IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE GRACE BRETHREN CHURCH OF DELAWARE, OHIO

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STATEMENT OF FACTS

A. Nature of the Case

The case arises out of the rape of 15 year old Appellant Jessica Simpkins ("Simpkins")[1] by Brian Williams at a church in Delaware County in 2008. At that time, Williams was employed as senior pastor at Sunbury Grace Brethren Church ("Sunbury Grace"), but had previously been employed as a youth pastor by Appellee Grace Brethren Church of Delaware, Ohio (hereinafter "Delaware Grace"). Asserting claims for negligence, intentional infliction of emotional distress, breach of fiduciary duty, willful, wanton and reckless misconduct and other theories, Simpkins and her father sued both churches in Ross County Common Pleas Court.[2] Subsequently, Plaintiffs dismissed that action without prejudice and ultimately refiled in Delaware County Common Pleas Court, where the case was tried to a jury in June of 2013.

B. Facts

From 1982 through 2002, Jeffrey Gill was the Senior Pastor at Delaware Grace. Williams was hired as youth pastor at Delaware Grace in 1988. When Gill left in 2002, Williams applied for the position of senior pastor, but did not get that job. Tr. 188. Williams continued working as a youth pastor at Delaware Grace through 2004. In October 2004, Gary Underwood was hired as Senior Pastor at Delaware Grace. Tr. 310. In the interim period before Underwood started, Darrell Anderson served as "acting senior pastor" of Delaware Grace. Tr. 187.

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1 Appellants state in their brief that Jessica was 15 years old at the time of trial. Appellant's Merit Brief, pgs. 24-25. That is not the case. Jessica was 15 when she was raped, but was obviously older than that at the time of trial.

2 At that time, venue in Ross County was arguable proper under Civil Rule 3 because Williams was a "resident" of Ross Correctional Institute outside Chillicothe.

Leaders of Delaware Grace made a decision to "plant" a Grace Brethren church in the Delaware County town of Sunbury, and Williams was selected to serve as the senior (and only) pastor of Sunbury Grace. Delaware Grace provided financial support to the new church and financial support and guidance to Williams in that position. Tr. 190-201. Williams deposition, pgs. 27-49, 74-77.[3]

Jessica Simpkins began attending Sunbury Grace while she was a freshman at Big Walnut High School. Tr. 327. On the afternoon of March 6, 2008, Simpkins's father dropped her off at the church for a counseling session with Williams. During that session, while Simpkins and Williams were alone, Williams closed the door to his office, dropped his pants and told Simpkins to suck his penis, which Simpkins eventually did. Simpkins tried to get away, but Williams blocked the door, pushed Simpkins to the ground, removed her pants and inserted his penis into her vagina. Tr. 330-335. Williams Deposition, pgs. 52-54.

The undisputed evidence was that Williams forced Simpkins to perform oral sex and, immediately thereafter, forced vaginal intercourse. Both events happened in the same confined area of the Sunbury Grace facility and within a very short span of time. No one else entered the office between the two events, and neither Simpkins nor Williams left the office between the two penetrations. Tr. 330-334. Simpkins did not testify that she was affected differently by the two events. Dr. Jeffrey Smalldon, a psychologist who examined Simpkins and provided opinions at trial, testified that Simpkins suffered one indivisible injury:

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

3 Williams' testimony was presented to the jury by way of a video deposition. References to his testimony are thus noted by page number of the transcript of that deposition.

Deposition of Dr. Jeffrey Smalldon, Tr. 427.

Evidence at trial also established that, notwithstanding her post-traumatic stress disorder, Simpkins continued playing basketball through her senior year of high school, graduated from high school, matriculated at Heidelberg College, played basketball at Heidelberg, got good grades in college, and sought virtually no mental health counseling after she was raped. Tr. 344-345, 351-359. Finally, notwithstanding Dr. Smalldon's testimony that future psychological counseling would be needed [Tr. 426-429], Simpkins testified that she has no intention of seeking any such treatment. Tr. 358-359.

In an effort to establish that Williams' rape of Simpkins in 2008 was foreseeable to Delaware Grace, Plaintiffs presented evidence of two earlier incidents of inappropriate conduct by Williams. Sometime in the early 1990's, while Williams was serving as youth pastor at Delaware Grace, the church sponsored a youth mission trip and invited youth from Lexington Grace Brethren Church (in Richland County) to participate. Williams supervised the trip. One of the teens from Lexington who participated was April Jokela (nka April Brown), who was somewhere between 13 and 16 years old at the time. While participants attended a concert, Williams began rubbing Brown's shoulders and then moved his hands down her back. There was bare skin between the bottom of Brown's shirt and the top of her "panty line," and Williams made "skin on skin" contact with Brown's back in that gap. That made Brown feel uncomfortable, so she "jerked forward" to get away and left her seat. Shortly after the group returned to Ohio, Brown told her mother what had happened. Brown's mother reported the incident to the pastor at the church in Lexington, who set up a meeting with Williams, Pastor Gill and others from Delaware Grace. During that meeting, April Brown gave a full account of what

Williams had done. Williams did not deny anything, but said "I'm sorry if you felt uncomfortable." The perception of Brown and her mother was that the church didn't take the allegations seriously. In fact, Brown's mother (Mary Storz) testified that one of the Delaware Grace representatives said "let's keep this quiet to protect our brother." Tr. 125-133; 152-157.

In 2002, Robin McNeal (nka Robin Weixel), an 18 year old female, was applying to go on an international mission trip through Campus Crusade for Christ. As part of the application process, she was required to do an interview with a pastor who knew her, and asked Brian Williams to do that. During the course of that interview, Williams did four specific things that Weixel felt were inappropriate: (1) Williams shared details of his sex life with his wife; (2) Williams told her that "most men view women as a thing to be f****d;" (3) Williams shared his views on women dressing provocatively and then used his finger to trace around the outside of the tank top she was wearing; (4) Williams told her that he "could get away with having sex with me right there and then in his office. He could get away with it, but his guilty conscience would stop him." Weixel Deposition, pgs. 19-22, 33-36;[4] Williams Deposition, pgs. 18-23. Weixel never felt threatened by Williams or that he was "coming on" to her sexually. Weixel Deposition, pgs. 36-37. A month or so later, Weixel met with Williams and Pastor Anderson and reported what happened. Weixel did not tell Anderson that she felt threatened, that Williams had been sexually aggressive, or that Williams "came on" to her sexually. Weixel Deposition, pgs. 41-42. Williams said "I don't remember saying those things, but if I did, I'm sorry." Weixel Deposition, pgs. 19-22; Williams Deposition, pgs. 23-26; testimony of Darrell Anderson, Tr. 201-210.

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4 Weixel's testimony was also presented to the jury by way of a video deposition. References to her testimony are thus noted by page number of the transcript of that deposition.

C. Disposition in the trial court

The trial judge ultimately submitted only Plaintiffs' claims for negligence to the jury. After deliberations, the jury returned verdicts in favor of Plaintiffs – for Jessica Simpkins for $3,651,378.855 and for Gene Simpkins on his loss of consortium claim for $75,000.[6]

Before entering final judgment, the trial court: (1) applied a setoff of $1,378.85 in connection with Jessica's settlement with Sunbury Grace; and (2) applied Ohio's damage cap statute [R.C. 2315.18] to reduce the award for Jessica's past and future non-economic damages to $350,000. As a result, the court entered judgment for Simpkins for $500,000 and for her father for $75,000. See Opinion and Final Judgment of the trial court, attached at A-5.

After that judgment was entered, Delaware Grace filed motions for judgment notwithstanding the verdict and for a new trial. The trial court denied the motion for judgment notwithstanding the verdict. The trial court denied the motion for a new trial on all issues, but granted a remittitur. See Order of the trial court, attached at A-11.

D. Disposition in the court of appeals

Both sides appealed. On the church's appeal, the Court of Appeals: (1) affirmed the trial court's denial of the church's motions for directed verdict; (2) affirmed the trial court's refusal to give certain jury instructions; (3) reversed the trial court's decision refusing to allow the jury to apportion responsibility between Delaware Grace and Williams; and (4) affirmed the trial court's denial of the church's motion for a new trial on the basis that the jury's award for future economic loss was not supported by the evidence. On Simpkins' appeal, the Court of Appeals:

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6 A copy of the jury's Verdict and Answers to Interrogatories is attached at A-1. The verdict in Jessica's favor was broken down as $1,378.85 for past economic damages, $1,500,000 for past non-economic damages, $150,000 for future economic damages and $2,000,000 for future non-economic damages.

(1) affirmed the trial court's decision rejecting her "as applied" constitutional challenge to Ohio's damage cap statute; (2) reversed the trial court's entry of summary judgment in favor of Delaware Grace on Plaintiffs' claim for punitive damages; (3) affirmed the trial court's finding that, for purposes of the damage cap statute, there was but one "occurrence;" and (4) affirmed the trial court's decision that R.C. 2307.60 does not conflict with R.C. 2315.18.

ARGUMENT

Jessica Simpkins was the victim of a vile, degrading and violent crime, made worse by the fact that the perpetrator was a married adult pastor whom Simpkins had previously trusted. The arguments raised by Simpkins in this appeal raise important issues of public policy. But one of the fundamental principles of the constitutional separation of powers among the three branches of government is that the legislative branch is "the ultimate arbiter of public policy." *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis*, 98 Ohio St. 3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 21. The role of this Court is not to pass on the wisdom of policy decisions made by the General Assembly, but to evaluate the constitutionality of the legislature's choices. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 113. Because Appellants have failed to establish that R.C. 2315.18 is unconstitutional as applied to her, their constitutional challenges to R.C. 2315.18 should be rejected.

I. THE COURT SHOULD CONSIDER DISMISSING THIS APPEAL AS HAVING BEEN IMPROVIDENTLY GRANTED.

Appellee's Proposition of Law No. 1:

A court should decide issues of constitutional law only when absolutely necessary to resolve the case before it. *State v. Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, approved and followed.

When the Fifth District considered this case, it affirmed the judgment of the trial court on most of the issues raised by the parties. But the court of appeals reversed the judgment of the trial court on two issues. The two assignments of error sustained by the Fifth District were: (1) Delaware Grace's argument that the trial court's improperly refused to allow the jury to apportion fault between Williams and Delaware Grace; and (2) Simpkins' argument that the trial court entry of summary judgment in favor of Delaware Grace on her claim for punitive damages was improper.

Both sides appealed the Fifth District's judgment. The only issues accepted for consideration by this Court were those relating to the constitutionality and interpretation of R.C. 2315.18, Ohio's damage cap statute. But because this Court's resolution of those issues may not resolve the case, Appellee urges this Court to consider dismissing this appeal as having been improvidently allowed.

This Court has traditionally not decided constitutional issues unless and until absolutely necessary. See *State v. Talty,* 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201; *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921); *State ex rel. Herbert v. Ferguson*, 142 Ohio St. 496, 52 N.E.2d 980 (1944); *Hall China Co. v. Pub. Util. Comm.,* 50 Ohio St.2d 206, 210, 364 N.E.2d 852 (1977); *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 415-416, 96 N.E.2d 414 (1951).

No matter how this Court resolves the "damage cap" issues presented by Appellees, the Fifth District's decision means that the case will go back to Delaware County for a second trial on both liability and damages. In that trial, Delaware Grace will have an opportunity to convince the jury that it is not liable at all or that its responsibility should be apportioned with that of Brian Williams. Thus, there are multiple possible outcomes – the jury could find: (1) that Delaware Grace was not negligent or that the rape of Simpkins by Williams was not foreseeable to the church; (2) that Delaware Grace had been negligent but that legal responsibility for Simpkins' damages should be allocated between Williams and Delaware Grace; (3) that Delaware Grace is liable and assess damages in favor of Jessica Simpkins that do not exceed the damage cap imposed by R.C. 2315.18; or (4) that Delaware Grace is liable and assess damages in favor of Plaintiff that do exceed the damage "cap" imposed by R.C. 2315.18. Only if the fourth scenario occurs will whatever action this Court takes affect the ultimate outcome of the case.

Thus, a finding by this Court that R.C. 2315.18 does or does not violate the Ohio Constitution may, in the end, have no effect at all on the outcome of this case. Because this case could still be resolved in a way that avoids the need for this Court to address the constitutionality of R.C. 2315.18, Appellee respectfully asks this Court to consider dismissing this appeal as having been improvidently allowed.

II. R.C. 2315.18 IS NOT UNCONSTITUTIONAL "AS APPLIED" TO JESSICA SIMPKINS

Appellee's Proposition of Law No. 2:

When a court is asked to find a legislative enactment unconstitutional on an "as applied" basis, there must be an adequate factual record to support that challenge.

Appellee's Proposition of Law No. 3:

R.C. 2315.18 is not unconstitutional "as applied" to a minor victim of sexual assault who suffers emotional trauma which does not permanently prevent her from being able to independently care for herself or perform life-sustaining activities.

A. Nature of Appellants' challenge to R.C. 2315.18

R.C. 2315.18 was enacted in 2004 as part of the 125th General Assembly's most recent effort to reform tort law in Ohio. That statute limits the amount that may be recovered by tort claimants in non-catastrophic injury cases. For any one "occurrence," R.C. 2315.18 limits the amount of damages for noneconomic loss to the greater of $250,000 or an amount equal to three times the plaintiff's economic loss, limited to a maximum of $350,000. Exceptions to those limits apply in cases where the plaintiff sustains a permanent and substantial physical deformity, loss of use of a limb or organ system, or a physical functional injury that permanently prevents him or her from being able to independently care for himself and perform life-sustaining activities.

In this case, the jury returned a verdict in favor of Jessica Simpkins in excess of $3.65 million. Of that total, $151,378.85 was awarded for past and future economic loss and $3,500,000 was awarded for past and future non-economic damages. Applying R.C. 2315.18, the trial court reduced the award to Simpkins for non-economic loss to $350,000, the greater of the two "caps" imposed by R.C. 2315.18. On appeal, the Fifth District Court of Appeals affirmed on

that issue. In this appeal, Appellants argue that R.C. 2315.18 is unconstitutional "as applied" to Simpkins. Specifically, she argues that R.C. 2315.18 is inconsistent with provisions in the Ohio Constitution providing all citizens with the right to due process of law, the right to equal protection of the law, the right to trial by jury, the right to "open courts" and the right to a remedy.

This Court has explained the differences between a "facial" challenge to the constitutionality of a law and an "as applied" challenge:

> A facial challenge alleges that a statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate governmental purpose. *Jaylin Invests., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶ 11. Facial challenges to the constitutionality of a statute are the most difficult to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances. When determining whether a law is facially invalid, a court must be careful not to exceed the statute's actual language and speculate about hypothetical or imaginary cases. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L. Ed. 2d 151 (2008). Reference to extrinsic facts is not required to resolve a facial challenge. *Reading* at ¶ 15.
>
> A party raising an as-applied constitutional challenge, on the other hand, alleges that "the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. 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.' " *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 14, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting). Because an as-applied challenge depends upon a particular set of facts, this type of constitutional challenge to a rule must be raised before the administrative agency to develop the necessary factual record. *Reading* at ¶ 13.

Wymsylo v. Bartec, Inc., 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, at ¶¶ 21-22.

To prevail on an "as applied" constitutional challenge to a statute, the burden is on the challenger to present clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional when applied to him or her. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377.

B. This Court's decision in *Arbino.*

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

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

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

Arbino's next challenge to R.C. 2315.18 was based on the "due course of law" provision in Section 16, Article I of the Ohio Constitution. This Court rejected that argument as well, holding that the statute's limitation on non-economic damages "bears a real and substantial relation to the general welfare of the public." *Arbino*, at ¶ 49. Additionally, the court found that the legislature's determination that achieving benefits from limiting non-economic damages in some cases without limiting recovery by more seriously injured individuals was neither unreasonable nor arbitrary. *Arbino*, at ¶¶ 53-62.

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

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

C. Introduction

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

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

The damages for pain and suffering and mental anguish Simpkins suffered are nearly identical to the type of damages many tort claimants sustain. Indeed, the standard "damages" instruction in Ohio Jury Instructions defines "noneconomic loss" to include pain and suffering and mental anguish without differentiating between the two. Ohio Jury Instructions § 315.01(5). It is the uncertain, non-quantifiable nature of these inherently subjective injuries that led the General Assembly to enact R.C. 2315.18. There is nothing that clearly and convincingly sets Simpkins apart from anyone else whose non-economic loss exceeds the legislatively-designated caps found in R.C. 2315.18. This Court rejected the facial challenge to those caps in *Arbino*, and should now reject Simpkins' "as applied" challenge as well.

D. R.C. 2315.18 does not violate Simpkins' right to the "due course of law" provision of Section 16, Article I of the Ohio Constitution.

Simpkins first challenges R.C. 2315.18 as being violative of the "due course of law" provision found in Section 16, Article I of the Ohio Constitution, which is the functional equivalent of the "due process of law" clause found in the 14th Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941); *Sorrell v. Thevenir*, 69 Ohio St.3d 422-423, 633 N.E.2d 504 (1994).

1. Because R.C. 2315.18 neither restricts nor denies a fundamental right, Appellants' due process arguments must be analyzed under a "rational basis" test.

While Simpkins suggests that a "strict scrutiny" analysis should be applied to her due process challenge, this Court ruled otherwise in *Arbino*:

> When reviewing a statute on due-process grounds, we apply a rational-basis test unless the statute restricts the exercise of fundamental rights. *Morris, 61 Ohio St.3d at 688-689, 576 N.E.2d 765*; *Sorrell, 69 Ohio St.3d at 423, 633 N.E.2d 504.* Because we have already concluded that R.C. 2315.18 violates neither the right to a jury trial nor the right to a remedy, we must find it valid under the rational-basis test "'[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.'" *Mominee v. Scherbarth (1986), 28 Ohio St.3d 270, 274, 28 OBR 346, 503 N.E.2d 717*, quoting *Benjamin v. Columbus (1957), 167 Ohio St. 103, 4 O.O.2d 113, 146 N.E.2d 854, 146 N.E.2d 854*, paragraph five of the syllabus.
>
> *Arbino* at ¶ 49.

Thus, because R.C. 2315.18 neither restricts nor denies a fundamental right, Appellants' due process concerns should be analyzed under a "rational basis" test, with the constitutionality of the statute upheld if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and is not unreasonable or arbitrary. *Arbino* at ¶ 49.

2. R.C. 2315.18 bears a substantial relation to the general public welfare and thus does not violate Section 16, Article I of the Ohio Constitution "as applied" to Jessica Simpkins.

The judiciary's forays into constitutional law must give due respect to the decisions of coordinate branches of government. As in any constitutional challenge, courts begin with the presumption that R.C. 2315.18 enjoys a presumption of constitutional validity. *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986); *Northern Ohio Patrolmen's Benevolent Assn. v. City of Parma*, 61 Ohio St. 2d 375, 377, 402 N.E. 2d 519 (1980); *State, ex rel. Taft, v. Campanella* 50 Ohio St. 2d 242, 364 N.E.2d 21 (1977); *State, ex rel. Dickman, v. Defenbacher* 164 Ohio St. 142, 128 N.E. 2d 59 (1955).

A democratically elected legislature is far better suited to evaluate and give effect to the social and moral choices of the citizens of a state than judges, who are largely insulated from public contact and scrutiny. The role of the judiciary is not to reflect the will of the people or the will of individual judges, but to apply the rule of law and issue judgment. In the recent words of Supreme Court of Connecticut Justice Carmen Espinosa in *State of Connecticut v. Santiago*, 318 Conn. 1, ___ A.2d. ___, 2015 Conn. LEXIS 228 (2015), at *693 (dissenting):

> We are not here for drama or glory. We are not here to sweep away entire statutory schemes with the stroke of a pen by amending public acts from the bench. We are here to perform the much smaller, yet essential role assigned to us as a part of this democracy -- we are here to judge.

A legislative enactment is valid on due process grounds if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary. *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103, 146 N.E.2d 854; *Downing v. Cook*, 69 Ohio St. 2d 149; 431 N.E.2d 995 (1982); *Mominee v. Scherbarth*, 28 Ohio St. 3d 270; 503 N.E.2d 717 (1986).

Considering a facial due process challenge, the *Arbino* majority accepted the General Assembly's numerous findings relative to the positive effects of tort reform in general and R.C. 2315.18 in particular on Ohio's economy.[7] Based on those factors, this Court had no difficulty concluding that R.C. 2315.18 bears a real and substantial relation to the general welfare of the public. *Arbino* at ¶ 58.

On the basis of solid evidence, the General Assembly concluded that the beneficial effects of damage cap legislation outweighed any perceived unfairness. Indeed, the job of Ohio's elected representatives is to consider the costs and benefits of proposed legislation and make policy choices that are often difficult and sometimes unfair. Appellants do not challenge the findings made by the General Assembly in 2005 when it enacted R.C. 2315.18. Nevertheless, they contend that "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." Appellants' Merit Brief, pg. 15. On what basis? Appellants do not suggest one. The fact that Jessica Simpkins is a minor victim of sexual abuse does not alter the legislature's findings or conclusions in any way. The benefits of R.C. 2315.18

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7 Evidence cited by the legislature included: (1) a National Bureau of Economic Research study showing that states adopting tort reforms experienced growth in employment, productivity, and total output; (2) a 2002 White House Council on Economic Advisors study equating the cost of tort litigation to a 2.1 percent wage and salary tax, a 1.3 percent personal-consumption tax, and a 3.1 percent capital-investment-income tax; (3) a Harris Poll of corporate attorneys showing that the litigation environment in a state greatly affected the business decisions of their companies; (4) a study showing that the tort system failed to return even 50 cents for every dollar to injured plaintiffs and that the cost of the national tort system grew at a record rate in 2001, with a cost equivalent to a five percent tax on wages; and (5) testimony from the Director of Ohio Department of Development on the rising costs of the tort system, which he believed were putting Ohio businesses at a disadvantage and hindering development. In addition, the General Assembly concluded that noneconomic damages are difficult to calculate and lack a precise economic value, that such damages awarded for pain and suffering and similar injuries are inherently subjective and susceptible to influence from irrelevant factors, and that inflated damages awards were likely under the then current system and that the cost of these awards was being passed on to the general public. See *Arbino* at ¶¶ 53-54.

that the General Assembly found exist whether the injured person is a man or a woman, minor or adult, or the victim of sexual abuse or any other tort.

As recognized by the *Arbino* majority, the role of this Court is not to evaluate the information relied upon by the General Assembly and come to its own conclusions as to whether R.C. 2315.18 was or was not a good idea. *Arbino* at ¶¶ 57-58. The legislature has spoken, and the separation of powers doctrine commands that this Court respect its findings and judgment.

3. R.C. 2315.18 is neither unreasonable nor arbitrary and thus does not violate Section 16, Article I of the Ohio Constitution "as applied" to Jessica Simpkins.

A statute may also violate Section 16, Article I of the Ohio Constitution if it is deemed unreasonable and arbitrary. In *Arbino*, this Court considered an argument that R.C. 2315.18 was facially unconstitutional because it drew an improper distinction between plaintiffs who suffered catastrophic injuries and those who had not. Citing the General Assembly's conclusion that some benefits of damage caps could be obtained without limiting the recovery of individuals whose pain and suffering was traumatic, extensive and/or chronic, the *Arbino* majority concluded that R.C. 2315.18 was "tailored to maximize benefits to the public while limiting damages to litigants." *Arbino* at ¶ 61.

Appellants contend that "sexual abuse does not typically result in serious physical injury or economic loss [but] rather manifests itself in terms of emotional distress, depression, altered sense of self and social adjustment and impaired relationships." Appellant's Merit Brief, pg. 15. But Appellants' "as applied" challenge to R.C. 2315.18 is based on the assumption that Jessica Simpkins' non-physical injures were catastrophic in nature[8] and that a distinction between

8 Indeed, she argues that "no person of good conscience could characterize the injuries she suffered as "noncatastophic." Appellants' Merit Brief at pg. 19.

catastrophic physical and catastrophic non-physical injures is unreasonable and arbitrary.

When a court is asked to find a legislative enactment unconstitutional on an "as applied" basis, there must be an adequate factual record to support that challenge. While Appellant argues that she suffered catastrophic emotional damages, the record is to the contrary. The testimony of Jeffrey Smalldon, the only psychologist called as an expert witness at trial, admitted that, notwithstanding her post-traumatic stress disorder, Simpkins continued to play basketball in high school, graduated from high school, attended college, played college basketball, got good grades in college, and sought virtually no mental health counseling after she was raped. Tr. 344-345, 351-359. Compare that to the types of "catastrophic" injuries for which R.C. 2315.18(B)(3) permits unlimited non-economic damages -- permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system and permanent physical functional injury that permanently prevents the injured person from being able to independently care for himself and perform life-sustaining activities. Because Simpkins' emotional injuries are not equivalent to any of those things, the damage caps imposed by R.C. 2315.18 are not unreasonable or arbitrary as to her. There may well be individuals whose emotional injuries prevent them from being able to independently care for themselves or perform life-sustaining activities. But because Simpkins is not so limited, the damage caps for non-economic injuries imposed by R.C. 2315.18 are neither arbitrary nor unreasonable as applied to her.

Thus, even if this Court were to hold that R.C. 2315.18 may not be constitutionally applied to some Plaintiffs, Simpkins does not fall within the ambit of that protection. That was the precise holding of the court of appeals in this case:

> We find there is not clear and convincing evidence that the damages cap is unreasonable or arbitrary as to Simpkins. While there may be nonphysical injuries the effects of which approximate those listed in R.C. 2315.18(B)(3), that is not

> what the evidence shows in this case. Though Smalldon testified Simpkins has post traumatic stress disorder and low grade depression, there is no suggestion that the effect of these injuries approximates the effect of a permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or that her emotional injury permanently prevents her from being able to independently care for herself and perform life-sustaining activities. *** [T]he evidence shows that she is able to independently care for herself and perform life-sustaining activities. Accordingly, Simpkins failed to present clear and convincing evidence of a presently existing set of facts such that R.C. 2315.18 violates her due process rights when applied to those facts.
>
> At ¶¶ 77-78.

Even if Simpkins' characterization of her emotional distress as "catastrophic" is accepted, it is within the legislature's province to differentiate between physical and non-physical injuries and such a differentiation is neither arbitrary nor unreasonable. For example, in the workers' compensation arena, R.C. 4123.54(A) provides that every employee is entitled to compensation for loss sustained on account of occupational injury or disease. But 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.

Appellant's basic argument is that applying R.C. 2315.18 to her is unfair. But the standard for determining whether a statute is unreasonable or arbitrary cannot be whether its application is unfair to one party or the other. To recognize that an outcome is regrettable, but to insist on it anyway, is the very essence of the rule of law.

Courts must "grant substantial deference to the predictive judgment of the General Assembly" and it is not the court's function to second guess such action. *Arbino, supra* at ¶ 71. It is the legislature which is tasked with making policy decisions that it believes achieve the maximum public good. *Arbino* at ¶¶ 59-62. Appellants ask this Court to substitute its judgment regarding the wisdom of legislation for the considered judgment the Ohio General Assembly,

which is improper.

Appellants have pointed to nothing demonstrating that the application of R.C. 2315.18 to Jessica Simpkins is more arbitrary or more unreasonable than applying the damage cap to other tort claimants whose damages are capped. As such, R.C. 2315.18 does not violate Simpkins' right to "due course of law" or "due process of law."

E. R.C. 2315.18 does not violate Simpkins' right to "equal protection" of the law guaranteed by the Ohio.

Simpkins' next argument is that R.C. 2315.18 violates her right to equal protection because its damage limitation impermissibly creates two classes of individuals, those who have sustained a major physical injury and those who have not. That argument is also without merit.

As with the "due course of law" provision, this Court has interpreted this provision as the equivalent of the equal protection clause in the United States Constitution. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, at ¶7. And as with due process, a "rational basis" test is the proper standard as long as neither a fundamental right nor a suspect class is involved. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181. Because R.C. 2315.18 involves neither a fundamental right nor a suspect class, the rational basis test is used to analyze an equal protection challenge to the statute. *Arbino*, at ¶¶ 64-66. Under that test, distinctions created by R.C. 2315.18 need only bear a rational relationship to a legitimate state interest. *Clements v. Fashing* (1982), 457 U.S. 957, 963, 102 S. Ct. 2836, 2843, 73 L. Ed. 2d 508, 515. Distinctions are invalidated only where "they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Id.*; see also *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257, 271 (1993); *Am. Assn. of Univ. Professors, Cent. State Univ. v. Cent. State Univ.*, 87

Ohio St. 3d 55, 58, 717 N.E.2d 286, 290 (1999); *State v. Williams,* 88 Ohio St.3d 513, 530, 728 N.E. 2d 342 (2000).

In *Arbino*, this Court determined that R.C. 2315.18 was rationally related to a legitimate government purpose and was grounded on a reasonable justification. Specifically, as to the limitation on non-economic damages, the *Arbino* majority cited the General Assembly's finding that awards for non-economic injuries "are inherently subjective and susceptible to improper inflation" which "create[s] an improper resolution of civil justice claims." *Id.* at ¶ 68. The General Assembly believed that Ohio had a strong interest in making certain that it has "a fair, predictable system of civil justice that preserves the rights of those that have been harmed by negligent behavior, while curbing the number or frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs of consumers, and may stifle an innovation." *Id.* The General Assembly's legitimate interest in reforming the civil justice system by attempting to make it fair, more predictable and more friendly to Ohio's economy and by attempting to eliminate the uncertainty associated with such damages are goals rationally related to Ohio's interests. *Id.* at ¶ 69. The bright lines the General Assembly drew with regard to tangible versus intangible damages were rationally related to its stated goals in that tangible injuries represent "more concrete evidence of non-economic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations." *Arbino, supra* at ¶ 72. While *Arbino* recognized that the legislature's decision to limit intangible losses was controversial, it also noted that the judiciary is not the proper forum in which to second-guess such legislative choices. *Id.* at ¶71, *citing State ex rel Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E. 2d 1148, at ¶ 20. This Court also correctly noted that the court's sole function in a case of this nature is to

determine whether the legislation is inconsistent with the Constitution, not whether the law was wise.

In establishing a cap of either $250,000 or $350,000 on noneconomic damages for certain injuries and no caps on others, *Arbino* recognized that R.C. 2315.18 treats those with lesser injuries differently from those most severely injured. Nevertheless, the majority held that:

> After reviewing [the legislature's] findings, we conclude that R.C. 2315.18 is rationally related to the legitimate state interests of reforming the state civil justice system to make it fairer and more predictable and thereby improving the state's economy. One cannot deny that noneconomic-damages awards are inherently subjective and difficult to evaluate. The uncertainty associated with such damages logically leads to a lack of predictability as well as the occasional influence of irrelevant factors such as a defendant's improper actions. While such uncertainty and the specter of improper influences are serious concerns on their own, the General Assembly reviewed and cited evidence that these issues are having real, deleterious effects on state economies across the nation, including Ohio. At ¶ 69.

Simpkins contends that R.C. 2315.18 is unconstitutional as applied to plaintiffs who sustain catastrophic emotional injuries but who have not sustained significant physical injuries. Again, Delaware Grace take issue with Simpkins' characterization of her emotional injuries as "catastrophic."[9] But even if her emotional injuries are deemed catastrophic, the General Assembly's determination that tangible injuries represent "more concrete evidence of non-economic damages" and that "calculation of those damages poses a lesser risk of being tainted by improper external considerations" applies.

Arbino determined that R.C. 2315.18 was rationally related to a legitimate government purpose and grounded on a reasonable justification. Appellants have failed to demonstrate why applying the limitation on non-economic damages to her on that same basis violates her right to equal protection. A successful equal protection challenge to R.C. 2315.18 on as "as applied"

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9 See pages 18-19, *supra*.

basis would effectively negate this Court's decision in *Arbino* in any case where the plaintiff is represented by counsel creative enough to differentiate his or her client's circumstances from those of other plaintiffs. In the end, when the challenges raised by Simpkins are examined either as a rehashed "facial" challenge or in the context of her "as applied" argument, the result is the same -- R.C. 2315.18 is constitutional and Simpkins' equal protection challenge fails.

F. R.C. 2315.18 does not violate Simpkins' right to trial by jury.

Appellants next contend that R.C. 2315.18 violates their right to a jury trial. But they also recognize and implicitly acknowledge that their argument is inconsistent with this Court's decision in *Arbino*.[10] For several reasons, this challenge to R.C. 2315.18 should be rejected.

Over vigorous dissents from Justices O'Donnell and Pfeiffer, the *Arbino* majority held that R.C. 2315.18 did not violate Section 5, Article 1 of the Ohio Constitution. While Appellants believe that result was incorrect, they have elected to not reargue the case made by Arbino's lawyers. Likewise, Appellee will not repeat the arguments made in support of R.C. 2315.18 by Johnson & Johnson's lawyers in *Arbino*.

For two reasons, Appellants' constitutional challenge to R.C. 2315.18 in the context of a right to trial by jury should be rejected.

1. *Stare decisis*

S*tare decisis* is a doctrine designed to provide continuity and predictability in the legal system. This Court adheres to *stare decisis* as a means of "thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs." *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 4-5, 539 N.E.2d 103 (1989).

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10 Appellants contend that "the majority holding in Arbino on this issues renders the fact finding function of the jury meaningless *and was wrongly decided*." Merit Brief of Appellants, at pg. 23 (emphasis added).

See also 1 Blackstone, Commentaries on the Laws of England (1765) 70 ("precedents and rules must be followed, unless flatly absurd or unjust * * *").

Notwithstanding the importance of *stare decisis*, this Court has the right and is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E. 2d 1256. In *Galatis*, this Court recognized that "any departure from the doctrine of stare decisis demands special justification," citing *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120, 2001-Ohio-1293, 752 N.E.2d 962. Specifically, *Galatis* noted that a prior Supreme Court decision should be overruled only where: (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability; and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *Westfield Ins. Co. v. Galatis, supra*, paragraph 1 of the syllabus.

Appellants have not suggested that any of the *Galatis* factors are present here. Essentially, Appellants' argument is that "*Arbino* was wrong and should therefore be overruled." Under the standards announced in *Galatis*, that is an insufficient basis to overrule an eight year old decision of this Court.

2. Appellants have failed to demonstrate that R.C. 2315.18 is unconstitutional as applied to Jessica Simpkins.

In *Arbino*, this Court rejected a facial challenge to the constitutionality of R.C. 2315.18 with respect to Section 5, Article 1 of the Ohio Constitution and its guarantee of the right to trial by jury. As noted above, Simpkins has suggested no basis for reversal other than "Arbino was wrongly decided." Certainly, Simpkins has not demonstrated that the application of R.C. 2315.18 affects her right to trial by jury any differently than it affect any other tort claimant whose

damages are capped. Thus, her "as applied" challenge is no different than Arbino's facial challenge to R.C. 2315.18. On this issue, the Court cannot find in favor of Appellants without overruling *Arbino*, which it should decline to do.

G. R.C. 2315.18 does not violate Simpkins' right to a remedy or the "open courts" provision of Section 16, Article I of the Ohio Constitution.

Appellants next challenge the application of R.C. 2315.18 to Jessica Simpkins on the basis that it violates Section 16, Article 1 of the Ohio Constitution, which guarantees "open courts" and "remedy by due course of law" for injuries.

This Court has interpreted the "open courts" and "right to a remedy" provision to prevent a statute's application when it would prevent a claimant from pursuing any remedy at all. See *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466, 639 N.E.2d 425 (finding a statute of repose unconstitutional because it deprived certain plaintiffs of the right to sue before they were aware of their injuries); *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 60–61, 514 N.E.2d 709 (declaring a statute of repose unconstitutional because it did not give certain litigants the proper time to file an action following discovery of their claims); *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415 (striking down collateral source statute where it operated to reduce the entire jury award). But only where a statute completely forecloses a plaintiff's claimant's right to seek any remedy or which would result in a complete obliteration of the entire jury award does the statute violate these provisions. *Arbino* at ¶47. Because R.C. 2315.18 neither wholly denies a meaningful remedy to Simpkins nor completely obliterates the entire jury award in her favor, this Court's decision in *Arbino* and the above-noted principles of *stare decisis* compel a finding that R.C. 2315.18 does not violate the right to a remedy or the right to "open courts" under Section 16, Article I of the Ohio Constitution as applied to her.

Appellants point to R.C. 2743.48, which permits a person who has been wrongfully imprisoned to recover both attorney fees and litigation expenses in a successful "wrongful imprisonment" civil case. From that, Appellants appear to argue that the damage cap statute is unconstitutional as applied to any Plaintiff who recovers damages in a civil action who is not entitled to an award of attorney fees and litigation costs, both of which reduce their ultimate monetary recovery.

But that restriction applies to virtually all personal injury Plaintiffs. Ohio adheres to the "American rule," which requires each party involved in litigation to pay his or her own attorney fees in most circumstances. *Sorin v. Warrensville Hts. School District Board of Educatio*n, (1976), 46 Ohio St. 2d 177, 179, 347 N.E.2d 527. Only where contractual provisions between the parties shift the costs of defending, where there has been a finding of bad faith, or where statutory provisions specifically provide that a prevailing party may recover attorney fees may an award of attorney fees be entered. *Pegan v. Crawmer*, 79 Ohio St. 3d 155, 156, 679 N.E.2d 1129 (1997); *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 66 Ohio St. 3d 75, 77, 609 N.E.2d 152 (1993); *Vance v. Roedersheimer*, 64 Ohio St. 3d 552, 556, 597 N.E.2d 153 (1992).

Appellants' "as applied" theory presents several difficult questions. If, as applied to Jessica Simpkins, R.C. 2315.18 contravenes Section 16, Article I of the Ohio Constitution because she has incurred unreimbursed attorney fees and litigation costs in this case, to which tort claimants would that argument not apply? If Appellants' "right to a remedy" argument applies to all tort claimants, isn't that the very argument made in *Arbino* when the Plaintiff asserted a facial challenge to the constitutionality of R.C. 2315.18 based on Section 16, Article I? If so, why does the doctrine of *stare decisis* not compel affirmance of the lower court's judgment? If R.C. 2315.18 is unconstitutional as applied to Simpkins because she has incurred

unreimbursed attorney fees and litigation expenses, couldn't that constitutional infirmity be eliminated by legislative action mandating an award of attorney fees and litigation costs to every successful tort claimant? If so, doesn't that mean that the "right to a remedy" provision of the Ohio Constitution mandates an award of attorney fees and litigation expenses to every successful tort claimant?

Simpkins has failed to demonstrate that the application of the damage cap statute affects her differently than it affects other tort claimants whose damages are limited by the statute. Her "as applied" constitutional challenge to R.C. 2315.18 therefore fails.

III. FOR PURPOSES OF THE CAP ON DAMAGES IMPOSED BY R.C. 2315.18, THE RAPE OF SIMPKINS BY WILLIAMS CONSTITUTED ONLY ONE OCCURRENCE.

Appellee's Proposition of Law No. 4:

For purposes of the damage cap imposed by R.C. 2315.18, it is the conduct of the Defendant toward the Plaintiff that determines the number of "occurrences," not the number of separate and distinct injuries sustained by the Plaintiff.

R.C. 2315.18 imposes a cap on non-economic damages "for each occurrence that is the basis of that tort action." "Occurrence" is defined as "all claims resulting from or arising out of any one person's bodily injury." R.C. 2315.18(A)(5). If Ohio's damage cap statute is constitutional as applied to Simpkins, Appellants argue that the caps it imposes should be applied separately in a case where there is more than one occurrence.

In general terms, Appellee agrees with that interpretation of R.C. 2315.18. But the devil is in the details -- how many "occurrences" were there in this case? Because the evidence presented by Simpkins at trial established only one occurrence, her argument is without merit.

The basis of Simpkins' claim was negligence on the part of Delaware Grace in promoting Williams to the position of senior pastor at Sunbury Grace notwithstanding the knowledge its employees had of earlier inappropriate conduct by Williams. Appellants neither alleged nor proved separate and discrete acts or omissions on the part of Delaware Grace that lead to Williams' rape of Simpkins. Relative to Delaware Grace, its negligence in promoting Williams to the position of pastor at a different church was the one and only "occurrence" that was the basis of the action. Because it was against Delaware Grace from whom Appellants sought damages at trial, it is the church's acts or omissions that determine the number of "occurrences" applicable when applying the limitation on damages imposed by R.C. 2315.18. Because there was only one "occurrence" that was the basis for Appellants' action against the church, a single "cap" on damages applies in this case.

Appellee's Proposition of Law No. 5:

In a case where the Plaintiff is a victim of two separate instances of sexual penetration, both of which occur within a very short period of time, in a confined geographic space and without any intervening factor, there is but one "occurrence" for purposes of the limitation on damages imposed by R.C. 2315.18.

Even if the Court focuses on the acts of Williams rather than the acts/omissions of Delaware Grace, there was still but one "occurrence" and one "injury" in this case.

In addition to applying a cap on damages to "each occurrence that is the basis of that tort action," R.C. 2315.18 also applies to "any one person's bodily injury." R.C. 2315.18(A)(5). Not to each bodily injury, but to any one person's bodily injury. So if a person sustains bodily injury, a single cap applies, even if he or she suffered more than one distinct injury.

The undisputed evidence at trial was that Williams forced Simpkins to perform oral sex and, almost immediately thereafter, forced vaginal intercourse. Both events happened in the

same confined area and within a very short span of time. No one else entered the office between the two events, and neither Simpkins nor Williams left the office. Tr. 330-334. Simpkins did not testify that she was affected differently by the two events. The testimony of Dr. Jeffrey Smalldon, a psychologist who examined Simpkins and provided opinions at trial, supports the position that there was only one indivisible injury:

> Q. [By Mr. Fitch] Is it your opinion to a reasonable degree of psychological certainty that the post-traumatic stress disorder from which she [Simpkins] suffers is a direct result *of the incident with Brian Williams*? {emphasis added}
>
> A. Yes.
>
> [Tr. 427]

Citing *Madvad v. Russell*, Lorain App. No. 96CA006652, 1997 Ohio App. LEXIS 5181, Appellants argue that, because Simpkins was the victim of two separate criminal acts (i.e. oral and vaginal penetration), there were two separate "occurrences." *Madvad* was a sexual abuse case, but the issue before the court involved only the statute of limitations. The court concluded that each separate sexual assault by Russell constituted a separate and independent tort and that the statute of limitations would be applied individually to each separate assault. But in that case, Plaintiff alleged that "she was sexually assaulted by Diane Russell's husband, Walter Russell, throughout her childhood and once as an adult" (emphasis added). At *2. Thus, there were multiple acts of sexual abuse that occurred over a lengthy period of time and, presumably, in a number of different places. Under those facts, Delaware Grace would agree that there were separate "occurrences," at least with respect to the person who abused the Plaintiff. But those are not the facts in this case, so *Madvad* does not support Appellants' argument.

An issue that arises occasionally in the context of insurance law is whether a series of events constitutes one or more "occurrence" for purposes of the "per occurrence" liability limits

in a policy. In resolving cases of that nature, courts have focused on what may be described as a "time-space continuum." See for example *Olsen v. Moore*, 56 Wis. 2d 340, 202 N.W. 2d 236 (Wis. 1972) (holding that there was one "accident" when the insured's vehicle struck two vehicles almost simultaneously and he never regained control over the vehicle prior to striking the second vehicle); *Truck Ins. Exch. v. Rohde*, 49 Wash. 2d 465, 303 P. 2d 659 (Wash. 1956) (finding one "accident" rather than three when a driver's vehicle went out of control and remained out of control during the three collisions); *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y. 2d 169, 305 N.E. 2d 907, 350 N.Y.S. 2d 895 (N.Y. 1973) (finding one accident because the two collisions occurred only an instant apart and the sequence of events was unbroken); and *Bacon v. Miller*, 113 N.J. Super. 271, A. 2d 602 (N.J. App. 1971) (finding one accident when a vehicle collided with a car and then immediately hit three pedestrians on the sidewalk). In all of these cases, the critical fact was that multiple impacts occurred within a very short period of time and within a relatively small geographic area. Thus, the general rule is that, where one act or omission is the sole proximate cause of sequential and immediate impacts that occur within a relatively confined area, there is only one occurrence even though there may have been multiple resulting injuries. The court in *Illinois Nat. Ins. Co. v. Szczepkowicz*, 185 Ill. App. 3d 1091, 542 N.E.2d 90 (1989), succinctly summarized this rule as follows:

> For purposes of liability policy limiting insurer's liability to specified amount per accident or occurrence, the number of occurrences is determined by referring to cause or causes of damage rather than to number of individual claims or injuries and, applying "cause" theory, courts will find single accident if cause and result are so simultaneous or so closely linked in time and space as to be considered as one event.

According to the *Szczepkowicz* court, "[c]ourts applying the 'cause theory' uniformly find a single accident 'if cause and result are so simultaneous or so closely linked in time and space as to be

considered by the average person as one event."

In *Progressive Preferred Ins. Co. v. Derby*, Fulton App. No. F-01-002, 2001 Ohio App. LEXIS 2649 (June 15, 2001), the Plaintiff was working as a traffic control flagger on a construction site. A dump truck driver placed his vehicle in reverse, began moving backward, and ran over the flagger. The driver then immediately shifted into forward gear, moved ahead slowly, and ran over the flagger again. The court found that this constituted only one occurrence for purposes of insurance coverage. In *Greater Cincinnati Chamber of Commerce v. Ghanbar*, 157 Ohio App. 3d 233, 2004-Ohio-2724; 810 N.E.2d 455 (1st Dist.), a driver drove his vehicle through traffic barricades and through a crowd of people gathered around a bandstand, injuring more than twenty people before his car came to a stop. The court held that there was but one occurrence because: (1) the injuries occurred as a result of a single act on the part of the driver; (2) the injuries occurred almost simultaneously. The logic of those insurance cases can and should be applied here.

As a practical matter, Appellants' "multiple occurrences" theory is unworkable. Consider the case of a bar fight between two individuals, Smith and Jones, that lasts only a couple of minutes. Smith sustains serious but non-catastrophic injuries -- two separate skull fractures, a broken jaw, loss of a tooth, and diminution of hearing function that persists for two months, all resulting from separate blows administered by Jones. Smith doesn't sue Jones (because he is judgment-proof), but instead sues the owner of the bar for negligence because Jones had been involved in other fights at the bar. If Appellants' theory in the case at bar is correct, each individual injury to Smith would constitute a separate "occurrence" for purposes of R.C. 2315.18. The trial judge would have to instruct the jury that, if they find in favor of the Smith, a separate damage award for noneconomic damages for each injury must be calculated. The jury

awards $100,000 for noneconomic loss for each injury, a total of $500,000. Under Appellants' theory, because the award for any one injury is less than $250,000, the total verdict for noneconomic loss, which exceeds the cap by a considerable amount, would be allowed to stand. Most assuredly, that was not the intent of the General Assembly when it enacted R.C. 2315.18. Moreover, the result sought by Appellants is inconsistent with statutory language specifying that the cap is applicable to "any one person's bodily injury." R.C. 2315.18(A)(5).

Williams penetrated Simpkins both orally and vaginally in short period of time, in a confined space, and with no intervening acts. Appellants offered no testimony at trial establishing separate and distinct effects from the oral and vaginal penetrations. In fact, the testimony of Dr. Smalldon was that Simpkins' post-traumatic stress disorder was the direct result "of the incident with Brian Williams." On that record, there is simply no basis for the conclusion that the oral and vaginal penetrations constituted separate "occurrences" for purposes of R.C. 2315.18.

CONCLUSION

In the guise of an "as applied" constitutional challenge to R.C. 2315.18, Appellants have essentially raised arguments about the wisdom of the policy supporting Ohio's damage cap statute. But because this Court's decision on the constitutionality of R.C. 2315.18 will not necessarily resolve this case, Appellee initially suggests that this appeal should be dismissed as having been improvidently allowed.

Should this Court elect to reach the "as applied" constitutional issues presented by Appellants, Appellee respectfully asks that the judgment of the court of appeals be affirmed. Had the justices of this Court been legislators when Am. Sub. S.B. 80 was presented for a vote in 2005, perhaps one, perhaps most, or perhaps all might have voted "no." But a majority of the

125th General Assembly voted "yes" on that legislation. The legislature made a policy choice that took into account the perceived benefits and disadvantages of the bill, which is the essential function of the legislature. It is not the role of the judiciary to decide whether a statute is a wise one; the choice between competing notions of public policy must be made by elected representatives of the people.

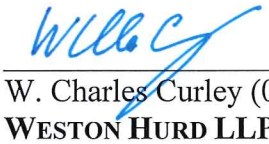
Eight years ago, this Court in *Arbino* rejected a facial challenge to the constitutionality of R.C. 2315.18. To the extent that the arguments made by Appellants in support of their argument that R.C. 2315.18 is unconstitutional "as applied" to Jessica Simpkins are the same as those made by counsel for Ms. Arbino and because Appellants have not have not demonstrated any basis for *Arbino* to be overruled, the doctrine of *stare decisis* commands that Appellants' "as applied" challenges be rejected. To the extent that Appellants have made arguments not made in *Arbino*, they have failed to demonstrate that the damage caps imposed by R.C. 2315.18 affect Simpkins differently than they affect virtually every other tort claimant. Accordingly, the holding of the court of appeals that R.C. 2315.18 is not unconstitutional "as applied" to Simpkins should be affirmed.

The damages sustained by Jessica Simpkins were the result of one "occurrence," namely the negligence of Delaware Grace in promoting Williams to the position of senior pastor at Sunbury Grace after he had been involved in two instances of inappropriate conduct while working as a youth pastor at Delaware Grace. The record establishes that oral and vaginal penetrations were committed in the same confined area within a short span of time and without any intervening events. The only expert who testified relative to Simpkins' damage claim opined that her post-traumatic stress disorder was the result of "the incident with Brian Williams." There was no request by the Plaintiff to have the jury allocate Simpkins' damages for noneconomic

loss between with the vaginal and oral penetrations. In light of all of that, there is no support for the conclusion that there was more than one "occurrence" for purposes of R.C. 2315.18. So on that basis, the judgment of the court of appeals should also be affirmed.

Jessica Simpkins was the victim of a horrific crime. Reasonable people can disagree on whether the noneconomic damages of tort claimants who have sustained emotional distress without accompanying physical injury and without having incurred significant economic loss should be capped by statute. But that decision was made by the Ohio General Assembly in 2005. If that is to be changed, the change should come from the legislature, not this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was sent via regular U.S. mail, postage prepaid, this 4th day of September 2015, to the following:

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