

IN THE SUPREME COURT OF OHIO

<p>JESSICA SIMPKINS, et. al.,</p> <p style="text-align: center;">Appellants,</p> <p style="text-align: center;">v.</p> <p>GRACE BRETHERN CHURCH OF DELAWARE, OHIO,</p> <p style="text-align: center;">Appellee.</p>	<p>:</p>	<p>Supreme Court Case No. 14-1953</p> <p>Court of Appeals Case No. 13 CAE 10 0073</p> <p>On Appeal from the Delaware County Court of Appeals, Fifth Appellate District</p>
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BRIEF OF NATIONAL CENTER FOR VICTIMS OF CRIME AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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STATEMENT OF THE FACTS

Amicus National Center for Victims of Crime (National Center) submits this brief in support of Appellants Jessica Simpkins et. al. The National Center adopts and incorporates by reference the Statement of Facts and Appendix in the merits brief filed or to be filed by the Appellants.

ARGUMENT

Proposition of Law No. 1:

R.C. §2315.18 violates the constitutional rights to due process of law, equal protection of the laws, trial by jury, and open courts and a remedy guaranteed by the Ohio and United States Constitutions as applied to minors who are victims of sexual abuse.

Ohio Revised Code Section 2315.18(B)(2) provides for caps on noneconomic damages in tort actions, with the specific caps being:

“Two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.”

There is, however, no cap where a plaintiff incurs noneconomic losses for “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).

This Court reviewed the facial constitutionality of the Section 2315.18 noneconomic damage caps in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 880 N.E.2d 420 (Ohio 2007).

The *Arbino* Court held the caps to be facially constitutional under various provisions of the Ohio and federal constitutions, including the “due course of law” provision of Section 16, Article I, Ohio Constitution, which Ohio has recognized as equivalent to due process of law as defined under the federal constitution. The Court held that the caps did not implicate a fundamental right and therefore reviewed their constitutionality under a rational basis test. Under this test, a statutory provision is constitutional if it “bears a real and substantial relation to the public health, safety, morals or general welfare of the public” and “is not unreasonable or arbitrary.” *Arbino*, 116 Ohio St.3d at 478.

The noneconomic damage cap provisions in general passed the rational basis test and therefore were facially constitutional under the Ohio due course of law and federal due process clauses. The Court found sufficient evidence that the caps bore a real and substantial relationship to the general welfare, specifically a policy goal of reducing uncertainty in the tort system. Just as importantly, the Court determined the limitations on noneconomic damages to be neither arbitrary nor unreasonable, because they operated “without limiting the recovery of individuals whose pain and suffering is traumatic, extensive and chronic,” while setting reasonable monetary limits “for those not as severely injured.” *Arbino*, 116 Ohio St.3d at 478. The Court thus premised its conclusion that the caps were not arbitrary and unreasonable on the presence of the exceptions for certain designated types of physical injury, which the Court deemed to include those whose injuries were most severe.

The National Center does not ask the Court to revisit the determination in *Arbino* that the Section 2515.18 caps are facially constitutional under the rational basis test. Based on the Court’s own reasoning in *Arbino*, however, the facial constitutionality of the caps does not mean that they pass the rational basis test as applied in a case such as this one involving sexual assaults

on a minor.

Notwithstanding the dismissive tone of the court below, it requires no extensive recitation of facts to determine that the effects of a sexual assault, particularly a sexual assault on a minor can be psychologically devastating. Even in cases such as the present one where the physical component of the injuries is limited, the psychological injury is immense. A minor sexually assaulted by a teacher, priest or youth pastor has sustained not only a violation of her person but a breach of the trust reposed in a previously respected authority figure.

More importantly, the jury in this case actually found past noneconomic damages of \$1,500,000.00 and future noneconomic damages of \$2,000,000.00, based almost entirely on the psychological damage to Ms. Simpkins. The jury thus found the consequences of the sexual assaults upon Ms. Simpkins to be devastating and found her to have incurred noneconomic but quite real damages in an amount far exceeding the Section 2315.18 caps. If, at the time the perpetrator assaulted and struggled with Ms. Simpkins, he had also injured her physically, for example by fracturing one of her arms or legs and injuring it severely enough that she permanently lost the use of it, she would be able to collect her full noneconomic damages. This did not occur, but she did sustain psychological damage permanently restricting her ability to engage in normal relationships and activities. Merely because the effects of her injury were psychological rather than physical, her damages were arbitrarily capped even though the jury determined those damages to be as severe as those of many people who do sustain permanent loss of use of a limb or organ system. Her damages as determined by the jury were just as “traumatic, extensive and chronic” as those of someone with severe physical injuries, but Section 2315.18 allows only a fraction of them to be collected.

The Court in *Arbino* premised the conclusion that the Section 2315.18 caps passed muster

under the rational basis test on a determination that the caps were not arbitrary and unreasonable, because they enhance the certainty of damage calculations in tort actions without limiting recovery in cases where the noneconomic damages are "traumatic, extensive and chronic" *Arbino*, 116 Ohio St.3d at 480. As applied in cases of sexual assault, however, the caps do limit the recovery of individuals incurring traumatic, extensive and chronic suffering, often suffering exceeding that of even severely physically injured persons. As applied to sexual assault cases, the statutory distinction between those whose permanent and severe injuries are physical, thereby relieving them of the caps, and those whose injuries are just as or more severe but who are subject to mandatory caps, is arbitrary and unreasonable. The Court should so hold and should indicate that the Section 2315.18 caps, as applied to victims of sexual assault in general and sexual assault on minors are unconstitutional as applied.

Proposition of Law No. 2:

Separate and distinct acts of sexual battery constitute separate "occurrences" for purposes of applying the damage cap for Non-economic losses in R.C. §2315.18.

Ohio Revised Code Section 2315.18(B)(2) applies the noneconomic damage caps of Section 2315.18 to "each occurrence that is the basis of that tort action." The court below held that the two crimes perpetrated on Jessica Simpkins, the forced oral sex and forced vaginal penetration, were only a single "occurrence" subject to a single noneconomic damage cap, even though the Ohio criminal justice system recognized and prosecuted them as separate crimes, for which the perpetrator received consecutive prison terms. The lower court's restrictive definition of the term "occurrence" is inconsistent both with the statutory definition of the term and with a logical interpretation of the effects of sexual assaults.

Ohio Revised Code Section 2315.18(A)(5) defines an “occurrence” for purposes of Section 2315.18 as including “all claims resulting from or arising out of any one person’s bodily injury.” The lower court assumed that Jessica Simpkins had sustained only one “injury” through the successive incidents of oral and vaginal contact, due to their close proximity in time and space and the failure by Simpkins’ expert below to distinguish between the effects of the two incidents. Like its definition of the term “occurrence,” the lower court’s interpretation of the nature of an “injury” sustained during an “occurrence” is inconsistent with logic and sound public policy.

The term “occurrence” is found in many insurance policy clauses defining policy limits or caps, and courts nationwide have been challenged to define the term in that insurance context. The three general approaches utilized nationwide and recognized by Ohio courts are: 1) the “cause” or “causation” view, under which an “occurrence” refers to the cause of an incident rather than to the injury sustained; 2) the “effect” view, under which the term “occurrence” refers to an injury sustained by a claimant, and 3) an interpretation of the term “occurrence” as referring to a liability triggering event. *Dutch Maid Logistics, Inc. v. Acuity*, 2009 Ohio 1783 ¶25 (Ohio App. 8th Dist. 2009), citing *Banner v. Raisin Valley, Inc.*, 31 F.Supp. 2d 591, 593 (N.D. Ohio 1998).

The causation view has been adopted by the majority of courts nationwide considering the interpretation of the term "occurrence," at least as it occurs in insurance policies. *Banner*, 31 F.Supp.3d at 593-94. Notwithstanding the nationwide prevalence of the causation view, Ohio has not adopted any one method in preference to another for calculating the number of occurrences covered by an insurance policy. Rather, Ohio courts interpreting insurance or other contracts containing the term “occurrence” refer to the specific language of the policy or

contract, which may support a “cause,” “effect” or “liability” related definition of the term “occurrence” for purposes of that particular contract. *See Nationwide Mutual Ins. Co. v. Godwin*, 2006 Ohio 4167, ¶¶50-51 (Ohio App. 11th Dist. 2006) (“Nationwide is simply wrong that the ‘causation view’ is standard Ohio common law ... Nationwide failed to provide any definition of the terms ‘accident’ and ‘occurrence’ in the liability policy in question. The contract is ambiguous, and must be construed against it.”); *Cincinnati Ins. Co. v. Ace Ina Holdings, Inc.*, 175 Ohio App.3d 266, 886 N.E.2d 876, 2007 Ohio 5576, ¶56 (Ohio App. 1st Dist. 2007)(“We note that in calculating the number of occurrences under an insurance policy, blanket judicial application of any one test could frustrate the contracting parties’ intent. Courts must adhere to policy language in making a determination whether the cause test applies.”). *Cf. Dutch Maid Logistics* (“In making this determination, we are mindful of [*Cincinnati Ins. Co.*], which held inter alia that ‘calculating the number of occurrences under an insurance policy, blanket judicial application of any one test (cause or effect) could frustrate the contracting companies intent.’ Our reading of the Acuity policy is consistent with this approach. A simple, plain reading of the contract reveals that its drafters included ‘cause’ language in it, not ‘effect’ language.”).

Even where a court does decide to apply a causation focused definition of the term occurrence, the applicable definition of a “cause” is not always clear. A court may consider the “cause” of an event to be its immediately preceding cause, its proximate or legal cause, or some underlying cause setting in motion a chain of events eventually leading to injury. Furthermore, the proximity in time and space of multiple injury causing events does not determine whether they constitute one occurrence or several. *See Godwin* at ¶49 (where a single negligently operated motor vehicle struck two motorcyclists in rapid succession, a “person unversed in the

technicalities of insurance law might, therefore, easily conclude that Mr. Chepla's striking each of the Godwins, sequentially, constituted separate accidents or occurrences, rather than the single accident or occurrence of losing control of the minivan.").

The Florida case of *Koikos v. Travelers Ins. Co.*, 849 So.2d 263 (Fla. 2003) is instructive. In *Koikos*, an assailant fired "two separate – but nearly concurrent – rounds" from his handgun, hitting two victims with a single bullet each while they were standing in the lobby of *Koikos'* restaurant. *Koikos*, 849 So.2d at 265. The Florida Supreme Court applied what it deemed a causation approach to interpreting the term "occurrence" in *Koikos'* insurance policy, but interpreted the term "cause" for purposes of that approach to refer to the immediate cause of each injury sustained by each victim, not the underlying potential negligence of *Koikos* in providing inadequate security. Therefore, the term "occurrence" in *Koikos'* policy was "defined by the immediate injury-producing act and not by the underlying tortious omission," so that the relevant "immediate causes of the injuries" were "the intruder's gunshots." *Koikos*, 849 So.2d at 271-72. The *Koikos* court concluded that each gunshot was a separate cause of injury and hence a separate occurrence, even though the two bullets were fired only moments apart and were fired from the same handgun by the same perpetrator standing in the same location. *See also Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317 (11th Cir. 2005)(applying Florida law)(where victim was kidnapped from church parking lot, sexually assaulted, and robbed, each separate criminal act of kidnapping, robbery, and assault was a separate occurrence for the purpose of the church's liability insurance policy).

Cases interpreting the term "occurrence" in the context of liability insurance policies potentially providing coverage for negligence contributing to sexual assaults or abuse have reached varying results, depending on the particular policy language involved. In *TIG Ins. Co. v.*

Smart School, 401 F.Supp.2d 1334, (S.D. Fla. 2005), for example, the court, applying Florida law including *Koikos*, recognized that Florida generally applied a cause centered definition of the term "occurrence" in insurance policies. Application of that cause theory, as interpreted in *Koikos*, to a case involving sexual assault "could lead to the conclusion that [the perpetrator's] sexual misconduct as to each child was the proximate cause of each of their injuries and therefore comprised two occurrences Or even to the conclusion that each act of abuse or molestation was a separate occurrence." *Smart School*, 401 F.Supp.2d at 1343. The court in *Smart School* ultimately concluded that the *Koikos* cause definition did not apply in that case, but only because the policy in question explicitly provided that "all" acts of sexual abuse by a single perpetrator were to be deemed a single occurrence "regardless" of the "number of persons ... incidents or locations" involved, thereby clearly indicating that for purposes of the policy at issue in that case, separate incidents of sexual assault by one perpetrator were to be deemed a single occurrence. *Smart School*, 401 F.Supp.2d at 1343. Cf. *Society of Roman Catholic Church v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1364 (5th Cir. 1994), where the church's insurance policy defined an "occurrence" to include "a continuous or repeated exposure to conditions" involving "substantially the same general conditions" resulting in injury "during the policy period," each perpetrator's acts of sexual molestation against each child victim during each policy period were to be deemed a single occurrence for purposes of the policy). Since insurance policy cases ultimately define the term "occurrence" with reference to the specific language of the policy in question, as does Ohio, these cases may come to varying results on the basis of varying policy language and do not mandate a particular interpretation of the term "occurrence" for purposes of Section 2315.18.

In this case, the perpetrator committed two distinct acts of sexual assault, one involving oral-genital contact and another involving vaginal contact. The Ohio criminal system recognized these events as separate, prosecuting them as separate criminal counts warranting and ultimately leading to separate punishment through consecutive sentences. The perpetrator's intent to commit each act was separate, just as the intent of the perpetrator in *Koikos* to discharge his firearm on each successive occasion, albeit moments apart, and the perpetrator's intent during the successive kidnapping, assault and robbery in *Guideone* were separate. Thus, even if a cause based definition of the term "occurrence" were to apply under Section 2315.18, the perpetrator had separate wrongful and tortious intents in committing his successive acts, generating separate causes of injury and hence separate occurrences.

The particular language of Section 2315.18(A)(5), however, defines an "occurrence" with reference to "claims" "resulting from or arising out of any one person's bodily injury." Since the statute refers to "claims" and "injury," the language appears to warrant a definition of "occurrence" based on an effect or liability triggering theory, not a causation theory, assuming cases interpreting insurance policy language to be relevant at all to the issue of statutory interpretation. An occurrence for purposes of Section 2315.18 refers to each event causing injury or each event giving rise to potential liability for an injury. Under this interpretation, serial sexual assaults causing successive injuries are distinct "occurrences," even if they occur close together in space and time.

While, according to the court below, Appellants' expert did not attempt to distinguish the psychological effects of each assault, a reasonable jury could readily conclude that the damaging psychological effect on a sexual assault victim of being assaulted twice is far greater than the effect of being assaulted once, even or perhaps especially if the two incidents occur in close

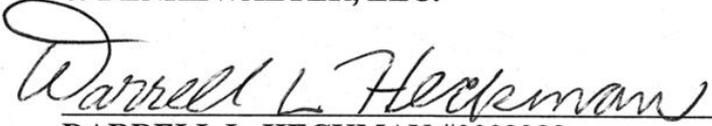
temporal and spatial proximity. Furthermore, in a case such as this one where the second assault occurs while the victim is attempting to escape after the first assault, a jury could also reasonably conclude that the thwarting of the escape attempt further enhances the victim's psychological damage, such as feelings of helplessness. Successive sexual assaults lead to successive injuries, not one indivisible injury, even if the successive assaults occur close together in space and time. Accordingly, even if the Court deems it appropriate to apply the Section 2315.18 caps to cases of sexual assault, each assault creates its own injury and should be subject to a separate cap as a separate occurrence. If the caps apply at all, they should apply to two statutory occurrences, not one.

CONCLUSION

The noneconomic damage caps of Section 2315.18, Revised Code, are unconstitutional as applied to cases of sexual assault and sexual assault on minors, since they discriminate arbitrarily between victims who sustain severe but nonphysical injuries and victims who sustain less severe but physical injuries. If the caps apply at all, they should be applied in this case to two occurrences, not one as erroneously concluded below, since Appellant Simpkins was subject to two sexual assaults, not one.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Brief of National Center for Victims of Crime As Amicus Curiae in Support of Appellants** was sent by ordinary mail, first-class postage prepaid, this 17 day of July, 2015 to the following:

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