

IN THE SUPREME COURT OF OHIO

Amanda Brandt,	:	Ohio Supreme Court Case No. 2021-
	:	0497
Appellant,	:	
	:	On Appeal from the Cuyahoga
v.	:	County Court of Appeals,
	:	Eighth Appellate District
Roy Pompa,	:	
	:	Court of Appeals
Appellee.	:	Case No. CA 20 109517

MERIT BRIEF OF APPELLANT AMANDA BRANDT

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STATEMENT OF FACTS

A. Nature of the Case

From 2002 to 2006, Appellee Roy Pompa (“Pompa”) molested and sexually assaulted numerous female children, ages 6 to 14, in his home. One of Pompa’s victims was Appellant Amanda Brandt, ages 11 and 12 at the time of the abuse. Ultimately, Pompa was arrested and convicted of a multitude of charges including, but not limited to, 17 counts of rape, 5 counts of kidnapping, 55 counts of pandering sexually oriented matter involving a minor, 21 counts of gross sexual imposition, and possession of criminal tools. Appellant was the victim in 34 of these counts.

In 2018, Appellant filed a civil complaint against Pompa seeking damages for the severe injuries caused by Pompa’s sexual abuse. Appellant’s complaint asserted claims for intentional criminal wrongdoing, knowing dissemination of child pornography, intentional infliction of emotional distress, and a declaratory judgment that R.C. 2315.18 was unconstitutional. The complaint sought both compensatory and punitive damages for Appellant’s injuries.

B. The Disposition Below

The case was tried before a Cuyahoga County, Ohio, Common Pleas Court jury. The jury returned a verdict in favor of Amanda Brandt in the amount of \$134,000,000.00 as follows: \$14,000,000.00 in compensatory damages for acts occurring prior to April 6, 2005; \$20,000,000.00 for acts occurring after April 6, 2005; and \$100,000,000.00 in punitive damages. (TR. 159-60). The Court, relying upon the decision in *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, applied R.C. 2315.18 to significantly reduce Amanda’s non-economic damages for acts occurring after April 6, 2005, from \$20,000,000.00 to \$250,000.00.

Appellant appealed to the Eighth District Court of Appeals from the trial court decision granting Pompa's motion to cap the monetary amount of recovery for Amanda's post April 6, 2005 non-economic damages. The Eighth District overruled both of Appellant's assignments of error and affirmed the decision of the trial court.

C. Statement of Facts

Roy Pompa is a serial, sexual predator who molested, sexually assaulted, and raped many young girls from 2002 to 2006. *Brandt v. Pompa*, 2021-Ohio-845, 169 N.E.3d 285, ¶ 2 (8th Dist.). Pompa victimized these girls while they were at his home and in his care. From May of 2004 to November of 2005, Amanda was abused by Pompa on 34 occasions. Amanda was 11 and 12 years old at the time of the abuse. Amanda continues to suffer severe and catastrophic injuries as a result of Pompa's sexual abuse. In addition to the abuse of Amanda, a search of Pompa's home uncovered films that included children as young as three being sexually abused. (Pompa Dep. 25).

1. Roy Pompa's history of sexual abuse of Amanda Brandt

As a child, Amanda was friends with Pompa's daughter, Marissa. (TR. 20). Frequently, Amanda would have sleepovers with Marissa, spending the night at the Pompa residence. (TR. 20). During those sleepovers, Pompa always provided Amanda with something to drink before she went to bed. (TR. 27). Out of courtesy and respect, Amanda would often accept the drinks despite their "pretty bad" taste. (TR. 28). Although denied by Pompa, the Appellate Court, in its decision, noted that Pompa put illicit substances in Amanda's drinks prior to her going to sleep so that he could commit the devious sexual acts, previously set forth, against her without her knowledge or full awareness. *Brandt* at ¶ 3. Amanda frequently woke up at Pompa's house feeling "fuzzy," "a little blurry," and "groggy" (TR. 29).

Amanda does remember some of Pompa's assaults waking her up at night. On one occasion, Amanda awoke to something touching her. At first, she thought it was one of the Pompas' cats, but quickly realized it was a hand "running all over [her] genitals and under [her] underwear to touch [her] vagina." (TR. 28–29). These recollections were corroborated by video recordings which Pompa had created. *Brandt* at ¶ 3. The recordings showed Pompa sexually abusing Amanda. *Id.* at ¶ 6. In each recorded incident, Amanda was either 11 or 12 years of age. *Id.* at ¶ 3. These recordings were discovered pursuant to the execution of a search warrant by the Ohio Internet Crimes Against Children Task Force and Brook Park Police. *Id.* at ¶ 3. The recordings depicted Pompa abusing Amanda, including, but not limited to (1) Pompa masturbating on Amanda, (2) Pompa ejaculating on Amanda, and (3) Pompa abusing Amanda with a dildo or vibrator. (Pompa Dep. 19, 63).

At trial, the Parties stipulated and read to the jury the 34 counts of criminal offenses that occurred from May 2004 through November 2005, which Pompa was convicted of with respect to Amanda, including gross sexual imposition and rape of a minor under 13 years of age. The Stipulation appears at pp. 22-27 of the trial transcript.

2. Amanda's resulting severe and permanent emotional and psychological injuries

Prior to the sexual abuse, as Amanda's mother, Kelly Brandt, testified Amanda was an outgoing, "happy-go-lucky" child that "wanted to conquer the world." (TR. 76). She loved to travel and participate in mission trips. (TR. 76–77). She was an honor student, involved in various school activities, and was also an active participant in her church and community. (TR. 76-78). Prior to the abuse, she had no mental health issues and had never been diagnosed with anxiety. (TR. 47). Her parents served as foster parents to special needs children while Amanda was growing up (TR.

46) and were also involved in community service (TR. 68). Overall, Amanda had a “pretty normal” childhood. (TR. 21).

Following Pompa’s abuse, Amanda fundamentally changed. According to Amanda’s mother, “she [was] not the same kid we knew growing up.” (TR. 78). Amanda’s mother testified that Amanda became a recluse suffering from severe anxiety and anger issues. (TR. 77–78). She no longer participated in any of the community or social activities she once enjoyed. (TR. 30). She self-isolated and never wanted to go anywhere. (TR. 77–78). At age twelve, Amanda wrote a letter to the trial judge in Pompa’s criminal case, detailing the changes she experienced as a result of the abuse. (TR. 29–32). She discussed being unmotivated to participate in her favorite activities, like going to book club or the movies. (TR. 30). She described the “serious emotional problems” she suffered, including screaming fits and outbursts of tears. (TR. 30). She detailed her difficulty sleeping and constant state of distraction, which caused her grades in school to plummet. (TR. 30–31). In her letter, Amanda’s pain and suffering was exemplified by her pleas for the court to execute Pompa. (TR. 31). “He doesn’t deserve to live. It is Roy’s fault that we all have to go through this* * *Please do the victims some justice and, like I said, kill the man.” (TR. 32).

Amanda began counseling the day after her family learned about Pompa’s abuse. (TR. 41). Over the years, she has worked with multiple counselors in multiple locations, undergoing various treatment plans. (TR. 41). All of the counselors have diagnosed Amanda with the same disorder—Post Traumatic Stress Disorder (PTSD) (TR. 54). At the start of trial, it had been fourteen years since Amanda’s first counseling session, and yet she continues counseling with no end in sight. (TR. 33).

As an adult, Amanda continues to suffer from PTSD and anxiety. These disorders have affected her life in a severe manner. (TR. 34–35). Amanda experiences difficulties being around

groups of people, and she struggles with life outside of her home. (TR. 34). For example, Amanda must do her grocery shopping at two or three in the morning to avoid masses of customers. (TR. 34). Additionally, Amanda is unable to attend parties, concerts, or bars because of the noise and crowds. (TR. 43–44). When subjected to these situations, Amanda’s heart rate increases, she feels like something is painfully squeezing her chest, and noises become extra loud. (TR. 43). In order to cope with her debilitating anxiety and panic attacks, Amanda is forced to restructure her life to avoid exposure to groups. Additionally, Amanda is prescribed Zoloft to stabilize her mood and depression from the PTSD. (TR. 32). She takes Zoloft daily. (TR. 54). Zoloft is simply another medication in a series of treatments that Amanda has been prescribed in an attempt to combat her disorders. (TR. 42). She also takes Prazosin every day in an attempt to help with her reoccurring nightmares. (TR. 32).

Amanda’s anxiety and mental health battles have been the catalyst for various other challenges in her life. After high school, Amanda worked as a customer service representative. (TR. 35). Due to her worsening anxiety, she could not meet the responsibilities of her job and was subsequently terminated. (TR. 36). Amanda specifically attributes the call center as being overwhelming for her anxiety, resulting in her having to call off work more. (TR. 57).

After losing her job, Amanda started self-medicating with heroin to cope with her deteriorating mental health. (TR. 36). She felt that the heroin allowed her to be able to not worry for a while and not feel as uncomfortable as she did while not on heroin. (TR. 60). Amanda eventually became addicted to heroin, lost her apartment, and was homeless for almost a year, living in a tent in Michigan (TR. 36–37). Eventually, after a brief attempt to cease her use of heroin, Amanda attempted suicide via a heroin overdose. (TR. 38). According to Amanda, but for Pompa’s sexual abuse, she never would have experienced severe mental health problems, nor would she

have started using heroin. (TR. 38). Due to Pompa's abuse, Amanda also battles anxiety involving physical contact. Amanda does not like to be touched (TR. 44). "[S]mall bits of brushing up that people do is enough to send me into an anxiety attack." *Id.*

In addition to her emotional disorders, Amanda also battles constant, recurring nightmares. These nightmares began during the abuse and continue to persist today. (TR. 33). The nightmares always involve "personal space violations," and in nearly every nightmare, Amanda is trapped in the Pompa basement and attempting to escape. (TR. 32). Although Amanda takes Prazosin to combat the nightmares, she still has them at least five times a week. (TR. 32). As a significant side effect, Prazosin also eliminates her good dreams in an attempt to prevent her nightmares. (TR. 42). Amanda notes that, "[u]nfortunately, you do have to give up the good dreams, too. You don't dream at all on that medication, the Prazosin." (TR. 42).

Ultimately, Amanda's mental anguish due to Pompa's abuse continues despite her continued efforts at treatment and counseling. She suffers from severe and pervasive injuries that require her to restructure her entire life, as well as rely on various medications to minimize her infirmities. Clinical psychologist, Dr. Patrick Yingling, evaluated Amanda in June 2019 and opined that her injuries would persist "with some degree of intensity" for a "significant" period of time. (Yingling Dep. 42). These injuries include PTSD, clinical depression, anxiety attacks, agoraphobia, nightmares, ruminative thinking, dysphoria, self-depreciation, lethargy, lack of confidence, and physical contact issues, even with her husband. (Yingling Dep. 36-42). Dr. Yingling testified with a reasonable degree of psychological certainty that her PTSD is a direct result of Pompa's sexual assaults. (Yingling Dep. 41). Further, Dr. Yingling testified that Amanda "would benefit from ongoing psychotherapy as well as psychiatric medication management to

address her symptoms.” (Yingling Dep. 42). Pompa proffered no expert testimony to challenge Dr. Yingling’s testimony.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 1: R.C. 2315.18, as applied to minor victims of sexual abuse that suffer severe and permanent injuries, violates constitutional rights to due process of law, equal protection of the laws, trial by jury, and open courts and a remedy as guaranteed by the Ohio Constitution.

I. Introduction

Under present law, the sole purpose of R.C. 2315.18, as applied to these facts, is to protect intentional tortfeasors, mainly criminals, from paying for their actions. One in nine girls and one in 53 boys under the age of 18 experience sexual abuse or assault by an adult. *Children and Teens: Statistics*, RAINN (<https://www.rainn.org/statistics/children-and-teens>), Finkelhor, et al., *The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence*, 55 J. of Adolescent Health 329, 329-333 (2014). Every nine minutes, child protective services confirms or finds evidence to support a child sex abuse claim. *Id.*, citing United States Department of Health and Human Services, *Child Maltreatment Survey 2016* (2018), <https://www.acf.hhs.gov/cb/report/child-maltreatment-2016>.

Victims who experience sexual abuse are prone to suffering from severe effects when compared to those who don’t suffer from sexual abuse, including being four times more likely to develop symptoms of drug abuse and four times more likely to experience post-traumatic stress disorder as adults. *Id.*, citing H.M Zinzow, et al., *Prevalence and risk of psychiatric disorders as a function of variant rape histories: results from a national survey of women*, 47 Social Psychiatry and Psychiatric Epidemiology, 893–902 (2012).

This Court, itself, has recognized just how extreme the problem of child abuse is in our state and country. In a 2004 opinion, the Court acknowledged that child abuse is “a pervasive and

devastating force in our society” and is “a problem of epidemic proportions.” *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.3d 861, ¶ 12.

The tort system has two main functions: compensation and deterrence. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L.Rev. 905, 910 (2008). R.C. 2315.18 works to explicitly counteract one of these goals, compensation, and also has the effect of hindering the other main goal, deterrence.

R.C. 2315.18 runs counterintuitive to the purpose our civil justice system – making a victim whole– by severely limiting the constitutional rights of children who are sexually abused and, instead, protecting the sexual predators who sexually abuse those children. Under R.C. 2315.18, child sexual predators like Roy Pompa, and not minor victims, are the beneficiaries of the cap on noneconomic damages.

In *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 51, a case in which R.C. 2315.18 limited the recovery of a minor who was the victim of a single occasion of sexual abuse by an adult, this Court posited that “there may exist a set of facts under which application of the statutory damage caps would prove unconstitutional[.]” *Id.* at ¶ 51. That set of facts does exist and is now before this Court. Amanda Brandt, between the ages of 11-12, suffered from some of the most degrading and depraved acts that a human being can endure. Those acts have resulted in catastrophic emotional and psychological injury to Amanda equivalent to the physical injuries which R.C. 2315.18 exempts from the cap on non-economic damages.

For the reasons set forth below, the Court should declare that R.C. 2315.18, as applied to minor victims of sexual abuse who suffer severe and catastrophic injuries, violates the rights guaranteed to them by the Ohio Constitution.

II. The Legislature and the Court

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 over 200 years ago 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.

Cincinnati, W. & Z.R. Co. v. Clinton Cty. Com'rs., 1 Ohio St. 77 (1852).

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 rebuttable presumption of constitutionality." *Id.* at ¶ 25. While true, the presumption is rebuttable. *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 361, 653 N.E.2d 212 (1995). Furthermore, the legislature must operate within the confines of the Ohio Constitution, including equal protection and due process. *Id.*, citing *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 355, 639 N.E.2d 31, 35. In fact, in *Adamsky* the majority exercised its power to nullify unconstitutional statutes and held that the two-year statute of limitations for personal injury actions against political subdivisions was unconstitutional on equal protection grounds *as applied to minors* (emphasis added). *Id.* at 363. While legislatures are granted the power to make laws, it is the responsibility and duty of this Court to ensure those laws are constitutional and, if not, to nullify those laws. Such is the essence of our system of checks and balances.

III. The Special Status of Children

Ohio has recognized that children should be afforded special protection in our legal system. In Ohio, an adult bringing a civil sexual assault claim has one year to bring a claim. R.C. 2305.111(B). However, Ohio has recognized that children have a special status and allows minor victims 12 years from the age of majority to bring civil lawsuits against their abusers. *See* R.C. 2305.111.

This Court has also recognized children's special status in our society, as is evidenced by the *Adamsky* decision. Additionally, "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).

IV. Appellant's As Applied Challenge

There are two types of constitutional challenges to statutes: facial challenges and as applied challenges. A statute which is unconstitutional on its *face* may not be enforced under any situation. *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21. In *Arbino*, the Court held that R.C. 2315.18 was constitutional on a *facial* basis.

On the contrary, an as applied challenge recognizes that a statute might be unconstitutional 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 (2006), citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289, 42 S.Ct. 106, 66 L.Ed. 239 (1921). ("It is axiomatic that a 'statute may be invalid as applied to one set of facts and yet valid as applied to another.'"). In an as applied challenge, the issue is whether application of the statute in a particular context is constitutional and is dependent upon a particular set of facts. *Wymsylo* at ¶ 22.

When a statute is held unconstitutional as applied to a certain set of facts, the effect is the prevention of similarly applying it in the future, while not declaring the statute totally unconstitutional and inoperative. *Id.*

This appeal presents a precise set of facts upon which the Court can determine that R.C. 2315.18 as applied to minor victims of sexual abuse who suffer severe and catastrophic injuries violates the protections afforded by the Ohio Constitution.

A. R.C. 2315.18 as applied to Amanda Brandt violates her right to due course of law under Section 16, Article I of the Ohio Constitution

The “due course of law” provision in Section 16, Article I of the Ohio Constitution has been recognized by this Court as the equivalent of “due process of law” protections in the U.S. Constitution. *Arbino* at ¶ 48. In *Arbino*, this Court applied a “rational-basis” test to the due process challenge.¹ Under the rational basis test, a statute must “bear a real and substantial relation to the public health, safety, morals or general welfare of the public and not be unreasonable or arbitrary.” *Arbino* at ¶ 49; *Groch v. General Motor 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 who suffer severe and catastrophic injuries is not rationally related to the public’s health, safety, morals, or general welfare and is both unreasonable and arbitrary.

In *Simpkins*, this Court stated:

Because that situation does not exist here, we need not opine whether there may be some instance in which application of the damage caps to damage awards for

¹ As discussed in Proposition 2 below, Appellant disagrees 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 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 controlling, however, Appellants proceed to demonstrate that R.C. 2315.18 denies Amanda Brandt her right to due process of law even under a rational basis test.

emotional injuries that rise to the level of physical injuries excepted from the damage caps by R.C. 2315.18(B)(3) would violate due process.

Simpkins, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122 at ¶ 42. The present case, however, does involve emotional injuries that rise to the level of physical injuries excepted from the damage caps by R.C. 2315.18(B)(3), and application of the caps in this case violates Amanda Brandt's due process rights

1. R.C. 2315.18, as applied to minor victims of sexual abuse who suffer severe and permanent injuries does not bear a real and substantial relation to the public health, safety, morals, or 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. Therefore, this Court upheld a cap on noneconomic damages for all tort victims except those suffering those injuries set forth in R.C. 2315.18(B)(3).

To the extent minors who are victims of sexual abuse suffer any physical injuries, those injuries are rarely the type listed in R.C. 2315.18(B)(3). Further, these victims rarely suffer significant economic injury. However, these minor victims do suffer real, substantial, noneconomic injuries as was demonstrated by Amanda Brandt at her trial, and these noneconomic injuries can even manifest physically, for example, as post-traumatic stress disorder. Whatever can be said about the "inherently subjective" nature of noneconomic damages, there is nothing subjective about the harm caused to child victims of sexual abuse. Amanda's case demonstrates that child victims of sexual abuse suffer in an extreme and life altering way.

Scholarly research has demonstrated that sexual abuse victims commonly suffer non-economically. "The injury from sexual assault affects the victim primarily in noneconomic ways."

Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1301 (2004). Therefore, if one's injury is primarily noneconomic, it naturally flows that noneconomic damages will be the primary form of recovery for victims of sexual abuse, including minors who suffer from sexual abuse that results in catastrophic injury. Data from one 2004 study demonstrated that, in Florida, noneconomic damages were a "much higher" proportion of the total compensatory damages given by a jury to victims of sexual assault when compared to tort awards overall. *Id.* at 1300–01.

A cap on noneconomic damages for minor victims of sexual abuse who suffer catastrophic injuries, but no physical injury nor economic loss, bears no real and substantial relation to the public health, safety, morals, or general welfare of the public. In fact, high noneconomic awards granted by juries demonstrate that the caps are in fact contrary to the functions of our tort system.

In Amanda's case, the jury, after hearing uncontradicted testimony, both lay and expert, of the severe trauma suffered by Amanda as a result of Pompa's sexual abuse, demonstrated their belief that minor victims of sexual abuse deserve recognition and deterrence through a substantial verdict, and that "capping" those damages does not bear a substantial relation to the general welfare.

2. R.C. 2315.18, is both arbitrary and unreasonable as applied to minor victims of sexual abuse who suffer severe and permanent injuries

Even if this Court were to find that R.C. 2315.18, as applied to minors who are victims of sexual abuse, bears a real and substantial relationship to the public's health, safety, morals, or general welfare, the statute must not be arbitrary or unreasonable if it is to be constitutional. "Arbitrary" has been defined as "without adequate determining principal," and "unreasonable" has been defined as "irrational." *Detelich v. Gecik*, 90 Ohio App.3d 797, 795, 630 N.E.2d 771 (11th

Dist. 1993). R.C. 2315.18, as applied to minors who are victims of sexual abuse who suffer severe and catastrophic injuries, is both arbitrary and unreasonable.

R.C. 2315.18 cannot be said to be anything but arbitrary. There is no valid reason or justification why minor victims of sexual abuse who suffer severe and catastrophic injury should be denied the full compensation awarded to them by a jury, unless the purpose of the cap is to protect perpetrators. In his dissenting opinion in *Sorrell v. Thevenir*, Chief Justice Moyer stated: “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.” *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 427, 633 N.E.2d 504 (1994).

As applied to these victims, it is clearly irrational to require that minor victims suffer a physical injury of the kind set forth in R.C. 2315.18(B)(3) before they can receive the full amount of compensatory damages awarded by a jury. This is especially irrational since sexual abuse does not typically result in the serious physical injury that would be exempted by R.C. 2315.18(B)(3). Rather, injury from sexual abuse manifests itself in terms of emotional distress, depression, altered sense of self, post-traumatic stress disorder, and social adjustment and impaired relationships. “While there will certainly be some initial medical bills, and perhaps some ongoing mental health therapy costs, the lasting impact is not about medical bills and lost wages, as with a physical disability, but on one’s sense of self, on one’s comfort with the body and intimate expression, and on feelings of security in going about daily activities and interactions.” Finley, *supra* at 1301. Injuries such as these are as real as those physical injuries set forth in R.C. 2315.18 and, indeed, often more life altering. Yet, R.C. 2315.18 dictates that these injuries are not worthy of full compensation because of a lack of a compensable physical injury.

This Court concluded in *Simpkins* that exceptions to R.C. 2315.18 required “extreme qualifications.” *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 43, citing *Weldon v. Presley*, N.D. Ohio No 1:10 CV 1077, 2011 U.S. Dist. LEXIS 95248 (Aug. 9, 2011). In its decision below, the Eighth District stated that Amanda Brandt’s resulting harm did not meet the requisite level of “extreme qualifications.” *Brandt*, 2021-Ohio-845, 169 N.E.3d 285, at ¶ 48. In making this decision, the Appellate Court cites to the fact that Amanda is married with children; works as a part-time waitress; completed the classes to get her real estate license; and “hopes to establish a career selling real estate.” *Id.* at ¶ 48. The Appellate Court also questioned whether all of the mental health and other issues Amanda faced were attributable to the sexual abuse she suffered by Pompa. *Id.* at ¶ 49. Clearly, the jury, which heard the actual testimony, found a direct nexus of causation between the sexual abuse and Amanda’s devastating emotional injuries as reflected in its verdict. Furthermore, the record is devoid of actual evidence to the contrary.

In determining that Amanda’s injuries don’t meet the “extreme qualifications,” the Appellate Court is (a) ignoring the uncontradicted testimony at trial; (b) ignoring the jury’s verdict; and (c) essentially punishing Amanda for having taken steps to overcome the sexual abuse she underwent as a minor. The Appellate Court wrongfully minimizes the PTSD, anxiety, depression, and recurring nightmares (for which she takes daily medication), and ignores her inability to be in large crowds, her time as a heroin addict and time as being homeless, her attempted suicide, and her past counseling and need for counseling in the future. The fact that Amanda has, through over fourteen years of counseling and daily medication, been able to have a family and find part-time employment cannot be said to outweigh the severe trauma and mental health issues that Amanda continues to struggle with today. (TR. 34; 41-44).

In fact, the Appellate Court's rationale that these issues cannot be directly causally related to the abuse parallels the arguments made by Pompa's counsel in his closing argument. (*See* TR. 142-47). Those arguments were clearly and explicitly rejected by the jury. Amanda testified on direct examination that she relates the drug addiction to the sexual abuse. (TR. 38) She also testified that she relates her suicide attempt to the sexual abuse. (TR. 39). Thus, when the Appellate Court states, "...it appears that she is able to independently care for herself and perform life-sustaining activities..." it seemingly overlooks the fact that her life was almost lost due to the sexual abuse perpetuated by Roy Pompa. *Brandt*, at ¶ 48. Furthermore, cross-examination of Amanda not only failed to discredit her testimony but in fact further demonstrated the mental and emotional issues she suffered as a direct result of Pompa's abuse (TR. 47, 51, 53, 63).

Based upon the testimony and evidence at trial, a jury awarded Amanda \$20,000,000.00 in noneconomic damages for her injuries resulting from acts that occurred on or after April 6, 2005. The jury's award evidences their conclusion that Amanda's noneconomic damages for this time frame were the type of severe and life-altering injuries – or “extreme qualifications” – that the legislature had exempted from the damage cap – *but only if the result of a physical injury*. The effect of excluding minors who suffer severe and catastrophic non-physical injury is simply telling perpetrators who sexually abuse minors to make sure you don't leave a substantial physical injury. Such a result is definitively arbitrary and irrational.

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, as a matter of course, to strip ninety-eight percent of the award that a jury, after hearing and fully considering all the evidence, deemed appropriate to fully compensate Amanda for her

noneconomic injuries. On what nonarbitrary, rational basis could a legislature determine that an award of \$250,000.00 is adequate to compensate a minor who was repeatedly drugged, sexually abused, and filmed as she was being abused? There is no rational basis.

By imposing caps on noneconomic damages, R.C. 2315.18, as applied to minor victims of sexual abuse who suffer severe and catastrophic injuries, denies Amanda Brandt and others similarly situated their right to due course of law as guaranteed by the Ohio Constitution.

B. R.C. 2315.18 as applied to Amanda Brandt violates her right to equal protection under Article I, Section 2 of the Ohio Constitution

In *Arbino*, the majority opinion rejected, as it did with respect to due process, a strict scrutiny review of the plaintiff's equal protection claim by finding 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*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 37-38. For the reasons set forth in Proposition 2, Section B below, Appellant asserts that *Arbino* was wrongly decided.

However, even if the Court applies a rational basis test, R.C. 2315.18 still violates Amanda Brandt's 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 Amanda, the classes two created by R.C. 2315.18(B)(3) are not as described in *Arbino* but rather are as follows: 1) catastrophic physical injuries; and 2) non-catastrophic physical injuries, catastrophic non-physical injuries, and non-catastrophic non-physical injuries. The latter group lumps together the remaining types of injury without regard to the fact that it includes catastrophic non-physical injuries. Moreover, the former group enjoys unlimited noneconomic damages, while the latter group is arbitrarily and irrationally deemed to, without question, have a cap on noneconomic damages no matter the level of catastrophe involved. This is despite the fact that catastrophic non-physical injuries are often as equally catastrophic as physical injuries. While both groups previously mentioned sustained catastrophic injury – recall, the Court in *Arbino* and subsequently in *Simpkins* stated that catastrophic injury offers more evidence of noneconomic damages – catastrophic non-physical injuries are denied full compensation for no reason other than the injuries being psychological rather than physical.

Although not controlling, comparing how other states have handled this issue can be informative. Florida has held that noneconomic damage caps in wrongful death cases violated the Equal Protection Clause of Florida's Constitution. *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). In analyzing the issue, the Court reasoned that the effect of the statute was to save a modest amount while simultaneously imposing devastating costs on those most severely injured. *Id.* at 903. The Court further reasoned that it was unreasonable and arbitrary to limit recovery in a speculative experiment to determine whether liability insurance rates will decrease. *Id.* at 912, quoting *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

As applied to minors who are victims of sexual abuse, R.C. 2315.18 provides that no matter how severe – or catastrophic – their non-physical 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 that 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, or primarily suffer, nonphysical injuries, is clearly not rational.

Furthermore, the irrationality of the statute as applied to minors who are victims of sexual abuse who suffer from severe and catastrophic injury is further evidenced by its use of economic damages to establish the limits on noneconomic damages. Amanda Brandt was ages 11 and 12 at the time she was sexually abused by Roy Pompa. No 11- or 12-year-old is going to have wage loss associated with their sexual abuse. Further, Amanda Brandt had limited medical bills associated with her sexual abuse. As a result, Amanda is precluded from receiving full compensation for her injuries, regardless of their persistency and severity.

Even more irrational is that if Amanda's situation would have had no other changes, except she suffered a scar at the hands of Pompa that qualified as a permanent and substantial physical deformity, she would have received the full \$20,000,000.00 awarded to her by the jury. Ohio courts have held that scars on one's hand and thumb can qualify as a permanent and substantial physical deformity. *See Cawley v. Eastment Outdoors, Inc.*, N.D. Ohio No. 1:14-CV-00310, 2014 WL 5325223, at *7. This begs the question: is a scarred hand and thumb really worth \$19,750,000.00? If Amanda had suffered a scar on her hand, would the jury have awarded her more than \$20,000,000.00? Surely that would not have been their focus. Does the fact that Amanda did not sustain a scar on her hand make her PTSD, anxiety, depression, inability to be in large crowds, and reoccurring nightmares any less real? The answer is clearly no.

By implementing a law where tort victims with certain physical injuries are excluded from a cap on noneconomic damages while other tort victims, specifically minor victims of sexual abuse who suffer permanent and substantial injury, are denied the same exclusion, the legislature has

created an arbitrary and unreasonable system, which denies Amanda Brandt and others similarly situated equal protection rights under Ohio's Constitution.

C. R.C. 2315.18 as applied to Amanda Brandt violates her right to a jury trial under Section 5, Article I 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). As early as 1913, the Ohio Supreme Court held: "The right of trial by jury...cannot be invaded or violated by either legislative act or judicial order or decree." *Gibbs v. Girard*, 88 Ohio St. 34, 102 N.E. 299, 299 (1913).

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, at ¶ 37-38, 42.² In *Simpkins*, the Court stated that a trial court can award damages as a matter of law as long as the fact-finding process of the jury is not intruded on and the findings of fact are not "ignored or replaced by another body's findings." *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 24. The Court went on to say that R.C. 2315.18 doesn't stop the jury from its fact-finding process nor allows the Court to replace the jury's findings of facts with its own findings of fact. These decisions in *Arbino* and *Simpkins* render the fact-finding function of a jury meaningless.

The effect of R.C. 2315.18 as to applied to minor victims of sexual abuse who suffer injuries like Amanda Brandt is to intrude on and ignore the jury's findings of fact. The jury has sat

² As discussed in Proposition 2 below, Appellant believes *Arbino* was wrongly decided at the time and should be overruled.

through the trial and heard all of the evidence. The Legislature has not. The Legislature, without hearing any facts of the case, gets to decide that no matter the facts of your case, you get no more than \$250,000.00, regardless of the jury's verdict. As applied to Amanda Brandt, the jury gets 2% say in the award and the Legislature gets 98%.

Again, while not controlling, it is helpful to look at how other states have handled this issue. In 2010, Georgia held that the state's cap on noneconomic damages with respect to a verdict or judgment entered in medical malpractice actions violated the constitutional right to trial by jury. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010). In coming to its conclusion, the Georgia Supreme Court noted it found *Arbino* as containing "unpersuasive reasoning reaching the opposite result." *Id.*

Georgia isn't the only state to rule that a cap on noneconomic damages was unconstitutional because it violated a right to trial by jury. Kansas recently made a similar decision. In *Hilburn v. Enerpipe Ltd.*, the Kansas Supreme Court found that the noneconomic damages cap violated Section 5 of the state's constitution because it "intruded upon the jury's determination of compensation owed personal injury plaintiffs to redress their injuries." *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (Kansas 2019). In rendering its' decision, the Court said,

Regardless of whether an existing damages cap is technically or theoretically applied as a matter of law, the cap's effect is to disturb the jury's finding of fact on the amount of the award. Allowing this substitutes the Legislature's nonspecific judgment for the jury's specific judgment. The people deprived the Legislature of that power when they made the right to trial by jury inviolate.

Id.

The jury in Amanda Brandt's case awarded her \$20,000,000.00 in noneconomic damages for her injuries resulting from acts that occurred after April 6, 2005.³ After the application of R.C. 2315.18, the Court reduced her noneconomic damages for this time frame to \$250,000.00 as determined by the legislature even though the Ohio Constitution assigns the determination of damages to the jury. The words of the Kansas Supreme Court apply with equal force to Ohio: "To whom have the people of Kansas assigned the determination of the amount of the award? Unless an injured party has decided to waive his or her right under section 5, the answer is 'the jury'". *Hilburn*, at 1127.

The effect of R.C. 2315.18 as applied to minor victims of sexual abuse who suffer severe and catastrophic injury is to abrogate constitutional rights, including the constitutional right to a trial by jury. In addition to abrogating the constitutional right to a trial by jury, the effect of the cap is to defeat the very purpose of tort law, which is to make the victim whole. Ohio's cap on noneconomic damages resulted in (with respect to the award for noneconomic damages for acts occurring on or after April 6, 2005) Amanda only receiving a miniscule fraction of the amount that, in the eyes of the jury, would justly compensate her.

As demonstrated previously, minors who suffer sexual abuse resulting in injuries similar to Amanda's suffer injury as severe – if not sometimes more severe – than those physical injuries designated in R.C. 2315.18(B)(3). Based upon the amount awarded to her, it is clear that the jury found Amanda's nonphysical injuries to be catastrophic. As applied to Amanda Brandt, the effect of the statute is to clearly alter the jury's finding. By arbitrarily overruling that finding, R.C. 2315.18 violates Amanda Brandt's right to a trial by jury.

³ For purposes of this discussion, the focus on the jury award will be strictly on noneconomic damages awarded for the time frame after tort caps were put in place in Ohio.

D. R.C. 2315.18 as applied to Amanda Brandt violates her right to open courts and remedy under Section 16, Article I 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*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 44, quoting *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47, 512 N.E.2d 626 (1987). In *Sorrell*, the Court said: “‘Denial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff without legal recourse.’ (Emphasis *sic.*)” *Sorrell*, 69 Ohio St.3d at 426, 633 N.E.2d 504.

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 \$100,000.00 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 \$12,273,506.00 in economic damages and \$5,000,000.00 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.

As previously discussed, minor victims of sexual abuse who suffer catastrophic injuries will, in most cases, have little or no economic damages and none of the physical injuries set forth in R.C. 2315.18. Their real injury is nonphysical, and their real damages are noneconomic.

The jury in this case awarded Amanda Brandt \$20,000,000.00 in noneconomic damages for acts occurring on or after April 6, 2005. Under the mandate of R.C. 2315.18, Amanda's noneconomic damages for acts occurring on or after April 6, 2005 were reduced to \$250,000.00. Whether phrased as denying a "meaningful" remedy or phrased as "emasculating" the remedy provided for Amanda at common law, R.C. 2315.18 violates her constitutional right to open courts and a remedy.

E. This case is distinguishable from *Simpkins v. Delaware Grace Brethren Church*

In *Simpkins*, the Supreme Court of Ohio posited that "there may exist a set of facts under which application of the statutory damage caps would prove unconstitutional[.]" *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 51, Amanda Brandt's case is that case.

The *Simpkins* case and Amanda's case do hold some similarity: both victims were minor females who were sexually abused by a male adult. However, while the noneconomic injuries in *Simpkins* were significant, the consequences suffered by Amanda are vastly different and more severe, so as to distinguish these two cases.

To begin, Amanda's sexual abuse occurred at a younger age and at a more frequent rate – 34 times when compared to the two instances suffered by Jessica *Simpkins*. Amanda's abuse also happened at a time when humans are often most vulnerable – while they are sleeping.

More significantly, Amanda's psychological injuries, induced by the numerous instances of Roy Pompa's sexual abuse, took Amanda to the lowest points in her life, low points that most individuals do not ever have to experience. As demonstrated in the statement of facts, Amanda's

anxiety became so severe that she could no longer perform her duties at work, she was terminated and, subsequently, struggled to find another job. With her mental health deteriorating, Amanda turned to heroin, spent the next year of her life homeless, and eventually attempted suicide by heroin overdose. Luckily, the overdose was unsuccessful. Although Amanda has since married, become clean from drugs, and had children of her own, her anxiety and PTSD caused by Pompa's sexual abuse continues. How can anyone who has continuing nightmares, spent years in counseling and taking medications, and feels compelled to shop for groceries at 2:00 or 3:00 a.m. be said, as the Court of Appeals implies, to have resumed living a normal life?

F. This case presents objective criteria for the Courts to apply an “As Applied” analysis

In *Arbino*, this Court characterized noneconomic damages as “inherently subjective.” *Arbino*, 116 Ohio St.3d, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 69. In *Simpkins*, the Court acknowledged that “there may exist a set of facts under which application of the statutory damage caps would prove unconstitutional,” *Simpkins*, 149 Ohio St.3d, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 69, but nonetheless declined to find the facts sufficient in that case, referencing again the concept that physical injuries “offer more concrete evidence of noneconomic damages.” *Id.* at ¶ 49. The Court also determined that noneconomic injuries require “extreme qualifications” in order to avoid the operation of the damage caps in R.C 2315.18. *Id.* at ¶ 44. The Court did not, however, identify the criteria necessary to meet that standard.

Appellant urges the Court to find that the objective facts established by the evidence in this case are sufficient to overcome any “inherently subjective” concern and to meet the “extreme qualifications” referenced in *Simpkins*, as applied to Amanda Brandt and to others similarly situated. First, Amanda Brandt was a child, whose special status has been long recognized by this Court. Second, Amanda was a victim of sexual abuse, also a condition the Court has recognized

as warranting special attention. Third, the evidence established that Amanda suffers from a specifically diagnosed illness – Post Traumatic Stress Disorder – that was the result of the sexual abuse. Fourth, rather than generalized feelings of anxiety and depression, the evidence established that Amanda has physical manifestations of her PTSD, including an inability to be with large groups of people and a severe reaction to physical contact with others. Finally, the evidence established that Amanda has required continuous counseling and prescription medication to deal with her anxiety and PTSD since the abuse occurred, and that her mental condition and need for treatment will persist.

The Court in *Simpkins* left open the question of whether a set of facts would justify declaring the caps on noneconomic damages in R.C. 2315.18 unconstitutional on an as applied basis. Amanda Brandt’s case contains that set of facts. Any decision otherwise would beg the question: if not Amanda, then who?

Proposition of Law 2: *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, was (1) wrongly decided at the time, (2) circumstances have changed since the decision, (3) the decision defied practical workability, (4) abandoning the decision would not create an undue hardship for those who have relied upon it, and accordingly *Arbino* must be overruled.

A. Introduction

In 2005, the Ohio General Assembly enacted Senate Bill 80, premised on the state’s “interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by *negligent* behavior, while curbing the number of frivolous lawsuits...” (Emphasis added) Jennifer L. La Fayette, *Final Analysis: Am. Sub. S.B. 80*, Section 3(A)(3), at 54. In 2007, the U.S. District Court for the Northern District of Ohio certified four questions of state law to the Ohio Supreme Court regarding the constitutionality of provisions

of Senate Bill 80. The Court accepted three of the questions for resolution. *Arbino*, 116 Ohio St.3d at ¶ 3, 880 N.E.2d 420.

Fourteen years after *Arbino* was decided, it is clear that the primary impact of Senate Bill 80 has been to deny victims of negligent and intentional torts the full compensation awarded to them by a jury of their peers. In this appeal, Appellant Amanda Brandt challenges whether the Court's decision on the first certified question, upholding limits on non-economic damages in tort actions, should be overturned. Appellant limits her request for relief to the first certified question in *Arbino*.

B. Standard of review

Under the doctrine of stare decisis, courts generally must adhere to prior judicial decisions. *City of Cleveland v. Maistros*, 145 Ohio App.3d 346, 354, 762 N.E.2d 1065 (5th Dist.2001). The benefits that flow from stare decisis consist of a greater degree of certainty and stability in our legal system. *Id.* However, the principle of stare decisis is not intended to “effect a petrifying rigidity.” *Id.* Where adherence to precedence results not in “justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains the court to follow it.” *Id.*

Nonetheless, “any departure from the doctrine of stare decisis demands special justification.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 44. In *Westfield*, the Supreme Court of Ohio articulated a three-prong test to determine what constitutes “special justification.” *Id.* at ¶ 48. According to this test, Supreme Court precedent may be overruled when “(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 precedent would not create an undue hardship for those who have relied upon.” *Id.*

C. *Arbino* was wrongly decided at the time

In *Arbino*, the Supreme Court of Ohio rejected a facial challenge to the constitutionality of R.C. 2315.18. *Arbino*, 116 Ohio St.3d, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 8. In doing so, the majority in *Arbino* concluded that R.C. 2315.18 did not infringe upon every Ohioan’s right to a trial by jury.

Section 5, Article I of the Ohio Constitution provides, “[t]he right of trial by jury shall be inviolate * * *.” This right is a “fundamental” and “substantial” right. *Sorrell v. Thevenir*, 69 Ohio St.3d at 421, 633 N.E.2d 504. The right of trial by jury includes “the plaintiff’s right to have all facts determined by the jury, including damages.” *Id.* at 422, citing *Miller v. Wikel Mfg. Co.*, 46 Ohio St.3d 76, 81, 545 N.E.2d 76 (1989) (Douglas, J., concurring in part and dissenting in part).

In finding that R.C. 2315.18 did not violate a plaintiff’s right of trial by jury, the majority in *Arbino* relied on two situations where a court may modify a jury’s damage award in addition to federal precedent upholding the application of damage caps to jury awards. *Arbino* at ¶¶ 38-42. First, the majority likened the damage caps in R.C. 2315.18 as being akin to a remittitur. However, a remittitur is fundamentally different from R.C. 2315.18’s cap on noneconomic damages. The principal difference, as articulated in Justice O’Donnell’s dissenting opinion, is that a remittitur requires the plaintiff to consent to the reduction in damages. *Id.* at ¶ 42 (O’Donnell, J., dissenting). Further, unlike a remittitur, R.C. 2315.18 rigidly mandates that a jury’s award for noneconomic damages is excessive if it is greater than \$250,000.00 or \$350,000.00—without any consideration of the facts underlying the case. These fundamental differences between R.C. 2315.18 and a

remittitur undercut the majority's reasoning, thus eroding the majority's justification for upholding the constitutionality of the caps on noneconomic damages in R.C. 2315.18.

Second, the majority found that because statutes that treble jury damages awards are constitutionally firm, so too is a statute that decreases a jury award. For example, the majority opinion cited to R.C. Chapter 1345, the Consumer Sales Practices Act ("CSPA"), which authorizes treble damages to punish and deter future violations. *Id.* at 1145 (O'Donnell, J., dissenting). As Justice O'Donnell states in his dissent "the CSPA increases the damages found by a jury with respect to a statutory cause of action in keeping with the *punitive* nature of the legislation." (Emphasis sic.) *Id.* at ¶ 146 (O'Donnell, J., dissenting). Additionally, rather than increasing punitive damages as does the CSPA, R.C. 2315.18 places a ceiling on a jury's findings regarding compensatory damages. The majority opinion ignored these distinctions.

Finally, the majority invoked federal court analysis of the U.S. Constitution's Seventh Amendment, which allows for statutory damage caps, to justify the same conclusion with regard to Ohio's Constitution. *Id.* at ¶ 41. However, as the U.S. Supreme Court stated in *Minneapolis & S. L. R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S.Ct. 595, 60 L.Ed. 961 (1916), "the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same."

The majority's rationale in *Arbino*, that the legislative caps on noneconomic damages does not invade a party's constitutional right to determine all issues of facts, including the extent of damages, is simply untenable. The majority opinion in *Arbino* itself recognizes that "[b]ecause the extent of damages suffered by a plaintiff is a factual issue, it is within the jury's province to determine the amount of damages awarded." *Arbino*, 116 Ohio St.3d, 2007-Ohio-6948, 880 N.E.2d

420, at ¶ 140. As recognized by Justice O’Donnell in his dissent in *Arbino*, “(t)he statute requires the trial court to *disregard* the jury’s finding of noneconomic damages” and “renders fact-finding with respect to noneconomic damages in excess of the statutory limit a meaningless exercise.” *Id.* at ¶ 148.

Arbino was also wrongly decided on equal protection and due process grounds due to the Court’s failure to apply the strict scrutiny test. As Justice Pfeifer explained in his *Arbino* dissent, strict scrutiny is the appropriate test to evaluate the constitutionality of R.C. 2315.18. *Id.* at ¶ 176. Strict scrutiny is the appropriate test because R.C. 2315.18 involves or infringes upon the fundamental right a to trial by jury. Further, when strict scrutiny is applied, R.C. 2315.18 must be invalidated because it fails to “promote a compelling governmental interest. *Id.*

The holding in *Arbino* that the noneconomic damage caps in R.C. 2315.18 does not violate the right to a trial by jury guaranteed by Section 5, Article I of the Ohio Constitution, as well as the Court’s failure to apply a strict scrutiny analysis of the equal protection and due process claims in that case render *Arbino* wrongly decided, thus satisfying the first prong of the *Westfield* test.

D. Circumstances have changed since *Arbino*

As the Court articulated in *Westfield*, a “decision either must have been wrong at the time it was decided, or was initially correct, but the passage of time has rendered it obsolete.” *Westfield*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 44. As demonstrated above, *Arbino* was wrongly decided at the time, thus meeting the first part of the either/or test set forth in *Westfield*. However, the passage of time has also demonstrated *Arbino*’s obsolescence.

It has been nearly fourteen years since the Court decided *Arbino*, and the evidence indicates that Ohio has not economically prospered as a result of R.C. 2315.18. According to U.S. News & World Report’s 2021 Economy Rankings, at least thirteen states without caps for noneconomic

damages, economically out-perform Ohio. *Economy Rankings: Measuring states' economic stability and potential*, U.S. NEWS & WORLD REPORT (2021), <https://www.usnews.com/news/best-states/rankings/economy>. As revealed by the U.S. News 2021 Economy Rankings, *Arbino* does not support the goals of tort reform.

Additionally, when tort reform was implemented, evidence exists that the reform was not intended to apply to intentional conduct. In the Legislative Service Commission (LSC) Final Analysis of Am. Sub. S.B. 80, as passed by the General Assembly, the LSC notes that the statement of findings and intent in the act provides that the state has a legitimate state interest in a civil justice system that “preserves the rights of those who have been harmed by *negligent* behavior, while curbing the number of frivolous lawsuits.” (Emphasis added) Jennifer L. La Fayette, *Final Analysis: Am. Sub. S.B. 80*, Section 3(A)(3), at 54. In addition, a key author of tort reform has stated that noneconomic damage caps do not apply to injuries sustained by sexual assault perpetrators because those acts are intentional. Jim Siegel, *State Representative: Ohio law should stop being lenient to those who let children get raped*, RECORD-COURIER (Nov. 14, 2018), <https://www.record-courier.com/news/20181114/state-representative-ohio-law-should-stop-being-lenient-to-those-who-let-children-get-raped>. Rather, Representative Seitz has asserted that noneconomic damage caps only apply to parties whose liability is a result of “acts of mere negligence.” *Id.* Apparently, the legislature intended to limit tort reform to “negligent” behavior. *Id.*

However, as this case illustrates, the tort reform caps apply to intentional misconduct. Moreover, this Court has held that tort reform caps do apply to intentional torts. In *Wayt v. DHSC*, 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92, an intentional tort case, this Court determined that R.C. 2315.18(B)(2) “unambiguously caps the noneconomic damages that can be

recovered as a result of defamation.” *Id.* at ¶ 2. The *Arbino* decision has effectively opened the door for perpetrators of intentional torts to victimize others without full legal redress. As a result, in Ohio, a man who rapes a child benefits from “tort reform.” This statute does not further the alleged goals of tort reform. How does Ohio’s tort reform foster “growth in employment” (*Arbino* at ¶ 53) when applied to those who rape a child? What jobs are being preserved in this context? How is Ohio’s economic “productivity” (*Id.*) enhanced by capping damages of child rapists or their enablers? When applied to the Roy Pompas of Ohio, tort reform, as upheld in *Arbino*, bears no rational relationship to its purported goals, and for this reason *Arbino* should be overruled.

E. *Arbino* defies practical workability

The next prong that establishes special justification, permitting a court to overturn a prior judicial decision, is whether the prior decision defies practical workability. Although a comprehensive doctrine of workability has yet to be articulated, there are several factors that courts evaluate in determining whether practical workability has been defied. In his dissent in *Franchise Tax Board v. Hyatt*, Justice Breyer explained that practical workability is defied if “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” *Franchise Tax Board v. Hyatt*, 578 U.S. 171, 139 S.Ct. 1485, 1506, 194 L.Ed.2d 431 (2019).

Fourteen years after *Arbino*, facts have come to be seen so differently that the old rule has been robbed of significant justification. In *Arbino*, the Court determined that R.C. 2315.18 was constitutional because the statute provided exceptions to the damage caps for individuals whose pain and suffering was traumatic, extensive, and chronic. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 61. However, a closer look at the statute shows that this

exception only applies to catastrophic physical injuries. Therefore, R.C. 2315.18 and the rule in *Arbino* presume that mental health injuries can never be chronic, traumatic, or extensive.

Sufficient, concrete evidence does in fact exist about the chronic, traumatic, and extensive injuries sustained from mental health problems and disorders. According to Johns Hopkins Medicine, about one in four adults “suffers from a diagnosable mental disorder in a given year,” and most adults struggle with more than one disorder at a time. *Mental Health Disorder Statistics*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics> [hereinafter JOHNS HOPKINS]. Persons with mental health infirmities battle severe consequences, including depression, PTSD, delusions, paranoia, hallucinations, excessive anger or violence, feelings of guilt, confused thinking, substance and opioid misuse, risky sexual behaviors, and increased risk of suicide. *Mental Illness*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/mental-illness/symptoms-causes/syc-20374968> [hereinafter MAYO CLINIC]. “Most people who commit suicide have a diagnosable mental disorder.” JOHNS HOPKINS. Mental illness can also affect a person physically, including headaches, gastrointestinal issues, back pain, etc. MAYO CLINIC. Additionally, in a year, mental illness is estimated to cost the world economy \$2.5 trillion due to “poor health and reduced productivity.” *Mental health matters*, 8 *The Lancet Global Health* E1352 (2020). However, economic investment in mental health clearly demonstrates that “for every \$1 invested in scaled-up treatment for depression and anxiety, there is a \$4 return in better health and productivity.” *Id.*

The unworkable nature of the *Arbino* decision is clearly demonstrated in its progeny: *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122. The rigid application

of R.C. 2315.18 left Jessica Simpkins, a sexually abused minor, with a jury award that was less than seven percent of what the duly empaneled jury declared just. *Id.* at ¶ 66 (O’Neill, J., dissenting). When *Simpkins* was decided in 2016, the Court determined that victims of child sex abuse were properly excluded from the R.C. 2315.18 exceptions because the nonphysical injuries these victims suffer do not provide “concrete evidence” to determine noneconomic damages. *Id.* at ¶ 41. Based on modern standards and beliefs, this determination is recognizably inaccurate.

The facts surrounding preclusion of persons suffering from severe mental health injuries from the exceptions of R.C. 2315.18 have come to be seen so differently that the *Arbino* rule has been robbed of significant justification.

F. Abandoning *Arbino* would not create an undue hardship for those who have relied on it.

The last prong that provides a court “special justification” to decline to follow a prior judicial decision requires that disregarding the precedent would not create undue hardship for those who have relied upon the precedent. In considering this prong, the court “must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 58.

Here, the *Arbino* decision has not become so embedded, so accepted, and so fundamental to everyone’s expectations that to change it would produce real-world dislocations. First, it appears the only case that has relied upon *Arbino*, in a similar factual circumstance, is *Simpkins*, where the Court relied upon *Arbino* to limit the amount of recovery to Jessica Simpkins, a victim of child sex abuse. A majority of the other cases that have relied upon *Arbino* are medical malpractice cases, which are beyond the scope of this appeal.

Second, as demonstrated above, the caps on noneconomic damages does not further the twin goals of compensation and deterrence embodied in our tort system but rather serves to undermine these goals.

Third, contrary to claims made by the advocates of R.C. 2315.18, the statute does not encourage economic growth and businesses development in Ohio. The statute does not promote Ohio's economic productivity, nor does it foster growth in employment, and therefore bears no rational relationship to the purported goals of tort reform as set forth in *Arbino*. Further, as Justice Pfeifer's dissent noted, "the statutory caps imposed by R.C. 2315.18...benefit any business located anywhere in the world." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 at ¶ 211. This means that an international corporation based anywhere in the world is protected by R.C. 2315.18, regardless of whether it engages in significant business in Ohio. Finally, the statute protects intentional tortfeasors, including child rapists and their enablers, and as such clearly bears no relationship to economic growth and business development.

CONCLUSION

For the reasons stated above, the Court should find that the damage caps in R.C. 2315.18, as applied to Amanda Brandt, violate her constitutional rights to due process of law, equal protection of the laws, trial by jury, and open courts and a remedy as guaranteed by the Ohio Constitution. Furthermore, *Arbino* was wrongly decided at the time, circumstances have changed since the decision, the decision defies practical workability, and abandoning the decision would not create an undue hardship for those who have relied upon it. Accordingly, the Court should overrule that part of its decision in *Arbino* upholding the limits on noneconomic damages set forth in R.C. 2315.18.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **MERIT BRIEF OF APPELANT AMANDA BRANDT** was served by electronic and regular U.S. Mail this 1st day of October, 2021, upon the following:

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APPENDIX

1. Notice of Appeal
2. March 18, 2021 Journal Entry and Opinion of Eighth District Court of Appeals
3. January 13, 2020 Final Judgment Entry in the Court of Common Pleas, Cuyahoga County
4. Constitutional Provisions
 - a. Article I, Section 2 of the Ohio Constitution
 - b. Article I, Section 5 of the Ohio Constitution
 - c. Article I, Section 16 of the Ohio Constitution
5. Statutory Provisions
 - a. R.C. 2305.111
 - b. R.C. 2315.18

APPENDIX 1

IN THE SUPREME COURT OF OHIO

Amanda Brandt,	:	Ohio Supreme Court Case No. _____
	:	
Appellant,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
v.	:	Eighth Appellate District
	:	
Roy Pompa,	:	Court of Appeals
	:	Case No. CA 20 109517
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT AMANDA BRANDT

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NOTICE OF APPEAL OF APPELLANT AMANDA BRANDT

Appellant Amanda Brandt hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 109517 on March 18, 2021. This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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APPENDIX 2

**COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

MAR 18 2021

AMANDA BRANDT,	:	
Plaintiff-Appellant,	:	
v.	:	No. 109517
ROY POMPA, ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 18, 2021**

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-899352

Appearances:

The Fitch Law Firm, John K. Fitch, and Kirstin A. Peterson, *for appellant*

Samuel R. Smith II, *for appellees.*

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Plaintiff-appellant, Amanda Brandt, appeals from the trial court's judgment that reduced the jury verdict for noneconomic damages pursuant to R.C. 2315.18. Brandt contends that as applied to her, a victim of sexual abuse as a minor,



R.C. 2315.18 is unconstitutional. For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 2} From 2002 to 2006, defendant-appellee Roy Pompa molested and sexually assaulted numerous female children in his home. He molested Brandt, who was age 11 and 12 during the abuse, in 2004 and 2005. Brandt was a friend of one of Pompa's daughters and would often spend the night at the Pompas' home. On many occasions, Pompa put illicit substances in Brandt's drinks before she went to sleep in order to commit sexual acts against her without her knowing or being fully aware.

{¶ 3} Pompa recorded many of these acts, which were uncovered following several searches of Pompa's home initiated by the Ohio Internet Crimes Against Children Task Force and the Brook Park police. *State v. Pompa*, 8th Dist. Cuyahoga No. 90110, 2008-Ohio-3672, ¶ 2-3. Pompa also possessed child pornography depicting children as young as three being sexually abused by adults.

{¶ 4} Pompa was arrested and convicted of 17 counts of rape, 5 counts of kidnapping, 55 counts of pandering sexually oriented matter involving a minor, 21 counts of gross sexual imposition, and possession of criminal tools, among other convictions, and sentenced to life in prison. *Pompa* at ¶ 7, 9.

{¶ 5} In 2018, Brandt filed a complaint against Pompa, asserting claims for intentional criminal wrongdoing, knowing dissemination of child pornography, and intentional infliction of emotional distress. Brandt also asserted a claim for

declaratory judgment that as applied to the facts of her case, R.C. 2315.18 is unconstitutional.¹

II. Trial Testimony

{¶ 6} At trial, the jury heard the parties' stipulation regarding Pompa's convictions for his offenses against Brandt, which included 34 instances of abuse that occurred from May 2004 to November 2005. The jury also watched Pompa's videotaped deposition, in which he admitted that he recorded incidents involving his sexual abuse of Brandt on at least eight occasions.

{¶ 7} Brandt's mother testified that prior to the abuse, Brandt was "a beautiful, happy-go-lucky friend to everyone" who "wanted to conquer the world," but after the abuse, she "never wanted to go anywhere" and "just wanted to be alone." She testified further that the abuse "totally changed" her daughter, and that she does "not have the same daughter anymore." She explained that Brandt "has a lot of anger [and] anxiety issues," and that she "just is not the same kid that we knew growing up and even into her adulthood."

{¶ 8} Brandt, who was 26 years old at trial, testified that prior to the abuse, she had a "pretty normal" childhood. She testified that the Pompas lived about a mile away from her house, and their youngest daughter was her best friend growing up. She said she often went to the Pompas' house for sleepovers, and that during these sleepovers, before she went to bed, Pompa would give her already-opened

¹ Brandt also asserted claims for negligence and willful, wanton, and reckless misconduct against Pompa's ex-wife, which were settled before trial.

juice boxes, iced tea, or water laced with illicit drugs that left her feeling groggy when she woke up. Brandt testified that despite being drugged, she could recall some instances of abuse, including one where she woke thinking a cat was rubbing against her but then realized it was a hand rubbing her vagina.

{¶ 9} Brandt read for the jury a letter she had written to the trial judge in Pompa's criminal trial before his sentencing. In the letter, written when Brandt was twelve years old, Brandt told the judge that she had been involved in many activities before the abuse, but now did not want to go anywhere. She said the abuse had caused "serious emotional problems" for her, and as a result, she was seeing a counselor, sometimes multiple times each week. She said she had lost her best friend as a result of the abuse and had difficulty sleeping, and her grades had dropped because she was always distracted. She asked that Pompa be given the death penalty.

{¶ 10} Brandt testified that she was a "very angry kid" after the abuse, and had "a lot of breakdowns" that required counseling. She said she began counseling immediately after her family learned of the abuse, had seen numerous counselors over the years, and was "still in counseling to this day." Brandt said she hopes to someday not need counseling "but that's not even on the radar right now."

{¶ 11} Brandt testified that she suffers from "constant nightmares" that began during the abuse but still continue and make it difficult for her to function during the day because she does not get enough sleep. She said she takes medication

to help with the nightmares but still has them at least five times a week. She said a majority of the nightmares involve her being trapped in Pompa's house.

{¶ 12} Brandt testified that she suffers from PTSD and anxiety issues that she attributes to the abuse. She said she gets anxiety attacks if she is in large groups of people, so she does her grocery shopping at Walmart at 2 or 3 a.m. because not many people are there at that time. She said that she can no longer be in nightclubs, perform community service, or go to concerts for the same reason. She said she currently takes Zoloft to help with her mood and depression, and that she had taken numerous other drugs over the years "trying to get this under control."

{¶ 13} Brandt testified that after graduating high school in 2011, she found a job working full time in a customer call center and moved into her own apartment. She said she initially did well at the job, but was terminated after a few years because her anxiety had increased, making it difficult for her to fulfill the job requirements. Brandt then obtained a door-to-door sales job at which she met a coworker who was a heroin addict. Brandt said she began using heroin at the coworker's encouragement that it would make her feel better, which led to her drug addiction.

{¶ 14} The door-to-door sales job did not work out, and Brandt could no longer afford her apartment. Brandt said she met a man online who lived in Michigan, and decided to move there to live with him because she "liked the idea of being able to go somewhere and make a life for myself." Brandt testified "that wasn't a great plan" because he was homeless and a drug addict. She and the man lived in a tent for approximately a year.

{¶ 15} Brandt said she eventually decided she “was done living like this” and moved back in with her parents for a few months. She said her mental health continued to worsen, however, and she tried to commit suicide by overdosing on heroin. Upon her discharge from the hospital, she began attending Narcotics Anonymous meetings, and at the time of trial, had been clean for six years.

{¶ 16} Brandt met her husband six months after she became sober. They lived together and eventually married, and have two young children. Brandt testified that although she works part-time as a waitress, she has completed the necessary classes to obtain to her real estate license and hopes to start a career in real estate.

{¶ 17} The jury watched the videotaped deposition of Brandt’s expert, Dr. Patrick Yingling, a clinical psychologist, who evaluated Brandt in June 2019. Dr Yingling took a history from Brandt and administered the Minnesota Multiphasic Personality Inventory. In light of her responses to the test and his review of medical records and other documents, Dr. Yingling opined that Brandt suffers from PTSD as a result of Pompa’s sexual abuse. He further opined that her symptoms would continue “with some degree of intensity” for a “significant” period of time and that she would benefit from ongoing psychotherapy and medications.

{¶ 18} On cross-examination, Dr. Yingling conceded there was “an indication” in Brandt’s deposition that “there was a family history of substance abuse issues.” He further conceded that the medical records he reviewed indicated that Brandt attempted suicide more than once, but that she mentioned only one

attempt to him. Dr. Yingling testified further that he had observed in the medical records that at least one other of Brandt's family members had attempted suicide, but Brandt did not mention this to him.

{¶ 19} Dr. Yingling also conceded that the medical records indicated that Brandt had had an abusive boyfriend, but she did not tell him about that relationship. He testified that it would be important to know about an abusive relationship when diagnosing PTSD because such a relationship can contribute to PTSD. Dr. Yingling admitted that he does not dispute that homelessness can lead to PTSD, and that a heroin overdose could "cause or contribute to" a diagnosis of PTSD. Dr. Yingling further admitted that an individual's relationship with their parents, siblings, and extended family can be important to a diagnosis of PTSD, but conceded that he did not "specifically ask with that level of detail about [Brandt's] family history." Dr. Yingling also testified that it impossible to know "the precise moment" when Brandt "officially had PTSD" or how long her symptoms will continue. Finally, he admitted that any questioning of Brandt about the sexual abuse outside of a therapeutic setting — such as her testimony at Pompa's criminal trial — could lead to an increase in the intensity of her symptoms.

{¶ 20} The jury returned a verdict for Brandt for compensatory damages of \$14 million for noneconomic damages incurred prior to April 6, 2005, (the effective date of R.C. 2325.18), \$20 million for noneconomic damages occurring after April 6, 2005, and \$100 million in punitive damages. The trial court subsequently granted Pompa's post-trial request to cap the amount of noneconomic damages

occurring after April 6, 2005, pursuant to R.C. 2315.18 on the authority of *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, and reduced those damages to \$250,000. This appeal followed.

III. Law and Analysis

{¶ 21} Under R.C. 2315.18(B)(2),

the amount of compensatory damages that represents damages for noneconomic loss * * * shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.

{¶ 22} The damage caps on noneconomic loss do not apply when the noneconomic loss is for “[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system” or for “[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.” R.C. 2315.18(B)(1) and (b).

{¶ 23} In her first assignment of error, Brandt contends that the trial court erred in granting Pompa’s motion to reduce the monetary amount of her recovery for noneconomic damages occurring after April 6, 2005, pursuant to R.C. 2315.18. She argues that as applied to the facts of this case, R.C. 2315.18 violates her constitutional rights to a jury trial, open courts and a remedy, equal protection, and due process of law.

{¶ 24} There are two ways to challenge the constitutionality of a statute.

A party may challenge the constitutionality of a statute with either a facial challenge or an as-applied challenge. A facial challenge asserts that there is no conceivable set of circumstances in which the statute would be valid. An as-applied challenge, on the other hand, alleges that application of the statute in a particular factual context is unconstitutional. A holding that a statute is unconstitutional as applied prevents future application of the statute in a similar context, but it does not render the statute wholly inoperative.

(Citations omitted.) *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 20.

{¶ 25} A party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statute is unconstitutional when applied to an existing set of facts. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 181. When addressing constitutional challenges, we remain mindful that all statutes have a strong presumption of constitutionality. *Simpkins* at ¶ 22, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 25. Thus, “if at all possible, statutes must be construed in conformity with the Ohio and the United States Constitutions.” *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991).

{¶ 26} In *Simpkins*, the Ohio Supreme Court considered whether, as applied to damages awarded to minors who are victims of sexual assault, R.C. 2315.18 violates the constitutional rights afforded by the Ohio Constitution to trial by jury, open courts and a remedy, due process of law, and equal protection. *Id.* at ¶ 19. Relying on its decision in *Arbino*, in which the court rejected facial constitutional challenges to R.C. 2315.18 on the same grounds, the *Simpkins* court held that R.C.

2315.18 was constitutional as applied to the facts before it. *Id.* at ¶ 1. The court noted that “there may exist a set of facts under which application of the statutory damage caps would prove unconstitutional,” but found that the *Simpkins* case did not present such facts. *Id.* at ¶ 51.

{¶ 27} Brandt argues that this is such a case. She concedes that there are some factual similarities between her case and *Simpkins*, but asserts that the egregious nature of her abuse, coupled with the devastating impact the abuse has had on her life, distinguishes her case from *Simpkins*. Upon considering the factual circumstances of this case as applied to the constitutional rights of trial by jury, open courts and a remedy, due process, and equal protection, we find no reason to reach a different result in this case than that in *Simpkins*.

A. Trial by Jury

{¶ 28} Article I, Section 5 of the Ohio Constitution states that “[t]he right of trial by jury shall be inviolate.” Article I, Section 5 “protects a plaintiff’s right to have a jury determine all issues of fact,” including the extent of the plaintiff’s damages. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 34. Brandt contends that the damage caps in R.C. 2315.18 violate the fundamental right to trial by jury.

{¶ 29} The Ohio Supreme Court considered the same argument in *Simpkins* and concluded that “our analysis in *Arbino* requires us to reject that argument.” *Simpkins* at ¶ 23. Citing to *Arbino*, the court stated:

A law that prevents the jury from determining issues of fact or that allows a judge to substitute his or her own findings of fact for those of

the jury is unconstitutional. But a trial court may alter an award of damages as a matter of law “[s]o 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. R.C. 2315.18 neither precludes the jury from determining factual issues nor permits the court to substitute its own findings of fact. Rather, courts “simply apply the limits as a matter of law to the facts found by the jury.”

(Citations omitted.) *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 24.

{¶ 30} Just as the plaintiff in *Simpkins*, Brandt argues that as applied to her damages, R.C. 2315.18(B)(2) alters the jury’s finding that she suffered a catastrophic injury commensurate with those designated in R.C. 2315.18(B)(3). But as the *Simpkins* court concluded, “even characterizing the jury’s damage award as a finding that [the victim] suffered catastrophic injuries commensurate with those designated in R.C. 2315.18(B)(3), the trial court simply applied the law to the facts, as determined by the jury.” *Id.* at ¶ 25. Further, “application of the damage caps does not affect [the victim’s] right to a jury trial any differently than it affects any tort claimant whose damages are capped as a matter of law.” *Id.*

{¶ 31} Brandt asserts that the majority holding in *Arbino* that the statute does not alter a jury’s findings of fact, upon which the *Simpkins* court relied in reaching its decision, “renders the fact finding function of the jury meaningless and was wrongly decided.” This court, however, as an intermediate court, is bound by and must follow and apply the decisions of the Ohio Supreme Court. *Gehad & Mandi, Inc. v. Ohio State Liquor Control Commn.*, 10th Dist. Franklin No. 05AP-

1181, 2006-Ohio-3081, ¶ 7. “This court has no authority to modify, and much less to overrule, any decision of the Ohio Supreme Court.” *Id.*

{¶ 32} Accordingly, because Brandt makes the same arguments considered and rejected in *Simpkins* regarding R.C. 2315.18 and the constitutional right to trial by jury, we find that she has not demonstrated by clear and convincing evidence that R.C. 2315.18 violates the right to trial by jury when applied to the facts of this case.

B. Open Courts and Right to Remedy

{¶ 33} Article I, Section 16 of the Ohio Constitution provides that “[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” In *Arbino*, the court found that the right to open courts and a remedy means “an opportunity granted at a meaningful time and in a meaningful manner.” *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 44, quoting *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47, 512 N.E.2d 626 (1987).

{¶ 34} Brandt contends that the reduction of the jury’s award of noneconomic damages from \$20 million to \$250,000 pursuant to R.C. 2315.18 violates her constitutional rights to open courts and a remedy by denying her a “meaningful” remedy. The plaintiff in *Simpkins* raised the same argument, and the court found that its holding in *Arbino* required it to reject this argument. The court stated:

This court has recognized that the rights to open courts and a remedy become hollow when an individual is wholly foreclosed from relief after

a verdict in his favor. *Arbino* at ¶ 45. But although R.C. 2315.18 limits the amount of noneconomic damages that a plaintiff may recover, it does not “wholly deny persons a remedy for their injuries.” *Id.* at ¶ 47. And the types of damages that remain available to plaintiffs — unlimited economic damages, up to \$350,000 in noneconomic damages, and punitive damages — are meaningful remedies under the Ohio Constitution. *Id.*

Simpkins, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 30.

{¶ 35} The court further found that R.C. 2315.18(B)(2) does not affect a minor victim of sexual abuse any differently than any other plaintiff and, further, that “neither the amount of the reduction of noneconomic damages nor appellants’ assertion that minors who are victims of sexual assault will generally have noneconomic damages that far outweigh their economic damages demonstrates that those victims are denied a meaningful remedy.” *Id.* at ¶ 31. Brandt raises the same arguments here, and we reject them on the basis of *Simpkins*.

{¶ 36} Brandt also argues, as did the plaintiff in *Simpkins*, that application of R.C. 2315.18 violates her rights to open courts and a remedy because she has incurred significant litigation expenses and attorney fees. The *Simpkins* court rejected this argument, stating that “[a]ppellants are not unique in that regard, however, and the impact of litigation expenses and attorney fees does not render the available remedies unmeaningful.” *Id.* at ¶ 32. We further note that the trial court awarded Brandt attorney fees of \$194,920.00 and litigation expenses of \$11,941.43.

{¶ 37} Because Brandt raises the same arguments regarding open courts and a remedy that were addressed and rejected in *Simpkins*, we find that she has not

proven by clear and convincing evidence that application of R.C. 2315.18 to the facts of this case violates her constitutional rights to open courts and a remedy.

C. Due Process of Law

{¶ 38} Brandt also contends that as applied to her, R.C. 2315.18 violates the “due course of law” provision in Article I, Section 16 of the Ohio Constitution. This clause has generally been recognized as the equivalent of the Due Process Clause in the United States Constitution. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 48, citing *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422-423, 633 N.E.2d 504 (1994), citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941).

{¶ 39} When reviewing a statute on due-process grounds, we apply a rational-basis test unless the statute restricts the exercise of fundamental rights. *Arbino* at ¶ 49, citing *Morris*, 61 Ohio St.3d at 688-689, 576 N.E.2d 765; *Sorrell* at 423. As in *Simpkins* and *Arbino*, having found that R.C. 2315.18 does not violate Brandt’s fundamental rights to a jury trial or to open courts and a remedy, we apply the rational-basis test to our due-process analysis. Under the rational-basis test, a statute must be upheld if it bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and is not unreasonable or arbitrary. *Arbino* at ¶ 49.

{¶ 40} In *Arbino*, the court found that R.C. 2315.18 “bears a real and substantial relation to the general welfare of the public.” *Id.* at ¶ 55. The court reasoned that before enacting R.C. 2315.18,

[t]he General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.

Id.

{¶ 41} Brandt raises the same argument asserted by the appellants in *Simpkins*, i.e., that R.C. 2315.18, as applied to minors who are victims of sexual assault, does not bear a real and substantial relation to the general public welfare because “those victims rarely suffer significant economic injury and will typically not suffer the types of injuries required by R.C. 2315.18(B)(3) to avoid application of the damage caps.” *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 38. The court rejected this argument, however, reasoning that “the status of a plaintiff does not diminish either the economic benefits of limiting noneconomic damages, as found by the General Assembly, or the substantial relationship that we found in *Arbino* between the statutory limitations and the benefits to the general public welfare.” *Id.*

{¶ 42} Brandt next contends that R.C. 2315.18 is arbitrary and unreasonable as applied. She argues that because minors who are victims of sexual assault typically suffer serious psychological harm, as opposed to serious physical injury or pecuniary harm, “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 the jury.” She further contends that the

psychological damage suffered by minors who are victims of sexual abuse is catastrophic, such that it is arbitrary and unreasonable to impose on her and others similarly situated “the high cost of ameliorating the perceived ‘deleterious economic effects of the tort system.’”

{¶ 43} These arguments were likewise considered and rejected in *Simpkins*.

The court reasoned:

Although damages awarded to minors who are victims of sexual assault may be unlikely to qualify for an exception to the application of the noneconomic-damage caps, the General Assembly’s policy decision to exclude from the damage caps only those awards to plaintiffs who suffer catastrophic *physical* damages does not place upon *Simpkins* and those similarly situated an undue portion of the cost of ameliorating the deleterious economic effects of the tort system * * *.

* * * Appellants’ as-applied challenge essentially asserts that the General Assembly acted unreasonably and arbitrarily by distinguishing between catastrophic physical and catastrophic nonphysical injuries for purposes of applying caps on noneconomic damages. But in *Arbino*, we held that the General Assembly distinguished between plaintiffs who suffered catastrophic physical injuries specified in R.C. 2315.18(B)(3) and plaintiffs suffering other injuries based on the conclusion that the injuries specified in R.C. 2315.18(B)(3) “offer more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations.” *Arbino* at ¶ 72. In the end, R.C. 2315.18 does not affect *Simpkins* any differently than it affects any other victim whose injuries do not fall within the R.C. 2315.18(B)(3) exceptions to the damage caps.

Simpkins at ¶ 40-41.

{¶ 44} Nevertheless, Brandt contends that the severity of her emotional injuries and the resulting impact on her life rises to the level of the physical injuries excepted from the damage caps by R.C. 2315.18 such that applying the damage caps to her violates due process.

{¶ 45} In *Simpkins*, the court noted that R.C. 2315.18(B)(3) excludes from the damage caps in R.C. 2315.18(B)(2) noneconomic damages for “[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system,” or for “[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining injuries.” Thus, it concluded that the exceptions to the damage caps in R.C. 2315.18(B)(3) require “extreme qualifications.” *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 43, citing *Weldon v. Presley*, N.D. Ohio No. 1:10 CV 1077, 2011 U.S. Dist. LEXIS 95248 (Aug. 9, 2011).

{¶ 46} In considering whether *Simpkins*’s emotional injuries met these “extreme qualifications,” the court noted there was evidence that she suffers from PTSD and low-grade depression as a result of the perpetrator’s sexual assault. *Simpkins* at ¶ 44. There was also evidence that she is afraid of the dark, suffers from anxiety, and has trust issues with men. *Id.* There was other evidence, however, that she played basketball in college, received good grades in college, was currently employed full-time, and had not been in counseling for some time and had no current plans to seek further counseling. *Id.* In light of that evidence, the court concluded she was “able to independently care for herself and perform life-sustaining activities.” *Id.* Accordingly, the court found that although *Simpkins* had undoubtedly suffered serious emotional and psychological injuries as a result of the sexual abuse, her noneconomic injuries did not meet the “extreme qualifications”

required by the law in order to avoid the operation of the damage caps of R.C. 2315.18. *Id.*

{¶ 47} We reach the same conclusion here. The evidence indicates that Brandt suffers from PTSD, depression, anxiety, and recurrent nightmares. The evidence also indicates that some years after the abuse, she became a heroin addict and tried to commit suicide. She also was homeless for a year. She has been in counseling many times during the years after the abuse and assumes she will need counseling for the foreseeable future, an assumption corroborated by Dr. Yingling.

{¶ 48} But the evidence also indicates that Brandt is married and has two young children. She works part-time as a waitress, and has completed the necessary classes to obtain her real estate license and hopes to establish a career selling real estate. Thus, it appears that she is able to independently care for herself and perform life-sustaining activities, even though her participation in some activities, such as those involving crowds, is admittedly very limited.

{¶ 49} Moreover, the evidence is not clear that all of Brandt's mental health issues and the negative events that occurred in her life after the abuse are attributable to the sexual abuse. Brandt's testimony seems to indicate that she chose to be homeless in order to be with her boyfriend, who did not have housing. And although Dr. Yingling attributed Brandt's PTSD to the sexual abuse, he conceded that an abusive relationship, such as Brandt's abusive boyfriend, can lead to PTSD. Likewise, he conceded that homelessness and a heroin overdose can lead to PTSD. He admitted that an individual's relationship with their parents, siblings,

and extended family can be important to a diagnosis of PTSD, but conceded that he had not asked Brandt about those relationships with any level of detail. He further admitted that there is a family history of substance abuse issues in Brandt's family, and that one of her relatives had attempted suicide. He also admitted that it is impossible to know when Brandt "officially had PTSD" or how long her symptoms will continue.

{¶ 50} We recognize that Brandt suffered real and debilitating mental health issues immediately after she and her family learned of the abuse and in the years following the abuse. We also recognize that she currently suffers mental health issues with accompanying symptoms. Nevertheless, it is not clear that all of her mental health issues and symptoms can be attributed to the sexual abuse. Because the evidence is equivocal, we cannot find that Brandt's injuries meet the "extreme qualifications" the law requires in order to avoid the operation of the damage caps in R.C. 2315.18(B)(2).

{¶ 51} Accordingly, we conclude that Brandt failed to demonstrate by clear and convincing evidence that the trial court's application of the R.C. 2315.18(B)(2) damage caps to the jury's damages award amounted to a violation of due process.

D. Equal Protection

{¶ 52} Brandt's final constitutional challenge asserts that as applied here, R.C. 2315.18 violates the right to equal protection guaranteed by Article I, Section 2 of the Ohio Constitution. The Ohio Supreme Court has interpreted Article I, Section 2 of the Ohio Constitution to be the equivalent of the Equal Protection Clause of the

United States Constitution. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 63, citing *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 7.

{¶ 53} Because R.C. 2315.18 does not involve a fundamental right nor a suspect class, we review the statute under the rational-basis test, which requires us to uphold it if it is rationally related to a legitimate governmental purpose. *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 47, citing *Arbino* at ¶ 66, citing *State v. Williams*, 88 Ohio St.3d 513, 530, 728 N.E.2d 342 (2000).

{¶ 54} Brandt contends that we should apply a strict scrutiny analysis because R.C. 2315.18 impinges upon the fundamental right to trial by jury,² but argues that even under the rational-basis test, the statute violates her equal protection rights. She asserts that when applied to minors who are victims of sexual assault, like herself, R.C. 2315.18 creates an irrational distinction between those with the serious physical injuries designated in R.C. 2315.18(B)(3), whose noneconomic damages are not capped, and “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.” (Appellant’s Brief, p. 20).

{¶ 55} This argument was considered and rejected in *Simpkins*. The court stated:

² As discussed above, consistent with *Simpkins* and *Arbino*, we reject Brandt’s assertion that R.C. 2315.18 violates the fundamental right to trial by jury.

But the statutory classification remains the same regardless of the age of the victim or the nature of the tort. And the legislative classification applies the same to all persons; absent the physical injuries designated in R.C. 2315.18(B)(3), the statutory damage caps on noneconomic loss apply. Even if we accept appellants' characterization of *Simpkins's* injuries as catastrophic, the General Assembly's determination that the types of physical injuries listed in R.C. 2315.18(B)(3) offer more concrete evidence of noneconomic damages provides a rational basis for limiting noneconomic damages that are not accompanied by those types of serious physical injuries.

Simpkins at ¶ 50.

{¶ 56} Accordingly, consistent with *Simpkins*, we find that Brandt has not demonstrated by clear and convincing evidence that R.C. 2315.18 violates her right to equal protection under Article I, Section 2 of the Ohio Constitution.

{¶ 57} The first assignment of error is therefore overruled.

IV. The Continuing Validity of the Ohio Supreme Court's Decision in *Arbino*

{¶ 58} In her second assignment of error, Brandt contends that *Arbino* should be overruled because it was wrongly decided. She asserts that we should not recognize and follow *Arbino* because circumstances have changed since it was decided, the decision "defies practical workability," and abandoning the decision would not create an undue hardship for those who have relied on it.

{¶ 59} As discussed above, this court, as an intermediate court, is required to follow and apply Ohio Supreme Court decisions, even if the appellate judges disagree with the Ohio Supreme Court's determination. *Gehad*, 10th Dist. Franklin No. 05AP-1181, 2006-Ohio-3081, at ¶ 7. We have no authority to modify, much less overrule, any decision of the Ohio Supreme Court. Nevertheless, we recognize that

to preserve an issue for review by the Ohio Supreme Court, a litigant must first present the issue to this court.

{¶ 60} Because we have no authority to overrule *Arbino*, the second assignment of error is overruled.

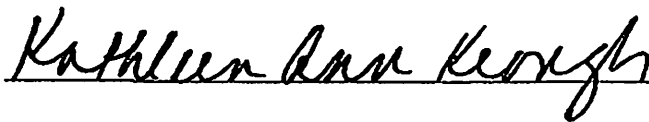
{¶ 61} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KATHLEEN ANN KEOUGH, JUDGE

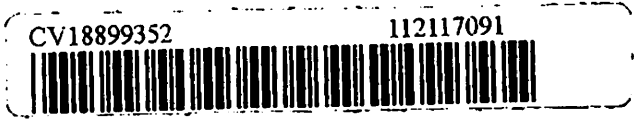
ANITA LASTER MAYS, P.J., and
MARY EILEEN KILBANE, J., CONCUR

FILED AND JOURNALIZED
PER RULE 22(C)

MAR 18 2021

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Gregg Heekin Deputy

APPENDIX 3



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

AMANDA BRANDT,
PLAINTIFF

v.

ROY POMPA, ET AL,
DEFENDANTS

) CASE No. 899352 JAN 21 P 1:01
) JUDGE JANET R. BURNETT
) CLERK OF COURTS
) CUYAHOGA COUNTY
)
) FINAL JUDGMENT ENTRY
)
)

Hearing held this date on the amount of attorney fees and costs to be awarded to Plaintiff pursuant to the jury's verdict that fees and costs should be awarded as part of Plaintiff's prayer for punitive damages. Both counsel present and participating on the record with the Court Reporter. Based on the evidence and argument presented, the Court finds the amount of attorney fees of \$194,920.00 and litigation expenses of \$11,941.43 should be and are hereby awarded.

Defendant Pompa's filing of 12/5/19 titled "Post-Trial Brief of Defendant Roy Pompa" which Court took to be a motion for the Court to reduce certain verdicts to judgment using Ohio law, specifically, R.C. 2315.18, to cap the monetary amount of recovery for certain noneconomic damages is hereby granted on authority of *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St. 3d 307 (2016).

The Court finds and the parties agree that the above motion ruling in effect litigates to completion Plaintiff's declaratory judgment claim in her complaint. Accordingly judgment is entered in favor of Defendant Roy Pompa and against Plaintiff Amanda Brandt upon the declaratory judgment claim.

The jury's money verdicts on the first three claims of Plaintiff's complaint (litigated as one claim for intentional physical assault) are hereby reduced to judgment as follows. Judgment entered in favor of Plaintiff Amanda Brandt, n.k.a.

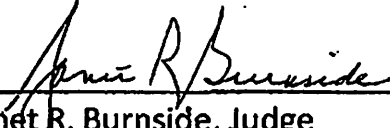
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Amanda Nolan, and against Defendant Roy Pompa in the amount of \$14,000,000.00 for injury occurring as a result of Defendant Roy Pompa's acts prior to 4/6/2005 as and for compensatory damages; in the amount of \$250,000.00 for injury occurring as a result of Defendant Roy Pompa's acts on or after 4/6/2005 as and for compensatory damages; in the amount of \$100,000,000.00 as and for punitive damages; and in the amount of \$194920.00 + \$11,941.41=\$206,861.43 as and for attorney fees and costs.

Plaintiff's claims against Co-defendant Whiteside being previously settled and dismissed with prejudice by separate entry, the within judgment is therefore a final judgment under R.C. 2505.02. Costs to be paid by Defendant Roy Pompa.

Under Civil Rule 58, the Clerk of Courts is hereby ordered to deliver notice of this judgment entry and a copy thereof to the parties.

IT IS SO ORDERED.



Janet R. Burnside, Judge

Date: January 13, 2020

APPENDIX 4a

Oh. Const. Art. I, § 2

Current through January 1, 2021

**Page's Ohio Revised Constitution Annotated > CONSTITUTION OF THE STATE OF OHIO >
Article I BILL OF RIGHTS**

**§ 2 Right to alter, reform, or abolish government, and repeal special
privileges.**

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

Page's Ohio Revised Constitution Annotated
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APPENDIX 4b

Oh. Const. Art. I, § 5

Current through January 1, 2021

Page's Ohio Revised Constitution Annotated > **CONSTITUTION OF THE STATE OF OHIO** >
Article I BILL OF RIGHTS

§ 5 Trial by jury; reform in civil jury system.

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

History

As amended September 3, 1912.

Page's Ohio Revised Constitution Annotated
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APPENDIX 4c

Oh. Const. Art. I, § 16

Current through January 1, 2021

Page's Ohio Revised Constitution Annotated > **CONSTITUTION OF THE STATE OF OHIO** >
Article I BILL OF RIGHTS

§ 16 Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

History

As amended September 3, 1912.

Page's Ohio Revised Constitution Annotated

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APPENDIX 5a

ORC Ann. 2305.111

Current through File 47 of the 134th (2021-2022) General Assembly; acts signed as of July 14, 2021.

Page's Ohio Revised Code Annotated > Title 23: Courts — Common Pleas (Chs. 2301 — 2337) > Chapter 2305: Jurisdiction; Limitation of Actions (§§ 2305.01 — 2305.52) > Torts (§§ 2305.09 — 2305.117)

§ 2305.111 Actions for assault or battery; victims of childhood sexual abuse.

(A) As used in this section:

(1) "Childhood sexual abuse" means any conduct that constitutes any of the violations identified in division (A)(1) (a) or (b) of this section and would constitute a criminal offense under the specified section or division of the Revised Code, if the victim of the violation is at the time of the violation a child under eighteen years of age or a child with a developmental disability or physical impairment under twenty-one years of age. The court need not find that any person has been convicted of or pleaded guilty to the offense under the specified section or division of the Revised Code in order for the conduct that is the violation constituting the offense to be childhood sexual abuse for purposes of this division. This division applies to any of the following violations committed in the following specified circumstances:

(a) A violation of section 2907.02 or of division (A)(1), (5), (6), (7), (8), (9), (10), (11), or (12) of section 2907.03 of the Revised Code;

(b) A violation of section 2907.05 or 2907.06 of the Revised Code if, at the time of the violation, any of the following apply:

(i) The actor is the victim's natural parent, adoptive parent, or stepparent or the guardian, custodian, or person in loco parentis of the victim.

(ii) The victim is in custody of law or a patient in a hospital or other institution, and the actor has supervisory or disciplinary authority over the victim.

(iii) The actor is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the victim is enrolled in or attends that school, and the actor is not enrolled in and does not attend that school.

(iv) The actor is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the victim is enrolled in or attends that institution.

(v) The actor is the victim's athletic or other type of coach, is the victim's instructor, is the leader of a scouting troop of which the victim is a member, or is a person with temporary or occasional disciplinary control over the victim.

(vi) The actor is a mental health professional, the victim is a mental health client or patient of the actor, and the actor induces the victim to submit by falsely representing to the victim that the sexual contact involved in the violation is necessary for mental health treatment purposes.

(vii) The victim is confined in a detention facility, and the actor is an employee of that detention facility.

(viii) The actor is a cleric, and the victim is a member of, or attends, the church or congregation served by the cleric.

- (2) "Cleric" has the same meaning as in section 2317.02 of the Revised Code.
- (3) "Mental health client or patient" has the same meaning as in section 2305.51 of the Revised Code.
- (4) "Mental health professional" has the same meaning as in section 2305.115 of the Revised Code.
- (5) "Sexual contact" has the same meaning as in section 2907.01 of the Revised Code.
- (6) "Victim" means, except as provided in division (B) of this section, a victim of childhood sexual abuse.

(B) Except as provided in section 2305.115 of the Revised Code and subject to division (C) of this section, an action for assault or battery shall be brought within one year after the cause of the action accrues. For purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

- (1) The date on which the alleged assault or battery occurred;
- (2) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the following dates:
 - (a) The date on which the plaintiff learns the identity of that person;
 - (b) The date on which, by the exercise of reasonable diligence, the plaintiff should have learned the identity of that person.

(C) An action for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse, or an action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, shall be brought within twelve years after the cause of action accrues. For purposes of this section, a cause of action for assault or battery based on childhood sexual abuse, or a cause of action for a claim resulting from childhood sexual abuse, accrues upon the date on which the victim reaches the age of majority. If the defendant in an action brought by a victim of childhood sexual abuse asserting a claim resulting from childhood sexual abuse that occurs on or after August 3, 2006, has fraudulently concealed from the plaintiff facts that form the basis of the claim, the running of the limitations period with regard to that claim is tolled until the time when the plaintiff discovers or in the exercise of due diligence should have discovered those facts.

History

140 v S 183 (Eff 9-26-84); 149 v S 9, Eff 5-14-2002; 151 v S 17, § 1, eff. 8-3-06; 2016 hb158, § 1, effective October 12, 2016.

APPENDIX 5b

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Current through File 47 of the 134th (2021-2022) General Assembly; acts signed as of July 14, 2021.

Page's Ohio Revised Code Annotated > Title 23: Courts — Common Pleas (Chs. 2301 — 2337) > Chapter 2315: Trial Procedure (§§ 2315.01 — 2315.99) > Damage Awards in Tort Actions (§§ 2315.18 — 2315.21)

§ 2315.18 Compensatory damages for economic and noneconomic loss in tort actions.

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

- (1) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code.
- (2) "Economic loss" means any of the following types of pecuniary harm:
 - (a) All wages, salaries, or other compensation lost as a result of an injury or loss to person or property that is a subject of a tort action;
 - (b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations as a result of an injury or loss to person or property that is a subject of a tort action;
 - (c) Any other expenditures incurred as a result of an injury or loss to person or property that is a subject of a tort action, other than attorney's fees incurred in connection with that action.
- (3) "Medical claim," "dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in section 2305.113 of the Revised Code.
- (4) "Noneconomic loss" means nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.
- (5) "Occurrence" means all claims resulting from or arising out of any one person's bodily injury.
- (6) "Product liability claim" has the same meaning as in section 2307.71 of the Revised Code.
- (7) "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a civil action upon a product liability claim or an asbestos claim, a civil action based on an unlawful discriminatory practice relating to employment brought under section 4112.052 of the Revised Code, and a civil action brought under section 4112.14 of the Revised Code. "Tort action" does not include a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim or a civil action for damages for a breach of contract or another agreement between persons.
- (8) "Trier of fact" means the jury or, in a nonjury action, the court.

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

- (1) There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action.
- (2) Except as otherwise provided in division (B)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as

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determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.

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

- (a)** Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
- (b)** Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.

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

- (1)** Evidence of a defendant's alleged wrongdoing, misconduct, or guilt;
- (2)** Evidence of the defendant's wealth or financial resources;
- (3)** All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

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

- (1)** The total compensatory damages recoverable by the plaintiff;
- (2)** The portion of the total compensatory damages that represents damages for economic loss;
- (3)** The portion of the total compensatory damages that represents damages for noneconomic loss.

(E)

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

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

(F)

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

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

(G) With respect to a tort action to which division (B)(2) of this section applies, any excess amount of compensatory damages for noneconomic loss that is greater than the applicable amount specified in

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division (B)(2) of this section shall not be reallocated to any other tortfeasor beyond the amount of compensatory damages that the tortfeasor would otherwise be responsible for under the laws of this state.

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

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

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

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

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

History

150 v S 80, § 1, eff. 4-7-05; 2020 hb352, § 1, effective April 15, 2021.

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