

IN THE SUPREME COURT OF OHIO

Jessica Simpkins, et al.,	:	
	:	Case No. 14-1953
Appellees/Cross-Appellants,	:	
	:	
vs.	:	
	:	APPEAL TO THE
Grace Brethren Church of Delaware,	:	SUPREME COURT OF
	:	OHIO FROM THE FIFTH
Appellant/Cross-Appellees.	:	DISTRICT COURT OF APPEALS

**MEMORANDUM IN SUPPORT OF JURISDICTION
 OF CROSS-APPELLANT
 GRACE BRETHERN CHURCH OF DELAWARE, OHIO**

AND

**MEMORANDUM IN OPPOSITION TO JURISDICTION
 OF APPELLEE
 GRACE BRETHERN CHURCH OF DELAWARE, OHIO**

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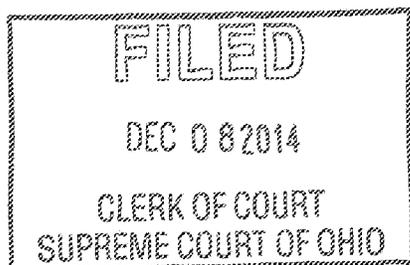


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Proposition of Law No. 1:

The foreseeability of a criminal act depends upon the knowledge of the defendant, which must be determined by the totality of the circumstances. It is only when the totality of the circumstances is “somewhat overwhelming” that the defendant will be held liable. *Reitz v. May Co. Dept. Stores* (8th Dist. 1990), 66 Ohio App.3d 188, approved and followed. For a crime of sexual violence to be foreseeable to one who has some relationship with the actor, the Plaintiff must establish that: (1) the actor had previously committed a sexual crime involving the use of force or threat of force; (2) at a time that has some temporal association with the subsequent crime5

Proposition of Law No. 2:

To justify an award of punitive damages against a church, the Plaintiff must show that the church’s leaders authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrate malice. R.C. 2315.21(C), applied; *Estate of Robert L. Beavers v. Knapp*, 175 Ohio App. 3d 758, 2008-Ohio-2023, approved and followed.9

Proposition of Law No. 3:

To establish a claim that a Defendant is liable for a subsequent criminal act committed by one it recommended or promoted to a position of employment, the Plaintiff must prove that: (1) the Defendant promoted or recommended the hiring of the person; (2) the person promoted or recommended had a propensity to engage in conduct similar to the criminal act which lead to Plaintiff’s injury; (3) the Defendant knew or should have known that the person had a propensity to engage in conduct similar to the criminal act which lead to Plaintiff’s injury; and (4) the Defendant’s negligent promotion or recommendation of the person proximately caused the Plaintiff’s injuries and damages..... 11

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**EXPLANATION OF WHY CROSS-APPELLANT'S APPEAL PRESENTS ISSUES
OF PUBLIC OR GREAT GENERAL INTEREST**

Concern for victims of crime and a means for compensating them have increased steadily over the years. Unfortunately but realistically, few criminals have the resources to compensate their victims for the harm they cause. It comes as no surprise then that victims have increasingly sought compensation from deep-pocketed third parties – e.g., a criminal’s employer or former employer whose negligence allegedly allowed the criminal act to occur. Such is the case here, where Appellant Jessica Simpkins was raped by Brian Williams, a former employee of Cross-Appellant Grace Brethren Church of Delaware (“Delaware Grace”). Simpkins’ claims against Delaware Grace were premised on the notion that prior misconduct by Williams while employed by Delaware Grace made his subsequent rape foreseeable to the church. But while inappropriate and offensive, Williams’ prior conduct Grace was neither violent nor criminal in nature. Both prior incidents – one in 1991 and one in 2002 – occurred years before he raped Simpkins. And that prior misconduct bore no degree of similarity to his violent rape of Simpkins in 2008.

For those reasons, the first trial court to review this issue, in Ross County, concluded that Williams’ rape of Simpkins was unforeseeable as a matter of law. Simpkins avoided this ruling by dismissing the Ross County action under Rule 41(A) and refiled in Delaware County. There, the court determined that whether the rape was foreseeable was a question for the jury. One of Simpkins’s claims were submitted to a jury, which returned a verdict for more than \$3.6 million.

On appeal, the Fifth District affirmed the trial court’s decision denying Delaware Grace’s motions for directed verdict, effectively holding the church liable for the criminal acts of its former employee regardless of the temporal relationship or lack of similarity between the prior conduct and what happened later.

This case presents an opportunity to resolve several important substantive legal issues not previously addressed by this Court: (1) the nature of proof required to establish that an actor's criminal conduct is foreseeable to another; (2) the elements of a claim that an employer "negligent promoted" or "negligently promoted" an employee to a position of greater responsibility; (3) the quantum of proof necessary to establish "actual malice" on the part of an actor; and (4) the vicarious liability of an employer for the malicious conduct of an employee.

Justice O'Neill wrote recently that the Court should exercise caution in announcing a new rule of law in a case on a complex subject coming as an appeal from a summary judgment because such a case "simply does not have the sufficient evidentiary record to provide the foundation for a major pronouncement." *Friebel v. Visiting Nurse Assn. of Mid-Ohio*, 2014-Ohio-4531, ¶¶ 35-37. Those concerns are not present here, as this case comes with the benefit of a full evidentiary record, three trial court decisions, a jury trial, and a lengthy appellate opinion.

The issues presented here are of great importance to both victims of crime and businesses from whom damages are sought in cases of this nature. Accordingly, Cross-Appellant respectfully asks the Court to accept and consider the merits of its appeal.

STATEMENT OF THE CASE AND FACTS

The case arises out of the rape of Appellant Jessica Simpkins by Brian Williams, who was then employed as senior pastor at Sunbury Grace Brethren Church in Delaware County.

In 2004, leaders of Delaware Grace decided to "plant" a Grace Brethren church in the Delaware County town of Sunbury. Williams, who at the time served as a youth pastor at Delaware Grace, was selected to serve as senior pastor at Sunbury Grace. For the first two years of the new church's existence, Delaware Grace provided financial support to the church and financial support and guidance to Williams in his position as senior pastor.

On March 6, 2008, Simpkins attended a counseling session with Williams at Sunbury Grace. While Simpkins and Williams were alone, Williams closed the door to his office and raped Simpkins, who was 15 years old at the time.

Simpkins and her father sued Delaware Grace, asking for both compensatory and punitive damages. Plaintiffs alleged that Delaware Grace knew that Williams had previously engaged in sexually inappropriate conduct and, notwithstanding that knowledge, “negligently promoted” Williams to the position of senior pastor at Sunbury Grace. Based on prior misconduct by Williams, Plaintiffs alleged that his rape of Simpkins was foreseeable to Delaware Grace.

The case was originally filed in Ross County, where the trial judge found as a matter of law that Williams’ 2008 rape of Simpkins was not foreseeable. Before a final judgment was entered, Plaintiffs dismissed the Ross County lawsuit without prejudice and later refiled in Delaware County. The Delaware County trial judge initially agreed with the prior decision, holding that Williams’ rape of Simpkins was unforeseeable, and entered summary judgment in favor of Delaware Grace on many of Plaintiffs’ claims (including their claims for punitive damages). Somewhat inexplicably, however, that same trial judge permitted Plaintiffs’ claims that Delaware Grace had “negligently recommended” and “negligently promoted” Williams to proceed.

At trial, Plaintiffs presented evidence of two incidents of inappropriate conduct by Williams. On a youth mission trip sometime in the early 1990’s, Williams began rubbing the shoulders of April Brown, a teenage female, and then moved his hands down her back. Williams made “skin on skin” contact with Brown’s back in the gap between the bottom of Brown’s shirt

and the top of her panty line. Brown reported the incident to her mother, and it was brought to the attention of Delaware Grace Senior Pastor Jeff Gill, who took no action against Williams.

In 2002, as part of her application to go on an international mission trip, 18 year old Robin Weixel asked Williams to conduct a mandatory pre-trip interview. During the course of that interview, Williams did four specific things: (1) shared details of his sex life with his wife; (2) told Weixel that “most men view women as a thing to be f***d;” (3) shared his views on women dressing provocatively and then used his finger to trace around the outside of the tank top Weixel was wearing; (4) told Weixel that he could get away with having sex with her in his office. Weixel reported all of that to Darrell Anderson, acting senior pastor at Delaware Grace. Anderson counseled Williams about his inappropriate behavior, but took no formal disciplinary action against him.

Plaintiffs’ theory at trial was that the earlier incidents of inappropriate conduct by Williams demonstrated “dangerous propensities” and made his 2008 rape of Jessica Simpkins foreseeable. Because it was aware of Williams’ prior behavior, Plaintiffs asserted that Delaware Grace was negligent in promoting and supporting Williams to serve as pastor at Sunbury Grace.

Arguing that Williams’ rape of Simpkins had not, as a matter of law, been foreseeable, Delaware Grace moved for a directed verdict at the end of Plaintiffs’ case-in-chief and at the conclusion of all of the evidence. Both motions were denied. The jury found in favor of Jessica Simpkins and awarded compensatory damages of \$3,651,378.85. On Plaintiff Gene Simpkins’ claim for loss of his daughter’s consortium, the jury awarded \$75,000. The trial court applied Ohio’s damage cap statute to reduce the award for Jessica Simpkins’s non-economic damages to \$350,000, entered judgment in favor of Jessica Simpkins for \$500,000, and for her father for \$75,000. Delaware Grace’s subsequent motion for judgment notwithstanding the verdict was

denied.

Both sides appealed. On the church's appeal, the Court of Appeals: (1) affirmed the trial court's denial of the church's motions for directed verdict; (2) affirmed the trial court's refusal to give certain jury instructions; (3) reversed the trial court's decision refusing to allow the jury to apportion responsibility between Delaware Grace and Williams; and (4) affirmed the trial court's denial of the church's motion for a new trial on the basis that the jury's award for future economic loss was not supported by the evidence. As to Plaintiffs' appeal, the Court of Appeals: (1) affirmed the trial court's decision rejecting Plaintiff's "as applied" constitutional challenge to Ohio's damage cap statute; (2) reversed the trial court's entry of summary judgment in favor of Delaware Grace on Plaintiffs' claim for punitive damages; (3) affirmed the trial court's finding that, for purposes of the damage cap statute, there was but one "occurrence;" and (4) affirmed the trial court's decision that R.C. 2307.60 does not conflict with R.C. 2315.18.

**CROSS-APPELLANT'S PROPOSITIONS OF LAW
AND ARGUMENTS IN SUPPORT**

Proposition of Law No. 1:

The foreseeability of a criminal act depends upon the knowledge of the defendant, which must be determined by the totality of the circumstances. It is only when the totality of the circumstances is "somewhat overwhelming" that the defendant will be held liable. *Reitz v. May Co. Dept. Stores*, 66 Ohio App.3d 188, 583 N.E.2d 1071 (8th Dist. 1990), approved and followed. For a crime of sexual violence to be foreseeable to one who has some relationship with the actor, the Plaintiff must establish that: (1) the actor had previously committed a sexual crime involving the use of force or threat of force; (2) at a time that has some temporal association with the subsequent crime.

As in any negligence case, Plaintiffs have the burden of proving the existence of a legal duty, a breach of that legal duty, and injury proximately caused from that breach. *Meniffee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 472 N.E.2d 707 (1984). The existence of a duty depends upon the foreseeability of harm. When a third person's criminal act intervenes between

a defendant's conduct and the plaintiff's injuries, the defendant's negligence is the proximate cause of the plaintiff's injuries only where the defendant could have reasonably foreseen the intervening criminal act. *Taylor v. Webster*, 12 Ohio St.2d 53, 56, 231 N.E.2d 870 (1967). Thus, the existence of a duty on the part of Delaware Grace turns on whether Williams' rape of Jessica Simpkins in 2008 was foreseeable to the church. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from a particular action or non-action. *Commerce & Industry Ins. Co. v. City of Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989).

It is well-established that "criminal behavior of third persons is not predictable to any degree of certainty." *Adkins v. RLJ Mgmt. Co.*, 5th Dist. Muskingum No. CT2011-0012, 2011-Ohio-6609, ¶ 13. Accordingly, the foreseeability of a criminal act depends upon the knowledge of the defendant, which must be determined by the totality of the circumstances. It is only when the totality of the circumstances is "somewhat overwhelming" that the defendant will be held liable. *Reitz v. May Co. Dept. Stores*, 66 Ohio App.3d 188, 583 N.E.2d 1071 (8th Dist. 1990), *March v. Steed Enterprises, Inc.*, 5th Dist. Muskingum No. CT2012-0058, 2013-Ohio-4448, ¶ 30. When a criminal act is unforeseeable to the Defendant, that Defendant is entitled to judgment as a matter of law. *Clifford v. Licking Baptist Church*, 5th Dist. Licking No. 09CA 0082, 2010-Ohio-1464, ¶ 27. *March v. Steed Enterprises, Inc.*, *supra*.

While this Court has not yet decided a case in this context, a number of intermediate court of appeals decisions are instructive relative to the foreseeability of a third-party's sexual assault. In *Wagoner v. United Dairy Farmers*, 1st Dist. Hamilton No. C-990767, 2000 Ohio App. LEXIS 5320, an 18-year-old UDF clerk (Parker) raped a 12-year-old girl in the store's bathroom while he was on duty. The victim and her family argued that the rape was foreseeable because

UDF knew that Parker had previously flirted with teenage girls who frequented the store, spoken to girls on the telephone while at work, made comments to co-workers that he was having sex or would like to have sex with certain girls, and engaged in a sexual relationship with the minor daughter of a co-worker during off-duty hours. The appellate court affirmed summary judgment for UDF, stating, “[t]he instances of prior behavior cited by [the plaintiffs] were legally insufficient to establish the foreseeability of Parker’s misconduct. Parker’s alleged flirtations and boastful comments, though sexually-oriented, were not criminal, tortious, or otherwise dangerous.”

In *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 680 N.E.2d 161 (10th Dist. 1996), a county 4-H board hired Waites, knowing of his prior sex convictions. The Tenth District affirmed judgment in favor of OSU, holding that Waites’ subsequent criminal acts were not foreseeable. Among other evidence, the appellate court noted that the molestation of the Plaintiff occurred more than a year after Waites stopped working for the board and that the incident did not occur at a 4-H event.

Similarly, in *Doe v. Beach House Development Co.*, 136 Ohio App.3d 573, 737 N.E.2d 141 (8th Dist. 2000), the court held that it was not foreseeable that a juvenile with an extensive history of delinquencies would sexually assault another boy. In *Adkins v. RLJ Mgmt. Co.*, 5th Dist. Muskingum No. CT2011-0012, 2011-Ohio-6609, the court held that evidence of a prior stabbing and other criminal activity did not constitute "overwhelming evidence" of the likelihood of a subsequent rape because those incidents were not similar in nature to a rape. In *Doe v. Blaney*, 1st Dist. Hamilton No. C-950093, 1995 Ohio App. LEXIS 5765, the court held that it was not foreseeable that a man with a history of alcohol abuse and with a criminal background involving sexual assault of a minor would later sexually assault another minor. And in *Clifford v.*

Licking Baptist Church, supra, the court held that a sexual assault by a church volunteer was not foreseeable based on evidence that the volunteer was being investigated by his employer for having pornography on his work computer.

In all of those cases, the evidence was deemed legally insufficient to support a finding of foreseeability. In the present case, Plaintiffs established two prior incidents of which Delaware Grace was aware. The first was the incident in the early 1990's when, on the church mission trip, Williams rubbed April Brown's shoulders and then moved his hands down her back to the point where Williams touched Brown's skin between the bottom of her shirt and the top of her panty line. The second was the 2001 incident when, in the course of a pre-mission trip interview, Williams shared with Weixel details of his sex life with his wife, told her that "most men view women as a thing to be f****d," used his finger to trace around the outside of the tank top Weixel was wearing, and told Weixel that he could get away with having sex with her in his office.

To be sure, Williams' conduct on both occasions was highly inappropriate. But Williams did nothing that was criminal, tortious, or which caused physical injury to either victim. Williams' conduct can in no way be viewed as "somewhat overwhelming" evidence that should have put Delaware Grace on notice that, approximately seventeen years after the mission trip incident, six years after the Weixel interview, and almost two years after Williams was no longer associated with Delaware Grace, Williams would commit a heinous rape. Williams' rape of Simpkins was, as a matter of law, unforeseeable to Delaware Grace, and under the correct standard, Delaware Grace could not be liable.

Proposition of Law No. 2:

To justify an award of punitive damages against a church, the Plaintiff must show that the church's leaders authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrate malice. R.C. 2315.21(C), applied; *Estate of Robert L. Beavers v. Knapp*, 175 Ohio App. 3d 758, 889 N.E.2d 181, 2008-Ohio-2023 (10th Dist.), approved and followed.

Recovery of punitive damages in Ohio is governed by R.C. 2315.21(C), which requires proof that the acts or omissions of the defendant demonstrate “malice or aggravated or egregious fraud” or that an employer-defendant “knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.” In opposing Delaware Grace’s motion for summary judgment, Plaintiffs argued that their claim for punitive damages was based on the “malice” branch of R.C. 2315.21(C). Malice is defined as: (1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Preston v. Mutry*, 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987). Appellants focused on the second branch of *Preston*, arguing that the church’s actions demonstrated a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm.

An award of punitive damages based on the “conscious disregard” branch of the malice test requires “a positive element of conscious wrongdoing * * *.” This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior.” *Malone v. Courtyard by Marriott Partnership* (1996), 74 Ohio St. 3d 440, 446, 659 N.E.2d 1242 (1996), quoting *Preston, supra*, at 335. In a case involving the criminal act of a third person, that requirement means that the Defendant must have actually known of the threat to the Plaintiff. Absent such proof of a defendant's subjective knowledge of

the danger posed to another, a claim for punitive damages premised on the "conscious disregard" theory of malice is not warranted. *Malone, supra*.

At the time Delaware Grace allowed Williams to become the pastor at Sunbury Grace, Williams had been employed as the youth pastor at Delaware Grace since 1988. There was no evidence that Williams had acted violently toward anyone during that period of time. Plaintiffs produced evidence that, while he worked at Delaware Grace, Williams had engaged in inappropriate conduct with two young females, once in the early 1990's on a youth mission trip and the other in the course of a counseling session in 2002. A number of years passed after both incidents, neither of which involved criminal conduct or threats of sexual violence. Between the time Williams took over as pastor at Sunbury Grace and the time he raped Simpkins in 2008, Delaware Grace received no reports of inappropriate or criminal conduct on his part. Even construing that evidence in a light most favorable to Simpkins, there was no evidence that Delaware Grace ignored a known threat of harm to Simpkins or anyone else. As such, there was simply no evidence that reasonable minds could construe as a "conscious disregard for the rights and safety of others that had a great probability of causing substantial harm."

Even assuming that Delaware Grace pastors acted with a conscious disregard for the rights and safety of others, Delaware Grace cannot be held liable for punitive damages because its governing body did not act maliciously or ratify the actions of its employees. Delaware Grace is a corporate body that acts only through its elected board of elders. Recovery of punitive damages against a Defendant requires a showing of malice or that an employer-defendant "knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate." R.C. 2315.21(C). Neither of the two earlier incidents was reported to the

church's elder board and that board was unaware of them when it made the decision to "promote" Williams to the position of senior pastor at Sunbury Grace.

Moreover, Ohio law does not permit the imposition of punitive damages against Delaware Grace for the wrongful acts of its employee acting within the scope of employment. To justify an award of punitive damages, Delaware Grace itself must have acted maliciously or authorized, participated in or ratified the employee's actionable conduct. See now Justice French's lengthy opinion in *Estate of Robert L. Beavers v. Knapp*, 175 Ohio App. 3d 758, 889 N.E.2d 181, 2008-Ohio-2023 (10th Dist.), which Appellant urges this Court to apply and adopt. In this case, Plaintiffs presented no evidence that the church's board of elders, the governing body of the church, knew of Williams' past transgressions when it "promoted" Williams to the position of senior pastor at Sunbury Grace. Nor was there evidence of inappropriate behavior by Williams after he assumed that position. Thus, there was no evidence upon which reasonable minds could find that Delaware Grace acted with a conscious disregard for the safety of anyone at Sunbury Grace.

For all of those reasons, the court of appeals erred when it reversed the trial court's entry of summary judgment in favor of Delaware Grace on Plaintiffs' claims for punitive damages.

Proposition of Law No. 3:

To establish a claim that a Defendant is liable for a subsequent criminal act committed by one it recommended or promoted to a position of employment, the Plaintiff must prove that: (1) the Defendant promoted or recommended the hiring of the person; (2) the person promoted or recommended had a propensity to engage in conduct similar to the criminal act which lead to Plaintiff's injury; (3) the Defendant knew or should have known that the person had a propensity to engage in conduct similar to the criminal act which lead to Plaintiff's injury; and (4) the Defendant's negligent promotion or recommendation of the person proximately caused the Plaintiff's injuries and damages.

It is incumbent on the trial court to give proper jury instructions on all issues submitted to

the jury. In general, a court should give party's requested jury instruction if it is a correct statement of the law as applied to the facts of the case. *Murphy v. Carrollton Manufacturing Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991).

The only claim submitted to the jury was that Delaware Grace had negligently recommended, promoted and supported the hiring of Williams by Sunbury Grace. On that claim, the church requested this instruction:

To prove that Delaware Grace Brethren Church is liable for negligently promoting, recommending or supporting Brian Williams as the senior pastor of the Sunbury Grace Brethren Church, Plaintiffs must prove each of the following elements by a preponderance of the evidence:

- 1) the Delaware Grace Brethren Church promoted, recommended or supported Brian Williams to become the senior pastor of the Sunbury Grace Brethren Church;
- 2) Brian Williams had a propensity to engage in conduct that is similar to the criminal act which he engaged in on March 6, 2008;
- 3) the Delaware Grace Brethren Church knew or should have known that William had a propensity to engage in conduct that is similar to the criminal act which he engaged in on March 6, 2008; and
- 4) the Delaware Grace Brethren Church's negligent promotion, recommendation or support of Williams as the senior pastor of the Sunbury Grace Brethren Church proximately caused Plaintiffs to suffer damages.

That instruction is consistent with Ohio law. See *Browning v. Ohio State Highway Patrol*, 151 Ohio App.3d 798, 2003-Ohio-1108, 786 N.E.2d 94, ¶ 67; *Harmon v. GZK, Inc.*, 2d Dist. Montgomery No. 18672, 2002-Ohio-545; *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 729, 729 N.E.2d 813 (10th Dist. 1999); *Stephens v. A-Able Rents Co.* 101 Ohio App.3d 20, 26, 654 N.E.2d 1315 (8th Dist. 1995). Nevertheless, the trial court gave only a general instruction on negligence. In a case involving a specific claim that the Defendant negligently recommended and promoted Williams to his position at Sunbury Grace, it was error on the part of the trial court to give only the general negligence instruction and error by the court of appeals

to affirm.

Proposition of Law No. 4:

When a proposed jury instruction is a correct statement of the law as applied to the facts of the case, a trial court has no discretion to refuse to give it on the basis that its district court of appeals has not yet formally adopted it.

Once the trial court made the determination that the issue of foreseeability was one for jury resolution, it was required to give an appropriate instruction on that topic. The trial court gave the standard “foreseeability” instruction from OJI §4.01.07. Because this case involved the foreseeability of a third-person’s criminal act, however, Delaware Grace asked for this more specific instruction, which the trial court refused to give:

In deciding whether ordinary care was used, you will consider whether Delaware Grace Brethren Church should have foreseen under the circumstances that the likely result of an act or failure to act would cause damages.

The foreseeability of a criminal act depends on the knowledge of the defendant, which must be determined by the totality of the circumstances, and it is only when the totality of the circumstances are somewhat overwhelming that the defendant will be held liable.

Citing its own decision in *March v. Steed Enterprises, Inc.*, Muskingum App., Fifth Dist. 2013-Ohio-4448, the court of appeals agreed (at ¶ 43) that the requested instruction was a correct recitation of Ohio law. Nevertheless, the trial court’s refusal to give that instruction was affirmed because, in the words of the court of appeals, “the *March* decision was not issued until October 2, 2013, several months after the June 2013 trial was held in this case.”

When a proposed jury instruction is a correct statement of the law as applied to the facts of the case, the court of appeals errs when it holds that the trial court did not abuse its discretion by not giving it simply because its district court of appeals has not yet formally adopted it.

**EXPLANATION OF WHY APPELLANTS' APPEAL DOES NOT PRESENT A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

Appellants initially challenge Ohio's damage cap statute, R.C. 2315.18, as unconstitutional "as applied" to Jessica Simpkins, an argument that this Court has not specifically addressed. Ordinarily, a novel constitutional challenge to a statute would appear to present a "substantial constitutional question" for purposes of this Court's jurisdiction. In this appeal, however, no such question is presented.

Seven years ago, this Court rejected a constitutional challenge to R.C. 2315.18 premised on arguments that a "cap" on damages was inconsistent with the Ohio Constitution's guarantees of the right to trial by jury, the right to a remedy and the "open courts" provision, the right to due process of law and the right to equal protection of the law. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. The constitutional challenge to R.C. 2315.18 in *Arbino* was a "facial" challenge, meaning that Arbino argued that there were no circumstances under which R.C. 2315.18 could constitutionally be applied. In this case, Appellants modify that argument only slightly, contending that R.C. 2315.18 is unconstitutional "as applied" to Jessica Simpkins. But in reality, Simpkins' "as applied" challenge is nothing more than a rehash of the "facial" constitutional challenges presented to and rejected by this Court in *Arbino*. So while Appellant's challenge to R.C. 2315.18 in this case is constitutional in nature, it presents no arguments not considered and rejected by the *Arbino* court.

Just as importantly, Appellants have not created a record that lends support to an "as applied" challenge to R.C. 2315.18. As noted below, the post-traumatic stress disorder Jessica Simpkins suffered as a result of being raped by Williams did not prevent her from graduating from high school with excellent grades, attending college, playing basketball at both levels or

holding a part-time job while she was in school. Her psychological treatment has been quite limited, and she has no impairment that prevents her from caring for herself or performing life-sustaining activities. So even if the Court were to hold that R.C. 2315.18 may not be constitutionally applied to some Plaintiffs, Jessica Simpkins would not fall within the ambit of that protection. There is simply no need for this Court to pass on the constitutionality of a statute in a case where the outcome would remain unchanged.

Appellant's non-constitutional arguments (Propositions 2 and 3) ask this Court to interpret R.C. 2315.18 in a manner that is inconsistent with the facts in this case, inconsistent with the language of the statute and inconsistent with common sense. For example, Appellant's proposition of law Nos. 2 and 3 suggest an interpretation of the statute that would transform, for purposes of damage caps, one incident of rape into two "occurrences" on the basis that Williams penetrated Simpkins both vaginally and orally. That statutory interpretation, even if adopted, has very limited application and hardly qualifies as an issue of public or great general interest.

Appellants' fourth proposition of law is a challenge to the constitutionality of R.C. 2307.23(C), which permits a Defendant to assert a right to "apportionment" of liability at any point in the case. Again, that argument might seem on its surface to present a substantial constitutional question. But in this case it does not. Here, no constitutional analysis of R.C. 2307.23(C) is necessary because Delaware Grace raised "apportionment" as an affirmative defense in its Answer and thus did not rely on R.C. 2307.23(C).

Because Appellants' appeal raises no substantial constitutional issues or issues of public or great general interest, Appellee asks this Court to decline to hear Appellants' appeal.

Appellee's argument in support of its position regarding
Appellants' Proposition of Law. No. 1

Appellant's first proposition of law suggests that the application of Ohio's statutory cap

on damages [R.C. 2315.18] deprives minor Plaintiffs who are victims of sexual abuse various rights guaranteed by the Ohio Constitution on an “as applied” basis. On its face, that proposition would appear to raise significant issues of constitutional law. But upon closer examination, it does not.

A. This Court’s decision in *Arbino*

In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, Arbino argued that R.C. 2315.18 was inconsistent with the Ohio Constitution’s guarantees of the right to trial by jury, the right to a remedy and the “open courts” provision, the right to due process of law, and the right to equal protection of the law, the same provisions relied on by Simpkins in this case. As noted by Appellant, the constitutional challenge to R.C. 2315.18 in *Arbino* was a “facial” challenge, meaning that she argued that there were no circumstances under which R.C. 2315.18 could constitutionally be applied.

Arbino initially argued that the statute violated the right to trial by jury because it infringed on a Plaintiff’s right to have a jury determine the full amount of damages. Acknowledging that the jury’s fact-finding function is protected, the court noted that “so long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body’s findings, [jury] awards may be altered *as a matter of law*. At ¶ 37. Further, the court found that “by limiting noneconomic damages for all but the most serious injuries, the General Assembly made a policy choice that noneconomic damages exceeding set amounts are not in the best interest of the citizens of Ohio. *** Courts must simply apply the limits as a matter of law to the facts found by the jury; they do not alter the findings of facts themselves, thus avoiding constitutional conflicts.” At ¶ 40.

Next, Arbino argued that R.C. 2315.18 violates Ohio's "open courts" and "right to a remedy" provisions, asserting that the statute "denies *any* recovery for noneconomic damages for the increment of harm greater than \$250,000." At ¶ 46. After acknowledging that R.C. 2315.18 does limit certain types of non-economic damages, this Court rejected Arbino's argument because "those limits do not wholly deny persons a remedy for their injuries" and because "it neither forecloses their ability to pursue a claim at all nor completely obliterates the entire jury award." At ¶ 47.

Arbino's next challenge to R.C. 2315.18 was based on the "due course of law" provision in Section 16, Article I of the Ohio Constitution. This Court rejected that argument as well, holding that the statute's limitation on non-economic damages "bears a real and substantial relation to the general welfare of the public." Additionally, this Court found that the legislature's determination that achieving benefits from limiting non-economic damages in some cases without limiting recovery by more seriously injured individuals was neither unreasonable nor arbitrary. At ¶¶ 53-62.

Finally, Arbino challenged R.C. 2315.18 on equal protection grounds. The court initially acknowledged that "the statute treats those with lesser injuries, i.e., those not suffering the injuries designated in R.C. 2315.18(B)(3), differently from those most severely injured." At ¶ 67. Applying a rational basis analysis, the court ruled that the statute did not deny equal protection of the law because it was rationally related to a legitimate government purpose, namely "the legitimate state interests of reforming the state civil justice system to make it fairer and more predictable and thereby improving the state's economy." At ¶ 69. The distinctions drawn by the legislature in limiting damages for certain types of injuries, the court noted, "were rational and based on the conclusion that catastrophic injuries offer more concrete evidence of noneconomic

damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations.” At ¶ 72.

Although Appellant’s memorandum is less than clear on how and why she is different from other tort claimants to whom R.C. 2315.18 applies, it appears that the basis of her “as applied” argument is that she: (a) was a minor at the time of the incident; (b) was the victim of sexual abuse; and (c) sustained “catastrophic” emotional loss despite the fact that she did not suffer significant economic loss.

A court’s ability to invalidate legislation is a power to be exercised only with great caution and in the clearest of cases. That power is circumscribed by the rule that laws are entitled to a strong presumption of constitutionality and that a party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955).

In reality, Simpkins’ “as applied” challenge is nothing but a rehash of the “facial” constitutional challenges presented to and rejected by this Court in *Arbino*. That is true because a decision accepting Simpkins’ arguments would effectively invalidate the statutory limitations on non-economic damages upheld by this Court in *Arbino*.

The damages for pain and suffering and mental anguish Simpkins suffered are nearly identical to the type of damages many tort claimants sustain. Indeed, the standard “damages” instruction in Ohio Jury Instructions defines “noneconomic loss” to include pain and suffering and mental anguish without differentiating between the two. See OJI § 315.01(5). It is the uncertain, non-quantifiable nature of these inherently subjective injuries that led the General Assembly to enact R.C. 2315.18. There is nothing that clearly and convincingly sets Simpkins apart from anyone else whose non-economic loss is in excess of the legislatively-designated caps

found in R.C. 2315.18. This Court has previously rejected a facial challenge to those caps and should reject Simpkins' "as applied" challenge as well.

B. Appellant did not create a factual record that supports an "as applied" challenge to R.C. 2315.18.

When a court is asked to find a legislative enactment unconstitutional on an "as applied" basis, there should be an adequate factual record to support that challenge. While Appellant argues that she suffered catastrophic emotional damages that may not be limited by R.C. 2315.18, the record is to the contrary.

In general, R.C. 2315.18 caps jury awards for noneconomic damages. But the statutory cap does not apply where the noneconomic losses of the plaintiff relate to "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system" or "permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities." R.C. 2315(B)(3). Appellant's best "as applied" argument would seem to be that, in enacting R.C. 2315.18, the General Assembly drew an impermissible distinction between plaintiffs who suffer physical injuries and those who sustain emotional injuries. Had the jury found that Appellant sustained emotional injuries that prevent her from being able to independently care for herself or that prevent her from performing life-sustaining activities and the trial court nevertheless applied R.C. 2315.18 to reduce her damages, that argument might well have legs. But Appellant did not ask the trial court to submit such a question to the jury, and the jury thus made no such finding.

Moreover, the analysis of this issue by court of appeals demonstrates that the constitutional issue is not properly before the Court.

While there may be nonphysical injuries the effects of which approximate those listed in R.C. 2315.18(B)(3), that is not what the evidence shows in this case. Though [Dr.] Smalldon testified Simpkins has post-traumatic stress disorder and

low grade depression, there is no suggestion that the effect of these injuries approximates the effect of a permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or that her emotional injury permanently prevents her from being able to independently care for herself and perform life-sustaining activities. Simpkins testified she is afraid of the dark, sometimes has anxiety, and has some trust issues with men. However, after the incident, Simpkins played basketball in high school and college, got good grades in college, is currently employed full-time, has not sought or participated in mental health treatment or counseling since 2008, and does not have current plans to seek treatment. Thus, the evidence shows that she is able to independently care for herself and perform life-sustaining activities. Accordingly, Simpkins failed to present clear and convincing evidence of a presently existing set of facts such that R.C. 2315.18 violates her due process rights when applied to those facts.

Because accepting Appellant's "as applied" challenge to R.C. 2315.18 would effectively negate this Court's decision in *Arbino* and because the record does not provide an adequate factual basis to support an "as applied" challenge, Appellant's arguments should be rejected.

Appellee's argument in support of its position regarding
Appellants' Proposition of Law. Nos. 2 and 3

If this Court follows *Arbino* and applies R.C. 2315.18 as written, Appellant's second and third propositions of law suggest that Simpkins was the victim of two "separate and distinct" occurrences and that the \$350,000 cap should therefore be applied once to each occurrence, either as a matter of statutory interpretation or because a contrary interpretation violates the "open courts" and "right to a remedy" provisions found in Article I, Section 16 of the Ohio Constitution. Neither argument has merit.

Citing *Madvad v. Russell*, 9th Dist. Lorain No. 96CA-006652, 1997 Oho App. LEXIS 5181, Appellants argue that, because Simpkins was the victim of two separate criminal acts (i.e. oral and vaginal penetration), there were two occurrences and two injuries for purposes of R.C. 2315.18 and the Ohio Constitution. *Madvad* was a sexual abuse case, but the only issue before the court involved the statute of limitations. Madvad alleged that she was sexually assaulted by Russell "throughout her childhood and once as an adult" (emphasis added). At *2. Thus, there

were multiple acts of sexual abuse that occurred over a lengthy period of time and, presumably, in a number of different places. Under those facts, Delaware Grace agrees that there were separate “occurrences,” at least with respect to the person who abused the Plaintiff. But those are not the facts in this case, and *Madvad* does not support Appellants’ argument.

Contrasting the facts in this case with those in *Madvad*, the court of appeals noted that “the oral and vaginal penetration in this case occurred within a short period of time, in a confined geographic space, and without any intervening factors.” At ¶ 93. Simpkins did not testify that she was affected differently by the two events. Simpkins’ damage expert, psychologist Dr. Jeffrey Smalldon, testified that she suffered post-traumatic stress disorder and depression. But Dr. Smalldon’s did not express an opinion that there was more than one occurrence or injury. In fact, his testimony was to the contrary – that Simpkins suffered one indivisible injury:

Q. Is it your opinion to a reasonable degree of psychological certainty that the post-traumatic stress disorder from which she [Simpkins] suffers is a direct result of *the incident with Brian Williams*? {emphasis added}

A. Yes.

While there were two separate instances of penetration, both occurred within a very short period of time, in a confined space and without any intervening act. There was no testimony separating the incidents that would justify separate damage awards for each. And there was no request from the Plaintiffs that the jury consider separate awards for each act of penetration. Without that foundation, there is no basis to reverse the court of appeals determination that there was one “occurrence” and that a single cap should be applied for purposes of R.C. 2315.18.

Additionally, in addition to applying a cap on damages to “each occurrence that is the basis of that tort action,” R.C. 2315.18 also applies to “any one person’s bodily injury.” Not to each bodily injury, but to any one person’s bodily injury. So if a claimant sustains two broken

arms and two broken legs in an accident, R.C. 2315.18 limits recovery for non-economic damages to a total of \$350,000 even though she arguably sustained four separate and distinct injuries.

Appellants' "open courts" and "right to a remedy" arguments are premised on the notion that Simpkins sustained two separate injuries and two separate and identifiable types of damage. Because she did not, the Court may resolve the issue of whether there was more than one occurrence or injury without the need for constitutional interpretation.

Appellee's argument in support of its position regarding
Appellants' Proposition of Law. No. 4

Appellants' final proposition of law argues that R.C. 2307.23(C) violates Ohio's "Modern Courts Amendment." The essence of Article IV, Section 5 of the Ohio Constitution is that, with respect to procedural matters arising in the course of litigation, the Ohio Rules of Civil Procedure take precedence over statutes enacted by the General Assembly.

Generally speaking, R.C. 2307.22 and 2307.23(A) require the trier of fact to apportion liability between each party from whom the plaintiff seeks recovery and any other at-fault party from whom the plaintiff has not sought recovery. R.C. 2307.23(C) permits a Defendant to raise apportionment as an affirmative defense any time before trial, even if the defense had not previously been raised in an Answer. Without explicitly saying so, Appellants apparently argue that R.C. 2307.23(C) conflicts with Civil Rule 8(C) (which deems affirmative defenses waived unless raised in an Answer) and Civil Rule 15 (which gives to the trial court discretion regarding the filing of amended pleadings).

The Answer filed by Delaware Grace included the following affirmative defense:

SECOND DEFENSE

In the event that liability on the part of either of these Defendant [sic] is

established, each Defendant is liable for only that portion of Plaintiff's damages caused by his or its own proportionate share of fault. See Ohio Revised Code 2307.22 (D).

With Delaware Grace having raised apportionment as a defense in its Answer (which the court of appeals recognized at ¶ 55 of its decision), it did not need seek leave to amend its Answer, nor did it do so. While the church subsequently filed a “Notice of Intent to Seek Apportionment” as permitted by R.C. 2307.23(C), that filing was not technically necessary. Given that, it was not necessary for either the trial court or the court of appeals to undertake a constitutional analysis of R.C. 2307.23.

Moreover, Appellant did not assert a constitutional challenge to R.C. 2307.23 in the trial court. In opposing Delaware Grace’s request for a jury instruction on apportionment, Appellant argued that the apportionment statute was not applicable under the facts of this case. But at no time did Appellants even suggest that R.C. 2307.23 was unconstitutional. The trial court decided *sua sponte* that R.C. 2307.23 was unconstitutional, without notice to Delaware Grace and without affording Delaware Grace an opportunity to defend the constitutionality of the statute. Citing this Court’s decision in *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, the court of appeals noted that “[d]eclaring a statute unconstitutional, *sua sponte*, without notice to the parties would be ‘unprecedented’ when neither party has raised a constitutional issue.” At ¶ 56. For that reason and because Appellants did not challenge the constitutionality of R.C. 2307.23 in the trial court, their arguments cannot succeed in this Court.

CONCLUSION

For the reasons stated, Cross-Appellant Grace Brethren Church of Delaware, Ohio respectfully asks this Court to accept jurisdiction and to consider the merits of its appeal but to decline jurisdiction over the appeal filed by Appellants Jessica and David Simpkins.

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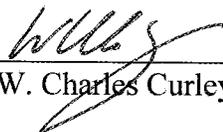
CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was sent via regular U.S. mail, postage prepaid, this 8th day of December 2014, to the following:

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JESSICA SIMPKINS, et al
Plaintiffs-Appellees/Cross-Appellants

-vs-

GRACE BRETHERN CHURCH OF
DELAWARE, OHIO

Defendant-Appellant/Cross-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney

Case No. 13 CAE 10 0073

OPINION

I hereby certify the within be a true
copy of the original on file in this office.
Court of Appeals
Delaware Co., Ohio
Jan Antonopoulos, Clerk of Courts
By Jan Antonopoulos Deputy

CHARACTER OF PROCEEDING:

Civil appeal from the Delaware County
Court of Common Pleas, Case No. 12 CV C
05 0605

JUDGMENT:

Affirmed in Part, Reversed and Remanded
in Part

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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For Defendant-Appellant/Cross-Appellee

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2014 AUG - 8 PM 1:48
JAN ANTONIOPOLOS
CLERK

A-1

Gwin, P.J.

{¶1} Appellant/Cross-Appellee and Appellees/Cross-Appellants appeal the judgment by the Delaware County Court of Common Pleas.

Facts & Procedural History

{¶2} In March of 2008, appellee/cross-appellant Jessica Simpkins ("Simpkins") was raped by Brian Williams ("Williams"), the senior pastor at Sunbury Grace Brethren Church ("Sunbury"). Williams pled guilty to two counts of sexual battery in violation of R.C. 2907.03(A)(12) and was sentenced to two consecutive four-year prison terms. Williams previously worked as a youth pastor at appellant/cross-appellee Grace Brethren Church of Delaware, Ohio ("Delaware Grace"). Simpkins and her father Gene Simpkins originally sued Sunbury, Delaware Grace, Pastor Darrell Anderson ("Anderson") and Williams in Ross County Common Pleas Court. While that case was pending, Simpkins settled all claims against Sunbury for \$90,000. In June of 2011, Simpkins dismissed the case without prejudice after the Ross County Common Pleas Court granted Delaware Grace's summary judgment motion on all but one of the claims -- negligent hiring, retention, and supervision.

{¶3} On May 25, 2012, Simpkins re-filed the case in Delaware County Court of Common Pleas against Delaware Grace and Anderson. The complaint alleged that, for a number of years, Williams was employed as a youth pastor by Delaware Grace; that in the early 1990's Delaware Grace learned that Williams had engaged in sexually inappropriate sexual conduct with a minor female associated with Lexington Grace Brethren Church but took no action; that in 2001, Delaware Grace learned that Williams had made inappropriate sexual comments to and inappropriately touched a female he

was counseling but took no action; and that in 2004, Williams left his employment with Delaware Grace and became senior pastor at Sunbury with the assistance, financial support, guidance, and supervision of Delaware Grace. Simpkins alleged causes of action for intentional infliction of emotion distress, breach of fiduciary duty, willful wanton and reckless misconduct, negligence, negligent hiring, retention and supervision, failing to report child abuse, and respondeat superior. The complaint sought damages for past and future economic and non-economic injury to Simpkins, punitive damages, and loss of consortium injuries for her father Gene Simpkins.

{¶4} Delaware Grace and Anderson filed motions for summary judgment. On March 20, 2013, the Delaware County Common Pleas Court issued a judgment entry incorporating the Ross County judgment entry on summary judgment and dismissing the claims for intentional infliction of emotional distress, breach of fiduciary duty, willful wanton and reckless misconduct, punitive damages, negligence, and respondeat superior. As such, the trial court granted summary judgment to Anderson on all counts. The trial court granted summary judgment to Delaware Grace on all counts except one and permitted a trial on negligent hiring, retention, or supervision, or negligent recommendation, promotion or support. The trial court set the case for trial on June 11, 2013.

{¶5} During the preliminary discussions with the trial court, the parties indicated there was some confusion with the trial court's summary judgment entry regarding whether the foreseeability of Williams' conduct was a factual issue to be submitted to the jury. From the bench on June 11, 2013 and in a written entry on June 12, 2013, the trial court issued a revised summary judgment entry stating that, "to the extent that any

party construes the Ross County decision as finding no factual issue regarding the Delaware church's ability to anticipate or foresee [Williams'] misconduct, this Court declines to accept or follow that ruling." The trial court thus expanded the Ross County ruling to permit a trial on claims that the alleged damages proximately resulted from negligence by Delaware Grace in hiring, retaining, or supervising Williams, or in recommending, promoting and supporting his hiring and retention by Sunbury.

{¶6} The trial commenced on June 11, 2013. April Brown, fka Jokela ("Brown") testified that she attended Lexington Grace Brethren Church ("Lexington Grace") in Richland County and, in the early 1990's, when she was between 13 and 16 years of age, her church went on a joint mission trip with Delaware Grace. Williams was the youth pastor of Delaware Grace at the time. Brown testified that while at a concert during the mission trip, Williams started rubbing her shoulders, moved his hand down her back between her shirt and the overalls she was wearing, and continued to move his hand down right at her panty line so his hand was on her skin on her lower back and the top area of her buttocks. Brown jerked forward and left the concert.

{¶7} Brown initially told her friend Jason about the incident during the trip and told her mother, Mary Storz ("Storz"), about the incident when she returned home. Jason Saxton testified that April was upset and shaken up and told him that day that Williams attempted to put his hand up her shirt and then down her pants. Storz reported the incident to Lexington Grace. Brown and Storz testified that there subsequently was a meeting at Lexington Grace between Brown, Storz, Brown's youth pastor, Williams, and other Delaware Grace officials. Brown could not remember the names of the individuals who attended from Delaware Grace, but thought it was a

senior pastor and elders or deacons. Brown stated that, during the meeting, she gave a full account of what happened to her, including that she felt scared and uncomfortable, and Williams apologized and said he was sorry if she felt uncomfortable. Brown testified that Delaware Grace officials made light of the incident and acted as if she were making it up. Storz stated that, at the end of the meeting, one of the men from Delaware Grace said, "let's just keep this quiet to protect our brother." Storz was upset and felt the officials from Delaware Grace were protecting Williams. Neither Brown nor Storz reported the incident to law enforcement and neither contacted Delaware Grace after the meeting to find out if Delaware Grace took any action with regard to Williams.

{¶8} Robin Weixel ("Weixel") fka McNeal testified that she attended Delaware Grace when Williams was the youth pastor. In 2002, when she was eighteen (18) years old, Weixel applied to go on a mission trip and had to meet with a pastor as part of the application process. When she met with Williams, he did several things Weixel felt were inappropriate: shared the details of his sex life with his wife with Weixel; told Weixel that "most men view women as a thing to be fucked;" shared with Weixel his view on women dressing provocatively; used his finger to trace around the outside of the tank top she was wearing over her shoulder; and told her he could get away with having sex with her right there and then in his office, but his guilty conscience would stop him. Weixel reported the incident to Anderson and, during a meeting with Williams and Anderson, Williams told her he did not remember saying those things, but if he did, he was sorry.

{¶9} Anderson testified that in 2002 he was the acting senior pastor at Delaware Grace and was on the elder board. Anderson confirmed that though Williams was leaving to be the senior pastor at Sunbury, he remained on the payroll at Delaware

Grace until December 31 of 2005. Further, that Delaware Grace gave Sunbury a lot of financial support, including \$40,000 in 2005, \$20,000 in 2006, and \$10,000 in 2007. Anderson said Weixel contacted her after the incident in 2002 and said Williams offended her and she needed Anderson to go with her to talk with Williams. Anderson did not view this as a complaint by Weixel. Anderson testified the conduct was inappropriate as there was sexual language involved. Anderson did not report the conduct to the other members of the elder board, but met with Williams afterwards and told him the conduct was inappropriate. Anderson testified that Weixel never asked him to go further with the information. Further, that he had no other indication that what happened in 2008 would happen and had no knowledge of the Brown incident.

{¶10} Gary Underwood ("Underwood"), senior pastor at Delaware Grace since October of 2004, testified that Anderson never told him about the 2002 incident and no records reflect the 2002 incident or the earlier 1990's incident. Underwood confirmed that Delaware Grace provided financial support and guidance to Sunbury after Delaware Grace decided to "plant" a Grace Brethren church in the town of Sunbury. Underwood stated that Williams' behavior was inappropriate and should have been reported. Underwood would not have supported Williams as pastor of Sunbury if he had known about the Brown and/or Weixel incident.

{¶11} Williams testified he rubbed Brown's shoulders on the mission trip. He remembers after the incident meeting with David Martin, Jeff Gill, Brown, and the pastor from Lexington Grace. Williams confirmed he was inappropriate with Weixel when he made a statement about having sex with her and when he traced the outline of her tank top. Anderson reprimanded him verbally for his conduct. Williams assumed the board

of elders was told, but he did not know. Williams testified Delaware Grace assured him of their support to become pastor of Sunbury and, if they were not going to support him, he was going to look for another job. Williams reported weekly to the Delaware Grace elder board regarding his activities as senior pastor at Sunbury and, for a period of time, Anderson acted as his supervisor while Williams was at Sunbury. Williams stated that, after 2006 or 2007, Delaware Grace did not have authority over the Sunbury budget other than the contributions they provided.

{¶12} Gene Simpkins testified that, prior to the incident, Simpkins was happy, bubbly and cheery and, after the incident, she was angry, demanding, and withdrawn. Due to the incident, Gene Simpkins stated he lost his trust in the church and missed how his daughter used to act.

{¶13} Simpkins testified that on March 6, 2008, when she was fifteen (15) years old, she went to a counseling session with Williams. Simpkins had been attending Sunbury since her freshman year in high school. At the counseling session on March 6, 2008, Williams closed the door, dropped his pants, and told Simpkins to suck his penis, which Simpkins eventually did. Simpkins tried to get away, but Williams blocked the door, pushed her to the ground, removed her pants, and inserted his penis into her vagina. Simpkins testified that, after the incident, it was hard for her to go back to school because everyone was talking about her. She briefly saw a counselor for nightmares about being kidnapped or raped. After Simpkins graduated high school, she played basketball in college until she had to quit due to an injury. She is currently working full-time as a cashier. Simpkins got good grades in college. When asked how the incident affected her, Simpkins testified that she thinks about the incident two to

three times per week and has anxiety when she thinks about the incident, has trust issues with men, and is afraid of the dark. Simpkins has not had mental health counseling or treatment since 2008 and does not have current plans to seek mental health counseling or treatment.

{¶14} Jeffrey Smalldon ("Smalldon"), a clinical psychologist, testified that he interviewed Simpkins three times and diagnosed her with chronic post traumatic stress disorder and dysthymic disorder (low grade depression). Smalldon stated that Simpkins does not want to talk about the incident, is distrustful of men, is afraid of the dark, and has anxiety. Smalldon concluded that Simpkins is in need of long-term treatment.

{¶15} Robin Frey, the bookkeeper at Delaware Grace since 2002 testified that, through the incident date of March of 2008, monthly payments were made from Delaware Grace to Sunbury, though those payments reduced in amount each year.

{¶16} David Martin ("Martin"), who sat on the elder board at Delaware Grace in the late 1980's and early 1990's, said he never saw or heard Williams do or say anything inappropriate. Martin recalls having a meeting with Williams, a girl, the girl's mother, and a pastor from another church. Martin testified that, at the meeting, Williams apologized and Martin thought the issue had been resolved.

{¶17} Rita Boham ("Boham") is a member of Delaware Grace who frequently went on youth trips with Williams as a female staff member. Boham never saw or heard him do or say anything appropriate. Boham testified that Jeff Gill contacted her after a trip in the 1990's and Jeff Gill and Martin asked her if anything inappropriate happened on the trip. Boham told them Williams and another female staff raced around and

elbow-teased and maybe he should not have acted like that. Boham testified that Jeff Gill asked her not to discuss the incident with other people.

{¶18} Jeff Gill ("Gill") was the senior pastor at Delaware Grace from 1982 to 2002. Gill testified that when he met with the pastor at Lexington Grace regarding the Brown incident, he told the other pastor he would investigate Brown's claims. Williams told Gill that Brown was angry with him and that he only rubbed her shoulders. Gill and Martin interviewed the other adults on the trip and they said many people were rubbing each other's shoulders. When Gill and Martin met with Brown, Storz, and the other pastor, Williams read a statement. Gill testified that he did not say "let's keep this quiet to protect our brother." Gill felt the issue was resolved that day after Williams read his statement.

{¶19} The jury found Delaware Grace negligent and specifically found Delaware Grace was aware of the past behavior of Williams and failed to do a proper investigation and documentation of the previous two incidents and, as a result, Williams was empowered to a greater responsibility as senior pastor at Sunbury. The jury returned a verdict in favor of Simpkins for \$1,378.85 for past economic damages, \$1,500,000 for past non-economic damages, \$150,000 for future economic damages, and \$2,000,000 for future non-economic damages for a total of \$3,651,378.85. The jury also returned a verdict for Simpkins' father in the amount of \$75,000 for loss of consortium.

{¶20} After the jury returned their verdict, the parties filed briefs on damages. On August 5, 2013, the trial court issued a judgment entry applying a setoff of \$1,378.85 in connection with the settlement with Sunbury, applied Ohio's damages cap statute of R.C. 2315.18 to reduce the award for Simpkins' past and future non-economic damages

to \$350,000, and entered judgment for Simpkins in the amount of \$500,000 and for her father Gene in the amount \$75,000 on his loss of consortium claim. Delaware Grace subsequently filed a motion for judgment notwithstanding the verdict and motion for new trial or remittitur. The trial court denied the motion for judgment notwithstanding the verdict and denied the motion for new trial. However, the trial court granted Delaware Grace's motion for remittitur and reduced Simpkins' future economic damages to \$60,000. The trial court gave Simpkins time to accept or reject the remittitur after the parties' appeals are exhausted. Delaware Grace appeals and assigns the following as error:

{¶21} "I. WILLIAMS' PRIOR MISCONDUCT WAS, AS A MATTER OF LAW, INSUFFICIENT TO MAKE HIS SUBSEQUENT RAPE OF SIMPKINS FORESEEABLE.

{¶22} "II. A TRIAL COURT MUST GIVE A PARTY'S REQUESTED JURY INSTRUCTION IF IT IS A CORRECT STATEMENT OF THE LAW AS APPLIED TO THE FACTS OF THE CASE. IN THIS CASE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE APPELLANT'S PROPOSED JURY INSTRUCTIONS ON: (A) PLAINTIFFS' CLAIM FOR NEGLIGENT PROMOTION, RECOMMENDATION AND SUPPORT, AND (B) THE ISSUE OF FORESEEABILITY.

{¶23} "III. IN A TORT CASE WHERE PLAINTIFF'S DAMAGES WERE CAUSED BY AN INTENTIONAL RAPE BY A CHURCH PASTOR AND THE ALLEGED NEGLIGENCE OF THE PASTOR'S PRIOR EMPLOYER, R.C. 2307.22 AND 2307.23 REQUIRE THE JURY TO APPORTION LIABILITY BETWEEN THE PASTOR-RAPIST AND THE PASTOR'S PRIOR EMPLOYER.

{¶24} "IV. WHEN A PLAINTIFF TESTIFIES THAT SHE HAS NO INTENTION OF SEEKING FUTURE PSYCHOLOGICAL TREATMENT, ANY JURY AWARD FOR FUTURE ECONOMIC LOSS FOR SUCH TREATMENT IS NOT SUPPORTED BY THE EVIDENCE."

{¶25} Appellee/Cross-appellant Simpkins assigns the following as error:

{¶26} "I. THE TRIAL COURT ERRED IN REDUCING THE JURY VERDICT FOR JESSICA SIMPKINS' NON-ECONOMIC DAMAGES AS R.C. 2315.18 IS UNCONSTITUTIONAL UNDER THE OHIO AND UNITED STATES CONSTITUTIONS AS APPLIED TO JESSICA SIMPKINS.

{¶27} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DGBC ON THE ISSUE OF PUNITIVE DAMAGES.

{¶28} "III. THE TRIAL COURT ERRED IN HOLDING THAT JESSICA SIMPKINS SUFFERED A SINGLE "INJURY OR LOSS" FOR PURPOSES OF APPLYING R.C. 2315.18.

{¶29} "IV. THE TRIAL COURT ERRED IN RULING THAT JESSICA SIMPKINS SUFFERED A SINGLE INJURY OR LOSS AS THAT RULING VIOLATES THE OHIO CONSTITUTION.

{¶30} "V. THE TRIAL COURT ERRED IN REFUSING TO AWARD JESSICA SIMPKINS' FULL DAMAGES PURSUANT TO R.C. 2307.60."

I.

{¶31} Delaware Grace argues that the trial court erred in denying their motions for directed verdict and motion for judgment notwithstanding the verdict because the

prior misconduct by Williams was, as a matter of law, insufficient to make his conduct in 2008 foreseeable.

Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict

{¶32} A trial court's decision on a motion for directed verdict presents a question of law, which an appellate court reviews de novo. *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170. Civil Rule 50 provides for a motion for directed verdict, which may be made at the opening statement of the opponent, at the close of opponent's evidence, or at the close of all the evidence. Upon receiving the motion, the trial court must construe the evidence most strongly in favor of the party against whom the motion is directed. Civil Rule 50(A)(4). If the trial court finds on any determinative issue reasonable minds could come but to one conclusion on the evidence submitted, then the court shall sustain the motion and direct the verdict as to that issue. A directed verdict is appropriate where a plaintiff fails to present evidence from which reasonable minds could find in plaintiff's favor. See *Hargrove v. Tanner*, 66 Ohio App.3d 693, 586 N.E.2d 141 (9th Dist. 1990).

{¶33} The standard for granting a motion for judgment notwithstanding the verdict under Civil Rule 50(B) is the same used for granting a Civil Rule 50(A) directed verdict. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 693 N.E.2d 271 (1998); *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 121, 671 N.E.2d 252, 256 (1996). In other words, as long as substantial competent evidence supports the non-moving party, and reasonable minds could reach different conclusions about that evidence, the motion must be denied. See *Strother v. Hutchinson*, 67 Ohio St.2d 282, 284-85, 423 N.E.2d 467 (1981); *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45

Ohio St.2d 271, 275, 344 N.E.2d 334 (1976). In reviewing a motion for JNOV, courts do not consider the weight of the evidence or the witness credibility; rather, courts consider the much narrower legal question of whether sufficient evidence exists to support the verdict. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 693 N.E.2d 271 (1998); *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 121, 671 N.E.2d 252, 256 (1996).

Negligence & Foreseeability

{¶34} Negligent retention, supervision, hiring, and/or promotion are negligence-based torts which require proof of the basic elements of negligence: duty, breach, proximate cause, and damages. *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516 (10th Dist.). The existence of a duty in a negligence case is a question of law for a court to determine and there is no formula for ascertaining whether such a duty arises. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). When considering a claim based upon negligent hiring or retention, the issue of whether a duty is owed is based upon the foreseeability of the injury. *Evans v. Ohio State University*, 112 Ohio App.3d 724, 680 N.E.2d 161 (10th Dist. 1996). The existence of an employer-employee relationship imposes a duty upon the employer to prevent foreseeable injury to others by exercising reasonable care to refrain from employing an incompetent employee. *Chapa v. Genpak, LLC*, 10th Dist. Franklin No. 12AP-466, 2014-Ohio-897. Injury is foreseeable if a defendant knew or should have known that his act was likely to result in harm to someone. *Mudrich v. Standard Oil Co.*, 153 Ohio St.31, 39, 90 N.E.2d 859 (1950).

{¶35} The foreseeability of a criminal act depends upon the knowledge of the defendant, which must be determined by the totality of the circumstances. *March v. Steed Enterprises, Inc.* 5th Dist. Muskingum No. CT2012-0058, 2013-Ohio-4448. It is when the totality of the circumstances is "somewhat overwhelming" that a defendant will be held liable. *Id.*

{¶36} Upon our de novo review, we find no error by the trial court to deny the motions for directed verdict and motion for judgment notwithstanding the verdict as the prior conduct of Williams was not, as a matter of law, insufficient to make his 2008 conduct foreseeable. In this case, the two prior incidents which Delaware Grace became aware of both consisted of sexual misconduct and involved minor females being supervised or counseled by Williams as a church employee either at the church or at a church camp. In light of this similar prior conduct, we find the totality of the circumstances indicates that a reasonable jury could have found that Delaware Grace should have reasonably foreseen the 2008 incident. Reasonable minds could also differ as to whether Delaware Grace took reasonable steps to protect Simpkins and whether these incidents should have influenced the church's retention and promotion of Williams to Sunbury. There is a need for the trier of fact to weigh and determine witness credibility regarding these issues. Because reasonable minds could have reached different conclusions on whether the 2008 incident was foreseeable, the trial court properly denied the motions for directed verdict and motion for judgment notwithstanding the verdict. Delaware Grace's first assignment of error is overruled.

II.

{¶37} Delaware Grace argues the trial court erred in refusing to give a specific jury instruction they requested on negligent promotion/recommendation/support and erred in refusing to give their requested jury instruction on foreseeability.

{¶38} The trial court has the duty to instruct the jury on the applicable law on all issues raised by the pleadings and evidence, and it must give jury instructions that correctly and completely state the law. *Pallini v. Dankowski*, 17 Ohio St.2d 51, 245 N.E.2d 353 (1969); *Marshall v. Gibson*, 19 Ohio St.3d 10, 482 N.E.2d 583 (1985), *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E. 2d 1170. A jury charge should be "a plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall*, 19 Ohio St.3d at 12, 482 N.E.2d 583. Furthermore, "[a] charge ought not only be correct, but it should also be adapted to the case and so explicit as not to be misunderstood or misconstrued by the jury." *Id.* Ordinarily, a trial court should give requested jury instructions if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusions sought by the instruction. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991).

{¶39} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens*, 90 Ohio App.3d 338, 629 N.E.2d 462 (3rd Dist. 1993). In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Whether the jury instructions

correctly state the law is a question of law, which we review de novo. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991). Jury instructions must be reviewed as a whole. *State v. Coleman*, 37 Ohio St.3d 286, 525 N.E.2d 792 (1988).

Negligent Recommendation, Retention, Promotion Instruction

{¶40} Delaware Grace argues the trial court erred in failing to give the specific negligent recommendation, retention, and promotion instruction it requested. To prove the claims of negligent hiring, retention, supervision, retention, or promotion, a plaintiff must establish: (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of the incompetence, (4) the employer's act causing the plaintiff's injuries, and (5) the employer's negligence in hiring, retaining, or supervising the employee as the proximate cause of the plaintiff's injuries. *Clifford v. Licking Baptist Church*, 5th Dist. Licking No. 09 CA 0082, 2010-Ohio-1464. Negligent supervision and retention are negligence-based torts which require proof of the basic elements of negligence; and the elements as listed above "correspond with the basic elements of negligence – duty, breach, proximate cause, and damages." *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516 (10th Dist.); *Ball v. Stark*, 10th Dist. Franklin No. 11AP-177, 2013-Ohio-106.

{¶41} In this case, the trial court provided the jury with the instruction for negligence, including an instruction on duty, ordinary care, the test for foreseeability, proximate cause, and damages. These basic elements of negligence correspond directly to the elements listed in the instruction requested by Delaware Grace. Accordingly, we find the trial court did not err in refusing to give the instruction as a trial

court may refuse to give an instruction that is redundant. *Bostic v. Connor*, 37 Ohio St.3d 144, 524 N.E.2d 881 (1988).

Foreseeability

{¶42} Delaware Grace further contends the trial court erred in failing to give their requested instruction on foreseeability. The trial court gave the standard Ohio Jury Instruction for foreseeability. The trial court then added a sentence that "foreseeability for future intentional criminal conduct requires stronger knowledge than foreseeability of other possible future conduct." Delaware Grace sought an instruction consisting of the standard Ohio Jury Instruction for foreseeability plus an additional sentence that "the foreseeability of a criminal act depends on the knowledge of the defendant, which must be determined by the totality of the circumstances, and it is only when the totality of the circumstances are somewhat overwhelming that the defendant will be held liable." Delaware Grace asserts this sentence is a correct statement of law and is required by our decision in *March v. Steed Enterprises, Inc.* 5th Dist. Muskingum No. CT2012-0058, 2013-Ohio-4448.

{¶43} While we agree Delaware Grace's instruction is a correct recitation of the law pursuant to our decision in the *March* case, the *March* decision was not issued until October 2, 2013, several months after the June 2013 trial was held in this case. Accordingly, the trial court did not abuse its discretion in failing to give the foreseeability instruction requested by Delaware Grace.

{¶44} Delaware Grace's second assignment of error is overruled.

III.

{¶45} Delaware Grace argues the trial court erred in failing to require the jury to apportion liability between Williams and Delaware Grace. We agree.

{¶46} R.C. 2307.23(A) requires the trier of fact to make factual findings specifying the percentage of fault attributable to the plaintiff, to each party from whom the plaintiff seeks recovery, and attributable to each person from whom plaintiff does not seek recovery in the action. Once the jury makes these findings, R.C. 2307.22 provides that, when more than one tortfeasor has proximately caused a person's damage, any tortfeasor who caused fifty percent or less of the conduct is responsible for only his or her proportional share of the economic loss. R.C. 2307.22. However, if the trier of fact determines that more than fifty percent of the tortious conduct is attributable to one defendant, the defendant is jointly and severally liable for all compensatory damages that represent economic loss. R.C. 2307.22. With regard to noneconomic damages, if a trier of fact determines that two or more persons proximately caused the same injury, each defendant is liable only for their proportionate share of the compensatory damages that represent noneconomic loss and this proportionate share is calculated by multiplying the total amount of noneconomic damages awarded to plaintiff by the percentage of tortious conduct that was determined pursuant to R.C. 2307.23 to be attributable to that defendant. R.C. 2307.22(C).

Vicarious Liability

{¶47} The trial court's first reason for denying Delaware Grace's request for an instruction and jury interrogatories on apportionment was its determination that R.C. 2307.24(B) rendered R.C. 2307.22 inapplicable due to Simpkins' claims being based on

vicarious liability and thus the trial court treated Williams and Delaware Grace as one person for purposes of the apportionment statutes. R.C. 2307.24 provides as follows:

Sections 2307.22 and 2307.23 of the Revised Code do not affect any other section of the Revised Code or the common law of this state to the extent that the other section or common law makes a principal, master, or other person vicariously liable for the tortious conduct of an agent, servant, or other person. For purposes of Section 2307.22 of the Revised Code, a principal and agent, a master and servant, or other persons having a vicarious liability relationship shall constitute a single party when determining percentages of tortious conduct in a tort action in which vicarious liability is asserted.

{¶48} The Supreme Court of Ohio has stated that, "an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior." *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712. Further, that it is "axiomatic that for the doctrine of respondeat superior to apply, an employee must be liable for a tort committed in the scope of his employment." *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991), quoting *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988).

{¶49} In Ohio, negligent hiring, supervising, and retention are separate and distinct from torts from other theories of recovery such as negligent entrustment and respondeat superior and an employer can be held independently liable for negligently

hiring, supervising, or retaining an employee. *Stephens v. A-Able Rents Co.*, 101 Ohio App.3d 20, 654 N.E.2d 1315 (8th Dist. 1995); *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991); *Lutz v. Chitwood*, 337 B.R. 160 (Bankr. S.D. Ohio 2005) (applying Ohio law). As noted by one author, "the vicarious liability of an employer for torts committed by employees should not be confused with the liability an employer has for his own torts. An employer whose employee commits a tort may be liable in his own right for negligence in hiring or supervising the employee * * * [b]ut that is not vicarious liability." Kenneth S. Abraham, *The Forms and Functions of Tort Law*, 2nd Ed. 166, (2002).

{¶50} Accordingly, a church may be held liable for both the negligence of its employees who are acting in the scope of their employment as well as their own negligence. *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991). Further, courts examining causes of action for negligent hiring, retention, supervision, or promotion, analyze them separately from respondeat superior or vicarious liability causes of action, which require a scope of employment analysis. See *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991); *Clifford v. Licking Baptist Church*, 5th Dist. Licking No. 09 CA 0082, 2010-Ohio-1464; *DiPietro v. Lighthouse Ministries*, 159 Ohio App.3d 766, 2005-Ohio-639, 825 N.E.2d 630 (10th Dist.). While an employer may be held vicariously liable for acts of their employees in the scope of the employment, Ohio courts have generally held an intentional tort such as sexual assault or rape, "which in no way facilitates or promotes the employer's business, is so far outside the scope of employment that employers should not be held liable for such acts under the doctrine of

respondeat superior or vicarious liability.” *Stephens v. A-Able Rents Co.*, 101 Ohio App.3d 20, 654 N.E.2d 1315 (8th Dist. 1995).

{¶51} In this case, as made clear by the trial court’s original judgment entry and amended judgment entry on summary judgment, the only cause of action submitted to the jury was negligence by Delaware Grace in hiring, retaining, or supervising Williams, or in recommending, promoting, and supporting his hiring and retention by Sunbury. The trial court granted summary judgment to Delaware Grace on Simpkins’ cause of action for respondeat superior for the actions of Williams while in the scope of his employment. As noted above, unlike in a respondeat superior or vicarious liability cause of action, there is no requirement to prove in Simpkins’ negligent hiring, retention, promotion, support, recommendation, or supervising cause of action that Williams’ conduct occurred within the scope of employment. The only cause of action submitted to the jury was based on Delaware Grace’s own independent negligence. Accordingly, we find the trial court erred in declining to provide the apportionment instruction and interrogatories based upon the vicarious liability exception contained in R.C. 2307.24 because the claim submitted to the jury was based not on vicarious liability but on claims Delaware Grace itself was negligent.

Waiver of Affirmative Defense & Constitutionality of Statute

{¶52} The trial court also declined to give the jury the apportionment instruction because it found that Delaware Grace did not timely raise R.C. 2307.22 as a defense and that R.C. 2307.23(C), which allows a defendant to raise R.C. 2307.22 as an affirmative defense at any time prior to trial, is unconstitutional. We disagree with the trial court.

{¶53} R.C. 2307.23(C) provides, in pertinent part that:

It is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property * * * is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the tort action from whom the plaintiff seeks recovery in this action may raise an affirmative defense under this division at any time before the trial of the action.

{¶54} Pursuant to the liberal pleading requirements of Civil Rule 8, the pleadings of the parties to an action need only be in general terms. A defendant's answer is subject to the same notice-pleadings standards as a plaintiff's complaint, and an affirmative defense is generally adequate as long as the plaintiff receives fair notice of the defense. Civil Rule 8.

{¶55} In this case, the second defense in Delaware Grace's answer is that, "in the event that liability on the part of either of these Defendants is established [Delaware Grace or Anderson], each Defendant is liable for only that portion of Plaintiff's damages caused by his or her own proportionate share of fault." Further, approximately two-and-a-half weeks before trial, Delaware Grace filed a "Notice of Intent to Seek Apportionment." Based upon the notice pleading rules set forth in Civil Rule 8(C), Delaware Grace provided Simpkins with fair notice of the apportionment defense in its answer. Further, even if we found the answer to be insufficient to raise the defense,

Delaware Grace raised the issue by filing its notice of intent several weeks prior to trial in accordance with R.C. 2307.23 which states the affirmative defense can be raised at any time before trial.

{¶56} The trial court also declined to give the apportionment instruction because it declared R.C. 2307.23 unconstitutional. The Ohio Supreme Court has noted that, “[d]eclaring a statute unconstitutional, sua sponte, without notice to the parties would be ‘unprecedented’ when neither party has raised a constitutional issue.” *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016.

{¶57} In this case, prior to the empaneling of the jury, Delaware Grace requested the trial court include in its jury instructions an instruction on apportionment of liability. The trial court indicated it would reserve its final ruling on the issue, but stated it felt the apportionment statute was not applicable in this case because it is a vicarious liability issue so Delaware Grace and Williams are treated as one person. Subsequently, near the end of the trial when there was a hearing regarding jury instructions and objections thereto, the trial court, for the first time and without it being raised by Simpkins, found R.C. 2307.23 directly conflicts with the rule that a trial judge has the discretion to determine whether a party can amend a pleading and thus is an unconstitutional violation of the Modern Courts Amendment, Ohio Constitution, Article IV, Section 5, as well as the Due Process Clause of the Ohio and U.S. Constitutions.

{¶58} We find the trial court erred when it sua sponte found R.C. 2307.23(C) unconstitutional without providing notice to the parties. Prior to declaring the statute unconstitutional, the trial court did not give the parties notice that it intended to consider the constitutionality of the statute. Where neither party raised a constitutional argument

before the court, it should not sua sponte declare a statute unconstitutional without providing parties notice of the court's intention and the opportunity to respond. *In re K.A.G.*, 12th Dist. Warren No. CA2012-10-101, 2013-Ohio-780.

{¶59} Based on the foregoing, we sustain Delaware Grace's third assignment of error and find the trial court erred in refusing to allow the jury to consider apportionment.

IV.

{¶60} Delaware Grace next argues the trial court erred in failing to grant its motion for new trial because future economic loss was not supported by the evidence as Simpkins testified she did not have current plans to seek mental health treatment.

{¶61} Civil Rule 59(A) permits a new trial to be granted to a party on all or part of the issues based upon any one of the nine enumerated grounds. Civil Rule 59(A)(6) allows for a new trial when the "judgment is not sustained by the weight of the evidence." When considering a motion for a new trial pursuant to Civil Rule 59(A)(6), a court must weigh the evidence and pass on the credibility of the witnesses. A new trial will not be granted where the verdict is supported by competent, substantial, and apparently credible evidence. *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201. Because a trial court is in the best position to decide issues of fact, it is vested with broad discretion in ruling upon motions for new trial based upon Civil Rule 59(A)(6). *Id.* Our standard of review on a motion for new trial is abuse of discretion. Civil Rule 59. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶62} "A plaintiff's claim for future medical expenses must be supported by evidence that reasonably establishes the amount likely to be incurred for the future medical treatment." *Bowers v. Next Generation Films, Inc.*, 5th Dist. Richland No. 08 CA 43, 2009-Ohio-1153. If an alleged injury is subjective in character, the claimant must present expert evidence as to future pain and suffering or permanence. *Id.* However, without evidence in the record reflecting that the jury was wrongfully influenced or that the award was manifestly excessive or inadequate, a reviewing court may not interfere with a jury's verdict on damages. *Nevins v. Ohio Dept. of Transp.*, 132 Ohio App.3d 6, 724 N.E.2d 433 (10th Dist. 1998), citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994).

{¶63} In this case, Smalldon testified that Simpkins would need weekly counseling for one year, monthly counseling for five years, and ten times per year in the foreseeable future after that. Smalldon stated counseling costs \$200 per session. Further, Smalldon testified Simpkins should see a psychiatrist five times per year for ten years at \$300 per session. Delaware Grace filed a motion for new trial or a remittitur to the amount testified by Smalldon (\$60,000) rather than the \$150,000 in future economic loss awarded by the jury. The trial court denied the motion for new trial, but granted the remittitur in the amount of \$60,000.

{¶64} We find the trial court did not abuse its discretion in denying the motion for new trial and instead granting the remittitur. The testimony by Smalldon was evidence that reasonably establishes the amount likely to be incurred for future medical treatment. Simpkins did not testify she would never seek out mental health counseling

in the future and thus her testimony does not completely preclude an award for future economic loss. Delaware Grace's fourth assignment of error is overruled.

Cross-Assignment of Error I

{¶65} Simpkins argues the trial court erred in reducing the jury verdict for noneconomic damages as R.C. 2315.18 is unconstitutional as applied. In *Arbino v. Johnson*, the Ohio Supreme Court held that R.C. 2315.18 does not violate the right to a trial by jury, the right to a remedy, the right to an open court, the right to due process of law, the right to equal protection of the laws, or the separation of powers, and is therefore constitutional on its face. 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. In a facial constitutional challenge, the challenger must establish that no set of circumstances exists under which the act would be valid and requires proof beyond a reasonable doubt. *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898.

{¶66} A party raising an as applied constitutional challenge alleges that "the application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Yajnik v. Akron Dept. of Health, Housing Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632. "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Id.* To prevail on a constitutional challenge to the statute as applied, the challenger has the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional when applied to those facts. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377. The Ohio Supreme Court defined the

standard of clear and convincing evidence as the "measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954).

{¶67} In this case, Simpkins makes substantially the same arguments as set forth by the plaintiff in *Arbino*, but instead of arguing R.C. 2315.18 is facially unconstitutional, argues that the statute is unconstitutional as applied to her.

{¶68} When the constitutionality of legislation is in question, we must interpret the applicable constitutional provisions and "acknowledge that a court has nothing to do with the policy or wisdom of a statute" as this is the exclusive province of the legislative branch of government. *State ex rel. Ohio Congress Parents & Teachers v. State Board of Education*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148.

Right to Trial by Jury

{¶69} Simpkins argues R.C. 2315.18, as applied to her, is unconstitutional because it deprives a minor victim of sexual abuse from having his or her damages fully assessed by the jury. We disagree.

{¶70} In *Arbino*, the Ohio Supreme Court found as long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered as a matter of law and the right to a jury trial does not extend to the determination of questions of law. 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. Accordingly, a court does not violate a plaintiff's right to trial by jury when it applies a statutory limit on noneconomic damages

to the facts found by the jury. *Id*; *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205.

{¶71} In this case, the jury made its findings of fact and the trial court, as a matter of law, applied the limits imposed by R.C. 2315.18 to the findings of fact after they were determined by the jury and did not alter the findings of fact themselves. Simpkins has not demonstrated that the application of R.C. 2315.18 in this case affects her differently than any other tort claimant whose damages are limited by the statute with regards to the right to a jury trial. There is thus no clear and convincing evidence that the statute unconstitutionally violates her right to a jury trial.

Open Courts and Right to a Remedy

{¶72} Simpkins contends that, as applied, R.C. 2315.18 violates her right to a remedy or the "open courts" provision of the Ohio Constitution. We disagree.

{¶73} In *Arbino*, the plaintiff argued R.C. 2315.18 violates the right to a remedy and the open courts provision because it denies any recovery for noneconomic damages for the increment of harm above \$250,000. The Ohio Supreme Court determined that the limits do not wholly deny a person remedy for their injuries and that injured persons not suffering the catastrophic injuries in R.C. 2315.18(B)(3) may still recover full economic damages, up to \$350,000 in noneconomic damages, and punitive damages; and that these available remedies are "meaningful" remedies under the Constitution. 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420.

{¶74} In this case, Simpkins is not denied a meaningful remedy as she is entitled to recover economic damages and \$350,000 in noneconomic damages. While the statute prevents her from obtaining the same dollar figure she may had received prior to

the effective date of the statute, it does not foreclose upon her ability to pursue a claim at all or nor completely obliterate the entire jury award. Further, Simpkins has failed to demonstrate the application of R.C. 2315.18 affects her right to "open courts" differently than it affects other tort claimants whose damages are limited by the statute. Accordingly, there is not clear and convincing evidence the statute unconstitutionally violates her right to a remedy.

Due Process

{¶75} Simpkins contends R.C. 2315.18 violates her right to due process because though her injuries were catastrophic, they were not physical injuries and thus she is denied due process of law because she is not entitled to utilize the exceptions listed in R.C. 2315.18(B)(3) for emotional or mental injuries.

{¶76} As considered in *Arbino*, R.C. 2315.18 neither restricts nor denies a fundamental right and thus due process issues must be analyzed under a rational basis test and the constitutionality of the statute must be upheld if it "bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable and arbitrary." 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. In *Arbino*, the court determined R.C. 2315.18 bears real and substantial relation to the general welfare of the public and the statute is not arbitrary or unreasonable as the statute alleviates the concern about imposing the cost solely on those most severely injured because it allows for limitless noneconomic damages for those suffering catastrophic injuries. *Id.* The Ohio Supreme Court reasoned that the General Assembly, in deciding that exceptions would only apply in certain

circumstances, made a policy choice that noneconomic damages exceeding set amounts are not in the best interest of the citizens of Ohio. *Id.*

{¶77} Under Ohio law, a tort plaintiff may recover unlimited compensatory damages for noneconomic losses if the plaintiff has sustained either “permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system,” or “permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.” R.C. 2315.18(B)(3).

{¶78} We find there is not clear and convincing evidence that the damages cap is unreasonable or arbitrary as to Simpkins. While there may be nonphysical injuries the effects of which approximate those listed in R.C. 2315.18(B)(3), that is not what the evidence shows in this case. Though Smalldon testified Simpkins has post traumatic stress disorder and low grade depression, there is no suggestion that the effect of these injuries approximates the effect of a permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or that her emotional injury permanently prevents her from being able to independently care for herself and perform life-sustaining activities. Simpkins testified she is afraid of the dark, sometimes has anxiety, and has some trust issues with men. However, after the incident, Simpkins played basketball in high school and college, got good grades in college, is currently employed full-time, has not sought or participated in mental health treatment or counseling since 2008, and does not have current plans to seek treatment. Thus, the evidence shows that she is able to independently care for herself and perform life-sustaining activities. Accordingly, Simpkins failed to present clear and convincing evidence of a presently

existing set of facts such that R.C. 2315.18 violates her due process rights when applied to those facts.

Equal Protection

{¶79} Simpkins contends R.C. 2315.18 violates her right to equal protection because it is unreasonable and arbitrary to create two classes of victims based upon those suffering from physical injury versus minor victims of sexual assault suffering from permanent, non-physical, catastrophic injuries without significant economic loss.

{¶80} In *Arbino*, the Court determined R.C. 2315.18 is facially neutral and thus the statute denies equal protection only if the General Assembly lacked any reasonable justification for its enactment and if it is not rationally related to a legitimate government purpose. 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. The rational basis test requires that a statute be upheld if it is rationally related to a legitimate government purpose even if its classifications are not precise. *Id.* The Court stated that though the statute treats those with lesser injuries differently from those most severely injured, R.C. 2315.18 is rationally related to the legitimate state interest of making sure 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. *Id.* As noted by the Ohio Supreme Court, while noneconomic damage limits may or may not be the best way to address the perceived problems with the inherent subjectability and difficulty in evaluating noneconomic awards, the court is not the forum in which to second-guess such legislative choices. *Id.* The Court determined the distinctions the legislature drew in refusing to limit certain injuries contained in R.C. 2315.18(B)(3) while limiting other injuries were rational and based on the conclusion that the injuries

covered by the exceptions offered more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations. *Id.*

{¶81} Simpkins has failed to present clear and convincing evidence that the damages caps is unreasonable or arbitrary as applied to her with regards to equal protection. As discussed above, while there may be nonphysical injuries the effects of which approximate the effect of a permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or permanently prevents a plaintiff from begin able to independently care for herself and perform life-sustaining activities, that is not what the evidence shows in this case.

{¶82} Accordingly, since Simpkins has shown that she suffered a permanent, non-physical injury, the issue is whether R.C. 2315.18 violates equal protection by capping her damages but not capping the noneconomic damages of a plaintiff who has suffered from one of the physical conditions in R.C. 2315.18(B)(3). This question was answered by the Ohio Supreme Court in *Arbino* when it determined that the distinction between those with one of the physical conditions in R.C. 2315.18(B)(3) (those with the most severe injuries) and those without one of those conditions (those with lesser injuries) was rationally related to a legitimate government purpose and was grounded on a reasonable justification. 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. Specifically, that this distinction was rationally related to the General Assembly's stated goals that tangible injuries represent more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper

external considerations. *Id.* As stated in *Arbino*, the Ohio Supreme Court is not the proper forum in which to second-guess such legislative choices. *Id.*

{¶83} Based upon the foregoing, we find the trial court did not err in reducing the jury verdict for noneconomic damages as R.C. 2315.18 is not unconstitutional as applied to Simpkins. Simpkins' first assignment of error is overruled.

Cross-Assignment of Error II

{¶84} Simpkins argues that the question of whether Delaware Grace's conduct warranted an award of punitive damages is an issue for the trier of fact when considering the evidence and thus the trial court erred in granting summary judgment on punitive damages. We agree.

{¶85} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶86} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review

the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶87} The award of punitive damages in tort actions is currently governed by Ohio statute. R.C. 2315.21 provides that damages are not recoverable from a defendant in a tort action unless the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that the defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate. R.C. 2315.21(C)(1). The Ohio Supreme Court defines malice for the purposes of punitive damages as, "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of another person that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987). "Since punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required." *Id.* Only the second type of malice articulated in *Preston* is applicable in this case.

{¶88} Punitive damages are recoverable in a negligent hiring, supervision, or retention case. *A. Doe v. First Presbyterian Church (USA)*, 126 Ohio App.3d 358, 710 N.E.2d 367 (5th Dist. 1998); *Stephens v. A-Able Rents Co.*, 101 Ohio App.3d 20, 654 N.E.2d 1315 (8th Dist. 1995). Even where a plaintiff proves a claim of negligent hiring, supervision, or retention, the plaintiff must establish malice (as defined above) before he is entitled to recover punitive damages. *Id.*

{¶89} In this case, the trial court granted summary judgment on punitive damages based upon the Ross County ruling that punitive damages could not be

established because the actions of Delaware Grace were not foreseeable. However, in its subsequent, clarified, ruling, the trial court stated that, "to the extent that any party construes the Ross County decision as finding no factual issues regarding the Delaware church's ability to anticipate or foresee [Williams'] misconduct, this Court declines to accept or follow that ruling." Accordingly, the trial court specifically allowed the jury to determine foreseeability and punitive damages should not have been precluded on that basis.

{¶90} Delaware Grace argues there is no evidence from which a jury could award punitive damages because there is no evidence of conscious disregard for Simpkins' rights and safety. We disagree and find that reasonable minds could differ on whether Delaware Grace's conduct demonstrated a conscious disregard for Simpkins' rights and safety having a greater probability of substantial harm such that the issue of punitive damages may be submitted to the jury. See *A. Doe v. First Presbyterian Church (USA)*, 126 Ohio App.3d 358, 710 N.E.2d 367 (5th Dist. 1998). In Brown and Stotz's depositions, they testified that the Delaware Grace officials at the meeting, including the senior pastor and someone from the board of elders, made light of the incident. Stotz's affidavit provides that she heard a Delaware Grace official state they should "keep things silent to protect our brother." Gill was the senior pastor and member of the board of elders and did not make a report of the Brown incident and placed nothing in Williams' file regarding the incident. Anderson, a senior pastor and a member of the elder board, knew about the Weixel incident and also knew that Williams continued to work with young women at the church. Underwood stated he would not have supported Williams as pastor at Sunbury if he would have known about the

incidents. Boham was told by Gill not to discuss an incident between Williams and staff members that she felt might have been inappropriate.

{¶91} Accordingly, we find a genuine issue of material fact exists as to whether Delaware Grace showed a conscious disregard for the rights and safety of Simpkins that has a great probability of causing substantial harm. Simpkins' second assignment of error is sustained.

Cross-Assignments of Error III and IV

{¶92} Simpkins argues the trial court erred in finding that she suffered a single "injury or loss" for purposes of R.C. 2315.18 because she suffered two distinct occurrences. We disagree.

{¶93} R.C. 2315.18(A)(5) defines "occurrence" as "all claims resulting from or arising out of any one person's bodily injury." R.C. 2315.18(B)(2) limits noneconomic damages "for each occurrence that is the basis of that tort action." Unlike the case cited by Simpkins in support of her argument in which numerous sexual assaults throughout childhood were found to be separate incidents for the purposes of statute of limitations, *Madvad v. Russell*, 9th Dist. Lorain No. 96CA006652, 1997 WL 760898, the oral and vaginal penetration in this case occurred within a short period of time, in a confined geographic space, and without any intervening factors. The testimony of Smalldon supports the position that there is one indivisible injury as he testified that Simpkins' post-traumatic stress disorder is the direct result of the incident with Williams and he does not distinguish between the two actions.

{¶94} Simpkins further argues even if Ohio's damage cap statute is constitutional, the trial court erred when it applied the cap to two separate "occurrences"

because it violates her rights under the “open courts” and “right to a remedy” provision of the Ohio Constitution. Simpkins asserts that the *Arbino* court upheld the constitutionality of the statute because R.C. 2315.18 operates as a limitation on damages, not a complete denial of a remedy to an injured person.

{¶95} Simpkins’ argument assumes that she sustained two separate incidents and is not compensated for one of them. However, as discussed above, this assumption is inconsistent with the evidence, as the oral and vaginal penetration occurred in one setting only a minute or so apart and Smalldon’s testimony did not differentiate their effect on Simpkins. This is a single course of wrongful conduct at the same time and place and there is no evidence Simpkins suffered separate, different, or additional damage from any separate part of the sexual assault.

{¶96} Accordingly, the trial court did not err in determining a single cap applied for purposes of R.C. 2315.18. Simpkin’s fourth cross-assignment of error is overruled.

Cross-Appellant’s Assignment of Error V

{¶97} Simpkins argues the trial court erred in applying the damage cap in R.C. 2315.18 because R.C. 2315.18 conflicts with R.C. 2307.60, which provides that, “anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically exempted by law * * *.” We disagree.

{¶98} R.C. 2307.60 does not establish a separate cause of action and is simply a codification of the Ohio common law rule that a civil action is not merged into a criminal prosecution for the same acts that form the basis for the civil action. *McNichols v. Reinnicker*, 5th Dist. No. 2002 AP 04 0026, 2002-Ohio-7215. “It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the

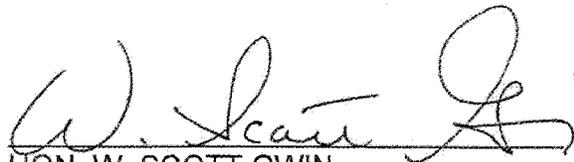
Revised Code be read as an interrelated body of law.” *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522. Pursuant to R.C. 1.51, “[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both.” Here, we find that the statutes can be construed so that effect is given to both as R.C. 2307.60 does not create any substantive rights. Thus, no conflict exists between R.C. 2307.60 and R.C. 2315.18 and cross-appellant’s fifth assignment of error is overruled.

{¶99} Based on the foregoing, we affirm in part and reverse and remand in part the judgment entries of the Delaware County Common Pleas Court. Delaware Grace’s first, second, and fourth assignments of error are overruled. Delaware Grace’s third assignment of error is sustained. Simpkins’ first, third, fourth, and fifth assignments of error are overruled. Simpkins’ second assignment of error is sustained.

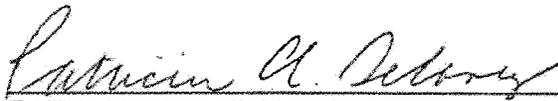
By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur


HON. W. SCOTT GWIN


HON. SHEILA G. FARMER


PATRICIA A. DELANEY

WSG:clw 0721

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JESSICA SIMPKINS, ET AL.

Plaintiffs-Appellees/Cross-Appellants

-vs-

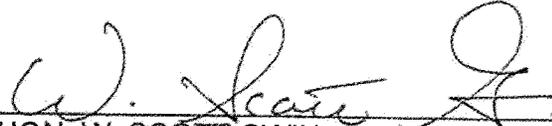
GRACE BRETHERN CHURCH OF
DELAWARE, OHIO

Defendant-Appellant/Cross-Appellee

JUDGMENT ENTRY

CASE NO. 13 CAE 10 0073

For the reasons stated in our accompanying Memorandum-Opinion, we affirm in part and reverse and remand in part the judgment entries of the Delaware County Common Pleas Court. Costs split equally between the parties.


HON. W. SCOTT GWIN


HON. SHEILA G. FARMER


PATRICIA A. DELANEY

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FILED

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
DELAWARE COUNTY, OHIO
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JESSICA SIMPKINS, et al.,
Plaintiffs-Appellees/Cross-Appellants

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-vs-

JUDGMENT ENTRY

GRACE BRETHERN CHURCH OF
DELAWARE, OHIO

Defendant-Appellant/Cross-Appellee

CASE NO. 13 CAE 10 0073

This matter came before the Court upon cross-appellee Grace Brethren Church of Delaware, Ohio's ("Delaware Grace") application for reconsideration pursuant to App.R. 26(A) filed on August 18, 2014. Cross-appellants' filed a memorandum in opposition on August 27, 2014.

App. R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified. In *Mathews v. Mathews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist. 1981), the court stated: [t]he test generally applied in [A]pp. R. 26(A) motion[s] is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." See also *State v. Owens*, 112 Ohio App.3d 334, 678 N.E.2d 956 (11th Dist. 1996), *Erie Ins. Exchange v. Colony Dev. Corp.*, 136 Ohio App.3d 419, 736 N.E.2d 950 (10th Dist. 2000).



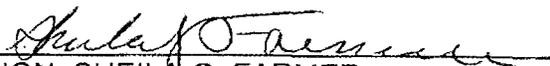
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A review of Delaware Grace's application reveals that they have not demonstrated any obvious error or pointed out any issue that was not adequately addressed in the opinion. "An Application for Reconsideration is not designed for use in instances where the parties simply disagree with the conclusions reached and logic used by an appellate court. App. R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *Id.* Delaware Grace has made no such demonstration in their application for reconsideration and instead re-argues the positions advanced in their merit brief.

Upon a complete review of Delaware Grace's application and arguments we find that there are no obvious errors or incomplete consideration by the Court of any issue presented for review. For these reasons, Delaware Grace's application for reconsideration is not well taken and, accordingly, is hereby denied.

IT IS SO ORDERED.


HON. W. SCOTT GWIN


HON. SHEILA G. FARMER


HON. PATRICIA A. DELANEY

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IN THE COURT OF COMMON PLEAS

ROSS COUNTY, OHIO

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JANE DOE, et al.

PLAINTIFFS,

CASE NO. 09 CI 155

-VS-

JUDGE ATER

BRIAN WILLIAMS, et al.

JOURNAL ENTRY

DEFENDANTS.

* * * * *

This cause came on for consideration on the Motion for Summary Judgment filed October 14, 2010 by Defendant Grace Brethren Church of Delaware. The Plaintiffs, Jane Doe, a minor female, and her father, John Doe, oppose said motion and have filed a Memorandum Contra to which Defendant filed a Reply Memorandum.

Plaintiffs' First Amended Complaint filed September 27, 2010 alleges that Defendant Brian Williams, then a Senior Pastor at Sunbury Grace Brethren Church of Sunbury, Ohio, orally and vaginally raped and committed sexual battery upon Jane Doe during a counseling session at Defendant Williams' office on March 6, 2008. On June 23, 2008, Defendant Williams pleaded guilty to two counts of Sexual Battery, a violation of O.R.C. 2907.03(A)(12), in the Delaware County Court of Common Pleas. Defendant was sentenced to two consecutive terms of four years on each count. Plaintiffs commenced this civil action on March 15, 2010 against Defendant Brian Williams, Defendant Sunbury Grace Brethren Church of Sunbury,

Ohio and Defendant Grace Brethren Church of Delaware, Ohio. On May 20, 2010, Plaintiff filed a Stipulation of Dismissal as to Defendant Sunbury Grace Brethren Church stating that all claims against Sunbury have been settled and resolved.

The pertinent facts are that Defendant Williams was employed by Delaware Grace Brethren Church from 1989 to 2004 as Youth Counselor and then Associate Pastor. In 1991, while a Youth Pastor, Defendant was supervising a youth mission trip sponsored by Delaware Grace. During the course of this trip, Williams rubbed a fifteen year old girl's shoulder and slid his hands underneath the straps of her overalls. The fifteen year old girl was a member of Lexington Grace Brethren Church. The Lexington Pastor alerted Delaware Grace to this incident. A meeting was then held between Defendant Williams, the Senior Pastor of Delaware Grace, a church elder, the Lexington Pastor, the fifteen year old girl and the girl's mother. At the meeting, Williams offered an apology but denied any improper motive. Delaware Grace took no further action against Williams. As part of that same trip, a female chaperone alleged in her affidavit that Williams reached over and placed his hand on her upper thigh without her consent. This person confronted Williams personally about the incident, but did not report it to Delaware Grace officials.

In 2001, an eighteen year old female member of the Delaware Grace youth group was interviewed by Williams as required before embarking on an international mission trip. During this interview, the following conduct occurred:

1. Williams related the details of his sex life with his wife;
2. Williams told her that most men view women as a "thing to be fucked";

3. Williams told her that she could help men remain sexually pure by refraining from wearing sexually provocative clothing, and to illustrate his point, Williams touched her shoulder with his finger and traced the outline of her tank top.
4. Williams told her that he could have sex with her in the office and get away with it, but he wouldn't because his guilty conscience would stop him.

Defendant Williams explained his behavior as an attempt to help her understand some of the dangers she would face as a young woman on a missionary trip to a foreign country. The woman reported this conduct to Delaware Grace's Pastor. A meeting was then held between Williams, the woman and the Church Pastor. It was determined that Williams had used inappropriate language and acted inappropriately, but no further action was undertaken. The incident was not reported to church elders.

Delaware Grace officials decided to start a new church in Sunbury, Ohio. In 2004, Defendant Williams was selected to undertake the role of planting the church which would become Sunbury Grace Brethren Church. Williams would act as pastor. In 2007, Plaintiff Jane Doe was a member of Sunbury Grace Brethren Church and attended a church camp at Delaware Grace Brethren Church. She counseled at Sunbury Grace with Defendant Williams and also counseled with the Delaware Grace pastor. Her father, John Doe, also counseled with Delaware Grace Brethren Church in 2007.

In May of 2007, Williams sexually propositioned Jane Doe at the Sunbury Church. She did not report this incident to her parents or church officials at either Delaware Grace or Sunbury Grace. On another occasion in 2007, Williams exposed his penis to Jane Doe. This incident was neither reported to Sunbury Grace nor Delaware Grace. On March 6, 2008, Jane Doe was counseling with Williams. Doe was then fifteen years old and a sophomore in high school. During this counseling session, according to Doe's deposition, she was forced to perform oral sex on Williams and then Williams forcibly engaged in vaginal intercourse with her.

Plaintiff's Complaint alleges the following causes of action against Defendant Delaware Grace Brethren Church:

- 1. Intentional infliction of emotional distress;**
- 2. Breach of fiduciary duty;**
- 3. Willful, wanton and reckless misconduct;**
- 4. Negligence;**
- 5. Negligent hiring, retention and supervision;**
- 6. Negligence in failing to report child abuse and criminal acts;**
- 7. Respondeat Superior.**

Defendant Delaware Grace Brethren Church seeks summary judgment on the above-referenced claims. A party seeking summary judgment on the ground that the non-moving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the non-moving party's claim. Dresher v. Burt (1996), 75 Ohio

St. 3d 280. Once the moving party sets forth specific reasons for summary judgment, the non-moving party bears a reciprocal burden to produce evidence on any element essential to his case for which he bears the burden of proof at trial. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108. The moving party bears the burden of showing that no genuine issue of material fact exists for trial. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64. Thus, a court may grant summary judgment if: (1) there is no genuine issue as to any material fact that remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in its favor. Leibreich v. A. J. Refrigeration, Inc. (1993), 67 Ohio St. 3d 266.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To establish a claim of intentional infliction of emotional distress, a plaintiff must show the defendant (1) intended to cause emotional distress, or knew or should have known that its actions would result in serious emotional distress to plaintiff, (2) by engaging in extreme and outrageous conduct and (3) which proximately caused serious emotional distress. Phung v. Waste Management, Inc. (1994), 71 Ohio St. 3d 408. To be extreme and outrageous conduct, is conduct that has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369.

Essentially, Plaintiffs' intentional infliction of emotional distress claim against Defendant Delaware Grace is that Defendant, despite knowledge of Defendant Williams' past conduct towards young women, took no action to warn or protect others from Defendant Williams. The Court finds that when considering the evidence most strongly in Plaintiffs' favor, Defendant Grace Brethren's failure to act, despite knowledge of Williams' past inappropriate conduct, does not amount to extreme and outrageous conduct. When notified of Williams' conduct, the church met with Williams and addressed his behavior. Further, it was not foreseeable that Williams' inappropriate touching and behavior towards young women in 1991 and 2002 would likely lead to sexual assault in 2008. It cannot be said that Defendant Delaware Grace possessed knowledge of a certain and impending sexual assault and let it happen.

Defendant Delaware Grace Brethren Church is hereby granted summary judgment on Plaintiffs' intentional infliction of emotional distress claim.

BREACH OF FIDUCIARY DUTY

A claim of breach of fiduciary duty is basically a claim for negligence, involving a higher standard of care. Strock v. Pressnel (1988), 38 Ohio St. 3d 207. In proving liability, a plaintiff must show the existence of a duty on the part of the defendant not to subject the plaintiff to the injury complained of, a failure to observe such duty, and an injury proximately caused by that failure. Id. A fiduciary relationship exists where one has placed a special confidence and trust in another. In re: Termination of Employment (1974), 40 Ohio St. 2d 107.

There is no dispute that Plaintiffs Jane and John Doe counseled briefly with Darrell Anderson, pastor of Defendant Delaware Grace Brethren in 2007. Jane Doe counseled only to comply with a juvenile court order. Neither Plaintiffs were members of Delaware Grace, but were members of Sunbury Grace. After construing the evidence most strongly in Plaintiffs' favor, the Court finds there was no special confidence and trust between Plaintiffs and Defendant Delaware Grace Brethren Church.

Further, even if such a trust existed for any reason, to further prevail on this claim, Plaintiffs must show a breach of duty. As outlined in the intentional infliction of emotional distress discussion above, it was not foreseeable that Defendant would commit a sexual assault based on his past inappropriate conduct. There was no prior history of violent sexual assault or rape. Moreover, there was a considerable length of time between the past conduct (1991, 2002) and the act complained of (2008). Such distant inappropriate behavior was too far removed from the sexual assault to be foreseeable. Accordingly, Defendant Delaware Grace is granted summary judgment on Plaintiffs' claim for a breach of fiduciary duty.

WILLFUL, WANTON AND RECKLESS MISCONDUCT

Wanton and reckless conduct is defined as perversely disregarding a known risk, or acting or intentionally failing to act in contravention of a duty, knowing or having reason to know of facts which would lead a reasonable person to realize such conduct creates an unreasonable risk of harm substantially greater than the risk necessary to make the conduct negligent. Thompson v. McNeil (1990), 53 Ohio St. 3d 102. As to "wanton misconduct", the Supreme Court of Ohio has held:

“We agree with appellants that the issue of wanton misconduct is normally a jury question. Matkovich v. Penn Cent. Transp. Co. (1982), 69 Ohio St. 2d 210, 23 O.O. 3d 224, 431 N.E.2d 652. The standard for showing wanton misconduct is, however, high. In Hawkins v. Ivy (1977), 50 Ohio St.2d 114, 4 O.O.3d 243, 363 N.E.2d 367, syllabus, we held that wanton misconduct was the failure to exercise any care whatsoever. In Roszman v. Sammett (1971), 26 Ohio St.2d 94, 96-97, 55 O.O.2d 165, 166, 269 N.E.2d 420, 422, we stated, ‘mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.’ Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury. Id. at 97, 55 O.O. 2d at 166, 269 N.E.2d at 423.”

The term “willful misconduct” implies an intentional deviation from a clear duty or from a definite role of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. Tighe v. Diamond (1948), 149 Ohio St. 520.

In this matter, the reported inappropriate acts of Williams were addressed by Defendant Delaware Grace. There was no showing that Delaware Grace attempted to thwart or forestall any investigation when the incidents were reported. The acts complained of did not show a history of forced sexual assault. Although Defendant Williams’ conduct may have been extremely offensive, it was not such that one could reasonably anticipate Williams would commit a criminal sexual assault or rape. Defendant Delaware Grace did not perversely disregard a known risk or act intentionally to create an unreasonable risk of harm. Defendant Delaware Grace is granted summary judgment on Plaintiffs’ claim for willful, wanton and reckless conduct.

**NEGLIGENCE IN FAILING TO REPORT CHILD ABUSE
AND CRIMINAL ACTS**

Plaintiffs have not presented a response in opposition and have dismissed this claim.

RESPONDEAT SUPERIOR

Plaintiffs' memorandum does not address Defendant's Motion for Summary Judgment on this claim. Plaintiffs' response did not state any reason for the omission.

For an employer to be liable under the Doctrine of Respondeat Superior, the conduct of the employee must be committed within the scope of employment. Taylor v. Doctor's Hospital (1985), 21 Ohio App. 3d 154. If the action is intentional, the act must be calculated to facilitate or promote the business for which the servant was employed. Little Miami Railroad Co. v. Wetmore (1869), 19 Ohio St. 110. An employer is not liable for independent self-serving acts of his employee which in no way facilitate or promote the employer's business. Mills v. Deehr, 2004 - Ohio - 2410.

The Court will assume for the purposes of addressing this claim only that Defendant Williams was an employee of Defendant Delaware Grace. In this case, Williams' behavior in sexually assaulting Plaintiff was intentional. It can in no way be held that this act was done to facilitate the operation of the church. Moreover, there was no evidence presented that Williams' actions were ratified by the church in furtherance of its interests. Accordingly, Defendant Delaware Grace is granted summary judgment for Plaintiffs' claim for Respondeat Superior.

NEGLIGENCE

To establish a claim for negligence, one must demonstrate the existence of a legal duty, a breach of that legal duty and an injury proximately caused from the breach. Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St. 3d 75. Whether Defendant was negligent again depends on whether Defendant Williams' misconduct was foreseeable as previously discussed. Again, the Court must conclude, under the totality of the circumstances, Williams' 2008 sexual assault of Plaintiff was not foreseeable. The gravity and degree of Williams' conduct in 2008 was not similar in nature to and far removed from his past transgressions in 1991 and 2002. It could not have been anticipated that Plaintiffs' injuries would be caused by Defendant Williams' subsequent wrongful act.

Accordingly, the Court finds that Defendant Delaware Grace is entitled to summary judgment on Plaintiffs' claim for negligence.

NEGLIGENT HIRING, RETENTION AND SUPERVISION

It has been held that if a church hires an individual despite knowledge of prior improper behavior in his former church-related employment, the church may be held liable in tort for negligent hiring. Byrd v. Faber (1991), 57 Ohio St. 3d 56 citing Mathews v. Wittenberg College (1960), 113 Ohio App. 387. To establish such a claim, the Fourth District case of Eastley v. Huffman, 2010 - Ohio - 4771 states it must be shown: (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's knowledge of the employee's incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) a causal link

between the employer's negligence in hiring, retention and supervision of its employee and the plaintiff's injuries.

There is no dispute that Defendant Williams was personally selected by Defendant Delaware Grace to plant a new church in Sunbury. Further, there is no dispute that Defendant Delaware Grace had knowledge of Defendant Williams' past inappropriate conduct with young women when he was selected to start the new church. It is further undisputed that the sexual assault occurred when Williams was acting within the scope of his employment during a counseling session with Jane Doe. After construing the evidence most strongly in favor of Plaintiff, one may conclude Defendant was incompetent as a pastor. His inappropriate behavior towards young women in such a capacity was not what one would expect from a religious and spiritual leader.

The major issue in dispute regarding this claim is whether there was an employment relationship between Defendant Williams and Defendant Delaware Grace at the time of the sexual assault in 2008. Upon consideration of the facts as outlined on pages 7 through 9 in Plaintiffs' November 12, 2010 Memoranda Contra Defendant's Motion for Summary Judgment, the facts cited on pages 4 through 5 by Defendant in its Motion for Summary Judgment filed October 14, 2010, and the facts cited on pages 4 through 5 in Defendant's November 30, 2010 reply, and the supporting depositions, the Court finds there is a genuine issue of material fact as to whether there was an employment relationship between Defendant Williams and Defendant Delaware Grace Brethren Church. Accordingly, Defendant's Motion for Summary Judgment on this claim is denied.

PUNITIVE DAMAGES

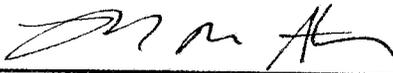
Defendant further seeks summary judgment on Plaintiffs' prayer for punitive damages. Punitive damages are governed by statute. Pursuant to O.R.C. 2315.21(C), such damages are recoverable if the following applies:

“1. The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in or ratified actions or omissions of an agent or servant that so demonstrate.”

This Court finds as a matter of law that it was not foreseeable that Defendant Delaware Grace could anticipate future criminal acts of Defendant Williams because he had shown no criminal propensity in the past, only inappropriate behavior. Plaintiff would not be able to show malice as a matter of law. Accordingly, Defendant's Motion for Summary Judgment on this claim is granted.

Accordingly, based on the above reasoning, Defendant's Motion for Summary Judgment is granted in part and denied in part. Judgment is granted Defendant Grace Brethren Church of Delaware, Ohio on all claims raised in Plaintiffs' Complaint with the exception of Plaintiffs' claim for negligent hiring, retention and supervision.

Enter: 26 April, 2011.



MICHAEL M. ATER, JUDGE
COMMON PLEAS COURT #1
ROSS COUNTY, OHIO

The Clerk of this Court is hereby directed to serve a copy of this journal entry, and its date of Entry upon the journal, upon all counsel of record and all parties not represented by counsel, by personal service or by U.S. Mail, and to note service on the Docket.

Recipients of Entry:

**John K. Fitch
Fitch Law Firm
Easton Town Center
4200 Regent Street, Ste. 200
Columbus, OH 43219**

**Mark A. Preston
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18 E. Second Street
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9211 Hawthorn Pl.
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**W. Charles Curley
J. Quinn Dorgan
Weston Hurd LLP
10 W. Broad St., Ste. 2400
Columbus, OH 43215**

The Clerk of this Court is hereby directed to serve a copy of this Judgement Order, and its date of Entry upon the Journal, upon all counsel of record and all parties not represented by counsel, by personal service or by U.S. Mail, and to note service on the Docket.

Judge

D

IN THE COURT OF COMMON PLEAS
FOR DELAWARE COUNTY

JESSICA AND JOHN SIMPKINS,)

Plaintiffs)

vs.)

GRACE BRETHERN CHURCH :)
OF DELAWARE, OHIO, and)
DARRELL ANDERSON)

Defendants)

416
155-140

CASE NO. 12 CVC 050605

JUDGE RICHARD MARKUS
(Serving By Assignment)

OPINION AND ORDER GRANTING
IN PART AND DENYING IN PART
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT

JANAY TENOR PLOS

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COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED

PROCEDURAL HISTORY

Jessica Simpkins and her father, John Simpkins, assert that Rev. Brian Williams sexually assaulted Jessica Simpkins in his office at the Sunbury Grace Brethren Church on March 6, 2008. On March 5, 2009, they filed suit in Ross County for allegedly resulting damages against Rev. Williams, the Sunbury Grace Brethren Church, the Grace Brethren Church of Delaware, and Rev. Darrell Anderson. *Sub Nom* Jane and John Doe v. Brian Williams, et al, Ross County Common Pleas Court Case No. 09CI000155.

On May 8, 2011, that court granted in part and denied in part a summary judgment motion filed solely by the Grace Brethren Church of Delaware. In an opinion that this Court incorporates in this decision, the Ross County Court dismissed the plaintiffs' claims against that defendant for (a) intentional infliction of emotional distress; (b) breach of fiduciary duty; (c) punitive damages for willful, wanton and reckless conduct; (c) negligence; and (e) *respondereat superior*.

In that same opinion, the Ross County Court denied the motion by the Grace Brethren Church of Delaware to dismiss the plaintiffs' claim that the alleged damages resulted from that defendant's negligent hiring, retention, and supervision of Brian Williams. From the evidentiary



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materials it received, that court concluded: "there is a genuine issue of material fact as to whether there was an employment relationship between Defendant Williams and Defendant Delaware Grace Brethren Church. Accordingly, Defendant's Motion for Summary Judgment on this claim is denied."

On June 15, 2011, the Ross County Court denied a motion by Delaware Grace Brethren Church to reconsider the partial denial of its summary judgment motion. On June 16, 2011, while a motion for summary judgment by defendant Darrell Anderson was pending, the plaintiffs voluntarily dismissed the Ross County case pursuant to Civ. R. 41(A)(1), before that court entered any final order for that case.

On May 25, 2012, the plaintiffs filed this case in this Court, which asserts substantially the same claims against these two defendants but without claims against Rev. William or the Sunbury Grace Brethren Church. On July 13, 2012, the original judge assigned to this case granted a motion to permit any party to file depositions from the previous Ross County case in this case. On October 10, 2012, these defendants filed separate motions for summary judgment on all claims, which relied on depositions in the Ross County case that they refiled here without any additional evidentiary materials. On October 24, 2012, that judge deferred consideration of those motions until March 13, 2013, so the plaintiffs could conduct a proposed deposition of April Brown, another alleged subject of Rev. Williams' misconduct.

On November 27, 2012, after the original judge recused himself, the Chief Justice assigned this visiting judge to conduct all further proceedings for this case. On February 27, 2013, after completing their additional discovery, the plaintiffs filed their memoranda opposing the defendants' summary judgment motions, which they supported with two further depositions from the Ross County case and the Brown deposition in this case. On March 12, 2013, the

defendants filed replies in support of their respective summary judgment motions. Pursuant to this Court's order on October 24, 2012, the defendants' summary judgment motions are now ripe for decision. In deciding these motions, this court must rely on the evidentiary materials that the parties submit to support their respective positions.

THE DARRELL ANDERSON MOTION

Darrell Anderson is a senior pastor at the Sunbury Grace Brethren Church. There is no contention and no evidence that he is or ever was an employee of the Grace Brethren Church of Delaware. Though he may have been Rev. Williams' co-employee at the Sunbury Grace Brethren Church, there is no claim or evidence that he was ever Rev. Williams' employer.

Even in the light most favorable to the plaintiffs, there is no evidence that Rev. Anderson had any authority, opportunity, or reason to preclude Rev. Williams' service for their co-employer. Although Rev. Williams provided Jessica Simpkins counseling services at an earlier time, there is no evidence that (a) he had any reason to anticipate that Rev. Williams would provide her with later counseling services, or (b) that someone engaged in his professional counseling services should have cautioned Ms. Simpkins against that relationship with Rev. Williams.

There is no genuine issue of material fact regarding Rev. Anderson's responsibility for the alleged wrongful conduct. He is entitled to judgment as a matter of law on all the claims asserted against him. Accordingly, this Court grants his summary judgment motion and dismisses all claims against him at the plaintiffs' costs.

THE GRACE BROTHERS CHURCH OF DELAWARE MOTION

For this motion, the plaintiffs and this defendant ask this Court to revisit the issues that the Ross County court previously decided for the comparable motion there. None of these

parties submits any further evidentiary materials that support their respective positions here. Ms. Brown's deposition merely supplements prior evidentiary materials that relate her experience in lesser detail. At least in part for the reasons expressed in that court's opinion, this court grants the same portion of this defendant's motion and denies the same portion of that motion.

Considering the evidentiary materials which the parties filed to support or oppose this motion, this Court grants this defendant's summary judgment motion for all claims against it except the claim allowed by the Ross County court. However, this Court would expand the Ross County court's ruling to permit a trial on claims that the plaintiffs' alleged damages proximately resulted from negligence by the Grace Brethren Church of Delaware in hiring, retaining, or supervising Rev. Williams – or in recommending, promoting, and supporting his hiring and retention by the Sunbury Grace Brethren Church.

TRIAL PROCEDURES

Subject to any party's compliance with Delaware County Common Pleas Local Rule 25.04, this Court will conduct a jury trial on those claims beginning at 9:00 a.m. on Tuesday, June 11, 2013. For this case, the court does not require counsel to submit a trial brief or proposed jury instructions. This judge will submit a draft of proposed jury instructions to counsel for their comment.

However, the court directs counsel to comply with the following pretrial procedures:

1. No later than two weeks before the trial date as scheduled in this Order or as later modified [the Witness Disclosure Date], each counsel will provide adverse counsel with the names of all witnesses whom that party intends to call at the trial.
 - a. Any party that first locates a prospective witness after the Witness Disclosure Date, despite the exercise of due diligence to learn about that witness earlier, shall disclose the name of that witness to each adverse party (i) within forty-eight hours after learning about that witness, and (ii) no less than twenty-four hours before referring to the witness at the trial.

- b. Any party who proposes to use or refer to a witness that was not timely disclosed shall first satisfy the Court that the party exercised due diligence to learn about that witness before the Witness Disclosure Date.
- c. Absent a showing of good cause that the name or location of a witness was unknown to a party earlier with the exercise of due diligence, the Court will exclude from evidence and will preclude any comment about or reference to any witness for whom the proponent failed to comply with this order.
2. To facilitate the use of trial exhibits and to avoid any unnecessary disputes about discovery compliance, the Court directs the parties to comply with the following exhibit order:
- a. The parties shall premark all joint exhibits with sequential roman numerals (Jt. Ex. I, etc.). Each party shall premark all of that party's prospective separate exhibits, with the plaintiff using sequential arabic numbers (Pl. Ex. 1, etc.) and the defendant using sequential letters (Def. Ex. A, etc.). The parties shall make reasonable efforts to avoid duplicative exhibits, by omitting any exhibits which another party supplies as a prospective exhibit. The Court will instruct the jury to draw no inference from exhibit identification labels, or from the fact that any party first produced any exhibit at the trial.
- b. No later than one week before the trial date as scheduled in this Order or as later modified [the Exhibit Disclosure Date], each party shall supply the adverse party with a list of all proposed exhibits and a premarked copy of every exhibit that the party may offer at the trial (or reference to any exhibit which the adverse party already possesses from discovery responses).
- c. No later than the last business day before the trial date, each party who objects to the admissibility of any adverse party's exhibit shall file and serve a written Objection Statement regarding any challenged exhibits which shall state (i) whether the party objects to an exhibit's authenticity, and (ii) any other ground on which the party objects to that exhibit's admissibility (without argument or citation of authority). The Court intends to admit unchallenged exhibits before opening statements and may rule on some or all exhibit challenges then or at an appropriate later time after giving the complaining party an opportunity to explain the objection more fully.
- d. Any party that first obtains a prospective exhibit after the Exhibit Disclosure Date, despite the exercise of due diligence to obtain it earlier, shall supply a copy of that prospective exhibit to the adverse party (i) within twenty-four hours after obtaining it, and (ii) no less than twenty-four hours before referring to it at the trial. Any party who proposes to use or refer to a tardy exhibit shall first satisfy the Court that the party exercised due diligence to obtain the exhibit earlier.
- e. At the beginning of the trial, each party shall provide two additional premarked sets of all prospective exhibits: one for the trial judge, and one which will remain at the witness chair for any witness to use at any counsel's direction.

f. Absent a showing of good cause where an exhibit was unavailable to a party earlier with the exercise of due diligence, the Court will exclude from evidence and will preclude any comment about or reference to any exhibit for which the proponent failed to comply with this order.

g. This order does not apply to any exhibit that a party may use solely to impeach a witness's credibility or solely to refresh a witness's recollection, and not as substantive evidence.

Richard M. Markus

Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Delaware County Common Pleas Court for this matter

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS CASE MANAGEMENT ORDER TO ALL COUNSEL AND THE ASSIGNED JUDGE

This document sent to each attorney/party by:

- ordinary mail
- fax
- attorney mailbox
- certified mail

Date: 3/21/13 by: JD

In that same opinion, the Ross County Court denied the motion by the Grace Brethren Church of Delaware to dismiss the plaintiffs' claim that the alleged damages resulted from that defendant's negligent hiring, retention, and supervision of Brian Williams. From the evidentiary materials it received, that court concluded: "there is a genuine issue of material fact as to whether there was an employment relationship between Defendant Williams and Defendant Delaware Grace Brethren Church. Accordingly, Defendant's Motion for Summary Judgment on this claim is denied."

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Even in the light most favorable to the plaintiffs, there is no evidence that Rev. Anderson had any authority or opportunity to preclude or discourage Rev. Williams' service for their co-employer, let alone that he had any duty or opportunity to preclude Rev. Williams employment by the Sunbury church. Although Rev. Williams provided Jessica Simpkins counseling services at an earlier time, there is no evidence that someone engaged in his professional counseling services should have cautioned Ms. Simpkins against that relationship with Rev. Williams.

There is no genuine issue of material fact regarding Rev. Anderson's responsibility for the alleged wrongful conduct. He is entitled to judgment as a matter of law on all the claims asserted against him. Accordingly, this Court grants his summary judgment motion and dismisses all claims against him at the plaintiffs' costs.

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Considering the evidentiary materials which the parties filed to support or oppose this motion, this Court grants this defendant's summary judgment motion for all claims against it except the claim allowed by the Ross County court. However, the evidentiary materials cause this Court to rephrase or expand the Ross County court's ruling to permit a trial on claims that the plaintiffs' alleged damages proximately resulted from negligence by the Grace Brethren Church of Delaware in hiring, retaining, or supervising Rev. Williams – or in recommending, promoting, and supporting his hiring and retention by the Sunbury Grace Brethren Church.

Richard M. Markus

Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Delaware County Common Pleas Court for this matter

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<input type="checkbox"/>	ordinary mail
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Date:	6/12/13 By: Judge's office