

IN THE SUPREME COURT OF OHIO

ORIGINAL

DONALD KRIEGER, et al.)	Case No.: 2008-1463
)	
Appellees,)	
)	On Appeal from the Cuyahoga County
)	Court of Appeals, Eighth Appellate
v.)	District,
)	
CLEVELAND INDIANS , et al.,)	Court of Appeals
BASEBALL CO., et al.)	Case Nos. 89314, 89248 and 89463
)	
Appellant)	

MERIT BRIEF OF APPELLEES DONALD KRIEGER AND CLIFTON OLIVER

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I. STATEMENT OF FACTS

On June 11, 2002, Appellees Donald Krieger (“Krieger”) and Clifton Oliver (“Oliver”) were part of a group that attended a Cleveland Indians baseball game at Jacobs Field. (Krieger and Oliver are collectively referred to as “Appellees”)

Krieger was dissatisfied with their upper deck, “nose bleed” seats and left the group for better seating in the lower deck, near third base. (TR. 322-324, 458) Oliver, an active duty Marine who was on medical leave because of fractured cervical vertebrae, joined Krieger several innings later. (TR. 323-324, 451-453, 459). TR.) Near the end of the game, Appellees left their seats with the intention of reuniting with their group in the upper deck. (TR. 325, 459)

While they were near a lower deck restroom, Appellees heard an explosion and headed toward the noise which, by this point, had drawn a large crowd. (TR. 326, 460) When they reached the upper deck, one of their companions, Andrew Mendez was being questioned by security personnel because the explosive device was thought to have emanated from the right field, upper deck area. (TR. 327-328) Representatives of the Cleveland Police Department and Jacobs Field security questioned Krieger, Oliver and Mendez on three separate occasions concerning the explosion. Appellees fully cooperated and consented to be searched. (TR. 330-331, 472)

After these encounters, Krieger and Oliver became upset with the police and security personnel and headed toward the customer service area to lodge a complaint. (TR. 331, 475). Upon arrival, Appellees were immediately surrounded by 7-8 Cleveland police officers, hand cuffed and placed in a holding cell at Jacob’s Field. (TR. 332-333, 476-479) Oliver, who was wearing a hard plastic cervical collar, requested that he be

handcuffed in front, due to his neck fractures, but the police ignored his request. (TR. 483-484)

Appellees were transported to the Cleveland Police Department and placed in separate cells. Their clothing was confiscated and they were issued paper jumpsuits. (TR. 334, 485) The cells were filthy and infested with cockroaches. Other than a toilet, the cell did not have any type of mattress or chair, and they were not permitted to shower or brush their teeth. (TR. 335, 379, 485) Krieger had to sleep on the ground and stuff toilet paper in his ears to keep out the insects. (TR. 335) Oliver could not lie down because of his hard collar and was forced to sit in the corner of the cell. (TR. 489) The two remained in jail without being charged with a crime for four days.

During their confinement, Appellees were harassed by guards and labeled as terrorists. (TR. 379-380, 48) Krieger was placed in a cell with a mentally unstable person and feared for his life. (TR. 379-380) During the four days of imprisonment, Krieger was subject to sleep deprivation, sustained numerous insect bites, and lost approximately twelve (12) pounds. (TR. 335, 380) Krieger did not contact his parents due to the fact that his father was recovering from heart problems and he did not want to disturb him. Nonetheless, Krieger's and Oliver's parents learned of their respective son's predicament from the news media.

During interrogations by Cleveland Police Detective Peachman, Krieger and Oliver denied any knowledge of the source of the explosive devise and further indicated that they were in the lower deck area of the stadium when the blast occurred. (TR. 336-337, 486-87) Peachman admitted knowing that Appellees were innocent and offered to immediately release both if they would give him a statement implicating Mendez. When

Appellees refused, they were charged with aggravated arson and felonious assault, charges carried potential jail time of seventy (70) years. (TR. 342-43, 498)

At bond hearing, Peachman advised Krieger's lawyer, William McGinty, that "we know Donny (Krieger) had nothing to do with this case." and that, "we want him to testify against the person who committed the crime." (TR. 172-179) Krieger maintained his innocence, but refused to implicate Mendez. (TR.180-81, 341) Peachman also told Oliver's father that he knew his son did not have anything to do with the explosion, but that he wanted Oliver to testify against Mendez. (TR. 218-219, 494-495, 555-560) Oliver also refused to give false testimony against Mendez. (TR. 488-489)

During the course of the bond hearing, Peachman falsely testified that he considered Appellees to be terrorists and that Oliver had procured a military explosive device from the Marine Corps. Peachman requested that the judge set a bond of one million dollars. On the heels of 911, the media attended the hearing and covered the case extensively, characterizing Appellees as domestic terrorists. (TR. 181-182, 341, 498-500)

Appellees were adamant that stadium surveillance video would validate their story. Krieger's attorney subpoenaed the stadium video but the Cleveland Indians sent the tapes to the prosecutor, not the defense (TR. 193-195, 217)

The video tapes conclusively proved that Krieger and Oliver were in the lower deck near third base, far away from the area where the blast occurred. Forensic analysis performed by U.S. Bureau of Alcohol, Tobacco & Firearms confirmed the absence of explosive residue on the Appellees' clothing. (TR.196-198, 344-347,461-470)

Despite this evidence, as well as his admission that he knew Appellees were innocent, Peachman refused to consent to dismissal of the charges unless Appellees

implicated Mendez. (TR. 198-199). The charges were ultimately dismissed by the Prosecutor on January 29, 2003, more than seven months after arrest.

By this time, the weight of these charges had taken its toll on Appellees. Krieger, age 27, experienced nightmares of his incarceration and actually had to sleep in his parents' bedroom. Krieger received threatening phone calls and was harassed by the media and branded a terrorist. (TR. 342-43) Oliver, whose Marine unit was eventually dispatched to Iraq, was also branded as a terrorist and his career with the Marine Corps was ruined. During the course of the proceedings, Oliver was unable to obtain employment because of his neck injuries and was forced to borrow money from his parents to pay for his bond and attorney. Oliver gained unwanted notoriety due to the extensive media attention given to this matter and was unable to obtain employment, even after his neck injury resolved. Oliver became depressed and had to resort to taking anti-depressant medication. (TR. 504-511)

In June of 2003, Clifton Oliver and Donald Krieger filed separate lawsuits against, *inter alia*, the Cleveland Police Department and Detective Peachman.

On July 19, 2006, Krieger and Oliver voluntarily dismissed their claims against Detective Peachman in exchange for the City's stipulation that Peachman was "acting within the course and scope of his employment as it relates to the above bold-faced matter" *i.e.* the lawsuit. (R. 87.)

The case went to trial in November, 2006 and the jury returned unanimous verdicts in favor of Appellees on the claims of malicious prosecution, intentional infliction of emotional distress, and false imprisonment. The jury awarded each Plaintiff \$400,000 in compensatory damages, \$600,000 in punitive damages, and reasonable attorneys' fees. (TR. 767-768) Appellant failed to make any offer prior to

trial. (TR. 773, 801-804). The trial court awarded pre-judgment interest and attorneys' fees to but vacated the award of punitive damages. (TR. 911-912)

On appeal, the Eighth District affirmed the judgment of the trial court in all respects, but vacated the award of attorney fees to plaintiffs. This Court accepted Jurisdiction for the limited purpose of deciding the constitutionality the non-economic damages limitation set forth in R.C. 2744.05(c)(1).

II. RESPONSE TO APPELLANT'S ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

Appellant's Proposition of Law

R.C. 2744.05(C)(1) 's limitation on the award of non-economic damages against a political subdivision is a constitutional legislative enactment that does not impair the right to trial by jury under Article I, Section 5 of the Ohio Constitution and does not violate equal protection guarantees..

A. This Courts decision in *Arbino v. Johnson & Johnson* was wrongly decided and should be reversed.

In holding that of R.C. 2744.05 (c)(1) was unconstitutional, the Eighth District followed its prior precedent in *Gladon v. GCRTA* (March 10, 1994) 1994 WL 78468 and held:

{¶ 68} In *Gladon v. Greater Cleveland RTA* (Mar. 10, 1994), Cuyahoga App. No. 64029, 1994 WL 78468, this court held that R.C. 2744.05(C)(1) violates the constitutional right to a jury trial, because it impairs the function of the jury to determine the amount of damages. This court further held that the statute violates constitutional guarantees of equal protection, because it creates arbitrary and irrational differing classifications between non wrongful-death tort claimants and wrongful-death tort claimants. Accord *Richardson v. Bd. of Cty. Commrs.* (Dec. 4, 1996), Tuscarawas App. No. 95-AP-110114, 1996 WL 753188.

{¶ 69} In *Gladon v. Greater Cleveland RTA* (1996), 75 Ohio St.3d 312, 1996-Ohio-137, the Ohio Supreme Court reversed this court's holding in *Gladon* without reaching the issue of the constitutionality of the statute. We find no Supreme Court cases that otherwise address the constitutionality of R.C. 2744.05(C), and accordingly, we follow our holding in *Gladon* finding the statute unconstitutional. Therefore, the trial court did not err in denying the city's

motion to reduce the compensatory damages awards to \$250,000. Id at 68-69.

Although this Court accepted jurisdiction to address the constitutionality issue in Glendon, a plurality later sidestepped the “substantial constitutional question regarding R.C. 2744.05(C)”, despite extensive briefing by the parties. Id at 314-323

Nonetheless, a plurality of this Court did join in the well researched dissent of Justice Douglas which , after a detailed, scholarly analysis concluded that the non-economic damage limitations set in R.C. 2744.05(C)(1) violated the right to trial by jury. Id at 331-343.

In the fifteen (15) years since the Eighth District decided *Glendon v. GCRTA*, *supra*, this Court has not revisited the issue as to whether limitations on non-economic damages in tort claims against municipalities are constitutionally permissible. Presumably, there have not been any cases resulting in judgments against municipalities in excess of the non-economic cap, largely because R.C. 2744.01 -04 provides political sub-division with broad immunity from tort claims.

This Court has addressed the constitutionality of damages limitations in other contexts on numerous occasions. Prior to *Arbino v. Johnson & Johnson*, this court consistently struck down statutorily imposed limitations on damages as contravening the rights to trial by jury, equal protection and due course/due process of law. *viz.* *Morris v. Savoy* (1991), 61 Ohio St, 3d 684, 686-67.; *Sorell v. Thevenir* (1994), 69 Ohio St. 3d 415, *syllabus*; *Galayda v. Lake Hospital Sys. Inc.* (1994) 71 Ohio St. 3d. 421, *syllabus*; *Zoppo v. Homestead v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552: *State ex rel OATL v. Sheward* (1991), 86 Ohio St.3d 490.

Plaintiffs are forced to concede that *Arbino v. Johnson & Johnson* evinces a philosophical sea-change on the part of this Court to now, for the first time, countenance limitations on economic damages in tort cases.¹

In the post *Arbino* world, the right to trial by jury in tort cases guaranteed by the Ohio Constitution encompasses the right to have a jury determine the issues of breach of duty and proximate cause but not damages. While acknowledging that the calculation of damages suffered by a tort plaintiff is factual in nature and is thereby within the exclusive province of the jury, this court for the first time held that the legislature is permitted to arbitrarily dictate the amount of damage award that a tort plaintiff may actually collect. *Id.* at ¶33 through ¶37 Presumably, the legislature is in a better position than a jury to analyze the veracity of tort plaintiffs from the cloistered confines of the State House.

Arbino further represents a departure from longstanding precedent which held that damage limitations offend equal protection. The *Arbino* majority recognized that limitations on damages in “certain torts” arbitrarily draws distinctions between similarly situated groups of people (*Arbino* at ¶67), this court nonetheless found that, since the civil justice system has run amuck, the legislature now has a legitimate interest in repairing it. While acknowledging that damage limitations “may not be the best way to address the perceived problems in the civil justice system”, this court adopted a “we gotta start somewhere” approach. (¶ 70) In essence, to assuage the perceived crises in the civil justice system, this court empowered the legislature to amend the Ohio Constitution and become the final arbiter on the issue of damages in tort cases.

¹ At the time the within case was briefed and argued in the Eighth District, *Arbino, supra*, was still decisional.

In light of *Arbino v. Johnson & Johnson, supra*, Appellees are forced to concede that tort economic damages limitations no longer violate the rights to trial by jury and equal protection. Appellees nonetheless beseech this court contemplate the long term potential implications of this decision on our system of government. By sanctioning this erosion of the right to trial by jury, this court has ventured down what will no doubt become a very slippery slope.

B. The non-economic damages limitation set forth in R.C 2704.05(C)(1) violates of the Right to Due Course of Law/Due Process contained in Section 16, Article I of the Ohio Constitution.

Appellant and the *Amicus* argue that *Arbino v. Johnson & Johnson, supra* mandates a finding that R.C. Section 2744.05(C)(1) is constitutional. However, *Arbino* evaluated the constitutionality R.C. Section 2315.18 and, in doing so, went out of its way to point out that this section was not applicable to tort cases against political subdivisions. (*Arbino, supra p. 430, FN 3.*)

What Appellant and the *Amicus* fail to acknowledge is that there are significant differences between R.C. Section 2315.18 and R.C. Section 2744.05(C)(1).

First and foremost, R.C. Section 2315.18 does not impose an arbitrary cap on non-economic damages in all cases. In fact, R.C. Section 2315.18(B)(3) specifically provides that there shall be no limit on non-economic damages in serious injury cases.

The *Arbino* plaintiff argued that R.C. Section 2315.18 was unconstitutional because, *inter alia*, it violated the due course of law/due process provisions of Section 16, Article 1, of the Ohio Constitution. In reviewing the history of various tort reform measures that have been enacted in Ohio since 1975, this court acknowledged that, prior to R.C. Section 2315.18, the Ohio Legislature's previous attempts at limiting non

economic damages did not include exceptions for serious or catastrophic injury cases and thereby violated the due course of law/due process guarantees set forth in the Ohio Constitution. (*Arbino* at ¶60-61, **see also**; *Morris v. Savoy, supra*)

As to the issue of whether R.C. Section 2315.18 was unconstitutional on due process grounds, the *Arbino* court applied the rational basis test previously espoused in *Mominee v. Scherbath* (1986), 28 Ohio St.3d 270 (*Arbino* at ¶ 49). In order to pass muster under the rational basis standard, the statute at issue must:

1. Have a real and substantial relationship to general public welfare; and
2. be neither arbitrary nor unreasonable (*Arbino* at ¶ 49.)

The *Arbino* court noted that prior attempts by the legislature to impose limitations on non-economic damages had been held unconstitutional as being in violation of the second prong because these measures assigned an arbitrary figure as a limitation for non-economic damages in all cases and thereby “imposed the cost of the intended benefit to the public upon those most severely injured.” (*Arbino* at ¶59, citing *Morris v. Savoy*, 61 Ohio St.3d 690-91, and *State ex rel OATL v. Sheward* (1991), 86 Ohio St.3d 490.)

The only reason R.C. 2315.18 passed muster under the second prong of the rational basis test was that it did not limit non-economic damages in serious injury cases. As such, the benefits of non-economic damage limitations could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic. *Arbino* at ¶61.

R.C. 2744.05(C)(1) does not contain an exception for serious injuries and imposes an arbitrary limit on non-economic damages in all tort cases against political subdivisions. Notwithstanding Appellant’s assertions to the contrary, *Arbino* actually

reaffirms the longstanding principle that all encompassing, arbitrary limits on non economic damages violate of due process. (*Arbino at ¶59*)

The *Amicus* counter by arguing that, even though R.C 2744.05 (C)(1) may violate due process because it lacks the serious injury exceptions that saved R.C. 2315.18, the arbitrary, all inclusive \$250,000.00 political subdivision cap is not unconstitutional as applied to this particular case since “the two Appellees have not suffered catastrophic injuries”.² (Amicus Brief, page 12)

The problem with the *Amicus* position is that R.C 2744.05 does not include a process to define what constitutes a “catastrophic injury” nor does it specify exactly who makes such a determination.

R.C. 2315.18 E(2) provides that, prior to the trial in the tort action, any party may seek summary judgment on the issue as to whether an injury is “catastrophic” as defined in R.C. 2315.18(B) (3). Presumably this would require expert medical testimony and, if the medical experts did not concur, the issue would presumably have to be submitted to a jury by way of special interrogatory.

In this instance, the injured plaintiff still retains the right to have a court or a judge make a determination as to whether the damage limitation will apply.

By contrast, R.C 2744.05 simply imposes a blanket damage limitation on all classes of tort plaintiffs (other than wrongful death), similar to the medical malpractice limitation that was struck down in *Morris v. Savoy, supra*.

R.C. 2315.18(b) (3) provides that there shall not be any limitation on non economic damages where the Plaintiff has suffered either:

(a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
or

(b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities

Moreover, a close reading of *Arbino* suggests that plaintiff Janice Arbino did not sustain “catastrophic injuries”, at least as defined by R.C. 2315.18(B)(3) and she nonetheless maintained standing to challenge the constitutionality of the statute.

The Amicus further argue that R.C 2744.05 does not offend due process because the legislature possesses the power to ban all tort actions against political subdivisions and could, if it so chose, return to the days when “the King can do no wrong”. Amicus Brief, pagea13-14 , citing *Haverlack v. Portage Homes, Inc.* (1982) 2 Ohio St. 3d 26, 30.

As noted by Justice Douglas in his dissenting opinion in *Gladon v. GCRTA*,
supra:

“[i]t is something of an anomaly that the common-law doctrine of sovereign immunity which is based on the concept that ‘the king can do no wrong’ was ever adopted by the American courts.” *Id* at 304, citing *Haas v. Hayslip* (1977), 51 *Ohio St. 2d* 135, 140.

There appears an issue as to whether *Haverlack v. Portage Homes, Inc., supra* would even allow *the* state legislature to bestow blanket immunity on an incorporated political subdivision, as opposed to the sovereign state government. *See Gladon v. GCRTA, supra* at 339-340.

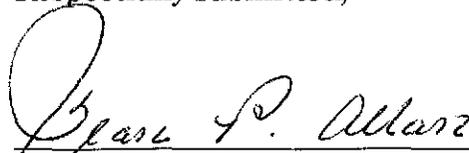
Assuming, *arguendo*, that Amicus correctly reads *Haverlack* as hypothetically empowering the legislature to forbid all tort plaintiffs from suing municipal corporations, the fact remains that the legislature has not done so. By limiting (as opposed to eliminating) the rights of injured citizens to sue such municipal corporations, the legislature is charges with crafting statutes that do not run afoul of the citizenry’s constitutionally guaranteed rights to trial by jury , due process and equal protection.

Based upon *Arbino v. Johnson & Johnson*, supra, R.C. 2744.05(C)(1) violates the due course of law requirements as contained in Section 16, Article I of the Ohio Constitution.

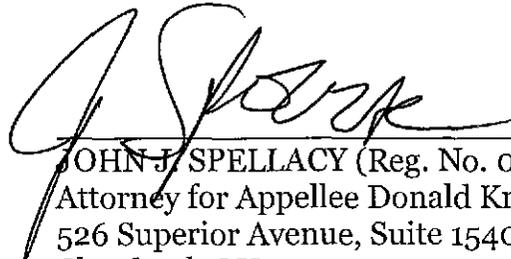
IV. Conclusion

Based upon the foregoing, Appellees Donald Krieger and Clifton Oliver request this court to affirm the decision of the court of appeals in all respects.

Respectfully submitted,



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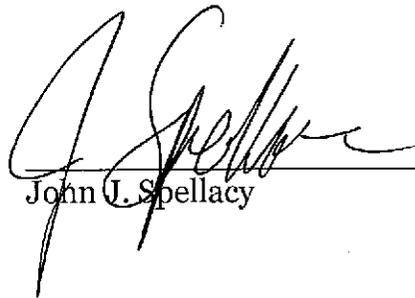
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