

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

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INTRODUCTION

The Ohio Attorney General, defending the constitutionality of R.C. 2315.18, calls it “incredibly foolish” “in its application to the psychological damages of rape victims” and even uses his brief to “urge[] the legislature to lift the damages cap in civil cases brought against rapists.” Nonetheless, he asserts the law is constitutional, even in that application. OAG Amicus Brief (hereinafter “AG Br.”) 2. However, the entire idea that it is “incredibly foolish” to apply it here, and his support for amending the cap to allow this action, undermines any claim that this application of the law furthers any legitimate government interest.

The grounds upon which the OAG bases his disaffection with the damage limitation in this case mirrors the constitutional rational-relationship test. In addition, he agrees that “psychological injuries can be as real as physical injuries.” *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 39 (Stratton, J., concurring) AG Br. 1. He further cites *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 135, 447 N.E.2d 109 (1983), for the proposition that “[e]motional injury can be as severe and debilitating as physical harm” and equally “deserving of redress.” AG Br. 1.

This Court recognized in *Simpkins v. Grace Brethren Church*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122 that “there may exist a set of facts under which application of the statutory damage caps would prove unconstitutional, under both due process and equal protection analysis. *Simpkins* at ¶ 44, 51. As demonstrated in Appellant’s Merit Brief, and further delineated below, Amanda Brandt presents that set of facts.

Furthermore, when applying an “as-applied” analysis to the facts of this case, it is self-evident that capping damages of a rape victim like Amanda does nothing to further the General Assembly’s purported goals of advancing Ohio’s economy. It helps no market, insulates no employer from liability, and curbs no frivolous lawsuit. It also fails to advance an imagined

purpose in making the civil justice system more predictable, as no one could logically assert that a large verdict in this case is either unwarranted or representative of what might occur under a wholly different fact pattern. Because there is no logical or rational relationship between these legislative goals and artificially restricting the damages reduced to judgment in this case, the criteria for an as-applied challenge is met and a declaration of unconstitutionality should follow. To hold otherwise would drain all content from the equal protection and due process guarantees.

To Defendant Pompa and his *amici*, Amanda should be satisfied with a judgment for compensation of a mere \$250,000 for enduring 34 separate instances of statutory rape or other sexual abuse, along with life-long traumatic injuries. The reduction occurs because all of Amanda's compensatory damages were noneconomic in nature; she had no economic damages. Pompa asserts that there are substantial punitive damages, so the reduction of compensatory damages should not matter. However, compensatory and punitive damages serve different purposes. Punitive damages reflect the State's interests in punishment and deterrence. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). If Amanda was solely interested in vindicating the State's interests, the criminal prosecution might have been sufficient to do so. Compensatory damages, on the other hand, serve a plaintiff to demonstrate that her life has worth and that the injuries she suffered are recognized as a wrong committed against her. To a person who has suffered a deep psychological scar that will never be fully healed, a judgment of full compensation, even if never fully collected, provides a strong measure of corrective justice that can, to some extent, ameliorate her pain and suffering. But when the jury's verdict is reduced arbitrarily, particularly as deeply as R.C. 2315.18 requires, it sends a quite different message that the law does not value her life or recognize the depth of her injury.

Pompa further asserts that he is judgment-proof, though nothing in the record supports the claim. More importantly, collectability is never a consideration for whether a case goes forward. If it had been, he would have asserted that at the outset of trial. The plain fact of the matter is that judgments are entered all the time without regard to whether they will be collectible.

In addition to Amanda's as-applied challenges, Amanda has mounted a facial challenge to R.C. 2315.18. Amanda asks this Court to reconsider its decision in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. With respect to the Constitution's guarantee of an inviolate right to a jury trial, *Arbino* adopted an approach that turned the jury's factual determination of compensatory damages into an advisory opinion that robbed her of the value of a jury trial when the court reduced the damages to a one-size-fits all amount that disregards the evidentiary record in the case. With respect to Amanda's constitutional open courts/remedy right, *Arbino* so reduced the fundamental constitutional guarantee that it would allow the legislature to arbitrarily limit all damages to serve a hypothetical state goal, as though access to the courts is the same even when the legislature allows a plaintiff to collect compensation of as little as \$100 regardless of the jury verdict.

Arbino further sanctioned the General Assembly's decision that improving the state's economy provided a rational basis for mandating that all but the most physically injured people should be specially taxed through lowered compensation for proven injuries in order to serve that attenuated public purpose, sweeping away claims for due process and equal protection. It further deferred to the legislature on whether limiting some noneconomic compensatory damages rendered the civil justice system more predictable, when it, rather than the General Assembly, has both the knowledge and experience in the civil justice system to know that such a claim is, at best, pretextual.

For these reasons, it follows that the noneconomic damages cap cannot be constitutional in all circumstances and should be declared void.

I. This Case is Neither Advisory Nor Hypothetical But Involves Justiciable Issues Subject to Review by This Court

Appellee initially argues that this action should be dismissed as improvidently granted under S.Ct.Prac.R. 7.10. That rule identifies four instances where dismissal is warranted: (1) no substantial constitutional question; (2) no question of public or great general interest; (3) leave to appeal in a felony case was not warranted; and (4) the same question was previously passed upon by the Court. Appellee advances none of these prerequisites, and none is present here. Rather, Appellee asserts the novel argument that because Appellee is imprisoned for life, and allegedly judgment proof, a decision in this case would be nothing more than an advisory opinion. App. Br. 13. Appellee's argument fails for multiple reasons.

First, S.Ct.Prac.R. 5.02 provides that the Court has jurisdiction in a jurisdictional appeal where the case involves a substantial constitutional question or a question of public or great general interest. Four justices of this Court have found that one or both of those requirements have been met, at least for purposes of review. Appellee seeks to add an additional inquiry, namely, whether the defendant in an action for compensatory damages is "judgment proof." Such an inquiry finds no basis either in the Court's rules or jurisprudence and poses an unwise and unwarranted precedent for those seeking to defeat Supreme Court jurisdiction.

Furthermore, Appellee cites to nothing in the record below regarding his collectability, preferring instead to suggest that the Court can take judicial notice of Appellee's "likely" wherewithal. At the same time, Appellant notes that Pompa has been represented by private counsel throughout this protracted litigation, and is currently represented by two sets of counsel,

including a well-known multi-attorney business litigation firm. Speculation about a party's collectability provides no basis for dismissing an otherwise proper action before this Court.

Finally, Appellee essentially argues that Amanda Brandt lacks standing to bring her claim before this Court. Under the Ohio and U.S. Constitutions, various terms are used to describe the elements of standing but at its core is a requirement that the party bringing the action "has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 21 citing *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987). And particularly relevant to this proceeding, "**standing is to be determined as of the commencement of suit.**" (Emphasis added). *Schwartzwald* at ¶ 24, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570–571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), n. 5. Amanda clearly had a concrete personal injury, caused by Appellee, which could be redressed through a favorable judgment, at the time her complaint was filed. Appellee's arguments about his prisoner status and collectability post-judgment have no bearing on the jurisdiction of this Court to review the determination below.

II. Amanda's As-Applied Challenge Is Both Proper and Should Succeed on the Merits

A. Amanda Has Made an As-Applied Challenge

An as-applied challenge asserts that the statute in the particular context applicable to her is unconstitutional. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 862 N.E.2d 512, ¶ 17. Another way of saying it is that the statute is unconstitutional "as applied to the facts of her case." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 26. An as-applied challenge contrasts with a facial challenge, where the plaintiff asserts that the statute cannot be applied

constitutionally in *any circumstance*. *Jaylin Invests., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶ 11 (Emphasis added).

Pompa tries to avoid the implications of an as-applied challenge by asserting that Amanda is attempting to assert a class action. Pompa Br. at 1-2; 18-20. This action is not a class challenge. If the statute is held unconstitutional as applied to her, it would also be unconstitutional to others where the facts and application are substantially the same. *See Yajnik v. Akron Dep't of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 14 (invalidation as applied prevents future application in a similar context). Pompa's argument, then, is nothing more than an act of misdirection that this Court should disregard.

Amanda's as-applied challenge thus places before this Court the question of whether the caps of R.C. 2315.18 can be applied to her or anyone else in similar circumstances. Those circumstances may be regarded as any tort action brought by (a) minor victims of sexual abuse that suffer severe and permanent injuries; and/or (b) victims of rape, assault, or other criminal acts.

B. This Case is Distinguishable from *Simpkins*

Appellee and his *amici* argue, and the Appellate Court agreed, that, while Amanda's injuries were significantly different in severity and number from Jessica *Simpkins*, Amanda's "noneconomic injuries do not meet the "extreme qualifications" that the law requires in order to avoid the operation of the damage caps in R.C. 2315.18(B)(2)." *Simpkins* at ¶ 44. For the reasons set forth in Appellant's Merit Brief, as well as below, the Court should reject the collective efforts to ignore the clear findings of the jury and the record.

1. Differences Set Forth in Appellant's Merit Brief

While Pompa tries to equalize the resulting harms in *Simpkins* and Amanda's case, the acts and the resulting harms in the two are not equal. As set forth in Appellant's Merit Brief, Amanda's

abuse occurred at a younger age (only 11-12 years old) and at a more frequent rate – 34 times when compared to the two instances of abuse suffered by Jessica Simpkins. Amanda’s abuse also occurred while she was sleeping; Jessica was awake. Additionally, the psychological effects took a greater toll on Amanda. She was terminated from her customer service job, as her anxiety became so severe that she could no longer perform her work duties. Amanda then turned to heroin, spent the next year homeless, and attempted suicide via a heroin overdose.

The evidence established that Amanda suffers from a *specifically diagnosed illness* – Post Traumatic Stress Disorder – *that expert testimony established was the result of the sexual abuse*. 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*. Absent special interrogatories in conflict with the jury’s general verdict, the verdict must stand, and a collateral attack on it, particularly by a non-appealing party, is improper. *See First Nat’l Bank of Omaha v. iBeam Sols., L.L.C.*, 2016-Ohio-1182, ¶ 57, 61 N.E.3d 740, 763.

2. At Trial, Appellant Did Not Concede that Brandt and Simpkins are Indistinguishable

Pompa wrongly claims concessions at trial when he cites Appellant’s Memorandum in Opposition to Defendant Pompa’s Post-Trial Brief (hereinafter “Memorandum in Opp.”) as evidence that there were only three differences between the two cases.

In that Memorandum in Opp., Appellant concedes that both Amanda and Jessica were minor females who were raped by older men and suffered from PTSD and anxiety. Memorandum in Opp. at 5. However, Appellant goes on to note, “...Amanda, in addition to becoming a heroin

addict, lost her job, and became homeless.” *Id.* She also notes that “[t]he trial court heard the post-abuse changes described by her mother, including plummeting grades” and that Amanda *attempted* suicide while Jessica merely *contemplated* it. *Id.* at 5-6 (Emphasis added).

While Jessica Simpkins suffered debilitating injuries as a result of a grievous sexual assault, Amanda suffered even greater injuries, both in number and in kind, of a catastrophic nature. In *Simpkins*, this Court recognized that a certain degree of injuries could exist that would render the noneconomic damage caps a denial of equal protection and/or due process. What level of abuse and what level of suffering beyond that suffered by Amanda must a child endure to meet that standard?

Pompa also vaguely suggests that additional evidence should have been offered, yet he proffers none. Further, Pompa erroneously argues that Appellant “stipulated to its summary resolution.” (Pompa Br. at 10), citing the Trial Court’s final judgment entry. In fact, that entry simply says the Court’s ruling on Pompa’s motion completes the litigation on Appellant’s constitutional claim and nothing more. Final Judgment Entry at 1.

Pompa also argues that Appellant “did not advocate for a reversal of *Simpkins* before the lower court.” Pompa Br. at 27. Simply stated, neither the Trial Court nor the Appellate Court had the authority to reverse *Simpkins*, and Pompa’s suggestion to the contrary is inexplicable.

3. Pompa’s Abuse of Amanda was the Proximate Cause of Her Injuries

In his Merit Brief, Pompa repeatedly attempts to plant doubt with the Court that Pompa’s abuse brought about Amanda’s resulting injuries. There is no room for doubt. Proximate causation was an element of Appellant’s claim for damages against Pompa. *See* Trial Court Exhibit A, which is the charge by the Court to the jury (“A party who seeks to recover for damages must prove not only that the other party was wrongful, but also that such wrongful act was a direct cause of the

damages.”). Furthermore, the same arguments and speculation about other causes of Amanda’s injuries advanced by Pompa, his *amici*, and the appellate court were specifically argued to the jury by Pompa’s counsel at trial, and clearly rejected by the jury. (TR. 143-146). The resulting general verdict in Amanda’s favor settles the issue, as Pompa has not appealed that decision. Unfounded speculation about other causes of Amanda’s severe injuries should be rejected by this Court.

4. The Trial Record Below

Appellant fully described the testimony at trial in her Merit Brief and will not repeat it here. The full testimony of Amanda and her mother appear at pp. 17-81 of the trial transcript. The testimony of Amanda’s expert psychologist, Dr. Patrick Yingling, presented by videotape, is in the Court’s record by means of a redacted transcript.

Pompa’s recitation of the trial record glosses over the horrendous abuse Amanda endured, including that Amanda remembers some of Pompa’s assaults [on one occasion, Amanda woke to a hand “running all over [her] genitals and under [her] underwear to touch [her] vagina.” (TR. 28-29)]. Pompa masturbated on Amanda, ejaculated on her, and abused Amanda with a dildo or vibrator. Pompa Dep. 19, 63. Amanda was 11 or 12. *Brandt* at ¶ 3. This horrific abuse resulted in Amanda experiencing “serious emotional problems” as she expressed in a letter she wrote to the judge on Pompa’s criminal case when she was 11 or 12. (TR. 29-30).

At age 26 when she testified at trial – fourteen years later – she was still having constant nightmares, for which she takes medications. (TR. 32). She is still in counseling. (TR. 33). She still suffers from PTSD and anxiety. (TR. 34). Large groups of people are hard for her to deal with. (TR. 34). Between graduating high school in 2011 and 2013, she was fired from a job, lost her apartment, became addicted to heroin, lived in a tent, and attempted suicide. (TR. 36-38).

While Pompa describes Amanda’s mother’s testimony as observations on how Pompa’s abuse “generally impacted” Amanda’s childhood, Amanda’s mother actually testified as follows:

- A: Well, we saw our daughter go from being outgoing to a recluse. Her anxiety level was huge. She never wanted to go anywhere. We saw this beautiful, outgoing child turn into someone that didn’t want to leave. She just wanted to be alone.
- Q: Did you see any anger?
- A: A lot of anger. It was a very hard period, obviously. She’s still, I think, angry at God.
- Q: What about her ability to sleep, did she have any problems sleeping?
- A: Oh, yeah. We went – we were determined to find a therapist that had dealt with this* * *
- Q: Moving on into her teen years and even adult life, what is your view based on your observations of the impact of this abuse?
- A: The impact has totally changed my daughter. I do not have the same daughter anymore. She has a lot of anger, has a lot of anxiety issues. She can’t handle being at a lot of family functions. She has to go to another room when everyone is there. She just is not the same kid that we knew growing up and even now in her adulthood* * *

(TR. 77-78). This testimony is anything but generalities.

Finally, Pompa also tries to undercut the testimony of Dr. Yingling. To begin, Dr. Yingling testified to a *reasonable degree of psychological certainty* that Amanda’s PTSD was a direct result of Pompa’s abuse. (Yingling Dep. 38-41). He notes that Amanda’s testing results also indicated: clinical depression and ruminative thinking; (Yingling Dep. 36); somatic complaints which are likely a “reflection of the physical symptomatology that she experienced related to her panic attacks” (Yingling Dep. 36); that Amanda lacks self-confidence and feels useless and unable to function (Yingling Dep. 37); and proneness to experience problems with anxiety. (Yingling Dep. 37). He also opined that Amanda’s symptoms would persist “with some degree of intensity” for a “significant” period of time. (Yingling Dep. 41-42). No contrary expert testimony was offered by Pompa at trial.

Some *amici* argue that Amanda has failed to establish that her injuries are permanent and thus not of the same catastrophic nature as the physical injuries exempted from the noneconomic damages caps in R.C. 2315.18. (E.g., OACTA Amicus Brief at 26). The Trial Court’s instructions to the jury included the following: “The Plaintiff also claims that the injury or loss is permanent. As to such claims no compensation or damage can be found except that which is reasonably certain to exist as a direct cause of the Defendant’s conduct.” TR. 124.

The Court’s charge was based upon the testimony of Amanda, her mother, and Dr. Yingling, who testified that “her symptoms would continue with some degree of intensity over a significant period of time.” Yingling Dep. at 42. No objection to the Court’s charge on permanency was raised at trial, and the jury clearly took the permanency of Amanda’s injuries into account in making its post-April 6, 2005 award.

As stated above, the Court in *Simpkins* acknowledged that a sufficiently egregious set of facts demonstrating catastrophic emotional injuries could render the caps on noneconomic damages in R.C. 2315.18 unconstitutional. Those facts are present in this case, and the Court should rule accordingly.

C. There is No Legitimate Governmental Interest in Capping Damages for Those Who Rape Children

In Part B above, Appellant demonstrates that the severity of injuries in Amanda Brandt’s case meets the requirements set forth in *Simpkins* for finding the R.C. 2315.18 noneconomic damage caps unconstitutional on an as applied basis. However, that analysis is supplemented by additional reasons why the caps cannot survive an as-applied constitutional challenge.

As Pompa and his *amici* detail and this Court has recognized, the General Assembly enacted R.C. 2315.18 because it believed that “uncertainty and subjectivity associated with the civil justice system were harming the state’s economy.” *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-

6948, 880 N.E.2d 420, at ¶ 101. The General Assembly asserted a state “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, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation.” *Arbino*, 2007-Ohio-6948, ¶ 68, 116 Ohio St.3d 468 (quoting S.B. 80, Section 3(A)(3), 150 Ohio Laws, Part V, 8024).

The legislature settled on capping noneconomic damages as the tool it would use to address the alleged uncertainty. Those with catastrophic physical injuries were exempt from the cap, and those with lesser physical injuries or those with solely non-physical injuries were not exempt. R.C. 2315.18(B)(3). This Court deferred to that assessment, even as it recognized that the “noneconomic-damages limits created in R.C. 2315.18 may or may not be the best way to address the perceived problems in the civil justice system.” *Id.* at ¶ 70, 116 Ohio St.3d at 482.

Neither Pompa nor his *amici* make any attempt to even hypothesize how capping Amanda’s damages resulting from repeated sexual abuse at \$250,000 furthers the legislative goals. There is no market to protect in the rape of children, which is what occurred here. There is no legitimate government interest in protecting defendants who commit that rape from supposed uncertainty in the operation of the civil justice system. Amanda’s lawsuit is plainly not frivolous, does nothing to increase the cost of doing business in Ohio, threatens no jobs, drives up no consumer costs, and stifles no innovation that the General Assembly sought to encourage. In other words, capping the only compensatory damages available to a young woman like Amanda in this case serves no legitimate government interest and renders the damage cap, as applied here, irrational and therefore unconstitutional as a matter of equal protection and due process.

Under both due process and equal protection,¹ a statute must, at a minimum, meet the rational-basis test, which asks, “[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.” *Arbino*, 2007-Ohio-6948, ¶ 49, 116 Ohio St.3d at 478 (quoting *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274, 503 N.E.2d 717 (1986)). There not only is no evidence that this standard is satisfied, but, as a matter of logic, it cannot be satisfied. No studies nor did any testimony the General Assembly considered assert otherwise, and no findings it made have any relevance to the facts presented here. It is not too great a leap to surmise that the legislature never contemplated applying the cap in these circumstances.

What the cap does accomplish is to impose a substantial cost on Amanda in which the only beneficiary is Pompa, her rapist. As in *Morris v. Savoy*, 61 Ohio St.3d 684, 691, 576 N.E.2d 765 (1991) where this Court found a prior damage cap unreasonable and arbitrary because it lacked a rational connection between damage awards in excess of the caps and malpractice-insurance rates and imposed too great a cost on severely injured persons without any alleviation for a modest societal benefit, the current cap is unreasonable and arbitrary because it imposes too great a cost on someone like Amanda who suffers a horrific and life-changing injury where there is absolutely *no* societal benefit.

D. *Simpkins* Should Not Require the Court to Uphold the Cap As Applied Here

Pompa asserts that this Court’s decision in *Simpkins* forecloses an as-applied challenge as a matter of *stare decisis*. Pompa Br. 27. Of course, *stare decisis* is not an “inexorable command,” is “*not* inflexibly applicable to constitutional interpretation,” and “does not apply with the same

¹ Brandt’s equal-protection claim consists of the irrationality of including her in the class whose noneconomic damages must be limited to further the state’s economy or add predictability to the civil justice system. *Cf. Morris*, 61 Ohio St.3d 684, 691, 576 N.E.2d 765 (1991). Where the classification is not rationally related to the State’s goals, it cannot be justified. *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct 2863, 73 L.Ed.2d 508 (1982).

force and effect when constitutional interpretation is at issue.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 36 (citations omitted).

Simpkins rejected the as-applied challenge because the Court concluded that the plaintiff’s injuries did not adequately mirror the catastrophic physical injuries exempt from the caps, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 38, rather than whether the underlying damage limitation satisfied the rational-relationship test as applied to these circumstances. That inquiry requires this Court to determine whether including a plaintiff victim of rape within the applicable damage cap bears a “real and substantial relationship” to a legitimate government objective and is not unreasonable or arbitrary. In doing so, the Court should not apply a single *Simpkins* sentence that deviates from this inquiry and should reject *Simpkins* conclusion that the plaintiff’s status does not affect the economic and general welfare benefits the General Assembly assumed would flow from limiting noneconomic damages. *Id.* at ¶ 38.

That analysis, rejecting the status of a plaintiff as a legitimate consideration, may be appropriate in a facial challenge, but not an as-applied challenge. Instead, the status of the plaintiff and the facts surrounding her case absolutely diminish the real and substantial relationship between the legitimate government objective and the imposition of the cap on Amanda *in these circumstances*. Moreover, the economic benefits and civil-justice consistency justifications fail to provide a rational relationship between those exempted from operation of the caps due to devastating physical injuries and the trauma and life-changing injuries visited upon Amanda.

A U.S. Supreme Court decision provides useful instruction. In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), the plaintiff challenged the constitutionality of a municipal zoning ordinance that prevented it from operating a group home for the mentally retarded. The Court examined the as-applied challenge by seeking to determine if

the distinction drawn by the city between the mentally retarded and others is rationally related to a legitimate governmental purpose. It found no rational justification for treating a home for the mentally retarded differently than apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, hospitals, nursing homes or other group homes, which did not require special permit requirements. *Id.* at 447. The differential treatment based on mental retardation, the Court held, was unrelated to any legitimate government purpose, and the ordinance was held invalid as applied to the proposed group home. *Id.* at 450. Thus, the status of a plaintiff does matter.

Because no one has similarly identified a legitimate state interest that is furthered by imposing the cap in Amanda's case and similar circumstances, the cap cannot survive an as-applied constitutional challenge.

III. *Arbino* Should be Reversed

Pompa argues that Amanda's facial challenge is limited to the facts of this case, i.e. effectively an as-applied challenge. Pompa Br. at 2. As set forth in Appellant's Merit Brief (p. 27), Amanda challenges the Court's ruling on the first certified question in *Arbino*, namely, that R.C. 2315.18, limiting noneconomic damages in tort actions, is constitutional. Amanda's challenge to the holding in *Arbino* is a facial challenge.

A. R.C. 2315.18 Violates Ohio's Constitutional Right to Trial by Jury

Article I, Section 5, which guarantees an inviolate right to a jury trial, creates a categorical bar on interfering with the responsibilities assigned to a jury at common law and existing at the time of the state constitution's adoption. *Kneisley v. Lattimer-Stevens Co.*, 40 Ohio St.3d 354, 356, 533 N.E.2d 743 (1988). Amanda's challenge under this provision is facial, and she requests reconsideration of *Arbino*.

Contrary to the limited role as a mere procedural and non-substantive guarantee that the Attorney General would assign it, AG Br. 26, the jury-trial right “does not involve merely a question of procedure.” *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 188 N.E. 1 (1933), paragraph one of the syllabus. In fact, this Court has repeatedly recognized the jury trial as “the crown jewel of our liberty,” the “most cherished institution of free and intelligent government,” the “best institution for the administration of justice,” both “fundamental” and “substantial,” and “[d]esigned to prevent government oppression and to promote the fair resolution of factual issues.” *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, ¶ 21 (citations omitted).

Arbino correctly recognized that the jury trial right “applies to both negligence and intentional-tort actions.” 116 Ohio St.3d, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 32. However, it gave the right an especially narrow scope. At common law, and even the English common law that predated the Constitution, jurors served as the “judges of the damages.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1978) (quoting *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677)).

In her Merit Brief, Appellant quotes extensively from Justice O’Donnell’s dissent in *Arbino* which not only disposes of the arguments raised by Appellee and his *amici*, but correctly points out that R.C. 2315.18 “renders fact-finding with respect to noneconomic damages in excess of the statutory limit a meaningless exercise.” *Arbino* at ¶ 148.

To rationalize that the statute does not violate constitutional guarantees, Pompa and his *amici* revert to semantics. For instance, the Attorney General argues that the jury’s “findings of fact are not ignored or replaced by another body’s findings” but are simply “altered as a matter of law.” AG Br. 27-28. Not “ignored” or “replaced”; just “altered.” The distinction is meaningless.

The U.S. Supreme Court's decision in *Feltner* is telling. There, the Court held that, where the cause of action does not exist solely as a matter of legislative grace, "if a party so demands, a jury must determine the actual amount of . . . damages." *Feltner*, 523 U.S. at 354-55. *Feltner* further stated: "there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff." *Id.* at 355 (Emphasis added). The argument accepted in *Arbino* and made by Pompa and *amici* that the jury's work is finished at verdict and then there is an opportunity to "apply the law" was made, based on a misreading of *Tull v. United States*, 481 U.S. 412 (1987), and rejected in *Feltner*.² Indeed, according to the unanimous decision in *Feltner*, any other approach to finalizing the award of damages would fail "to preserve the substance of the common-law right of trial by jury." *Feltner*, 523 U.S. at 355 (citation omitted).

The subterfuge of allowing a jury to render a meaningless verdict on noneconomic damages is further highlighted by reference to R.C. 2315.18(F)(2), which prohibits the Court, the attorneys or witnesses from advising the jury that they are about to engage in a fruitless exercise. If jurors are to weigh evidence, negotiate, compromise, and arrive at a just award, why hide from them that the legislature has already pre-determined the amount of noneconomic damages? Jurors are normally instructed on the law and apply it themselves in reaching a verdict.

The emasculating nature of the noneconomic damages cap is also evident in its disregard for the safeguards embedded in the civil procedure process. A remittitur as well as other tools embedded in Ohio's rules of civil procedure provide judicial oversight over alleged "runaway

² The leading pre-*Feltner* federal case that made the same argument, *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989), which is relied upon by Pompa and *amici*, cites *Tull* in support of its holding. *See Boyd*, 877 F.2d at 1196 n.5 (stating the Supreme Court "recently suggested that the right to a jury trial may not even extend to the 'remedy phrase of a civil trial.')" (quoting *Tull*, 481 U.S. at 426 n.9). *Feltner*, in finding *Tull* "inapposite," *Feltner*, 523 U.S. at 355, rejects that foundation to *Boyd's* holding. The Ohio Constitution, which utilizes the same historic test described in *Feltner*, provides no lesser protection even from a post-verdict alteration of damages.

juries.” Remarkably, *Amicus* Ohio Alliance for Civil Justice argues that any award for noneconomic damages is a “category mistake” and that there is a “philosophical incoherence to non-economic damages.” OACJ Br. 5, 8. *Amicus* fails to then explain how it is rational for a jury to award unlimited noneconomic damages where a permanent physical injury is present and have a constitutionally assigned role in assessing noneconomic damages but is in need of an arbitrary legislative limit when only noneconomic damages are present. The OACJ even suggests that not only the trial court but even reviewing courts are incapable of addressing arguably excessive verdicts, thus requiring legislative intrusion. OACJ Br. 14-15.

Amici cite *Arbino*’s statement that the legislature “may modify or entirely abolish common-law actions” as a justification for taking the lesser step of impairing the damages available through a jury trial. OACJ Br. 33 (citing *Arbino*, 2007-Ohio-6948, ¶ 128, 116 Ohio St.3d 468, 495). Of course, the legislative authority to do so has always been subject to “constitutional limitations.” *Strock v. Pressnell*, 38 Ohio St.3d 207, 214, 527 N.E.2d 1235 (1998). These limitations include the right to trial by jury, open courts, due process and equal protection.

The fallacy of *amici*’s argument is exemplified by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), where the Supreme Court held that a state’s “undisputed authority to ban alcoholic beverages” does not include the “power to restrict advertisements offering them for sale.” *Id.* at 511. In so holding, the Court stated that the “greater-includes-the-lesser” argument “is inconsistent with both logic and well-settled doctrine.” *Id.*

B. The R.C. 2315.18 Cap Violates Ohio’s Open Courts/Right to Remedy Constitutional Guarantee

Appellee Pompa attempts to interpose an evidentiary standard for determining whether the caps violate Article I, Section 16’s guarantee of meaningful access to the courts. However, the question of whether RC. 2315.18 *on its face* violates the constitutional guarantee that the courts be

open and that every person shall have remedy by due course of law is a legal question that requires this Court to engage in statutory and constitutional construction, which is subject to de novo review. See *Akron Ctr. Plaza, L.L.C. v. Summit Cty. Bd. of Revision*, 2010-Ohio-5035, ¶ 10, 128 Ohio St. 3d 145.

In *Simpkins*, this Court held that the constitutional open courts and remedy guarantee is only rendered “hollow when an individual is wholly foreclosed from relief after a verdict in his or her favor.” *Simpkins* at ¶ 30 (citing *Arbino* at ¶ 45). It further held that “R.C. 2315.18(B)(2) does not foreclose a plaintiff from pursuing a claim”. *Id.* at ¶ 31 (citing *Arbino* at ¶ 47). No evidence was necessary for the Court to undertake that evaluation or conclusion. Thus, Pompa is wrong to suggest that deference to the trial court’s evidentiary determinations is warranted.

The conclusion that the constitutional provision provides a limited right to seek relief without a meaningful remedy gives the guarantee too narrow a scope and should be revisited, based on the remedy guarantee’s historic scope. Cf. Hon. William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article i, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333 (1997). Moreover, as the Florida Supreme Court put it:

Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at \$450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, if the legislature may constitutionally cap recovery at \$450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps \$50,000, or \$1,000, or even \$1. None of these caps, under the reasoning of appellees, would “totally” abolish the right of access to the courts.

Smith v. Dep’t of Ins., 507 So. 2d 1080, 1088-89 (Fla. 1987).

Appellant commends this reasoning to the Court, for deferring to legislative choices, but without any limiting principles, even while allowing one to enter the courthouse door, undermines

the organic choice made in Ohio's Constitution to assure meaningful remedies for recognized causes of action.

CONCLUSION

For the reasons set forth above, as well as those set forth within Appellant's Merit Brief, the Court should find that the damage caps in R.C. 2315.18, as applied to Amanda Brandt in these circumstances, violate her constitutional rights as guaranteed by the Ohio Constitution. Furthermore, *Arbino* was wrongly decided by the Court in upholding the non-economic damages cap on a facial basis. Accordingly, the decision of the Court of Appeals should be reversed.

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APPENDIX

1. Constitutional Provisions
 - a. Article I, Section 5 of the Ohio Constitution
 - b. Article I, Section 16 of the Ohio Constitution
2. Statutory Provisions
 - a. R.C. 2315.18

APPENDIX 1a

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.

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APPENDIX 1b

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 2a

ORC Ann. 2315.18

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

ORC Ann. 2315.18

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

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.

Page's Ohio Revised Code Annotated

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