ORIGINAL

IN THE SUPREME COURT OF OHIO

Jessica Simpkins, et al.	:	Ohio Supreme Court Case No. 14-1953
Appellants,	:	On Appeal from the Delaware County Court of Appeals, Fifth Appellate District
v.	:	
Grace Brethren Church of Delaware, Ohio	:	Court of Appeals Case No. 13 CAE 10 0073
Appellee.	:	

MERIT BRIEF OF APPELLANTS JESSICA SIMPKINS AND GENE SIMPKINS

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STATEMENT OF FACTS

A. Nature Of The Case.

Pastor Brian Williams ("Williams") engaged in forced oral and vaginal intercourse with fifteen year old Jessica Simpkins during a counseling session at her church. At the time, Williams was the senior pastor[1] of Sunbury Grace Brethren Church ("Sunbury Grace"). He was placed into that position by Appellee Delaware Grace Brethren Church ("DGBC") where Williams had served as youth pastor. While at DGBC Williams twice engaged in sexual misconduct involving young girls, a fact known to DGBC. Appellants, Jessica Simpkins and her father, Gene Simpkins, filed a complaint asserting multiple claims against DGBC, including a claim that DGBC was negligent in retaining Williams as an employee and in aiding, abetting, assisting and empowering Williams as the Senior Pastor of Sunbury Grace in spite of the previously reported instances of Williams' sexual misconduct with young girls. The complaint sought damages for past and future economic and noneconomic injury to Jessica and loss of consortium injuries for her father.

B. The Disposition Below.

The case was tried before a Delaware County, Ohio Common Pleas Court jury from June 11 through June 17, 2013.[2] The jury returned a verdict in favor of Jessica Simpkins in the amount of $1,378.85 for past economic damages, $1,500,000 for past noneconomic damages, $150,000 for future economic damages, and $2,000,000 for future noneconomic damages for a

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[1] Senior Pastor at Sunbury Grace also encompasses overseeing the young parishioners including leading youth group functions and counseling sessions. (Williams Dep., T.Ct. R. 18, pp. 98- 99.)

[2] Appellants originally sued Sunbury Grace, DGBC, Pastor Darrell Anderson and Williams on March 5, 2009 in Ross County, Ohio where Williams was incarcerated in a state penal institution. That action was subsequently dismissed and re-filed on May 25, 2012 in Delaware County.

total of $3,651,378.85. (T.Ct. R. 89.)[3] The jury also returned a verdict for Gene Simpkins in the amount of $75,000. (T.Ct. R. 89, TR. 742.)

Following post-trial briefing, the Court significantly reduced the jury's verdict. First, the Court set-off $1,378.35 (Jessica Simpkins' past economic damages) due to a prior settlement with Sunbury Grace. Second, the Court applied R.C. 2315.18 to reduce Jessica's past and future noneconomic damages to $350,000. (T.Ct. R. 101.) That amount, coupled with the jury's verdict of $150,000 for future economic damages, set Jessica's recovery at $500,000. Her father's recovery of $75,000 was unchanged.

Following entry of judgment, DGBC filed a motion for a new trial or remittitur and also a motion for judgment notwithstanding the verdict ("JNOV"). (T.Ct. R. 104, 105.) The Court denied DGBC's motion for a new trial and motion for JNOV. (T.Ct. R. 110.) However, the Court granted a remittitur, reducing Jessica's future economic damages to $60,000.[4] (Id.) Given the impact the lower economic damage would have on Jessica's recovery of noneconomic damages and the likelihood of appeal by both parties, the Court extended Appellants' time to agree to the remittitur until all appeals are exhausted. (Id.)

DGBC subsequently filed its notice of appeal and the Simpkins filed their notice of cross-appeal to the Fifth District Court of Appeals. (T.Ct. R. 111, 115.) The Fifth District overruled DGBC's assignments of error except for its assignment of error on apportionment of liability. (Appx. 3.) The Fifth District also overruled the Simpkins' assignments of error on the constitutionality of the damage caps in R.C. 2315.18 as applied to Jessica Simpkins and the trial

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[3] Citations to the trial court record are listed as T.Ct. R. ___. Citations to the jury trial transcript for the trial court are listed as TR. ____.

[4] The impact of this reduction is to reduce Jessica's total economic loss to $61,378.32 and her noneconomic award to $250,000. *See*, R.C. 2315.18(B)(2).

court's ruling that Jessica suffered but one "occurrence" under that statute, but sustained the Simpkins' assignment that the trial court erred in granting summary judgment to DGBC on the Simpkins' claim for punitive damages. (Id.)

C. Statement Of Facts.

Williams served as a youth pastor at DGBC from 1988 until 2004. (Williams Dep., T.Ct. R. 18, pp. 6, 31.[5]) During his employment, two young females reported to Williams' supervisors that Williams' had engaged in separate incidents of sexual misconduct towards them. (TR. 147, 155; Weixel Dep., T.Ct. R. 53, p. 23.)

1. The First Incident.

In the early 1990's, Williams led a trip with a DGBC youth group and a youth group from a Lexington, Ohio church ("Lexington Grace"). (Williams Dep., T.Ct. R. 18, p. 7.) During the trip the first incident occurred as testified to by April Brown (nee Jokela), a 13-16 year old girl (at the time) from Lexington Grace. (TR. 125, 128.) At the time of her testimony (by deposition), April Brown was a 36 year old married mother of four serving with her husband as a church missionary in Naples, Italy where she was deposed by international satellite videoconference. (TR. 124, 147.) She testified as follows:

> Q. Can you tell me what you recall with respect to that incident?
> A. Yes. We were in the concert setting and we were all sitting on bleachers, and he had started to rub my shoulders. And I felt uncomfortable at that moment but I didn't do anything.
> And then he started to move his hand down my back but between my shirt and the overalls that I was wearing. And then he continued to move his hand down right at my panty line so his hand was on my skin. And at that point I jerked forward and I left.
>
> * * *

[5] The testimony of Brian Williams, Michelle Poland and Robin Weixel were presented by video deposition at trial. (T.Ct. R. 18, 53, 71.)

Q. How were you feeling while this man's hand is on your body?
A. Very uncomfortable and scared and that's why I jerked forward and left and then I didn't return to my seat.

(TR. 128-30.)

When April jerked forward and left her seat, she was followed out by Jason Saxton, a young, male friend, also part of the Lexington Grace youth group, who noticed she had left "very upset." (TR. 161-63.) Saxton testified:

Q. Can you give us an idea of what her emotional state was? What was her -- what was her demeanor? Can you tell us a little bit about that?
A. Upset, shaken.
Q. What did she tell you that Williams did to her?
THE WITNESS: She said that Brian attempted to put his hand up her shirt and then down her pants.

(TR. 165.)

When April returned home from the trip, her mother noticed that "she wasn't quite her normal self." (TR. 154.) After April finally advised her mother of the incident, April's mother contacted the youth pastor at Lexington Grace. (TR. 155.) A meeting was subsequently arranged with representatives of Lexington Grace, DGBC senior pastor Jeff Gill and an elder from DGBC, Williams, April and her mother. (TR. 131-32.) April testified that at the meeting the DGBC officials "just made light" of her story, "as if I was making the story up." (TR. 132.) April's mother testified that at the meeting a DGBC official said, "let's just keep this quiet to protect our brother." (TR. 156.) Pastor Gill denied making the statement, but admitted that he did intentionally "keep it quiet." (TR. 593.)

Although Williams was a DGBC employee whose primary responsibility was dealing with youths, Gill made no record of the allegations made by April. (TR. 593.) Furthermore, no personnel file record or record of any kind exists at DGBC which reflect the allegations made by April against Williams. (TR. 312-13.)

2. The Second Incident.

The second incident of sexual misconduct by Williams involving a young girl took place during a counseling session in Williams' office. In 2001 or 2002, Williams interviewed 18 year old Robin Weixel (nee McNeal) in advance of a mission trip. (Weixel Dep., T.Ct. R. 53, p. 19.) Robin testified that during the course of the interview "he went off on tangents" and "there were four specific things that he approached that I thought were extremely inappropriate." (Id. p. 20.) Robin testified:

> Q. All right.
> Let's talk about those four specific things. What was No. 1?
> A. One of them was that he shared with me about he and his wife's sex life and how they had a good sex life. There was no purpose for him telling me this. He just offered this information.
>
> * * *
>
> Q. Okay.
> What was No. 2?
> A. Another one was that he told me that many men -- he -- he told me that if I were ever to go to a mall and just sit and observe people walking about the mall, and if I look specifically at the men, he said it would be obvious that most men view women as a thing to be fucked.
> Q. Okay.
> What was No. 3?
> A. The third one he was sharing with me how women can conduct themselves to decrease the amount of lust that men have for them. One of them being that women can dress appropriately and not provocatively.
>
> And I, at the time of this interview, was wearing a tank top that was -- had very thick shoulder straps. And he came around his desk to me and he told me that his general rule of thumb for how women can dress is that any man should be able to walk up to them and trace the outline of their clothing and not touch anything that they shouldn't touch. So, after coming around his desk, he took his finger and traced the outline of my tank top, which ended up being straight over the shoulder (indicating).
>
> * * *
>
> And what was the fourth thing?

A. The fourth thing was that he told me that he probably could get away with having sex with me right then and there in his office. He could get away with it, but his guilty conscience would stop him.

Q. Did you get the sense that he was saying these things in some effort to protect you in some way or have concern for your safety?

A. No.

(Id. p. 20-22.)

Robin reported Williams' conduct to then-DGBC Senior Pastor Darrell Anderson. (Weixel Dep., T.Ct. R. 53, p. 23.) Anderson did not report the incident to the church Elder Board even though Anderson was on the Elder Board. (TR. 208, 211.) Nor did Anderson make any notes from the meeting. (TR. 203.) As with the earlier April Brown incident, there are no personnel records of Williams or any other church records at DGBC that reflect the incident with Robin. (TR. 312.)

In 2004, Pastor Gary Underwood became the senior pastor at DGBC replacing Pastor Anderson. (TR. 310.) Although 2004 was when DGBC was considering whether to place Williams as the senior pastor at Sunbury Grace, Anderson never told Underwood about the incident with Robin and Underwood was unaware of the incident with April. (TR. 310, 312.)

When Senior Pastor Underwood finally learned of Williams' conduct with Robin Weixel, he was shocked. (TR. 314.) He described Williams' conduct as "very disturbing," "highly inappropriate" and an "abuse of the trust that the church placed in him, that God placed in him, that Robin McNeal (Weixel) placed in him * * *." (TR. 314-315.) DGBC's failure to maintain records of Williams' prior sexual misconduct and Anderson's failure to advise Underwood of Williams' conduct with Robin Weixel culminated with tragic results.

3. DGBC Installs Williams at Sunbury Grace.

In 2004, DGBC officials started (planted) a new church in Sunbury, Ohio. (TR. 313, Williams Dep., T.Ct. R. 18, p. 27-8.) Williams sought to become the senior pastor at the new

church. (Williams Dep., T.Ct. R. 18, p. 27.) Ignorant of the allegations of prior sexual misconduct by Williams, Senior Pastor Underwood supported Williams' appointment to Sunbury Grace. (TR. 313, 316.) Underwood testified, however, that had he known of Williams' conduct with Robin, he would not have supported Williams to be the senior pastor at Sunbury Grace where Williams' later sexual assault on Jessica Simpkins occurred. (TR. 316-317.) Similarly, he testified that he would not have supported Williams' move if he had known of Williams' conduct with April Brown. (TR. 317.)

Despite DGBC's knowledge of Williams' prior sexual misconduct with young girls, Williams was in fact selected as Sunbury's senior pastor. (TR. 312-13, 504.) DGBC "was the primary financial supporter, encourager and resource" for the new Sunbury Grace church and provided financial and other support to Williams to get Sunbury Grace started. (TR. 313.) Williams and DGBC conceded that without the support of DGBC, he could not have made the move. (Williams Dep., T.Ct. R. 18, p. 39; TR. 708-9.)

4. Williams Assaults Jessica.

On March 6, 2008, Williams conducted a counseling session with Jessica Simpkins in his office.[6] (TR. 330.) Jessica testified as to what occurred as follows:

Q. What happened?

A. I kept telling him no and I didn't want to. And he has his hand on my shoulder, and with his other hand he's unzipping his pants. And he took his penis out. And I said no, that I didn't want to. And he kept telling me to do it, do it. And I said, no. So, like, after a minute of arguing with him I thought if I did it I could get up and run out the door and get away from him, because I thought that was my only option. But when I got up from the chair and ran around it, he got in front of the door.

Q. Ok. And then what happened?

[6] As set forth on p. 6 above, it was during a counseling session that Williams told Robin McNeal he could have sex with her in his office "and get away with it."

A. He shut the door and he started kissing me. And I was like, stop, I don't want to do this. And he, like, pushed me and I fell. And he was pulling my pants down, and next thing I know, he sticks it in me and he's like, this feels good.

Q. Did you find both of those experiences, both the oral and vaginal intercourse, equally revolting.

A. Yes.

(TR. 332-33.)

The next day, Jessica told a friend and then school officials about the incident. (TR. 335.) During a telephone call by Jessica to Williams which was recorded by the police, Williams incriminated himself. (TR. 336.) Williams subsequently pled guilty to two counts of sexual battery in violation of R.C. 2907.03(A)(12). (Pl.'s Ex. 18.) He was sentenced to two consecutive four year terms. (Williams Dep., T.Ct. R. 18, p. 54.)

5. Jessica Suffers Severe and Permanent Emotional/Psychological Injuries.

Jessica suffers Chronic PTSD, Dysthymic Disorder (depression), and has dependent and avoidant personality characteristics because of her encounter with Williams. (TR. 410-11, 427.) She is afraid of the dark and afraid to be home alone. (TR. 349-50.) She is mistrustful and avoids intimate relationships. (TR. 414.) She still relives the incident, testifying that "two to three times a week, a whole tape will replay in my head of the whole day that it happened. I can be at home, out with friends and the whole day will just replay in my head." (TR. 347.)

Dr. Jeffrey Smalldon testified that Jessica's injuries are permanent and that she requires long-term psychological, psychiatric, and medicinal care. (TR. 423-29.) DGBC proffered no expert medical testimony to challenge these diagnoses. In fact, DGBC conceded in closing argument "this was a violent and heinous crime against a 15-year-old girl * * * who, through absolutely no fault of her, has had some major issues to deal with in her life." (TR. 706-07.)

On June 17, 2013, the jury found DGBC negligent, finding, "DGBC was aware of the past behavior of Brian Williams and failed to do a proper investigation and documentation of the previous two incidents involving April and Robin. As a result, Brian Williams was empowered to a greater responsibility as senior pastor at Sunbury Grace Brethren Church." (TR. 740-43.)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 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 Constitution as applied to minors who are victims of sexual abuse.

I. INTRODUCTION.

Rapes and sexual assaults are crimes that disproportionately affect young adults. U.S. Department of Justice, Bureau of Justice Statistics, *Juvenile Victimization and Offending, 1993-2003*, http://www.bjs.gov/content/pub/pdf/jvo03.pdf (accessed July 13, 2015). In a study conducted by the U.S. Department of Justice, Bureau of Justice Statistics, the authors note:

> This report reinforces a striking observation in recent studies about crimes involving rape and sexual assault: In a high percentage of cases, the victims are children. In self-reported victimization surveys of the public age 12 and older, teenagers report the highest per capita rates of exposure to rape and sexual assault. Data drawn from police-recorded incidents of rape in three States revealed that 44% of rape victims were under the age of 18. The self-reports of convicted rape and sexual assault offenders serving time in State prisons indicate that two-thirds of such offenders had victims under the age of 18, and 58% of those--or nearly 4 in 10 imprisoned violent sex offenders--said their victims were age 12 or younger.

U.S. Department of Justice, Bureau of Justice Statistics, *An Analysis of Data on Rape and Sexual Assault, Sex Offense and Offenders,* http://www.bjs.gov/content/pub/pdf/SOO.PDF (accessed July 13, 2015).

This Court has recognized that "(c)hild abuse is a pervasive and devastating force in our society" which has "long been considered a problem of epidemic proportions." *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶ 12. Included in

the study cited by the Court is the tragic statistic that 60,000 to 100,000 children are sexually abused each year. *Id.* While *Yates* was decided in 2004, there is no doubt that sexual abuse of minors remains an ongoing, pervasive problem.[7]

R.C. 2315.18 makes a mockery of our civil justice system by, on the one hand, severely limiting the constitutional rights of a raped child but, on the other, protecting sexual predators of children and those who aid, abet or conceal sexual predators. Under R.C. 2315.18, not only DGBC but also the perpetrator, Williams himself, are beneficiaries of the cap on noneconomic damages.[8]

Jessica Simpkins, at age 15, suffered one of the most degrading and vile acts that a human being can suffer. The effect of R.C. 2315.18 is to re-victimize the victim while protecting those who commit, aid, abet, and/or conceal such dehumanizing acts. For the reasons set forth below, the Court should declare that the damages caps in R.C. 2315.18, as applied to tort victims such as Jessica, violate the rights guaranteed to all Ohio citizens by the Ohio Constitution.

II. THE LEGISLATURE AND THE COURT.

In *Arbino v. Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, the Court began its analysis by noting that "(a)ll statutes have a strong presumption of constitutionality." *Id.* at ¶ 25. While true, "this presumption is rebuttable." *Adamsky v. Buckeye Local School*

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[7] *See, e.g., Former pastor gets nearly 5 years for sex with teen church member*, Columbus Dispatch (July 14, 2015) available at http://www.dispatch.com/content/stories/local/2015/07/14/pastor-teen-sex-sentence.html (accessed July 20, 2015); *Former Health counselor who had sex with student is released from prison early*, Columbus Dispatch (July 15, 2015) available at http://www.dispatch.com/content/stories/local/2015/07/15/heath-guidance-counselor-released.html (accessed July 20, 2015). The Court may take judicial notice of facts by resort to sources whose accuracy cannot reasonably be questioned. Evid.R. 201(B); *Disciplinary Counsel v. Sargeant*, 118 Ohio St.3d 322, 2008-Ohio-2330, 889 N.E.2d 96.

[8] R.C. 2315.21, the statutory cap on punitive damages, includes an exception to the cap for tort actions against persons convicted of a felony. No such exception is found in R.C. 2315.18.

Dist., 73 Ohio St.3d 360, 361, 653 N.E.2d 212 (1995). In *Adamsky*, Chief Justice Moyer, the principal author of the majority opinion in *Arbino*, joined in the Court's opinion holding that a two-year limitations statute for personal injury actions against political subdivisions was unconstitutional on equal protection grounds *as applied to minors*. *Id.*

The duty of the courts to determine the constitutionality of statutes under the doctrine of judicial review dates back to the U.S. Supreme Court's decision in *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803). Similarly, this Court has recognized its power and duty to review acts of the legislature since before the Civil War:

> It seems now, however, to be generally, if not universally conceded, that it is the right, and consequently the duty of the judicial tribunals, to determine, whether a legislative act drawn in question in a suit pending before them, is opposed to the constitution of the United States, or of this State, and if so found, to treat it as a nullity.
>
> * * *
>
> These laws, emanating directly from the fountain and source of all political power, serve not only to define the power, and as guides to the action of that body, but extend their protection, and to a great extent, apply their provisions, to the rights and interests of every individual citizen; who has at all times a right to invoke that protection when these rights and interests are invaded; and may rightfully and truthfully insist, that, to this extent, he is placed above, and beyond the power of the government, created by the constitution.
>
> * * *
>
> To adjudicate upon, and protect these rights and interests, constitute the whole business of the judicial department. Each judge before he is permitted to enter upon so important a duty, is required to bind his conscience by a solemn oath to support these constitutions. After all this, when he is clearly convinced, their provisions have been violated, and the rights of the individual secured by them, have been invaded by a legislative enactment, he has but one of two courses to pursue--either to regard his oath, vindicate the fundamental law, and protect the rights of the individual citizen, or to give effect to an act of usurped authority. In such case, it cannot be doubtful where the path of duty leads.

Cincinnati, Wilmington & Zanesville RR. Co. v. Clinton Cty. Commrs., 1 Ohio St. 77, (1852).

III. THE SPECIAL STATUS OF CHILDREN.

"This court has consistently held that children have a special status in tort law and that duties of care owed to children are different than duties owed to adults(.)" *Bennett v. Stanley*, 92 Ohio St.3d 35, 39, 748 N.E.2d 41 (2001). "'Children of tender years, and youthful persons generally, are entitled to a degree of care proportioned to their inability to foresee and avoid the perils they may encounter.'" *Id.*, quoting *DiGildo v. Caponi*, 18 Ohio St.2d 125, 127, 247 N.E.2d 732 (1969). *See also, Uddin v. Embassy Suites Hotel*, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638, ¶ 8 (O'Connor, J., dissenting, noting "the unique issues presented by children in Ohio tort law").

While the Court in *Bennett* focused on the different duty of care owed to children, the special status of children in Ohio tort law is no less relevant in determining whether statutes limiting their ability to recover damages in tort are constitutional as applied to them.

IV. APPELLANTS' AS APPLIED CHALLENGE.

In *Arbino*, the Ohio Supreme Court held that R.C. 2315.18 was constitutional on a *facial* basis. "If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances" and "(r)eference to extrinsic facts is not required * * *." *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21. An *as applied* challenge, however, recognizes that a statute might operate unconstitutionally under some plausible set of circumstances without rendering it wholly invalid. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37. *See also*, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812, citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289, 42 S.Ct. 106, 66 L.Ed. 239. ("It is axiomatic that a 'statute may be invalid as applied to one set of facts and yet valid as applied to another.'") In an *as applied*

challenge, the issue is whether application of the statute in a particular context is constitutional and is dependent upon a particular set of facts. *Wymsylo* at ¶ 22. "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.*

The *Arbino* Court specifically noted that it was dealing with a facial challenge in upholding R.C. 2315.18:

> Using a *highly deferential* standard of review appropriate to a *facial challenge* to these statutes, we conclude that the General Assembly has responded to our previous decisions and has created constitutionally permissible limitations. (Emphasis in original)
>
> *Arbino* at ¶ 113.

This acknowledgement by the Court is consistent with the U.S. Supreme Court's view that facial challenges are disfavored, in part because they often rest on speculation as opposed to a precise set of facts. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50, 128 S.Ct. 1184, 170 L.Ed.2d 151. This appeal presents such a precise set of facts upon which the Court can determine whether R.C. 2315.18, as applied to minors who are victims of sexual abuse, meets constitutional muster.

A. R.C. 2315.18 As Applied To Jessica Simpkins Violates Her Right To Due Course Of Law Under Article I, Section 16 Of The Ohio Constitution.

The "due course of law" provision in Article I, Section 16 of the Ohio Constitution has been recognized by the Ohio Supreme Court as the equivalent of the "due process of law" protections in the U.S. Constitution. *Arbino* at ¶ 48. In *Arbino*, this Court declined to apply a "strict scrutiny" test to the due process challenge in that case but rather applied a "rational-basis" test.[9] Under the rational basis test, a statute must "bear a real and substantial relation to the

[9] As discussed in part IV(C) below, Appellants disagree with the majority holding in *Arbino* that the right to a trial by jury is not a fundamental right requiring "strict scrutiny" review of a due

public health safety, morals or general welfare of the public and not be unreasonable or arbitrary." *Arbino* at ¶ 49; *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377. The application of R.C. 2315.18's damage caps to minors who are victims of sexual abuse is not rationally related to the public's health, safety or welfare and is both unreasonable and arbitrary.

1. R.C. 2315.18, as Applied to Minor Victims of Sexual Abuse, Does Not Bear a Real and Substantial Relation to the General Welfare of the Public.

In *Arbino*, this Court accepted the General Assembly's view that noneconomic damages are "inherently subjective" and "that an uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system." *Arbino* at ¶ 55. As a result, the Court upheld a cap on noneconomic damages for all tort victims except those suffering injuries designated in R.C. 2315.18(B)(3).

In this case, a minor female was the victim of a sexual assault. To the extent minors who are victims of sexual assaults suffer any physical injuries, they are typically not of the type listed in R.C. 2315.18(B)(3). Further, these victims rarely suffer significant economic injury. These victims do, however, suffer real, substantial noneconomic injury in the form described at trial by Dr. Jeffrey Smalldon and in multiple treatises and articles.[10] Nonetheless, R.C. 2315.18 provides

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process claim. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422 (1994) (Right to a jury trial in negligence actions is a fundamental right requiring strict scrutiny review of due process claim.); *Arbino* at ¶ 176, (Pfeifer, J. dissenting). Given the majority holding in *Arbino* remains extant, however, Appellants proceed to demonstrate that R.C. 2315.18 denies Appellant Jessica Simpkins her right to due process of law even under a rational basis test.

[10] *See., e.g,* Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly,* 53 Emory L.J. 1263 (2004); Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels,* 55 UCLA L.Rev. 905 (2008); Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury,* 31 Dayton L.Rev. 307 (2006); Gibbons & Campbell, *Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children By*

no exception for such victims. As a result, Ohio's most vulnerable citizens bear a disproportionate share of the burden in the legislature's attempt to improve the business climate in this state.

Legislation which effectively precludes minor victims of sexual abuse from receiving just compensation for their injury cannot be said to bear a real and substantial relationship to the public's general welfare. As a result, R.C. 2315.18 fails the first prong of the rational basis test.

2. R.C. 2315.18 is Both Arbitrary and Unreasonable as Applied to Minors Who are Victims of Sexual Abuse.

Even if a statute bears a real and substantial relationship to the public's general welfare, it cannot be arbitrary or unreasonable if it is to pass constitutional muster. "Arbitrary" has been defined as "without adequate determining principal" and "unreasonable" has been defined as "irrational." *Detelich v. Gecik*, 90 Ohio App.3d 793, 795, 630 N.E.2d 771 (11th Dist.1993).

As applied to minors who are victims of sexual abuse, it is clearly irrational to require that they suffer a physical injury of the kind listed in R.C. 2315.18(B)(3) before they can receive the amount of compensatory damages awarded by a jury. Sexual abuse does not typically result in serious physical injury or economic harm. Rather it manifests itself in terms of emotional distress, depression, altered sense of self and social adjustment and impaired relationships. Injuries such as these are real and yet R.C. 2315.18 places them, in a group, as not being worthy of full compensation.

Scholarly research has recognized that caps on noneconomic damages do indeed disproportionally affect females, like Jessica, in particular. As one commentator noted:

Administrators, Coaches and Volunteers, 13 J. Legal Aspects Sport 185 (2003); Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U.Pa.L.Rev. 463 (1998); Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 Tenn.L.Rev. 847 (1997).

> The reasons go beyond the lower wages earned by women. Several types of injuries that are disproportionately suffered by women - sexual assault, reproductive harm, such as pregnancy loss or infertility, and gynecological medical malpractice - do not affect women in primarily economic terms. Rather, the impact is felt more in the ways compensated through noneconomic loss damages: emotional distress and grief, altered sense of self and social adjustment, impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market based wage earning activity. Many of these most precious, indeed priceless, aspects of human life are virtually worthless in the market, and there is social resistance to seeing them solely or primarily in commodified, market-based terms. Society, and thus jurors, tends to understand these injuries in noneconomic, nonmarket referenced ways. Consequently, noneconomic loss damages become the principal means by which a jury can signal its sense that these types of harm are serious and profound and provide a woman plaintiff with what it regards as adequate compensation.

Finley, *The 2004 Randolph W. Thrower Symposium: The Future of Tort Reform: Reforming the Remedy, Re-balancing the Scales: Article: The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263 (2004).

In his dissenting opinion in *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 427, 633 N.E.2d 504, Chief Justice Moyer wrote: "If the underlying purpose of tort law is to wholly compensate victims, due process is satisfied when the plaintiff recovers, from all sources, the amount that the jury deems a just and appropriate reward." Minors who are victims of sexual abuse face a lifetime of dealing with the consequences of a tortious and, in this case, criminal act. R.C. 2315.18, as applied to those victims, however, ignores the fact that some torts result almost exclusively in noneconomic injuries and thus guarantees that young victims such as Jessica Simpkins can never be wholly compensated for their injury.

In ruling on Appellants' due process claim, the Fifth District held that in order to prevail on such a claim the plaintiff must show that he or she suffered nonphysical injuries that approximate the physical injuries listed in R.C. 2315.18(B)(3). (Appx. 3.) That court thus recognized that subjecting all nonphysical injuries to a damages cap could be deemed an

arbitrary and unreasonable denial of due process, but nonetheless held that the evidence in this case did not support such a finding. (Id.)

In reaching its conclusion, the Fifth District ignored the findings of fact by the jury and essentially ruled that the jury's verdict on damages was against the manifest weight of the evidence. This Court has recognized on numerous occasions that a reviewing court "has an obligation to presume that the findings of the trier of fact are correct." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. Ignoring that long-standing principle of appellate review, the Fifth District in this case acted as a super-jury, substituting its own view of the facts for those of the jury.

The jury in this case heard the testimony of not only Jessica and her father, Gene Simpkins, but also the uncontradicted testimony of psychologist Dr. Jeffrey Smalldon. Jessica testified that as a result of Williams' actions she, among other things, quit attending high school for periods of time, is afraid to be left alone, is afraid of the dark, has issues being alone with men she is dating and suffers from nightmares. (TR. 340, 344, 346, 348-49.) She testified that, without any provocation, the details of the incident with Williams will replay through her head around three to four times a week. (TR. 347.) Her testimony at trial was over five years after the incident, yet she still testified that the mental anguish was ongoing and was unsure when these issues will pass. (TR. 349.) Jessica also testified that she would like to get married one day but these two instances of abuse have affected her sexual relationships, her trust in members of the opposite sex, and her ability to form long-term relationships. (TR. 348-49.)

The gravity of Jessica's injuries includes a diagnosis of: Post-Traumatic Stress Disorder; Dysthymic Disorder, which is a chronic, low-grade, depressive condition; alcohol abuse; and dependent and avoidant personality characteristics. (TR. 410-11.) Dr. Smalldon testified that

Jessica's injuries are permanent, that she will need long-term treatment and that the treatment will come in several different forms throughout Jessica's life. (TR. 423-27.) He testified that Jessica associates sexual contact with negativity, is very hesitant to enter into relationships that involve sexual contact or intimacy, suffers from feelings of anxiety and mistrust, and finds it difficult to be with a man alone. (TR. 414-15, 429.) Jessica is even hesitant to seek out counseling to help her recover from her injuries, as she associates the counseling and therapy with reliving the event with Williams. (TR. 447.)

Based upon the testimony and evidence, the jury awarded Jessica $1,500,000 for past noneconomic damages and $2,000,000 for future noneconomic damages. (T.Ct. R. 89.) The jury's award evidences their conclusion that her noneconomic injuries were the type of serious, permanent life-altering catastrophic injuries that the legislature exempted from the damage cap, but only if the result of a physical injury. The Fifth District was correct in finding that a cap on noneconomic damages can result in an unconstitutional denial of due process. The Fifth District was wrong, however, in concluding that such a finding was not supported by the record in this case.

Furthermore, Appellants' "as applied" challenge to the constitutionality of the damage caps is broader than that addressed by the Fifth District and focuses on the "particular context" in which the statute is being applied. *Wymsylo*, 132 Ohio St.3d at ¶ 22. Specifically, Appellants assert that it is arbitrary and unreasonable, and thus a denial of due process, for a statute to impose a cap on noneconomic damages to be awarded to a minor who is the victim of sexual abuse. Any minor injured in that manner will have little or no significant physical injury and limited economic damages but will suffer significant noneconomic injury.

In its due process analysis, the majority in *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, noted that in *Morris v. Savoy,* 61 Ohio St.3d 684, 576 N.E.2d 765 (1991) and *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), the Court found that damage caps violated the second prong of the rational-basis test because they imposed the cost of the intended benefit to the public on those most severely injured. *Arbino* at ¶ 59. The *Arbino* Court concluded, however, that "R.C. 2315.18 alleviates this concern by allowing for limitless noneconomic damages for those suffering catastrophic injuries." *Id.* at ¶ 60.

As applied to minors who are victims of sexual abuse, the rationale employed in *Arbino* simply does not hold true. The evidence in this case, as well as common sense, compels the conclusion that the effect of a rape on a child is "catastrophic." No person of good conscience could characterize the injuries suffered by Jessica as "noncatastrophic." Nonetheless, R.C. 2315.18 arbitrarily and unreasonably imposes upon her and others similarly situated the high cost of ameliorating the perceived "deleterious economic effects of the tort system." *Arbino* at ¶ 55.

Recognizing, as this Court has, that minors have a special status in tort law and further recognizing that minors suffer a disproportionate number of sexual assaults and will bear the effects of a sexual assault for a lifetime, it is also arbitrary and unreasonable for the legislature, by fiat, to strip ninety percent of the award that a jury, after fully considering the evidence, deemed appropriate to fully compensate Jessica for her noneconomic injuries. On what rational, reasonable, nonarbitrary basis could a legislature determine that an award of $250,000 or even $350,000 is adequate compensation for a child who has been raped. There is none.

By imposing caps on noneconomic damages, R.C. 2315.18, as applied to minor victims of sexual abuse, denies Jessica Simpkins and others similarly situated their right to due course of law guaranteed by the Ohio Constitution.

B. R.C. 2315.18 As Applied To Jessica Simpkins Violates Her Right To Equal Protection Under Article I, Section 2 Of The Ohio Constitution.

In *Arbino*, the majority opinion rejected a strict scrutiny review of the plaintiff's equal protection claim by finding, as it did with respect to due process, that R.C. 2315.18 did not infringe upon any constitutional right and also finding that the statute was "facially neutral" and thus valid even if it did disproportionately affect certain classes. *Arbino* at ¶ 66. For the reasons set forth in part IV(C) below, Appellants assert that the statute does impinge upon the fundamental right to trial by jury and that a strict scrutiny standard of review should apply to their equal protection claim.

Even if the Court applies a rational basis test, however, R.C. 2315.18 violates Jessica Simpkins' equal protection rights. Under the rational-basis test, the Court must first identify a valid state interest and then determine whether the means chosen to advance that interest is rational. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 9. A "means" is not rational if it is clearly arbitrary and unreasonable. *Id.*

The Court in *Arbino* acknowledged that R.C. 2315.18 creates different classes of injured persons. "(T)he 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." *Arbino* at ¶ 67. The Court also said that "catastrophic injuries offer more concrete evidence of noneconomic damages." *Id.* at ¶ 72.

In fact, as applied to victims like Jessica, the classes created are not as described in *Arbino* but rather are classes of those with the catastrophic and noncatastrophic physical injuries

listed in R.C. 2315.18(B)(3) versus those who, by the nature of the tort and the age of the victim, will rarely, if ever, suffer permanent physical injury but have and will continue to suffer permanent catastrophic nonphysical injuries. The former enjoy unlimited noneconomic damages while the latter's noneconomic damages are capped, no matter that the injuries are permanent and no matter how severe the injury.

As applied to minors who are victims of sexual abuse, R.C. 2315.18 provides that no matter how severe their nonphysical injuries may be, they can never receive the same treatment under the law as a person with a physical injury designated in R.C. 2315.18(B)(3). Even if one assumes the state has a valid state interest in limiting noneconomic damages, the means chosen by the legislature, i.e., the exclusion of a class of victims who by the nature of the tort are likely to only suffer nonphysical injuries, is clearly not rational.

For example, R.C. 2315.18 allows unlimited noneconomic damages for "(p)ermanent and substantial physical deformity." R.C. 2315.18(B)(3)(a). That language has been interpreted to include scarring. *Bransteter v. Moore*, N.D. Ohio No. 3:09-cv-2, 2009 U.S. Dist. LEXIS 6692 (Jan. 21, 2009) ("scarring may be so severe as to qualify as a serious disfigurement (for purposes of R.C. 2315.18(B)(3)(a))."). Thus under the statute, an elderly victim of a traffic accident with residual scarring may recover unlimited noneconomic damages but a child victim of sexual abuse, facing a lifetime of permanent psychological damage, has his or her noneconomic damages capped at $250,000, or, potentially, up to $350,000, inclusive and attorney fees and litigation costs. As noted in part I above, rapes and sexual assaults disproportionately affect young adults, and their injuries will affect them over their extended life expectancy, and yet R.C. 2315.18 consigns them to a class that can never receive adequate compensation for their injuries.

The irrationality of the statute as applied to minors who are victims of sexual abuse is further evidenced by its use of economic damages to establish the limits on noneconomic damages. Jessica Simpkins, a fifteen year old at the time of the assaults, had no wage loss and limited medical bills associated with her rape by Williams. As a result, she and all others similarly situated, are precluded from receiving full compensation for their injuries, regardless of the permanency and severity of their nonphysical injuries.

Further illuminating the disparity created by R.C. 2315.18, the Court can posit a situation where the minor rape victim also receives a physical scar that qualifies as a deformity under R.C. 2315.18(B)(3). If that had been the situation in Jessica's case, she would have been able to receive the full $3,500,000 in noneconomic damages awarded to her by the jury. Because she did not receive a qualifying physical injury that amount has been reduced by 90%.

As argued in the dissent in *McCrone*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, does the fact that Jessica did not receive an accompanying physical injury make her Chronic PTSD, her depression, her personality disorders as testified to by Dr. Smalldon any less real? Would a scar provide "such independent verification of the post-traumatic stress disorder as to be rationally determinative of its compensability?" *Id.* at ¶ 44. The answer is clearly no.

Fundamentally, the issue for this Court is whether the legislature, consistent with the constitutional right to equal protection, can create a civil legal system where tort victims with some physical injuries are excluded from the cap on noneconomic damages but minor victims of sexual abuse, who routinely suffer no physical injury but permanent, catastrophic nonphysical injuries, are denied the same exclusion. Such a system is clearly arbitrary and unreasonable, and violates Jessica's equal protection rights under the Ohio Constitution.

C. R.C. 2315.18 As Applied To Jessica Simpkins Violates Her Right To A Jury Trial Under Article I, Section 5 Of The Ohio Constitution.

Article I, Section 5 of the Ohio Constitution provides: "The right of trial by jury shall be inviolate * * *." Inviolate is defined as "free from change or blemish: pure, unbroken." *Webster's Third New International Dictionary* 1190 (1993). In *Arbino*, the majority opinion held that in spite of the clear constitutional language, legislation that requires a jury to determine the "fact" of the amount of an injured party's noneconomic damages but then requires the judge, as a matter of "law," to limit those damages to a specified amount, does not violate the constitutional right to trial by jury. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶¶ 37-38, 42. Appellants assert that the majority holding in *Arbino* on this issue renders the fact finding function of the jury meaningless and was wrongly decided. *See, e.g., Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218, (2010), fn. 8.

The majority in *Arbino* found that the legislature could cap noneconomic damages, regardless of a jury's determination, based upon its policy choice to limit such damages for all but the most serious injuries. *Arbino*, ¶ 40. As demonstrated above, minors who are victims of sexual abuse suffer life-altering injuries as serious as those designated in R.C. 2315.18(B)(3). Based upon the amount awarded in her case, it is clear that the jury found Jessica's nonphysical injuries to be permanent and catastrophic. The majority in *Arbino* found that the statute did not alter a jury's findings of fact. *Id.* at ¶ 40. As applied to Jessica Simpkins, the effect of the statute is to clearly alter the jury's finding that she suffered a catastrophic injury commensurate with those designated in R.C. 2315.18(B)(3). By arbitrarily overruling that finding, R.C. 2315.18 violates Jessica Simpkins' right to a trial by jury.

D. R.C. 2315.18 As Applied To Jessica Simpkins Violates Her Right To Open Courts And A Remedy Under Article I, Section 16 Of The Ohio Constitution.

In *Arbino*, the Court noted that the right to open courts and a remedy meant "an opportunity granted at a meaningful time and in a meaningful manner." *Arbino*, ¶ 44, quoting *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47, 512 N.E.2d 626 (1987). In *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 426, 633 N.E.2d 504, the Court said: "Denial of a remedy and denial of a meaningful remedy lead to the same result: an injured plaintiff without legal recourse."

In *Clarke v. Oregon Health Sciences Univ.*, 343 Or. 581, 175 P.3d 418 (2007), the Oregon Supreme Court used a different analysis to reach the same conclusion that a constitutional right to a "remedy" requires a meaningful remedy. The statute at issue in *Clarke* capped economic damages and noneconomic damages at $100,000 each for personal injury claims against public bodies. *Id.* at 608. The plaintiff, an infant, suffered brain damage as a result of negligence during surgery and was rendered totally and permanently disabled. *Id.* at 586. The plaintiff alleged, and for purposes of appeal the defendants agreed, that plaintiff had suffered $12,273,506 in economic damages and $5,000,000 in noneconomic damages. *Id.*

The court in *Clarke* acknowledged the legislature's authority "to adjust remedial processes and substantive remedies to satisfy the constitutional command to provide 'remedy by due course of law for injury.'" *Id.* at 607. The court held, however, that "any alteration may not substitute an 'emasculated' version of the remedy that was available at common law" *id.* citing *Smothers v. Gresham Transfer, Inc.,* 332 Or. 83, 23 P.3d 333 (2001), and held that the statute in question did in fact emasculate the common law remedy and thus violated Oregon's constitutional right to a remedy.

The jury in this case awarded Jessica Simpkins $1,500,000 for past noneconomic damages and $2,000,000 for future economic damages. (T.Ct. R. 89.) At the time of trial,

Jessica was 15 years old. The future noneconomic damages were to compensate her for the permanent injuries identified by Dr. Smalldon that will occur over her remaining life expectancy. Under the mandate of R.C. 2315.18, however, Jessica's noneconomic damages were reduced to $350,000 or 1/10th of the amount awarded by the jury. (T.Ct. R. 101.) Furthermore, the trial judge in this case has granted a remittitur, further reducing Jessica's future economic damages to $60,000, thus limiting her noneconomic damages to $250,000. (T.Ct. R. 110.) Whether phrased as denying a "meaningful" remedy or phrased as "emasculating" the remedy available to Jessica at common law, R.C. 2315.18 violates her constitutional right to open courts and a remedy.

A further factor evidencing the statute's violation of the right to a remedy is the fact that minor victims of sexual abuse incur significant litigation expense and require competent legal counsel to pursue their claims. The majority opinion in *Arbino* notes that tort victims may recover full economic damages and up to $350,000 in noneconomic damages and that those remedies are "meaningful." As applied to Jessica Simpkins and others similarly situated, that is demonstrably not the case.

As noted above, minor victims of sexual abuse will, in most cases, have little or no economic damages and none of the physical injuries listed in R.C. 2315.18(B)(3). Their real injury is nonphysical injury and their real damages are noneconomic damages. Thus, in virtually every instance their recovery will be limited to $350,000 or less.

While exact figures are not in the record, it is apparent from the record in this case that Jessica Simpkins and her father have incurred significant litigation expense which will be deducted from their recovery. This case is now in its seventh year. Nineteen depositions were taken, transcribed and filed, including one international videoconference deposition of a witness in Naples, Italy with the attendance cost of locating, serving and paying for the logistics of the

deposition. The case required expert testimony, as would any similar case, with the accompanying expert fees. The trial lasted five days with attendance trial costs. All of these costs will serve to reduce Jessica's recovery.

In addition to litigation expenses, Jessica will incur attorney fees which will further reduce her actual recovery. In R.C. 2743.48, the legislature has provided for a civil action to recover damages for persons wrongfully imprisoned. In enumerating the damages recoverable, the statute includes attorney fees and expenses incurred in the underlying criminal proceedings. R.C. 2743.48(E)(2)(a). In addition, the statute provides that the award to the wrongfully imprisoned person "shall include" an award of reasonable attorney fees in the wrongful imprisonment civil case. R.C. 2743.48(F)(2). In contrast, tort victims such as Jessica must bear the full cost of attorney fees under R.C. 2315.18.

Further precluding an adequate remedy under R.C. 2315.18 is the fact that, if that statute's noneconomic damage caps are upheld by this Court, minors who are victims of sexual abuse will be challenged to find a qualified, experienced attorney willing to undertake the representation. Few minors or their families could afford an hourly fee arrangement for the time required to litigate their claim. As a result, an attorney presented with a potential client with little or no economic injury, and none of the physical injuries listed in R.C. 2315.18(B)(3), but severe nonphysical injuries, will be hard-pressed to justify accepting the case on a contingent fee basis and committing to the substantial amount of time and expense the case will entail, knowing that the maximum recovery upon which the fee will be based is $350,000, or $250,000, depending upon the economic loss.

In sum, contrary to wholly compensating a tort victim as referenced by Chief Justice Moyer in *Sorrell*, the legislature, through adoption of R.C. 2315.18, has precluded a

"meaningful" recovery for Jessica and others like her and, in doing so, has denied her the right to a remedy guaranteed by Article I, Section 16.

<u>Proposition of Law 2</u>: 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.

If this Court decides that the damage caps in R.C. 2315.18 are constitutional, then imposition of the damage cap should nonetheless permit recovery for two separate and distinct counts of sexual battery. An "occurrence" means "all claims resulting from or arising out of any one person's bodily injury." R.C. 2315.18(A)(5). Jessica Simpkins suffered two distinct bodily injuries: oral and vaginal penetration. These were two separate occurrences and thus the $350,000 cap should be applied to each occurrence.

In *Madvad v. Russell*, 9th Dist. Lorain No. 96CA006652, 1997 Ohio App. LEXIS 5181, *5 (Nov. 19, 1997), the Court was required to determine how the discovery rule was to be applied for statute of limitations purposes in cases involving multiple instances of sexual abuse of a minor. After concluding that there is no separate cause of action for sexual abuse in Ohio and that, therefore, each instance of abuse is treated as an assault and battery, the Court held:

> Thus, we conclude that each sexual assault * * * constitutes an independent tort, separate and apart from any other claims that the Madvads may have. Because each assault constitutes a separate and independent tort, the statute of limitations must be applied individually to each assault.

Id. at *7.

In *State v. Murphy*, 8th Dist. Cuyahoga No. 95705, 2011-Ohio-3686, ¶ 35, the court held that "(w)here the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each" the defendant may be convicted of each separate offense.

The Fifth District rejected Appellants' argument that R.C. 2315.18's damage cap should be applied to each separate assault by saying the assaults occurred "within a short period of time, in a confined geographic space, and without any intervening factors." (Appx. 3.) Under the Fifth District's rationale, presumably had Williams delayed for some undefined amount of time the vaginal penetration after the oral penetration, or had forced Jessica to perform one act in a different room than the other act, two caps would apply. Such a rationale unconscionably disregards the fact that Jessica was violated twice and in two different manners.

Also, the Fifth District's reference to the assaults occurring "without any intervening factors" is undefined but, given the facts in this case, is clearly erroneous. Jessica testified that after the oral penetration, she saw an open door and a pathway to escape. (TR. p. 333.) When she attempted to flee, Williams blocked the door, began kissing her, forced her to the ground, removed her pants and vaginally penetrated her. (TR. p. 333.) A victim's forced oral penetration followed by an attempted escape, a subsequent recapture, and forced vaginal penetration qualify as intervening factors under any definition.

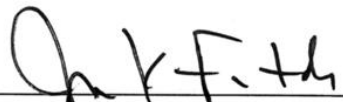
As the sexual battery on Jessica constituted two separate criminal counts, it follows that they have already been determined to be of dissimilar import and to have stemmed from separate animus. They should therefore be treated as two separate tort actions, or occurrences. Thus, if this Court denies Jessica Simpkins' full, uncapped noneconomic damages and upholds the constitutionality of the damage caps contained in R.C. 2315.18, Appellants assert that the damage caps should apply to the two occurrences separately.

CONCLUSION

If the damage caps in R.C. 2315.18 are not arbitrary and unreasonable as applied to Jessica Simpkins in this case, it may fairly be said that the legislature's ability to preclude

victims of tort from recovering full and fair compensation is wholly unconstrained by the Ohio Constitution. Because the Constitution does in fact limit the power of the legislative branch, Appellants ask that this Court exercise its authority and duty by declaring that R.C. 2315.18, as applied to Jessica Simpkins, violates her enumerated rights under the Ohio Constitution.

Respectfully submitted,



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Jessica Simpkins and Gene Simpkins

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF APPELLANTS JESSICA SIMPKINS AND GENE SIMPKINS** was served by regular U.S. Mail, postage prepaid, this 20th day of July 2015, upon the following:

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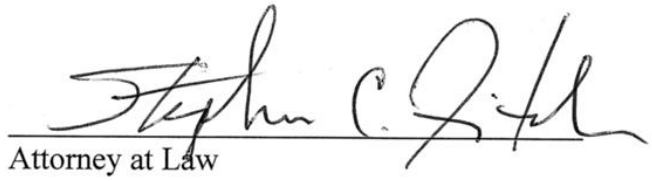
Grace Brethren Church of Delaware, Ohio



Attorney at Law

APPENDIX

1. Notice of Appeal

2. August 8, 2014 Judgment Entry of Fifth District Court of Appeals

3. August 8, 2014 Opinion of Fifth District Court of Appeals

4. September 30, 2014 Judgment Entry of Fifth District Court of Appeals Denying Application for Reconsideration

5. Constitutional Provisions

    a. Article I, Section 2 of the Ohio Constitution

    b. Article I, Section 5 of the Ohio Constitution

    c. Article I, Section 16 of the Ohio Constitution

6. Statutory Provisions

    a. R.C. 2315.18

    b. R.C. 2315.21

    c. R.C. 2743.48

APPENDIX 1

IN THE SUPREME COURT OF OHIO 14-1953

Jessica Simpkins, et al.	:	Ohio Supreme Court Case No. _____
	:	
Appellants,	:	On Appeal from the Delaware County Court of Appeals, Fifth Appellate District
	:	
v.	:	
	:	
Grace Brethren Church of Delaware, Ohio	:	Court of Appeals Case No. 13 CAE 10 0073
	:	
Appellee.	:	

NOTICE OF APPEAL OF
APPELLANTS JESSICA SIMPKINS AND GENE SIMPKINS

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FILED
NOV 12 2014
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANTS
JESSICA SIMPKINS AND GENE SIMPKINS

Appellants Jessica Simpkins and Gene Simpkins hereby give notice of appeal to the Supreme Court of Ohio, pursuant to Ohio Supreme Court Rule 7.01, from the judgment of the Delaware County Court of Appeals, Fifth Appellate District, captioned *Simpkins v. Grace Brethren Church of Delaware,* No. 13 CAE 10 0073, entered and journalized on August 8, 2014. A timely application for reconsideration was filed on August 18, 2014 by Appellee Grace Brethren Church of Delaware, Ohio. The Fifth District denied the application and journalized that decision by a Judgment Entry dated September 30, 2014.

Date-stamped copies of the Fifth District Court of Appeals August 8, 2014 Opinion, August 8, 2014 Judgment Entry and September 30, 2014 Judgment Entry denying reconsideration are attached as Exhibits 1, 2 and 3, respectively, to the Appellants' Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

John K. Fitch by Stephen C. Fitch per authority 11-12-14

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Counsel for Appellants
Jessica Simpkins and Gene Simpkins

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **NOTICE OF APPEAL OF APPELLANTS JESSICA SIMPKINS AND GENE SIMPKINS** was served by regular U.S. Mail, postage prepaid, this 12th day of November 2014, upon the following:

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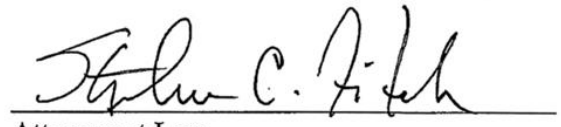

Attorney at Law

31654110.1

APPENDIX 2

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JESSICA SIMPKINS, ET AL.	:	
Plaintiffs-Appellees/Cross-Appellants	:	
-vs-	:	JUDGMENT ENTRY
GRACE BRETHREN CHURCH OF DELAWARE, OHIO	:	
Defendant-Appellant/Cross-Appellee	:	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

2014 AUG 18 PM 1:48
JAN ANTONOPLOS
CLERK
COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED

APPENDIX 3

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
JESSICA SIMPKINS, et al	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiffs-Appellees/Cross-Appellants	:	Hon. Patricia A. Delaney
	:	
-vs-	:	
	:	Case No. 13 CAE 10 0073
GRACE BRETHREN CHURCH OF DELAWARE, OHIO	:	
	:	
Defendant-Appellant/Cross-Appellee	:	OPINION

Court of Appeals
Delaware Co., Ohio
I hereby certify the within be a true copy of the original on file in this office.
Nan Antonopolos, Clerk of Courts
By _____ 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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COURT OF APPEALS
DELAWARE COUNTY, OHIO
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JAN ANTONOPLOS
CLERK

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 if 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 or 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 obliterates 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

APPENDIX 4

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2014 SEP 30 AM 9:21
JAN ANTONOPLOS
CLERK

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JESSICA SIMPKINS, et al.,	:	
Plaintiffs-Appellees/Cross-Appellants	:	
-vs-	:	JUDGMENT ENTRY
GRACE BRETHREN 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

APPENDIX 5a

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article I. Bill of Rights (Refs & Annos)

OH Const. Art. I, § 2

O Const I Sec. 2 Equal protection and benefit

Currentness

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Notes of Decisions (1799)

Const. Art. I, § 2, OH CONST Art. I, § 2
Current through 2015 Files 1 to 10, and 12 to 14 of the 131st GA (2015-2016).

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APPENDIX 5b

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article I. Bill of Rights (Refs & Annos)

OH Const. Art. I, § 5

O Const I Sec. 5 Right of trial by jury

Currentness

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

Notes of Decisions (442)

Const. Art. I, § 5, OH CONST Art. I, § 5
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APPENDIX 5c

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article I. Bill of Rights (Refs & Annos)

OH Const. Art. I, § 16

O Const I Sec. 16 Redress for injury; due process

Currentness

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

Notes of Decisions (5253)

Const. Art. I, § 16, OH CONST Art. I, § 16
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APPENDIX 6a

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Prior Version Held Unconstitutional by** State ex rel. Ohio Academy of Trial Lawyers v. Sheward, Ohio, Aug. 16, 1999

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

Baldwin's Ohio Revised Code Annotated
Title XXIII. Courts--Common Pleas
Chapter 2315. Trial Procedure (Refs & Annos)
Determination of Amount of Recovery; Contributory Negligence and Assumption of Risk; Damages

R.C. § 2315.18

2315.18 Amount of recovery to be determined

Currentness

(A) As used in this section and in section 2315.19 of the Revised Code:

(1) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code.

(2) "Economic loss" means any of the following types of pecuniary harm:

(a) All wages, salaries, or other compensation lost as a result of an injury or loss to person or property that is a subject of a tort action;

(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations as a result of an injury or loss to person or property that is a subject of a tort action;

(c) Any other expenditures incurred as a result of an injury or loss to person or property that is a subject of a tort action, other than attorney's fees incurred in connection with that action.

(3) "Medical claim," "dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in section 2305.113 of the Revised Code.

(4) "Noneconomic loss" means nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

(5) "Occurrence" means all claims resulting from or arising out of any one person's bodily injury.

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(6) "Product liability claim" has the same meaning as in section 2307.71 of the Revised Code.

(7) "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a civil action upon a product liability claim or an asbestos claim. "Tort action" does not include a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim or a civil action for damages for a breach of contract or another agreement between persons.

(8) "Trier of fact" means the jury or, in a nonjury action, the court.

(B) In a tort action to recover damages for injury or loss to person or property, all of the following apply:

(1) There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action.

(2) Except as otherwise provided in division (B)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of 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.

(3) There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action to recover damages for injury or loss to person or property if the noneconomic losses of the plaintiff are for either of the following:

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

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

(C) In determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact shall not consider any of the following:

(1) Evidence of a defendant's alleged wrongdoing, misconduct, or guilt;

(2) Evidence of the defendant's wealth or financial resources;

(3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

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(D) If a trial is conducted in a tort action to recover damages for injury or loss to person or property and a plaintiff prevails in that action, the court in a nonjury trial shall make findings of fact, and the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:

(1) The total compensatory damages recoverable by the plaintiff;

(2) The portion of the total compensatory damages that represents damages for economic loss;

(3) The portion of the total compensatory damages that represents damages for noneconomic loss.

(E)(1) After the trier of fact in a tort action to recover damages for injury or loss to person or property complies with division (D) of this section, the court shall enter a judgment in favor of the plaintiff for compensatory damages for economic loss in the amount determined pursuant to division (D)(2) of this section, and, subject to division (F)(1) of this section, the court shall enter a judgment in favor of the plaintiff for compensatory damages for noneconomic loss. Except as provided in division (B)(3) of this section, in no event shall a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in division (B)(2) of this section. Division (B) of this section shall be applied in a jury trial only after the jury has made its factual findings and determination as to the damages.

(2) Prior to the trial in the tort action described in division (D) of this section, any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages as described in division (B)(2) of this section.

(F)(1) A court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in this section.

(2) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limit on compensatory damages for noneconomic loss described in division (B)(2) of this section, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that limit.

(G) With respect to a tort action to which division (B)(2) of this section applies, any excess amount of compensatory damages for noneconomic loss that is greater than the applicable amount specified in division (B)(2) of this section shall not be reallocated to any other tortfeasor beyond the amount of compensatory damages that the tortfeasor would otherwise be responsible for under the laws of this state.

(H) This section does not apply to any of the following:

(1) Tort actions that are brought against the state in the court of claims, including, but not limited to, those actions in which a state university or college is a defendant and to which division (B)(3) of section 3345.40 of the Revised Code applies;

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(2) Tort actions that are brought against political subdivisions of this state and that are commenced under or are subject to Chapter 2744. of the Revised Code. Division (C) of section 2744.05 of the Revised Code applies to recoverable damages in those actions.

(3) Wrongful death actions brought pursuant to Chapter 2125. of the Revised Code.

(I) If the provisions regarding the limits on compensatory damages for noneconomic loss set forth in division (B)(2) of this section have been determined to be unconstitutional, then division (C) of this section and section 2315.19 of the Revised Code shall govern the determination of an award of compensatory damages for noneconomic loss in a tort action.

CREDIT(S)

(2004 S 80, eff. 4-7-05)

Notes of Decisions (36)

R.C. § 2315.18, OH ST § 2315.18
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APPENDIX 6b

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted **Unconstitutional as Applied by** Roginski v. Shelly Co., Ohio Com.Pl., Aug. 21, 2014

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

Baldwin's Ohio Revised Code Annotated
Title XXIII. Courts--Common Pleas
Chapter 2315. Trial Procedure (Refs & Annos)
Determination of Amount of Recovery; Contributory Negligence and Assumption of Risk; Damages

R.C. § 2315.21

2315.21 Recovery of compensatory, punitive, or exemplary damages in tort action; bifurcated trial; burden of proof

Currentness

(A) As used in this section:

(1) "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(2) "Trier of fact" means the jury or, in a nonjury action, the court.

(3) "Home" has the same meaning as in section 3721.10 of the Revised Code.

(4) "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual shall be considered an employer under this section only if the subject of the tort action is related to the individual's capacity as an employer.

(5) "Small employer" means an employer who employs not more than one hundred persons on a full-time permanent basis, or, if the employer is classified as being in the manufacturing sector by the North American industrial classification system, "small employer" means an employer who employs not more than five hundred persons on a full-time permanent basis.

(B)(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

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(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant.

(3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.

(C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(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.

(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

(D)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

(b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

(c) Any attorneys fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

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(3) No award of prejudgment interest under division (C)(1) of section 1343.03 of the Revised Code shall include any prejudgment interest on punitive or exemplary damages found by the trier of fact.

(4) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

(5)(a) In any tort action, except as provided in division (D)(5)(b) or (6) of this section, punitive or exemplary damages shall not be awarded against a defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds the maximum amount of punitive or exemplary damages that may be awarded under division (D)(2) of this section against that defendant in the tort action.

(b) Notwithstanding division (D)(5)(a) of this section and except as provided in division (D)(6) of this section, punitive or exemplary damages may be awarded against a defendant in either of the following types of tort actions:

(i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(i) of this section.

(ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior of a type described in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(ii) of this section.

(6) Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action.

(E) This section does not apply to tort actions against the state in the court of claims, including, but not limited to, tort actions against a state university or college that are subject to division (B)(1) of section 3345.40 of the Revised Code, to tort actions

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against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code, or to the extent that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud or on a basis other than that the defendant in question as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages.

(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence.

(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

(F) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limits on punitive or exemplary damages pursuant to division (D) of this section, and neither counsel for any party or a witness shall inform the jury or potential jurors of those limits.

(G) When determining the amount of an award of punitive or exemplary damages against either a home or a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:

(1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;

(2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;

(3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 2002 H 412, eff. 11-7-02; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1987 H 1, eff. 1-5-88)

Notes of Decisions (441)

R.C. § 2315.21, OH ST § 2315.21
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APPENDIX 6c

Baldwin's Ohio Revised Code Annotated
Title XXVII. Courts--General Provisions--Special Remedies
Chapter 2743. Court of Claims (Refs & Annos)
Action Against State for Wrongful Imprisonment

R.C. § 2743.48

2743.48 Action against state for wrongful imprisonment; notice of rights; amount of damages; eligibility

Effective: September 29, 2013
Currentness

(A) As used in this section and section 2743.49 of the Revised Code, a "wrongfully imprisoned individual" means an individual who satisfies each of the following:

(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information, and the violation charged was an aggravated felony or felony.

(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.

(3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.

(4) The individual's conviction was vacated, dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by the court of common pleas in the county where the underlying criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

(B)(1) A person may file a civil action to be declared a wrongfully imprisoned individual in the court of common pleas in the county where the underlying criminal action was initiated. That civil action shall be separate from the underlying finding of guilt by the court of common pleas. Upon the filing of a civil action to be determined a wrongfully imprisoned individual, the attorney general shall be served with a copy of the complaint and shall be heard.

(2) When the court of common pleas in the county where the underlying criminal action was initiated determines in a separate civil action that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform the person and the person's attorney of the person's rights under this section to commence a civil action against

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the state in the court of claims because of the person's wrongful imprisonment and to be represented in that civil action by counsel of the person's own choice.

(3) The court described in division (B)(1) of this section shall notify the clerk of the court of claims, in writing and within seven days after the date of the entry of its determination that the person is a wrongfully imprisoned individual, of the name and proposed mailing address of the person and of the fact that the person has the rights to commence a civil action and to have legal representation as provided in this section. The clerk of the court of claims shall maintain in the clerk's office a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in the clerk's office for each such individual.

(4) Within sixty days after the date of the entry of the determination by the court of common pleas in the county where the underlying criminal action was initiated that a person is a wrongfully imprisoned individual, the clerk of the court of claims shall forward a preliminary judgment to the president of the controlling board requesting the payment of fifty per cent of the amount described in division (E)(2)(b) of this section to the wrongfully imprisoned individual. The board shall take all actions necessary to cause the payment of that amount out of the emergency purposes special purpose account of the board.

(5) If an individual was serving at the time of the wrongful imprisonment concurrent sentences on other convictions that were not vacated, dismissed, or reversed on appeal, the individual is not eligible for compensation as described in this section for any portion of that wrongful imprisonment that occurred during a concurrent sentence of that nature.

(C)(1) In a civil action under this section, a wrongfully imprisoned individual has the right to have counsel of the individual's own choice.

(2) If a wrongfully imprisoned individual who is the subject of a court determination as described in division (B)(2) of this section does not commence a civil action under this section within six months after the entry of that determination, the clerk of the court of claims shall send a letter to the wrongfully imprisoned individual, at the address set forth in the notice received from the court of common pleas pursuant to division (B)(3) of this section or to any later address provided by the wrongfully imprisoned individual, that reminds the wrongfully imprisoned individual of the wrongfully imprisoned individual's rights under this section. Until the statute of limitations provided in division (H) of this section expires and unless the wrongfully imprisoned individual commences a civil action under this section, the clerk of the court of claims shall send a similar letter in a similar manner to the wrongfully imprisoned individual at least once each three months after the sending of the first reminder.

(D) Notwithstanding any provisions of this chapter to the contrary, a wrongfully imprisoned individual has and may file a civil action against the state, in the court of claims, to recover a sum of money as described in this section, because of the individual's wrongful imprisonment. The court of claims shall have exclusive, original jurisdiction over such a civil action. The civil action shall proceed, be heard, and be determined as provided in sections 2743.01 to 2743.20 of the Revised Code, except that if a provision of this section conflicts with a provision in any of those sections, the provision in this section controls.

(E)(1) In a civil action as described in division (D) of this section, the complainant may establish that the claimant is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with the claimant's conviction and sentencing, and a certified copy of the entry of the determination of the court of common pleas that the claimant is a wrongfully imprisoned individual under division (B)(2) of this section. No other evidence shall be required of the complainant to establish that the claimant is a wrongfully imprisoned individual, and the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.

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(2) In a civil action as described in division (D) of this section, upon presentation of requisite proof to the court of claims, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts:

(a) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in the state correctional institution;

(b) For each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty, forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code, and for each part of a year of being so imprisoned, a pro-rated share of forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code;

(c) Any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;

(d) The amount of the following cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual who was in custody of the department or under the department's supervision:

(i) Any user fee or copayment for services at a detention facility, including, but not limited to, a fee or copayment for sick call visits;

(ii) The cost of housing and feeding the wrongfully imprisoned individual in a detention facility;

(iii) The cost of supervision of the wrongfully imprisoned individual;

(iv) The cost of any ancillary services provided to the wrongfully imprisoned individual.

(F)(1) If the court of claims determines in a civil action as described in division (D) of this section that the complainant is a wrongfully imprisoned individual, it shall enter judgment for the wrongfully imprisoned individual in the amount of the sum of money to which the wrongfully imprisoned individual is entitled under division (E)(2) of this section. In determining that sum, the court of claims shall not take into consideration any expenses incurred by the state or any of its political subdivisions in connection with the arrest, prosecution, and imprisonment of the wrongfully imprisoned individual, including, but not limited to, expenses for food, clothing, shelter, and medical services. The court shall reduce that sum by the amount of the payment to the wrongfully imprisoned individual described in division (B)(4) of this section.

(2) If the wrongfully imprisoned individual was represented in the civil action under this section by counsel of the wrongfully imprisoned individual's own choice, the court of claims shall include in the judgment entry referred to in division (F)(1) of

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this section an award for the reasonable attorney's fees of that counsel. These fees shall be paid as provided in division (G) of this section.

(3) The state consents to be sued by a wrongfully imprisoned individual because the imprisonment was wrongful, and to liability on its part because of that fact, only as provided in this section. However, this section does not affect any liability of the state or of its employees to a wrongfully imprisoned individual on a claim for relief that is not based on the fact of the wrongful imprisonment, including, but not limited to, a claim for relief that arises out of circumstances occurring during the wrongfully imprisoned individual's confinement in the state correctional institution.

(G) The clerk of the court of claims shall forward a certified copy of a judgment under division (F) of this section to the president of the controlling board. The board shall take all actions necessary to cause the payment of the judgment out of the emergency purposes special purpose account of the board.

(H) To be eligible to recover a sum of money as described in this section because of wrongful imprisonment, both of the following shall apply to a wrongfully imprisoned individual:

(1) The wrongfully imprisoned individual shall not have been, prior to September 24, 1986, the subject of an act of the general assembly that authorized an award of compensation for the wrongful imprisonment or have been the subject of an action before the former sundry claims board that resulted in an award of compensation for the wrongful imprisonment.

(2) The wrongfully imprisoned individual shall commence a civil action under this section in the court of claims no later than two years after the date of the entry of the determination of the court of common pleas that the individual is a wrongfully imprisoned individual under division (B)(2) of this section.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2012 H 487, eff. 9-10-12; 2010 H 338, eff. 9-17-10; 2002 S 149, eff. 4-9-03; 1994 H 571, eff. 10-6-94; 1988 H 623, eff. 3-17-89; 1986 H 609)

Notes of Decisions (107)

R.C. § 2743.48, OH ST § 2743.48
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