

IN THE SUPREME COURT OF OHIO

MELISA ARBINO,

Petitioner,

v.

JOHNSON & JOHNSON, et al.,

Respondents.

: Case No. 2006-1212  
:  
: On Questions Certified by the  
: United States District Court for  
: Northern District of Ohio,  
: Western Division  
:  
: U.S. District Court Case No.  
: 3:06 CV 40010  
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:

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MERIT BRIEF OF *AMICUS CURIAE* OHIO ALLIANCE FOR CIVIL JUSTICE,  
IN SUPPORT OF THE RESPONDENTS

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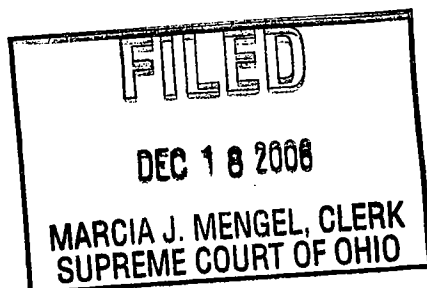
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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Alliance for Civil Justice (“OACJ”) is a group of over 200 small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others.<sup>1</sup> OACJ members, large and small, support a balanced civil justice system that will not only award fair compensation to injured persons, but also impose sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ also supports stability and predictability in the civil justice system in order that Ohio's businesses and professions may know what risks they assume as they carry on commerce in this state.

OACJ strongly supports the General Assembly’s enactment of S.B. 80. In particular, the OACJ believes that the limitations on noneconomic damages in tort actions, codified in R.C. 2315.18, are a desirable and necessary component of Ohio tort law. Noneconomic damages, though theoretically compensatory in nature, are designed to compensate for intangible injury

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<sup>1</sup> The following five organizations occupy officer positions with the OACJ and fully support the OACJ’s position in this *Amicus Brief*:

(1) The National Federation of Independent Business/Ohio, with more than 36,000 members, is the state’s largest association dedicated exclusively to the interests of small and independent business owners.

(2) The Ohio Chamber of Commerce is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate

(3) The Ohio Farm Bureau Federation, with over 225,000 members, is Ohio’s largest general farm organization. Farm Bureau members are in every county in the state and serve on boards and committees working on legislation, regulations, and issues that affect agriculture, rural areas, and all Ohio citizens.

(4) The Ohio Manufacturers’ Association is a statewide association of more than 2,000 manufacturing companies that collectively employ the majority of the approximately 800,000 men and women who work in manufacturing in the State of Ohio.

(5) The Ohio Society of Certified Public Accountants was established in 1908 and represents more than 23,000 CPAs in business, education, government and public accounting. Members of the Society embrace the highest standards of professional and ethical performance through a rigorous commitment to continuing education, a comprehensive quality review requirement and compliance with a strict Code of Professional Conduct.

that is inherently incapable of objective measurement. Accordingly, awards of noneconomic damages are largely unpredictable. Thus, while OACJ urges this Court to uphold the constitutionality of S.B. 80 in its entirety, OACJ dedicates the instant *Amicus* Brief solely to a discussion of R.C. 2315.18's limitations on noneconomic damages. For the reasons contained herein, the OACJ urges this Court to declare R.C. 2315.18 to be a constitutionally valid exercise of legislative authority.<sup>2</sup>

### **STATEMENT OF FACTS**

OACJ concurs in the statement of the case and facts contained in the Respondents' Merit Brief. Additionally, in order for the Court to examine the issues of this case in proper perspective, OACJ submits the following factual information regarding the background and history of how and why S.B. 80, and the noneconomic damage limitation included within its enactment, came into being.

S.B. 80, which became effective on April 7, 2005, was enacted by the General Assembly as legislation designed to reform Ohio's tort laws. More than 30 persons, representing opinions and interests for and against S.B. 80's passage, testified before legislative committees prior to S.B. 80 being enacted. From the testimony given before the House and Senate committees, as well as a multitude of studies considered along with the testimony, the General Assembly issued a number of important findings that illustrated the public policy motivation behind S.B. 80.

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<sup>2</sup> In addition, the following organizations and entities, composed of both members and nonmembers of the OACJ, concur with the position taken by the OACJ in this *Amicus* Brief: The Academy of Medicine of Cleveland & Northern Ohio, American Institute of Architects-Ohio, American Insurance Association, The Independent Insurance Agents of Ohio, Ohio Association of Convenience Stores, Ohio Association of McDonalds Operators, Ohio Association of Wholesaler-Distributors, Ohio Automatic Merchandising Association, Ohio Automobile Dealer's Association, Ohio Bakers Association, Ohio Cleaners Association, Ohio Coal Association, Ohio Construction Suppliers Association, Ohio Council of Retail Merchants, Ohio Dental Association, Ohio Grocers Association, Ohio Jewelers Association, Ohio Propane Gas Association, Ohio Tire Dealers and Retreaders Association, Ohio Trucking Association, Ohio Wholesale Marketers Association, and OHIC Insurance Company.

Among these findings, which the General Assembly specifically enacted in the uncodified law, were:

- Ohio’s economic well-being depends upon “business providing essential jobs and creative innovation.” S.B. 80, Section 3(A)(1). The pre-S.B. 80 civil litigation system presented a “challenge” to that economic well-being. *Id.*
- While understanding the need for our tort system to provide compensation to individuals who have suffered injury, Ohio law was in need of a “fair system of civil justice” that balanced the rights of tort claimants with “the rights of those who have been unfairly sued.” *Id.*, Section 3(A)(2).
- Ohio has a “rational and legitimate state interest” in providing a “fair, predictable system of civil justice” that preserves the rights of those who have been harmed while at the same time “curbing the number of frivolous lawsuits” that inevitably result in unneeded costs to consumers. *Id.*, Section 3(A)(3).
- Noneconomic damages, which include such elements as pain and suffering, emotional distress, and loss of consortium or companionship, “do not involve an economic loss and have, therefore, no precise economic value.” *Id.*, Section 3(A)(6)(a). These types of damages are inherently subjective, and have been unfairly inflated in the civil tort system by, among other factors, “the improper consideration of evidence of wrongdoing.” *Id.*, Section 3(A)(6)(d).
- “Inflated damage awards,” which include the unpredictable awards of noneconomic damages for intangible loss, create an “improper resolution of civil justice claims.” *Id.*, Section 3(A)(6)(e). This “improper resolution” has the negative effect of increasing the cost of litigation, resulting in a rise in insurance premiums. *Id.* These costs are

ultimately borne by the general public “through higher prices for products and services.”

*Id.*

- As stated in testimony by Bruce Johnson, Ohio Department of Development Director, tort costs put Ohio businesses at a disadvantage via-a-vis foreign competition. *Id.*, Section 3(A)(3)(f). Since 1950, tort costs in the United States have grown from 0.6% to 2% of gross domestic product.

The various findings enacted into the uncodified law were gleaned not only from testimony given before legislative committees, but also from published studies that illustrated the societal (and monetary) costs of excessive tort litigation. For example, a 2002 study from the White House Council of Economic Advisors concluded that the cost of tort litigation in the United States effectively operates as a tax upon the citizenry at large. Specifically, the study determined that this “litigation tax” burden is borne by various individuals through, among other things: (1) job loss or a reduction in wages for workers, (2) an increase in consumer prices, (3) a decline in property values for landowners, or (4) a reduction in profits for owners of capital. See Council of Economic Advisers, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* (April 2002), at p. 13 (“White House Study”). The study quantified the effect of tort litigation as:

- a 2.10% “wage and salary tax,”
- a 1.3% tax on “personal consumption,” and
- a 3.10% tax on “capital investment income.”

*Id.* at p. 16; S.B. 80, Section 3(A)(3)(b). This “litigation tax” had the great potential of imposing “deadweight losses on the economy in the form of products and services that are never produced as a result of the fear of litigation.” White House Study, at p. 19.

