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Déjà Vu All Over Again: Ohio's 2005 Tort Reform Act Cannot Survive a Rational Basis Challenge

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DÉJÀ VU ALL OVER AGAIN OHIO'S 2005 TORT REFORM ACT CANNOT SURVIVE A RATIONAL BASIS CHALLENGE

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I. INTRODUCTION

The Ohio Legislature recently enacted a massive "tort reform" package, which became effective in April of 2005. Like its many predecessor enactments, this legislation, entitled Senate Bill 80, directly impacts the constitutional rights of every Ohio citizen. If upheld by the courts, Senate Bill 80 will deprive Ohio tort victims of remedies for their injuries, remedies which the Ohio Supreme Court has repeatedly held in a long series of decisions to be constitutionally guaranteed.

Not only does Senate Bill 80 defy long-standing Ohio Supreme Court precedent, but Senate Bill 80 also lacks any rational basis. Instead, Senate Bill 80 relies upon anecdotal evidence, hyperbole and political position papers to attempt to justify the deliberate destruction of the constitutional rights of Ohio citizens. An analysis of the conjecture upon which Senate Bill 80 is based reveals that the Ohio Legislature acted irrationally in enacting Senate Bill 80. Indeed the evidence cited by the Ohio General Assembly in enacting Senate Bill 80 fails to satisfy any of the indicia of reliability required by courts for admissibility. Ironically then, in attacking the judicial system for allegedly unpredictable and unreliable results, the Ohio Legislature itself acts without a rational basis, and thereby violates the rights guaranteed citizens by the Ohio Constitution.

II. THE STANDARD OF REVIEW FOR CONSTITUTIONAL CHALLENGES TO LEGISLATION

In reviewing statutes challenged under constitutional grounds, courts apply varying levels of scrutiny dependent upon the nature of the constitutional challenge. The highest level of review, strict scrutiny, applies when the challenged legislation implicates a constitutionally protected right.

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Thus legislation challenged due to infringement of such constitutional rights as the right to trial by jury, or the right to remedy and open courts, are subject to review on a strict scrutiny basis.[1] In addition, in the equal protection context, challenges to legislation based on constitutionally protected characteristics such as race, religion, or national origin are subject to strict scrutiny.[2] Under strict scrutiny, courts demand that the classification further a "compelling governmental interest" which is "narrowly tailored to further [that] governmental interest[]."[3]

On the other hand, equal protection and due process challenges that do not implicate a constitutionally protected class or do not interfere with a constitutionally protected right are reviewed on a lesser standard, the rational basis test. Under rational basis review, courts determine whether the "classification bears a rational relationship to a legitimate governmental interest or if reasonable grounds exist for drawing the distinction."[4] Stated another way, legislation will withstand rational basis scrutiny if there exists "any reasonably conceivable state of facts that could provide a rational basis for the classification[,]"[5] or if "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational . . . ."[6] Moreover, the state "has no obligation whatsoever 'to produce evidence to sustain the rationality of a statutory classification.'"[7] Instead, the burden is on the challenger to demonstrate that no conceivable basis exists to support the legislation.[8]

III. BINDING OHIO SUPREME COURT PRECEDENT HOLDS TORT REFORM TO BE UNCONSTITUTIONAL

In the tort reform context, the Ohio Supreme Court applied strict scrutiny to a challenge of the collateral source rule provision of the Tort Reform Act of 1987.[9] This rule required a plaintiff to disclose, and a court

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[1] *See e.g. Skinner v. Okla.*, 316 U.S. 535 (1942).

[2] Classifications based on race, religion, or national origin are subject to the highest level of scrutiny. However, classifications based on sex (which is not a constitutionally protected characteristic) are subject to intermediate scrutiny, requiring only that the classification "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

[3] *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); *see also Loving v. Va.*, 388 U.S. 1 (1967). Ohio's Equal Protection and Due Process clauses are analyzed identically to that of the federal Equal Protection and Due Process clauses. *Am. Assn. of U. Profs. v. Central St. U.*, 717 N.E.2d 286, 291 (Ohio 1999).

[4] *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111, 1126 (Ohio 2001); *see also State ex rel. Ohio Acad. of Tr. Laws. v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

[5] *Am. Assn. of U. Profs.*, 717 N.E.2d at 290 (quoting *FCC v. Beach Commun., Inc.*, 508 U.S. 307, 313 (1993)).

[6] *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

[7] *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

[8] *Id.*

[9] *See Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994). The Ohio Supreme Court accepted this battery case on appeal after the Common Pleas court found the statute unconstitutional, and the appellate court reversed and remanded on a split decision. *Id.* at 507. The Court consolidated the appeal with a

thereby to deduct from the jury award, collateral benefits such as insurance proceeds or worker's compensation benefits the plaintiff received from third parties.[10] The plaintiffs alleged the statute violated the following sections of the Ohio Constitution: Section 16, Article I (due process, right to a remedy and open courts), Section 2, Article I (equal protection), and Section 5, Article I (right to a jury trial).[11] Given that the right to a jury trial is a fundamental right,[12] the Court applied strict scrutiny, finding that the post-verdict deduction of collateral benefits impermissibly violated the "plaintiff's right to have all facts determined by the jury, including damages."[13]

The Ohio Supreme Court also indicated that because the governmental action at issue implicated the fundamental right to a jury trial, the more stringent strict scrutiny standard would apply to the due process and equal protection challenges as well.[14] The Court, however, determined that the statute could not survive even under the more deferential rational basis analysis, so it struck down the statute based on this minimal level of scrutiny.[15] The Court found that the statute's purpose of reducing the causes of a perceived insurance crisis did not "bear a real and substantial relationship to the health, safety, morals or general welfare" and was "unreasonable and arbitrary" because empirical evidence of such an insurance crisis, and its relationship to tort reform legislation, was scarce.[16] Furthermore, the Court found that although the goal of preventing double recoveries for plaintiffs was legitimate, the means enumerated in the statute were "irrational and arbitrary" because "the statute can arbitrarily reduce damages that a jury awards a plaintiff, since under the statute it is irrelevant whether any collateral benefit actually represents any portion of the jury's award."[17]

The Ohio Supreme Court also found that the collateral benefit rule failed strict scrutiny on equal protection grounds because non-medical malpractice tort awards were subject to deduction of collateral benefits while medical malpractice tort awards were not.[18] The Court found that this

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negligence case from which the U.S. District Court, Northern District of Ohio certified questions of law pertaining to the constitutionality of the statute. *Id.* 506-507.

[10] *Id.* at 508-509 (citing Ohio Rev. Code Ann. § 2317.45 of the Tort Reform Act of 1987, Am.Sub.H.B. No. 1, 142 Ohio Laws, Part I, 1661, 1694).

[11] *Id.*

[12] The right to a jury trial is guaranteed "only for those causes of actions where the right existed at common law at the time the Ohio Constitution was adopted." *Id.* at 510. Because negligence derived from the common law cause of action of trespass, which existed at the time the Ohio Constitution was adopted, as did battery actions, the right to a jury trial is a fundamental right in these types of actions. *Id.*

[13] *Id.*

[14] *Id.* at 511.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 512.

classification did not meet the compelling governmental interests of preventing double recoveries or aiding a questionable insurance crisis.[19] Again, the Court noted that the statute also would not have withstood the rational basis test on equal protection grounds due to the arbitrary classification of tort victims.[20]

Subsequent to the Ohio Supreme Court's opinion in *Sorrell*, the Ohio legislature attempted again to require jury awards in personal injury cases to be reduced by consideration of collateral benefits. Under House Bill 350, the General Assembly reinstated a law requiring consideration of collateral benefits in jury verdicts.[21] Instead of mandating that courts deduct collateral benefits post-verdict, this statute instead permitted introduction of evidence at trial of a plaintiff's receipt of collateral benefits, in order to allow a jury to account for them in determining what amount, if any, a plaintiff should receive.[22] The Ohio Supreme Court in *Sheward* noted that the change from a post-verdict, mandatory deduction by the court to a pre-verdict, discretionary deduction by the jury eradicated any possible impingement upon the fundamental right to a jury trial.[23] The Court then applied the rational basis test, rather than strict scrutiny, to the collateral benefits provision of House Bill 350.[24] However, the Court found that the provision still failed rational basis for the same reasons that it also failed rational basis analysis in *Sorrell* – because it arbitrarily and unreasonably

> gathers all evidence of collateral source payments, regardless of the category of harm for which it compensates and regardless of whether it compensates for past or future losses, tosses it in an indiscriminate heap along with all categories and items of compensatory damages, and authorizes, out of that, a general verdict replete with collateral benefit setoffs.[25]

In addition to the rational basis analysis employed in *Sorrell*, the Ohio Supreme Court utilized rational basis review within the context of tort reform legislation elsewhere. For example, the Court applied the rational basis test in examining whether a medical malpractice statute of limitations

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[19] *Id.*
[20] *Id.* at 513.
[21] *Sheward*, 715 N.E.2d at 1088-1089.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1089.
[25] *Id.* at 1090. Similarly, the current collateral source rule of Senate Bill 80, R.C. 2315.20, allows a defendant to introduce evidence of collateral benefits payable to a plaintiff during the trial, thus eliminating any concerns of violating the right to a jury trial. 2004 Ohio Legis. Serv. L-1911 (Banks-Baldwin) *also available at* http://www.legislature.state.oh.us/bills.cfm?ID=125_SB_80 (accessed Dec. 26, 2005). The rule is, of course, still open to rational basis analysis.

violated the Ohio Constitution's equal protection.[26] The statute required minors under ten years of age whose cause of action had accrued to file any of their claims within four years; however, minors ten years of age or older whose cause of action had accrued only had a year to file any of their claims before being barred by the statute of limitations.[27] The Court applied a rational basis analysis given that the challenge to the provision did "not involve either a fundamental right or a suspect class."[28] The Court determined that the statute failed rational basis review because a child whose cause of action accrued one day before her tenth birthday would have four years to file a claim, while a child whose cause of action accrued one day after her tenth birthday would only have one year to file; therefore, the statute served no rational relationship to the purpose of curbing the perceived medical malpractice crisis.[29]

Three years later, the Court evaluated the amended version of the medical malpractice statute of limitations pertaining to minors at issue in *Schwan*.[30] Pursuant to *Schwan*, the revised statute eradicated the distinction between minors under the age of ten and minors over the age of ten, but made the statute of limitations period for a minor involved in a medical malpractice claim equivalent to that of an adult in a medical malpractice case.[31] However, the statute of limitations for minors in non-medical malpractice claims whose claims had accrued was tolled until they reached the age of majority, at which time they had one year to file a claim.[32] Plaintiffs challenged the constitutionality of the statute on due process grounds, and the Court employed rational basis review to determine whether the statute "b[ore] a real and substantial relation to the public health, safety, morals or general welfare of the public" and was not "unreasonable or arbitrary."[33] The Court found that the statute did not bear a substantial relationship to the legislature's proffered goal of reducing medical malpractice insurance premiums given no evidence was provided that minors involved in malpractice cases affected insurance premiums or even "constitute[d] a significant portion of all medical malpractice claims."[34] Additionally, the Court concluded that the statute unreasonably and arbitrarily precluded minors from exercising their right to redress, because

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[26] *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337 (Ohio 1983).
[27] *Id.* at 1338 (quoting former R.C. 2305.11(B)).
[28] *Id.*
[29] *Id.* at 1339. As further support of this finding, the Court noted that the Act of which the provision at issue was a part required the Superintendent of Insurance to report annually to the legislature the effectiveness of amendments on decreasing medical malpractice insurance. *Id.* The effects of this provision, however, were insufficiently significant to warrant inclusion in the report. *Id.*
[30] *See Mominee v. Scherbath*, 503 N.E.2d 717 (Ohio 1986).
[31] *Id.* at 719-720.
[32] *Id.* at 719.
[33] *Id.* at 720-721.
[34] *Id.* at 721.

minors have no standing to sue as minors and were effectively barred from bringing a medical malpractice claim upon attaining majority.[35]

The Ohio Supreme Court also applied the rational basis test in examining whether general damages caps for medical malpractice claims violated due process and equal protection under the Ohio Constitution.[36] The statute at issue there, R.C. 2307.43 of the Ohio Medical Malpractice Act, limited recovery of general damages in medical malpractice claims to $200,000.[37] The Court decided rational basis review was appropriate given a fundamental right or suspect class was not involved.[38] The Court held that the cap failed rational basis scrutiny because a rational connection between damage awards over $200,000 and medical malpractice insurance rates was unfounded.[39] The Court also found the damages cap unreasonably and arbitrarily shifted the costs of the intended benefit "solely upon a class consisting of those most severely injured by medical malpractice."[40] With respect to the alleged equal protection violation, the Court found that the statute did not fail rational basis review, assuming that a medical malpractice insurance crisis conceivably could have existed.[41]

The most recent and comprehensive discussion of tort reform legislation occurred in *State v. Sheward*.[42] There, the Court struck down the then-current tort reform legislation, House Bill 350, in its entirety for multiple reasons, mostly involving separation of powers issues.[43] With regard to damage caps, however, the Court found that the provision requiring the court to reduce punitive damages awards that exceeded the statutory amount specified violated the fundamental right to a jury trial by substituting the legislature's will for that of the jury.[44] Additionally, the Court found that the general damages cap on all tort claims, similar to the medical malpractice cap struck down in *Morris*, violated due process for exactly the same reasons as the statute in *Morris*–it unreasonably and arbitrarily "continue[d] to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured

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[35] *Id.* The Court also commented that the fact a parent or guardian could sue on behalf of the minor did not afford adequate protection to the minor because such a parent or guardian may not be aware that a wrongdoing had occurred until too late. *Id.* Also, the parent or guardian may be barred by minority or simply choose not to bring an action, or the minor may not have a parent or guardian. *Id.* at 721-722. Such situations, the Court posited, would then pit minors against their parents or guardians for failing to file a claim – an unrealistic recourse for minors in the eyes of the Court. *Id.* at 722.
[36] *See Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991).
[37] *Id.* at 767.
[38] *Id.* at 769-770.
[39] *Id.* at 770. In fact, the Court found that evidence to the contrary existed. *Id.* at 770-771.
[40] *Id.* at 771 (quoting *Nervo v. Pritchard*, Stark App. No. CA-6560, slip op. at 8 (June 10, 1985)).
[41] *Id.*
[42] 715 N.E.2d 1062 (Ohio 1999).
[43] *See supra* nn. 22-25 and accompanying text for a discussion of *Sheward*.
[44] *Sheward*, 715 N.E.2d at 1091.

by tortious conduct."[45]

Aside from the equal protection and due process analysis discussed above, the Ohio Supreme Court has also addressed the validity of tort reform legislation in light of the right-to-a-remedy and open courts provisions of Section 16, Article I of the Ohio Constitution.[46] In particular, the Court has found that statutes of repose violate this right.[47] The Court in *Hardy v. VerMeulen* expressly stated that "the right-to-a-remedy provision of Section 16, Article I does not require the analysis of rational-basis that is used to decide due process or equal protection arguments against the constitutionality of legislation."[48] The Court noted in a subsequent footnote that "[i]n other jurisdictions, statutes of repose, having features similar to ours, have been analyzed on due process and equal protection grounds. The courts are divided on the question of whether due process and equal protection arguments render a statute of repose unconstitutional."[49] Similarly, the Court in *Brennaman v. R.M.I. Co.* made no mention of any level of scrutiny in examining whether the statute of repose at issue there violated the right to remedy provision of the Ohio Constitution.[50]

IV. OHIO'S 2005 TORT REFORM LEGISLATION, SENATE BILL 80, CANNOT SURVIVE THE RATIONAL BASIS TEST

As described above, the Ohio Supreme Court struck down many prior attempts by the legislature to enact *tort reform*, even when it analyzed the legislation under the minimal, rational basis test. In enacting Senate Bill 80, the General Assembly cites nothing new or different to distinguish this latest attempt to enact *tort reform* from the failed, unconstitutional statutes struck down before. While clearly many constitutional challenges can and will be made to Senate Bill 80 that would necessitate strict scrutiny, such a heightened level of review is not necessary to invalidate this 2005 legislative enactment. Because no rational basis exists to support the enactment of Senate Bill 80, and no basis exists to distinguish Senate Bill 80 from the unconstitutional tort reform measures of the past, Senate Bill 80 cannot survive any constitutional challenge.

Courts have articulated little specific guidance as to the standard for

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[45] *Id.* at 1095.
[46] This section provides in part that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const. art. I, § 16.
[47] *Hardy v. Vermeulen*, 512 N.E.2d 626 (Ohio 1987) (holding that a four-year statute of repose for medical malpractice action violated the Ohio constitutional right to remedy and open courts); *see also Brennaman v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994) (finding that a ten-year architects' and engineers' statute of repose for improvements to real property violated the right to remedy and open courts).
[48] 512 N.E.2d at 629.
[49] *Id.* The Court proceeded to cite articles and cases discussing this issue.
[50] 639 N.E.2d at 430.

evaluating whether a *reasonably conceivable state of facts* exists to support challenged legislation, or whether the distinctions drawn by the challenged statute are *arbitrary or irrational*. Yet a review of what the General Assembly did cite as the basis for enacting Senate Bill 80 compels the conclusion that no justification exists to deviate from binding Ohio Supreme Court precedent invalidating tort reform. The data relied upon by the General Assembly as its basis for enacting tort reform in 2005 exhibits none of the characteristics required by Courts to establish minimal levels of reliability. Indeed, in any court proceeding, judges would exclude from evidence the data cited by the General Assembly as "junk [political] science."[51] While constitutional law does not require the General Assembly to provide admissible evidence supporting its enactments, when the evidence the legislature does cite is so biased, non-scientific, and unsubstantiated as to be completely lacking in reliability, the logical conclusion to be drawn is that the legislation is arbitrary, unreasonable, and has no rational basis. Particularly where, as here, the Ohio Supreme Court has struck down virtually identical tort reform enactments, the fact that the General Assembly can identify no new, reliable basis to overcome the prior determinations of unconstitutionality eviscerates any presumption of constitutionality. Instead, like the failed tort reform attempts that preceded it, Senate Bill 80 must be held unconstitutional because it lacks a rational basis, as is proven by a close review of the evidence and assumptions underlying this legislation.

V. SENATE BILL 80 BEARS NO RATIONAL RELATIONSHIP TO A LEGITIMATE GOVERNMENT INTEREST

A. *Statement of Findings and Intent Supporting Senate Bill 80*

1. The Introductory Provisions

Senate Bill 80 contains a "statement of findings and intent[,]"[52] which report the basis for the legislation. The Introductory provisions are as follows:

> (A) The General Assembly finds:
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> (1) The current civil litigation system represents a challenge to the economy of the state of Ohio, which is dependent on business providing essential jobs and creative innovation.
>
> (2) The General Assembly recognizes that a

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[51] *Dickenson v. Cardiac and Thoracic Surgery of E. Tenn., P.C.*, 388 F.3d 976, 982 (6th Cir. 2004).
[52] 2004 Ohio Legis. Serv. at L-1981.

> fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued.
>
> (3) This state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation. The General Assembly bases its findings on this state interest upon the following evidence: . . . .[53]

2. The Assumptions Implicit in the Introductory Provisions

Before reviewing the citations relied upon by the General Assembly for its findings, it is important to review these findings closely to distill the assumptions underlying them. In Paragraph (1), the General Assembly presents its view that the "current civil litigation system represents a challenge to the economy of the state of Ohio."[54] It should be noted, however, that Senate Bill 80 does not address *the civil litigation system* in the State of Ohio. To the contrary, it addresses only a select portion of the civil litigation system – that of personal injury and property damage claims. Other civil actions, including those "for damages for a breach of contract or other agreement between persons" are not affected by any provisions of Senate Bill 80.[55] Therefore, as an initial matter, although the General Assembly has identified a *challenge* posed by the entire *civil litigation system*, it has chosen to remedy this challenge by restricting only one class of claimants, those alleging tort injuries, while placing no restrictions on another class of claimants, those alleging breach of contract. By distinguishing between two classes of litigants and diminishing the ability of one group only to obtain full relief in court, the General Assembly arbitrarily discriminates against the class of tort claimants.[56]

Of further importance, note that although the General Assembly finds that the civil justice system is a *challenge* to the economy, it does not

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[53] *Id.*
[54] *Id.*
[55] *See* Ohio Rev. Code Ann. § 2307.011(J) (West 2004 & Supp. 2005).
[56] *Cf.* Ohio Const. art. I, § 2, which provides: "All political power is inherent in the people. Government is instituted for their equal protection and benefit . . . ."

find that this challenge imposes a wrongful burden on business. Just as the highway patrol represents a *challenge* to reckless drivers, and the IRS represents a *challenge* to tax evaders, so too the civil justice system represents a *challenge* to businesses that sell unsafe products, discriminate against employees, or defraud consumers. If businesses are *challenged* because they have violated the law and are therefore forced through the civil justice system to pay for the consequences or their actions, this *challenge* to the economy would not indicate a need to reform the courts. To the contrary, such a *challenge* to business would indicate that litigation is having its desired effect of placing the onus for harm upon the party who inflicted the injury.

Next, Paragraph (1) asserts that the State of Ohio "is dependent on business providing essential jobs and creative innovation."[57] Thus in its findings to justify *tort reform*, the Ohio General Assembly elevates the interest of businesses in making money over the interest of individuals in "enjoying and defending life, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."[58] In fact, the General Assembly overlooks and disregards the constitutionally protected interest of the citizens in Ohio to *obtaining happiness and safety*.

As to Senate Bill 80 Introductory Paragraph (2), the General Assembly assumes that the interests of those who have been *legitimately harmed* and the *rights of those who have been unfairly sued* present equal concerns. Presumably, the phrase *legitimately harmed* represents an awkward attempt to characterize the claims of persons who have been harmed by another and thereby have a legitimate claim for damages. Those *unfairly sued*, while undefined, would presumably be those business entities, since the General Assembly's only concern in *reformin*g the justice system is to protect businesses, that not only win lawsuits, but were *unfairly* imposed upon to defend themselves in the first instance. Again, while the Ohio Constitution specifically acknowledges the inalienable right of "[a]ll men . . . of . . . seeking and obtaining happiness and safety,"[59] no similar concern can be located in the Ohio Constitution to protect businesses from transaction costs in defending lawsuits. Further, in terms of sheer numbers, the General Assembly provides no reason to believe that the number of businesses *unfairly sued* in the Ohio civil justice system equates to the number of persons who file legitimate claims for personal injury. Yet the General Assembly seeks to balance the constitutional interest of Ohio citizens who have legitimate claims for personal injury against the interests of those businesses that have been *unfairly sued* in saving their transaction

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[57] 2004 Ohio Legis. Serv. at L-1981.
[58] *See* Ohio Const. art. I, § 1 (containing the Bill of Rights).
[59] *Id.*

costs – a balance that denigrates the value of Ohio citizens' constitutional rights by equating them to a minor economic interest of business entities.

The third introductory paragraph of Senate Bill 80 states that Ohio "has a rational and legitimate interest in making certain that Ohio has a fair, predictable system of civil justice."[60] Curiously, the General Assembly introduces the word *predictable* to describe its goal for the civil justice system. Yet requiring predictability in the context of ascertaining damages for harm caused to tort victims provides businesses the opportunity to quantify their potential exposure, then weigh the expense of paying for harm versus the expense of avoiding unsafe conduct. Just as the Ford Company's actuaries did in regard to the *Pinto* fuel tanks,[61] businesses in Ohio could calculate whether it is cheaper to injure consumers or make safe products. Such predictability does not promote the constitutional right of Ohio citizens to obtain *happiness and safety*. To the contrary, predictability in damages hinders safety by providing an option for businesses to put profits ahead of safety.

Introductory Paragraph (3) further discusses "preserv[ing] the rights of those who have been harmed by negligent behavior."[62] This reference to *negligent behavior* merits close attention because Senate Bill 80 affects all tort claims, not just those based on negligent conduct. On one extreme, Senate Bill 80 protects intentional tortfeasors such as child molesters, arsonists, and drunk drivers, by capping their exposure for punitive damages and capping their liability for pain and suffering caused by their intentional acts. Similarly, businesses that choose to intentionally sell harmful products, or engage in intentional misrepresentation and defraud consumers, are also protected by Senate Bill 80. Further, Senate Bill 80 also purports to abrogate common law negligence claims based on harm caused by products and limit claims in such cases to those based on strict products liability. Thus, the statement that Senate Bill 80 is intended to protect the rights of those harmed by *negligent behavior* does not coincide with the scope of Senate Bill 80, which limits remedies available to the entire gambit of personal injury tort claimants, including those harmed by intentional misconduct.

Next, Introductory Paragraph (3) discusses the curbing of "frivolous lawsuits," a term which the General Assembly does not define.[63] Moreover, the General Assembly fails to provide any connection between capping damages awarded in meritorious personal injury cases and the stifling of

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[60] 2004 Ohio Legis. Serv. at L-1981.
[61] *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (Cal. App. 4th Dist. 1981).
[62] 2004 Ohio Legis. Serv. at L-1981.
[63] *Id.*

frivolous lawsuits. Using similar logic, the legislature could mandate that medical treatment available to terminally ill patients will be arbitrarily limited in order to discourage doctor visits by hypochondriacs. The General Assembly cannot articulate a rational basis for requiring that its remedy for the alleged flaws in the civil justice system be borne by those tort victims who have suffered the greatest damages and who have proven the merits of their claims.

Further undercutting the entire basis of assumptions contained in the findings of the General Assembly is the presumption that Senate Bill 80 will have the effect of "curbing the number of frivolous lawsuits, which increases [sic] the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and *may* stifle innovation," all of which the General Assembly identifies as important *state interests*.[64] The presumption that *tort reform* legislation will promote business activity in Ohio stems from a fundamental misunderstanding of choice of law principles. Clearly, the legislature is presuming that by limiting the ability of Ohio citizens to sue for personal injury and property damages they have suffered through such mechanisms as caps on damages, statutes of repose, and other legal hurdles, Ohio businesses and the Ohio economy will benefit as a result.

Senate Bill 80, however, does not protect Ohio businesses; instead, Senate Bill 80 harms Ohio citizens. Under choice of law principles, courts apply the tort law of the place where the injury occurred or the state with the most relationship to the events, not the law of the state where the business is located. Senate Bill 80 therefore provides no benefit whatsoever to businesses located in Ohio, even those headquartered in Ohio, if they sell harmful products that injure consumers – unless they are fortunate enough to injure a consumer from Ohio. Instead, Senate Bill 80 prohibits injured Ohio citizens from being awarded full damages to compensate them for injuries caused by any tortfeasors, whether the tortfeasors are from New Jersey, Japan, or California, or if they happen to be from Ohio.

Therefore, the General Assembly bases Senate Bill 80 on an erroneous fundamental assumption. The General Assembly mistakenly assumes that by limiting tort damages, it will protect businesses located in Ohio or encourage new businesses to relocate to Ohio. In so reasoning, the General Assembly simply misunderstands the impact of Senate Bill 80 on the rights of Ohio tort victims and misunderstands the application of conflict of laws principles. Senate Bill 80 limits remedies of every tort victim in Ohio, regardless of the location of the business defendant.

Thus, the impact of Senate Bill 80 is to leave Ohio citizens who

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[64] *Id.* (emphasis added).

suffer personal injury or property damage with an inadequate remedy at law that denies them compensation for their full damages, in order to protect business defendants. The protected business defendants need not be located in Ohio, but instead can literally be citizens of any other state or any foreign country. As a result, the State of Ohio, its citizens, and its taxpayers bear the burden of coping with uncompensated harm, while foreign business entities benefit by escaping responsibility for the damages they have caused to Ohio citizens.

3. The Evidence Cited by the General Assembly

a. The National Bureau of Economic Research Study[65]

As its first piece of evidence supporting the rationale for Senate Bill 80, the General Assembly cites a study entitled: "The Causes and Effects of Liability Reform: Some Empirical Evidence."[66] The Working Papers are simply individual reports or studies submitted by The National Bureau of Economic Research ("NBER") researchers.[67] NBER makes no claim to conduct peer review before distributing these papers.[68] According to the NBER website: "Nearly 700 NBER Working Papers are published each year, and many subsequently appear in scholarly journals."[69] Therefore, by implication, NBER Working Papers should not be confused with scholarly publications.

Nor does the NBER Working Paper relied upon by the General Assembly present other indicia of reliability. The authors state their purpose as follows:

> We provide empirical evidence both on the causes and effects of liability reforms. Using a newly collected data set of state tort laws and a panel data set containing industry-level data by state for the years 1969-1990, we (1) identify the characteristics of states that are associated with liability reforms and (2) examine whether liability reforms influence productivity and employment.[70]

However, if one wishes to examine the list of states relied upon by the

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[65] Thomas J. Campbell, Daniel P. Kessler. and George B. Shepherd, *The Causes and Effects of Liability Reform: Some Empirical Evidence*. NBER Working Paper No. W4989 (Jan. 1995) *available at* http://ssrn.com/abstract=226587 (accessed Dec. 26, 2005).
[66] 2004 Ohio Legis. Serv. at L-1981.
[67] *See* NBER website at http://www.nber.org/publications (accessed Dec. 26, 2005).
[68] *Id.*
[69] *Id.*

[70] Campbell, Kessler & Shepherd, *supra* n. 65, at Abstract, ¶ 1.

authors to see how each state is classified in terms of having enacted tort reform, a review of the paper indicates that no such list exists. Thus while the authors claim in Appendix A of the report, under the heading "Sources of Data," that they "obtained information on liability reforms from state statutes and judicial decisions," and state further that "Appendix C lists the reforms by state and adoption date,"[71] the Working Paper in fact contains no Appendix C.

Because this Working Paper contains no evidence to explain which states it considered to be in the tort reform camp and which were not, it is impossible to determine the reliability of the conclusions in the paper. For example, did the study authors properly interpret state law, and consider not only whether statutes were enacted, but also whether they were held unconstitutional, or repealed, or amended? If a state enacted tort reform legislation in 1984 and its highest court struck down the legislation as unconstitutional in 1988, is that state considered to be a pro-tort reform state or a non-tort reform state by the study authors? The only means by which the reliability of the authors' conclusions can be assessed is by reviewing the exhibit, Appendix C to the article, which purports to categorize each state. The fact that the authors specifically reference Appendix C, but the Appendix does not exist, demolishes any presumption of reliability for this report. In fact, the inability to replicate the results of the study has been recognized by courts as a factor to reject data as unreliable.[72]

Moreover, the authors' conclusion from the study, even if it were derived from reliable data, provides no basis for the General Assembly to act. The authors state:

> These results are consistent with the hypothesis that reductions in liability from the current common-law levels improve efficiency. However, the results are also consistent with three other alternative hypotheses.[73]

They continue to explain that the results could be due to other factors, such as public policy or economic issues which they failed to control for in their analysis.[74]

Therefore, in relying upon this report, the General Assembly cites as a basis for upsetting 200 years of common law a flawed study, which is not peer reviewed, has no indicia of reliability, omits referenced data, and reaches a conclusion that can be due to any of four different factors.

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[71] *Id.* at 40.
[72] *See e.g. State v. Workman*, 670 N.E.2d 315, 324 (Ohio Mun. 1996) ("The ability to replicate the same results from the original raw data is the hallmark of scientific reliability.").
[73] Campbell, Kessler & Shepherd, *supra* n. 65, at 28.
[74] *Id.*

Moreover, the authors base their analysis on national data from 1969 through 1990,[75] providing scant relevance to Ohio law in 2005, and no basis for disregarding Ohio Supreme Court precedent from 1999.

b. The 2002 Study by the White House Council of Economic Advisors[76]

The Council of Economic Advisors ("CEA") consists of three members appointed by the President, who are to assist the President in developing economic policy.[77] As such, the CEA consists of political appointees who serve to advance the economic policy of the current administration. The 2002 White House CEA publication cited by the General Assembly in support of Senate Bill 80 advances the policies of the George W. Bush administration. As with the NBER report, the CEA report has not been subject to peer review, nor is it published in a scholarly journal. For that matter, the 2002 report is not a study at all. Instead, the document, which is available on the CEA website, is described as a "CEA White Paper."[78] A *white paper* is generally understood to be a position or policy paper of an organization. As such, white papers do not purport to represent an objective review of empirical data.

The 2002 CEA White Paper ("White Paper") cited by the General Assembly "pursues th[e] analogy between inefficient tort litigation and taxes, and examines the question of 'who pays' for excessive tort costs."[79] The White Paper concludes that the tort system generates a "'tort tax' [which] is ultimately borne by individuals through higher prices, reduced wages, or decreased investment returns."[80] The White Paper estimates the amount of this tax as the equivalent of a 2% tax on consumption, a 3% tax on wages, or a 5% tax on capital income.[81]

Before examining the basis for the conclusions in the CEA White Paper, it cannot be overlooked that, obviously, no American actually pays a *tort tax*. Instead, the depiction of the alleged costs of litigation as a *tort tax* represents a public relations spin intended to create a negative impression of the American justice system. Again, for the General Assembly to cite such hyperbole as the basis for fundamental changes in the rights of Ohio citizens must raise serious doubts as to the bona fide need for action by the General

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[75] Campbell, Kessler & Shepherd, *supra* n. 65, at Abstract, ¶ 1.
[76] Council of Economic Advisors, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* (Apr. 2002) *available at* http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf (accessed Dec. 26, 2005).
[77] *Id.*
[78] *Id.* This can be found by going to the 'Publications' link and selecting 'Tort Liability System, April 2002.'
[79] *Id.* at 1.
[80] *Id.*
[81] *Id.*

Assembly.

In regard to the data discussed in the White Paper, none of it is specific to Ohio. Instead, the White Paper takes a sweeping view of national trends in tort liability and economic costs. Further, the White Paper does not distinguish between tort cases involving businesses and those involving medical malpractice tort claims. To the contrary, the White Paper specifically includes in its discussion repeated references to the alleged effects of tort liability on medical practice,[82] "doctors deciding not to practice certain specialties or in particular communities for fear of being sued," and the "practice of 'defensive medicine.'"[83] Senate Bill 80, however, does not encompass claims alleging medical malpractice because the Ohio General Assembly passed separate legislation concerning medical claims.[84] Yet the General Assembly nonetheless relies upon this national data incorporating medical malpractice statistics to establish its alleged need for altering the justice system for non-medical malpractice claims in Ohio. Because the data discussed in the CEA White Paper is not specific to Ohio and is not specific to non-medical malpractice tort claims, the White Paper cannot provide a logical basis for passage of Senate Bill 80.

The White Paper bases its analysis upon the Tillinghast-Towers Perrin Report,[85] which the General Assembly also cites separately as an independent basis for enacting Senate Bill 80. As a result, the General Assembly relies twice on the same source, Tillinghast-Towers Perrin. Then, by adopting figures from Tillinghast-Towers Perrin, the CEA White Paper contends that U.S. tort costs are 1.8% of the Gross Domestic Product.[86] The authors then jump one step further, calculating the "litigation tax" created by "'excessive' tort costs"[87] in the United States tort system.[88]

In addition to the unreliability of the data upon which the White Paper is based, the White Paper contains an obvious flaw in the methodology by which the alleged *tort tax* is calculated. Specifically, the White Paper contends that the alleged cost of the tort system can be calculated as a percentage of the "total wage and salary disbursements to private industries (i.e., excluding government workers)."[89] Yet the *costs* of the tort system certainly include tort claims brought by persons who are

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[82] *Id.* at 6.
[83] *Id.* at 8.
[84] *See* 2003 Ohio Laws 3791.
[85] *See generally* Tillinghast-Towers Perrin, http://www.towersperrin.com/tillinghast/default.htm (accessed Dec. 29, 2005). The unreliability of the Tillinghast-Towers Perrin data is discussed in detail infra § IV(A)(3)(d).
[86] Council of Economic Advisors, *supra* n. 76, at 2.
[87] *Id.* at 10.
[88] *Id.*
[89] *Id.* at 15.

government workers, unemployed persons, children, and retirees. Therefore, the calculation that tort claims equate to a 2.1% tax of wage and salary for private sector workers[90] represents a deliberate distortion in which the authors attempt to assess the cost of the exercise of a constitutional right by the entire citizenry of the United States upon the earnings of private sector employees.

Finally, the conclusion of the White Paper that "the cost of the litigation tax is also far more than enough money to solve Social Security's long-term financing crisis"[91] represents an absurd confusion of issues that underscores the political motivation behind the paper. Such a biased persuasion piece cannot qualify as a rational basis to alter fundamental constitutional rights of Ohio citizens to trial by jury.

c. The 2003 Harris Poll of 928 Senior Corporate Attorneys[92]

At least the 2003 Harris Poll, entitled "State Liability Systems Ranking Study,"[93] which was conducted for the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform, does not pretend to be objective or scientific. It consists of a survey ("Survey") of "928 senior corporate attorneys" to "explore how reasonable and fair the tort liability system is perceived to be by Corporate America."[94] One conclusion of the Survey is that "an overwhelming 82% report that the litigation environment in a state could affect important business decisions at their company, such as where to locate or do business."[95]

Apparently, one can conclude from this Survey that in-house counsel share the General Assembly's lack of understanding of choice-of-law principles. Beyond that, the Survey reflects the *perceptions* of in-house corporate counsel as to which states' court systems are more favorable to business interests. The authors warn: "While these findings only reflect the perceptions of in-house general counsel or other senior litigators from corporate America . . . , W. I. Thomas once noted that, 'Those things that are believed to be real are real in their consequences.'"[96]

Apparently the General Assembly finds such Chicken Little logic persuasive, but others would agree that this survey hardly rises to the level of a rational basis to upend the Ohio legal system. In fact, despite the author's disclaimer of a valid factual basis, the Ohio General Assembly

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[90] *Id.* at 16.
[91] *Id.* at 17.
[92] Harris Interactive, Inc., *2003 U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report*, *available at* http://www.state.de.us/corp/2003_harris_survey.pdf (accessed Dec. 22, 2005).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 5.

actually relies upon this Survey of biased, interested parties, which purports to measure in-house counsel's perception of reality, as its basis for altering the civil justice system in Ohio. The General Assembly, acting upon the speculative opinions of partisans rather than demanding reliable proven facts, shocks and upsets any presumption of rationality on the part of the General Assembly in enacting Senate Bill 80.

d. The Tillinghast-Towers Perrin 2003 Study[97]

Like the other reports cited by the General Assembly, the report authored by Tillinghast-Towers Perrin is not published in a peer reviewed scholarly journal, nor is it prepared by a non-partisan to the tort *reform* debate. To the contrary, as described on its website, "The Tillinghast business of Towers Perrin provides consulting and software solutions to insurance and financial services companies and advises other organizations on risk financing and self-insurance. We help our clients improve business performance in areas related to their financial, risk, product, distribution and capital issues."[98] In describing the reports available on its website, the company states: "Tillinghast provides clients around the world with published research and viewpoints on industry issues."[99] To be clear, the *published research* is *published* through its availability on the Internet, not through scholarly, peer reviewed journals. Further, the studies, including the "U.S. Tort Costs: 2003 Update"[100] and the 2004 Update,[101] have no acknowledged individual authors, but rather are identified as being prepared by the consulting firm.

The 2003 Tillinghast report claims that the rate of annual increases in "tort system costs" was by far the lowest for the decade of the 1990s – at 3.3%, compared to rates of 11.6% for the 1950s, 9.8% for the 1960s, 11.9% for the 1970s, and 11.7% for the 1980s.[102] It then reports anomalous results for 2001 and 2002 of 14.4% and 13.3% increases, which it claims are based on factors including: "record jury awards in medical malpractice cases,"[103] increases in shareholder lawsuits, inflation in medical care costs for injured

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[97] Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System* (2003) *available at* http://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (accessed Feb. 12, 2006).

[98] *See* http://www.towersperrin.com/tillinghast/default.htm, Select "Publications," (accessed Feb. 12, 2006).

[99] *Id.*

[100] Tillinghast-Towers Perrin, *2003 Update*, *supra* n. 97.

[101] Tillinghast-Towers Perrin, *U.S. Tort Costs: 2004 Update, Trends and Findings on the Costs of the U.S. Tort System* (2004) available at http://www.towersperrin.com/tillinghast/publications/reports/Tort_2004/Tort.pdf (accessed Feb. 12, 2006).

[102] Tillinghast-Towers Perrin, *2003 Update*, *supra* n. 97, at 1.

[103] *Id.* at 3.

victims, and "increases in class action lawsuits and large claim awards."[104] No data is cited to support these presumptions.

Interestingly, by the next year, in its *U.S. Tort Costs: 2004 Update*, Tillinghast reports: "U.S. tort costs grew by 5.4% in 2003, representing a dramatic *reduction* from the double-digit trends experienced in 2001 and 2002."[105] Thus it appears that the General Assembly jumped to alter the entire civil justice system based on two years worth of data, ignoring trends over five decades that indicated a consistent, and in fact a declining, rate of increase in the costs of the tort claims.[106]

Further, as with the other data cited by the General Assembly as the basis for tort reform, the 2003 Tillinghast report presents nationwide data that is not specific to Ohio. In fact, the data analyzed by Tillinghast is not limited to *tort actions* as defined by the General Assembly, that is, claims based on damages to person or property, excluding medical malpractice. Instead, the Tillinghast report includes in its calculations the alleged cost of medical malpractice in presenting its data on trends in the costs of tort cases.[107]

In addition, the Tillinghast report indicates that the alleged 2001-2002 spike in tort claims is based not only upon increases in medical malpractice litigation, but states that it is also due to increases in other types of litigation clearly not encompassed by Senate Bill 80, such as Enron type claims "against the boards of directors of publicly traded companies, reflecting poor stock performance and further exacerbated more recently by corporate accounting scandals and general consumer mistrust of U.S. corporations."[108] Shareholder claims of this nature were not addressed by the General Assembly's actions in capping noneconomic damages,[109] nor were they addressed by the General Assembly's cap on punitive damages in products liability cases,[110] or its enactment of a ten year statute of repose for product liability cases.[111]

The Tillinghast report also cites increases in the cost of medical care as a cause for an increase in jury verdict awards.[112] Yet the General Assembly places no limits on economic damages in passing Senate Bill 80, so this factor too has no rational relationship to the alleged defects in the

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[104] *Id.*
[105] Tillinghast-Towers Perrin, *2004 Update*, *supra* n. 101, at 2 (emphasis added).
[106] *See supra* nn. 102-105 and accompanying text.
[107] Tillinghast-Towers Perrin, *2003 Update*, *supra* n. 97, at 3, 13.
[108] *Id.* at 3.
[109] Ohio Rev. Code Ann. § 2323.43 (West 2004).
[110] Ohio Rev. Code Ann. § 2307.80 (West 2004 & Supp 2005).
[111] *Id.* at § 2305.10.
[112] Tillinghast-Towers Perrin, *2003 Update*, *supra* n. 97, at 3.

civil justice system in Ohio, which the General Assembly contends to be addressing.

As with the other reports cited by the General Assembly, the underlying data relied upon in the Tillinghast report remains a mystery. For example, Tillinghast reports and the General Assembly parrot:

> The cost of the United States tort system grew at a record rate in 2001, according to a February 2003 study published by Tillinghast-Towers Perrin. The system, however, failed to return even fifty cents for every dollar to people who were injured. Tillinghast-Towers Perrin also found that fifty-four per cent [sic] of the total cost accounted for attorney's fees, both for plaintiffs and defendants, and administration. Only twenty-two per cent [sic] of the tort system's cost was used directly to reimburse people for economic damages associated with injuries and losses they sustain.[113]

As noted by many commentators, these percentages quoted in the Tillinghast report are both undocumented and misleading. First, the Tillinghast report includes in its analysis of the total cost of tort litigation not only the amount paid to claimants for their damages and the amount allocated to their attorneys for fees, but also includes defense attorney fees and expenses, handling costs for insurance company claims, and an "administrative, or overhead, component."[114] This administrative, or overhead, cost refers to internal expenses of insurance companies to do business.[115] No source for any of these figures is ever cited. Clearly, Tillinghast deliberately mischaracterizes the analysis of the percentage recovered by claimants in tort cases by portraying defense costs and insurance company overhead as part of the costs from which tort claimants are paid.

If the defense and insurance costs are excluded, the Tillinghast figures actually demonstrate that the total amount awarded in tort cases nationwide for economic loss equals 34%, noneconomic loss equals 38%, and claimant attorney fees equals 27% of total awards.[116] Further, the amount awarded to claimants equals 72% of total recovery, compared to 27% for attorneys' fees. These figures present quite a different portrayal than the deliberately misleading statement by Tillinghast, quoted by the

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[113] 2004 Ohio Legis. Serv. at L-1982.
[114] Tillinghast-Towers Perrin, *2003 Update*, *supra* n. 97, at 17.
[115] *Id.* at 13.
[116] Tillinghast reports that Economic Loss is 22%, Noneconomic loss is 24% and Claimants' attorney's fees is 19% of the total when defense costs and administration are included, which translates to 34%, 38% and 27% respectively when defense costs and administration are excluded. *Id.* at 17.

General Assembly that "[t]he system, however, failed to return even fifty cents for every dollar to people who were injured."[117] Further, the statement quoted by the General Assembly, that "[o]nly twenty-two per cent of the tort system's cost was used directly to reimburse people for the economic damages associated with injuries and losses they sustain,"[118] must be contrasted with the fact that claimants recovered 72% of the total amounts awarded, of which 34% reflected economic recovery and 38% reflected noneconomic damages.

The General Assembly further quotes figures for the increase in costs alleged by the Tillinghast report of 14.3% in 2001, "the highest increase since 1986,"[119] while disregarding that its calculation for the increase in tort costs for the decade of 1991-2000 was 3.3%,[120] the lowest amount in any decade studied, and disregarding that Tillinghast attributed the increase in 2001 and 2002 to multiple factors largely unrelated to the issues addressed by Senate Bill 80.[121] The General Assembly also claims that the cost of the tort system grew in 2001 at a rate "greatly exceeding overall economic growth of two and six tenth[s] per cent [sic],"[122] again ignoring 50 years of previous data, and ignoring the many factors that contributed to the collapse of the economy in 2001, wholly unrelated to tort issues.

The General Assembly concludes its discussion of the Tillinghast data with the statement that the costs of the United States tort system is "equal to a five per cent [sic] tax on wages."[123] No such data, however, is contained in the Tillinghast report, and the basis for this claim by the General Assembly cannot be determined.

e. Testimony of Bruce Johnson, Director of the Ohio Department of Development

The General Assembly quotes figures concerning United States tort costs based upon testimony by Bruce Johnson, Director of the Ohio Department of Development.[124] Mr. Johnson's testimony, however, indicates he too is merely quoting from Tillinghast-Towers Perrin. Thus, of the three different alleged sources of information from the General Assembly concerning statistics of tort costs, all are derived from the Tillinghast-Towers Perrin report, which has no verifiable basis to confirm

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[117] 2004 Ohio Legis. Serv. at L-1982.
[118] *Id.*
[119] *Id.*
[120] Tillinghast-Towers Perrin, *2003 Update*, *supra* n. 97, at 1.
[121] *Id.* at 3.
[122] 2004 Ohio Legis. Serv. at L-1982.
[123] *Id.*
[124] *Id.*

the reliability of the data presented. In addition, he cites facts and figures, such as "one out of three small businesses [in Ohio] has been sued," with no basis in the record whatsoever.[125] Nor does he disclose whether these businesses were sued in personal injury actions, or for such matters as breach of contract or other business related disputes. In short, Mr. Johnson presents an argument devoid of reliable data.

Mr. Johnson further testifies that alleged tort costs "put Ohio businesses at a disadvantage vis-á-vis foreign competition and are not helpful to development."[126] Once again, Mr. Johnson and the General Assembly confuse the concept of limiting damages available to injured victims from Ohio with the concept of protecting Ohio businesses. As previously discussed, under choice of law principles, Ohio businesses and foreign businesses alike enjoy equal protection under Senate Bill 80 for harm they inflict upon Ohio citizens, courtesy of Senate Bill 80's *tort reform*. There is no extra protection, however, under Senate Bill 80 for businesses located in Ohio. Instead, under Senate Bill 80, both Ohio and foreign corporations may harm Ohio citizens with impunity, and both will be equally protected by damages caps that prohibit the most seriously injured Ohio citizens from obtaining the full recovery to which they prove they are entitled.[127]

Mr. Johnson also cites anecdotal evidence regarding the closure of an Owens Corning plant in Ohio and the resulting loss of 275 jobs, which he alleges is due to the bankruptcy of the parent corporation from asbestos liability.[128] No evidence is offered, however, to support this claim, or to explain why the plant would not have been sold in the bankruptcy proceedings and operated by a new owner if it had economic value. Moreover, it appears that Mr. Johnson's concern for Owens Corning workers does not extend to worrying about their health. He asserts that the bankruptcy of asbestos manufacturers cost 65,000 jobs in Ohio and *around the world*,[129] but he makes no reference to the number of people who died in Ohio and *around the world* from exposure to asbestos manufactured by Owens Corning and other companies. Nor does he consider whether Ohio citizens are well protected by promoting corporations that produce products fatal to their workers and fatal to consumers. In short, he generalizes from a national crisis caused by the actions of the asbestos manufacturers in deliberately exposing their employees and consumers to a defective and

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[125] Ohio Sen. Test., *Test. of Bruce Johnson before the Ohio Sen. Jud.–Civ. Just. Comm.*, Ohio Sen., 125th, 2 (June 4, 2003).
[126] *Id.*
[127] *See supra* § IV(A)(2).
[128] Johnson Test., *supra* n. 125, at 3-4.
[129] *Id*. at 3.

dangerous product, which the courts and Congress have addressed for decades, as a basis to suddenly impose artificial limits on all personal injury tort claims by Ohio citizens in 2004.

While Mr. Johnson bemoans the anti-competitive dilemma for Ohio businesses, according to reports of the government agency he then headed, the Ohio Department of Development, Ohio's economy ranks third in the United States for Manufacturing and Durable Goods.[130] Further, the Ohio Department of Development raves that if Ohio were a separate country, its economy would rate 25th in the world.[131] The testimony of Mr. Johnson, therefore, appears unreliable, and is contradicted by data generated by his own state agency.

f. Laments about Punitive Damages.

The General Assembly recites generalizations about the dilemma of punitive damages, without citation to any specific testimony or evidence to support its claims.[132] The General Assembly does not name a single instance in which the alleged dilemma of "occasional multiple punitive damages awards" has ever occurred in Ohio, nor does the General Assembly cite a single situation in Ohio in which punitive damages were allegedly awarded in an excessive or inappropriate amount.[133] Further, the General Assembly acknowledges that the United States Supreme Court has rendered opinions that set parameters on the award of punitive damages.[134]

The General Assembly also attempts to justify the distinction contained in Senate Bill 80 regarding the amount of punitive damages that can be awarded based upon the number of employees of the wrongdoing employer.[135] Yet this distinction has no rational basis to the state's goal of deterring deliberate misconduct by corporations, inasmuch as the number of employees has no relationship to the profits realized through reckless acts. In short, the punitive damages discussion is nothing but rhetoric with no evidence, and provides no basis whatsoever for the legislature to undermine Ohio tort law.

g. Statutes of Repose.

In regard to its discussion of statutes of repose, the only evidence cited by the General Assembly to support the statute of repose relates to liability for architects, engineers and constructors of improvements to real property, which is the testimony of Jack Pottmeyer, architect and managing

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[130] *Ohio's Gross State Prod.*, Off. of Strategic Research, 3 (Ohio Dept. of Dev., Mar. 2005).
[131] *Id.* at 11.
[132] 2004 Ohio Legis. Serv. at L-1982 – L-1983.
[133] *Id.* at L-1983.
[134] *Id.*
[135] *Id.*

principal of MKC Associates, Inc.[136] Mr. Pottmeyer complains about his firm being named as a defendant in a lawsuit involving injuries sustained from a fall off a platform that the firm had designed 23 years prior, which ultimately resulted in the victim's death.[137] He contends that members of his profession bear an unfair burden because they have to buy professional liability "claims made" insurance polices to cover claims which may be based upon buildings designed in prior decades.[138] Citing only this single piece of anecdotal evidence, the Ohio General Assembly enacted a ten-year statute of repose.[139]

The General Assembly determines that "because the useful life of an improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion."[140] Yet the General Assembly protects the right of these same architects and builders to file breach of written contract claims for a period fifteen years from the date of the breach.[141] Similarly, architects can enjoy copyright protection for their designs for the duration of their lives plus seventy years after their date of death.[142] Furthermore, the General Assembly cites no evidence that enactment of a ten-year statute of repose will result in savings in insurance premiums for architects and contractors. In the similar situation involving medical malpractice, premiums paid by physicians did not diminish when *tort reform* became effective.[143]

Thus, based on a single episode of an allegedly unfair claim,[144] the Ohio General Assembly nullifies the legal right of every Ohio citizen to file a lawsuit for injuries related to negligent design of buildings and improvements to real property. Inasmuch as the expected life of buildings and improvements to real property far exceeds the ten-year period selected by the legislature, and no data existed in 2003 that differed from the

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[136] *Id.*.
[137] Ohio H. Test. *Proponent Test. of Jack Pottmeyer to the H. Jud. Comm.*, Ohio H., 125th, 1-3 *available at* http://www.ohiochamber.com/OBLR/PDFs/StatuteofRepose/Pottmeyer.pdf (accessed Dec. 30, 2005).
[138] *Id*. at 4.
[139] Ohio Rev. Code Ann. § 2305.10 (West 2004 & Supp. 2005).
[140] 2004 Ohio Legis. Serv. at L-1984.
[141] Ohio Rev. Code Ann. § 2305.06 (West 2004).
[142] 17 U.S.C.A. § 302(a) (West 2005).
[143] *Final Rpt. and Recommendations of the Ohio Med. Malpractice Commn.*, Ohio Med. Malpractice Ins. Commn., 6 (Ohio Dept. of Ins. Apr. 2005) (stating that Ohio's medical liability market is still in crisis, and that, "[a]lthough rate increases are stabilizing, doctors in Ohio are still suffering from the effects of rising rates. Premiums are overall much higher than they were just five years ago."). However, the Commission predicts that the medical malpractice tort reform will have stabilizing effects on Ohio's market over time. *Id.*
[144] Note that the injured person died from injuries sustained in a fall off the very platform Mr. Pottmeyer's firm designed.

evidence before the Ohio Supreme Court in *Brennaman v. R.M.I. Co.*,[145] the General Assembly simply does not supply a rational basis for enacting a change in the statute of repose for building and construction improvements.

Then based solely upon this testimony by a single architect, and without citation to any testimony or proof concerning consumer products, the General Assembly similarly insulates all product manufacturers from liability for any claims brought more than ten years after delivery of any product.[146] Once again, the General Assembly announces that "more than ten years after a product has been delivered, it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely disadvantaging manufacturers or suppliers in their efforts to defend actions based on a product[s] liability claim."[147] Yet these same manufacturers appear to have no problems filing lawsuits to protect their patents for a period of 20 years.[148] The assertions of the General Assembly are simply specious, and in fact do not even appear to be a serious attempt to justify the need for the legislation.

h. Noneconomic Damages Caps

The General Assembly states: "While pain and suffering awards are inherently subjective, it is believed that *this inflation* of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages."[149] What inflation? No *inflation of noneconomic damages* has been established in the record cited by the General Assembly. Without a shred of evidence, and without even a prior discussion, the General Assembly invents *this inflation* of noneconomic damages, which becomes a problem in need of a remedy. In fact, the only report cited that refers to the amounts of damages awarded, the Tillinghast report, notes that *economic* damages have increased due to increasing medical costs.[150] But no data is cited to even suggest that an increase in noneconomic damages is an issue. Undeterred, the General Assembly declares that evidence of punitive conduct has caused an increase in awards for noneconomic damages.[151] Once again, the General Assembly cites not one iota of evidence to support either the observation (inflation in noneconomic damages), or the alleged cause (improper consideration of evidence of wrong doing). The entire discussion is but a fabrication without

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[145] 639 N.E.2d 425 (Ohio 1994) (finding a ten-year architects' and engineers' statute of repose for improvements to real property violated the right to remedy and open courts).
[146] Ohio Rev. Code Ann. § 2305.10(C)(1).
[147] 2004 Ohio Legis. Serv. at L-1985.
[148] 35 U.S.C.A. § 154(a)(2) (West 2001).
[149] 2004 Ohio Legis. Serv. at L-1983 (emphasis added).
[150] *See* Tillinghast-Towers Perrin, *2003 Update*, *supra* n. 97.
[151] 2004 Ohio Legis. Serv. at L-1984.

citation.

Based upon this assumption of a problem and the speculation of a cause for the assumed problem, the General Assembly enacts limitations upon the introduction of evidence by the courts, instructs the courts on requirements for bifurcation of trials, and requires courts to "rigorously review pain and suffering awards to ensure that they properly serve compensatory purposes and are not excessive."[152] Similarly, the General Assembly claims that twenty-one states have modified or abolished the collateral source rule, but makes no findings as to why Ohio should consider doing the same.[153] The General Assembly also requests that the Supreme Court overturn its prior holdings in which it repeatedly struck down prior identical tort reform measures.[154] Thus, the General Assembly assumes that it possesses more expertise in operating courts than do the judges responsible for the court system, and then proceeds to insert the legislature into the operations of the judicial branch of Ohio government.

B. *Applying the Court Mandated Reliability Standards to the General Assembly's Analysis*

1. The Court's Gatekeeper Function

The General Assembly alleges that the civil justice system in Ohio unfairly harms business interests.[155] In enacting Senate Bill 80, the General Assembly presumes the need to repair the Ohio civil justice system and that Senate Bill 80 provides an appropriate remedy. To determine whether a rational basis for Senate Bill 80 exists, the evidence cited by the General Assembly to claim that Ohio courts are in crisis and that Senate Bill 80 will fairly cure the dilemma should be reviewed with the same degree of scrutiny courts use in reviewing other opinion evidence. That is, the recommendations of the Ohio General Assembly should be scrutinized under the standards adopted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[156] and its progeny to determine whether the General Assembly acted with a rational basis in passing Senate Bill 80. Under *Daubert*, the Courts have developed clear criteria for determining whether evidence is reliable.[157] If the evidence cited by the General Assembly and the assumptions drawn from this evidence fail to meet threshold reliability standards, then the evidence cannot be considered adequate to establish a rational basis for Senate Bill 80 under constitutional law.

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[152] *Id.*
[153] *Id.*
[154] *Id.* at L-1985.
[155] *See supra* § IV(A)(1).
[156] 509 U.S. 579 (1993).
[157] *Id.* at 589.

2. *Daubert* Requires Expert Opinion to be Based on Reliable Evidence

In scrutinizing opinion testimony, the United States Supreme Court requires that: (1) it be based upon sufficient facts or data; (2) it be the product of reliable principles and methods; and (3) the principles and methods be applied reliably to the facts.[158] Courts hold that the "reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion."[159] This link between the facts and conclusions is sometimes referred to as "fit[]," that is an inquiry as to whether the evidence fits the testimony.[160]

In addition, the qualifications of the expert must also be considered.[161] Not only may the level of expertise or specific qualifications of the expert opinion affect the reliability of the expert's opinion, but also bias on the part of the expert may render the opinion suspect under *Daubert*. Courts consider with great caution opinions reached only after an expert has been retained by a partisan to the dispute.[162] Similarly, the legislature should consider with caution data generated solely by a partisan with a direct interest in the outcome of the legislative debate.

It is accepted that "any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible."[163] The factors to be considered in determining the reliability under *Daubert* include: (1) whether the theory has been empirically studied or tested and the nature of the methodology used; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known and potential rate of error; and (4) whether the theory or technique enjoys general acceptance within the relevant professional community.[164] Each of these factors provides reassurance that the evidence is reliable, and that the evidence does not reflect arbitrary or irrational results. Similarly, courts identify publication in a peer reviewed journal as a critical means of assessing reliability. "[P]ublication (or lack thereof) in a peer reviewed journal . . . will be a relevant, though not dispositive, consideration in

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[158] *Daubert*, 509 U.S. at 592; *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999); Fed. R. Evid. 702.
[159] *Heller v. Shaw Indus. Inc.*, 167 F.3d 146, 155 (3d Cir. 1999).
[160] *Id*. at 159, *citing In re Paoli R.R. Yard PCB Litig*., 35 F. 3d 717, 746 (3d Cir. 1994).
[161] *Paoli*, 33 F.3d at 742.
[162] *See e.g. Daubert v. Merrell Dow Pharm., Inc.* (*Daubert II*), 43 F.3d 1311, 1317 (9th Cir. 1995); *TV-3 Inc. v. Royal Ins. Co. of Am.*, 193 F.R.D. 490 (S.D. Miss. 2000).
[163] *In re Paoli*, 35 F.3d at 745 (emphasis omitted).
[164] *Daubert*, 509 U.S. at 590-95; *see also Amorgianos v. Natl. R.R. Passenger Corp.*, 303 F.3d 256, 265-267 (2d Cir. 2002); *Zuchowicz v. U.S.*, 140 F.3d 381, 386 (2d Cir. 1998); *Roane v. Greenwich Swim Comm.*, 330 F.Supp.2d 306, 317 (S.D. N.Y. 2004).

assessing the scientific validity of a particular technique or methodology upon which an opinion is premised."[165]

Courts also review whether the expert has considered other possible explanations when rendering causation opinions. For example, in *In re Paoli*, the Third Circuit held that when an expert reaches a conclusion based upon a differential diagnosis but fails to consider other plausible causes, "that doctor's methodology is unreliable."[166] Similarly, in *Heller* the court found that an opinion on causation lacked reliable methodology when the expert failed to articulate good grounds for excluding other plausible causes.[167] Applying this standard to evidence relied upon by the legislature indicates that if the legislature accepts conclusions in data without considering and eliminating other plausible causes for an observed effect, then the legislature's conclusions cannot be considered to have a rational basis.

Another important factor under *Daubert* is the ability to replicate the results of any research. In other words, the data analyzed and the methodology employed should be presented clearly so that their reliability can be confirmed through independent means.[168] Methodologies must be validated by accepted scientific standards.[169] Anecdotal evidence, suppositions, and assumptions alone cannot be considered sufficient or reliable as a basis for opinion under *Daubert*.[170] If the legislature relies upon evidence which lacks the necessary transparency and supporting documentation, then the conclusions drawn from that data must be considered arbitrary due to an inability to confirm or replicate the underlying information.

3. Applying the *Daubert* Criteria to the Evidence Cited by the General Assembly

Not one piece of data cited by the General Assembly passes the admissibility requirements of the United States Supreme Court under *Daubert*. To the contrary, the data cited by the General Assembly could serve as a model of unreliable evidence. As a result of the unreliable evidence and unsupported conclusions drawn from the data by the General Assembly, Senate Bill 80 must be held arbitrary, unreasonable and lacking

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[165] *Daubert*, 509 U.S. at 594; *see also Miller v. Bike Athletic Co.*, 687 N.E.2d 735, 741-42 (Ohio 1998).
[166] 35 F.3d at 759 n. 27.
[167] 167 F.3d at 156-57.
[168] *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303-04 (6th Cir. 1997) (disputed insofar as it implied researchers conducting studies for the purpose of litigation may be less reliable than those conducting independent investigations on the same point).
[169] *U.S. v. Langan*, 263 F.3d 613, 621-22 (6th Cir. 2001).
[170] *Trepel v. Roadway Exp., Inc.*, 194 F.3d 708, 722 (6th Cir. 1999); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 802 (6th Cir. 2000).

in any rational basis.

First, none of the reports cited by the General Assembly appear in a peer reviewed journal. Far from it. The reports, if published at all, are published on the Internet at the websites of partisans to the tort reform debate, or on the websites of politically affiliated organizations. For example, the NBER study is available only on the Internet, purports to analyze the characteristics of states that have enacted tort reform legislation, and is not peer reviewed.[171] The Tillinghast-Towers Perrin report is by a consulting firm to the insurance industry, and the report appears on its web site of white papers on various insurance industry topics and is not peer reviewed.[172] In fact, its authors are not identified, but just the firm Tillinghast-Towers Perrin. Similarly, the CEA report is titled a White Paper, was prepared by a politically appointed council acting as the economic advisors to the White House, and is available on its website along with articles advocating changes in the Social Security system.[173] It is not peer reviewed. The final report cited by the General Assembly, the Harris Poll of In-House Counsel, *conducted for the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform*, also is not peer reviewed, is available on the Internet, and can only be described as unscientific and intentionally biased.[174]

Further, the data upon which these studies are based and the methodology employed by the authors cannot be understood. The NBER report omits Appendix C, which reportedly identifies which states it considered to be tort reform states and which it did not. Therefore, the analysis can never be confirmed nor reproduced because the data upon which it is based is not apparent. Similarly, the Tillinghast report omits any reference for its data. The calculations of tort costs, the amounts allocated to economic and noneconomic damages, the amounts paid for plaintiffs' fees and expenses, the amounts paid in defense costs and claims administration, the amounts paid in insurance company overhead, and the annual increases and decreases in costs of the tort system have no identifiable basis from which the data can be verified. Similarly, the methodology used by Tillinghast and CEA to calculate the *tort tax* has never been validated as appropriate in any peer reviewed publication. The Harris Poll does not even trouble to pretend to present scientific findings. Instead, it concludes that perceptions may become real; thus the antithesis of a conclusion based upon reliable data or susceptible to verification of

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[171] *See supra* § IV(A)(3)(a).
[172] *See supra* § IV(A)(3)(d).
[173] *See supra* § IV(A)(3)(b).
[174] *See supra* § IV(A)(3)(c).

results.[175]

The NBER report concedes that the alleged results of the effects of tort reform in each state could be due to "three other alternative hypotheses."[176] Yet, the General Assembly disregards these alternative hypotheses and assumes without a basis that the report forms a basis for tort reform. Such a failure to exclude alternative causes renders an opinion unreliable under *Daubert*.[177] Similarly, in Tillinghast-Towers Perrin, the authors cite other alleged causes for the alleged increase in tort costs in 2001 and 2002.[178] These factors include increases in the size of medical malpractice verdicts, increases in shareholder litigation, and increases in medical care costs.[179] Three of these factors have no relevance to Senate Bill 80, which excludes medical malpractice and contains no caps on economic damages. As to the fourth factor, alleging an increase in reserves by insurance companies based upon projections for asbestos claims, such an increase in reserves does not establish an increase in tort claims actually paid in 2001 and 2002. Further, the unique nature of the asbestos saga and the widespread harm to workers nationwide, due to decades of exposure to products that the manufacturers knew would cause deadly illness, cannot be generalized into a crisis facing Ohio in 2001 and 2002 which necessitates limiting tort remedies for all other claimants.

In fact, it cannot be overlooked that regardless of its source, none of the objective data quoted in the articles cited by the General Assembly is specific to Ohio, or even contains figures that can be extrapolated as applying to Ohio. Only the Harris Poll of In-House Counsel makes any specific reference to Ohio, which is generally ranked in the middle of the states on most questions. Instead, the articles quote national figures, which also include medical malpractice and other tort claims not subject to Senate Bill 80 in Ohio. Thus under the *Daubert* criteria of *fit*, the General Assembly fails to cite evidence to support its assumptions in Senate Bill 80.

The only Ohio-specific evidence cited by the General Assembly is the testimony of the architect, Mr. Pottmeyer, who does not want to be burdened with purchasing insurance or defending lawsuits for buildings he has designed, and the testimony of Mr. Johnson of the Ohio Department of Development. The single story Mr. Pottmeyer recites of a lawsuit involving his firm cannot be considered a reliable basis to conclude that the entire system of civil justice in Ohio must be overhauled. A single piece of anecdotal evidence, supposition, or assumption unsupported by any

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[175] *Id*.
[176] *See supra* n. 73 and accompanying text.
[177] *See Paoli*, 35 F.3d at 759 n.27; *Heller*, 167 F.3d at 156-57.
[178] *See supra* § IV(A)(3)(d).
[179] *Id*.

reproducible, verifiable data, cannot be considered a reliable basis for forming a conclusion.[180] The legislature's determination based on this single, one-sided piece of testimony that the claims of every Ohio citizen must be forever extinguished if related to products or events more than ten years old, arbitrarily degrades the constitutional rights of the entire population of Ohio citizens with no rational or objective basis.

The testimony of Mr. Johnson of the Ohio Department of Development, in which he contends that tort reform is needed to improve economic competitiveness of Ohio, stands directly contradicted by his own Departmental Report, which indicates that Ohio's economy ranks seventh in the United States[181] and would be 25th in the world if it were an independent country.[182] In terms of reliability, the Report prepared by his department, entitled *Ohio's Gross State Product*, March 2005, is a well-documented governmental publication by a state agency authorized to generate such reports. Significantly, the source of the data quoted in the Report is clearly indicated in each chart and graph generated by the Agency and contained within the Report. Mr. Johnson's testimony, on the other hand, represents his unsubstantiated opinion, in which he recites facts and figures with no identifiable basis, or which are based on flawed national data. For instance, Mr. Johnson cites no source for his claim that one in three small businesses in Ohio has been sued, nor does he state whether the lawsuits involve tort claims as opposed to business litigation.[183] He also quotes an unidentified survey in which "more than half of business owners" claim they would "go out of business if a lawsuit cost them more than $250,000 in legal fees and costs."[184] Such undocumented speculation cannot be confused with reliable evidence. Further, Mr. Johnson repeatedly cites the Tillinghast-Towers Perrin report, with its mystical calculation of a national *tort tax* on workers, for which no reliable basis or reproducible methodology is provided. Testimony based on non-disclosed sources or which references undocumented data cannot be considered reliable under *Daubert*.

Finally, Mr. Johnson makes many assumptions about asbestos litigation, without ever considering that the asbestos crisis arose due to the deliberate actions of the manufacturers in selling a dangerous and defective product. An argument certainly can be made that the flaw with asbestos lies not with the legal system, but rather with the manufacturers' misconduct. Under *Daubert*, an opinion formed without consideration of and exclusion of plausible alternative causes cannot be considered reliable. Moreover,

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[180] *Trepel*, 194 F.3d at 722; *McLean*, 224 F.3d at 802.
[181] *Ohio's Gross State Product*, *supra* n. 130, at 3.
[182] *Id.* at 11.
[183] Johnson Test., *supra* n. 125, at 2.
[184] *Id.*

neither Mr. Johnson nor the General Assembly explains how capping noneconomic damages for all tort victims in Ohio will make any perceptible impact upon the scope of the costs of asbestos insurance reserves, nor why the burden for the costs of the asbestos crisis should be borne by tort victims alleging unrelated claims caused by parties unrelated to the asbestos dispute. Such efforts to impose upon tort victims the burden of remedying an alleged tort crisis have been previously rejected by the Ohio Supreme Court.[185] Mr. Johnson's testimony provides no basis to revisit the issue.

In terms of the collateral source rule, the only foundation for the General Assembly's attempt to impose new evidentiary rules regarding collateral benefits is the claim that twenty-one other states have done it. The Ohio Supreme Court clearly rejected as arbitrary the legislature's prior attempts to diminish tort awards to victims through presumptions that the general verdicts reflect damages offset by collateral sources.[186] With no new basis for enacting the collateral source requirements other than the claim that other states are doing it, the provisions of Senate Bill 80 regarding collateral source must be found arbitrary and unreasonable.

VI. APPLICATION OF ESTABLISHED RELIABILITY CRITERIA AND THE DOCTRINE OF *STARE DECISIS* MANDATE THAT OHIO'S 2005 TORT REFORM LEGISLATION BE DECLARED UNCONSTITUTIONAL UNDER EVEN A RATIONAL BASIS STANDARD

In conclusion, the General Assembly cites not one piece of data that has the necessary indicia of reliability to require reconsideration of the well-reasoned precedent by the Ohio Supreme Court finding no rational basis for *tort reform*. It must be considered arbitrary for the General Assembly to enact legislation that destroys the constitutional rights of Ohio citizens to obtain full and fair compensation through the courts for harm caused by tortuous conduct, when no reliable evidence of any tort crisis in Ohio has ever been identified. Under the *junk science* mantra of corporate defendants in tort litigation,[187] courts should invalidate as constitutionally infirm flawed legislation enacted based upon unreliable evidence and unsubstantiated assumptions. Because the evidence relied upon by the General Assembly cannot overcome the classification of *junk political science*, the courts must find that Senate Bill 80 has no rational basis, and therefore cannot withstand constitutional challenge.

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[185] *See Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991).
[186] *See Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994); *see also State ex rel. Ohio Acad. of Tr. Laws. v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).
[187] *Dickenson*, 388 F.3d at 982.