

# Capped or Uncapped: The Current Status of Ohio's Statutory Cap On Noneconomic Damages

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Ohio law caps damages that can be awarded for pain and suffering (i.e., noneconomic damages) up to \$350,000 in tort claims unless a plaintiff can establish that she: (1) sustained a permanent and substantial physical deformity; (2) lost the use of a limb; (3)

lost a bodily organ system; or (4) sustained a permanent physical functional injury that prevents her from being able to independently care for herself and perform life-sustaining activities.

The statutory scheme of R.C. 2315.18 permits parties to file a motion for summary judgment to determine whether the noneconomic limitations apply as a matter of law. R.C. 2315.18(E)(2). This procedure allows for a speedy determination of the applicability of the exception because “[w]hen it is clear that the statutory exceptions are inapplicable, courts have not hesitated to decide the issue prior to trial.” *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-CV-238, 2014 WL 10293816, at \*2 (S.D. Ohio July 15, 2014).

When deciding the issue on a motion for summary judgment, the court makes the “threshold determination of whether there is sufficient evidence to submit the issue of the nature of the injury to the jury.” *Ohle v. DJO Inc.*, No. 1:09-CV-02794, 2012 WL 4505846, at \*3 (N.D. Ohio Sept. 28, 2012). However, some courts have been reluctant to correct apply the statute or rule, as a matter of law, that the plaintiff’s damages are capped. Other courts have confused the applicable standard and have incorrectly applied the statute. This article details some of the issues presented under R.C. 2315.18 and how it is analyzed by Ohio courts.

## Emotional or Mental Injuries Cannot Justify an Exception to the Statutory Cap on Non-Economic Damages

The only exceptions to the statutory cap on non-economic damages arise out of **physical** injuries—not emotional or mental. See R.C. 2315.18(B)(3). This is demonstrated in the Supreme Court of Ohio’s holding in *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118 and the Eighth District’s decision in *Brandt v. Pompa*, 8th Dist. Cuyahoga No. 109517, 2021-Ohio-845, *appeal allowed*, 163 Ohio St.3d 1501, 2021-Ohio-2307, 170 N.E.3d 891. Both decisions arise out of severe, traumatic, and gruesome injuries sustained by the respective plaintiffs over the course of numerous sexual assaults. *Simpkins* at ¶¶ 7–18; *Brandt* at ¶¶ 2–20. Both plaintiffs sustained permanent and excruciating emotional, mental, and psychological injuries associated with the sexual assaults committed against them, including, but not limited to, PTSD, depression, and anxiety. *Simpkins* at ¶ 44; *Brandt* at ¶ 12. However, the statutory cap on non-economic damages applied in both cases because neither of the plaintiffs sustained the physical injuries contemplated by R.C. 2315.18(B)(3). Therefore, claims from other plaintiffs arising from PTSD or other related non-physical injuries are statutorily capped.

The Supreme Court of Ohio is currently considering the constitutionality of R.C. 2315.18 in general and as-applied to minor victims of sexual abuse in *Brandt v. Pompa*, Case No. 2021-0497, 163 Ohio St.3d 1501, 2021-Ohio-2307, 170 N.E.3d 891. Oral arguments were heard on March 30, 2022 and has been submitted to the Court for its decision. OACTA’s amicus brief in this case can be accessed [here](#).

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## The Terms “Loss of Use of a Limb” and “Loss of a Bodily Organ System” are Applied Literally

The exceptions with respect to the loss of a limb or bodily organ system are applied literally and require a plaintiff to demonstrate that she has actually lost the use of an arm, leg, or complete organ system. *Williams v. Bausch & Lomb Co.*, S.D. Ohio No. 2:08-CV-910, 2010 WL 2521753, \*6 (June 22, 2010) provides a stark example of this standard, since it found that the caps applied to a plaintiff that was deemed “legally blind” because she was still able to partially see out of her left eye and, therefore, had not lost an organ system. *McLaren v. HB Klub, LLC*, Franklin C.P. No. 07 CVC 1767, 2011 WL 6737139, \*3 (Apr. 28, 2011) is another example of this literal application. In *McLaren*, the court found that the caps applied to a plaintiff that suffered partial loss of his auditory system because that loss was not “total” as required by R.C. 2315.18(B)(3)). Therefore, the exceptions related to the loss of a limb or bodily organ system are straightforward and easily applied because they require complete and total loss of limb or bodily organ system. Partial losses will not satisfy these exceptions under established Ohio law.

## How Courts Have Analyzed a “Permanent and Substantial Physical Deformity”

Courts, however, have struggled with the application of the “permanent and substantial” physical deformity exception. The Supreme Court of Ohio held that only “catastrophic injuries” meet the exceptions to R.C. 2315.18(B)(3) because the statute was drafted with the intent to cap damages in all cases that do not involve extraordinary and the “most serious injuries.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶¶ 40, 72 (holding that “catastrophic injuries offer more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations”).

A recent decision from the Twelfth District Court of Appeals affirmed this Supreme Court of Ohio principles in *Poteet v. MacMillan*, 12th Dist. Warren No. CA2021-08-071, 2022-Ohio-876. There, a pedestrian was struck by a motor vehicle while she was walking on a sidewalk. *Poteet*

*v. MacMillan*, 12th Dist. Warren No. CA2021-08-071, 2022-Ohio-876, ¶ 2. She sustained an open comminuted fracture of her distal tibia, a fracture of her distal fibula, and a fracture of her patella. *Id.* She underwent multiple surgeries, resulting in a steel plate and screws permanently placed in her leg and ankle. *Id.* at ¶¶ 2–3. The trial court denied the defense’s motion for directed verdict on whether the statutory cap on noneconomic damages applied, instead instructing the jury that the plaintiff sustained a permanent and substantial deformity so the caps would not apply. *Id.* at ¶ 5.

The court of appeals reversed and remanded this decision, holding that the trial court erred in denying the defense’s motion because the plaintiff did not sustain the type of injury that could trigger an exception to the statutory cap on noneconomic damages. *Id.* at ¶¶ 8–26. On appeal, the plaintiff argued that she sustained a permanent and substantial deformity because of the scarring, malunion, and steel plate in her leg as a result of her surgeries. *Id.* at ¶ 22. The court rejected this argument as a matter of law, holding that internal hardware does not create a substantial deformity. *Id.* at ¶ 23. The court stressed that an exception to the statutory cap on noneconomic damages requires a permanent and substantial **outward** physical deformity, explaining:

The key point is that a deformity must be **visible or noticeable**. A metal plate and screws are per se not a deformity, as a “deformity” is a characteristic of the subject being deformed (in this case the person), rather than a foreign, internal, unobservable object.

*Id.* at ¶ 20 (emphasis added). The court further stressed the “stringent standards” for the exceptions to the statutory cap that have been set by the Supreme Court of Ohio:

The Ohio Supreme Court has provided little guidance on what constitutes a permanent and substantial physical deformity, but where it has spoken, it is clear that the **standard is stringent**. See *Simpkins*, 2016-Ohio-8118 at ¶ 43 (“extreme qualifications” required);

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*Arbino*, 2007-Ohio-6948 at ¶ 47 (“catastrophic injury” necessary). We choose to look to the supreme court’s high standard rooted in the statute’s text rather than to the non-binding federal district court decisions to which Poteet directs us.

*Id.* at ¶ 24 (emphasis added), quoting *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 43; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 47.

The *Poteet* court analyzed these issues in conjunction with the severe injuries sustained by the plaintiff in that case, construed the facts in her favor, and held that the trial court committed reversible error when it denied the defense’s motion on the application of the statutory cap on noneconomic damages. *Id.* at ¶ 25. The court concluded that “Poteet did not sustain a permanent and substantial physical deformity and that MacMillian was entitled to a directed verdict.” *Id.*

The *Poteet* decision is a prime example of the correct application of the law, limiting the exceptions to the statutory cap on noneconomic damages to only the most severe and catastrophic injuries. Other courts have followed these principles and correctly applied the law as well.

For example, an Ohio court granted the defendants’ motion for summary judgment and found that the cap on non-economic damages applied in a case involving a plaintiff that suffered multiple fractures to her lumbar spine, thoracic spine, ribs, and clavicle, along with a collapsed lung. *Hetrick v. Edward, Franklin C.P.*, No. 12CV9190 (May 9, 2014). She was hospitalized for approximately one week and was in a body brace after she returned home. *Id.* at p. 3. A board-certified orthopedic surgeon determined she had 27% permanent partial impairment and her physicians opined that she would have “permanent and disabling pain, discomfort, and physical limitations” that qualified her “as permanently and totally disabled.” *Id.* at pp. 3–4. Notwithstanding this evidence, the court concluded that the caps applied because the term “deformity” in R.C. 2315(B)(3) means:

“the condition of being deformed,” “abnormal bodily formation” or “a deformed or disfigured part of the body,” “ugliness or depravity,” and “anything deformed or disfigured.” Webster’s New World College Dictionary, 4th Edition 380 (2002). Deformed is defined as “changed in form or shape, esp. so as to be misshapen, disfigured or ugly.” *Id.* And, disfigure is defined as “to hurt the appearance or attractiveness of; deform; deface; mar.” *Id.*, 412. Construing these definitions in the context of the statute, the Court finds that the legislature intended to except injuries constituting or resulting in objective, visible alterations of the body, especially those affecting a person’s outward appearance.

*Id.* at p. 4.

Even though the plaintiff in *Hetrick* sustained serious and permanent injuries that made her permanently and totally disabled, her injuries were not sufficient to qualify as an exception to the cap on non-economic damages and the court granted summary judgment on the issue in favor of the defendants. *Id.* at pp. 4–6.

*Hay v. Shirey* involved a plaintiff that sustained fractured ribs, a collapsed lung, chest trauma, injuries to his spleen, kidneys, and left shoulder, and a brain injury. *Hay v. Shirey*, N.D. Ohio No. 1:19 CV 2645, 2021 WL 2210565, \*1 (June 1, 2021). Despite those injuries, the court granted the defendant’s motion for summary judgment to enforce the cap on non-economic damages because none of his injuries rose to the level contemplated by the legislature in R.C. 2315.18(B)(3). *Id.* at \*4.

*Weldon v. Presley* involved a plaintiff that underwent a cervical fusion and discectomy due to injuries to her head, neck, shoulders, and back. N.D. Ohio No. 1:10 CV 1077, 2011 WL 3749469, \*1 (Aug. 9, 2011). She was additionally left with a four-centimeter incisional scar as a result of a surgery performed due to her injuries in the collision. *Id.* at \*7. However, the Northern District of Ohio concluded that the plaintiff’s injuries did not rise to the level of a permanent and substantial physical deformity

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as a matter of law, granting the defendants' motion for summary judgment with respect to the application of the caps on non-economic damages. *Id.* at \*\*6-7 (relying on "the extreme qualifications required for the other injuries listed, it seems clear that permanent and substantial physical deformity must be severe and objective.").

The Southern District Court of Ohio found that the caps applied as a matter of law with respect to a plaintiff that experienced destroyed bone mass in her jaw that resulted in a broken jaw. *Sheffer v. Novartis Pharmaceuticals Corp.*, S.D. Ohio No. 3:12-CV-238, 2014 WL 10293816 (July 15, 2014). The plaintiff in *Sheffer* testified that her jaw "will never be perfect" and that she experienced ongoing pain that required her to avoid eating certain foods. *Id.* at \*2. However, the court concluded that the injury "is not the type of catastrophic 'permanent and substantial physical deformity'" sufficient to trigger an exception to the statutory cap on non-economic damages. *Id.* at \*\*2-3.

Still other courts have demurred on the issue and allowed the jury to decide whether the cap on noneconomic damages should apply. See, e.g., *Bransteter v. Moore*, No. 3:09 CV 2, 2009 WL 152317, at \*2 (N.D. Ohio Jan. 21, 2009) (finding a scar may satisfy the exception and should be determined by the jury); *Ohle v. DJO Inc.*, No. 1:09-CV-02794, 2012 WL 4505846 at \*2-4 (N.D. Ohio Sept. 28, 2012) (finding combination of injuries may satisfy the exception and should be determined by the jury); *Cawley v. Eastman Outdoors, Inc.*, No. 1:14-CV-00310, 2014 WL 5325223 (N.D. Ohio Oct. 17, 2014) (same).

At least one Ohio court has ruled that the caps do not apply as a matter of law. See *White v. Bannerman*, Ohio App. 5th Dist. Stark No. 2009CA00221, 2010-Ohio-4846, ¶ 9. In *White*, however, the court did not discuss the deformity exception. Instead, it concluded that the totality of the minor plaintiff's permanent injuries, including the numbness in her fingers, multiple severe facial scars, and inability to care for herself, justified the exception from the cap. *Id.* at ¶¶ 7-9.

The recent *Poteet* case, however, correctly analyzed the statute, recognizing the extreme standards established

by the Ohio legislature and the Supreme Court of Ohio regarding the application of the statutory cap on noneconomic damages for alleged permanent and substantial physical deformities.

### **Permanent Physical Functional Injury That Permanently Prevents a Plaintiff from Being Able to Independently Care for Herself and Perform Life-Sustaining Activities**

Courts generally look to the plaintiff's own testimony when analyzing whether they are capable of performing life-sustaining activities. See, e.g., *Craig v. Simons*, Wood C.P. No. 2014CV0452, 2016 WL 8604644, at \*3 (June 14, 2016); *Sheffer* at \*2; *Weldon* at \*8.

In *Craig*, the court granted summary judgment in favor of the defendants to enforce the statutory cap on non-economic damages because the plaintiff testified that she was able to "work, care for her child, drive, and exercise." *Craig*, at \*3. The court relied on the deposition testimony of the plaintiff and her physician:

Based on the evidence properly before the court, it is clear that Mrs. Craig has sustained a permanent physical functional injury, but she has failed to demonstrate that the injury prevents her from caring for herself or perform life-sustaining activities. Mrs. Craig's own testimony shows that she is able to work, care for her child, drive, and exercise. She did not testify that she cannot perform activities such as feeding, bathing, or dressing herself. Dr. Grubb's testimony similarly indicates that Mrs. Craig's impairment is not so severe that it limits her from caring for herself or performing life-sustaining activities. Because the Craigs have failed to show that genuine issues of material fact remain regarding the permanent physical functional injury exception to the R.C. 2315.18(B) damages caps, Mr. Simons and PCS are entitled to summary judgment on this issue.

*Id.*

The U.S. District Court for the Northern District of Ohio similarly relied upon a plaintiff's deposition testimony

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when it enforced the caps, finding that the plaintiff did not sustain an injury that prevented her from caring for herself or performing life-sustaining activities. *Sheffer* at \*2. The court relied on the plaintiff's testimony that she was capable of bathing and dressing herself, as well as driving and cooking. *Id.* The plaintiff in *Sheffer* also testified that she taught bible school, danced at weddings, babysat several grandsons, and took care of chickens and horses. *Id.* Therefore, the statutory cap on non-economic damages applied as a matter of law. *Id.* at \*3.

The plaintiff in *Weldon* testified that she was unable to run a sweeper, move furniture, and maintain her yard, but the court found that these limitations were insufficient to prevent her from being able to independently care for herself or perform life-sustaining activities. The statutory cap on non-economic damages therefore applied as a matter of law. *Weldon* at \*8.

This final exception, instead, requires a substantial demonstration that the plaintiff is wholly unable to care for herself—a difficult standard to meet for many plaintiffs.

### **Conclusion**

There is no question that the Ohio legislature and Supreme Court of Ohio have given explicit instructions to

Ohio courts that the exceptions to the statutory cap on noneconomic damages should only apply to the most extreme, catastrophic, and physical injuries. Anything less than that extreme standard must be capped under R.C. 2315.18 as a matter of law.

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