ORIGINAL

**IN THE SUPREME COURT OF OHIO**

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| 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. | : | |

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# REPLY BRIEF OF APPELLANTS JESSICA SIMPKINS AND GENE SIMPKINS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION ..... 1

II. JESSICA SIMPKINS SUFFERED PERMANENT CATASTROPHIC INJURIES ..... 2

III. APPELLANTS' AS APPLIED CONSTITUTIONAL CHALLENGE ..... 5

A. The Nature Of An As Applied Challenge ..... 5

B. R.C. 2315.18 Is Unconstitutional As Applied To Minors Who Are Victims Of Sexual Abuse ..... 6

1. As Applied to Minors ..... 6

2. As Applied to Victims of Sexual Abuse ..... 7

IV. R.C. 2315.18 IS IRRATIONAL, ARBITRARY AND UNREASONABLE AS APPLIED TO JESSICA SIMPKINS IN VIOLATION OF HER RIGHT TO DUE PROCESS AND EQUAL PROTECTION ..... 8

A. R.C. 2315.18 Violates Jessica Simpkins' Due Process Rights ..... 8

B. R.C. 2315.18 Violates Jessica Simpkins' Equal Protection Rights ..... 11

V. R.C. 2315.18 VIOLATES JESSICA SIMPKINS' RIGHT TO OPEN COURTS AND A REMEDY AND RIGHT TO A JURY TRIAL ..... 12

VI. JESSICA SIMPKINS SUFFERED TWO "OCCURRENCES" FOR PURPOSES OF APPLICATION OF R.C. 2315.18'S DAMAGE CAPS ..... 15

VII. THIS COURT PROPERLY ACCEPTED THIS APPEAL FOR REVIEW ..... 17

VIII. CONCLUSION ..... 20

CERTIFICATE OF SERVICE ..... 21

APPENDIX

1. States Without Non-Economic Damage Caps

## TABLE OF AUTHORITIES

**Cases**

*Arbino v. Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 ..... 8, 19

*Bunger v. Lawson Co.*, 82 Ohio St.3d 463, 696 N.E.2d 1029 (1998) ..... 11

*Cincinnati, W. & Z. R. Co. v. Clinton Cty. Commrs.*, 1 Ohio St. 77 (1852) ..... 10

*City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 659 N.E.2d 781 (1996) ..... 19

*Danziger v. Luse*, 103 Ohio St.3d 337, 2004-Ohio-5227, 815 N.E.2d 658 ..... 17

*Lowery v. Rizer*, 4th Dist. Hocking No. 96CA11, 1996 WL 665015 (Nov. 12, 1996) ..... 18

*McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 ..... 9, 11

*Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994) ..... 18

*Sorrell v. Thevenir*, 69 Ohio St.3d 415, 633 N.E.2d 504 (1994) ..... 13

*Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898 ..... 5

*Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632 ..... 6

**Statutes**

R.C. 2307.23 ..... 14, 18

R.C. 2315.18 ..... passim

R.C. 2315.18(B)(2) ..... 16

R.C. 2315.18(B)(3) ..... passim

R.C. 2743.48 ..... 15

R.C. 2907.04 ..... 7

R.C. 2907.19 ..... 7

R.C. 2907.321 ..... 7

R.C. 2907.323 ..... 7

R.C. 2950.01 ..... 8

R.C. 4123.01(C)(1) ..... 9, 10

## I. INTRODUCTION.

Appellee Delaware Grace Brethren Church ("DGBC"), amici Ohio Alliance for Civil Justice and Ohio Association of Civil Trial Attorneys ("OACJ/CTA"), and amicus Academy of Medicine of Cleveland & Northern Ohio ("AMCNO"), seek to use tort reform, as applied in this case, not as a shield to protect Ohio's business interests, but rather to protect those who engage in, facilitate and cover-up predatory conduct against Ohio's most vulnerable and politically powerless citizens. In doing so, DGBC and its amici contend that the sexual assaults on fifteen year old Jessica Simpkins caused her no catastrophic injury and then proceed to "cherry pick" and "spin" facts from the record while ignoring the full record upon which the jury based its award. In part II of this reply brief, Appellants provide the Court with a complete summary of the testimony of not only Jessica, her sister and her father but also the un-contradicted testimony of psychologist Dr. Jeffrey Smalldon regarding the devastating effect of the assaults on Jessica.

DGBC and its amici also feign confusion as to the basis for Appellants' "as applied" constitutional challenge to R.C. 2315.18. The proposition advanced by Appellants, and accepted by the Court, is that R.C. 2315.18 violates enumerated rights guaranteed by the Ohio Constitution "as applied to minors who are victims of sexual abuse." While seemingly clear on its face, in part III of this reply brief Appellants delineate further the unique plight of minor victims of sexual abuse that underpins Appellants' as applied constitutional challenge.

In parts IV-V of this reply brief, Appellants respond to the arguments by DGBC and its amici that while the caps imposed by the Ohio Legislature on non-economic damages may be unfair, they do not violate the Ohio Constitution's due process or equal protection clauses. Appellants also respond to DGBC's argument that as long as the legislature does not completely foreclose *any* recovery, the amount that a tort victim may recover is a matter of "policy" about

which this Court may not inquire, regardless of the rights to a trial by jury, open courts and a remedy guaranteed by the Ohio Constitution.

Appellants, in part VI of their reply brief, respond to the arguments of DGBC and its amici with respect to the second proposition accepted by the Court, namely, that separate and distinct acts of forced oral and vaginal intercourse, interrupted by an attempted escape by the victim that was thwarted by the perpetrator, nonetheless constitute one "occurrence" for purposes of applying R.C. 2315.18's damage cap on non-economic damages.

Finally, Appellants address DGBC's novel argument that seven years after the assaults on Jessica and after over five years of litigation, the Court should change its mind about resolving the constitutional and statutory issues presented in this case and dismiss the appeal as "improvidently granted."

## II. JESSICA SIMPKINS SUFFERED PERMANENT CATASTROPHIC INJURIES.

The Fifth District Court of Appeals concluded that there could be circumstances where the effects of a non-physical injury approximate those of the physical injuries listed in R.C. 2315.18(B)(3), such that the caps on non-economic damages violate due process. (Op. at ¶ 78, Appx. 3 to Appellants' Merit Brief.) DGBC accepts that analysis, as does its amici, although amicus OACJ/CTA contends that the better view is that no non-physical injury can ever qualify as an exception to the damage caps. (OACJ/CTA Br. at 13.)[1] While recognizing that the statutory caps could be unconstitutional in some circumstances, the Fifth District did its own de novo review of the record and, ignoring the findings of the jury as reflected in its damage award, concluded that evidence such as the fact that Jessica played basketball in high school and college and has not participated in mental health treatment or counseling since the incident was sufficient

[1] Appellants address this issue in part VI below.

to conclude that she was not within the ambit of those victims for whom the non-economic damage caps result in a denial of due process.

What DGBC and its amici, along with the Fifth District, ignore is the full panoply of evidence upon which the jury's award of past and future non-economic damages to Jessica was based. In summary, the following evidence was admitted at trial:

- Jessica was 15 years old and a high school student at the time of the assaults. She missed 15 days of school after the assaults and, upon returning to school, other students would talk about her and put newspaper clippings in her locker. She often sat in the school counselor's office in tears, rather than sit with classmates. (TR. 338-342.)

- She saw a treating psychologist who counseled her with respect to her repeated nightmares of being kidnapped and raped. (TR. 343-344.)

- She developed a severe fear of the dark which manifested itself in sleeping with the lights on, being scared to walk alone, being afraid to be at home alone and turning on lights in every room. (TR. 349-350.)

- Jessica's sister, Jennifer Juggs, testified that Jessica became withdrawn after the incident and developed a short temper. If she was going to be home alone, Jessica would call Jennifer while driving home and would not get off the phone until she was home and knew she was safe. She also would not go outside in the dark unless someone was with her or watching her. (TR. 272-274.)

- With respect to college, Jessica attended Heidelberg for two years and dropped out. While there she continued to struggle with anxiety issues. For example, she would ask friends to walk with her from the dorm to the library if it were dark and, at her coach's suggestion, met with a school counselor. (TR. 344-346.)

- Contrary to the Fifth District's statement that she got good grades in college, Jessica explained at trial that her deposition testimony was incorrect and that the majority of her college grades were C's. (352-353.)

- After dropping out of Heidelberg, Jessica attended Ohio Dominican College, but dropped out after three weeks. (TR. 347.)

- Jessica's father, Gene Simpkins, testified that "before the incident she was always bubbly, cheery, happy go lucky * * * She never called me Dad, it was always Buddy * * * After the incident she is withdrawn, angry, very demanding * * * (Buddy) was the closeness that we had, the extra friendship that we shared, and it's just not there now." (TR. 298.)

- At the trial, which occurred five years after the assaults, Jessica testified that "every week, like, two to three times a week, like a whole tape will replay in my head of the whole day that it happened. I can be at work, I can be at home, out with friends and the whole day will just replay in my head." (TR. 347.)

- The assaults by Williams have caused her to not trust men and she has been unable to form a loving relationship with a young man. (TR. 348.)

- Based upon not only his examination of Jessica but his review of numerous medical records and interviews with others, including Jessica's treating psychologist, Dr. Jeffrey Smalldon diagnosed Jessica with Post Traumatic Stress Disorder ("PTSD"), Dysthymic Disorder (chronic low grade depression), Dependent and Avoidant Personality Disorder and alcohol abuse (referring to episodes of excessive alcohol use, not alcoholism). He explained that PTSD results from a traumatic event which the patient re-experiences and, like Jessica, involves nightmares and intrusive thoughts which the patient is unable to control. He testified to a reasonable degree of psychological certainty that Jessica's PTSD is a direct result of the assaults by Williams. (TR. 410-421.)

- With respect to the Dysthymic Disorder, Dr. Smalldon testified that, over two years after the incident, Jessica tested "well into the clinically significant range" on a depression inventory exam and that "she's clearly depressed." (TR. 421.)

- The Fifth District and DGBC place great weight on the fact that Jessica testified that after her initial treatment, she has had limited counseling with a treating psychologist and does not intend to seek counseling in the future. Dr. Smalldon addressed that issue in detail. He explained that Jessica does not want continued counseling and will avoid it at all costs because it forces her to relive the assaults by Williams. He testified that during his examination of Jessica, it was very difficult for her to go through what occurred, that she would divert her eyes and say "what I want most of all is for this to just be over. I wish it would just go away. I wish I could get on with my life." In an act of supreme irony, the Fifth District and DGBC have thus used a psychological condition caused by Williams' assaults, and for which the jury found DGBC liable, to minimize the seriousness of her injuries and deny her the compensation awarded to her by the jury. (TR. 447.)

- Jessica's aversion to discussing the incident was further demonstrated in her first meeting with her attorney where she preferred to write out what had happened to her rather than talk about it. She testified that she was more comfortable writing things down "cause it's hard for me to talk about things like that." (TR. 339-340.)

- Dr. Smalldon testified that Jessica is now very mistrustful of other people and that she is very hesitant to enter into any relationship involving intimacy. "Sexual contact has been very aversive or negative for her * * * She's tended to end relationships once they get to the point where her partner may be pushing for

some kind of sexual intimacy. She feels very vulnerable, very frightened." (TR. 414.)

- Dr. Smalldon testified that the psychological problems afflicting Jessica are permanent, and that she will need long term care. He testified that any counselor will be challenged to break through Jessica's denial and avoidance condition and that her "feelings of mistrust and violation are never going to go away." (TR. 426.)

As noted in Appellants' merit brief, no expert testimony contradicting Dr. Smalldon's testimony was presented by DGBC. Furthermore, DGBC's argument that the effect of the assaults on Jessica were not all that serious was presented to and rejected by the jury. (TR. 723-725, 728-729.) Appellants presented clear and convincing evidence that, as a result of the assaults, Jessica suffered a catastrophic injury which no amount of minimization or rationalization by DGBC or the Fifth District can erase.

## III. APPELLANTS' AS APPLIED CONSTITUTIONAL CHALLENGE.

### A. The Nature Of An As Applied Challenge.

DGBC and its amici make repeated argument that an as applied constitutional challenge is limited to the specific facts in the record regarding the party challenging the statute and that arguments suggesting that the party is also acting in a representative capacity are inappropriate. If the Court adopts the position advanced by DGBC and its amici, Appellants assert that the record below as summarized in part II of this reply brief provides clear and convincing evidence that the statutory caps are unconstitutional as applied only to Jessica Simpkins.

However, in *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, this Court explained that a party raising an as applied challenge alleges that "the 'application of the statute in the particular context in which he has acted * * * would be unconstitutional. 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.*

*citing*, *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 14. Appellants assert that the dispositive facts in the Court's consideration of Appellants' as applied challenge are that Jessica was a minor, was the victim of sexual abuse and suffers from permanent non-physical injuries as a result. The non-economic caps in R.C. 2315.18 are unconstitutional in that context.

### B. R.C. 2315.18 Is Unconstitutional As Applied To Minors Who Are Victims Of Sexual Abuse.

#### 1. As Applied to Minors.

R.C. 2315.18 ties the amount of non-economic loss a party can recover, up to a maximum of $250,000 or $350,000, to the amount of economic loss suffered by the tort victim. Absent significant medical expenses, minors will rarely have significant wage or other type of economic loss and it is irrational to limit the recovery of a minor's non-economic loss to his or her economic loss.

Furthermore, minors who suffer permanent non-economic injuries will, by virtue of their young years, suffer those injuries for decades. By artificially capping the amount of damages a minor can recover, the legislature has mandated an essentially negligible recovery for a lifetime of suffering. A simple example from this case illustrates the point. Assuming Jessica recovers $250,000 in non-economic damages and has attorney fees and expenses approximating 40% of the recovery, and assuming a sixty year life expectancy, Jessica will receive $150,000 or $2,500 a year in non-economic compensatory damages, even though a jury concluded that she should be awarded $3.5 million for her past and future non-economic damages.[2] Contrast that to the example referred to in Appellants' merit brief where an elderly tort victim suffers a scar that is

[2] While DGBC refers to an award of $350,000, given the trial court's remittitur order the actual pending award to Jessica is $250,000. (DGBC Br. at 5; OACJ/CTA Br. at 9.)

deemed a disfigurement under R.C. 2315.18(B)(3). Although having a limited life expectancy, that victim would receive the full amount of whatever is awarded by the jury for non-economic damages. A system that severely restricts the recovery by a minor victim while allowing unlimited recovery by an elderly victim, based solely on whether the victim received a scar as a result of the tort, is irrational, unreasonable and arbitrary.

Finally, a further distinguishing characteristic of minors, for purposes of an as applied analysis, is the fact that minors, unlike or less so than adults, are more vulnerable to sexual assaults while at the same time less equipped to deal with a traumatic event. Ohio, as with all states, has numerous statutes which recognize that children are susceptible to sexual abuse in ways that require protection not afforded to adults. For example, R.C. 2907.04 prohibits sexual conduct between an adult and minors under age 16. R.C. 2907.19 prohibits commercial sexual exploitation of minors. R.C. 2907.321 prohibits pandering obscenity involving minors. R.C. 2907.323 prohibits illegal use of a minor in nudity-oriented material. Thus, under the criminal statutes in Ohio, the devastating psychological harm to a sexually abused minor is well recognized, but is completely ignored when Ohio's statutory damage caps are applied to that same minor.

**2. As Applied to Victims of Sexual Abuse.**

R.C. 2315.18 requires a physical injury before any of the exceptions to the non-economic damage caps apply. Absent unusual circumstances, a victim of sexual abuse will not have a physical injury and specifically none of the physical injuries listed in R.C. 2315.18(B)(3). As a result, no matter how severe the psychological and emotional injury caused by the sexual assault, any recovery of non-economic damages will be arbitrarily limited under the current statute.

Similarly, a victim of sexual abuse will likely have limited economic damages which, under the statute, can further limit the amount of non-economic damages.

Victims of sexual abuse are also distinct for a more fundamental reason. Sexual abuse impacts an essential aspect of human life. The invasion and resulting psychic harm to a sexual abuse victim is of a different character than that to a personal injury tort victim. The fundamentally different nature of sexual abuse is reflected in the sexual predator statutes adopted in Ohio and most other states. Unlike other tortfeasors, the law places those who perpetrate sexual abuse in a special category requiring registration so that the public may be on notice of their presence. See, R.C. 2950.01, *et seq*.

It is evident that the legislature, through statutes like those cited above, properly recognizes the need to protect minors against the horrific psychological damage resulting from sexual abuse. When it comes to compensating minor victims of sexual abuse, however, the legislature's actions in arbitrarily capping non-economic damages, regardless of the severity and permanency of the psychological and emotional injury suffered by a minor, can only be described as irrational, unreasonable and arbitrary and thus in violation of the Ohio Constitution.

## IV. R.C. 2315.18 IS IRRATIONAL, ARBITRARY AND UNREASONABLE AS APPLIED TO JESSICA SIMPKINS IN VIOLATION OF HER RIGHT TO DUE PROCESS AND EQUAL PROTECTION.

### A. R.C. 2315.18 Violates Jessica Simpkins' Due Process Rights.

The parties agree that under the two-part rational basis test for due process, which this Court applied in *Arbino v. Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, a statute must bear a real and substantial relation to the general welfare of the public and cannot be unreasonable or arbitrary. With respect to the first prong, Appellants refer the Court to the argument in their merit brief.

With respect to the second prong, DGBC makes two arguments. First, DGBC adopts the Fifth District's analysis that, while some emotional injuries may be equivalent to the physical injury exceptions in R.C. 2315.18(B)(3) and thus result in a denial of due process, the record does not support such a finding in Jessica's case. Second, DGBC argues that even if Jessica did suffer a catastrophic injury, the legislature can constitutionally distinguish between physical injuries and non-physical injuries and cites to Ohio's workers' compensation statutes as support for that argument.

As demonstrated in part II above, a full and fair examination of the record clearly and convincingly supports the implicit finding of the jury that Jessica suffered catastrophic past and future psychological and emotional injuries as a result of the assaults by Williams. If the test adopted by the Fifth District is adopted by this Court, the result can be nothing other than a finding that Jessica suffered a catastrophic injury comparable to those listed in R.C. 2315.18(B)(3) and that, accordingly, the caps on non-economic damages in R.C. 2315.18 deny Jessica her constitutional right to due process.

With respect to DGBC's second argument, the requirement of a physical injury to recover workers' compensation benefits was upheld by this Court in *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1. In doing so, the Court emphasized that workers' compensation was a statutory system under which the limited resources of the state insurance fund had to be distributed. No such rationale applies in determining whether the tortfeasor who sexually abuses a minor, or aids, abets or conceals such abuse, should be excused from paying the compensatory damages awarded by a jury.

Furthermore, contrary to DGBC's statement in its brief at p. 19 that R.C. 4123.01(C)(1) "excludes psychiatric conditions from the general definition of 'injury' except where the

claimant's psychiatric condition arises from a physical injury or disease," R.C. 4123.01(C)(1) in fact provides:

> "Injury" does not include:
>
> (1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant **or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate**. (Emphasis added.)

The legislature itself has acknowledged that non-physical injuries resulting from sexual abuse, even without an accompanying physical injury, are sufficiently unique to require compensation under the workers' compensation statutes. The issue before the Court is whether it is arbitrary or unreasonable for the legislature to recognize that uniqueness for workers' compensation claimants but to deny it for minors who are victims of sexual abuse, all in the name of tort reform. Appellants assert that such a distinction is clearly arbitrary and unreasonable.

DGBC ends its argument regarding due process by characterizing Appellants' argument as one which is grounded in unfairness, rather than the standards for constitutionality. It may be, as DGBC contends, that the legislature can make policy choices which result in regrettable outcomes. However, it is the right, and indeed the duty of this Court to determine when the application of a statute crosses the line from unfairness to being arbitrary or unreasonable in a particular context. Such a process is not a substitution of this Court's judgment for that of the legislature but rather is a recognition of this Court's obligation to preserve and protect the right of every individual citizen to invoke the protection of the Ohio Constitution when those rights are invaded by a legislative enactment. *Cincinnati, W. & Z. R. Co. v. Clinton Cty. Commrs.*, 1 Ohio St. 77 (1852).

### B. R.C. 2315.18 Violates Jessica Simpkins' Equal Protection Rights.

DGBC appears to characterize the rational basis test for equal protection purposes as a one-step process. To the contrary, "[t]he rational-basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational." *McCrone*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, at ¶ 9.

As with the due process argument, Appellants rely upon the arguments in their merit brief with respect to the first prong of the equal protection rational basis test. With respect to the second prong, DGBC first argues that Jessica has suffered no catastrophic injury. In response, Appellants refer to the facts set forth in part II above with respect to the catastrophic nature of Jessica's injuries.

DGBC then argues that the legislature's determination that physical injuries offer "more concrete evidence of non-economic damages" is rational, even as applied to a minor victim of sexual abuse. In her concurring opinion in *Bunger v. Lawson Co.*, 82 Ohio St.3d 463, 696 N.E.2d 1029 (1998), Justice Stratton wrote: "A psychological injury is as real and may be as devastating as a physical injury." *Id.* at 467. Over seventeen years later, DGBC continues the refrain that citizens with psychological, non-physical injuries are not entitled to equal treatment under the law with those who suffer physical injuries, and that the legislature's perpetuation of that unequal treatment in R.C. 2315.18 is rational, reasonable and not arbitrary.

Appellants first note that with respect to the exception in R.C. 2315.18(B)(3) for a permanent and substantial physical deformity, a scar or other such qualifying deformity is not a physical limitation but rather is in the nature of a psychological injury. Furthermore, contrary to the argument of amicus OACJ/CTA that "(t)he types of injuries covered by R.C. 2315.18(B)(3)

require ongoing medical treatment or care," (OACJ/CTA Br. at 16) a scar or other physical deformities will require no such ongoing care. Contrast that to the testimony of Dr. Smalldon that Jessica will need long term care and that her "feelings of mistrust and violation are never going to go away." (TR. 426.)

But in this case, Appellants do not assert an as applied challenge with respect to all persons who suffer only non-physical injuries. Appellants' as applied challenge is with respect to that class of injured persons for whom, because of the nature of the tort and the age of the victim, the method chosen by the legislature to promote Ohio's economy is clearly not rational.[3] As explained above, minor victims of sexual abuse will rarely have wage or other economic loss, will rarely have physical injury and will suffer any permanent non-physical injuries for a long lifetime. If a psychological injury is as real and can be as devastating as a physical injury, can a civil justice system that permits tort victims with a disfigurement to recover full non-economic damages but denies the same recovery to minor victims of sexual abuse be considered rational, reasonable and not arbitrary? The answer is clearly no.

## V. R.C. 2315.18 VIOLATES JESSICA SIMPKINS' RIGHT TO OPEN COURTS AND A REMEDY AND RIGHT TO A JURY TRIAL.

In response to DGBC's arguments regarding the violation of Appellants' right to a jury trial, Appellants refer the Court to its argument in its merit brief.

With respect to Appellants' argument that the caps on non-economic damages violate Jessica's right to a remedy, Appellants dispute the standard posited by DGBC in its merit brief. DGBC asserts that "only where a statute <u>completely</u> forecloses a plaintiff's claimant's right to

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[3] Amici OACJ/CTA note on p. 3 of their brief over 20 states have adopted some form of non-economic damage cap in order to promote economic development. While irrelevant to a determination of this case, Appellants respond by noting that 23 states have either found non-economic damage caps to be unconstitutional, have constitutional prohibitions against non-economic damage caps or otherwise are without such caps. See, Reply Br. Appx. at 1.

seek any remedy or which would result in a complete obliteration of the entire jury award does the statute violate these provisions." (DGBC Br. at 25.) To the contrary, Ohio law requires not just any remedy but rather a "meaningful" remedy. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 426, 633 N.E.2d 504 (1994) ("Denial of a remedy and denial of a meaningful remedy lead to the same result: an injured plaintiff without legal recourse.") Under DGBC's analysis, the legislature could cap non-economic damages at $10, or $100, or $1000 without violating a tort victim's right to a remedy.

In its merit brief, DGBC does not address the first branch of Appellants' argument. Appellants assert that, as applied to a minor who was 15 at the time of the assault and who, based upon expert testimony of permanent injuries, will have a lifetime of dealing with those injuries, reduction of a jury's award of $3.5 million dollars to $250,000 precludes a meaningful remedy, even without regard to the real world fact that after litigation costs and attorney fees, the amount actually recovered will be significantly lower.

With respect to the impact of litigation costs and attorney fees on a meaningful recovery, DGBC argues that, based upon the American Rule, Jessica Simpkins is no different than any other tort plaintiff. A tort victim with substantial economic damages will have no cap on the amount of his or her recovery of economic damages. A tort victim with a physical injury falling within the exceptions listed in R.C. 2315.18(B)(3) will have no cap on either economic or non-economic damages. However, a minor victim of sexual abuse will, in all likelihood, have limited economic damages and none of the physical injuries listed in the statute but will, as in Jessica's case, have significant, permanent emotional or psychological injuries.

When the limited economic damages expected for a minor are combined with the lack of a physical injury expected for a victim of sexual abuse, the impact of litigation costs and attorney

fees becomes highly relevant to a determination of whether the victim can have a meaningful remedy. As set forth in detail in part III above, using reasonable assumptions for life expectancy and contingent attorney fees and litigation expenses, Jessica's actual recovery if her non-economic damages are capped at $250,000 will be $150,000 or $2,500 per year. Using the same assumptions, her recovery if this Court holds the damage caps unconstitutional as applied to her and she receives the full amount awarded by the jury would be approximately $35,000 per year. The latter would be a meaningful recovery. The former is clearly not.

The other relevant issue is whether a minor victim of sexual abuse with no physical injury and limited economic damages will be able to even retain experienced legal counsel to pursue his or her claim. Under the existing caps and factoring in the remittitur ordered by the trial court, Jessica's current gross recovery is $311,378. A one-third contingent fee will generate a gross fee of $103,792 for all counsel representing her. This case is currently in its seventh year and, after completion of this Court's review, is being remanded for further proceedings on the issues of apportionment and punitive damages. If the case were to be concluded after eight years, the total recovery for all counsel would be less than $13,000 per year. Added to that is the significant amount of expenses an attorney must advance to pursue a case of this magnitude. In this case, nineteen depositions were taken, an expert witness was retained and the trial lasted five full days.

Furthermore, under the system created by the legislature in R.C. 2315.18, an attorney weighing whether to undertake the representation of a minor victim of sexual abuse would also have to weigh the fact that even a claim against the rapist himself, in addition to any other responsible party, would be subject to the statute's non-economic damage caps and further would be subject to the apportionment requirements in R.C. 2307.23.

DGBC consciously misconstrues Appellants' reference to R.C. 2743.48, which permits wrongfully imprisoned persons to recover attorney fees as well as compensatory damages. Reference to that statute was to demonstrate that even the Ohio legislature has recognized that, in some circumstances, access to a civil remedy as well as receipt of a meaningful remedy requires legal counsel and the associated legal expense. A minor victim of sexual abuse with no physical injury but permanent psychological injuries is one of those circumstances.

Contrary to the argument of DGBC and its amici, Appellants do not seek an exception to the American Rule. Rather, Appellants point out that precisely because of the American Rule, any analysis of whether a minor victim of sexual abuse can receive a "meaningful" remedy under R.C. 2315.18's non-economic damage caps must take into account the attorney fees and litigation expense necessary for any recovery.

## VI. JESSICA SIMPKINS SUFFERED TWO "OCCURRENCES" FOR PURPOSES OF APPLICATION OF R.C. 2315.18'S DAMAGE CAPS.

If this Court determines that the damage caps in R.C. 2315.18 are constitutional as applied to Jessica Simpkins, Appellants assert that a separate damage cap should apply to each occurrence of assault, i.e., Williams' oral penetration and subsequent vaginal penetration of Jessica, for which he pled guilty to two separate counts of sexual battery. DGBC argues in response that (1) the Court must look to DGBC's conduct, not Williams', in determining whether there was more than one occurrence and (2) if the Court does consider Williams' conduct, there was only one occurrence due to space and time factors. Amicus AMCNO also argues that the occurrence limit in R.C. 2315.18 is intended to limit aggregate awards to multiple plaintiffs and is inapplicable to the claim of a single plaintiff. As set forth below, the arguments of neither DGBC nor its Amicus have merit.

"Occurrence" is defined in the statute to mean "all claims resulting from or arising out of any one person's bodily injury." R.C. 2315.18(B)(2) limits any award to a maximum of $250,000 or $350,000 for each plaintiff or a maximum of $500,000 "for each occurrence that is the basis of that tort action." The occurrences that are the basis for the action brought by Jessica Simpkins and her father, Gene Simpkins, are the oral and vaginal assaults by Williams. While DGBC was held responsible by the jury for failing to properly investigate and document the prior instances of misconduct by Williams, and placing Williams in the position of Senior Pastor at Sunbury Grace Brethren Church, the "basis" of the action was the two assaults by Williams.

With respect to DGBC's second argument, as Appellants demonstrated in their merit brief, the actual sequence of the assaults in the record contradicts DGBC's and the Fifth District's characterization of the events as one occurrence. Jessica testified that Williams stood next to her with his hand on her shoulder, unzipped his pants and forced her to perform fellatio, after which she attempted to escape, but Williams blocked and then closed his office door. Williams then pushed her to the ground, removed her pants and vaginally penetrated her. (TR. 332-334.) As Jessica testified, each experience of forced penetration was "equally revolting" to her. (TR. 334.) The multiple sexual violations that were perpetrated on Jessica constituted separate "occurrences" for purposes of R.C. 2315.18.

With respect to the argument of Amicus AMCNO that the function of the occurrence clause is to limit aggregate awards to multiple plaintiffs, the statute places a maximum of $500,000 "for each occurrence that is the basis of the tort action." AMCNO's contention that that provision applies only to an aggregate award assumes that only one occurrence occurred in this case. Even if the statute refers to an aggregate award, the Court must still determine whether the two separate sexual assaults on Jessica constituted one occurrence or two for purposes of the

statute. If there were two occurrences, the aggregate award for the two plaintiffs in this case, Jessica and her father, would be capped at $500,000 for each occurrence. It is only if the Court finds that the multiple assaults constituted one occurrence that the $250,000/$350,000/$500,000 caps would apply.

Finally, Appellants note that R.C. 2315.18 is in derogation of the common law. Under established Ohio law, "the legislature will not be presumed or held to have intended a repeal of the settled rules of the common law, unless the language employed by it clearly expresses or imports such intention." *Danziger v. Luse*, 103 Ohio St.3d 337, 2004-Ohio-5227, 815 N.E.2d 658. Accordingly, if this Court upholds the constitutionality of the statute's damage caps as applied to Jessica, the statute must be narrowly construed to provide that Appellants are entitled to two separate damage caps.

## VII. THIS COURT PROPERLY ACCEPTED THIS APPEAL FOR REVIEW.

Months after this Court accepted two of Appellants' propositions of law for review, DGBC suggests in its merit brief that the Court should dismiss this appeal as improvidently granted on the grounds that the retrial of this action may avoid the need for this Court to address Appellants' constitutional challenge to R.C. 2315.18. DGBC's suggestion ignores the fact that two propositions of law are before the Court for review, misstates the extent of the remand in this case and is contrary to any notion of fundamental fairness to Appellant Jessica Simpkins.

DGBC bases its suggestion on the assumption that "the Fifth District's decision means that the case will go back to Delaware County for a second trial on both liability and damages" (DGBC Br. at 8) and that, as a result, a new jury may find DGBC not liable. Appellants fundamentally disagree with DGBC's assumption. As DGBC notes, the only two issues upon which the Fifth District reversed the trial court were (1) whether Appellants are entitled to

punitive damages, and (2) the trial court's determination that the provisions of R.C. 2307.23, permitting a defendant to assert an affirmative defense of apportionment "at any time before the trial of the action," were unconstitutional. Appellants received a final judgment with respect to DGBC's liability and the jury rendered a verdict with respect to the amount of compensatory damages to be awarded. DGBC's liability was affirmed by the Fifth District and this Court refused to accept DGBC's proposition of law regarding its liability. Furthermore, DGBC did not appeal the jury's determination of the amount of compensatory, non-economic damages to be awarded to Appellants. As a result, the only issues to be tried on remand are whether Appellants are entitled to punitive damages and whether a proportionate share of the damages awarded to Appellants are to be apportioned to non-defendant Williams.

In *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 654, 635 N.E.2d 331 (1994), this Court ordered a remittitur of a punitive damage award and directed that, if the remittitur was rejected, the trial upon remand should be limited to the issue of punitive damages. In doing so, the Court acknowledged that limiting the retrial to punitive damages "might require the re-presentation of much of the underlying case." *Id.* In *Lowery v. Rizer*, 4th Dist. Hocking No. 96CA11, 1996 WL 665015 (Nov. 12, 1996), the Fourth District Court of Appeals similarly remanded a case for retrial solely on punitive damages, citing *Moskovitz*, even though the court recognized "that impanelling a jury solely to determine the amount of punitive damages involves some inefficiencies because it will likely require a presentation on much of the same evidence as the first trial." *Id.* at *6.

As with punitive damages, a retrial with respect to apportionment of damages to Williams does not require, and Appellants will vigorously oppose, a retrial with respect to DGBC's liability and the amount of compensatory damages awarded to Appellants by the jury. A jury is

fully competent, upon instruction by the Court, to determine the two issues remanded by the Fifth District without a retrial on all issues.

Furthermore, DGBC's desire to retry issues already decided is barred by the law of the case doctrine. "We have further held that the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal." *City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 659 N.E.2d 781 (1996). In its merit brief, DGBC argues that at retrial DGBC will have the opportunity to convince the jury that "the rape of Simpkins by Williams was not foreseeable to the church." (DGBC Br. at 8.) In its appeal to the Fifth District, DGBC's first assignment of error was: "Williams' prior misconduct was, as a matter of law, insufficient to make his subsequent rape of Simpkins foreseeable." The Fifth District overruled that assignment. (Op. at ¶ 36, Appx. 3 to Appellants' Merit Brief.) Accordingly, DGBC will not be permitted to retry that issue, nor any other liability issues at the retrial.

Appellants' second proposition of law is also ripe for determination by this Court. That proposition requires a statutory construction by the Court and will impact not only this action but similar actions in the future. In addition, the record in this case has been fully developed and presents a complete factual basis for the as applied constitutional challenge being asserted. DGBC relies heavily on this Court's opinion in *Arbino* and yet Appellants point out that *Arbino* was decided in the preliminary stages of that litigation, in sharp contrast to this case.

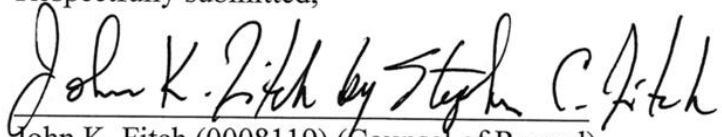
Finally, the assaults which form the basis for this action occurred in 2008. The jury award to Jessica Simpkins was entered in 2013 after years of litigation. The Court has already scheduled this case for oral argument on December 15, 2015. It presents the Court with an important and recurring issue and, as explained above, DGBC has failed to advance any

legitimate reason for reconsidering the Court's prior acceptance of Appellants' propositions of law for review. Nothing has changed since this Court determined months ago that the case presents both a substantial constitutional question and questions of public or great general interest. DGBC's effort to further delay a ruling on these issues, and delay resolution of this case for Jessica Simpkins, is without merit and should be rejected by the Court.

## VIII. CONCLUSION.

For the reasons set forth in Appellants' Merit Brief and above, Appellants ask this Court to exercise its constitutional authority and find that R.C. 2315.18, as applied to Appellant Jessica Simpkins, violates her enumerated rights under the Ohio Constitution.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANTS JESSICA SIMPKINS AND GENE SIMPKINS** was served via electronic transmission and regular U.S. mail, postage prepaid, this 14th day of October 2015, upon the following:

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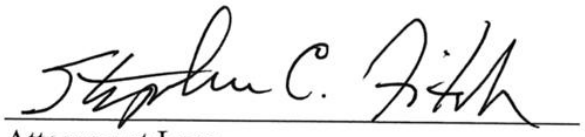

Attorney at Law

# APPENDIX

1. States Without Non-Economic Damage Caps

# APPENDIX 1

## APPENDIX 1

## STATES WITHOUT NON-ECONOMIC DAMAGE CAPS

**States in Which Non-Economic Damage Caps Have Been Found Unconstitutional:**

| | |
|---|---|
| 1. Alabama | *Moore v. Mobile Infirmary Assn.,* 592 So.2d 156 (Ala.1991) |
| 2. Florida | *Estate of McCall v. United States,* 134 So.3d 894 (Fla.2014); *Smith v. Dept. of Ins.,* 507 So.2d 1080 (Fla.1987) |
| 3. Georgia | *Atlanta Oculoplastic v. Nestlehutt,* 691 S.E.2d 218 (Ga.2010) |
| 4. Illinois | *Lebron v. Gottlieb Mem. Hosp.,* 930 N.E.2d 895 (Ill.2010); *Best v. Taylor Mach. Works,* 689 N.E.2d 1057 (Ill.1997) |
| 5. Missouri | *Watts v. Lester E. Cox Med. Ctrs.,* 376 S.W.3d 633 (Mo.2012) |
| 6. New Hampshire | *Carson v. Maurer,* 424 A.2d 825 (N.H.1980); *Brannigan v. Usitalo,* 587 A.2d 1232 (N.H.1991) |
| 7. Oregon | *Lakin v. Senco Prods., Inc.,* 987 P.2d 463 (Or.1999) |
| 8. Utah | *Smith v. United States,* __P.3d __, 2015-UT-68 (Ut.2015) |
| 9. Washington | *Sofie v. Fibreboard Corp.,* 771 P.2d 711 (Wa.1989) |

**States with Constitutions That Prohibit the Enactment of Non-Economic Damage Caps:**

| | |
|---|---|
| 10. Arizona | Ariz. Const. Art 2, § 31 |
| 11. Arkansas | Ark. Const. Art. 5, § 32 |
| 12. Kentucky | Ky. Const. § 54 |
| 13. Pennsylvania | Pa. Const. Art. 3, § 18 |
| 14. Wyoming | Wyo. Const. Art. 10, § 4 |

**States Otherwise Without Non-Economic Damage Caps:**

15. Connecticut
16. Delaware
17. District of Columbia
18. Iowa
19. Minnesota
20. New Jersey
21. New York
22. Rhode Island
23. Vermont