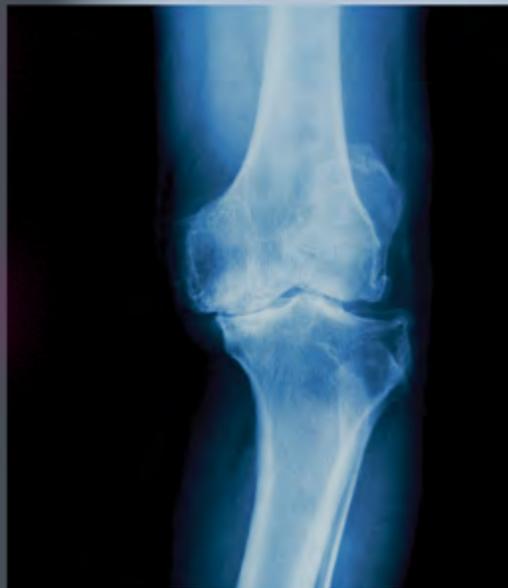




**What qualifies as a  
“permanent and  
substantial physical  
deformity”  
exception to**



**Ohio’s cap on  
noneconomic losses?**

**BY MARK W. BIGGERMAN**



Since the enactment of R.C. 2315.18 in 2005, Ohio plaintiffs have been limited in the amount they can recover for noneconomic losses in personal injury actions.<sup>1</sup> Generally, those damages are capped at \$250,000.<sup>2</sup>

There are four limited exceptions, however. They are found in R.C. 2315.18(B) and include situations where a plaintiff suffers a permanent and substantial physical deformity, a loss of use of a limb, the loss of a bodily organ system<sup>3</sup> or a permanent physical functional injury that permanently prevents the injured person from being able to independently care for him/herself and perform life-sustaining activities.<sup>4</sup>

Of the four, “permanent and substantial physical deformity” is the least specific and, therefore, the most open for interpretation. Unfortunately, R.C. 2315.18 does not define the term. Moreover, interpretive Ohio case law is scarce. There is only one Ohio decision addressing the meaning of the term: the 2010 Fifth District Court of Appeals opinion in *White v. Bannerman*.<sup>5</sup>

In that case, the plaintiff alleged that, due to the defendant’s negligence, the tendons in her hands had been severed, both her face and hands were scarred, and her fingers suffered permanent numbness.<sup>6</sup> After the defendant failed to respond to the complaint, the trial court granted default judgment, held a bench hearing on damages and then awarded the plaintiff \$750,000.<sup>7</sup>

The defendant appealed, arguing that the damages exceeded the noneconomic statutory limit in R.C. 2315.18.<sup>8</sup> The court of appeals disagreed, holding:

Ashley suffered objective injuries to her hands and face in the form of severe scarring and limited mobility, with the permanency of those injuries being obvious.

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Upon review of the evidence presented, including Ashley’s

testimony of the substantial nature of her injuries to both her hands, photographs of her injuries, and the objective permanency thereof in appearance and function, we find the trial court’s determination of damages does not exceed the statutory limits for noneconomic damages.<sup>9</sup>

Beyond that, Ohio courts have not provided any guidance. Fortunately, however, there are a few decisions by federal district courts in Ohio that do provide some assistance for practitioners. Five, to be exact, with four of them rendered by the U.S. District Court, Northern Division of Ohio.

The first, *Bransteter v. Moore*, was actually decided in 2009, a year before *White*.<sup>10</sup> That case involved a plaintiff who had sustained a perforated bowel and a resulting scar after several surgeries. The defendants sought to limit the noneconomic damages she could recover, pursuant to R.C. 2315.18.<sup>11</sup>

The Northern Division District Court noted the lack of legislative history or Ohio case law to assist it in determining whether the scar was a permanent and substantial physical deformity. The plaintiffs argued that a scar is a disfigurement. The defendants contended that scarring did not fall within the definition of permanent and substantial physical deformity because it is not specifically mentioned in the statute and the two categories are mutually exclusive.<sup>12</sup>

The court disagreed with the defendants and held that “scarring **may** be so severe as to qualify as a serious disfigurement.”<sup>13</sup> However, because it also found that “not every scar would qualify as a substantial physical deformity,” the court decided to wait to resolve the issue following trial testimony.<sup>14</sup> In doing so, it advised that the defendants could move for a directed verdict and the plaintiffs could request a jury interrogatory.<sup>15</sup>

The Northern Division District Court addressed the issue again in 2011. In *Weldon v. Presley*,<sup>16</sup> the plaintiff claimed that, as a result of a motor vehicle accident, she had sustained injuries to her head, neck, shoulders and back.<sup>17</sup> Consequently, she underwent surgery “to ‘relieve extensive compression of her spinal cord to stabilize the vertebrae in her spine.’”<sup>18</sup> As a result of the operation, she was left with a four centimeter incisional scar.<sup>19</sup> The plaintiff also claimed to have “permanent damage, pain, and suffering and that the pain and suffering will continue in the future.”<sup>20</sup>

The defendants filed a motion for summary judgment, arguing that the injuries were not a permanent and substantial physical deformity because the plaintiff had “suffered no anatomical or structural alteration of her spine” and her “chief complaints were ‘aching, stiffness and burning about the posterior aspect of her neck, bilateral trapezius and interscapular areas.’”<sup>21</sup> In response, the plaintiff submitted evidence to validate her injuries and cited *Bransteter* for support that her surgical scar raised a genuine issue of material fact as to whether her injuries were permanent and substantial.<sup>22</sup>

The court explained that, despite the lack of a specific definition for “permanent and substantial physical deformity,” the injuries listed in R.C. 2315.18(B)(3)(a) “help qualify the level of injury suffered.”<sup>23</sup> Thus, “[g]iven the extreme qualifications required for the other injuries listed, it seems clear that permanent and substantial physical deformity must be severe and objective.”<sup>24</sup>

The court then concluded that the plaintiff’s injuries did not rise to that level. In doing so, however, it focused specifically on her scar:

Reasonable minds could not conclude that such a small single scar, merely four cm long, amounts to a severe disfigurement. Common

experience readily teaches that many people have some type of scar, from childhood roughhousing or surgery. Such incidental scars do not rise to the level of “substantial physical deformities” as required by Ohio Revised Code § 2315.18.<sup>25</sup>

The court distinguished *Bransteter* by pointing out that it held only that scarring may be so severe as to qualify as a serious disfigurement.<sup>26</sup> The court also contrasted the facts in that case and *White* by explaining that the plaintiff’s scar was not “equivalent to the multiple scarring at issue in *Bransteter* or the disfigurement of hands and face noted in *White*.”<sup>27</sup>

About a year later, in 2012, the Northern Division District Court handed down its third decision on the

motions regarding the applicability of Ohio’s noneconomic damages cap have been treated as ones for summary judgment. Therefore, “whether a deformity is sufficiently permanent and substantial should, once the plaintiff crosses an evidentiary threshold, be for the jury, not the court, to decide.”<sup>31</sup>

In support, the court referenced Ohio’s Pattern Jury Instructions and interrogatories, which had been republished just shortly after enactment of the noneconomic damages cap. They require jurors to determine whether a plaintiff has been permanently and substantially physically deformed.<sup>32</sup> The court also cited the decisions in *Bransteter*,<sup>33</sup> *White*,<sup>34</sup> *Weldon*,<sup>35</sup> and *Williams v. Bausch & Lomb Co.*,<sup>36</sup> for the proposition that determining the nature of a plaintiff’s injuries

some exposed bone in her mouth.<sup>40</sup> After surgery, her jaw had been fused and she no longer had any exposed bone. However, she maintained that her jaw would never be perfect and that she still suffered some jaw pain.<sup>41</sup>

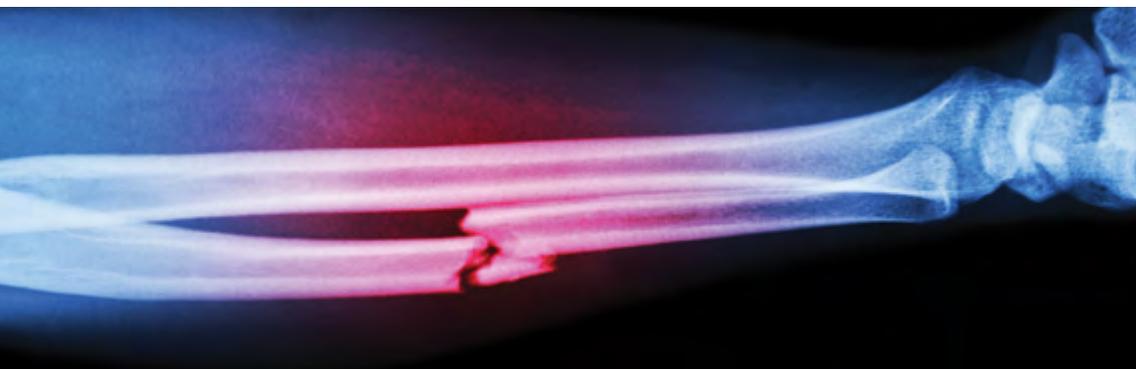
The court cited *Ohle* and the rule that whether a deformity is sufficiently permanent and substantial is a question for the jury once a plaintiff crosses an evidentiary threshold.<sup>42</sup> However, the court held that a permanent and substantial physical deformity must be severe and objective.<sup>43</sup> In this case, it found that the plaintiff’s injury was “not the type of catastrophic ‘permanent and substantial physical deformity’ contemplated by R.C. 2315.18(3)(a).”<sup>44</sup> Therefore, the injury was “insufficient, as a matter of law, to defeat the statutory caps on noneconomic damages.”<sup>45</sup>

The District Court in the Northern Division weighed in a final time in *Cawley v. Eastman Outdoors, Inc.*<sup>46</sup> In this case, the plaintiff was allegedly injured when a defective arrow shattered upon release, piercing his left-hand thumb. In addition to suffering lasting injuries to his hand, including a scar, he had

decreased range of motion, diminished grip strength, ongoing pain and the possibility of future ailments, such as arthritis. Further, because the surgeon was unable to remove all the minuscule carbon fiber fragments from the hand, they would sometimes migrate to the surface and extrude through the skin.<sup>47</sup>

The defendant moved for summary judgment, seeking imposition of the noneconomic damages cap.<sup>48</sup> The plaintiff argued that a jury could find that his scar and his external and internal deformities, which resulted from subsequent surgeries, qualified as a permanent and substantial physical deformity.<sup>49</sup>

The court denied the defendant’s motion, holding that the issue of “whether Plaintiff’s injury is a



issue in *Ohle v. DJO Inc.*<sup>28</sup> There, the plaintiff’s injuries included the loss of most or all of her shoulder cartilage. Her shoulder bone had also been replaced with a metal prosthesis and she now had a large raised keloid scar from her collar bone to her armpit and two smaller keloid scars on the front of her shoulder.<sup>29</sup> According to the plaintiff, the combination of these injuries qualified as a permanent and substantial physical deformity. The defendants disagreed, arguing that internal modifications of a person’s body structure and surgical scars did not satisfy that exception under R.C. 2315.18(B).<sup>30</sup>

The court explained that, in light of R.C. 2315.18(E)(2), which permits parties to seek summary judgment on the nature of a plaintiff’s injury,

should be left to the trier of fact.<sup>37</sup>

As to the facts before it, the court held that the plaintiff had reached the necessary evidentiary threshold by providing enough evidence of the lasting and permanent effects of the surgeries and whether they left a permanent substantial deformity. Accordingly, the jury was in the best position to determine whether the nature and location of scarring, removal of a portion of a bone or total loss of cartilage deforms an individual.<sup>38</sup>

The next decision, *Sheffer v. Novartis Pharmaceuticals Corp.*, was decided by the District Court in Ohio’s Southern Division in 2014.<sup>39</sup> The plaintiff there claimed that a prescription drug caused her to develop osteonecrosis of the jaw, which led to a broken jaw bone and

'permanent and substantial physical deformity' that is exempted from the statutory damages cap is a question for the jury.<sup>750</sup> However, the decision seemed to be based primarily on the plaintiff's scar. After citing *Bransteter* for the proposition that scarring may be so severe as to qualify as a serious disfigurement,<sup>51</sup> the court held: "Although Plaintiff and Defendant disagree about the severity of Plaintiff's scar, that is a question for the jury."<sup>52</sup>

So what collective guidance do these six opinions provide? With only six cases to work from, it is difficult to draw many expansive conclusions; however, at least two things do seem to be evident.

First, procedurally, R.C. 2315.18(E)(2) all but encourages the filing of a motion for summary judgment on the issue. As such, any other pretrial motions related to that topic will most likely be treated as if they were motions for summary judgment.

Second, scarring (especially multiple scarring) appears to be generally sufficient to at least survive summary judgment. Four out of the five opinions addressing this question agree. The only court concluding otherwise made it a point to emphasize that, in that case, the plaintiff had only a small, single scar, merely four centimeters long.

As for other commonalities in the opinions, three courts held that, to qualify as a permanent and substantial physical deformity, the injury must be severe and objective. Two held that whether internal deformities fall under the exception was a jury question. Two more ruled that decreased mobility and range of motion may qualify as permanent and substantial physical deformities. Yet, ongoing pain may not be enough.

Although the body of case law on this issue is small, it is beginning to take shape; however, it is still malleable. Counsel representing clients in cases where an injury is potentially a permanent and substantial physical deformity are still in a position to persuade

courts as to how the term should be defined. The best way to do that is to familiarize themselves with the applicable precedent on the subject. 



### Author bio

Mark Biggerman is a solo practitioner in Cleveland. He has over 21 years of experience representing both plaintiffs and defendants at all levels of the Ohio and federal judicial systems, including cases before the U.S. Supreme Court and Ohio Supreme Court. His practice areas include employment law, personal injury, product liability, appeals, civil rights and complex litigation. Visit his website at [www.mblegal.com](http://www.mblegal.com) or email him at [mark@mblegal.com](mailto:mark@mblegal.com).

### Endnotes

<sup>14</sup>Noneconomic loss" is defined as "nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish and any other intangible loss." R.C. 2315.18(A)(4).

<sup>2</sup> R.C. 2315.18(B)(2). More precisely, the statute caps damages for noneconomic loss at the greater of \$250,000 or three times the amount of the plaintiff's economic loss. Furthermore, each plaintiff may not recover more than \$350,000 or a maximum of \$500,000 for each occurrence that is the basis of the tort action. Id.

<sup>3</sup> R.C. 2315.18(B)(3)(a).

<sup>4</sup> R.C. 2315.18(B)(3)(b).

<sup>5</sup> 5th Dist. Nos. 2009CA00221, 2009CA00245, 2009CA00268, 2010-Ohio-4846, 2010 WL 3852354.

<sup>6</sup> Id. at ¶ 2, 7-9.

<sup>7</sup> Id.

<sup>8</sup> Id. at ¶ 77.

<sup>9</sup> Id. at ¶ 76, 87.

<sup>10</sup> N.D. Ohio No. 3:09 CV 2, 2009 WL 152317.

<sup>11</sup> Id. at \*2.

<sup>12</sup> Id.

<sup>13</sup> Id. (Emphasis in original).

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> N.D. Ohio No. 1:10 CV 1077, 2011 WL 3749469, report and recommendation adopted, 2011 WL 3754661.

<sup>17</sup> Id. at \*1.

<sup>18</sup> Id. at \*7.

<sup>19</sup> Id.

<sup>20</sup> Id. at \*1.

<sup>21</sup> Id.

<sup>22</sup> Id. at \*3, 7.

<sup>23</sup> Id. at \*6.

<sup>24</sup> Id.

<sup>25</sup> Id. at \*7.

<sup>26</sup> Id., citing *Bransteter*, 2009 WL 152317 at \*2.

<sup>27</sup> Id.

<sup>28</sup> N.D. Ohio No. 1:09-cv-02794, 2012 WL 4505846.

<sup>29</sup> Id. at \*2.

<sup>30</sup> Id. at \*4.

<sup>31</sup> Id. at \*3.

<sup>32</sup> Id. at \*4, citing OJI Civil 315.01(6).

<sup>33</sup> 2009 WL 152317.

<sup>34</sup> 2010 WL 3852354. 2011 WL 3749469. The court pointed out that, although the court in *White* made the factual finding that the scarring qualified as a deformity, it was nevertheless a bench trial in which the court properly acted as the trier of fact. *Oble*, 2012 WL 4505846 at \*3.

<sup>35</sup> 2011 WL 3749469.

<sup>36</sup> S.D. Ohio, No. 2:08-cv-910, 2010 WL 2521753. The opinion in *Williams* addressed the exceptions for "loss of a bodily organ system," in R.C. 2315.18(B)(3)(a), and "permanent physical functional injury," in R.C. 2315.18(B)(3)(b), as opposed to "permanent and substantial physical deformity."

<sup>37</sup> *Oble*, 2012 WL 4505846 at \*4.

<sup>38</sup> Id.

<sup>39</sup> S.D. Ohio, No. 3:12-cv-238, 2014 WL 10293816.

<sup>40</sup> Osteonecrosis is "a condition that occurs when there is loss of blood to the bone. Because bone is living tissue that requires blood, an interruption to the blood supply causes bone to die. If not stopped, this process eventually causes the bone to collapse." WebMd, [www.webmd.com/arthritis/avascular-necrosis-osteonecrosis-symptoms-treatments](http://www.webmd.com/arthritis/avascular-necrosis-osteonecrosis-symptoms-treatments).

<sup>41</sup> Id. at \*1-2.

<sup>42</sup> Id. at \*2, citing *Ohle*, 2012 WL 4505846 at \*3.

<sup>43</sup> Id. at \*2.

<sup>44</sup> *Sheffer*, 2014 WL 10293816 at \*2.

<sup>45</sup> Id. at \*3.

<sup>46</sup> N.D. Ohio No. 1:14-CV-00310, 2014 WL 5325223.

<sup>47</sup> Id. at \*1.

<sup>48</sup> Id. at \*1, 7.

<sup>49</sup> Id. at \*7.

<sup>50</sup> Id. at \*2.

<sup>51</sup> Id. at \*7, citing *Bransteter*, 2009 WL 152317 at \*2.

<sup>52</sup> Id.