Pandora II, Esq.
Sr. VP & General Counsel
Ohio Health
Columbus, Ohio

Gerald Draper, Esq.
Roetzel & Andress LPA
Columbus, Ohio
(Member from inception of Commission through June 2004.)

William Kose, MD
Rawson, Ohio

D. Brent Mulgrew
Executive Director
Ohio State Medical Association
Hilliard, Ohio

Hans Scherner, Esq.
Scherner Hanson & Cornwell LLC
Columbus, Ohio
(Member from July 2004 until conclusion of Commission)

Wayne Wheeler, MD
Portsmouth, Ohio

I. INTRODUCTION

Overview

The Ohio Medical Malpractice Commission was created in 2003 in legislation to address the medical liability crisis in Ohio. That legislation, Senate Bill ("S.B.") 281 (R-Goodman), was enacted in response to concerns that rapidly rising medical malpractice insurance premiums were driving away health care providers and compromising the ability of Ohio consumers to receive the health care they need.[1] The bill contained a comprehensive set of tort reforms aimed at addressing litigation costs and stabilizing the Ohio medical malpractice market. Governor Bob Taft signed S.B. 281 on January 10, 2003. The bill became effective on April 11, 2003.

In order to further analyze the causes of the current medical liability crisis, and to explore possible solutions in addition to tort reform, S.B. 281 created the Ohio Medical Malpractice Commission ("Commission"). The Commission is composed of nine members, including representatives of the insurance industry, health care providers, and the legal system. (Exhibit A). The Commission's first meeting was held in May 2003 and at the June meeting Commission members adopted the following mission statement:

"Provide available, affordable, and stable medical liability coverage for the Ohio Medical Community while providing for patient safety and redress for those who are negligently harmed."

The Commission's statutory requirements and mission statement indicate a desire among all members to conduct a thorough analysis of the causes of the current crisis. All Commission members are united in their intent to avert another crisis in which the health care of Ohio consumers could be compromised, and to mitigate the current crisis as possible. The Commission does note that many members voiced concern with the overall health system, including reimbursement rates for Ohio providers. Although reimbursement may be relevant to the affordability of medical liability coverage, the Commission has not examined that issue.

The enactment of S.B. 281 in Ohio was intended to respond to concerns raised by providers that Ohio medical liability insurance had become unaffordable, thereby creating a situation where medical liability insurance was no longer available to certain physicians.[2] Ohio's tort reform efforts were preceded by enactment of similar laws in other states. Among the states already with medical malpractice tort reform are Colorado, Indiana, Wisconsin, Louisiana, California, and New Mexico. These states are commonly referred to as "non-crisis" states as defined by the American Medical Association. A primary feature of such tort reform, including Ohio's, is caps on non-economic damages in medical malpractice lawsuits. While caps in some states include caps on economic damages (Colorado, Virginia, and Indiana) and lower caps than Ohio implemented, Ohio established caps on non-economic damages generally at $500,000, with a $1,000,000 cap for catastrophic injuries involving permanent and substantial physical deformity, loss of a limb or bodily organ system, or for an injury that deprives a person of independently caring for himself and performing life-sustaining activities.

Senate Bill 281 also changed the statute of repose to generally bar claims initiated more than four years after the occurrence of the act or omission constituting the basis of the claim, required a plaintiff's attorney whose contingency fees exceed the applicable amount of the limits on damages to file an application in the probate court for approval of the fees, and mandated lawsuit data reporting to the Department of Insurance.

Charge of Commission

As provided by S.B. 281, the Commission has two charges. First, the Commission is required to study the effects of the tort reforms contained in S.B. 281 on the medical malpractice marketplace. Second, the Commission is required to investigate the problems posed by, and the issues surrounding, medical malpractice. The Commission is required to submit a report of its findings to the Ohio General Assembly in April 2005.

Another piece of legislation impacting the Commission, Senate Bill 86 (R-Stivers), became effective on April 13, 2004. (Exhibit B). Senate Bill 86 added several additional charges to the Commission's mission. Those new charges require the Commission to

- Study the affordability and availability of medical malpractice insurance for health care professionals and other workers who are volunteers and for nonprofit health care referral organizations;
- Study whether the state should provide catastrophic claims coverage, or an insurance pool of any kind, for health care professionals and workers to utilize as volunteers in providing health-related diagnoses, care, or treatment to indigent and uninsured persons;
- Study whether the state should create a fund to provide compensation to indigent and uninsured persons who are injured as a result of the negligence or misconduct by volunteer health care professionals and workers; and
- Study whether the Good Samaritan laws of other states offer approaches that are materially different from the Ohio Good Samaritan Law.

Onset of the Ohio Medical Liability Crisis

In the late 1990's, the Ohio medical liability insurance market began to slip into what we now recognize as a crisis. Rapidly rising costs caused the profitability for insurers doing business in Ohio to plummet. In 1999, Ohio's medical liability insurers reported underwriting costs that were 50.2 percent higher than the premium they collected. In 2000, underwriting costs exceeded premium by 67.9 percent. (Exhibit C). Underwriting costs are those directly related to providing insurance, including claim investigation and payment, defense of policyholders and operating expenses. By 2000, companies were forced to react to the increasing costs and began to raise rates dramatically. By late 2001, insurers were leaving the market and rates were rapidly rising.

Since 2000, nine insurers have left the Ohio medical liability market. St. Paul, First Professionals, Professionals Advocate, Lawrenceville, Phico, Clarendon, CNA, Farmers, and Frontier all withdrew from Ohio and other states due to the difficulties faced in this line of business. The surplus lines market, where providers turn when admitted insurance carriers turn away business, grew significantly.

Health care providers faced increasing difficulty finding affordable medical liability insurance coverage since rates were rising rapidly. The five major medical liability insurance companies in the state, Medical Protective, ProAssurance, OHIC Insurance Company, American Physicians, and The Doctors Company, which collectively cover nearly 72 percent of the Ohio market, raised their rates dramatically. The attached exhibit shows the average rate change for Ohio "Physicians and Surgeons" since 2000. (Exhibit D). The average change in 2002 was the highest at 31.2 percent. Some areas of Ohio, such as the counties in the northeast and along the eastern border, experienced even higher increases. Medical specialties such as OB/GYNs, neurosurgeons, radiologists, and emergency/trauma providers were hit particularly hard.

Despite the rate increases, the premiums collected by medical liability insurers in Ohio have not been sufficient to cover the costs of providing insurance, such as the cost of investigation, defense and payment of claims and operating expenses. Financial reports by Ohio medical liability insurers have not shown a profit since the mid-1990's, with insurers reporting underwriting losses in each of the last five years. (Exhibit C). All five of the top insurers received downgrades from rating agencies over the last five years, and today only two have high "A-" ratings and one is unrated.

Another fact illustrating the crisis is the number of inquiries by Ohio providers and requests for help made to the Ohio Department of Insurance. Since late 2002, the Department has assisted 223 doctors regarding their medical liability insurance coverage. Many of the calls demonstrated that certain specialties such as obstetrics were particularly impacted by rate increases. Another 17 doctors asked the Medical Coverage Assistance Program (MCAP) to help them secure medical liability insurance coverage. Additionally, the Department has documented that 228 doctors have retired, reduced or eliminated high-risk procedures, or moved to another state. Of those doctors, 97 decided to drop their private practice, reduce or eliminate high-risk procedures, or otherwise change the service they provide; 68 decided to retire and 63 have moved to another state. As a result of these ongoing dialogues and concerns about the availability of physicians, the Department conducted a survey of Ohio providers to ascertain their concerns about the current crisis.

Impact of the Crisis on Doctors and Their Patients

In the summer of 2004, the Ohio Department of Insurance commissioned a survey of 8,000 doctors to understand how rising premiums affected the doctors' practices and their patients. (Exhibit E). The results demonstrated that the rising medical liability insurance costs have significantly affected physician behavior. Nearly 40 percent of the 1,359 doctors who responded to the survey indicated that they have retired or plan to retire in the next three years due to rising insurance costs, yet only 9 percent of the respondents were over age 64.

Northeast Ohio can anticipate the highest number of those retirements, with more than 40 percent of the local physicians planning to leave in the next three years.

Ohio's patient population is being impacted, with a significant reduction in patient services already having occurred. Sixty-six percent of doctors surveyed indicated that they have turned down high-risk procedure patients or have referred those patients elsewhere. The situation is critical in southeast Ohio, where 95 percent of doctors surveyed have declined or referred high-risk patients. In northeast Ohio, 48 percent of OB/GYN and family practice physicians reported they have stopped delivering babies due to high medical liability insurance costs. Over half of the osteopathic doctors who responded indicated that they are no longer delivering babies.

Rising insurance costs also have affected where doctors see patients. Doctors have reduced the number of patients they see in nursing homes and in home care and hospice settings. Southeast and northeast Ohio have been hit particularly hard with 60 percent of responding southeast Ohio doctors having cut their in-home visits, and 54 percent of responding northeast Ohio doctors reporting that they have done the same. Responding doctors also indicated that, as a result of these high medical liability premium costs, they are being forced to see more patients to remain financially viable and many are cutting staff. In short, the survey reported that high medical liability premiums are having an effect on health care services in Ohio, and that Ohio could soon face a crisis of access to care.

Initial Signs of Recovery

The Ohio medical liability market is beginning to show signs of recovery. Two new medical liability companies, OHA Insurance Solutions, Inc. and Healthcare Underwriters Group Mutual of Ohio, have been licensed in Ohio in the last year and a half. The five major medical liability insurers in the Ohio market have stayed in Ohio throughout these difficult times. These companies indicated to the Commission during a joint legislative hearing on April 19, 2004 that among other factors, Ohio's enactment of medical malpractice tort reform legislation made them more confident about the future of Ohio's medical liability marketplace.

Medical liability rates appear to be slowly stabilizing. In 2004, rates for the top five companies increased an average of 20 percent. The average increase, while still high, is smaller than that of the two previous years. So far in 2005, two of the top five insurers, Medical Protective and The Doctors Company, have filed and implemented rate changes averaging 12 percent. Moreover, in the past year, some of these insurers have filed decreases for some regions of the state. The Doctors Company lowered rates for General Practice by 1 percent in northwest and in southeast Ohio, and by 9 percent in central and southwest Ohio. Medical Protective filed a decrease of 3 percent for General Practice in northeast Ohio. By the end of 2005, Ohio may see average rate changes below 10 percent.

Ohio medical liability insurers are also slowly moving toward profitability, which helps ensure that the medical liability companies will remain in the market and will fulfill their financial obligations to their policyholders. Underwriting losses have steadily

decreased since 2000. (Exhibit C). While the latest year's results are not yet available, continued movement toward profitability is expected and the industry could report an operating profit for 2004 in Ohio. If that occurs, this will be the first year since 1997 that Ohio's medical liability insurance industry has reported a profit.[3]

Still in Crisis

While the Ohio medical liability market is beginning to recover, it is still in a state of crisis. Positive signs in the marketplace do not mean that doctors are no longer facing extremely high premiums. Although rate increases are stabilizing, doctors in Ohio are still suffering from the effects of rising rates. Premiums are overall much higher than they were just five years ago. For example, rates for OB/GYNs in Cuyahoga County for the top five companies averaged $60,000 in 2000. Now the average is $145,000. In Athens County, the average rate for neurosurgeons was $54,000 in 2000. Today the average is $125,000. General surgeons in Franklin County paid an average of $33,000 in 2000, and now face an average premium of $68,000.[4]

The continuing difficulties in finding affordable medical liability insurance coverage raise concerns that health care providers, particularly those in high-risk specialties, will further limit care, leave Ohio, or leave the profession entirely. Ohio health care consumers may experience increasing difficulty seeing the provider of their choice. Costs to consumers may also rise if providers defensively over-prescribe, over-treat, and over-test their patients to avoid potential lawsuits.

II. FINDINGS AND RECOMMENDATIONS OF THE COMMISSION

In this environment, the Commission held 26 meetings over a two-year period in order to meet its statutory charges. Speakers with expertise on particular medical malpractice-related topics were invited to testify before the Commission. The Commission heard testimony from actuaries, doctors, state regulators and other experts. A list of the Commission's meetings, the topics covered, and the witnesses who testified before the Commission is attached. (Exhibit F). Based upon a review of the testimony, the Ohio Medical Malpractice Commission makes the following findings and recommendations.[5]

A. Effects of Senate Bill 281

The Commission concludes that because of the nature of ratemaking - primarily relying on loss experience over a period of time - and the fact that most medical malpractice cases now being heard in Ohio courts are not subject to S.B. 281 because they were brought and/or arose before its effective date, the Commission cannot conclusively evaluate the effects of the new law on the Ohio market, or on medical malpractice cases in Ohio.

However, based on testimony and data from states that do have tort reform in place, the Commission fully expects tort reform to have a stabilizing impact on the medical malpractice market in Ohio over time. Insurance department representatives from Indiana, Wisconsin, and New Mexico testified about the positive impact damage caps and patient

compensation funds have had on their respective markets and statistics from those states and Louisiana show their relative market stability compared to Ohio's. (Exhibit G). In addition, the Texas commissioner testified that an in-house, peer reviewed study of their recent tort reform, which included a $250,000 cap on non-economic damages, estimated a 12 percent reduction in medical malpractice rates. Countrywide, those states with longstanding tort reform have more stable markets than Ohio's, and the American Medical Association's designation of non-crisis states also reflects this fact. (Exhibit H).

In addition, at the Commission's joint meeting with members of the House and Senate Insurance Committees on April 19, 2004, representatives of the five major medical liability insurers in Ohio (which hold about 70 percent of the market share) testified. Several indicated their increased confidence in operating in Ohio in light of the passage of medical malpractice tort reform, notwithstanding the fact that the industry has been losing money in Ohio since 1998. (Exhibit C). The Director of Insurance also has reported to the Commission that Department conversations with these insurers over the last two years indicate that a major reason they are still operating in Ohio is the passage of tort reform, since they are not compelled to remain in the market but are more optimistic the market will improve with tort reform.

RECOMMENDATION:

The Commission strongly recommends that S.B. 281 remain in effect in Ohio with the expectation that it will help to stabilize the medical malpractice market over time.

B. Ratemaking

The Commission heard testimony about ratemaking. Testimony included discussion of the ratemaking process, Department review of medical malpractice rate filings, various rate review standards such as "prior approval" and "file and use," and the role of investment income on ratemaking.

The Commission acknowledges and agrees with the testimony of most witnesses, including insurance actuaries, that the primary driver of medical malpractice rates is the costs associated with losses and defense of claims. For the three most recent years of financial reports, these costs have exceeded premiums collected by the top five medical malpractice insurance companies in Ohio by an average of 23.7 percent and have increased by 57 percent (241,488,088 to 378,313,587). (Exhibit I). In the last five years, rates for those insurers have increased more than 100 percent. (Exhibit D). The entire medical liability insurance industry has lost money in Ohio since 1998. (Exhibit C). Profit figures in Ohio for 2002 and 2003 show that the costs to provide this insurance exceeded premium by 46 percent in 2002 and by 30 percent in 2003.

Allegations that investment losses have caused the rapid rise in medical malpractice premiums in Ohio in the last several years are without basis. Returns on investments have been about 4 percent to 5 percent since 1999. Ohio law and regulation prohibit the recoupment of investment losses in prospective rates, and the Department ensures through

Ohio Medical Malpractice Insurance
Physicians & Surgeons Rate Changes for the Top Five Insurers

Company	2003 Direct Written Premium	2003 Market Share	2000 Rate Change	2001 Rate Change	2002 Rate Change	2003 Rate Change	2004 Rate Change	2005 Rate Change
The Medical Assurance Company	112,788,357	20.7%	9.6%	30.0%	43.6%	19.3%	8.6%	
The Medical Protective Company	106,941,441	19.6%	8.4%	6.3%	21.7%	27.5%	40.0%	13.0%
OHIC Insurance Company	81,014,009	14.9%	24.3%	28.0%	24.2%	17.0%	17.9%	
American Physicians Assurance Corporation	33,625,168	6.2%	14.9%	29.5%	29.0%	87.6%	9.1%	
The Doctors Company, An Interinsurance Exchange	29,616,791	5.4%	8.4%	14.9%	49.2%	18.0%	10.0%	6.9%
Total for Top Five Companies	363,985,766	66.7%	14.3%	20.5%	31.2%	27.4%	20.1%	11.7%
Total Ohio Industry	545,525,318	100.0%						
Cumulative Change for Top Five Companies			14.3%	37.7%	80.6%	130.2%	176.3%	208.6%

Exhibit D

Ohio Department of Insurance
Med Mal Rate Changes 2000 to 2005

Most Recent Filing Effective Date: January 1, 2005
Exhibit Last Revised: January 3, 2005

Exhibit E

OHIO Department of INSURANCE

Bob Taft, Governor
Ann Womer Benjamin, Director

2100 Stella Court, Columbus, OH 43215-1067
(614) 644-2658 www.ohioinsurance.gov

Ohio Department of Insurance

Physician Medical Malpractice Insurance Survey

Executive Summary

The rising cost of malpractice insurance has significantly impacted Ohio physician behavior. Nearly 40 percent of the 1,359 respondents to the Ohio Department of Insurance survey said they have retired or plan to retire in the next three years due to rising insurance expenses. Only 9 percent of the respondents were over age 64.

Northeast Ohio can anticipate the highest number of those retirements, with more than 40 percent of the local physicians planning to leave in the next three years.

Ninety-six percent of the respondents had malpractice rate increases in 2004. The average annual premium for personal medical malpractice insurance paid by these Ohio physicians in 2004 was $40,385, a 39 percent increase compared with 2003 expenses. On average, physician respondents paid 18 percent of their gross annual income in premiums.

Rates for insurance, however, vary from state to state and are very different within each state based on the specialty practice of the physician.

The Ohio Department of Insurance commissioned this survey of doctors to focus on how professional liability insurance rate increases have changed the way doctors practice medicine in Ohio and to learn doctors' preferences for solutions.

Anecdotal evidence has been presented in Ohio and across the country that a crisis has been developing due to the rapid premium increases. This study quantified the impact on physicians and patients and was large enough to show how Ohioans in different regions of the state and with varying medical needs are being affected.

The rising costs of malpractice insurance have significantly impacted physician behavior and doctors have closed their practices or are planning to do so.

More than 50 percent of the state's neurology and specialty surgeons responding to the survey are planning to retire in the next three years due to insurance rate increases. These specialties, along with obstetrics, are considered higher insurance risks and are charged the highest rates among physicians.

Ohio's patient population is already being impacted. In addition to the anticipated reduction in the number of physicians, the survey results show there has been a significant reduction in the services offered to Ohio patients. Sixty-six percent of physicians surveyed have turned down or referred high-risk procedure patients elsewhere.

The situation is critical in Southeast Ohio, where 95 percent of the survey respondents have turned down or referred patients who required high-risk procedures to other practitioners.

Forty-eight percent of OB/Gyn and family practice physicians in Northeast Ohio surveyed have stopped delivering babies due to insurance costs, and more than 50 percent of the osteopathic doctors in the state no longer deliver babies.

Insurance concerns have also affected where physicians will see patients. Physicians responding to the survey have reduced the number of patients they see in nursing homes (55 percent have cut back), home care settings (46 percent have cut back), and hospice settings (30 percent have cut back).

Northeast and Southeast Ohio have been hit particularly hard. Sixty percent of the survey group from Southeast Ohio report having cut their in-home visits, while 54 percent of physicians surveyed in Northeast Ohio say they have cut in-home care.

Physicians recognize a need for patients to have recourse when malpractice occurs. In the survey, they recommend the state of Ohio pursue remedies that focus first on determining the merits of a claim before it is filed in court.

Methodology

- This is the largest study of the impact of malpractice insurance rates conducted to date in the State of Ohio.
- 8,000 surveys were mailed to a random sample of Ohio physicians.
- 1,359 surveys were returned, for a 17 percent response rate.
- Comparisons among physicians' specialties, region of the state, age, and number of liability claims were conducted on every question.

Objectives

- To understand how medical malpractice insurance has impacted Ohio physicians' revenue, as well as physicians' willingness to perform certain procedures, invest in their practices, and continue to practice medicine in Ohio.
- To learn how medical malpractice insurance has impacted overall physician care, patient access to care and the patient experience.
- To determine physician interest in various proposed measures to stabilize medical malpractice insurance premiums.

Conclusions

1. **The first conclusion is that the rising costs of malpractice insurance have significantly impacted physician behavior and doctors have closed or are planning to close their practices.**

    - We learned that nearly four out of 10 respondents said they have retired or plan to retire in the next three years due to rising insurance expenses. This finding is all the more sobering since just 9% of the respondents were over age 64.

    - More specifically:
        - The percentage of doctor retirements is even higher in Northeast Ohio.
        - More than half of Ohio's neurologists and specialty surgeons responding to the survey plan to retire because of malpractice insurance rates. These specialties, along with obstetrics, are considered higher insurance risks and are charged the highest rates.

2. **Second, rising premiums and the exodus of doctors have already negatively affected Ohio's patient population. In fact, a significant reduction in patient services has already occurred.**

    - For example, 66% of physicians surveyed have turned down or referred high-risk procedure patients elsewhere.
        - The situation is critical in Southeast Ohio, where 95% of physicians surveyed have declined or referred high-risk patients.
        - In addition, 48% of OB/GYN and family practice physicians in Northeast Ohio reported they have stopped delivering babies due to insurance costs.
        - Over half of Ohio's osteopathic doctors reported they no longer do deliveries.

    - Also, high malpractice insurance premiums have influenced where physicians will see patients. Respondents indicated that
        - 55% have reduced the number of patients they see at nursing homes.
        - 46% have cut back the number of patients they see in home care settings.
        - And 30% see fewer patients in hospice settings.
        - The percentages are particularly high in Northeast and Southeast Ohio.
        - Physicians are minimizing patients in these settings because they consider them high-risk in terms of medical liability.

- Patient care has been impacted in other ways as well:
  - Nearly three-quarters of physician respondents say that they order more tests to better defend their decisions.
  - Physicians also report that they need to see more patients to remain financially viable, which results in longer waits for appointments and less time with each patient.
  - Finally, many doctors have cut their staff in response to malpractice insurance increases.

3. **The third conclusion from the survey is that malpractice insurance premiums have risen dramatically and have strained office economics.**

   - 2004 rates went up for 96% of survey respondents, rising by an average of 39% over 2003. Well over a quarter of Ohio physicians responding paid more than $50,000.

   - On average, almost 20% of physicians' gross annual income – one dollar in five – goes to pay malpractice premium costs.

   - Rates vary widely, both among states and within medical specialties. In Ohio, for example, OB/GYN physicians responding to the survey pay an average of 30% of their annual incomes – 50% more than the average physician – to malpractice insurers.

4. **The survey's final conclusion deals with curative measures, steps we might take to remedy the current problem. Here we found that physicians, while recognizing the need for patient recourse when malpractice occurs, generally favor any proposed measure to address rising medical malpractice insurance costs.**

   - They are particularly supportive of a Medical Review Panel to screen medical liability cases, prior to court filing, to determine the merits of the cases. Almost nine physicians in 10 [88%] highly favor this proposal.

- Eighty percent of survey respondents highly favor the institution of a 60-day Mandatory Notice. This would require medical liability insurance companies to notify physicians well in advance if their policy were being cancelled or not renewed, or if they were receiving a significant premium increase. The Department spearheaded legislation (S.B. 187 effective 9/13/04) last year to implement this requirement.

- Finally, more than three doctors in four [76%] highly favor what is called Expert Witness Qualification Review. This would require the plaintiff to submit a "certificate of expert review" confirming that each medical expert witness is qualified to serve in that capacity. Legislation (H.B. 215 effective 9/13/04) was passed last year with the Department's sponsorship requiring witnesses to be pre-certified as expert witnesses in their field by the Ohio State Medical Board.

EXHIBIT 2

Crain's Cleveland Business

September 11, 2006

SECTION: COVER STORY; Pg. 1

LENGTH: 944 words

HEADLINE: Docs find relief at last;
Tort reform helps apply brakes to steep malpractice insurance hikes; more physicians staying in Ohio

BYLINE: SHANNON MORTLAND

BODY:

Many Ohio doctors finally can exhale. For several years, physicians have held their breath each time they renewed their medical malpractice insurance, wondering if rates would rise 20%, 30% or more. However, medical liability insurance rates in the state finally have begun to level off - and even decline slightly - after years of climbing to levels that were some of the highest in the country.

``The market really appears to be slowly stabilizing,'' said Ann Womer Benjamin, director of the Ohio Department of Insurance. ``Rates for the five major medical liability companies in Ohio show an average decrease of 1.5%. That follows significant increases in the past six years.''

Just two years ago, doctors were fleeing the state and closing or limiting their practices because they no longer could afford Ohio's malpractice rates. Cuyahoga County was especially hard hit, as local hospitals lost specialists such as obstetrician-gynecologists, neurosurgeons and cardiologists.

That's no longer the case, said Tim Maglione, senior director for government relations at the Ohio State Medical Association, the professional group for Ohio's doctors.

``We're not getting the phone calls and letters from doctors who say they've got to pick up and leave Ohio,'' he said.

Mr. Maglione and Ms. Womer Benjamin both credit the moderation in malpractice rates to the tort reform bill that was passed by the state Legislature in 2003. The bill limited the amount of noneconomic damages awarded in medical malpractice cases to $250,000 or three times the plaintiff's economic loss, not to exceed $350,000.

Ms. Womer Benjamin said the CEOs of the five medical malpractice insurers that together account for an estimated 60% of the malpractice coverage in Ohio have told her in recent weeks that the market has ``greatly improved'' since the bill was enacted.

``There has been a slight decrease in frequency of (malpractice) cases filed,'' she said. ``They are seeing fewer frivolous lawsuits.''

Since the tort reform bill passed, there also haven't been as many ``runaway verdicts'' that awarded huge sums of money to the plaintiffs in medical malpractice cases, Ms. Womer Benjamin said.

Make way for new players

The improved market even has prompted a sizable medical malpractice insurer to enter the Ohio market.

Ace American Insurance Co. of Philadelphia last month partnered exclusively with Toledo-based insurance broker Hylant Group to market its insurance in Ohio for physicians, said Richard Hylant, president of Hylant Group Toledo. Ace provides medical liability insurance to individual physicians, hospitals and health systems, as well as to companies in the biotechnology, pharmaceutical, research and medical device fields.

Ace's interest in Ohio is quite a shift from a few years ago, when insurance companies were halting their medical malpractice business in the state due to high jury verdicts. Ms. Womer Benjamin said she has licensed one other company to issue medical malpractice insurance in Ohio in the last two years. Before that, new companies had not entered Ohio since the early 1990s, she said.

Still, the Ohio medical liability market isn't completely healed, said Dr. John Bastulli, an anesthesiologist at St. Vincent Charity Hospital and chairman of the legislative committee at the Academy of Medicine Cleveland/Northern Ohio Medical Association. The association represents 4,000 local physicians.

``There are a large number of (medical) residents that aren't going to stay in Ohio because of medical liability insurance,'' and some don't even want to train here, Dr. Bastulli said.

Even the doctors who remain are struggling to pay rates that have stabilized at their peak, Dr. Bastulli said. That's why the Ohio State Medical Association has refocused its energy on helping doctors better manage the costs of running their practices, Mr. Maglione said.

``While rates may be stabilizing, they're still very expensive,'' he said. ``Physicians have to find ways to not only keep up with that expense, but the economics of their practice.''

Mr. Maglione said the association also is focusing on medical malpractice cases that go to court. Ohio law allows defendants to recoup the money they spent defending themselves in a lawsuit if the court deems that lawsuit frivolous. The association helps those defendants bring sanctions against the attorney who brought the frivolous case to court, he said.

State keeps up the pressure

Ms. Womer Benjamin said the Ohio Department of Insurance also isn't resting.

The department has implemented more comprehensive reviews of insurance rates, and Ms. Womer Benjamin now personally reviews any property and casualty insurance rate change request that is 5% or more. This year also is the first year that each insurance company doing business in Ohio annually must justify its rates, even if the insurer isn't requesting rate increases, she said.

Meanwhile, Ohio doctors are pushing Senate Bill 88, which would establish a pilot project in Northeast Ohio under which all medical malpractice cases would go through a mandatory arbitration process before going to trial.

Under the bill, which passed the Senate in May, each side in a medical malpractice complaint would select an arbiter, and a chairperson would choose a third person to serve on an arbitration panel. The idea is to reduce the time and money it takes to go to trial, as well as to deter frivolous lawsuits.

* * *

RUNAWAY MALPRACTICE RATES REINED IN

These numbers show the average rate increases for medical malpractice insurance in Ohio since 2000:

* 2000: 14%

* 2001: 21%

* 2002: 30%

* 2003: 30%

* 2004: 20%

* 2005: 6.7%

* 2006: down 1.5%

Source: Ohio Department of Insurance

GRAPHIC: Art Caption: info box: RUNAWAY MALPRACTICE RATES REINED IN (see end of story)
Art Credit: illustration: LISA HANEY/NEWSCOM
LOAD-DATE: September 14, 2006

EXHIBIT 3

State Limits on Noneconomic Damages

STATE	APPLICABILITY	STATUTORY CITATION	PROVISIONS
Alaska	Personal injury - Noneconomic Damages	Alaska Stat. § 09.17.010	In a personal injury or wrongful death action, noneconomic losses shall not exceed the greater of $400,000 or injured person's life expectancy in years multiplied by $8,000. In personal injury cases involving "severe physical impairment or severe disfigurement," the limit is increased to the greater of $1 million or injured person's life expectancy in years multiplied by $25,000. The limit applies to all claims, including a loss of consortium claim, arising out of a single injury or death.
	Medical liability - Noneconomic Damages	Alaska Stat. § 09.55.549	In a personal injury or wrongful death action, noneconomic damages for personal injury or death based on the provision of services by a health care provider may not exceed $250,000 regardless of the number of health care providers against whom the claim is asserted or the number of separate claims or causes of action brought with respect to the injury. This limit increases to $400,000 when damages are awarded for wrongful death or severe permanent physical impairment that is more than 70% disabling. The limitation does not apply if the damages resulted from "reckless or intentional misconduct."
California	Medical liability - Noneconomic Damages	Cal. Civ. Code § 3333.2(b) (as amended by AB 35 (2022)).	Noneconomic damages shall not exceed $250,000 in any action for injury against a health care provider based on professional negligence. In January 2023, the cap increased to $350,000 (further increasing $40,000 per year over ten years to $750,000) and to $500,000 in wrongful death cases (increasing $50,000 per year over ten years to $1 million). **The 2025 adjusted limit is $430,000.** After ten years, these amounts will automatically increase by 2% annually for inflation.
Colorado	Personal injury - Noneconomic Damages (effective 2025)	Colo. Rev. Stat. § 13-21-102.5(3)(a) as amended by H.B. 24-1472 (2024).	In any civil action filed on or after January 1, 2025, except medical liability or wrongful death actions: $1.5 million cap. Adjusted every two years for inflation by the Secretary of State beginning January 1, 2028.
	Medical liability - Total Compensatory Damages (until 2025)	Colo. Rev. Stat. § 13-64-302	The total amount recoverable for all defendants in any civil action for damages in tort brought against a health care professional or a health care institution shall not exceed $1 million, of which not more than $300,000 shall be attributable to noneconomic loss or injury. If, upon good cause shown, the court determines that the present value of past and future economic damages would exceed such limitation and that the application of such limitation would be unfair, the court may award in excess of the limitation the present value of additional past and future economic damages only.
	Medical liability - Noneconomic Damages (effective 2025)	Colo. Rev. Stat. § 13-64-302 as amended by H.B. 24-1472 (2024).	Effective January 1, 2025, in actions against healthcare professionals or institutions, the amount recoverable for noneconomic loss or injury damages for derivative or direct noneconomic loss may not exceed $415,000 (2025), $530,000 (2026), $645,000 (2027), $760,000 (2028), $875,000 (2029). Beginning in 2030, the limit will be adjusted every two years for inflation by the Secretary of State.
	Medical liability - Wrongful death (effective 2025)	Colo. Rev. Stat. § 13-21-203(1) as amended by H.B. 24-1472 (2024).	In wrongful death actions against healthcare professionals or institutions, the amount recoverable for derivative or direc noneconomic losses may not exceed $550,000 (2025), $810,000 (2026), $1,065,000 (2027), $1,300,000 (2028), $1,575,000 (2029). Beginning in 2030, the limit will be adjusted every two years for inflation by the Secretary of State.
	Wrongful death (effective 2025)	Colo. Rev. Stat. § 13-21-203(1) as amended by H.B. 24-1472 (2024).	Effective January 1, 2025, the amount recoverable for noneconomic loss or injury damages for derivative or direct noneconomic loss, including grief, loss of companionship, pain and suffering, and emotional stress to surviving parties entitled to sue may not exceed $2.125 million. Adjusted every two years for inflation by the Secretary of State beginning January 1, 2028. Does not apply if the wrongful act, neglect, or default causing death constitutes a felonious killing.
Hawaii	Personal injury - Noneconomic Damages	Haw. Stat. § 663-8.7	Limits damages for *pain and suffering* to $375,000. Does not apply to intentional torts, torts relating to environmental pollution, toxic and asbestos-related torts, torts relating to aircraft accidents, strict and products liability torts, or torts relating to motor vehicle accidents with some exceptions. Not applicable to mental anguish, disfigurement, loss of enjoyment of life, loss of consortium or other forms of noneconomic damages.
Idaho	Personal injury - Noneconomic Damages	Idaho Code § 6-1603	In an action for personal injury, including death, Idaho initially limited noneconomic damages to $250,000 with adjustments based on the state's average annual wage adjustments each year since 2004. Efffective July 1, 2024 the limit is $490,512 (https://iic.idaho.gov/wp-content/uploads/2024/07/Benefits-Non-economic-caps-effective-07_01_24.pdf). Not applicable to cases involving willful or reckless misconduct or acts that would constitute a felony.
Indiana	Medical liability - Total Compensatory Damages	Ind. Code § 34-18-14-3	Limits the total amount recoverable for an injury or death of a patient to $1,800,000. Requires any amount awarded in excess of $500,000 to be paid from the Patient's Compensation Fund. The statute does not differentiate between economic and noneconomic damages.
	Wrongful death - Love and Companionship	Ind. Code Ann. § 34-23-1-2(e).	In wrongful death actions, aggregate damages recoverable for loss of an adult person's love and companionship may not exceed $300,000.

Iowa	Medical liability - Noneconomic Damages	Iowa Code § 147.136A (as amended by HF 161 (2023) to cap damages in cases of catatrophic injuries and add an inflation adjustment, among other changes)	Limits the total amount recoverable for noneconomic damages in an action against a healthcare provider for the injury or death of a patient to $250,000 regardless of the number of plaintiffs, derivative claims, theories of liability, or defendants in the action. If the jury finds there is a substantial or permanent loss of a bodily function, substantial disfigurement, loss of pregnancy, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained, the cap is $1 million or $2 million if the action includes a hospital. The limit is adjusted for inflation by 2.1% beginning 1/1/2028 and each January 1 thereafter. The Commissioner of Insurance publishes the adjusted limit on the agency's website. Clarifies that loss of dependent care, includiing the loss of child care, is considered economic damages (not subject to the cap). The limit does not apply if the defendant acted with actual malice. Prohibits punitive damages in healthcare liability actions.
Iowa	Commercial motor vehicle accidents - Noneconomic Damages	S.F. 228 (Iowa 2023) (codified at Iowa Code § 668.12A).	Limits the total amount recoverable per plaintiff against the owner or operator of a commercial motor vehicle (not primarily engaged in transporting passengers) for noneconomic damages for personal injury or death to $5 million. The limit does not apply if the trial court finds, by a preponderance of the evidence, that the negligent act involved operating a commercial motor vehicle under the influence of alcohol or a drug, a refusal to submit to distribute illegal drugs, knowingly operating the vehicle without a proper license, or while the person's commercial driver's license is revoked, suspended, or canceled, or while the person is otherwise disqualified from operating a commercial motor vehicle, operating a commercial motor vehicle without the possession of a commercial driver's license or commercial learner's permit valid for the vehicle operated, operating a commercial motor vehicle involving an act or practice of human trafficking, reckless driving, use of an electronic communication device while driving, speeding fifteen miles per hour or more over the speed limit, or violating any state or local law or ordinance restricting or prohibiting the use of a mobile telephone, computer, tablet, or other device that is not a part of the vehicle while operating the vehicle. The limit will be adjusted for inflation by the secretary of state on January 1, 2028, and on January 1 of each even-numbered year thereafter.
Iowa	Motor vehicle accidents - Noneconomic Damages	Iowa Code § 613.20	A person may not recover noneconomic damages in an action arising out of the operation of a motor vehicle, if the injured person was the operator of a motor vehicle, a passenger in a motor vehicle, or a pedestrian and the person's injuries were proximately caused by the person's commission of any felony, or immediate flight therefrom, and the injured person was duly convicted of that felony. This limit does not apply if the person is found to have no fault in the accident.
Kansas	Wrongful death - Nonpecuniary Losses	Kan. Stat. Ann. § 60-1903(a)	In wrongful death actions, damages for nonpecuniary losses are capped at $250,000.
Louisiana	Medical liability - Total Compensatory Damages	La. Rev. Stat. Ann. § 40:1299.42	Limits the total amount recoverable in medical malpractice cases to $500,000, exclusive of future medical care and related benefits. Requires any amount awarded in excess of $100,000 plus interest to be paid from the Patient's Compensation Fund. The statute does not differentiate between economic and noneconomic damages.
Maine	Medical liability - Noneconomic Damages	24-A Me. Rev. Stat. Ann. § 4313(9)(B)	Limits noneconomic damages against a carrier of a health plan in claims alleging negligence in treatment decisions to $400,000.
	Wrongful death - Derivative Damages	18-A Me. Rev. Stat. Ann. § 2-807(2) (as amended in 2023).	Limits damages for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress, in wrongful death actions to $1 million (set in 2023), which adjusts annually for inflation. Does not limit damages for the decedent's conscious suffering.
	Seller of alcoholic beverages	28-A Me. Rev. Stat. Ann. § 2509	Limits noneconomic damages related to negligent or reckless service of liquor to $250,000.
Maryland	Medical liability - Noneconomic Damages	Md. Cts. & Jud. Proc. Code Ann. § 3-2A-09	In health care malpractice claims, noneconomic damages may not exceed $905,000 (as of Jan. 2025). This amount increases by $15,000 on January 1 of each year. This limit applies in the aggregate to all claims for personal injury and wrongful death arising from the same medical injury, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants. In wrongful death actions involving two or more claimants or beneficiaries, the noneconomic damage limit is 125% of the limit established above ($1,131,250 in 2025).
	Personal injury - Noneconomic Damages	Md. Cts. & Jud. Proc. Code § 11-108	In any action for damages for personal injury noneconomic damages may not exceed $950,000 (as of Oct. 2024). This limit increases by $15,000 on October 1 of each year. In wrongful death actions involving two or more claimants or beneficiaries, the noneconomic damage limit is 150% of the limit established above ($1,425,000). In addition, in a wrongful death action, the decedent can receive noneconomic damages through a survival action up to the individual limit ($950,000) which makes the combined limit in a wrongful death and survival action $2,375,000.
Massachusetts	Medical liability - Noneconomic Damages	Mass. Gen. Laws Ann. ch. 231, § 60-H.	The plaintiff shall not be awarded more than $500,000 for pain and suffering, loss of companionship, embarrassment and other items of general damages unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances in the case which warrant a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained.

Michigan	Medical liability - Noneconomic Damages	Mich. Comp. Laws 600.1483	§ Limits noneconomic damages to $280,000 in medical malpractice cases. The limit is increased to $500,000 when the plaintiff is "hemiplegic, paraplegic or quadriplegic resulting in total permanent functional loss of 1 or more limbs" due to "injury to the brain" or "spinal cord," or has "permanently impaired cognitive capacity rendering [the plaintiff] incapable of independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living," or has "permanent loss of or damage to a reproductive organ resulting in the inability to procreate." Limit is adjusted annually based on the consumer price index. In 2025, the adjusted limit is $586,300, rising to $1,047,000 in catastrophic injury cases. https://www.michigan.gov/treasury/-/media/Project/Websites/treasury/ORTA/Economic-Reports-Notices/FY-2025/Notice_01312025_NonEconomicLimitation-Posted.pdf.
	Product Liability - Noneconomic Damages	Mich. Comp. Laws 600.2946a	§ Limits noneconomic damages to $280,000 in product liability cases, unless the defect caused death or permanent loss of a vital bodily function, in which case noneconomic damages shall not exceed $500,000. Limit is adjusted annually based on the consumer price index. In 2025, the adjusted limit is $586,300, rising to $1,047,000 in catastrophic injury cases. https://www.michigan.gov/treasury/-/media/Project/Websites/treasury/ORTA/Economic-Reports-Notices/FY-2025/Notice_01312025_NonEconomicLimitation-Posted.pdf. The catastrophic injury limit does not apply in cases demonstrating gross negligence or actual knowledge of a defect.
Mississippi	Medical liability - Noneconomic Damages	Miss. Code Ann. § 11-1-60(2)(a)	In any cause of action for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than $500,000 for noneconomic damages.
	Personal injury - Noneconomic Damages	Miss. Code Ann. § 11-1-60(2)(b)	In any civil action other than those based on medical malpractice, the plaintiff may not receive more than $1 million for noneconomic damages.
Missouri	Medical liability - Noneconomic Damages	Mo. Rev. Stat. §§ 538.205, 538.210 (enacted 2015)	In any action against a health care provider for damages for personal injury arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than $400,000 ($473,444 in 2025) for noneconomic damages irrespective of the number of defendants. The limit rises to $700,000 ($828,529 in 2025) in cases meeting the definition of catastrophic personal injury and in wrongful death claims. The law also replaces the common law action for medical liability with a statutory action. There is an annual 1.7% annual adjustment for inflation. https://insurance.mo.gov/industry/medmal.php.
Montana	Medical liability - Noneconomic Damages	Mont. Code Ann. § 25-9-411	In a malpractice claim against one or more health care providers based on a single incident of malpractice, an award for past and future damages for noneconomic loss may not exceed $250,000.
Nebraska	Medical liability - Total Compensatory Damages	Neb. Rev. Stat. § 44-2825	The total amount recoverable under the Nebraska Hospital-Medical Liability Act from any and all health care providers and the Excess Liability Fund for any occurrence resulting in any injury or death of a patient may not exceed $1.75 million. A health care provider shall not be liable to any patient who is covered by the act for an amount in excess of $500,000 for all claims or causes of action arising from any occurrence during the period that the act is effective with reference to such patient. Subject to the overall limits from all sources above, any amount due from a judgment or settlement which is in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund. The statute does not differentiate between economic and noneconomic damages.
Nevada	Medical liability - Noneconomic Damages	Nev. Rev. Stat. Ann. § 41A.035, as amended by A.B. 404 (Nev. 2023).	In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages not to exceed $350,000 regardless of the number of plaintiffs, defendants or theories of liability. Effective January 1, 2024, the cap increased by $80,000 to $430,000. The cap will continue to increase by $80,000 per year until it reaches $750,000 in 2028, then the Nevada Supreme Court will increase the cap annually by 2.1% for the next 20 years.
New Hampshire	Wrongful death - Derivative Damages	N.H. Rev. Stat. § 556:12 (as amended in 2024).	In a wrongful death action, a surviving spouse's damages for loss of comfort, society, and companionship are capped at $500,000. A parent's damages for loss of the comfort, society, affection, guidance, and companionship of a deceased child is limited to $300,000 per individual claimant.
New Mexico	Medical liability - Total Compensatory Damages	N.M. Stat. Ann. § 41-5-6, as amended by H.B. 75 (N.M. 2021).	Except for punitive damages and medical care and related benefits, the total recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed $750,000 per occurrence (effective January 1, 2022), increasing annually for inflation beginning in 2023. The statute does not differentiate between economic and noneconomic damages. Sets a $4 million statutory limit per occurrence for claims against hospitals ($5.5 million in 2025). This amount will increase by $500,000 annually to $6 million in 2026, then adjust annually for inflation.

North Carolina	Medical liability - Noneconomic Damages	N.C. Gen. Stat. § 90-21.19	In any medical malpractice action, the total amount of noneconomic damages that can be awarded against all defendants may not exceed $500,000. The cap is adjusted for inflation on January 1st of every third year, beginning in January 1, 2014. **The 2023-2026 adjusted level is $656,730.** https://www.osbm.nc.gov/facts-figures/economy/liability-limit-noneconomic-damages-medical-malpractice. No limit if the "plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death" AND the defendant's "acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard for the rights of others, grossly negligent, fraudulent, intentional, or with malice."
North Dakota	Medical liability - Noneconomic Damages	N.D. Cent. Code § 32-42-02	With respect to a health care malpractice action or claim, the total amount of compensation that may be awarded to a claimant or members of the claimant's family for noneconomic damage resulting from an injury may not exceed $500,000, regardless of the number of health care providers and other defendants against whom the action or claim is brought or the number of actions or claims brought with respect to the injury.
Ohio	Personal injury - Noneconomic Damages	Ohio Rev. Code Ann. § 2315.18	Noneconomic damages recoverable in a tort action for injury or loss to person or property shall not exceed the greater of $250,000 or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of $350,000 for each plaintiff in that tort action or a maximum of $500,000 for each occurrence that is the basis of that tort action. The limit does not apply in cases of (a) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; or (b) permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities. Also does not apply in wrongful death actions.
	Medical liability - Noneconomic Damages	Ohio Rev. Code Ann. § 2323.43	In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, noneconomic damages shall not exceed the greater of $250,000 or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 per occurrence. A plaintiff may recover up to $500,000 per plaintiff or $1 million per occurrence if the noneconomic losses are for "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system" or for "permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities."
Oklahoma	Personal injury - Noneconomic Damages	S.B. 453 (Okla. 2025) (to be codified at Okla. Stat. tit. 23, § 61.3) (effective September 1, 2025).	In any civil action arising from a claimed bodily injury, the amount of compensation which a trier of fact may award a plaintiff for noneconomic loss shall not exceed $500,000, regardless of the number of parties against whom the action is brought or the number of actions brought. $1 million limit if the trier of fact finds that a plaintiff has suffered a permanent mental injury that itself severely impairs the plaintiff's ability to be employed or enjoy a reasonable standard of living. No limit if the trier of fact finds that a plaintiff has suffered permanent and severe physical injury, including a substantial physical abnormality or disfigurement, loss of use of a limb, or loss of or substantial impairment to a major body organ or system, or an injury of any type that renders the plaintiff incapable of being able to independently care for himself or herself or perform life-sustaining activities. No limit if the trier of fact finds by clear and convincing evidence that the defendant's acts or failures to act were reckless, grossly negligent, fraudulent, or intentional or with malice.
South Carolina	Medical liability - Noneconomic Damages	S.C. Code Ann. § 15-32-220	In an action on a medical malpractice claim against a single health care provider or institution, noneconomic damages shall not exceed $350,000 for each claimant. When final judgment is rendered against more than one health care institution or provider, the limit for each health care institution and provider is $350,000 for each claimant, and the noneconomic damage limit for all health care institutions and providers is $1,050,000 for each claimant. These limits do not apply if the defendant was grossly negligent, wilful, wanton, or reckless, and such conduct was the proximate cause of the claimant's noneconomic damages, or if the defendant has engaged in fraud or misrepresentation related to the claim, or if the defendant altered or destroyed medical records with the purpose of avoiding a claim or liability to the claimant. The amounts above were enacted in 2005 and are adjusted annually based on the Consumer Price Index. The 2025 adjusted level is $580,461 per claimant against a single health care provider and $1,741,383 for all health care providers for each claimant. https://rfa.sc.gov/sites/default/files/2025-03/Medical%20Malpractice%20Limitation%20-%20Inflation%20memo.pdf
South Dakota	Medical liability - Noneconomic Damages	S.D. Codified Laws § 21-3-11	In any action for damages for personal injury or death alleging malpractice against any physician, chiropractor, optometrist, podiatrist, dentist, dental hygienist, dental assistant, hospital, critical access hospital, registered nurse, licensed practical nurse, certified registered nurse anesthetist, clinical nurse specialist, nurse practitioner, nurse midwife, or physician's assistant, or against the practitioner's corporate, limited liability partnership, or limited liability company employer based upon the acts or omissions of the practitioner, total general damages may not exceed $500,000. There is no limitation on the amount of special damages which may be awarded.

Tennessee	Personal injury - Noneconomic Damages	Tenn. Code Ann. § 29-39-102	Compensation for noneconomic damages suffered by each injured plaintiff may not exceed $750,000. If an injury or loss is catastrophic in nature, the limit increases to $1 million. "Catastrophic loss or injury" is defined as "spinal cord injury resulting in paraplegia or quadriplegia," amputation of two hands, two feet or one of each, "third degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) or more of the face," or "wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights or custody or visitation" but does not apply if the defendant had "a specific intent to inflict serious bodily injury" or the defendant "intentionally falsified, destroyed, or concealed records containing materials evidence with the purpose of wrongfully evading liability in the case at issue" or the defendant was "under the influence of alcohol, drugs or any other intoxicant or stimulant" resulting in the defendant's judgment being "substantially impaired," or the defendant's acts resulted in a felony conviction.
Texas	Medical liability - Noneconomic Damages	Tex. Civ. Prac. & Rem. Code Ann. § 74.301	Liability for noneconomic damages against a single health care institution or provider may not exceed $250,000 per claimant. For actions against more than one defendant, noneconomic damages for all health care institutions are capped at $500,000, but no single institution is liable for more than $250,000 noneconomic damages cap per claimant. This cap is not indexed to inflation.
	Medical liability / wrongful death	Tex. Civ. Prac. & Rem. Code Ann. § 74.303	In any wrongful death or survival action against a physician or health care provider, *total damages*, including punitive damages, are limited to $500,000 regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based. The limit does not apply to necessary medical, hospital, or custodial care received before the judgment or required in the future. The limit is adjusted annually for inflation and is approximately $2.6 million (2023).
Utah	Medical liability - Noneconomic Damages	Utah Code Ann. § 78B-3-410	In a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience. The amount of damages awarded for noneconomic loss may not exceed $450,000 for actions arising after May 15, 2010.
Virginia	Medical liability - Total Compensatory Damages	Va. Code Ann. § 8.01-581.15	In any verdict returned against a health care provider in an action for malpractice, the total amount recoverable for any injury to, or death of, a patient shall not exceed $2,650,000 (as of July 1, 2024). This amount rises by $50,000 each year until it reaches $3 million in 2031. The statute does not differentiate between economic and noneconomic damages.
West Virginia	Medical liability - Noneconomic Damages	W. Va. Code § 55-7B-8	In any professional liability action brought against a health care provider, noneconomic damages shall not exceed $250,000 per occurrence. The plaintiff may recover noneconomic damages in excess of this limitation, but not in excess of $500,000 for each occurrence, where the damages for noneconomic losses suffered by the plaintiff were for: (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities. The noneconomic damage limit increases annually for inflation based on CPI but cannot exceed 150% of the set amounts, $375,000 generally, $750,000 for catastrophic injuries or death. The 2024 levels are at or near the statutory maximum.
	Commercial motor vehicle accidents - Noneconomic Damages	S.B. 583 (2024) (to be codified at W. Va. Code § 55-7-32).	In any civil action for personal injury or wrongful death involving the operation of a commercial motor vehicle, limits noneconomic damages to $5 million per person so long as the defendant carries liability insurance of at least $3 million per occurrence. Does not apply (d) This section does not apply if an operator or driver is found to have (1) operated under influence of alcohol; (2) refused to submit to testing; (3) was under the influence of any controlled substance, other drug, or inhalant substance; (4) operated a commercial motor vehicle in excess of the hours of operation established under state or federal regulations; (5) operated a commercial motor vehicle in willful or wanton disregard for the safety of persons or property; (6) operated a commercial motor vehicle loaded in excess of the maximum gross vehicle weight rating established under state or federal regulations; or (7) engaged in one or more of the acts that constitute distracted driving. The limit increases every January 1 beginning in 2026 based on the CPI, not to exceed 150% of the established cap.
Wisconsin	Medical liability - Noneconomic Damages	Wis. Stat. § 893.55	Total noneconomic damages recoverable for bodily injury, including any action or proceeding based on contribution or indemnification and any action for a claim by a person other than the injured person for noneconomic damages recoverable for bodily injury, may not exceed $750,000 for each occurrence from all health care providers and all employees of health care providers acting within the scope of their employment and providing health care services who are found negligent and from the injured patients and families compensation fund.
	Wrongful death - Nonpecuniary Losses	Wis. Stat. § 895.04(4)	Additional damages beyond those for pecuniary injuries may not exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death.