

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,
v.	:	Fifth Appellate District
	:	
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**

John K. Fitch (0008119) (Counsel of Record)
John@TheFitchLawFirm.com
 The Fitch Law Firm
 580 South High St., Ste. 100
 Columbus, Ohio 43215
 Telephone: (614) 545-3930
 Facsimile: (614) 545.3929

W. Charles Curley (Counsel of Record)
wcurley@westonhurd.com
 Weston Hurd LLP
 10 West Broad Street, Suite 2400
 Columbus, Ohio 43215
 Telephone: (614) 280-0200
 Facsimile: (614) 280-0204

David A. Fitch (0016325)
dfitchlaw@yahoo.com
 9211 Hawthorn Point
 Westerville, Ohio 43082
 Telephone: (614) 890-8726

Counsel for Appellee
 Grace Brethren Church of Delaware, Ohio

Stephen C. Fitch (0022322)
sfitch@taftlaw.com
 Celia M. Kilgard (0085207)
ckilgard@taftlaw.com
 Taft Stettinius & Hollister LLP
 65 East State Street, Suite 1000
 Columbus, Ohio 43215
 Telephone: (614) 221-2838
 Facsimile: (614) 221-2007

Counsel for 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 pastor¹ 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

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

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*

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 * * *.” *Wymyslo 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. *Wymysylo* 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

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 Inviolable: 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 disproportionately 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. *Wymyslo*, 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.

Proposition of Law 2: Separate and distinct acts of sexual battery constitute separate “occurrences” for purposes of applying the damage cap for non-economic losses in R.C. 2315.18.

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.

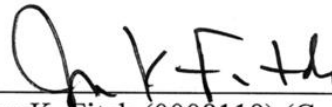
As the sexual battery on Jessica constituted two separate criminal counts, it follows that they have already been determined to be of dissimilar import and to have stemmed from separate animus. They should therefore be treated as two separate tort actions, or occurrences. Thus, if this Court denies Jessica 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,



John K. Fitch (0008119) (Counsel of Record)

John@TheFitchLawFirm.com

The Fitch Law Firm

580 South High St., Ste. 100

Columbus, Ohio 43215

Telephone: (614) 545-3930

Facsimile: (614) 545.3929

David A. Fitch (0016325)

dfitchlaw@yahoo.com

9211 Hawthorn Point

Westerville, Ohio 43082

Telephone: (614) 890-8726

Stephen C. Fitch (0022322)

sfitch@taftlaw.com

Celia M. Kilgard (0085207)

ckilgard@taftlaw.com

Taft Stettinius & Hollister LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215

Telephone: (614) 221-2838

Facsimile: (614) 221-2007

Counsel for Appellants

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:

W. Charles Curley
Weston Hurd LLP
10 West Broad Street, Suite 2400
Columbus, OH 43215

Counsel for Appellee
Grace Brethren Church of Delaware, Ohio



Attorney at Law