

TRANSPORTATION LAW ALERT

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New Decision on Catastrophic Loss Exceptions to the Non-Economic Damages Cap: The Cap Applies As a *Matter of Law*

By Christopher E. Cotter

The tort reform legislation passed by the Ohio General Assembly in 2005 includes a cap on the amount of non-economic damages that may be recovered at trial by an injured plaintiff. Damages for non-economic loss are limited to the greater of: (1) three times the economic loss (limited to \$350,000 per plaintiff); or (2) \$250,000. R.C. 2315.18(B)(2).

Yet this cap on non-economic damages does not apply when the plaintiff has suffered a catastrophic loss. R.C. 2315.18(B)(3)]. Eligible catastrophic losses are listed in the legislation and fall into two general categories: (a) permanent and substantial physical deformities, loss of use of a limb, or loss of a bodily organ system; and (b) permanent physical functional injuries that permanently prevent the injured person from being able to independently care for self and perform life-sustaining activities. *Id.*

Since the non-economic cap and its exceptions became law in 2005, only a handful of Court opinions have addressed the catastrophic loss exceptions. For instance, in 2010, the Southern District of Ohio held as a matter of law that plaintiff's loss of vision in one eye did not prevent her from independently performing her activities of daily living and none of the other catastrophic loss exemptions applied. *Williams v. Bausch & Lomb Co.*, 2010 WL 2521753 (S.D. Ohio June 22, 2010). In 2011, the Northern District of Ohio held as a matter of law that the plaintiff's injuries did not constitute any of the catastrophic losses set forth in the statute. *Weldon v. Presley*, 2011 WL 3749469 (N.D. Ohio Aug. 9, 2011).

More recently, however, Courts have held that the issue presents questions of fact that must be resolved by the jury at trial, rather than by the Court prior to trial. For instance, in 2012, the Northern District concluded that "the jury, and not the judge, [should] decide the issue of the nature of a plaintiff's injury" and should therefore decide whether the catastrophic loss exceptions apply to a plaintiff's injuries. *Ohle v. DJO Inc.*, 2012 WL 4505846 (N.D. Ohio Sept. 28, 2012). Last December, the Northern District issued another opinion concluding there was "sufficient evidence in the record to create an issue of fact as to whether plaintiff has suffered a '[p]ermanent physical functional injury that permanently prevents [her] from being able to independently care for [her]self and perform life-sustaining activities'" under Section 2315.18(B)(3)(b)). *Giebel v. Lavalley*, 2013 WL 6903784 (N.D. Ohio Dec. 31, 2013)

This week, a new decision was issued on the catastrophic loss exceptions to the non-economic damages cap. *Sheffer v. Novartis Pharm. Corp.*, 3:12-CV-238, Doc. # 108 (S.D. Ohio Jul. 15, 2014) (J. Rice). In *Sheffer*, the plaintiff asserted product liability claims alleging that her use of the prescription drug Zometa caused her to develop osteonecrosis of the jaw, eventually causing a broken jaw bone. The defense filed a motion arguing that plaintiff's recovery of non-economic damages is limited by Section 2315.18(B)(2) and that the catastrophic loss exceptions do not apply as a matter of law.

The Court agreed. The plaintiff had argued that the issue should be decided by the jury, rather than by the Court prior to trial, relying on the *Ohle* case discussed above. The Court acknowledged that "once the plaintiff crosses an evidentiary threshold, [it should] be for [the] jury, not the court to decide." However, the Court also explained that Section 2315.18(E)(2) specifically permits this issue to be decided on summary judgment.¹ Further, when

¹ Section 2315.18(E)(2) provides as follows: "Prior to the trial in the tort action described in division (D) of this section, any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages as described in division (B)(2) of this section."

“it is clear that the statutory exceptions are inapplicable, courts have not hesitated to decide the issue prior to trial.” (Citing the *Williams* and *Weldon* cases discussed above).

The Court then analyzed the two catastrophic loss categories in light of plaintiff’s osteonecrosis of the jaw and her broken jaw bone. The plaintiff had testified that her jaw “will never be perfect” and she still suffers some jaw pain. The Court concluded that “her injury is not the type of catastrophic ‘permanent and substantial physical deformity’ contemplated by Section 2315.18(3)(a).” Because her jaw is still functional, the injury does not involve the loss of use of a limb or loss of a bodily organ system. Although plaintiff testified she avoids raw vegetables and other foods that are hard or crunchy, she can chew meat and small pieces of fruit. As such, the first catastrophic loss category did not apply as a matter of law.

The plaintiff had also argued that the second category applied, that her jaw injury constituted a permanent physical functional injury that permanently prevented her from being able to independently care for herself and to perform life-sustaining activities. The Court explained that the deposition of plaintiff and her husband belied any such claim. The plaintiff testified that she bathes and dresses herself, is able to drive and does all of the cooking at their house. She also teaches Bible school, babysits several grandsons on a daily basis, takes care of chickens and five horses, and danced at her childrens’ weddings. The Court concluded that plaintiff’s jaw injury “is insufficient, as a matter of law, to defeat the statutory caps on non-economic damages.” (Emphasis added).

The *Sheffer* decision is important for anyone defending claims that potentially exceed the statutory cap on non-economic damages. Because there have been so few Court opinions on the catastrophic loss portion of the statute, these first decisions play an important role in shaping how Courts will view the statute. It had been several years since a Court decided as a matter of law that the catastrophic loss exceptions did not apply. The *Sheffer* decision reinforces the notion that the issue can be decided as a matter of law. When the nature and extent of plaintiff’s injury prevents him or her from crossing an evidentiary threshold on the issue, it is appropriate for Courts to decide as a matter of law that the non-economic damages cap should apply.

This makes sense in light of the fact that the tort reform legislation was passed in direct response to evidence “that the uncertainty and subjectivity associated with the civil justice system was harming the state’s economy.” *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 479 (2007). The *Sheffer* decision brings more certainty and objectivity to application of the non-economic damages cap.

Should you have any questions about the cap on noneconomic damages or the catastrophic loss exception under the Ohio Tort Reform Act, please contact the following Roetzel attorneys:

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