

**IN THE SUPREME COURT OF OHIO**

**Jessica Simpkins, et al.,** :  
 :  
 : **Case No. 14-1953**  
 :  
 **Appellants/Cross-Appellees,** :  
 :  
 :  
 **v.** : **Appeal from the**  
 : **Fifth District Court of Appeals**  
 : **Case No. 13-CAE-10-0073**  
 :  
 **Grace Brethren Church of Delaware,** :  
 :  
 :  
 **Appellee/Cross-Appellant.** :

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**MERIT BRIEF OF AMICI CURIAE  
OHIO ALLIANCE FOR CIVIL JUSTICE AND  
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS  
IN SUPPORT OF APPELLEE/CROSS-APPELLANT**

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
STATEMENT OF THE CASE AND FACTS .....	2
LAW AND ARGUMENT .....	2
I.    Background of Statute and Summary of Appellants’ Claims.....	2
II.   The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Right to Trial by Jury.....	5
III.  The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Right to Open Courts and a Remedy .....	8
IV.  The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Due Course of Law Clause.....	10
A.   The Statute Limiting Noneconomic Damages Satisfies Rational Basis Review. ....	10
B.   The Severe Permanent Injury Exception Should not be Expanded to Apply Here.....	12
V.   The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Equal Protection Clause of the Ohio Constitution.....	14
CONCLUSION.....	17
CERTIFICATE OF SERVICE .....	18

**TABLE OF AUTHORITIES**

Page

**CASES**

*Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 1999-Ohio-248, 717 N.E.2d 286 ..... 14

*Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420..... passim

*Benjamin v. City of Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957) ..... 12

*Estate of Sisk v. Manzanares*, 270 F.Supp.2d 1265 (D. Kan. 2003)..... 7

*Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989)..... 7

*Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) ..... 7

*Federal Communications Commission v. Beach Communications*, 508 U.S. 307 (1993) ..... 11

*Gourley v. Neb. Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43, 75 (2003) ..... 6

*Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165 ..... 5

*In re W.R. Grace & Co.*, 475 B.R. 34, 169 (D. Del. 2012)..... 7

*Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5<sup>th</sup> Cir. 2013)..... 6

*Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 29, 550 N.E.2d 181 (1990)..... 14

*Minnesota v. Clover Leaf Creamery, Inc.*, 449 U.S. 456 (1981) ..... 12

*Phillips v. Mirac, Inc.*, 470 Mich. 415, 685 N.W.2d 174 (2004)..... 6

*Sorin v. Board of Education*, 46 Ohio St. 2d 177, 347 N.E.2d 527 (1976) ..... 9

*State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955) ..... 5

*State v. Worst*, 12<sup>th</sup> Dist. Butler No. 2004-10-270, 2005-Ohio-6550 ..... 16

*Vance v. Bradley*, 440 U.S. 93 (1979) ..... 11

*Vance v. Roedersheimer*, 64 Ohio St.3d 552, 597 N.E.2d 153 (1992) ..... 9

*Yajnik v. Akron Dept. of Health*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 432..... 5

**STATUTES**

R.C. 2315.18 ..... passim

R.C. 2315.18(B)..... 8  
R.C. 2315.18(B)(3) ..... passim

**CONSTITUTIONAL PROVISIONS**

Article I, Section 16, Ohio Constitution ..... 4, 8  
Article I, Section 2, Ohio Constitution ..... 4, 14  
Article I, Section 5, Ohio Constitution ..... 4

## STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Alliance For Civil Justice (“OACJ”) is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others.<sup>1</sup> OACJ members support a balanced civil justice system that will not only award fair compensation to injured persons, but will also impose sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ also supports stability and predictability in the civil justice system in order that Ohio's businesses and professionals may know what risks they assume as they carry on commerce in this state.

The Ohio Association of Civil Trial Attorneys (“OACTA”) is an organization comprised of attorneys, corporate executives, and managers, all devoted to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For nearly half a century, OACTA’s mission has been to provide a forum where dedicated professionals can work together to promote and improve the administration of justice in Ohio. (Collectively the OACJ and OACTA are referred to herein as “Amici.”)

Amici strongly supported the comprehensive tort reform measures contained in Amended Substitute Senate Bill 80 (“S.B. 80”), including the limitations on noneconomic damages, codified in R.C. 2315.18, which were critical to the General Assembly’s 2005 tort reform effort. The noneconomic damage limitations in R.C. 2315.18 are presently before the Court in this case in which Jessica Simpkins argues that the statutory limits are unconstitutional as applied to her. Amici separately filed amicus briefs in support of Senate Bill 80 when several of its provisions were challenged as being facially unconstitutional in *Arbino v. Johnson & Johnson*, 116 Ohio

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<sup>1</sup> The OACJ leadership includes members from the NFIB Ohio, the Ohio Chamber of Commerce, the Ohio Association of Certified Public Accountants, the Ohio Hospital Association, the Ohio Medical Association, the Ohio Manufacturers’ Association and important organizations.

St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. In *Arbino*, this Court upheld the constitutionality of R.C. 2315.18's noneconomic damage limitations.

For the reasons set forth herein, Amici urge the Court to follow its sound reasoning in *Arbino* and to declare R.C. 2315.18 constitutional as applied in this case.

### **STATEMENT OF THE CASE AND FACTS**

Amici concur in the statement of the case and facts contained in the Merit Brief of Grace Brethren Church of Delaware, Ohio. In light of Appellants' broad attack on R.C. 2315.18, however, there is more at stake than the narrow facts of this case suggest.

### **LAW AND ARGUMENT**

#### **I. Background of Statute and Summary of Appellants' Claims**

The statute creating the noneconomic damage limitation at issue was included in S.B. 80, a comprehensive tort reform bill that became effective on April 7, 2005. After considering weeks of testimony and multiple economic and other studies, the General Assembly found that Ohio law was sorely in need of a "fair system of civil justice" that balanced the rights of tort claimants with the rights of those who have been sued. S.B. 80, Section 3(A)(2); *see Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶¶ 53-55.

The General Assembly identified runaway noneconomic damages as a major impediment to establishing a fair system of civil justice. Noneconomic damages, which are by their nature inherently subjective, incapable of measure, and unpredictable, had been inflated in the civil tort system by, among other factors, "the improper consideration of evidence of wrongdoing." S.B. 80, Section 3(A)(6)(d).

These "inflated damage awards" create an "improper resolution of civil justice claims," which in turn, increase the cost of litigation. *Id.* These increased litigation costs are ultimately

borne by the general public “through higher prices for products and services” – the so-called “litigation tax.” *Id.*

In order to address this statewide problem, the General Assembly enacted a comprehensive package of reform measures that included R.C. 2315.18’s statutory limitations on certain noneconomic damages.<sup>2</sup> In enacting R.C. 2315.18 the General Assembly sought to strike an appropriate balance between the rights of those injured by the negligent acts of others, the rights of defendants, and the rights of Ohio’s citizenry by allowing full recovery of economic damages and limiting noneconomic damages in cases where the injured person did not suffer a severe permanent physical injury as defined in the statute.

Ultimately, the General Assembly designed R.C. 2315.18 to limit noneconomic damages to “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 \* \* \* to a maximum of three hundred fifty thousand dollars for each plaintiff” or \$500,000 “for each occurrence” that is the basis of a tort action. These limitations do not apply to persons who sustain tort injuries involving permanent and substantial physical deformity, loss of use of a limb or bodily organ system, or for an injury that deprives a person of independently caring for herself and performing life-sustaining activities.<sup>3</sup> *See* R.C. 2315.18(B)(3).

Appellants contend that these noneconomic damage caps, as applied to Jessica Simpkins, violate multiple provisions of the Ohio Constitution – namely the right to trial by jury (Article I,

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<sup>2</sup> Ohio is not unique in enacting limits on noneconomic damages. At the time R.C. 2315.18 was adopted, more than 20 states had already adopted some form of a limitation on noneconomic damages, and some had limited total damages, including economic damages. (*See* Exhibit A attached hereto.)

<sup>3</sup> The injuries which are exempt from R.C. 2315.18’s noneconomic damage caps are sometimes referred to as “catastrophic” injuries, but that term is not used in the statute.



Section 5), due course of law (Article I, Section 16), equal protection (Article I, Section 2), and open courts (Article I, Section 16).

This Court has already upheld the constitutionality of R.C. 2315.18 against each of these challenges in *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, which involved a facial challenge to the constitutionality of the statute. In the years since, *Arbino* has been a crucial, stabilizing component of Ohio tort law. There is no reason for the Court to now minimize *Arbino*'s effect by accepting Appellants' expansive "as-applied" challenge and set aside the statute for a broad swath of plaintiffs, especially since her arguments are substantively the same as those in *Arbino*. *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 5<sup>th</sup> Dist. Delaware No. 13 CAE 10 0073, 2014-Ohio-3465, ¶ 67 (“Simpkins makes substantially the same arguments as set forth by the plaintiff in *Arbino*, but instead of arguing that R.C. 2315.18 is facially unconstitutional, argues that the statute is unconstitutional as applied to her.”)

Although Appellants claim to challenge the constitutionality of the statute “as applied” to Jessica Simpkins, it is apparent that they are attempting to create a new exception to the statute or expand R.C. 2315.18’s severe permanent physical injury exception to include persons who have not suffered injuries as defined in the statute – all in an attempt to avoid the statutory limitations on noneconomic damages in this and future cases.<sup>4</sup> Regardless of whether Appellants seek to create a new exception or to expand the current exception, their efforts should be rejected as there is no reason for the Court to deviate from the statute in this case. As with all “as applied” constitutional challenges, the Court should decide this case on narrow grounds based on

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<sup>4</sup> Appellants’ repeated references to Jessica Simpkins and others “similarly situated” suggest she is a class action plaintiff, but of course she is not.

the record facts. *See Yajnik v. Akron Dept. of Health*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 432.

As a preliminary matter, “[a]ll statutes have a strong presumption of constitutionality.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶25. Before a court may declare a legislative enactment unconstitutional, “it must appear beyond a reasonable doubt that the legislation and the constitutional provisions are clearly incompatible.” *Id.*, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. Appellants bear this high burden and must show by “clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional and void when applied to those facts.” *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 38, 836 N.E.2d 1165; *see also Yajnik*, ¶ 19 (holding that defendants failed to meet their burden to prove that the law is unconstitutional, as applied to them, beyond a reasonable doubt). As set forth below, when this standard is applied to the record facts and applicable law, the decision of the Fifth Appellate District should be affirmed.

## **II. The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Right to Trial by Jury**

Appellants contend that R.C. 2315.18, as applied to Jessica Simpkins, violates the right to trial by jury because the statutory limit on noneconomic damages supplants the jury's judgment, at least to the extent that the jury attempts to award damages in excess of the cap. (Appellants' Merit Brief, at 23.) This Court rejected this exact argument in *Arbino*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 33-42. That same analysis should apply here to this “as applied” challenge to the constitutionality of the statute limiting noneconomic damages.

*Arbino* held that the jury was the proper arbiter of all fact issues in a case, including the amount of damages suffered by the plaintiff. *Id.*, ¶ 34. But, the Court explained, the limits set forth in R.C. 2315.18 do not infringe on this fact-finding authority:

However, the fact that the jury's fact-finding function is protected does not mean jury awards are insulated from all outside influences.

So long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered *as a matter of law*. There is no dispute that the right to a trial by jury does not extend to the determination of questions of law. Thus, without violating the Constitution, a court may apply the law to the facts determined by a jury. (Emphasis sic.)

*Id.*, ¶¶ 36-37 (citations omitted).

The Court went on to state that the “the General Assembly made a policy choice that noneconomic damages exceeding set amounts are not in the best interest of the citizens of Ohio” and that “[c]ourts must simply apply the [statutory] limits as a matter of law to the facts found by the jury \* \* \*.” *Id.*, ¶ 40. In short, while a jury may determine liability and quantify harm, it may not decide the controlling law to be applied.

Similar to this Court’s decision in *Arbino*, courts across the country have recognized that “[j]uries traditionally do not decide the law . . . To maintain the traditional role of the jury, the jury must remain the factfinder; a jury may determine what happened, how, and when, *but it may not resolve the law itself.*” *Phillips v. Mirac, Inc.*, 470 Mich. 415, 427, 685 N.W.2d 174 (2004) (emphasis added); *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 260 (5<sup>th</sup> Cir. 2013) (holding that applying the statutory limit on noneconomic damages “comports with a judge’s role of applying the law to the jury’s factual findings – that is, converting the jury’s award into the award of the law.”); *Gourley v. Neb. Methodist Health Sys.*, 265 Neb. 918, 954, 663 N.W.2d 43, 75 (2003) (“[R]emedy is a question of law, not fact, and is not a matter to be decided by the

jury."); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989) (“[T]he jury’s factfinding function extends to the assessment of damages. Once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied. Thereafter, it is the duty of the court to apply the law to the facts”); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002) (“The decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury.”) Similarly, “[f]ederal 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.” *Estate of Sisk v. Manzanares*, 270 F.Supp.2d 1265, 1277-1278 (D. Kan. 2003); see also *In re W.R. Grace & Co.*, 475 B.R. 34, 169 (D. Del. 2012) (same). Instead, the court simply applies the law to the facts.

Against this backdrop, Appellants contend that Jessica Simpkins’ right to trial by jury has been violated because she is unable to recover the full amount of noneconomic damages awarded to her by the jury.<sup>5</sup> This rationale would apply to anyone who recovers noneconomic damages in excess of the statutory limits and would create a new exception to R.C. 2315.18 – applicable to anyone who receives a jury verdict for noneconomic damages in excess of the statutory limits -- which would completely undermine the purpose and intent of Ohio law as codified in R.C. 2315.18 and upheld in *Arbino*.

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<sup>5</sup> Appellants attempt to put a twist on this argument by asserting that based on the amount awarded, “it is clear that the jury found Jessica’s nonphysical injuries to be permanent and catastrophic.” (Appellants’ Brief, at 23.) But, that argument is simply not correct. The jury was not asked to decide whether Jessica Simpson’s injuries were permanent and catastrophic or whether they otherwise fell within the severe permanent injury exception to R.C. 2315.18. The size of the jury’s award for noneconomic damages cannot and should not, without more, dictate whether the statutory limits apply.

As this Court previously held, the General Assembly is entitled to shape legal remedies according to the demands of the electorate and the best interests of Ohio citizens. *See Arbino*, 116 Ohio St. 3d 468, ¶¶ 36-40. In this case, R.C. 2315.18(B) provides for such a statutory remedy. Applying the statute does not violate Jessica Simpkins' right to trial by jury—the jury made all findings of fact, and the trial court simply applied the law to those findings. This is precisely what the Court approved in *Arbino*. There is no reason for the Court to revisit this resolved issue and to create confusion where there is none.

Appellants have not demonstrated by clear and convincing evidence that the statute violates Jessica Simpkins' constitutional right to trial by jury.

The Court should affirm the Fifth Appellate District's determination that Jessica Simpkins' right to trial by jury has not been violated by applying R.C. 2315.18 to reduce her noneconomic damages.

### **III. The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Right to Open Courts and a Remedy**

Appellants argue that R.C. 2315.18 denies Jessica Simpkins her right "to open courts and a remedy" under Article I, Section 16 of the Ohio Constitution. (Appellants' Merit Brief, at 24.)

Once again, the Court thoroughly addressed this argument in *Arbino* and its analysis and holding are equally applicable here. As *Arbino* explains, the right to a meaningful remedy and open courts is not violated by the noneconomic damage limitations in R.C. 2315.18 because "those limits do not wholly deny persons a remedy for their injuries. Injured persons not suffering the catastrophic injuries in R.C. 2315.18(B)(3) (for which there are no damages limits) may still recover their full economic damages and up to \$350,000 in noneconomic damages, as well as punitive damages." *Id.*, ¶ 47. The Court went on to find that "[t]hese available remedies are 'meaningful' ones under the Ohio Constitution. While the statute prevents some plaintiffs

from obtaining the same dollar figures they may have received prior to the effective date of the statute, it neither forecloses their ability to pursue a claim at all nor completely obliterates the entire jury award." *Id.* "Therefore, R.C. 2315.18 does not violate the right to a remedy or the right to an open court under Section 16, Article I of the Ohio Constitution." *Id.*

Jessica Simpkins recovered her economic damages, as well as the statutory maximum amount of \$350,000 for noneconomic damages. (Appellants' Merit Brief, at 25.) Hence, under *Arbino's* analysis and holding, she has recovered "meaningful" damages. Accordingly, R.C. 2315.18, as applied to Jessica Simpkins, does not violate the right to remedy or open courts provisions of the Ohio Constitution.

Appellants' argument that R.C. 2315.18 is unconstitutional as applied because they need to pay attorney fees and other litigation expenses from their award, which will further reduce it, is misplaced. First, Appellants cite no authority for the proposition that a six-figure damage award (after statutory limits have been applied to reduce it) is a meaningless remedy simply because the plaintiff incurred attorney fees in obtaining it.

Second, the fact that Jessica Simpkins' six-figure damage award (after reduction) may be partially offset by attorney's fees is not new or unique to her. It is well-established that Ohio follows the "American rule," which requires litigants to pay their own attorney fees in most instances. *See Sorin v. Board of Education*, 46 Ohio St. 2d 177, 179, 347 N.E.2d 527 (1976) ("the general 'American Rule' does not permit the prevailing party to recover attorney fees, in the absence of statutory authorization, as part of the costs of litigation."); *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 556, 597 N.E.2d 153 (1992). So, in this regard, R.C. 2315.18 is applied no differently to Jessica Simpkins than to any other tort plaintiff to whom it

applies. At its core, this argument is not an “as applied” attack on R.C. 2315.18, but an attack on the “American Rule,” which is not an issue before the Court.

Appellants have not demonstrated by clear and convincing evidence that the statute violates Jessica Simpkins’ constitutional right to a remedy and open courts.

The Court should affirm the Fifth Appellate District’s determination that Jessica Simpkins’ right to a remedy and open courts has not been violated by applying R.C. 2315.18 to reduce her noneconomic damages.

#### **IV. The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Due Course of Law Clause**

##### **A. The Statute Limiting Noneconomic Damages Satisfies Rational Basis Review**

Appellants contend that R.C. 2315.18 violates Jessica Simpkins right to “due course of law” under the Ohio Constitution. This Court has recognized Ohio’s “due course of law” provision, in Article 16, Section I, as “the equivalent of the ‘due process of law’ protections in the United States Constitution.” *Arbino*, ¶ 48. Appellants appear to contend that Jessica Simpkins was denied due process of law because the type of injury she sustained (i.e., non-physical injury) does not qualify for the severe permanent injury exception included in R.C. 2315.18.

When reviewing a statute on due process grounds, a rational basis test applies unless the statute restricts the exercise of a fundamental right. *Arbino*, ¶ 49. Appellants acknowledge that under *Arbino*, a rational basis test applies to their due course of law claim because no fundamental right has been implicated. (Appellants’ Brief, at 13.)

Under the rational basis standard of review, courts are duty bound to uphold a statute against a constitutional challenge if the statute is “rationally related to furthering a legitimate

state interest.” *Vance v. Bradley*, 440 U.S. 93, 97 (1979). As the United States Supreme Court has observed, this standard of review is highly deferential to the legislature:

[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence of empirical data. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

*Federal Communications Commission v. Beach Communications*, 508 U.S. 307, 315 (1993) (citations and internal quotations omitted); *Arbino*, ¶ 58 (recognizing substantial deference granted to the legislature in addressing constitutionality of statutes).

In crafting R.C. 2315.18, the General Assembly drew a distinction between claimants based on severity of their injuries in an effort to strike a reasonable balance between potential plaintiffs and defendants, while treating similar potential plaintiffs equally and ensuring that all potential plaintiffs are able to recover their economic damages without limitation. The General Assembly’s rational public policy choice to enact limits on noneconomic damages, which are by nature subjective, arbitrary, and incapable of any reasonable calculation or measure, while allowing full recovery of economic damages, which are ascertainable, should not be second-guessed.

When reviewing a statute on due process grounds under the rational basis test, a court must find it valid if “[1] it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.” *Arbino*, 2007-Ohio-6948, ¶ 49. In applying this standard, deference is to be given to the legislative body:

Whether the exercise of police power bears a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, *unless the decisions*



*of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.* (Citations omitted.) (Emphasis added.)

*Benjamin v. City of Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854 (1957) (emphasis added).

Similarly, in applying this test, “it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.” *Arbino*, 2007-Ohio-6948, ¶ 58, citing *Minnesota v. Clover Leaf Creamery, Inc.*, 449 U.S. 456, 470 (1981).

Regarding both prongs of the test, this Court has already carefully reviewed R.C. 2315.18 (including its legislative record) and determined that it bears a real and substantial relation to the general welfare of the public (*Arbino*, ¶ 58) and that it is not arbitrary or unreasonable. *Arbino*, ¶ 61. As this Court has recognized, at some point “the General Assembly must be able to make a policy decision to achieve a public good” and by setting the limits as it did in R.C. 2315.18, with an exception for those suffering severe permanent injuries, the law is not arbitrary or unreasonable. Contrary to Appellants’ suggestion, this conclusion – that the law is not arbitrary or unreasonable – should not be altered based on who the plaintiff is (i.e., a minor, an elderly person, a sexual assault victim, etc.).

Again, there is no reason to deviate from *Arbino*’s reasoned analysis and create confusion and uncertainty.

**B. The Severe Permanent Injury Exception Should not be Expanded to Apply Here**

Appellants appear to argue that her non-physical injuries are akin to the physical injuries that qualify for R.C. 2315.18’s exception for those most severely injured. *See* R.C. 2315.18(B)(3). Again, that exception applies where the noneconomic losses of the plaintiff are for either of the following:

- permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; or

- permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities. *Id.*

Although there is no valid basis for considering this argument given the unambiguous language in the statute, the Fifth Appellate District considered it and determined that “[w]hile there may be nonphysical injuries the effects of which approximate those listed in R.C. 2315.18(B)(3), that is not what the evidence shows in this case.” *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 5<sup>th</sup> Dist. Delaware No. 13 CAE 10 0073, 2014-Ohio-3465, ¶ 78. After noting that her expert testified that Jessica Simpkins has posttraumatic stress disorder and low grade depression, the court of appeals found that these injuries do not approximate the types of injuries to which the exception in R.C. 2315.18(B)(3) applies. *Id.* Regarding whether Jessica Simpkins’ emotional injury prevented her from being able to independently care for herself and perform life-sustaining activities, the court of appeals summarized the evidence as follows:

[A]fter the incident Simpkins played basketball in high school and college, got good grades in college, is currently employed full-time, and has not sought or participated in mental health treatment or counseling, since 2008, and does not have current plans to seek treatment. Thus the evidence shows that she is able to independently care for herself and perform life-sustaining activities.

*Id.*

Appellants have not demonstrated by clear and convincing evidence that the statute violates Jessica Simpkins’ constitutional due process rights.

The Court should affirm the Fifth Appellate District’s determination that Jessica Simpkins’ right to due process has not been violated by applying R.C. 2315.18 to reduce her noneconomic damages.

**V. The Noneconomic Damage Limitation in R.C. 2315.18 Does Not Violate the Equal Protection Clause of the Ohio Constitution**

Appellants contend that R.C. 2315.18's limitation on noneconomic damages violates her right to equal protection under Article I, Section 2 of the Ohio Constitution. (Appellants' Merit Brief, at 20-22.) This Court has deemed the Equal Protection Clause of the Ohio Constitution to be functionally equivalent to the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 59, 1999-Ohio-248, 717 N.E.2d 286. Absent a classification that affects a fundamental constitutional right or a suspect class (i.e., race, gender, national origin), a rational basis test is used. *Arbino*, ¶ 64; *see also Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 550 N.E.2d 181 (1990). Here, there is no fundamental right or suspect class involved, so review is appropriate under the rational basis test. *Arbino*, ¶ 64 (“Finding R.C. 2315.18 to be facially neutral, we apply the rational-basis test.”).

The crux of Appellants “as applied” argument is that the damage cap differentiates between plaintiffs who suffer severe permanent physical injury under R.C. 2315.18(B)(3), and are thus exempt from the statutory cap, and those who do not suffer this type of physical injury. (*Id.* at 20-21).

That the statute so differentiates does not make it unconstitutional as applied in this case. Again, *Arbino* addressed a substantively identical argument and rejected it:

The limitations on noneconomic-damages awards in certain tort actions in R.C. 2315.18 certainly create distinctions between different groups of people. In setting a cap of either \$ 250,000 or \$ 350,000 on noneconomic damages for certain injuries and no caps on others, the statute treats those with lesser injuries, *i.e.*, those not suffering the injuries designated in R.C. 2315.18(B)(3), differently from those most severely injured.

*Arbino*, 116 Ohio St. 3d 468, ¶ 68.

As the Court has held, it is the General Assembly's prerogative to carve out an exception for those suffering from severe permanent physical injuries as defined in the statute. *See Id.*, ¶¶ 67-72. Applying rational basis review, the Court held that "R.C. 2315.18 is rationally related to the legitimate state interests of reforming the state civil justice system to make it fairer and more predictable and thereby improving the state's economy." *Id.*, ¶ 69. "One cannot deny that noneconomic-damages awards are inherently subjective and difficult to evaluate. The uncertainty associated with such damages logically leads to a lack of predictability as well as the occasional influence of irrelevant factors such as a defendant's improper actions." *Id.* "While such uncertainty and the specter of improper influences are serious concerns on their own, the General Assembly reviewed and cited evidence that these issues are having real, deleterious effects on state economies across the nation, including Ohio." *Id.*

Appellants have not identified any reason for the Court to retreat from *Arbino's* well-reasoned ruling in this case and to throw Ohio tort law back into flux. Instead, they broadly argue that the cap is "irrational" and "arbitrary" as applied to Jessica Simpkins and all victims "who by the nature of the tort are likely to only suffer nonphysical damages" and thus do not fall under R.C. 2315.18(B)(3)'s exemption. (Appellants' Merit Brief, at 21.)

That argument only illustrates the importance of the statutory cap and the soundness of the Court's analysis in *Arbino*. If noneconomic damages that are tied to some concrete physical injury are unpredictable and susceptible to improper influence, how much more so are noneconomic damages without any objective basis? This is especially so where, as here, Appellants are asking the Court to expand R.C. 2315.18's severe permanent physical injury exception to apply to a non-physical (or mental) injury in the absence of evidence of ongoing medical treatment or counseling or any intent to seek such treatment in the future. *See Simpkins*

*v. Grace Brethren Church of Delaware, Ohio*, 5<sup>th</sup> Dist. Delaware No. 13 CAE 10 0073, 2014-Ohio-3465, ¶ 78 (“[Simpkins] has not sought or participated in mental health treatment or counseling since 2008, and does not have current plans to seek treatment.”). The types of injuries covered by R.C. 2315.18(B)(3) require ongoing medical treatment or care.

Further, Appellants have mischaracterized the question before the Court. They argue that the Court must decide whether R.C. 2315.18's cap should apply to all plaintiffs "regardless of the permanency and severity of their nonphysical injuries." (Appellants' Merit Brief, at 22.) But Jessica Simpkins is not representing others – this is an as-applied challenge. The only question before the Court is whether the statute constitutionally applies to Jessica Simpkins and her specific, unique injuries. *See State v. Worst*, 12<sup>th</sup> Dist. Butler No. 2004-10-270, 2005-Ohio-6550. Here, the Fifth District considered the evidence presented by Jessica Simpkins and held, "there is no suggestion that the effect of these injuries approximates the effect of a permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or that her emotional injury permanently prevents her from being able to independently care for herself and perform life-sustaining activities." *Simpkins*, ¶ 78.

As the Court stated in *Arbino*, the General Assembly's public policy choice to enact limits on unpredictable and limitless noneconomic damages, which are by nature subjective and incapable of any reasonable calculation or measure, should not be second-guessed. *Arbino*, ¶ 71.

Appellants have not demonstrated by clear and convincing evidence that the statute violates Jessica Simpkins' constitutional right to equal protection of the law.

The Court should affirm the Fifth Appellate District's determination that Jessica Simpkins' right to equal protection has not been violated by applying R.C. 2315.18 to reduce her noneconomic damages.

## CONCLUSION

Appellants' attack on R.C. 2315.18 threatens the viability of Ohio's statutory limitations on noneconomic damages and the stability that Ohio has enjoyed since this statute was found to be constitutional in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. In *Arbino*, this Court rejected the same constitutional challenges as are raised by Appellants here. There is no reason to deviate from this Court's sound reasoning in *Arbino*. Amici urge the Court to again reject these challenges and affirm the decision of the court of appeals.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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## EXHIBIT A

### STATES WITH STATUTORY LIMITATIONS ON NONECONOMIC DAMAGES AS OF 2005<sup>1</sup>

State	Law
Alaska	Alaska Stat. § 09.55.549 (2005)
California	Cal Civ Code § 3333.2 (1975)
Colorado	C.R.S. 13-64-302 (1995)
Hawaii	Hawaii Revised Statutes § 663-8.7 (1986)
Idaho	Idaho Code § 6-1603 (1987)
Indiana	Indiana Code 34-18-14-3 (1998)
Kansas	Kan. Stat. Ann. § 60-19a01 (1988)
Louisiana	La. R.S. § 40:1299.42 (1975)
Maryland	Md. Courts and Judicial Proceedings Code Ann. § 11-108 (1986)
Massachusetts	ALM GL Ch. 231, § 60H (1986)
Michigan	Michigan Compiled Laws § 600.1483 (1986)
Mississippi	Mississippi Code § 11-1-60 (2004)
Montana	Montana Code § 25-9-411 (1995)
Nebraska	Nebraska Revised Statutes § 44-2825 (1976)
New Jersey	New Jersey Statutes § 2A:15-5.14 (2004)
New Mexico	N.M. Stat. §§ 41-5-1 to 41-5-29 (1976)
North Dakota	N.D. Cent. Code § 32-42-02 (1995)
South Carolina	S.C. Code Ann. § 15-32-220 (2005)
South Dakota	S.D. Codified Laws § 21-3-11 (1976)
Utah	Utah Code § 78B-3-410 (1986)
Virginia	Virginia Code § 8.01-581.15 (1976)
West Virginia	West Virginia Code § 55-7B-8 (1986)
Wisconsin	Wisconsin Stat. § 893.55 (2005)

The states referenced in this chart have some form of statutory damage cap applicable to noneconomic or total compensatory damages (for economic and noneconomic loss).

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<sup>1</sup> This may not be an exhaustive list.