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A Survey Of The Case Law Addressing “Permanent And Substantial Physical Deformity”

by Brenda M. Johnson

In 2003, the General Assembly enacted R.C. § 2323.43, which imposes caps on noneconomic damages available in medical malpractice actions. In 2005, it enacted R.C. § 2315.18, which imposes similar caps on noneconomic damages available in tort actions in general as well. Section 2323.43(A)(2), which applies to medical malpractice cases, imposes a cap of \$250,000 or three times the plaintiff’s economic loss, whichever is greater, with a maximum of \$350,000 for each plaintiff and \$500,000 for each occurrence. R.C. § 2323.43(A)(2). Section 2315.18(B)(2) imposes the same cap on tort cases in general. R.C. § 2315.18(B)(2). Both statutes, however, provide an exception to the caps when the injured plaintiff has sustained either:

- (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; [or]
- (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.¹

In the event a plaintiff in a medical malpractice case can demonstrate the requisite type of injury, the noneconomic damage cap is lifted to \$500,000 per person and \$1,000,000 per occurrence.² In an ordinary tort claim, the cap disappears entirely.³

This article is focused on the case law to date that has addressed what can constitute a “permanent and substantial physical deformity” for purposes of defeating the \$250,000 cap on noneconomic

damages imposed by these statutes. The term is not defined in either statute. Until recently, most of this case law emanated from Ohio’s federal district courts; however, in the past two years, Ohio’s state courts of appeals have generated several opinions that take on the issue, and which provide significant guidance as to the type of injuries that can get this issue to a jury.

Influential Federal Case Law

Bransteter v. Moore,⁴ a federal district court opinion issued in 2009, may be the first opinion addressing the level of injury that is sufficient to constitute a “permanent and substantial physical deformity” for purposes of Ohio’s damage cap statutes. In that case, the plaintiff had sustained a perforated bowel, and had undergone several surgeries that had caused scarring.⁵ Noting there was “no legislative history or Ohio case law available to assist in answering” the question of whether the scar was a “permanent and substantial physical deformity,” the district court looked to federal case law interpreting a similar West Virginia statute, and held that the issue of whether the scars qualified under Ohio’s statute was one for the jury to decide.⁶

Bransteter, being an early decision, is frequently discussed and cited by both state and federal courts.⁷ Other federal court decisions, however, indicate that scarring alone may not be sufficient to create a jury question. In *Weldon v. Presley*,⁸ for instance, the court held that reasonable minds could not conclude that a four centimeter surgical incision scar was a “severe disfigurement.”⁹ The

court also rejected the idea that internal changes caused by surgery – at least on the facts in that case – could constitute a “substantial physical deformity” for purposes of evading the caps.¹⁰

In reaching these conclusions, the *Weldon* court relied on an interpretation of the exceptions to Ohio’s damage caps that, as will be discussed below, has been adopted by Ohio’s state courts and is frequently cited by federal courts as well – namely, that “permanent and substantial physical deformity must be severe and objective.”¹¹ However, while this formulation has been widely adopted, its application has not precluded more plaintiff-favorable outcomes than the specific holding in *Weldon* might have suggested.

In *Ohle v. DJO, Inc.*,¹² for instance, a case involving a defective pain pump in which the plaintiff alleged a permanent and substantial physical deformity based on the loss of shoulder cartilage, the replacement of her shoulder bone with a metal prosthetic, and several keloid scars, the district court let the issue go to the jury. In so doing, the district court described *Weldon* as a “narrow” holding, and rejected the proposition that internal modifications of the plaintiff’s body or surgical scars could never be qualifying deformities.¹³

Likewise, in *Ross v. Home Depot USA Inc.*,¹⁴ the district court held that distortions to the plaintiff’s knee and shoulder, along with the surgical implantation of hardware, was sufficient to raise a jury question. A similar conclusion was reached in *Cawley v. Eastman Outdoors, Inc.*¹⁵ a case in which the plaintiff, who was injured when an archery arrow shattered on release, underwent surgery to remove carbon fiber fragments that had penetrated his hand, and to repair damage to his ligaments and tendons. Relying on *Ohle*, the district court found a jury question as to whether the resulting scarring, along with “other external and internal deformities left as a result of the injury and subsequent surgeries” were sufficient to defeat the cap.¹⁶ In *Swartz v. E.I. DuPont de Nemours & Co.*,¹⁷ which was a chemical exposure case, the district court held that the removal of one third of a plaintiff’s kidney, along with other major organ tissue and circulatory structures, and the presence of five external surgical scars, was sufficient to raise a jury question as well.¹⁸ And more recently, in *Schmid v. Bui*,¹⁹ Judge Benita Y. Pearson held that surgical scarring and the implantation of prosthetic joints can constitute a permanent and substantial physical deformity.

Ohio’s Appellate Courts Weigh In

Though their opinions have come later, Ohio’s appellate courts have not been silent with respect to what constitutes a permanent and substantial physical deformity under

the damage cap statutes, and they have been amenable to arguments that scarring, as well as internal deformities and the implantation of hardware, can qualify.

In *White v. Bannerman*,²⁰ for instance, which was decided in 2009, the Fifth District affirmed a bench trial decision to award damages in excess of the caps where the plaintiff had severe scarring to her hands and face. And in *Torres v. Concrete Designs, Inc.*,²¹ the Eighth District upheld a jury’s determination that the threshold was met when the evidence showed that the plaintiff had sustained an open skull fracture, had undergone several surgeries, was blind in one eye, and that she had testified to scarring and to permanent physical changes to the bone structure of her face.²² In so doing, the Eighth District found the district courts’ analyses in *Bransteter* and *Ross* persuasive, while rejecting the defendants’ reliance on *Weldon*.²³

The Fifth District addressed the issue again in *Johnson v. Stachel*,²⁴ which involved a delayed diagnosis of a hip fracture. The delayed diagnosis precluded hip replacement as a treatment, which meant the plaintiff was required to undergo a complete removal of the hip joint with no replacement. Relying on *Bransteter*, which involved scarring, the defendant argued that an injury needed to be both profound and visible to defeat the caps. According to the defendant, the hip joint removal did not qualify because it wasn’t visible, and because the plaintiff had already been wheelchair-bound before the injury.²⁵

The trial court rejected this argument, and the Fifth District did so as well. Distinguishing *Bransteter* because it dealt solely with scarring, the Fifth District quoted the trial court’s journal entry with approval:

Plaintiff presented uncontested evidence that he suffers from permanent shortening of one leg and also that his hip joint was surgically removed due to Defendant’s delayed diagnosis of his hip fracture. Such evidence is sufficient to constitute a permanent and substantial physical deformity. The Court is unpersuaded by Defendant’s analogies to cases that hold scarring must be visibly severe in order to qualify as a “substantial physical deformity.” Plaintiff’s injury is not merely aesthetic or superficial — it is a structural change to his skeletal system. The complete removal of a joint is not insubstantial merely because it is not visible to the human eye.²⁶

In *Farrow v. OhioHealth Corp.*,²⁷ a medical malpractice case, the Tenth District upheld a jury verdict finding the plaintiff had sustained permanent and substantial physical deformities for purposes of R.C. § 2323.43(A)(3)(a) in a case where the

plaintiff sustained injuries to his penis due to a failed catheter placement. The plaintiff had gone in for an appendectomy; however, placement of the Foley catheter was botched by the nursing staff. The resulting “false passages” caused damage to the plaintiff’s penis that ultimately required multiple surgeries, including a urethroplasty.²⁸

In rejecting the defendants’ challenge to the jury verdict, the Tenth District noted that “permanent and substantial physical deformity” is not defined in the statute, but that “courts have considered ‘any ‘permanent and substantial physical deformity’ must be ‘severe and objective.’”²⁹ The Tenth District also noted that while it is the trial court’s role to decide whether there is enough evidence to meet the basic evidentiary threshold, it is the jury’s role to decide the issue at trial.³⁰ In *Fairrow*, the evidence showed that the plaintiff underwent 12 different procedures in an eight month period, was left with scars on his scrotum and abdomen, and, as a result of the urethroplasty, which involved the removal of 4.6 centimeters of his urethra, suffered a corresponding shortening of his penis – all of which the Tenth District observed was sufficient to satisfy the standard.³¹

Finally, in *Setters v. Durrani*,³² the most recent Ohio appellate court decision addressing this exception to the caps, the First District upheld a verdict in another medical malpractice action in which the jury determined that the plaintiff had sustained permanent and substantial physical deformities as contemplated under R.C. § 2323.43(A)(3)(a). In that case, the plaintiff’s injuries consisted of “an abnormal cervical posture, or a tilt in the right side of her neck; a reduction in her cervical range of motion; two moveable nodules in her neck; and surgical scars.”³³

On appeal, the First District first noted that the phrase “permanent and substantial physical deformity” was not defined by statute, but that “under the plain and ordinary meaning of the word, a ‘deformity’ is ‘a physical blemish or distortion’ or ‘the state of being deformed,’ deformed meaning ‘unshapely in form’ or ‘misshapen.’”³⁴ The court then looked to *Johnson v. Stachel*, which it identified as the only other Ohio appellate court opinion addressing “permanent and substantial physical deformity” for purposes of R.C. § 2323.43(A)(3)(a), noting that the Fifth District had found that a structural change to the plaintiff’s skeletal system qualified as such.³⁵ The First District panel also noted the various federal court opinions, discussed above, stating that a deformity must be “severe and objective” to qualify under the statute.³⁶ At the same time, the First District noted that in *Ross* and *Cawley*, also discussed above, federal courts found that “misshapen or distorted conditions, restricted use of body parts, and

significant scarring” could satisfy the statutory requirement.³⁷

In light of these opinions, the First District concluded that there was sufficient evidence for the issue to have gone to the jury:

In this case, all of the treating doctors and experts agreed that Setters’s spinal anatomy changed as a result of the surgeries. Much like the plaintiff in *Cawley*, Setters suffered a restricted range of motion in her neck. According to Greiner, Setters could only rotate her neck approximately 20 degrees in either direction (normal rotation being 45-75 degrees). Akbik further testified that Setters could not laterally rotate or bend her neck. Setters also suffered from a “misshapen” neck, similar to the plaintiff’s knee and shoulder in *Ross*. Setters testified that her head began “fall[ing] to the side” approximately one month after surgery. According to Setters, “[i]t just gradually kept getting worse” until she could no longer keep her head up straight. Setters stated that she could “straighten [her neck] some,” but “it won’t stay.” All of the treating doctors and experts agreed that Setters sustained an abnormal cervical posture, or side flexion of her neck, from the C1-C2 fusion. Thus, taking into consideration the dictionary definitions and applicable case law, we find there was sufficient evidence to submit the issue of “permanent and substantial physical deformity” to the jury. We accordingly hold that the trial court did not err in denying the motion for a directed verdict, the JNOV motion, and the motion for a new trial on the award of noneconomic damages.³⁸

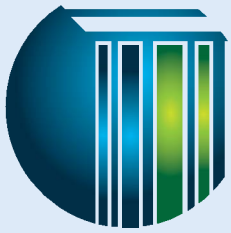
So What Does This Mean for *Your* Case?

Evaluating the likelihood of defeating damage caps based on a claim of “permanent and substantial physical deformity” is, by necessity, a very fact-specific endeavor. But based on the case law to date, a good argument can be made for getting the issue to a jury in cases where your clients have sustained serious visible scarring, or have undergone significant physical changes (including changes that may not necessarily be visible in a social setting). However, one thing is clear from the case law to date – compiling an evidentiary record documenting objectively verifiable alterations to your client’s physiognomy is crucial to defeating any challenge as to the sufficiency of that evidence. ■

End Notes

1. See R.C. § 2323.43(A)(3); R.C. § 2315.18(B)(3).
2. See R.C. § 2323.43(A)(3).
3. See R.C. § 2315.18(B)(3).
4. No. 3:09 CV 2, 2009 U.S. Dist. LEXIS 6692, 2009 WL 152317 (N.D.

- Ohio Jan. 21, 2009) (Zouhary, J.).
5. 2009 U.S. Dist. LEXIS 6692, *6.
 6. *Id.* at *7, citing *Wilson v. United States*, 375 F. Supp.2d 467, 471 (E.D. Va. 2005).
 7. Opinions discussing or referring to *Bransteter* include *Schmid v. Bui*, No. 5:19-CV-1663, 2020 U.S. Dist. LEXIS 249241, 2020 WL 8340144 (N.D. Ohio Sept. 16, 2020) (Pearson, J.); *Swartz v. E.I. du Pont de Nemours & Co.*, Nos. 2:13-md-2433, 2:18-cv-136, 2019 U.S. Dist. LEXIS 101760, 2019 WL 2515186 (S.D. Ohio June 18, 2019) (Sargus, J.); *Cawley v. Eastman Outdoors, Inc.*, No. 1:14-CV-00310, 2014 U.S. Dist. LEXIS 148194, 2014 WL 5325223 (N.D. Ohio Oct. 17, 2014) (Gwin, J.); *Ross v. Home Depot USA Inc.*, No. 2:12-cv-743, 2014 U.S. Dist. LEXIS 133507, 2014 WL 4748434 (S.D. Ohio Sept. 23, 2014) (Kemp, J.); *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014) (Rice, J.); *Ohle v. DJO, Inc.*, No. 1:09-cv-02794, 2012 U.S. Dist. LEXIS 140020, 2012 WL 4505846 (N.D. Ohio Sept. 8, 2012) (Pearson, J.); *Fairrow v. OhioHealth Corp.*, 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595; *Johnson v. Stachel*, 5th Dist. Stark No. 2019CA00123, 2020-Ohio-3015; and *Torres v. Concrete Designs, Inc.*, 8th Dist. Nos. 105833, 106493, 2019-Ohio-1342.
 8. No. 1:10 CV 1077, 2011 U.S. Dist. LEXIS 95248, 2011 WL 3749469 (N.D. Ohio Aug. 9, 2011) (Baughman, M), adopted by 2011 U.S. Dist. LEXIS 95247 (N.D. Ohio Aug. 25, 2011) (Wells, J.).
 9. 2011 U.S. Dist. LEXIS 95248, *21.
 10. *Id.* at *22.
 11. In *Simpkins v. Grace Brethren Church of Del.*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, for instance, the Ohio Supreme Court cited *Weldon* for the proposition that these exceptions, in general, require “extreme qualifications.” *Id.* at *19-*20 (quoting *Weldon*). *Simpkins* did not directly address the issue presented in this article, but other courts have relied on *Weldon*’s general formulation – i.e., that there must be something objective about the injury – in doing so. See, e.g., *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014) (Rice, J.); *Fairrow v. OhioHealth Corp.*, 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595, ¶ 67; *Torres v. Concrete Designs, Inc.*, 8th Dist. Nos. 105833, 106493, 2019-Ohio-1342 at ¶ 78.
 12. No. 1:09-cv-02794, 2012 U.S. Dist. LEXIS 140020, 2012 WL 4505846 (N.D. Ohio Sept. 8, 2012) (Pearson, J.).
 13. *Ohle*, 2012 U.S. Dist. LEXIS 140020 at *11. In *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014), however, the district court distinguished *Ohle* and relied on *Weldon* in holding that a plaintiff who suffered osteonecrosis in her jaw did not sustain a permanent and substantial physical deformity, as her jaw had been fused and she no longer had exposed bone in her mouth.
 14. No. 2:12-cv-743, 2014 U.S. Dist. LEXIS 133507, 2014 WL 4748434 (S.D. Ohio Sept. 23, 2014) (Kemp, J.).
 15. No. 1:14-CV-00310, 2014 U.S. Dist. LEXIS 148194, 2014 WL 5325223 (N.D. Ohio Oct. 17, 2014) (Gwin, J.).
 16. *Cawley*, 2014 U.S. Dist. LEXIS 148194 at *19-*20.
 17. Nos. 2:13-md-2433, 2:18-cv-136, 2019 U.S. Dist. LEXIS 101760, 2019 WL 2515186 (S.D. Ohio June 18, 2019) (Sargus, J.).
 18. 2019 U.S. Dist. LEXIS 101760 at *107-*109.
 19. No. 5:19-CV-1663, 2020 U.S. Dist. LEXIS 249241, 2020 WL 8340144 (N.D. Ohio Sept. 16, 2020) (Pearson, J.). *Schmid* is interesting from a procedural standpoint as well, as it is a case in which the plaintiff filed a motion for summary judgment as to whether the issue could go to the jury. This created a procedural anomaly – namely, a situation in which the moving party sought to establish the existence of a genuine issue of material fact – which meant the plaintiff could not simply rest on the pleadings but had the obligation to come forward with evidence. *Id.* at *3-*4 (discussing standard).
 20. 5th Dist. Stark Nos. 2009CA00221, 2009CA00245, 2009CA00268, 2010-Ohio-4846.
 21. 8th Dist. Nos. 105833, 106493, 2019-Ohio-1342.
 22. *Id.* at ¶¶ 82-83.
 23. *Torres* at ¶¶ 78-80.
 24. 5th Dist. Stark No. 2019CA00123, 2020-Ohio-3015.
 25. *Id.* at ¶ 75.
 26. *Johnson* at ¶ 76.
 27. 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595.
 28. *Id.* at ¶ 7.
 29. *Id.* at ¶ 67 (quoting *Torres* quoting *Sheffer v. Novartis Pharmaceuticals Corp.*, 2014 U.S. Dist. LEXIS 184614, quoting *Weldon v. Presley*, N.D. Ohio No. 1:10- CV 1077, 2011 U.S. Dist. LEXIS 95248 (Aug. 9, 2011)). The court also noted that in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6498, 880 N.E.2d 420, the Ohio Supreme Court observed the higher caps were reserved for “catastrophic” injuries. *Id.*
 30. *Id.* at ¶ 68 (citing *Ohle v. DJO, Inc.*, N.D. Ohio No. 1:09-cv-02794, 2012 U.S. Dist. LEXIS 140020 (Sept. 28, 2012)). The Tenth District also noted that in *Arbino*, the Ohio Supreme Court also noted that the trial court should not impose its own factual determinations on what the award should be. *Fairrow* at ¶ 68.
 31. *Id.* at ¶¶ 71-73.
 32. 1st Dist. Hamilton No. C-190341, 2020-Ohio-6859, *discretionary appeal not allowed*, 162 Ohio St.3d 1439, 2021-Ohio-1399, 166 N.E.3d 1261.
 33. 2020-Ohio-6589, ¶ 32.
 34. *Id.* at ¶ 33 (citing *Merriam-Webster’s Online Dictionary*, <https://www.merriam-webster.com/dictionary/deformity> and <https://www.merriam-webster.com/dictionary/deformed> (as accessed Dec. 1, 2020)).
 35. *Setters* at ¶ 34.
 36. *Id.* at ¶ 35 (citing *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014) and *Weldon v. Presley*, No. 1:10 CV 1077, 2011 U.S. Dist. LEXIS 95248, 2011 WL 3749469 (N.D. Ohio Aug. 9, 2011)).
 37. *Id.* at ¶¶ 36-37.
 38. *Id.* at ¶ 38.



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