IN THE SUPREME COURT OF OHIO

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

# MERIT BRIEF OF APPELLEE ROY POMPA

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## INTRODUCTION

This case should be dismissed as improvidently allowed for the reasons that follow.

- **Even after application of the noneconomic cap, Appellant still possesses a $114 million verdict in her favor.**
- **The Appellee is serving a life sentence and is uncollectable, thus no case or controversy remains.**
- **The Supreme Court does not issue advisory opinions.**

"Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary." *Hall China Co. v. Pub. Util. Comm.,* 50 Ohio St.2d 206, 210, 364 N.E.2d 852 (1977). Nevertheless, Appellant, who possesses a $114 million-plus ***uncollectible*** verdict, advances myriad constitutional claims for the putative purpose of securing a $134 million ***uncollectible*** verdict. A successful appeal affords her no actual or practical benefit. Accordingly, as they relate to the only person whose interest is before this Court, these constitutional challenges merely present hypotheticals from which advisory opinions are solicited. They do not arise to the level of a dispute and controversy justifying this Court's exercise of constitutional scrutiny.

- **Appellant's as-applied challenge is for a class for which she never sought class certification.**

Appellant purports to assert both "as-applied" and "facial" constitutional challenges to the constitutionality of R.C. 2315.18(B)(2). Yet, she conflates these contrasting and independent challenges in a transparent attempt to mask the fatal deficiencies in each, and ultimately does not present either a proper as-applied or facial challenge for this Court's consideration.

Specifically, given the fatal evidentiary deficiencies in her individual claim, Appellant casts her individual as-applied claim as a *de facto* class of persons ***whose claims are not before the Court*****:** all "minor victims of sexual abuse who suffer severe and permanent injuries." It is readily apparent that Appellant is not advancing a proper as-applied claim. Resolution of Proposition No. 1, as framed by Appellant, requires the Court to go ***"beyond the particular circumstances"*** of this case, and, if Appellant were to prevail, the Court's decision would render R.C. 2315.18 unconstitutional **"*not just as to*"** Appellant but also as to the uncertified *de facto* class of persons she does not represent and who are not before this Court. By this maneuver, Appellant attempts to cast her as-applied challenge as a quasi-facial challenge, albeit an improper one.

- **Appellant advances a facial challenge disguised as an as-applied challenge for a de facto class.**

The law strongly disfavors facial challenges, and thus Appellant also ignores the long-settled constitutional test in fashioning her facial challenge. Appellant perfunctorily styles her claim as a facial challenge in seeking reversal of *Arbino* (***but not*** *Simpkins* or *Wayt v. DHSC*). It is not. Appellant does not want the constitutionality of R.C. 23215.18(B)(2) considered in the context of automobile collision cases, medical malpractice claims, or the countless other garden-variety tort cases—even though she must establish "no set of circumstances exists under which the act would be valid." She specifically describes, for example, medical malpractice cases as **"*beyond*"** this Court's review here. Appellant instead attempts to limit the facial analysis to the most extreme of facts, thus effectively making it an as-applied challenge. These repeated contradictions within the settled constitutional framework not only highlight the

deficiencies in Appellant's arguments, they ultimately do not present appropriate constitutional questions for the Court's resolution.

- **Appellant failed to distinguish this case from *Simpkins*.**

Appellant's conflating of these distinct constitutional concepts is compelled out of necessity. Appellant failed to convince the Trial Court ***by the required clear and convincing evidence*** that application of R.C. 2315.18(B)(2) to her damages was unconstitutional. In fact, before the Trial Court, Appellant readily ***conceded*** the similarities between her case and the plaintiff's case in *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St. 307, 2016-Ohio-8118, 75 N.E.3d 122, which this Court had considered a mere three years earlier, but then failed to offer facts distinguishing this case from *Simpkins* that were either material or supported by the evidentiary record. The Eighth District affirmed the Trial Court's decision, specifically observing that Appellant's evidentiary submission was **"*equivocal*"** or failed to meet the required **"*clear and convincing*"** standard. A review of the testimony confirms the Eighth District's conclusion. The record is replete with evidence directly questioning whether the abuse proximately caused several components of Appellant's damages.

As such, there is ample "competent, credible evidence" supporting the Trial Court's rejection of Appellant's as-applied claim. We add that it cannot be reasonably argued the judicial system denied a litigant holding a $114 million judgment an adequate remedy. ***In fact, Appellant's $100 million punitive damages award exists because the General Assembly, in balancing and considering competing public concerns, specifically created an exception from the tort reform statutory caps to***

***provide unlimited punitive damages for this precise fact pattern***. *See* R.C. 2315.21(D)(6).

- **Appellant fails to satisfy the three prongs of the *Galatis* test. R.C. 2315.18(B)(2) is constitutional.**

"Facial challenges to the constitutionality of a statute are the most difficult to mount successfully, since the challenger must establish that ***no set of circumstances*** exists under which the act would be valid." *Wymsylo v. Bartee, Inc.,* 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, at ¶¶ 21-22 (emphasis added; citations omitted). R.C. 2315.18(B)(2) passed this test in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, and does once again here.

Beyond misframing the constitutional inquiry for a facial challenge, Appellant offers no cause for abandoning this Court's precedent under the three factors set forth in *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. Appellant's contention that *Arbino* was wrongly decided boils down to her claim that the Trial Court's application of the ***law*** to the jury's factual ***findings*** somehow runs afoul of her constitutional right to a jury. It, of course, does not.

There are two concurrent functions in play. The jury determines the facts; the judiciary applies the law. These respective roles are constitutionally discharged throughout the litigation process, including through Ohio's Civil and Evidence Rules and a trial court's jury charge. Application of the law constitutionally falls within the exclusive purview of the court, and in the case of R.C. 2315.18, Ohio courts are merely applying "the limits as a matter of law to the facts found by the jury; they do not alter the findings of fact themselves, thus avoiding constitutional conflicts." *Arbino* at ¶ 40. The Trial Court's application of the law, here a statutory cap, to the jury's factual determinations

does not infringe upon the jury's role, as numerous courts have found.[1] With the failure of this argument, so goes the balance of Appellant's legal arguments, since they are all premised upon the Court first finding a violation of the constitutional right to a jury and then applying strict scrutiny.

Appellant otherwise gives short shrift to the remaining *Galatis* considerations relating to the practical workability of this Court's precedent and whether its abandonment would create a hardship for those who have relied upon it. In each instance, she seeks to have these factors examined through the narrow factual lens of this case, with blinders applied to every other tort scenario. She conveniently ignores the straightforward and consistent application of the statutory caps to tens of thousands of cases in Ohio, and reliance upon this Court's precedent by the lower courts, practitioners, litigants who have compromised claims, and for-profit and non-profit businesses. In short, Appellant offers no basis for reversing this Court's precedent.

- **The legislature, not the courts, determines public policy.**

While this Court has specifically recognized there could eventually be a case where application of the damage caps to an award for noneconomic damages might run afoul of the Constitution, ***this is not that case***. *Simpkins* at ¶¶ 1, 42. This case merely invites the Court to reverse course and return to days gone where a jury verdict for substantial non-economic damages was just as likely to be the result of passion,

[1] The Court is referred to the *Amici Curiae* brief of the Chamber of Commerce of the United States of America, NFIB Small Business Legal Center, American Tort Reform Association, Coalition For Litigation Justice, Inc., and American Property Casualty Insurance Association In Support of Appellee's Position on the Constitutionality of R.C. 2315.18. The *Amici* provide a survey of other states confronting the constitutionality of tort reform measures, including those many courts holding that statutory caps do not infringe upon the respective states' constitutional right to a jury trial.

prejudice, and other impermissible biases as it was the result of actual harm to the claimant, thus creating a system yielding unfairness and inequality in jury verdicts among similarly situated claimants. It was within the General Assembly's policy making discretion to put an end to such disparity. Those are days that should remain firmly in Ohio's past.

The Court should dismiss this appeal has having been improvidently granted, or alternatively, affirm the Eighth District's decision.

## STATEMENT OF FACTS

### A. The Jury's Resolution Of Appellant's Non-Constitutional Claims.

Appellee's criminal conduct is undisputed here. On June 12, 2007, Appellee was convicted of rape and related charges. [Am. Compl. ¶ 21] These convictions included the molestation of Appellant, who was age 11 and 12 during the abuse, in 2004 and 2005. Appellee was sentenced to life in prison without parole and resides in the Marion Correctional Institution. [*Id.* ¶ 22] ***Thus, also undisputed is that Appellee is judgment proof.***

Over a decade later, in June 2018, Appellant filed a complaint against Appellee and his wife, asserting claims for intentional criminal wrongdoing, knowing dissemination of child pornography, and intentional infliction of emotional distress, among others. Appellant also sought a declaration that, ***as applied*** to the facts of her case, R.C. 2315.18 is unconstitutional. The parties tried this case to a jury on all claims against Appellee, except for the constitutional challenge, on November 18, 2019.[2]

[2] Appellant settled her claims against Appellee's spouse on a pre-trial basis.

At trial, the jury heard the parties' stipulation establishing Appellee's convictions for his offenses against Appellant and watched Appellee's videotaped deposition. Appellant also offered testimony from herself, her mother, and Dr. Patrick Yingling.[3]

Judge Janet Burnside instructed the jury that liability was undisputed and, thus, the jury's task was limited to determining what compensatory and punitive damages to award—emphasizing that the preponderance standard required only a tipping of "the scales ever so slightly" in Appellant's favor on the issues of compensatory damages. [Tr. 114, 123-27.] ***The Trial Court then specifically instructed the jury it could not consider Appellee's "ability to pay a verdict for compensatory damages" in rendering its verdict***. [Tr. 134 (emphasis added).] Appellant asked for a $100 million verdict in closing. [Tr. at 141] The jury responded by returning a verdict in the amount of $14 million for noneconomic damages for acts occurring before 2005, $20 million for noneconomic damages for acts occurring after 2005; and $100 million in punitive damages, for a total of $134 million. [Tr. 159-160] The court also awarded $206,861.43 for costs and attorneys' fees. [Final Judgment Entry]

### B. The Lower Courts' Consideration Of Appellant's Constitutional Challenge.

#### 1. Appellant Made No Further Evidentiary Submissions To Support Her Constitutional Challenge Before The Trial Court.

The Trial Court considered the constitutional challenge after the jury returned its verdict. It was Appellee, not Appellant, who ultimately placed this matter at issue by submitting his Post-Trial Brief. Appellant's brief made no challenge to the jury's punitive damage award or the compensatory award for acts occurring before 2005, the two of

[3] Appellee addresses the testimony of each of these witnesses below.

which totaled $114 million. Appellee's singular request was that the Trial Court apply R.C. 2315.18 and reduce the compensatory damages for acts occurring after 2005 from $20 million to $250,000.

In response, Appellant ***did not*** request a bench trial, or an evidentiary hearing, on the constitutional challenge. Appellant ***did not*** offer any additional evidence in support of her constitutional challenge, even though she had judicially admitted in her complaint that Appellee had been "sentenced to life without parole" and resided in the Marion Correctional Institution. [Am. Compl. ¶ 22.] Specifically, Appellant ***did not*** present for the Trial Court's consideration:

- Any evidence that Appellee had the ability to pay, or even the prospect of ever paying, a judgment exceeding $114 million, let alone the original verdict amount of $134 million (exclusive of fees), in order to establish a justiciable dispute necessitating a constitutional inquiry.

- Any of the multiple expert reports, research and studies cited in her Merit Brief before this Court—all of which are outside the trial record, not properly before this Court, and are evidence that would have been, if offered before the Trial Court, subject to the limitations imposed by the Ohio Evidence Rules, including Rule 702 (testimony by experts), Rule 703 (Ohio's rule restricting the basis for testifying experts' opinions), and Rule 802 (hearsay).

### 2. Appellant's Concession To The Trial Court: The Instant Case Is Substantially The Same As *Simpkins*.

Instead, Appellant's written submission consisted of a 5½-page legal memorandum very briefly identifying the legal theories in this case[4] but then ***conceding*** the similarities of Appellant's case with that of the plaintiff's in *Simpkins*.

[4] For example, in support of her argument that R.C. 2315.18 violated her right to due course under law under Article I, Section 16, of the Ohio Constitution, Appellant merely introduced the constitutional provision and then confined her argument to one sentence: "The application of R.C. 2315.18's damage caps to Amanda Brandt, a minor victim of sexual abuse, is not rationally related to the public's health, safety or welfare

> ***[Appellant] also concedes there are factual similarities [with Simpkins]***. Both were minor females raped by much older men. Both suffered PTSD and anxiety. Both engaged in post rape substance abuse. [Appellant] became a heroin addict. (Although not reflected in the Supreme Court's decision, trial testimony indicated Jessica Simpkins began to abuse alcohol). Neither suffered "catastrophic" physical injuries. [Appellant] attempted suicide. Jessica contemplated suicide. (Although not reflected in the Supreme Court's decision, the trial court record indicates that Jessica wrote a note to her friend after the rape, "Help me. I don't want to live this life anymore.") Both experience nightmares.
>
> [(Emphasis added.) Appellant's Opposition to Appellee's Post-Trial Brief, at 5.]

Before the Trial Court, Appellant purported to identify only three differences between the instant case and the recently decided *Simpkins* case.

> However, [Appellant], in addition to becoming a heroin addict, [1] lost her job, and [2] became homeless. The trial court heard the [3] post-abuse changes described by her mother, including plummeting grades. The Supreme Court in Simpkins . . . left open the question of whether a set of facts would justify declaring the law unconstitutional. Plaintiff suggests the facts of this case are "bad enough" to justify declaring Ohio R. C. 2215.18 unconstitutional.
>
> [*Id.* at 6 (brackets added)][5]

Appellant ***did not*** argue there were grounds for departing from the doctrine of *stare decisis*; and Appellant certainly ***did not*** present the Trial Court with any evidence relevant to the three-part test applied for identifying a "special justification" for circumventing this Court's precedent. *See Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 48.

Given Appellant's admissions and the state of the evidence (as explained below), the Trial Court unsurprisingly applied R.C. 2315.18 and reduced the judgment.[6] As for

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and is both unreasonable and arbitrary." [Plaintiff's Memorandum in Opposition to Defendant's Post-Trial Brief, at 2.] That was the entirety of the argument.

[5] These purported distinctions are addressed below.

her constitutional challenge, Appellant stipulated to its ***summary resolution***: the Trial Court found "and the parties agree that [the ruling on Appellee's post-judgment motion] . . . in effect litigates the completion [of Appellant's] declaratory judgment claim in her complaint," and then entered judgment in favor of Appellee. [1/21/20 Entry.]

### 3. The Eighth District Court Of Appeals Finds The Record Is Equivocal And Conflicting And Rejects Appellant's Constitutional Claim.

Appellant appealed to the Eighth District, which conducted a careful review of the trial record in considering Appellant's constitutional challenge under *Simpkins*. The Eighth District's analysis includes an extensive discussion of the evidentiary record. In rejecting Appellant's as-applied constitutional claim, the court specifically observed the evidentiary issues with Appellant's factual submission, concluding that Appellant failed to offer the required clear and convincing proof:

> . . . The evidence indicates that [Appellant] 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.
>
> ***But the evidence also indicates that [Appellant] 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.

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[6] The Trial Court was permitted to make its own determination and was not bound by the jury's determination. The jury considered whether Appellant established her non-economic damages by a preponderance of the evidence. And although the jury applied the clear and convincing standard in determining the availability of punitive damages, the inquiry was different and very limited, *i.e.*, did Appellee act with malice?

> ***Moreover, the evidence is not clear that all of [Appellant's] mental health issues and the negative events that occurred in her life after the abuse are attributable to the sexual abuse***. [***Appellant's] testimony seems to indicates [sic] that she chose to be homeless in order to be with her boyfriend, who did not have housing***. And although Dr. Yingling attributed [Appellant's] PTSD to the sexual abuse, he conceded that an abusive relationship, such as [Appellant'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 [Appellant] about those relationships with any level of detail. He further admitted that there is a family history of substance abuse issues in [Appellant's] family, and that one of her relatives had attempted suicide. He also admitted that it is impossible to know when [Appellant] "officially had PTSD" or how long her symptoms will continue.
>
> We recognize that [Appellant] 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***. . . .
>
> [(Emphasis added.) *Brandt v. Pompa*, 2021-Ohio-845, 169 N.E.3d 285, ¶¶ 47-50 (8th Dist.).]

Finding the evidence offered to be **"*equivocal*"** (including on the three factual elements offered to distinguish *Simpkins*), the Eighth District found that Appellant did not meet the "'extreme qualifications' the law requires in order to avoid the operation of the damage caps in R.C. 2315.18(B)(2)."

## ARGUMENT

### A. The Instant Appeal Was Improvidently Granted.

The Court should dismiss this matter as having been improvidently granted. S.Ct.Prac.R. 7.10. Fundamental and related propositions of Ohio law compel this result. First, "[i]t has been long and well established that it is the duty of every judicial

tribunal to decide actual controversies between parties legitimately affected by specific facts ***and to render judgments which can be carried into effect***." (Emphasis added.) *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). "Every court must 'refrain from giving opinions on abstract propositions and * * * avoid the imposition by judgment of premature declarations or advice upon potential controversies.'" *Arbino* at ¶ 84.

Hence, this Court has repeatedly held it "will not indulge in advisory opinions." *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18. *Accord: State ex rel. Sawyer v. Cendroski,* 118 Ohio St.3d 50, 2008-Ohio-1771, 885 N.E.2d 938, ¶ 10 (dismissing case involving recall petition because the politician left office was "consistent with our general rule that we will not issue advisory opinions").

Second, "Ohio law abounds with precedent to the effect that constitutional issues should not be decided ***unless absolutely necessary***." (Emphasis added.) *Hall China Co.* at 210. *See also State v. Talty,* 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201 (same). "The general principle [is] that one who invokes the power of the court to declare a statute or ordinance unconstitutional must be able to show that he has sustained, or is in immediate danger of sustaining, some direct injury as a result of the enforcement of the legislation." *State ex rel. Lieux v. Westlake,* 154 Ohio St. 412, 418, 96 N.E.2d 414 (1951).

These propositions, both individually and collectively, make clear this matter is not properly before this Court. Practically, Appellant's proposed Propositions of Law seek the resolution of a series of hypothetical constitutional law questions, the

resolution of which will not alter the ultimate result for Appellant. No tangible interest, economic or otherwise, is in fact at stake, as made clear by the Trial Court record. Appellant judicially admits in her Amended Complaint that Appellee will remain imprisoned and is thus unemployed, beyond nominal prison wages, ***for the remainder of his life***. Appellant secured a judgment in excess of $114 million, and it remains unsatisfied. If Appellant were to prevail, her judgment would be increased by more than $20 million, to $134 million-plus. Regardless of whether the judgment is $114 million or $134 million, the result is the same: ***Appellee is judgment-proof***. And, as noted above, Appellant made no effort before the Trial Court to establish otherwise.

Thus, while the Court's consideration of these hypotheticals is of interest to the *Amici*, they have no material or practical consequence for Appellant herself. Any decision will have no practical effect of the Appellant's inability to recover damages. These hypotheticals, therefore, seek an impermissible advisory opinion or, at the very least, violate the admonition that constitutional issues should not be resolved unless absolutely necessary.

**APPELLANT'S FIRST PROPOSITION OF LAW: 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.**

**A. Standard of Review.**

**1. The Trial Court's Factual Determinations Must Be Accepted Unless Clearly Erroneous.**

Under *Simpkins*, Appellant's "as applied" constitutional challenge raises factual issues. "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." (Emphasis added.) *Simpkins* at ¶ 22. By contrast, facial challenges present mixed questions of fact and law.

While questions of law are subject to a *de novo* standard of review, the Trial Court's factual determinations are subject to deference and the clearly erroneous standard of review. *See State v. Clemons*, 2013-Ohio-5131, 2 N.E.3d 930, ¶ 13 (8th Dist.) (applying "a de novo standard of review to the legal issues but afford[ing] great deference to the findings of fact made by the trial judge" in an appeal raising an alleged due process violation); *State v. Miller*, 9th Dist. Medina No. 07CA0037-M, 2008-Ohio-1002, ¶ 6 ("When reviewing an appellant's claim that he was denied his right to a speedy trial, this Court applies the de novo standard of review to questions of law and the clearly erroneous standard of review to questions of fact."); *Adkins v. Stow City Sch. Dist. Bd. of Educ.*, 70 Ohio App.3d 532, 535, 591 N.E.2d 795 (9th Dist. 1990) (in the First Amendment context, "the trial court's determinations of fact are entitled to substantial deference").

Under this standard of review, a trial court's factual findings will not be reversed so long as "some competent, credible evidence" supports the decision. *Kinney v. Mathias*, 10 Ohio St.3d 72, 74, 461 N.E.2d 901 (1984). *Accord: State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8 (mixed questions of law and fact require appellate court to "accept the trial court's findings of fact if they are supported by competent, credible evidence"). An appellate court reviewing a trial court's factual findings "should not substitute its judgment for that of the trial court…." *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 355, 671 N.E.2d 1136 (1993). After all, the trial court "is best able to view the witnesses and observe their demeanor, gestures and

voice inflections, and use these observations in weighing the credibility of the proffered testimony." *In re Jane Doe 1*, 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991). *See Stevens v. Highland Cty. Bd. of Comm'rs*, 4th Dist. Highland No. 04CA21, 2005-Ohio-2338, ¶ 10 (same).

**2. The Trial Court Found Plaintiff Failed To Prove By Clear and Convincing Evidence That R.C. 2315.18(B)(2) Is Unconstitutional As Applied To The Instant Facts.**

The Trial Court "is presumed to [have] follow[ed] the applicable law in all respects." *In re Disqualification of Martin v. Marsh*, 36 Ohio St.3d 603, 604, 522 N.E.2d 457 (1987). *State v. Lloyd*, 12th Dist. Warren No. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶ 28 (12th Dist.) (same). This presumption cannot be challenged here inasmuch as the Trial Court specifically cites *Simpkins* in adjudicating the constitutional challenge.

Ohio law also presumes the trial court properly "considered the evidence and appropriately applied the evidence to the applicable law." *Stevens* at ¶ 15 (where court did not issue findings of fact and conclusions of law, the reviewing court "must, therefore, presume the regularity of the proceedings and that the trial court considered the evidence and appropriately applied the evidence to the applicable law"). The lack of specific factual findings does not diminish this presumption. *See State v. Adams*, 37 Ohio St.3d 295, 297 (1988) ("we hold that a silent record raises the presumption that a trial court considered the [sentencing factors] contained in R.C. 2929.12"); *State ex rel. Fulton v. Halliday*, 142 Ohio St. 548, 549 (1944) ("The proceedings of a trial court are deemed correct unless error affirmatively appears on the face of the record."). In *Makranczy v. Gelfand*, 109 Ohio St. 325, 331, 333-335 (1924), for example, this Court

affirmed a trial court's decision vacating a dismissal entry even though the "record [was] entirely silent as to what evidence the court acted upon," because "the presumption of the law is that the action of the court is legal until the contrary affirmatively appears, and the burden is upon one who claims the existence of error to affirmatively so show."

The Trial Court found, based upon its assessment of the record evidence, that Appellant failed to establish by clear and convincing evidence that application of the R.C. 2315.18(B)(2) to her damages was unconstitutional.

### 3. Appellant (And The *Amici*) Cannot Challenge The Trial Court's Factual Determinations By Relying Upon Evidence Outside The Record.

Appellant and the *Amici* attempt to remedy this lack of evidence by offering materials not contained in the record and thus not presented to the Trial Court in the first instance. But that approach fails. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. The Court must therefore disregard the efforts by Appellant and the *Amici* to bolster their arguments by offering medical opinions and data outside of the trial record.[7]

[7] These materials not properly considered by the Court include the following citations by Appellant: Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1301 (2004); *Economy Rankings: Measuring states' economic stability and potential*, U.S. NEWS & WORLD REPORT (2021), https://www.usnews.com/news/best-states/rankings/economy; *Mental Health Disorder Statistics*, JOHNS HOPKINS MEDICINE, https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics; *Mental Illness*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/mental-illness/symptoms-causes/syc-20374968; *Mental health matters*, 8 The Lancet Global Health E1352 (2020).

### B. The Trial Court Did Not Abuse Its Discretion In Rejecting Appellant's As-Applied Constitutional Challenge.

#### 1. To Overcome The Presumption of Constitutionality, Appellant Must Prove By Clear And Convincing Evidence That R.C. 2315.18(B) Is Unconstitutional As Applied To The Instant Facts.

Appellant repeatedly tries to muddy the distinction between a "facial" and an "as-applied" constitutional challenge to a statute, but the differences are well established:

> A facial challenge alleges that a statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate governmental purpose. ***Facial challenges to the constitutionality of a statute are the most difficult to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid***. If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances. When determining whether a law is facially invalid, a court must be careful not to exceed the statute's actual language and speculate about hypothetical or imaginary cases. Reference to extrinsic facts is not required to resolve a facial challenge.
>
> A party raising an as-applied constitutional challenge, on the other hand, alleges that the application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative. ***Because an as-applied challenge depends upon a particular set of facts, this type of constitutional challenge to a rule must be raised before the [lower court] to develop the necessary factual record***.

(Citations and quotations omitted.) (Emphasis added.) *Wymsylo* at ¶¶ 21- 22.

"A party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statue is unconstitutional when applied to an existing set of facts." *Simpkins* at ¶ 22. The proposition that "all statutes are entitled to a strong presumption of constitutionality," applies with equal force in an as-applied constitutional challenge. *Id.*

### 2. Appellant Improperly Attempts To Advance A Facial Challenge As An As-Applied Constitutional Challenge.

As a preliminary matter, Appellant, despite styling it as a "as-applied" challenge, actually presents a facial challenge. Appellant seeks to address the constitutionality of R.C. 2315.18 as "applied" to a ***de facto class*** of persons ***whose claims are not before the Court*** without having sought class certification: she seeks a blanket exemption for all "minor victims of sexual abuse who suffer severe and permanent injuries." Absent from Appellant's Brief is any pretense that the Court's consideration should be limited to her, or her particular circumstances and facts, or even the evidentiary record presented below.

The types and range of damages for a class of persons "who suffer severe and permanent injuries" are diverse, unique to the individuals, and fall across a far-ranging continuum of possibilities. Appellant does not even attempt to limit her *de facto* class to victims who have suffered non-economic damages or to exclude those who recovered substantial damages not subject to a statutory cap: economic, catastrophic, or punitive. She draws no distinction between minors with limited exposure to criminal conduct and those with substantial exposure. All would be exempt from the statutory caps according to Appellant.

***Challenges that "reach beyond the particular circumstances" of a case*** must satisfy "standards for a facial challenge to the extent of that reach." (Emphasis added.) *John Doe No. 1 v. Reed*, 561 U.S. 186, 194, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010).[8] "The label [facial vs. as-applied] is not what matters." *Bucklew v. Precythe*,

[8] In *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509 (6th Cir. 2012), for example, the Sixth Circuit held that a purportedly as-applied challenge to legislation

139 S.Ct. 1112, 1127-28, 203 L.Ed.2d 521 (2019). On point is *Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Supreme Court, on Grievances*, No. 1:13cv435, 2017 WL 1177576, *5 (S.D. Ohio Mar. 30, 2017), where the court rejected plaintiffs' attempt to style their claim as an-applied constitutional attack. There, a lawyer who intended to run for judicial office and his campaign committee challenged Ohio's prohibition on public political speeches by judicial candidates and several other limitations on judicial candidates. *Platt* at *1. The plaintiffs claimed that they were challenging the rules as applied to plaintiffs and other non-incumbent judicial candidates. *Id.* at *1, 5. The court rejected plaintiffs' characterization of their suit, holding that the challenge was facial because "it is not limited to Plaintiffs' particular case, but instead challenges application of the law more broadly to all non-incumbent judicial candidates." *Id.* at *5. *See also Ison v. Madison Local Sch. Bd.*, 395 F.Supp.3d 923, 931 (S.D. Ohio 2019) (Citing *Reed*, the court held that the challenge to a policy was facial because the plaintiffs were "seeking the invalidation of particular sections of the Policy, and not merely a change in the application of the Policy to Plaintiff.").

The same is true here. Resolution of Proposition No. 1 requires the Court to go "beyond the particular circumstances" of this case, and, if Appellant were to prevail, the

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requiring warning labels for tobacco products should be analyzed as a facial challenge. The concurring opinion explained the reasoning for this holding. The act required textual and graphic warning labels, which the FDA was required to design and promulgate. *Id.* at 552. The plaintiffs claimed their suit was as-applied because it challenged the specific images the FDA selected. *Id.* Rejecting this argument, the concurring opinion explained that the "relief flowing from [plaintiffs' claim that the warnings violated the First Amendment], should they prevail, would render the warnings unconstitutional with respect to any tobacco-product manufacturer, retailer, distributor, or importer, ***not just the specific entities that are a party to this lawsuit*****."** *Id.* (emphasis added). Because of the broad impact of the relief, *John Doe # 1 v. Reed* required analyzing this issue as a facial challenge. *Id.*

Court's decision would render R.C. 2315.18 unconstitutional "not just as to" Appellant but also as to the uncertified *de facto* class she has framed. Appellant has therefore transformed her "as-applied" challenge into a facial challenge—a challenge previously resolved by this Court in *Arbino* and one that fails again for the reasons explained *infra*.

### 3. The "Equivocal" Record Presented To The Trial Court.

Nevertheless, we will address whether the Trial Court erred in rejecting Appellant's as-applied claim ***as to her*** by first examining the **"*equivocal*"** trial court record. Appellant elicited testimony from three sources: herself, her mother, and Dr. Patrick Yingling. The Trial Court was entitled, of course, to assess the credibility of each and determine what weight to accord such testimony.

#### a. Appellant's Testimony.

Appellant, who was 26 years old at the time of trial, testified first. [Tr. at 17-64] Her testimony included some background of her childhood and her parents' service as foster parents; a description of the incidents and circumstances of the abuse; and her reading to the jury a letter she had written, as a 12-year-old, to the trial judge in the criminal trial before Appellee's sentencing. This letter described her mental status some 14 years earlier. Appellant also testified that she suffers from PTSD and anxiety issues attributable to the abuse. She described her anxiety attacks, as well as her nightmares, medication, and counseling. [Tr. 30, 33-35]

However, notwithstanding these challenges, Appellant had graduated from high school in 2011 and completed an EMT program and became a certified nursing assistant. [Tr. 35; Dep. Tr. 17] She then voluntarily left her family home, secured a job with a customer call center, and found her own apartment. She later lost her

employment when she could not fulfill her job requirements. Appellant then pursued door-to-door sales. Unfortunately, there she met a co-worker who was a heroin addict. Appellant began using heroin and became addicted. [Tr. 36]

Being unsuccessful at her door-to-door sales job, Appellant lost her apartment. Rather than returning to her parents, however, Appellant moved to Michigan to join a man she had met online. Appellant explained she moved to Michigan because she "liked the idea of being able to go somewhere and make a life for myself." The Michigan man was also a drug addict. Appellant and he lived in a tent for approximately a year. [Tr. 37]

Appellant later returned to her parents' home. There, she attempted to commit suicide by overdosing on heroin. Upon her discharge from the hospital, Appellant began attending Narcotics Anonymous and had been "clean" for six years as of the date of trial. [Tr. 38] Appellant later married and at the time of trial had a 4-year-old daughter and 9-month-old son. [Tr. 18] Appellant has worked part-time as a waitress and completed the necessary class to obtain her real estate licensee for a future career in real estate. [Tr. 41]

**b. <u>The Questions Posed By The Jury To Appellant.</u>**

The Trial Court permitted the jurors to submit questions to Appellant after counsels' examination. Several of the questions posed are denoted below and provide insight into how the jury perceived several elements of Appellant's testimony.

- **"Why did you move out of your parents' home after graduation from high school?"**

This question was prompted by Appellant's testimony of her temporary homelessness. Appellant responded that she liked the idea of being on her own. She

characterized her parents' home as a positive environment. Her parents are Christians and very family-oriented, but Appellant "liked to have her own space so was eager to be on her own." [Tr. 66] In short, Appellant voluntarily left a supportive home environment.

- **"Why didn't you move back to your parents' home after you lost your apartment?"**

Appellant testified that after she lost her apartment, it was her choice not to return home. [Tr. 66-67] She explained that it was just the beginning of her drug addiction (although she was not quite sure she was addicted yet and her decision was in large part due to having met someone online). Appellant liked the idea of being able to go somewhere else and make a life for herself with someone else more than coming home. [Tr. 67]

- **"Why did you choose a retail business to work at? Weren't there other employment with less noise and people that would have helped with your anxiety?"**

Given Appellant's testimony about the anxiety she feels from large crowds, a juror challenged Appellant's work choice by this question.

- **"Do you feel that your parents focusing on foster children instead of you since the foster children were, as you described it, high time consuming children that could have led to negative feelings, low self esteem, confidence on your part and maybe some of your other mental health issues?"**

Appellant's parents hosted as many as nine children at a time, only one of which was her biological sibling. [Tr. 72] Her mother had testified that home sometime looked like a hospital ward given some of the challenging foster-home placements that were made, and often a nurse would be at the home. [Tr.75-77] ***Here, one of the jurors specifically questioned the proximate cause of Appellant's mental health issues and suggested an alternative cause***.

### c. Appellant's Mother's Testimony.

Appellant's mother was the next to testify. [Tr. 75-81] Her direct examination consisted of four pages of transcript, with two pages covering her observations on how Appellee's acts had generally impacted Appellant's childhood and only eight lines of transcript offering generalities concerning Appellee's impact on Appellant's "teen years and even adult life." [Tr. 78]. The cross-examination highlighted that the mother had only a limited understanding of Appellant's health and mental well-being as an adult. For example, the mother confirmed that Appellant had not been prescribed any treatment medication while she lived at home (through the age of 18). [Tr. 78.] But in response to questions relating to Appellant's time as an "adult," the mother offered no answer other than to reply that counsel would need to pose the questions to Appellant.

### d. Dr. Yingling's Testimony.

The final witness, Dr. Patrick Yingling, testified via videotape. Dr. Yingling received an oral history from Appellant and administered the Minnesota Multiphasic Personality Inventory ("MMPI"). [Dep. Tr. at 13] In light of her responses to the test and his review of medical records and other documents, he opined that Appellant suffers from PTSD as a result of Appellee's sexual abuse—although he could not identify the onset date for the PTSD. [Dep. Tr. 40, 110, 112] He further opined that her symptoms would continue "with some degree of intensity" for a "significant" time and that she would benefit from ongoing psychotherapy and medication. [Dep. Tr. at 42]

However, Dr. Yingling's testimony also undercut Appellant's claim in multiple respects. The MMPI consists of 567 questions, with the responses to questions 371-567 designed to assist in interpreting the presented data. [Dep. Tr. 33-35.] On direct

examination, Dr. Yingling noted that "[t]he results indicated that [Appellant's] responses to the later portion of the evaluation were somewhat more ***exaggerated***." [*Id.* 34 (emphasis added)] He reconfirmed this point on cross-examination and stated that Appellant's exaggerated responses had rendered the "responses invalid." [*Id.* 61]

On cross, Dr. Yingling also conceded the existence of other events and "stressors" that could have impacted his opinion, caused or attributed to Appellant's PTSD, and/or served as the cause for other challenges and issues in Appellant's life. Specifically:

(a) Dr. Yingling testified that it would be important to know about an abusive relationship when diagnosing PTSD because such a relationship can contribute to PTSD, and, here, such information would have been important to Appellant's diagnosis and his opinion. [Dep. Tr. 57-68] However, Appellant did not disclose to Dr. Yingling in her interview that she had an abusive boyfriend, although the available medical records reflected that Appellant had had a "shitty boyfriend that abused her." [Dep. Tr. 72; 106]

(b) Dr. Yingling conceded on cross-examination it was important to know whether Appellant had historically had a "rocky relationship with her parents"—this was important in assessing why someone had PTSD. [Dep. Tr. 55-56, 84] Yet Dr. Yingling made no inquiry of Appellant's historical relationship with her parents and she had not voluntarily disclosed the "family problems reflected in her medical records." [*Id.* at 84, 118]

(c) Dr. Yingling explained that Appellant had denied a family history of substance abuse issues. [Dep. Tr. 56] However, Appellant's own deposition suggested

a “family history of substance abuse issues” [Dep. Tr. 57], and her medical records identified many family members with substance abuse issues. [Dep. Tr. 107, 116].

(d) Dr. Yingling conceded that the medical records he reviewed indicated that Appellant attempted suicide more than once but that she mentioned the one attempt that occurred during her drug addiction. [Dep. Tr. 58.] Dr. Yingling testified further that he had observed in the medical records that several other family members had attempted suicide, but these were not disclosed to him. [Dep. Tr. 58, 85, 116] These same records reflected that her immediate family—grandmother, aunt, uncle, and sister—also had mental health issues. [Dep. Tr. 85]

(e) Most importantly, Dr. Yingling identified other events that could have caused or at least be attributed to Appellant’s PTSD: her attempted suicide [Dep. Tr. 76]; her miscarriage [Dep. Tr. 106]; her homelessness [60-61]; her overdosing on heroin [77]; her seizure [79]; extreme socioeconomic factors [82]; her voluntarily appearing on the Oprah Winfrey show and recounting the trauma outside of a clinical treatment program [91-92]; and even poor financial management [100]. ***Proving the point, Appellant’s sister suffers from anxiety and PTSD but had not been sexually abused.*** [Dep. Tr. 86]

Thus, there was ample “competent, credible evidence” to support the Trial Court’s determination Appellant had failed to satisfy her clear and convincing burden.

#### 4. This Case Is Indistinguishable From *Simpkins* And The Trial Court Could Otherwise Readily Find That The Three Limited Distinctions Offered By Appellant Were Factual Distinctions Of No Substantive Import Or Events Not Proximately Caused By The Abuse.

Before the Trial Court, Appellant conceded the factual parallels with *Simpkins*, except for her purported identification of three additional "facts": (1) loss of employment; (2) homelessness; and the (3) "post-abuse changes described by her mother." We submit that none of these three "facts" demonstrates any material distinction from the facts presented in *Simpkins*. Indeed, the seven-line transcript description offered by her mother of Appellant's condition offers no distinction from the circumstances found in *Simpkins.* These items are within the same category of symptoms or results considered in *Simpkins* and found to be insufficient to support an as-applied challenge.

Moreover, the other two purported distinctions are not of substantive consequence. The record does not support the conclusion that Appellant's homelessness was caused by any abuse. To be clear, Dr. Yingling could not "causally connect" the abuse with her homelessness. [Dep. Tr. 73] And the record is otherwise clear that Appellant voluntarily left her parents' home and elected not to return after she lost her apartment because of her personal desires to branch out on her own. Medical records before the Trial Court also attributed her lack of employment to her drug use, which is unsurprising given Appellant began her drug use with a co-worker and became addicted while employed. It was only after the addiction developed that she lost her employment and moved to Michigan where she lived for a year in a tent with a man she had met on the internet. [Dep. Tr. 104-05]

Accordingly, by Applicant's own admission, the presented facts are indistinguishable from *Simpkins*, save for one notable exception: after application of the statutory cap, Plaintiff's judgment in *Simpkins* was $500,000 (with her $3.5 million in non-economic damages reduced from $3.5 million to $350,000) whereas Appellant's exceeds $114 million.

**5. Irrespective Of The Similarity Of The Facts Of This Case To The Facts Of *Simpkins*, The Trial Court Did Not Abuse Its Discretion In Finding Appellant Had Failed To Prove Her Case By Clear And Convincing Evidence And Failed To Overcome The Presumption Of Constitutionality.**

We submit the lower courts' factual determinations are fatal to each of Appellant's as-applied challenges. But importantly, Appellant ***did not*** advocate for a reversal of *Simpkins* before the lower court, and even before this Court Appellant ***did not*** posit the reversal of *Simpkins* as a proposed proposition of law or otherwise advance such an argument in her Merit Brief. Thus, the doctrines of waiver and ***stare decisis*** compel the same result on the legal issues included in her "as-applied" claim.

**a. Appellant Has Not Proven By Clear And Convincing Evidence A Violation Of The Right To A Jury Trial Under Section 5, Article I, Of The Ohio Constitution.**

We next address each of the Appellant's arguments in the same sequence addressed in *Simpkins*. Appellant's as-applied argument on this first point is limited because it is, in effect, a facial challenge. Appellant summarily declares, of course, that applying R.C. 2315.18 to her class of minor victims of sexual abuse intrudes on the jury's findings of fact. But Appellant supports her claim with nothing more than two decisions from other states, one from Georgia and the other Kansas, where the respective Supreme Courts sustained facial challenges and, in so doing, specifically

refused to follow the many other authorities from states across the country, including *Arbino*, that had rejected such facial claims. *See Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* 286 Ga. 731, 691 S.E.2d 218, 224, fn. 8 (Ga. 2010) (declining to follow *Arbino)*; *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509, 522 (Kansas 2019) (same).

At bottom, and just as in *Simpkins*, "application of the damage caps does not affect [Appellant or her class of minor victims'] right to a jury trial any differently than it affects any tort claimant whose damages are capped as a matter of law." *Simpkins* at ¶ 25. Indeed, Appellant makes no attempt to prove otherwise, and thus failed to demonstrate by clear and convincing evidence that R.C. 2315.18 violates the right to a jury trial when applied to the facts of this case.

**b. Appellant Has Not Proven By Clear And Convincing Evidence A Violation Of The Right To Open Courts And Remedy Under Section 16, Article I, Of The Ohio Constitution.**

Appellant's argument here is indistinguishable from and, in large part, a verbatim repetition of the argument presented to this Court in *Simpkins*. The same inapposite law is cited and the general assertion is restated that "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." [Merit Brief, at 24; *see Simpkins* Merit Brief, at 25]

Again, the unchallenged *Simpkins* precedent on this point is dispositive: "[Appellant] do[es] not demonstrate that R.C. 2315.18 affects [her] differently than it does any other tort plaintiff. ... And neither the amount of the reduction of noneconomic damages nor [Appellant's] assertion that minors who are victims of sexual assault will

generally have noneconomic damages that far outweigh their economic damages demonstrate that those victims are denied a meaningful remedy." *Simpkins* at ¶ 31.

More fundamentally, the constitutional rights to open courts and remedy under Article I, Section 16, of the Ohio Constitution only "requires an opportunity granted at a meaningful time and in a meaningful manner." *Id.* at ¶ 29. "The General Assembly has the authority to determine what causes of action the law will recognize, to alter the common law by abolishing, defining or limiting those causes of action, and to determine what remedies are available." *Id.*

A constitutional challenge requires evidence that an individual has been prevented from pursuing relief for her injuries. Having received a judgment exceeding $114 million, Appellant cannot credibly be heard to argue that she has been prevented or foreclosed from securing meaningful relief. Both under *Simpkins* and under the specific facts presented, this claim fails.

**c. Appellant Has Not Proven By Clear And Convincing Evidence That R.C. 2315.18, As Applied, Violates Her Right To Due Course Of Law Under Article I, Section 16, Of The Ohio Constitution.**

So, too, here, Appellant's as-applied challenge is a restatement of the Merit Brief in *Simpkins*, except here she addresses the Eighth District's lower court decision, whereas in *Simpkins* the appellant addressed the preceding Fifth District decision. This Court in *Simpkins* addressed and resolved each of these arguments, as Appellant fully appreciates. Thus, Appellant attacks the Eighth District's factual analysis challenging her assertion that Appellee proximately caused her catastrophic non-economic damages and its holding that she had not proven the required existence of an "extreme qualification" to support an as-applied challenge.

Appellant's attack misses the point on several fronts. Most fundamentally, she continually focuses on the jury verdict, ***but her as-applied case was not considered by the jury***. This was a matter considered and resolved by the Trial Court—with Appellant's approval and stipulation. The jury did not answer any interrogatories specifically related to the constitutional challenges, and the Trial Court was under no obligation to follow a jury's verdict based upon a ***preponderance standard*** where the applicable standard is ***clear and convincing***.

Second, Appellant claims the lower courts penalized her because she had successfully recovered and was pursuing a positive and constructive life. Such an argument defies logic. A fact-finder assessing damages must necessarily consider a plaintiff's "current" or post-injury status. It is axiomatic that a plaintiff who successfully recovers from an injury sustains fewer damages than a plaintiff who fails to do so. Likewise, a plaintiff has an affirmative obligation to mitigate her damages. A plaintiff who successfully mitigates her damages necessarily reduces them.

Finally, Appellant's due process argument boils down to a dispute with the lower courts' factual determination. However, Appellant ignores the glaring deficiencies in the (often abbreviated) factual presentations before the Trial Court, and otherwise cannot prove the Trial Court abused its discretion in light of a record casting real doubt as to the proximate cause of certain of Appellant's injuries.

**d. Appellant Has Not Proven By Clear And Convincing Evidence That Application of R.C. 2315.18, As Applied, Violates Her Right To Equal Protection Under Article I, Section 2, Of The Ohio Constitution.**

Finally, Appellant's argument here is once again indistinguishable from the one presented in *Simpkins.* Significant excerpts of the argument are verbatim recitations

from the *Simpkins* briefing, and yet Appellant has chosen to simply ignore, and not properly challenge, the specific legal analysis set forth in *Simpkins.*

Specifically, Appellant emphasizes the classes compared and ultimately found to be constitutional in *Arbino*: "[T]he statue 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." [Merit Brief, at 20 (quoting *Arbino*)]. But then Appellant proceeds to argue that her purported as-applied case compares classes different from those addressed in *Arbino*: "those with the catastrophic and noncatastrophic physical injuries listed in R.C. 2315.18(B)(3) versus those who, by the nature of the tort and the age of the victim, will rarely, if ever suffer permanent physical injury but have and will continue to suffer permanent catastrophic nonphysical injuries." [*Id.* at 21]

This is not the first time this Court has considered these two classes for comparison purposes. They are the same class specifically compared in *Simpkins*:

> Appellants argue that when applied to damages awarded to victims like Simpkins, R.C. 2315.18 creates a distinction between those with the serious physical injuries designated in R.C. 2315.18(B)(3) 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***." 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.]

Here, on this record, we need not "accept [Appellant's] characterization of [her] injuries as catastrophic." Yet, even if Appellant had established her facts by clear and convincing evidence, the unchallenged *Simpkins* decision resolved this legal issue—a legal issue that Appellant herself describes as materially different from *Arbino*.

**APPELLANT'S SECOND PROPOSITION OF LAW: *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. Appellee And The *Amici* Urge The Court To Usurp The Legislative Function.

We now address Appellant's purported facial challenges, which "are disfavored for several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Perhaps most importantly, facial challenges are inherently anti-democratic: "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451. After all, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Id.* (quoting *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006)).

This is indeed the principal theme set forth in the Merit Briefs of both Appellant and the *Amici*: They offer their public policy arguments in opposition to the General Assembly's legislative pronouncement, as well as several *ex post facto* attacks on the evidence originally relied upon, and the findings made, by the legislature. However, as

explained, the General Assembly is the final arbiter of public policy. Appellant's recourse is before the legislature—not the courts.

### 1. Under The Doctrine Of Separation Of Powers, The Legislative Branch Is The Ultimate Arbiter Of Public Policy.

Within Ohio's constitutional structure of governance, "[t]he General Assembly has plenary power to enact legislation." *Bd. Of Trs. of the Tobacco Use Prevention & Control Found. v. Boyce*, 127 Ohio St. 3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 10. Statutes crafted by the General Assembly establish the laws and public policies of the state. Essential to maintaining the separation of powers embodied in the Ohio Constitution is the "established principle of law that courts do not interfere in political or legislative matters." *State ex rel. Scott v. Masterson*, 173 Ohio St. 402, 405, 183 N.E.2d 376 (1962). "[I]t is not the function of a reviewing court to assess the wisdom or policy of a statute but, rather, to determine whether the General Assembly acted within its legislative power." *Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St.3d 353, 356, 667 N.E.2d 1174 (1996). Simply put, the General Assembly is the "ultimate arbiter of public policy." (Quotations omitted.) *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 37 (2004). *See State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St. 3d 258, 266, 602 N.E.2d 1159 (1992) (the General Assembly bears the tasks of balancing competing public concerns).

### 2. The General Assembly Balanced Competing Public Concerns In Enacting R.C. 2315.18(B) And Contemporaneous Legislation.

For these reasons, "[i]ssues such as the wisdom of damages limitations and whether the specific dollar amounts available under them best serve the public interest are not for" the judiciary to decide. *Arbino* at ¶ 113. Much has already been written on

the legislative process culminating in the passage of R.C. 2315.18 and, thus, the process will be only briefly outlined here:

> This legislation was enacted 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. In support of these reforms, the General Assembly recognized ***Ohio's interest in "a fair, predictable system of civil justice"*** that preserves the rights of injured parties while curbing frivolous lawsuits, which increase the costs of doing business, threaten Ohio jobs, drive up consumer costs, and may hinder innovation. S.B. 80, Section 3(A)(3), 150 Ohio Laws, Part V, at 8024.
>
> [(Emphasis added.) *Simpkins* at ¶ 2]

The legislature did so with the benefit of substantial evidence, including various economic studies and testimony, contained in the legislative record. See *Arbino* at ¶¶ 53-54.

While the General Assembly exercised its discretion to limit the amount of noneconomic damages a plaintiff may recover, these reforms do not "wholly deny persons a remedy for their injuries." *Id.* at ¶ 47. A prevailing plaintiff may recover meaningful remedies under the Ohio Constitution and the legislative framework—as Appellant's own $114 million judgment makes clear. Specifically,

- ***Unlimited*** economic damages. Under this Section, "economic loss" is broadly defined to capture any form of expenditure made as a result of an injury or loss, save for attorney fees. R.C. 2315.18(A)(2) and (B)(1).

- ***Unlimited*** noneconomic damages resulting from "[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(A)(4) and (B)(3).

- Up to $350,000 in noneconomic damages, such as pain and suffering, mental anguish. R.C. 2315.18(A)(4) and (B)(2).

- ***Unlimited*** punitive damages "where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action." R.C. 2315.21(D)(6).

In limiting the recovery of damages for noneconomic loss, the General Assembly noted that awards for pain and suffering "are inherently subjective" and that noneconomic damages may be inflated by "improper consideration of evidence of wrongdoing." S.B. 80, Section 3(A)(6)(d), 150 Ohio Laws, Part V, at 8028. It further stated that "[i]nflated damage awards create an improper resolution of civil justice claims," leading to increased litigation costs and insurance premiums. S.B. 80, Section 3(A)(6)(e), 150 Ohio Laws, Part V, at 8028. ***Yet, at the same time, the General Assembly balanced the limitations on non-economic damages by allowing for the recovery of unlimited punitive damages in the very context presented here***. Contrary to Appellant's assertion, this legislative framework does not protect intentional tortfeasors. Just the opposite is true: Unlimited punitive damages are specifically available to punish such tortfeasors, as are a host of criminal provisions under Title 29 of the Revised Code, including the specific provisions of Chapter 2907 addressing sex offenses.

### 3. The Legislature Has Left Undisturbed The *Simpkins* Ruling.

Finally, this Court has repeatedly recognized that "legislative inaction" in the face of judicial interpretations of that section "evidences legislative intent to retain existing law." *State v. Cichon*, 61 Ohio St.2d 181, 183-184, 399 N.E.2d 1259 (1980). *Accord: Campbell v. Central Terminal Warehouse*, 56 Ohio St.2d 173, 175, 383 N.E.2d 135

(1978) ("the holding [in this Court's earlier decision] has remained unchanged for approximately 13 years and it is significant that the General Assembly has chosen not to alter the result obtained in" the earlier case). Similarly, when the General Assembly amends an existing statute, it is presumed to do so both with knowledge of this Court's decisions on such statute and with the intent to adopt or leave undisturbed this Court's ruling. *See State v. Buehler Food Markets, Inc.,* 50 Ohio App.3d 29, 31, 552 N.E.2d 680 (9th Dist. 1989) ("The reenactment of a statute creates the presumption of legislative adoption of a previous judicial construction of such a statute."); *State v. Glass*, 27 Ohio App.2d 214, 218, 273 N.E.2d 893 (4th Dist. 1971) ("when a statute . . . has been construed by a court of last resort and the same is substantially reenacted, the legislature may be regarded as adopting such construction").

***Here, the General Assembly has amended R.C. 2315.18 since Simpkins, but left the statutory caps fully intact***. The fact that the General Assembly did not amend the statute, in light of this Court's ruling in *Simpkins* (and other rulings from this Court and intermediate appellate courts), to create the judicial exception sought by Appellant conclusively establishes the legislative branch's policy determination to have the statutory caps apply under the instant facts.

**B. R.C. 2315.18(B) Is Constitutional.**

**1. R.C. 2315.18(B) Is Presumptively Constitutional.**

"Before any legislative power, as expressed in a statute, can be held invalid, it must appear such power is clearly denied by some constitutional provision." *Bd. Of Trs. of the Tobacco Use Prevention & Control Found.* at ¶ 10. Similarly stated, "[t]he legislative judgment in this behalf will not be nullified except when it clearly appears that

there has been a gross abuse of such discretion in undoubted violation of some state or federal constitutional provision." (Quotation omitted.) *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147, 128 N.E.2d 59 (1955).

This Court has repeatedly held that "all legislative enactments enjoy a presumption of constitutionality, and the courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional." *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 481, 692 N.E.2d 560 (1998). As this Court has counseled, "[t]he question, whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *State ex rel. Dickman*, 164 Ohio St. at 153. When called upon to determine the constitutionality of legislation, a court must reject the challenge "unless the nullity and invalidity of the act are placed ... beyond reasonable doubt." *Id.* at 148. As such, "[a]ny doubt as to the constitutionality of a statute will be resolved in favor of its validity." *Id.* at 149. Given this presumption, "where the validity of an act is assailed, and there are two possible interpretations, one of which would render it valid, and the other invalid, the court should adopt the former, so as to bring the act into harmony with the Constitution." *Id.* at 149. Similarly, "if under any possible state of facts the sections (of the law) would be constitutional, ***[the] court is bound to presume that such facts exist***." (Emphasis added.) *Id.* at 149.

**2. Appellant Is Not Advancing A Proper Facial Challenge.**

At the outset, Appellant is not advancing a proper facial challenge. By Proposition of Law No. 2, Appellant seeks a reversal of *Arbino* and the Court's rejection

therein of plaintiff's facial challenge to R.C. 2315.18. However, the limited analysis (or lack thereof) contained in the Merit Brief makes clear Appellant is not presenting a facial challenge predicated on the argument that there is no plausible set of circumstances in which R.C. 2315.18 is constitutional. *Arbino* at ¶ 26.

Rather, Appellant focuses on ***select and extreme fact patterns*** for her challenge, and specifically declares that her facial constitutional challenge does not extend to application of R.C. 2315.18 in other tort contexts. For example:

- In support of her argument that circumstances have changed to justify a reversal of *Arbino*, she repeatedly cites to application of R.C. 2315.18 to the extreme examples of sexual assault and rape. ***This is an as-applied attack, not facial***.

- In support of her argument that *Arbino* defies practical workability, Appellant limits her analysis to mental health injuries or, again, the as-applied consideration of this case.

- In support of her argument as to undue hardship, Appellant cites once again to her as-applied factors and then specifically disclaims any consideration of R.C. 2315.18 to medical malpractice cases. She characterizes "the other cases that have relied upon *Arbino* [in] ***medical malpractice cases*** . . . ***as beyond the scope of this appeal***." [Merit Brief at 34 (emphasis added)]

This runs directly counter to this Court's precedent. Contrary to Appellant's assertion, no form or type of tort case is beyond the scope of this appeal or this Court's consideration. If there is a single scenario where application of R.C. 2315.18 can be constitutionally applied, the Court is compelled to reject the facial challenge. If the statute survives constitutional scrutiny for a garden-variety car accident case or common medical malpractice claim, it withstands Appellant's facial challenge.

Appellant fails to offer this Court any argument that would allow the Court to find R.C. 2315.18 is unconstitutional in all respects, and Appellant specifically disclaims any

intent to do so. While the Court can summarily reject Appellant's facial challenge for this reason, we next address Appellant's limited challenges.

### 3. Appellant's (Limited) Facial Challenge Should Be Rejected.

#### a. R.C. 2315.18 Does Not Violate Ohioans' Right To A Jury.

This Court in *Arbino* found R.C. 2315.18 constitutional in response to myriad challenges: right to jury, right to due process, right to remedy, right to open court, right to equal protection, and separation of powers. While Appellant declares that *Arbino* was wrongly decided, her modest 2½-page analysis in support of her facial challenge only argues that the statute violates Ohioans' right to a trial by jury.[9] [Merit Brief, at 28-30] It does not.

##### 1) The Right To Jury Does Not Extend To The Determination Of Questions Of Law.

Two legal propositions are dispositive here. First, it is beyond peradventure that the Ohio constitutional right to trial by jury includes the right to have all facts determined by the jury, including damages. Second, it equally settled that right to jury "does not extend to the determination of questions of law." *Arbino* at ¶ 37. The two related corollaries to the second proposition are that the General Assembly possesses exclusive legislative power and the court is charged with applying the law. While the respective roles of the jury, court, and General Assembly are distinct, they are also

[9] To be sure, Appellant also conclusorily asserts that *Arbino* was wrongly decided on equal protection and due process grounds due to the fact that the Court did not apply strict scrutiny, but then only references Justice Pfeifer's dissent in *Arbino*. That is the sum and substance of Appellant's passing comment on these issues. It certainly does not constitute a presentation warranting this Court's review, let alone a constitutional review.

dependent: ***A jury only determines facts within the legal framework prescribed by statute or common law***.

Nothing in the language of Article 1 of Section 5 of the Ohio Constitution or Ohio precedent suggests that juries possess unbridled discretion to impose or fashion a particular result or the ability to nullify the law. In the context of a statutory claim, the General Assembly sets the boundaries within which the jury acts. For common law claims, the trial court's jury instructions set the boundaries. In practice, this is evidenced every day by instructions provided to the jury which delineate the jury and trial court's separate roles, forbid a jury from fashioning its own results inconsistent with the law, and set forth the standards for measuring liability and the award of damages. ***This Court, as well, limits a jury's actions by the Evidence Rules it promulgates restricting what information a jury may even consider in the first instance.***

Within this constitutional framework, Ohio courts routinely apply the law to undisputed facts (under Civil Rules 12, 50, and 56) or even after the jury has resolved specific issues of fact (under Civil Rule 38(C) and/or Rule 39(C)) without infringing upon a litigant's right to a jury. Moreover, trial courts will also review and disturb a jury's findings post-verdict without running afoul of Article I, Section 5. Trial courts, for example have the duty to enter judgments notwithstanding the verdict when the evidence supporting the verdict is insufficient as a matter of law, to vacate jury verdicts that are contrary to the manifest weight of the evidence, and to vacate, either entirely or subject to *additur* or *remittitur*, awards that are grossly excessive or inadequate. *See* Civil Rule 59(A)(4) (new trial for "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice"); Civil Rule 59(A)(6) (new trial

where "[t]he judgment is not sustained by the weight of the evidence . . ."). ***In resolving a motion for a new trial, a trial court will necessarily "pass upon the credibility of the witnesses and the evidence in general," thereby, like a jury, weigh the evidence***. (Emphasis added.) *Rohde v. Farmer*, 23 Ohio St.2d 82, 92, 262 N.E.2d 685 (1970).

**2) Appellant's Limited Attack Ignores The Core Proposition.**

Appellant's argument focuses on the jury's constitutional role but strategically ignores the core proposition that Ohio courts are charged with the task of applying the law. She merely attacks two of the examples offered in *Arbino* in which courts applied the law to modify a jury's damage award (remittiturs) and trebled damages under R.C. Chapter 1345.

But these limited attacks miss the mark—or, here, the undeniable proposition that it is the exclusive province of the court to apply the law. R.C. 2315.18 prescribes a procedure for ensuring that both the role of the jury and the court are equally honored and preserved. The statute requires a jury to return a general verdict accompanied by answers to interrogatories. R.C. 2315.18(D). The interrogatories record the jury's findings of fact as to the total compensatory damages recoverable by the plaintiff and those portions of those damages representing economic and non-economic losses. *Id.* at (D)(1) through (3). With the return of its verdict and interrogatories, the jury's constitutional role has been fulfilled. Ohio Civil Rule 48. In the case of a finding of noneconomic damages, the trial court then applies the statutory limit, which is simply the application of the law to the jury's factual findings. This structure is perfectly

consistent with the respective constitutional division of duties assigned to the trial court and jury.

As *Arbino* explained, "[s]o long as the fact-finding process is not intruded upon and the resulting findings are not ignored . . . , awards may be altered as a *matter of law*." (Emphasis sic.) *Arbino* at ¶ 37. In the case of R.C. 2315.18, Ohio courts are merely applying "the limits as a matter of law to the facts found by the jury; they do not alter the findings of fact themselves, thus avoiding constitutional conflicts." *Id.* at ¶ 40. The manner in which the legislature structured the required interrogatories specifically avoids a constitutional confrontation between these respective roles

This explains why Appellant ignores the constitutional roles of the legislature and courts and is so quick to summarily dismiss the federal decisions that uniformly uphold statutory damage caps under the Seventh Amendment. It is certainly true, as Appellant stated, that the Seventh Amendment applies only to proceedings conducted in Federal Courts. But that is a distinction of no consequence. Like Section 5, Article I, of the Ohio Constitution, the Seventh Amendment guarantees a person's right to have factual disputes resolved by a jury. However, under both the federal and state constitutions, issues of law (including its application) fall within the exclusive purview of the court.

"Federal courts uniformly have held that statutory damages caps do not violate the Seventh Amendment largely because a court does not 'reexamine' a jury's verdict or impose its own factual determination regarding what a proper award might be." (Quotes and citations omitted.) *Arbino* at ¶ 41. In the fourteen years since *Arbino* was decided, not a single federal court has reached a contrary conclusion. But other than explaining

that the Seventh Amendment applies in federal court, Appellant offers nothing to distinguish these authorities or explain why they are not instructive here.[10]

### 3) Appellant Is Seeking An Unconstitutional Result: An Encroachment On The General Assembly's Exclusive Legislative Authority.

The irony, of course, is that it is Appellant who is seeking to infringe upon the constitutional power of the General Assembly, as Ohio's ultimate arbiter of public policy, to promulgate the law. The right to trial by jury is not so expansive as to preclude the General Assembly from altering or limiting the amount of damages available to a prevailing party in a common-law cause of action. As Justice Cupp points out in his concurrence in *Arbino*, **numerous *decisions from this Court have confirmed the General Assembly's authority to modify or abolish common-law actions.*** (Emphasis added.) *Arbino* at ¶ 128 (summarizing cases). These same authorities make clear that "[t]he power to alter or abolish a common-law cause of action necessarily includes the power to modify an associated remedy." *Id.* at ¶ 132. In short, common law claims and their respective remedies are not vested. The General Assembly is empowered to modify them as part of its constitutional lawmaking power.

Appellant's argument that the legislative power to enact statutory damage limitations could somehow be trumped by a jury whose constitutional role is limited to

[10] Plaintiff's *amici* point to the Sixth Circuit's decision in *Lindenberg v. Jackson Nat'l Life Ins. Co*., 912 F.3d 348, 363-70 (6th Cir. 2018), as an example of a recent decision finding that a Tennessee statutory limit on damages (in that case, punitive damages) was inconsistent with the "inviolate" right to jury trial under the Tennessee Constitution. *See* Br. of *Amici Curiae*, Ohio Ass'n for Justice & Am. Ass'n for Justice at 20. However, the Tennessee Supreme Court rejected and found the Sixth Circuit's reasoning "unpersuasive" in a case in which it upheld Tennessee's statutory limit on noneconomic damages in personal injury cases. *See McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 696 (Tenn. 2020) (rejecting challenges to statutory limit based on right to jury trial, separation of powers, and equal protection grounds).

determining facts is a clear affront to Ohio's Constitution. ***Any holding to the contrary seeks not only a reversal of Arbino but also a reversal of this Court's numerous decisions upholding the General Assembly's authority to modify the common law and the associated remedies***.

**b. *Arbino* Correctly Applied A Rational Basis Test In Evaluating The Constitutionality Of R.C. 2315.18.**

We now turn to Appellant's facial equal protection and due process claims. Her argument here is confined to six lines wherein she briefly argues that the *Arbino* court erred by failing to apply the strict scrutiny test to R.C. 2315.18. [Merit Brief at 30] She predicates her assertion solely upon the false premise that the fundamental right to a trial by jury is implicated, nothing more. With the failing of her premise, so does Appellant's challenge. No fundamental constitutional right or rights of a suspect class are implicated: Thus, the rational basis test applies. Appellant does not even attempt to advance an argument under a rational basis test, necessarily conceding that under this controlling standard, R.C. 2315.18 is constitutional.

**c. Circumstances Have Not Changed Since *Arbino.***

Although her facial challenge fails on its merit, we nonetheless address the *Galatis* factors. Contrary to Appellant's assertions, *Arbino* is not obsolete. Those circumstances prompting enactment of R.C. 2315.18 remain present today: The General Assembly made a public-policy decision to place statutory caps on non-economic damages, given that these damages "are inherently subjective" and may be inflated by "improper consideration of evidence of wrongdoing." *Simpkins* at ¶ 6. This case exemplifies that premise—the *Simpkins* jury awarded $2.5 million, whereas the jury verdict below, involving indistinguishable facts, is a multiple of that figure. One

might easily conclude that the instant case is the quintessential case supporting the General Assembly's conclusion.

Appellant next argues that the legislative history of R.C. 2315.18 suggests that at least two lawmakers intended the statutory caps to apply only to negligence actions, not intentional torts. However, as noted above, the General Assembly has amended R.C. 2315.18 after *Simpkins* was decided, as well as after *Wayt v. DHSC, LLC,* 155 Ohio St. 3d 401, 2018-Ohio-4822, 122 N.E.2d 92, where the Court held that tort reform caps apply to intentional torts. The General Assembly left the statutory caps fully intact notwithstanding these decisions, thus conclusively establishing the legislative branch's policy decision to have the statutory caps apply to all tort claims, including the facts presented by this case.

Appellant also cites economic rankings from outside the trial court record, arguing at least thirteen states that do not have caps for noneconomic damages economically outperform Ohio during a defined time frame. While Appellant offers little analysis of the myriad factors that impact a state's economic performance and makes no attempt to track the economic data over a longer period, it is not the role of either Appellant or the Court to invade the legislative province of the General Assembly. The legislature is charged with considering the plethora of inputs, economic and otherwise, forming its legislative deliberations. The legislative considerations for the legislation included a litany of factors, ranging from economics and insurance premiums to managing inherently subjective awards and the "litigation tax" created by inflated damage awards. *Arbino* at ¶¶ 53-55. The singular citation offered neither undermines

the General Assembly's public-policy determinations nor addresses the extensive analysis set forth in *Arbino* of such determinations. *Id.*

For her final argument, Appellant offers musings that restate her as-applied challenge. She argues that jobs are not preserved, the economy is not improved, and productivity is not increased (which are some of the objectives of tort reform) when a statutory cap reduces the judgment against those "who rape a child." The obvious fallacy in Appellant's argument is that this is a facial challenge, not an as-applied claim. Further, Appellant ignores the constitutional framework. Under a rational basis standard, she must carry "***the burden to negate every conceivable basis that might support the legislation***." (Emphasis added.) *Pickaway County Skilled Gaming, LLC v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 936 N.E.2d 944, ¶ 20. And, "if under any possible state of facts the sections of the law would be constitutional, ***[the] court is bound to presume that such facts exist***." (Emphasis added.) *State ex rel. Dickman*, 164 Ohio St. at 149. Appellant falls well short of her burden—one that cannot be satisfied by mere reference to an-applied analysis, by purposefully ignoring the application of the statute in other tort contexts, or by citing general materials that do nothing to undercut the General Assembly's analysis or rebut the presumption that the facts supporting the General Assembly's stated rationale exist.

**d. *Arbino* Does Not Defy Practical Workability.**

As for the next prong of the *Galatis* analysis, Appellant argues that *Arbino* defies practical workability by essentially restating her equal protection clause argument. Appellant stakes out the analysis as a comparison between tort plaintiffs who have suffered catastrophic physical injuries versus those who have suffered catastrophic non-

physical injuries. ***This is nothing new; nothing has changed.*** The *Simpkins* court rejected this argument and explained "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 type of serious physical injuries." *Simpkins* at ¶ 50. The concerns expressed by the General Assembly and recognized in *Arbino*, remain just as real today as they were the tort reforms were first announced.

***Importantly, the statutory cap uniformly applies to all noneconomic damages***, irrespective of the tort committed or the particular factual circumstances. The "damages" instruction in Ohio Jury Instructions defines "noneconomic loss" to include pain and suffering and mental anguish without differentiating between the two. *See* OJI § 315.01(5). The damages for pain and suffering and mental anguish Appellant identifies are identical to the type of damages tort plaintiffs could sustain in a variety of contexts. This does not defy practical workability. Just the opposite is true: it promotes consistently and equality in result.

**e** ***Discarding Precedent Creates Havoc And A Return To Disparate, Unequal And Often Exaggerated Jury Verdicts.***

The final prong of the *Galatis* analysis is whether discarding precedent would create undue hardship. Here, Appellant again resorts to her as-applied analysis focusing on the particulars of this case and ignoring everything else within the tort universe. Appellant makes the absurd argument that rapists and other intentional tortfeasors have not relied upon this Court's precedent and statutory caps in how they conduct themselves. Sustaining Appellant's facial challenge to the constitutionality of

R.C. 2315.18 is not simply a reversal of this Court's precedent as to rapists or intentional tortfeasors; however, she asks for a declaration that the legislation is unconstitutional as to all tort plaintiffs.

Thus Appellant's artificial construct defies reality. The public at large has relied upon the legislative tort reforms and this Court's authority validating their constitutionality. This includes for-profit and non-profit businesses alike, ranging from medical practices to insurance carriers. As but one example, certainly the rates paid by every Ohioan for vehicle insurance are impacted, as are the premiums paid for medical and legal insurance, by this Court's prior validation of the statutory caps. Similarly, for over fifteen years, Ohio courts have both enforced and rejected constitutional challenges based upon this Court's precedent. In response, tens of thousands of claimants and tortfeasors have voluntarily settled their claims within the statutory framework and believing the Court's precedent would be honored.

Further, reversing *Arbino* would constitute an endorsement of the wide-ranging and disparate results preceding tort reform. The statutory caps increase certainty in projecting tort plaintiffs' damages; minimize the extreme range in jury verdicts, which were often improperly fueled by emotion and/or the underlying tort itself, as opposed to the actual damages sustained by the plaintiff; and importantly reduce the disparity in results among similarly situated tort plaintiffs. This is not simply in theory. The reality of Ohio's jury verdicts for noneconomic damages prior to the enactment of tort reform was a system that permitted an extreme range of disparate judgments among otherwise equally situated plaintiffs.

A fundamental tenet of civil justice is that the same injury and damages among similarly situated claimants should yield the same or reasonably same verdict. All persons stand equal before the law. In the criminal context, for example, this Court continues to promote fairness and consistency in criminal sentencing. In the civil context, no longer does Ohio permit a jury in one county to award tens of millions of dollars in damages for non-economic damages in one case, while a jury in another county confronted with similar facts awards an appreciably lower verdict that it thought was fair. The statutory caps eliminate results driven by passion, or even prejudice, thereby ensuring equal treatment under the law. Appellant seeks to reverse this progress and return to a day where a jury verdict for substantial non-economic damages is just as likely to be the result of passion, prejudice, and other biases as it is actual harm. Such results should remain unwelcomed in Ohio courts striving for equal justice for all litigants.

## CONCLUSION

For these reasons, the appeal should be dismissed as improvidently granted or, if reviewed, the decision of the Eighth District's decision should be affirmed.

Respectfully submitted,

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# APPENDIX

# *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.



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# *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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# *Oh. Const. Art. I, § 16*

Current through January 1, 2021

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## § 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.



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**RULE 48. Juries: Majority Verdict; Stipulation of Number of Jurors**

In all civil actions, a jury shall render a verdict upon the concurrence of three-fourths or more of their number. The verdict shall be in writing and signed by each of the jurors concurring therein. All jurors shall then return to court where the judge shall cause the verdict to be read and inquiry made to determine if the verdict is that of three-fourths or more of the jurors. Upon request of either party, the jury shall be polled by asking each juror if the verdict is that of the juror; if more than one-fourth of the jurors answer in the negative, or if the verdict in substance is defective, the jurors must be sent out again for further deliberation. If three-fourths or more of the jurors answer affirmatively, the verdict is complete and the jury shall be discharged from the case. If the verdict is defective in form only, with the assent of the jurors and before their discharge, the court may correct it.

The parties may stipulate that the jury shall consist of any number less than the maximum number provided by Rule 38(B). For the purpose of rendering a verdict, whenever three-fourths of the jury does not consist of an integral number, the next higher number shall be construed to represent three-fourths of the jury. For juries with less than four members, the verdict must be unanimous.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972.]

**RULE 59. New Trials**

**(A) Grounds for new trial.** A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

**(B) Time for certain post-trial motions, responsive briefs, and replies.** Except as otherwise provided by statute, a motion for a new trial, remitter, additur, prejudgment interest, or attorney's fees must be served within twenty-eight days of the entry of judgment or, if the clerk has not completed service of the notice of judgment within the three-day period described in Civ.R. 58(B), within twenty-eight days of the date when the clerk actually completes service. Unless otherwise provided by local rule or by order of the court, briefs in response to the motion

shall be served within fourteen days of service of the motion, and a movant's reply may be served within seven days of service of the response to the motion.

**(C) Time for serving affidavits.** When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty-one days either by the court for good cause shown or by the parties by written stipulation. The court may permit supplemental and reply affidavits.

**(D) On initiative of court.** Not later than twenty-eight days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.

The court may also grant a motion for a new trial, timely served by a party, for a reason not stated in the party's motion. In such case the court shall give the parties notice and an opportunity to be heard on the matter. The court shall specify the grounds for new trial in the order.

[Effective: July 1, 1970; amended effective July 1, 1996; July 1, 2013; July 1, 2015; July 1, 2018.]

**Staff Note (July 1, 2018 Amendment)**

**Division (B): Time for Certain Post-Trial Motions, Responsive Briefs, and Replies.**

The amendment makes two substantive changes.

First, it provides that if the clerk fails to serve the parties with notice of a judgment in the three-day period contemplated by Civ.R. 58(B), the time to serve a post-trial motion for judgment in favor of the movant does not begin to run until after the clerk does so. The purpose of the amendment is to avoid the harsh result that otherwise can occur if a would-be movant does not receive notice of the judgment. *See*, *e.g.*, *Wing v. Haaff*, 1st Dist. Hamilton No. C-160257, 2016- Ohio-8258. This amendment brings the timing of post-trial motions under Civ.R. 59 in line with the timing of a notice of appeal in civil cases under App.R. 4(A)(3).

**Staff Notes (July 1, 2015 Amendments)**

Consistent with a similar amendment to Civ.R. 6(B), the amendment to Civ.R. 59(B) specifies, in the absence of a local rule or court order specifying a time for responding to a motion for new trial, a fallback time of fourteen days after service of the motion within which to serve responsive arguments. In the absence of a local rule or court order addressing replies, the amendment also permits the movant to serve reply arguments within seven days after service of the adverse party's response. The time for filing responsive arguments and replies is governed by Civ.R. 5(D), again in the absence of a local rule or order of the court specifying a different time for filing.

**Staff Notes (July 1, 2013 Amendments)**

Rule 59(B) is amended to extend the time for serving a motion for new trial to 28 days after the entry of the judgment. This change is modeled on the 2009 amendment to Fed.R.Civ.P. 59(b) and is made for the same reasons that prompted the amendment to the federal rule.

**Staff Note (July 1, 1996 Amendment)**

**Rule 59(A) Grounds**

The amendment changed the rule's reference from "referee" to "magistrate" in division (A)(1) in order to harmonize the rule with the language adopted in the 1995 amendments to Civ. R. 53. The amendment is technical only and no substantive change is intended.

# Ohio Revised Code

## Section 2315.18 Compensatory damages in tort actions - factors excluded - findings or interrogatories.

Effective: April 15, 2021
Legislation: House Bill 352 - 133rd General Assembly

(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 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.

# Ohio Revised Code

## Section 2315.21 Punitive or exemplary damages.

Effective: April 15, 2021
Legislation: House Bill 352 - 133rd General Assembly

(A) As used in this section:

(1) "Tort action" means a civil action for damages for injury or loss to person or property.

(a) "Tort action" includes all of the following:

(i) A product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code;

(ii) A civil action based on an unlawful discriminatory practice relating to employment brought under section 4112.052 of the Revised Code;

(iii) A civil action brought under section 4112.14 of the Revised Code.

(b) "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(2) "Trier of fact" means the jury or, in a nonjury action, the court.

(3) "Home" has the same meaning as in section 3721.10 of the Revised Code.

(4) "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual shall be considered an employer under this section only if the subject of the tort action is related to the individual's capacity as an employer.

(5) "Small employer" means an employer who employs not more than one hundred persons on a full-time permanent basis, or, if the employer is classified as being in the manufacturing sector by the

North American industrial classification system, "small employer" means an employer who employs not more than five hundred persons on a full-time permanent basis.

(B)(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant.

(3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.

(C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

(D)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

(b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten per cent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

(c) Any attorney's fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

(3) No award of prejudgment interest under division (C)(1) of section 1343.03 of the Revised Code shall include any prejudgment interest on punitive or exemplary damages found by the trier of fact.

(4) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

(5)(a) In any tort action, except as provided in division (D)(5)(b) or (6) of this section, punitive or exemplary damages shall not be awarded against a defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds the maximum amount of punitive or exemplary damages that may be awarded under division (D)(2) of this section against that defendant in the tort action.

(b) Notwithstanding division (D)(5)(a) of this section and except as provided in division (D)(6) of this section, punitive or exemplary damages may be awarded against a defendant in either of the following types of tort actions:

(i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(i) of this section.

(ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior of a type described in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case, the court shall

make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(ii) of this section.

(6) Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action.

(E) This section does not apply to tort actions against the state in the court of claims, including, but not limited to, tort actions against a state university or college that are subject to division (B)(1) of section 3345.40 of the Revised Code, to tort actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code, or to the extent that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud or on a basis other than that the defendant in question as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages.

(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence.

(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

(F) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limits on punitive or exemplary damages pursuant to division (D) of this section, and neither counsel for any party or a witness shall inform the jury or potential jurors of those limits.

(G) When determining the amount of an award of punitive or exemplary damages against either a home or a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:

(1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;

(2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;

(3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.