

## TRANSPORTATION LAW ALERT

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### **New Northern District of Ohio Decision Interprets Ohio's Catastrophic Loss Exception to the Cap on Noneconomic Damages**

The Ohio Tort Reform Act, which became effective in 2005, provides a cap on a plaintiff's recovery of noneconomic damages. Under the Act and set forth in Ohio Revised Code ("R.C.") 2315.18, damages for noneconomic loss are limited to the greater of: (1) Three times the economic loss or (2) \$250,000. In addition, three times the economic loss cannot exceed \$350,000 for each plaintiff in the tort action or \$500,000 for each occurrence that is the basis of the tort action.

However, the noneconomic damages cap does not apply when the plaintiff has suffered a *catastrophic* loss as described in R.C. 2315.18(B)(3). Under the Act, catastrophic losses include the following: (a) Permanent and substantial physical deformities, loss of use of a limb, or loss of a bodily organ system; or (b) Permanent physical functional injuries that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.

There are only a few opinions from Ohio state and federal courts that have interpreted and applied these catastrophic loss exceptions. The latest was decided by the Northern District of Ohio on December 31, 2013, in *Giebel v. LaValley*. The *Giebel* case involves a collision between a tractor-trailer and a passenger vehicle. Plaintiff argued the following injuries were permanent conditions:

- Sprain/strain of the neck and lower back;
- Damage to the cerebellum portion of the brain;
- Other organic brain damage; and
- Damage to the optic nerve.

She claimed the permanency of these injuries was supported by her testimony and medical expert testimony. She also alleged the effects of those injuries were permanent in nature, including:

- Pain and restricted motion of the neck and lower back;
- Issues resulting from post-concussion syndrome and/or brain damage, including headaches, dizziness, problems with balance, memory, and concentration, reduced intellectual efficiency, and other cognitive issues;
- Psychological issues, including severe anxiety, depression, and suicidal thoughts;
- Visual problems, including severe impairment of visual processing speed, double vision, and loss of vision in the upper-left quadrant of the visual field in both eyes.

Plaintiff and her physicians also offered testimony that her injuries have affected her life activities in the following ways:

- Inability to perform activities requiring "heavy use of her neck or arms, or bending or twisting," including carrying her children or other heavy objects, going to the grocery store, lifting heavy pots of food, running a vacuum cleaner, etc.;
- Inability to lift over 25 pounds without pain;
- Inability to work for more than four to six hours per day;

- Forgetting things like paying bills and taking medicine;
- Inability to drive;
- Inability to ride as a passenger in a vehicle in certain situations; and
- Difficulty reading.

Defendants disputed whether such evidence justifies lifting the damage cap imposed by R.C. 2315.18(B)(3).

The Northern District of Ohio held that there was no evidence in the record indicating that plaintiff had suffered a “[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system” under R.C. 2315.18(B)(3)(a). In other words, it rejected the plaintiff’s argument that damage to her eyesight constituted a “loss of a bodily organ system” under R.C. 2315.18(B)(3)(a).

However, the court did conclude 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 § 2315.18(B)(3)(b).” (emphasis added). In other words, the court concluded that a jury should decide whether or not the catastrophic loss exception should apply.

On this point, the plaintiff had argued that the emotional effects of her brain injury rendered her unable to perform life-sustaining activities. Specifically, she argued that the inability to stop one’s self from committing suicide is the most basic of all life-sustaining activities. The court concluded that whether the plaintiff suffered from suicidal thoughts and impulses as a result of her brain injury was a question of fact for the jury to resolve. The court agreed with the plaintiff that a mental illness that impels one to suicide could be viewed as a paradigmatic instance of inability to care for oneself.

The *Giebel* case represents yet another instance in which courts conclude that application of the catastrophic loss exception is an issue for the jury to decide, when there are disagreements about the facts that relate to the issue. Other examples include *Bransteter v. Moore* (jury question as to whether multiple scarring constitutes a “permanent and substantial physical deformity”) and *Ohle v. DJO Inc.* (jury question as to whether the nature and location of plaintiff’s scarring, removal of a portion of a bone, and/or total loss of cartilage deforms an individual). Yet, other courts will grant summary judgment on this issue, concluding the noneconomic damages cap applies, when plaintiff fails to present evidence that would cause a reasonable jury to conclude one of the catastrophic loss exceptions applies, for example *Weldon v. Presley* (plaintiff’s inability to do household chores “is insufficient to defeat the 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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