TUCKER ELLIS & WEST LLP
ATTORNEYS AT LAW

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IMPACT OF *ARBINO* ON MEDICAL MALPRACTICE CASES

On December 27, 2007, the Ohio Supreme Court issued an opinion upholding some provisions of a 2005 state law (Senate Bill 80) passed by the Ohio General Assembly that caps non-economic and punitive damages awards. See *Arbino v. Johnson & Johnson, et al.*, 116 Ohio St.3d 468, 2007-Ohio-6948. While the impact of *Arbino* on tort cases in general was widely reported, the clues *Arbino* provides concerning the constitutionality of the separate medical malpractice non-economic damages cap have not been closely analyzed. We discuss the impact of *Arbino* on medical malpractice cases below.

I. The *Punitive* Damages Cap Is Constitutional On Its Face

Arbino rejected facial constitutional challenges to statutory provisions capping non-economic damages (R.C. 2315.18) and punitive damages (R.C. 2315.21) in tort cases. Two aspects of this holding are of interest in medical malpractice cases. First, while medical malpractice claims are governed by their own separate *non-economic* damages cap (R.C. 2323.43, contained in Senate Bill 281, effective April 11, 2003), the *punitive* damages cap upheld in *Arbino* does apply to medical malpractice claims as well as other tort claims. Second, *Arbino* only considered a facial constitutional challenge to the damages caps — not an "as-applied" challenge. In other words, *Arbino* held only that the punitive damages cap has a so-called "plainly legitimate sweep" — not that the cap is constitutional in all its applications. *Arbino* therefore leaves the door open for a creative plaintiff's attorney to argue that the facts of a particular case are so egregious that application of the cap would be unconstitutional *as applied*.

II. Challenges To The Medical Malpractice *Non-Economic* Damages Cap After *Arbino*

Before *Arbino*, lawyers seeking to defend the constitutionality of the medical malpractice non-economic damages cap bore the heavy burden of explaining to a court why the cap was not unconstitutional as a matter of *stare decisis* under *Morris v. Savoy* (1991), 61 Ohio St.3d 684 (holding medical malpractice non-economic damages cap passed as part of 1970s tort reform bill unconstitutional). As explained below, *Arbino* eases — but does not eliminate — the burden of distinguishing *Morris.*

A. *Arbino*, *stare decisis* and deference to legislative fact findings

Two aspects of *Arbino*'s reasoning are particularly relevant to an analysis of the medical malpractice non-economic damages cap: 1) *Arbino*'s interpretation of *stare decisis*; and 2) *Arbino*'s interpretation of the policy-making role of the General Assembly. First, *Arbino* endorsed a narrow interpretation of *stare decisis* in the context of tort reform. *Arbino* recognized that the Court had not "dismissed all tort reform as an unconstitutional concept." *Arbino*, 2007-

Ohio-6948, at ¶ 22. After tracing the history of tort reform efforts in Ohio, *Arbino* clarified that "[t]o be covered by the blanket of *stare decisis*, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated." *Id.* As explained below, the medical malpractice non-economic damages cap (R.C. 2323.43) should be considered "sufficiently different from the previous enactments so as to avoid the blanket application of *stare decisis* and to warrant a fresh review of [its] merits." *Id.* at ¶ 24.

Second, *Arbino* adopted a deferential posture towards findings by the legislature. *Arbino* refused to engage in "intensive reexamination" of infor-mation used by the General Assembly, and noted that "we are to grant substantial deference to the predictive judgment of the General Assembly under a rational-basis review." 2007-Ohio-6948, at ¶ 58. *Arbino* explained that "the General Assembly is charged with making the difficult policy decisions on such issues and codifying them into law," and that courts are "not the forum to second-guess such legislative choices; we must simply determine whether they comply with the Constitution." *Id.*, at ¶ 71. And *Arbino* emphasized that "[i]ssues such as the wisdom of damage limitations and whether the specific dollar amounts available under them best serve the public interest are not for us to decide." Id., at ¶ 113.

B. R.C. 2323.43 is sufficiently different from 1970s tort reform to warrant a fresh review of its merits

Focusing on the lack of legislative findings supporting the cap, *Morris* held the 1970s cap unconstitutional under the Ohio Constitution's due process clause because it did not have a "real and substantial relationship" to the goal of reducing malpractice insurance rates. *Morris* also found the cap "unreasonable and arbitrary" because it "imposed the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." 61 Ohio St.3d at 691 (internal citation omitted). R.C. 2323.43, however, is sufficiently different from the 1970s tort reform bill to warrant a fresh review of its merits.

Unlike 1970s tort reform, the legislature enacted detailed findings as part of Senate Bill 281 that support the non-economic damages cap in R.C. 2323.43. The bill contains findings that medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio — based on evidence including statements of the Superintendent of Insurance, the Ohio State Medical Association, testimony of the President of Physician Insurers Association of America and a U.S. Department of Health and Human Services 2002 report. The General Assembly also found that the overall cost of health care 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. No similar findings were present in the 1970s tort reform bill.

R.C. 2323.43 also contains far different language from the medical malpractice damages cap struck down in *Morris.* That cap imposed a flat limit on non-economic damages of $200,000. Unlike the cap at issue in *Morris*, R.C. 2323.43 creates a distinction between catastrophic and non-catastrophic injuries and includes higher limits. The current cap limits non-economic damages to $250,000 or three times economic damages up to a maximum of $350,000 per plaintiff or $500,000 per occurrence. These limitations increase to $500,000 per plaintiff and $1 million per occurrence for certain defined catastrophic injuries. The Ohio General Assembly expressly found that this distinction among claimants with catastrophic injury strikes a reasonable balance between potential plaintiffs and defendants in consideration of the intent of an award for non-economic

losses, while treating similar plaintiffs equally.

C. R.C. 2323.43 and catastrophic injuries

Applying a "fresh review" to R.C. 2323.43, the detailed findings by the General Assembly should answer the Court's concern in *Morris* about the "real and substantial relationship" between the medical malpractice non-economic damages cap and its goals. In addition to those detailed findings, Senate Bill 281 created an Ohio Medical Malpractice Commission to further study effects of the cap on the problems posed by medical malpractice, and requires the Department of Insurance to provide the General Assembly annual updates on medical malpractice insurance information. Coupled with the findings described above, these actions demonstrate a clear connection between the non-economic damages cap and the goal of stabilizing the cost of health care delivery in Ohio.

Less clear is whether R.C. 2323.43 effectively answers the Court's concern in *Morris* about the "arbitrary" nature of imposing the "cost" of the cap "solely upon a class consisting of those most severely injured by medical malpractice." The General Assembly addressed this concern in R.C. 2323.43 by creating a distinction between claimants with certain, defined catastrophic injuries and claimants with non-catastrophic injuries. Unlike the cap in *Arbino* (which exempted those with catastrophic injuries from the non-economic damages cap), however, the medical malpractice non-economic damages cap still applies to claimants with catastrophic injuries — albeit at higher limits. Advocates of tort reform will have to argue that the higher limits for catastrophic injuries (up to $1 million per occurrence), coupled with the General Assembly's finding that this distinction strikes a reasonable balance, means that the non-economic caps are not "arbitrary." Therefore, an absolute exemption from the cap is not required by the due process clause of the Ohio Constitution.

For more information, please contact a member of Tucker Ellis & West's Medical Malpractice Group.

TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
216-592-5000 (phone)
216.592.5009 (facsimile)
www.tuckerellis.com