IN THE SUPREME COURT OF OHIO

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

BRIEF OF *AMICUS CURIAE* DAVID GOODMAN, FORMER CHAIRMAN OF THE OHIO SENATE JUDICIARY COMMITTEE FOR CIVIL JUSTICE, IN SUPPORT OF APPELLEE

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I. INTRODUCTION

"Using legislative history is like looking over a crowd and picking out your friends."
– Judge Harold Leventhal[1]

As this Court has recognized, "tort reform is a contentious issue across the country" and it is the General Assembly who is "charged with making the difficult policy decisions on such issues and codifying them into law." *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, 116 Ohio St.3d 468, 880 N.E.2d 420, ¶¶ 70–71. "This court is not the forum in which to second-guess such legislative choices[.]" *Id.* at 71. Nevertheless, challenges to these very same policy decisions are before this Court yet again.

R.C. 2315.18 clearly and unambiguously establishes a cap on compensatory tort damages for "noneconomic loss." This Court must apply the statute as written to this case, just like it already has in two prior cases. The Court's inquiry should start and end there. However, even if the Court were to look beyond the statute (which it should not do), the legislative history demonstrates that R.C. 2315.18 was the result of a deliberative legislative process that included an extensive review of evidence and competing interests—including those at issue in this case. This process ultimately culminated in a policy decision by the General Assembly to place a cap on compensatory tort damages for noneconomic losses to address the challenges and uncertainties that the civil litigation system placed on Ohio's economy.

This cap does not deny the Appellant damages for her injuries. Plaintiffs, like Appellant, who did not suffer the catastrophic injuries enumerated in R.C. 2315.18(B)(3) (for which there are

[1] *See Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring) (recounting Judge Harold Leventhal's description of the use of legislative history as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends"); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

no damages limits) may still recover full economic damages and up to $350,000 in noneconomic damages, as well as punitive damages. There is no cap on punitive damages for plaintiffs like Appellant. Although Appellant and Amici[2] may disagree with the cap on Appellant's noneconomic damages, they conveniently gloss over the fact that Appellant is still entitled to an uncapped $100 million award in punitive damages.

Appellant and Amici improperly use legislative history in an attempt to change the outcome of this case and the outcome of the legislative process. Such arguments are unavailing and ask the Court to second guess the purpose and efficacy of the statute, which would require the Court to usurp the legislative process and prerogative. It is well-established that this is not the role of the Court. The legislature establishes a statute's purpose by negotiating, crafting, and enacting statutory text. Text controls; not a court's after-the-fact reevaluation of the nebulous rationales lurking behind legislative intent. For these reasons and as more fully articulated below, the Court must apply the statute as written, as it has several times before, and affirm the appellate court's decision.

II. STATEMENT OF FACTS

A. Statement of Interest of Amicus Curiae

David Goodman ("Amicus") is the former Chairman of the Ohio Senate Judiciary Committee for Civil Justice. In this role, he was directly involved in the drafting and enactment of the statute at issue in this case, R.C. 2315.18. As a dedicated public servant who recognizes that the Court's "paramount concern in examining a statute is the legislature's intent in enacting the statute," Mr. Goodman is interested in ensuring that the Court has a clear and comprehensive

[2] The Amici Curiae that filed briefs in support of the Appellant are referred to throughout this brief as "Amici."

understanding of the deliberate legislative process that resulted in R.C. 2315.18. *Gabbard v. Madison Loc. Sch. Dist. Bd. of Educ.*, 2021-Ohio-2067, ¶ 13.

By way of background, Mr. Goodman began his career by practicing law for almost a decade in both public and private practice. Mr. Goodman then served in the Ohio House of Representatives from 1998 until 2001 and the Ohio Senate from 2001 until 2011. During Mr. Goodman's time in the Ohio Senate, he served as the Chairman of the Senate Judiciary Committee for Civil Justice, through which tort reform initiatives, including R.C. 2315.18, were shepherded. Mr. Goodman also served on the Ways and Means and Economic Development Committee; the Environment Committee; and the Committee on Health, Human Services and Aging.

After his time with the legislature, Mr. Goodman was appointed as the Director of the Ohio Department of Commerce in 2011 and served in that role until 2013 when he was appointed to serve as the Director of the Ohio Development Services Agency. Mr. Goodman served in that role until 2019.

B. Incorporation of Appellee's Statement of the Facts

In the interest of judicial economy, Amicus adopts and incorporates by reference the statement of the case and facts submitted in the Merit Brief of Appellee Roy Pompa.

III. ARGUMENT

A. R.C. 2315.18 was the result of a deliberate legislative process.

This Court has made clear that if the statute is clear and unambiguous then the Court applies the statute as written and need not look beyond the words of the statute. *Dundics v. Eric Petroleum Corp.*, 2018-Ohio-3826, 155 Ohio St. 3d 192, 120 N.E.3d 758, ¶¶ 7, 15 (O'Connor, C.J.); *State ex rel. Plain Dealer Publ'g Co. v. Cleveland*, 2005-Ohio-3807, 106 Ohio St. 3d 70, 831 N.E.2d 987, ¶ 38 ("If a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further."). In such cases, "no resort to . . . an examination of the legislative

history is warranted." *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 2005-Ohio-5642, 108 Ohio St. 3d 129, 841 N.E.2d 757, ¶ 28; *State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 2007-Ohio-5228, 115 Ohio St. 3d 299, 874 N.E.2d 1205, ¶ 25.

Here, R.C. 2315.18 is clear and unambiguous and the Court need not consider the legislative history behind it. However, even if the Court looks beyond the statute, the legislative history demonstrates that R.C. 2315.18 was the result of a deliberative legislative process that included a review of evidence and competing interests and that ultimately culminated in a policy decision by the General Assembly.

1. The General Assembly had a legitimate purpose for enacting R.C. 2315.18.

The General Assembly had a legitimate purpose for enacting R.C. 2315.18. "The General Assembly enacted R.C. 2315.18 as part of a broader tort-reform bill in Am.Sub.S.B. 80, 150 Ohio Laws, Part V, 7915 ("S.B. 80"), effective April 7, 2005." *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 2016-Ohio-8118, 149 Ohio St. 3d 307, 75 N.E.3d 122, ¶ 2. When considering the state of the civil litigation system prior to the enactment of R.C. 2315.18, the General Assembly found that it presented a "challenge to the economy of the state of Ohio, which is dependent on business providing essential jobs and creative innovation." S.B. 80, Section 3(A)(1). Recognizing that the State "has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice," the General Assembly enacted R.C. 2315.18, among other provisions, to address the challenges that the civil litigation system placed on Ohio's economy. S.B. 80, Section 3(A)(3); *see also Simpkins*, 2016-Ohio-8118, 149 Ohio St. 3d 307, 75 N.E.3d 122, at ¶ 2. This Court has already found on multiple occasions that this constitutes a legitimate purpose. *See Simpkins*, 2016-Ohio-8118, 149 Ohio St. 3d 307, 75 N.E.3d 122, at ¶¶ 2, 37; *see also Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, at ¶ 69. Therefore, the Court should yet

again find, as it has several times already, that the General Assembly had a legitimate purpose for enacting R.C. 2315.18.

2. The General Assembly reviewed evidence demonstrating that uncertainty relating to the existing civil litigation system and rising costs associated with it were harming the economy.

In enacting R.C. 2315.18, the General Assembly reviewed a variety of evidence, including, several reports and testimony. Specifically, the General Assembly reviewed

1. **A National Bureau of Economic Research study**, which estimated that states that have adopted abuse reforms have experienced employment growth between eleven and twelve percent, productivity growth of seven to eight percent, and total output growth between ten and twenty percent for liability reducing reforms.

2. **A 2002 study from the White House Council of Economic Advisors**, which found that the cost of tort litigation is equal to a two and one tenth percent wage and salary tax, a one and three tenth percent tax on personal consumption, and a three and one tenth percent tax on capital investment income.

3. **The 2003 Harris Poll** of nine hundred and twenty-eight senior corporate attorneys conducted by the United States Chamber of Commerce's Institute for Legal Reform, which reported that eight out of ten respondents claim that the litigation environment in a state could affect important business decisions about their company, such as where to locate or do business. Additionally, one in four senior attorneys surveyed cited limits on damages as one specific means for state policy makers to improve the litigation environment in their state and promote economic development.

4. **A February 2003 study published by Tillinghast-Towers Perrin**, which found that the cost of the United States tort system grew at a record rate in 2001, but the system failed to return even fifty cents for every dollar to people who were injured. The study also found that fifty-four percent of the total cost accounted for attorney's fees, both for plaintiffs and defendants, and administration. Only twenty-two per cent of the tort system's cost was used directly to reimburse people for the economic damages associated with injuries and losses they sustain. The Tillinghast-Towers Perrin study also found that the cost of the United States tort system grew fourteen and three tenths of a percent in 2001, the highest increase since 1986, greatly exceeding overall economic growth of two and six tenth percent. As a result, the cost of the United States tort system rose to two hundred and five billion dollars total or seven hundred and twenty-one dollars per citizen, equal to a five percent tax on wages.

5. **Testimony by Ohio Department of Development Director Bruce Johnson**, which highlighted that as a percentage of the gross domestic product, United States tort costs have grown from six tenths of a percent to two percent since 1950, about double the percentage that other industrialized nations pay annually. These tort costs put Ohio businesses at a disadvantage vis-a-vis foreign competition and are not helpful to development.

See S.B. 80, Section 3(A)(3)(a–f). The General Assembly concluded that these reports and testimony "demonstrate[ed] that uncertainty related to the civil-litigation system was harming the economy[.]" *Simpkins*, 2016-Ohio-8118, 149 Ohio St. 3d 307, 75 N.E.3d 122, at ¶ 37.

3. After reviewing this evidence, the General Assembly decided, among other things, to implement caps on noneconomic damages.

The General Assembly reviewed the reports and testimony demonstrating that uncertainty in the civil-litigation system was harming the economy and decided to implement a cap on noneconomic damages in tort cases through R.C. 2315.18.

R.C. 2315.18 sets out the procedure for imposing damages in certain tort actions. When there is a jury trial, the jury returns a general verdict accompanied by answers to interrogatories. *See* R.C. 2315.18(D). The verdict must specify the jury's determination of the total compensatory damages recoverable as well as the portions of that total that represent economic and noneconomic losses. *Id.* The trial court will then enter judgment for the total amount of economic damages determined by the jury and for the amount of noneconomic damages determined by the jury up to the limits established by R.C. 2315.18(B). *See* R.C. 2315.18(E)(1).

R.C. 2315.18(B)(2) establishes a cap on compensatory tort damages for "noneconomic loss." It states:

> [T]he 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.

Thus, under R.C. 2315.18(B)(2), "the court must limit recovery [for noneconomic loss] to the greater of (1) $250,000 or (2) three times the economic damages up to a maximum of $350,000, or $500,000 per single occurrence." *Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, at ¶ 28.

4. The cap on compensatory tort damages for noneconomic losses was a deliberate policy choice by the legislature.

In establishing a cap on compensatory tort damages for noneconomic losses, the General Assembly made a deliberate policy choice. The General Assembly recognized that noneconomic damages are difficult to calculate and lack a precise economic value. *See* S.B. 80, Section 3(A)(6)(a); *see also Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, ¶ 54. The General Assembly also noted that such damages are inherently subjective and susceptible to influence from irrelevant factors. *See* S.B. 80, Section 3(A)(6)(d); *see also Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, at ¶ 54. It also recognized that inflated damages awards were likely under the then current system and that the cost of these awards was being passed on to the general public. S.B. 80, Section 3(A)(6)(d) and (e); *see also Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, at ¶ 54. These findings, led the General Assembly to exercise its authority to establish a cap on compensatory tort damages for noneconomic losses.

5. The legislature considered and built-in exceptions to the cap on compensatory tort damages for noneconomic loss.

The General Assembly considered exceptions to the cap on compensatory tort damages for noneconomic loss, weighed competing interests, and made a policy decision to exclude certain damages from the cap. Specifically, the General Assembly decided to exclude awards to plaintiffs who suffer catastrophic physical damages. R.C. 2315.18 (B)(3) states in full:

> 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.

These exceptions to the cap for catastrophic physical damages were a deliberate policy choice by the General Assembly. The cap was aimed at reducing uncertainty associated with the existing tort system and the negative consequences resulting from it. *See also Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, at ¶ 72. The legislature created an exception to this cap for catastrophic physical injuries based on the "conclusion that catastrophic injuries offer more concrete evidence of noneconomic damages and thus calculation of those damages poses a lesser risk of being tainted by improper external considerations." *Id.* Appellant and Amici may disagree and think there should be more exceptions to the cap on damages for noneconomic losses, but the legislature considered exceptions to the cap, balanced interests, and made a policy decision to include these exceptions and not others. "It is not the role of the courts to establish legislative policy or to second-guess policy choices the General Assembly makes." *Ohio Neighborhood Fin., Inc. v. Scott*, 2014-Ohio-2440, 139 Ohio St. 3d 536, 13 N.E.3d 1115, ¶ 38.

Additionally, "[a]lthough R.C. 2315.18 does limit certain types of noneconomic damages, those limits do not wholly deny persons a remedy for their injuries." *Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, at ¶ 47. "Injured persons not suffering the catastrophic injuries in R.C. 2315.18(B)(3) (for which there are no damages limits) may still recover their full economic damages and up to $350,000 in noneconomic damages, as well as punitive damages." *Id.* There is

no cap on punitive damages if "the defendant committed a felony in causing the injury, one of the elements of the felony is that it was committed purposely or knowingly, and the defendant was convicted of or pleaded guilty to the felony." *Id.* at ¶ 86. For example, in this case the jury awarded the Plaintiff-Appellant $100 million in punitive damages. No cap applies to the jury's punitive damages award in this case. Although Appellant and Amici may disagree with the cap on Plaintiff's noneconomic damages, they conveniently gloss over the fact that Appellant is still entitled to an uncapped ***$100 million award in punitive damages***.

In sum, R.C. 2315.18 was the result of a deliberative legislative process that included an extensive review of evidence and competing interests. This process ultimately culminated in a policy decision by the General Assembly to address the challenges that the civil litigation system placed on Ohio's economy by among other things, placing a cap on compensatory tort damages for certain noneconomic losses.

B. Appellant and Amici use legislative history improperly.

Appellant and Amici generally recognize the purpose of R.C. 2315.18 but disagree with the outcome of the legislative process. In turn, Appellant and Amici improperly use legislative history in an attempt to change the legislation and change the outcome of this case.

1. Appellant and Amici seek to usurp legislative prerogative and substitute a judiciary decision for the legislature's policy choices.

Assuming arguendo that R.C. 2315.18 is constitutional,[3] it is not proper for the Court to consider legislative history when attempting to discern how this statute, which is clear on its face, operates. *See Dundics v. Eric Petroleum Corp.*, 2018-Ohio-3826, 155 Ohio St. 3d 192, 120 N.E.3d 758, at ¶ 15 (O'Connor, J.) ("Because there is no ambiguity in the statute, we need look no further

[3] The constitutionality of this statute is beyond the scope of this brief and is discussed at-length in Appellee's merit brief and the briefs of other Amici Curiae in support of Appellee.

than its plain language."). When a statute's meaning is clear and unambiguous, the Court must exercise judicial restraint and apply the statute as written. *Bernardini v. Bd. of Ed. for Conneaut Area City Sch. Dist.*, 58 Ohio St. 2d 1, 4, 387 N.E.2d 1222, 1224 (1979). "[A] statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation." *Id.* Instead, the Court's "inquiry begins with the statutory text, and ends there as well[.]" *State ex rel. Plain Dealer Publ'g Co.*, 2005-Ohio-3807, 106 Ohio St. 3d 70, 831 N.E.2d 987, at ¶ 38.

It is generally undisputed that the cap on compensatory tort damages for noneconomic loss is clear and unambiguous under R.C. 2315.18. Thus, the Court's inquiry should start and stop there. However, the Appellant and Amici urge this court to consider and question the purpose of the statute. Their argument is a prime illustration of the issues with purposivism; it "suggests courts can simply ignore the enacted text and instead attempt to replace it with an amorphous 'purpose' that happens to match with the outcome one party wants." *Arangure v. Whitaker*, 911 F.3d 333, 345 (6th Cir. 2018). But the legislature establishes a statute's purpose "by negotiating, crafting, and enacting statutory text," and "[i]t is that text that controls, not a court's after-the-fact reevaluation of the purposes behind it." *Id.* Although attempting to discern a statute's purpose might be permissible when the text is ambiguous, the circumstances of this case do not authorize such an amorphous inquiry.

Appellant and the Amici also critique whether R.C. 2315.18 is effective at achieving its purpose. However, it is not the prerogative of the judiciary to assess the effectiveness of a statute. It is a prerogative of the legislature. *See Bernardini*, 58 Ohio St. 2d 1, 4, 387 N.E.2d 1222, 1224 ("[W]hether an act is wise or unwise is a question for the General Assembly and not this court."); *Dundics*, 2018-Ohio-3826, 155 Ohio St. 3d 192, 120 N.E.3d 758, at ¶ 10 ("[W]hether [a statute] makes sense is a policy question for the General Assembly to decide."). Likewise, it is not for the

court to question whether a more equitable statute can be crafted. It is for the legislature to consider. *See Bernardini*, 58 Ohio St. 2d 1, 5, 387 N.E.2d 1222, 1224–25 ("[E]ven if this court were to agree that a more equitable situation would arise under such an interpretation of the statute, the wisdom of what has already been enacted is not a subject of judicial concern.").

There have been several cases since R.C. 2315.18 was enacted where this statute has been applied, and the General Assembly has decided not to change the statute. For example, in *Simpkins*, this Court upheld the application of the statute's cap on compensatory damages for noneconomic losses in a case that involved a minor who was the victim of sexual assault. 2016-Ohio-8118, 149 Ohio St. 3d 307, 75 N.E.3d 122, ¶ 2. Nearly five years have passed since that decision and the legislature has not changed the statute to expand the exceptions to the damages cap to include such cases. "[S]uch legislative inaction in the face of longstanding judicial interpretations of [the statute] evidences legislative intent to retain existing law." *State v. Cichon*, 61 Ohio St. 2d 181, 183–84, 399 N.E.2d 1259, 1261 (1980); *Ohio Neighborhood Fin., Inc.*, 2014-Ohio-2440, 139 Ohio St. 3d 536, 13 N.E.3d 1115 at ¶ 37. Thus, the Court must apply this statute as written and as it has been applied in *Simpkins* and several other cases.

2. Appellant and Amici seek to create nonexistent legal standards and evidentiary thresholds for the legislature.

The General Assembly is not subject to a particular burden of proof or evidentiary threshold when enacting legislation. Nevertheless, Amici criticize the evidence reviewed by the General Assembly. The Court already considered this critique in *Arbino* and correctly concluded that "an intensive reexamination" of the evidence relied upon by the General Assembly "is beyond the scope" of the Court's review. 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420 at ¶ 58. It is not the role of the Court to "evaluate the information relied upon by the General Assembly and come to [their] own conclusions as to whether R.C. 2315.18 is warranted." *Id.* at ¶ 57. Further,

the U.S. Supreme Court has made clear that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 470, 202 S. Ct. 715, 66 L.Ed.2d 659. This Court recognizes this and has stated that the Court need not "cross check [the General Assembly's] findings to ensure that [the Court] would agree with its conclusions." *Arbino*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420 at ¶ 58. Thus, this argument is unavailing and must be rejected

IV. CONCLUSION

As Judge Harold Leventhal famously stated, Appellant and Amici's use of legislative history is akin to "looking over a crowd and picking out [their] friends." Appellant and Amici sorted through the statute and legislative history and have attempted to pick out what they could to try and change the outcome of a deliberate legislative process. That attempt fails. R.C. 2315.18 clearly and unambiguously represents a policy decision that was made by the General Assembly. This Court must apply the statute as written, as it has several times before, and affirm the appellate court's decision.

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The undersigned hereby certifies that a copy of the foregoing was filed with the Court's electronic filing system on November 24, 2021, and served via email upon the following:

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