



## Product Liability Law Alert

### A Litigation Department Publication

January 2012

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### Applicability of Ohio's Statutory Cap On Non-Economic Damages To Claims Based On Injuries Sustained Before Its Effective Date *Musgrave v. Breg, Inc.*

In a recent case before the U.S. District Court for the Southern District of Ohio, *Musgrave v. Breg, Inc.*, No. 2:09-cv-01029, the court was asked to decide whether Ohio's statutory cap on non-economic damages in tort actions should apply to a claim based on an injury that occurred before the statute became effective on April 7, 2005. Although other courts have dealt with the retroactive application of the cap on non-economic damages, it would appear that *Musgrave* is the first time that a court has dealt with the application of the statute when the plaintiff's cause of action accrued at some date later than the date of injury.

The issue in *Musgrave* centered on the cap on non-economic damages that Ohio enacted nearly seven years ago as part of a tort reform effort. Under Ohio Revised Code § 2315.18(B)(2), non-economic damages in tort actions are limited, with some exceptions, to the greater of \$250,000 or three times the economic loss to a maximum of \$350,000 per plaintiff or \$500,000 for each occurrence that is the basis of the tort action. The statute became effective on April 7, 2005.

In *Musgrave*, Judge Gregory L. Frost decided whether the non-economic damages cap applied to a product liability claim brought by the plaintiff, Kaid Musgrave. Musgrave was 17 years old in November 2003 when he injured his right shoulder during a football game. He had arthroscopic surgery on his shoulder, and after the surgery, his physician prescribed and implanted a catheter for an infusion pain pump manufactured by Breg, Inc. The pain pump delivered an anesthetic directly into Musgrave's shoulder joint to manage post-operative pain. Musgrave experienced problems with his shoulder after the surgery, and he underwent a second arthroscopic surgery. During that surgery, Musgrave's physician observed that Musgrave had developed chondrolysis, which is the rapid loss of joint cartilage following some chemical, mechanical, infectious, immunological, or thermal insult. As a result of his condition, Musgrave had to undergo a complete right shoulder arthroplasty and now has complete loss of cartilage in his shoulder and degenerative bone loss.

Musgrave filed a lawsuit in November 2009 against Breg, Inc. and others. Breg argued that, if Musgrave's product liability claim survived summary judgment, his non-economic damages should be capped as a matter of law pursuant to § 2315.18(B)(2). Judge Frost addressed Breg's argument in his initial order on Breg's motion as well as in a second order that addressed Breg's later-filed motion for reconsideration. In his initial order, Judge Frost explained that because Musgrave's injury occurred before the effective date of the statute, the cap on non-economic damages would not apply to Musgrave's claim unless it were applied retroactively to the date of his injury or, alternatively, if the relevant date for determining whether the statute applies was the

date that Musgrave filed his lawsuit instead of the date of the injury. Judge Frost first concluded that the cap on non-economic damages was not intended to be applied retroactively. He next determined that the relevant date for determining the applicability of the statute was not the date upon which the lawsuit was filed. Instead, the judge's initial order stated that the relevant date was the "date the conduct giving rise to the plaintiff's cause of action occurred." Accordingly, because the injury that formed the basis of Musgrave's claim was the use of the pain pump in November of 2003 — more than a year before § 2315.18(B)(2) became effective — the non-economic damages cap would not apply to Musgrave's claim.

That, however, did not end the story. In its motion for reconsideration, Breg argued that the court's determination as to the relevant date for the applicability of the non-economic damages cap was inconsistent and conflicting with the relevant date for determining when Musgrave's cause of action accrued for statute of limitations purposes. Musgrave's claim was governed by a two-year statute of limitations. Musgrave's surgery took place in November 2003, six years before the lawsuit was filed in November 2009, but Musgrave's claim against Breg did not accrue until many years later. Under the discovery rule (which tolls the date on which a plaintiff's claim accrues until he reasonably should have discovered the nexus between his injury and the defendant's actions), Musgrave's claim against Breg did not accrue until sometime after November 13, 2007, two years before the complaint was filed.

Breg argued that it was fundamentally unfair and inconsistent with Ohio law for Musgrave's claim to "arise" in 2003 for purposes of determining the applicability of the cap on non-economic damages, but not "accrue" for purposes of the statute of limitations until more than four years later, after § 2315.18(B)(2) became effective. Stated another way, Breg contended that Musgrave should be limited to one date on which his cause of action accrued and that one date should be used for both statute of limitation purposes and for determining the applicability of the non-economic damages cap.

Judge Frost agreed. He noted that the Supreme Court of Ohio made no distinction between a claim "arising" and "accruing." His earlier ruling, using the date of the injury for determining the applicability of § 2315.18(B)(2), "was in error" because it failed to distinguish that Musgrave's cause of action against Breg did not arise on the date of the injury. Because Musgrave's claim arose (and his cause of action accrued) when he reasonably discovered the claim, which was at least two and a half years after § 2325.18(B)(2) became effective, Judge Frost modified his earlier order and held that Ohio's cap on non-economic damages applied to Musgrave's claim.

The take-away from Musgrave is that Ohio's non-economic damages cap may sometimes apply to claims arising from injuries sustained before the statute's April 7, 2005 effective date. If a plaintiff alleges a tort claim based on an injury sustained before the effective date of the statute, but did not reasonably discover the claim until after the effective date of the act, the non-economic damages cap will apply to the plaintiff's claim. This often may be the case with tort claims arising from medical negligence and medical product liability. On the other hand, if the plaintiff both sustained his injury and discovered it before the effective date of § 2315.18(B)(2) — which, for instance, would often be the case with injuries sustained during auto collisions — then the non-economic damages cap will not apply because the Ohio General Assembly did not intend the statute to be applied retroactively.

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Practice Group Chair, Terrance M. Miller has been named *Best Lawyers'* 2012 Columbus Product Liability Litigation —Defendants Lawyer of the Year and Carolyn A. Taggart has been named *Best Lawyers'* 2012 Cincinnati Product Liability Litigation — Defendants Lawyer of the Year by *The Best Lawyers in America*®, one of the most highly-regarded peer-review publications in the legal profession. One attorney in each specialty, in each community, is selected by *Best Lawyers* as a "Lawyer of the Year."



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