IN THE SUPREME COURT OF OHIO

CASE NO. 2008-1463

DONALD KRIEGER, et al.,
Plaintiffs-Appellees,

-vs-

CLEVELAND INDIANS BASEBALL CO., et al.,
Defendant-Appellant.

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT,
CASE NO. CA-07-89314, CA-07-89248, AND CA-07-89463

MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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RESPONSE TO APPELLANT'S EXPLANATION AS TO WHY THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL ISSUES

Appellant, City of Cleveland (Referred to as Appellant or City, hereinafter) argues that this is a case of great public interest that involves substantial constitutional issues solely because the Eighth District Court of Appeals found Revised Code Section 2744.05(C)(1) to be unconstitutional. This statute limits the amount of non economic damages that any tort plaintiff may recover against a political subdivision to $250,000. The monetary limitation of Revised Code Section 2744.05(C)(1) applies no matter how "traumatic, extensive, or chronic" the injuries of a particular plaintiff may be, despite the fact that this Court has, on numerous occasions, refused to countenance such arbitrary monetary limitations on non-economic damages.[1] In beseeching this Court to accept jurisdiction, Appellant bemoans the fact that, were the Eighth District's decision to stand, it would, for all intents and purposes, bankrupt cities throughout the state. The reality of the situation dictates otherwise.

The Eighth District first found R.C. Section 2744.05(C)(1) unconstitutional back in 1994, in the case of Gladon v. Greater Cleveland RTA (Mar. 10, 1994), Cuyahoga App. unreported Case No. 64029. This Court had the opportunity to review Gladon, *supra*, and declined to reverse the Eighth District's holding with respect to the constitutionality of non-economic damage limitations on tort claims against political subdivisions. See Gladon v. Greater Cleveland RTA (1996), 75 Ohio St.3d 312.

For the past fourteen years, Gladon, *supra*, has been the law in the Eighth District and other cases have also found R.C. 2744.05 be constitutionally untenable.

During the intervening fourteen-year period of time, the Ohio legislature has amended various portions of R.C. Section 2744 *et seq.* on several occasions. Yet the legislature has not amended or otherwise modified the non-economic damage limitations contained in R.C. Section 2744.05(C)(1), despite the fact that Gladon, *supra*, and other cases noted herein have specifically held that arbitrary limits on non-economic damages in all tort cases were unconstitutional.

History has shown that Appellant's homily warning of the impending penury of Ohio's political subdivisions is over zealous. Neither this Court nor the Ohio legislature has seen fit to revisit this issue over the intervening fourteen-year interval.

STATEMENT OF THE CASE AND FACTS

On June 11, 2002, Appellees Donald Krieger ("Krieger") and Clifton Oliver ("Oliver") were part of a group that attended a Cleveland Indians baseball game at Jacobs Field. Krieger was dissatisfied with their upper deck, "nose bleed" seats and left the group for better seating in the lower deck, near third base. (TR. 322-324, 458) later and the two remained there until the top of the ninth inning. Oliver, an active duty Marine who was on medical leave because of fractured cervical vertebrae, joined Krieger several innings later. (TR. 323-324, 451-453, 459). TR.) Near the end of the game, Appellees left their seats with the intention of reuniting with their group in the upper deck. (TR. 325, 459) While they were near a lower deck restroom, Appellees heard an explosion and headed toward the noise which, by this point, had drawn a large crowd. (TR. 326, 460) When they reached the upper deck, one of their companions, Andrew Mendez was being questioned by security personnel because the

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1 Arbino v. Johnson (2007), 112 Ohio St.3d 1468, 2007-Ohio-6948, ¶ 59, citing Morris v. Savoy (1991), 61

explosive device was thought to have been dropped from the right field, upper deck area. (TR. 327-328) Representatives of the Cleveland Police Department and Jacobs Field security questioned Krieger, Oliver and Mendez on three separate occasions concerning the explosion. Appelles fully cooperated and also consented to be searched. (TR. 330-331, 472) However, after the three encounters, Krieger and Oliver became upset with the police and security personnel and headed toward the customer service area to lodge a complaint. (TR. 331, 475). Appelles were then surrounded by 7-8 Cleveland police officers, hand cuffed and placed in a holding cell at Jacob's Field. (TR. 332-333, 476-479) Oliver requested that he be handcuffed in front, due to his neck fractures, but the police ignored his request. (TR. 483-484)

Appellees were transported to jail placed in separate cells. Their clothing was confiscated and they were issued paper jumpsuits. (TR. 334, 485) The cells were filthy and infested with cockroaches. Other than a toilet, the cell did not have any type of mattress or chair, and they were not permitted to shower or brush their teeth. (TR. 335, 379, 485) Krieger had to sleep on the ground and stuff toilet paper in his ears to keep out the insects. (TR. 335) Oliver could not lie down because of his hard neck collar and was forced to sit in the corner of the cell. (TR. 489) The two remained in jail without being charged with a crime for four days. During this time, they were harassed by guards and labeled terrorists. (TR. 379-380, 48) Krieger was placed in a cell with a mentally unstable person and feared for his life. (TR. 379-380) During the four days of confinement, Krieger was subject to sleep deprivation, sustained numerous insect bites, and lost approximately twelve pounds. (TR. 335, 380) Krieger did not contact his

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Ohio St.3d 64, 690-91; State ex rel OATL v. Sheward (1999), 86 Ohio St.3d 451, 490.

parents due to the fact that his father was recovering from heart problems. Krieger's and Oliver's parents learned of their plight from the news media.

During interrogations by Cleveland Police Detective Peachman, Krieger and Oliver denied any knowledge of the source of the explosive devise and further indicated that they were in the lower deck area of the stadium when the blast occurred. (TR. 336-337, 486-87) Peachman admitted knowing that Appellees were innocent and offered to immediately release both if they would give him a statement implicating Mendez. When Appellees refused, they were charged with aggravated arson and felonious assault, charges carried potential jail time of seventy (70) years. (TR. 342-43, 498)

At bond hearing, Peachman advised Krieger's lawyer, William McGinty, that "we know Donny (Krieger) had nothing to do with this case." and that, "we want him to testify against the person who committed the crime." (TR. 172-179) Krieger maintained his innocence, but refused to implicate Mendez. (TR.180-81, 341) Peachman also told Oliver's father that he knew his son did not have anything to do with the explosion, but that he wanted Oliver to testify against Mendez. (TR. 218-219, 494-495, 555-560) Oliver also refused to give false testimony against Mendez. (TR. 488-489)

During the course of the bond hearing, Peachman falsely testified that he considered Appelles to be terrorists and that Oliver had procured a military explosive device from the Marine Corps. Peachman requested that the judge set a bond of one million dollars. On the heels of 911, the media attended the hearing and covered the case extensively, characterizing Appellees as terrorists. (TR. 181-182, 341, 498-500)

Appellees were adamant that stadium surveillance video would validate their story. Krieger's attorney subpoenaed the stadium video but to the Cleveland Indians sent the tapes to the prosecutor, not the defense (TR. 193-195, 217)

The video tapes conclusively proved that Krieger and Oliver were in the lower deck, far away form the area where he blast occurred. Forensic analysis confirmed an absence of bomb residue on the Appellees' clothing. (TR.196-198, 344-347,461-470) Despite this evidence, Peachman refused to dismiss the charges unless Appellees implicated Mendez. (TR. 198-199).

The charges were ultimately dismissed on January 29, 2003. After more than six months, the weight of these charges had taken its toll on Appellees. Krieger, age 27, experienced nightmares of his incarceration and actually had to sleep in his parents' bedroom. Krieger received threatening phone calls and was harassed by the media and branded a terrorist. (TR. 342-43) Oliver, whose Marine unit was eventually dispatched to Iraq, was also branded as a terrorist and his career with the Marine Corps was ruined. During the course of the proceedings, Oliver was unable to obtain employment because of his neck injuries and was forced to borrow money from his parents to pay for his bond and attorney. Oliver gained unwanted notoriety due to the extensive media attention given to this matter and was unable to obtain employment even after his neck injury resolved. Oliver became depressed and had to resort to taking anti-depressant medication. (TR. 504-511)

On June of 2003, Clifton Oliver and Donald Krieger filed separate lawsuits against, *inter alia*, the Cleveland Police Department and Detective Peachman. In both

cases Detective Peachman was validly served but the City refused service. The City's law department filed Answers on behalf of both its Police Department and Detective Peachman in both cases. On July 2, 2004, both Krieger and Oliver dismissed their cases without prejudice.

On June 29, 2005, Krieger and Oliver re-filed a single lawsuit against the Cleveland Police Department and Detective Peachman. On August 2, 2007, a representative of the City of Cleveland's Law Department moved to dismiss the case.

On November 28, 2005, Krieger and Oliver were granted leave to amend their complaint to substitute the City of Cleveland for the Cleveland Police Department. The Cleveland Law Department then filed a Joint Answer to the Amended Complaint on behalf of both the City of Cleveland and Detective Peachman and failed to raise the City's R.C. 2744 immunity defenses. (R. 69)

On July 19, 2006, Krieger and Oliver voluntarily dismissed their claims against Detective Peachman in exchange for the City 's stipulation that Peachman was "acting within the course and scope of his employment as it relates to the above bold-faced matter" i.e. this lawsuit. (R. 87.)

The case went to trial in November, 2006 and the jury returned unanimous verdicts in favor of both Appellees on the claims of malicious prosecution, Intentional infliction of emotional distress, and false imprisonment, and awarded each Plaintiff $400,000 in compensatory damages, $600,000 in punitive damages, and reasonable attorneys' fees. (TR. 767-768) Appellant failed to make any offer prior to trial. (TR. 773,

801-804). The trial court awarded pre-judgment interest and attorneys' fees to but vacated the award of punitive damages. (TR. 911-912)

RESPONSE TO PROPOSITION OF LAW NO. 1

Appellant argues that the Eight District's finding that R.C. Section 2744.05(C)(1) is unconstitutional is in contravention to this Court's recent decision in Arbino v. Johnson, 2007-Ohio-6948.2 However, Arbino simply addressed the constitutionality R.C. Section 2315.18 and, in doing so, when out of its way to point out that this section was not applicable to tort cases against political subdivisions. (*Arbino at p. 430, FN 3.*)

What Appellant fails to acknowledge is that there are significant differences between R.C. Section 2315.18 and R.C. Section 2744.05(C)(1).

First and foremost, R.C. Section 2315.18 does not impose an arbitrary cap on non-economic damages in all tort cases. In fact, R.C. Section 2315.18(B)(3)(a) *et seq.* specifically provides that there shall be no limit on non-economic damages in serious injury cases.

The Arbino plaintiffs argued that R.C. Section 2315.18 was unconstitutional because, *inter alia*, it violated the due course of law/due process provisions of Section 16, Article 1, of the Ohio Constitution. In reviewing the history of various tort reform measures that have been enacted in Ohio since 1975, this court acknowledged that, prior to the enactment R.C. Section 2315.18, the Ohio Legislatures previously attempts at limiting non economic damages did not include exceptions for serious or catastrophic injury cases..*(Arbino at ¶60-61)*

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2 At the time the within case was briefed and argued, Arbino, *supra*, remained decisional and was not cited by either party or referenced by the court.

As to the issue as to whether R.C. Section 2315.18 was unconstitutional on due process grounds, this court applied the rational basis test previously espoused in Mominee v. Scherbath (1986), 28 Ohio St.3d 270 (*Arbino at* ¶ 49). In order to pass muster under the rational basis standard, the statute at issue must:

1. Have a real and substantial relationship to general public welfare; and
2. be neither arbitrary nor unreasonable (*Arbino at* ¶ 49.)

The Arbino court noted that prior attempts by the legislature to impose limitations on non-economic damages had been held unconstitutional as being in violation of the second prong because these measures assigned an arbitrary figure as a limitation for non-economic damages in all cases and thereby "imposed the cost of the intended benefit to the public upon those most severely injured." (*Arbino at* ¶59, citing Morris v. Savoy, 61 Ohio St.3d 690-91, and State ex rel OATL v. Sheward (1991), 86 Ohio St.3d 490.)

The only reason R.C. 2315.18 passed muster under the second prong of the rational basis test because it did not limit non-economic damages in catastrophic injury cases. As such, the benefits of non-economic damage limitations could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic (*Arbino at* ¶61).

R.C. 2744.05(C)(1) does not contain the exception for catastrophic injuries and imposes an arbitrary limit on non-economic damages in all tort cases against political subdivisions. Notwithstanding Appellant's assertions to the contrary, Arbinio actually

reaffirms the longstanding principle that all encompassing, arbitrary limits on non economic damages violate of Section 16, Article 1. (*Arbino at* ¶59)

RESPONSE TO PROPOSITION OF LAW NO. 2

Appellant does not dispute the fact that it failed to raise its R.C. Section 2744 immunity defenses when it filed its Amended Answer and asks this Court to adopt a new rule of law essentially holding that the failure to raise affirmative defenses in an amended pleading does not constitute a waiver of such defenses.

The circumstances surrounding the waiver in this particular case are instructive. Appellant initially filed a separate Answer raising its R.C. Section 2744 defenses. Subsequent to this Answer, Appellees obtained service of an Amended Complaint on Cleveland Police Detective Ralph Peachman. The Amended Complaint alleged that Detective Peachman acted maliciously and intentionally, acts that were clearly outside the course and scope of his employment. Despite the existence of a clear conflict of interest, the lawyer representing Appellant filed an Amended Joint Answer that seemingly abandoning the City's immunity defenses. Appellant also stipulated that Detective Peachman was acting within the course and scope of his employment in exchange for Appellees dismissing their claims against Detective Peachman to eliminate the conflict of interest. (R. 58, 69.)

Subsequent to filing its Amended Joint Answer, Appellant did not attempt to reassert its immunity defenses by way of a pretrial motion, despite the fact that it would have had the right to an interlocutory appeal had the trial court found that immunity was not applicable. Likewise, Appellant never moved to amend its Answer.

Appellant argues that "the Eighth District's holding on the waiver issue is "inconsistent with prior rulings of this Court and numerous state appellate courts" but fails to reference any cases supporting this proposition. In reality, the opposite is true.

In Turner v. Central School Dist. (1999), 85 Ohio St.3d 95., this court specifically held that a political subdivision waives its immunity defenses under R.C. 2744 if such defenses are not raised by Answer in a timely fashion. Id at 99-100.

Moreover, the City found itself in a remarkably similar predicament in Jim's Steakhouse v. City of Cleveland (1998), 81 Ohio St.3d 18. In Jim's Steakhouse, the City raised the affirmative defense of *res judicata* in its original Answer to the Complaint and by way of a Rule 12(B)(6) motion to dismiss. However, when plaintiff amended its Complaint, the City failed to reassert the affirmative defense and this Court held that the affirmative defense was thereby waived. Id at 20-21.

It can also be argued that, by virtue of the failure to raise its immunity defenses, Appellant waived its right to rely upon the non-economic damages limitations of R.C. 2744.05(C). *c.f.*, Moore v. Greater Cleveland RTA (1989), 44 Ohio Misc.2d 25.

RESPONSE TO PROPOSITION OF LAW NO. 3

Appellant's third proposition of law is based upon a technical error related to the fact that Appellees initially sued the Cleveland Police Department as opposed to the City of Cleveland. Appellees obtained valid service on Detective Peachman, but certified mail service upon the Police Department was "refused." Nonetheless, the City's law department filed an Answer its behalf.

The initial lawsuits were voluntarily dismissed, without prejudice and refiled as a single lawsuit against the Police Department and Detective Peachman. Appellees were subsequently granted leave to substitute the City of Cleveland for the Cleveland Police Department. Appellant argues that the trial court should have dismissed the underlying lawsuit because Appellees' initial attempt to commence the lawsuit against the Cleveland Police Department, a non-*sui juris* entity, was not an "attempt at commencement" which would avail Appellees of the savings provisions set forth in Revised Code Section 2305.19 (The Savings Statute).3

Pursuant to Civil Rule 3(A), Appellees initially commenced their respective lawsuits against Detective Peachman and attempted to commence actions against the Cleveland Police Department. This Court has previously held that the filing of a lawsuit within the statute of limitations will constitute an attempt at commencement, for purposes of savings statute, despite the fact that a plaintiff may not obtain service of process upon the proper entity within one year of filing as required by Civil Rule 3(A). Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St.3d 549. In order to constitute an "attempt at commencement" within the meaning of the savings statute, a plaintiff need only take some action within the statute of limitations to effect service on **a defendant**. Stone v. Adamini (Ohio App. 8th Dist.), 2004-Ohio-4466; Abel v. Safety First Ind. (Ohio App. 8th Dist.), 2002-Ohio-6482; Schneider v. Steinbrunner (Ohio App. 2nd Dist.), 1995 WL 737480. Further, Ohio courts have consistently held that a plaintiff

3 The pertinent part of R.C. 2305.19 provides : In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than on the merits, the plaintiff ... may commence a new action within one year after the date of ... plaintiff's failure otherwise than on the merits or within the period of the original statute of limitations, whichever occurs later.

may rely upon the savings statute where such plaintiff has attempted commencement, een against an improperly named party. Husarcik v. Levi (Ohio App. 8th Dist.), 1999 WL 1024135; Cox v. Ohio Parole Comm. (1986), 31 Ohio App.3d 216; Carney v. Cleveland Heights-University Heights School Dist. (2001), 143 Ohio App.3d 415; Fields v. Daley (1990), 68 Ohio App.3d 33. The guiding principle underlying these decisions is that the savings statute is remedial in nature and is to be given liberal construction to permit the decision of the cases upon their merits rather than on procedure technicalities. Cero Realty Corp. v. American Manufacturers Mut. Ins. Co. (1960), 171 Ohio St. 82.

Appellant's position is ironic in light of Proposition of Law No. 2, where Appellant argued that this Court should excuse the City's technical error in favor of reaching the merits. Appellees made a technical error in initially suing the Cleveland Police Department, rather than the City of Cleveland. Appellant also made a technical error in omitting its immunity defenses when it filed its Amended Joint Answer. The only difference is that Appellees corrected their error by obtaining leave of court to amend the complaint to substitute the proper party; Appellant did not. Apparently, the technicality defense is valid only when it inures to Appellant's benefit.

ARGUMENT IN RESPONSE TO PROPOSITION OF LAW NO. 4

Appellant argues that the Eighth District erred in refusing to find the trial court abused its discretion in failing to instruct the jury on the so-called "rebuttable presumption" created by a grand jury indictment in malicious prosecution cases. The elements of a malicious prosecution claim are: (1) malice in instituting or continuing the

prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the defendant. Rogers v. Barbera (1960), 170 Ohio St.3d 241, ¶ 1 of syllabus.

Appellant does not dispute the fact that the trial court instructed the jury on the proper elements of malicious prosecution as contained in §330, *et seq.*, of Ohio Jury Instructions. (TR 745-747.) After the trial court finished instructing the jury, counsel for Appellant asserted an objection based upon the trial court's failure to instruct the jury as to the rebuttable presumption created by the grand jury indictment. However, the trial court noted that Appellant never submitted a proposed jury instruction to the trial court for consideration regarding the alleged rebuttable presumption created by the grand jury indictment. (TR 759.)

A trial court does not abuse its discretion in giving the standard charge approved by the Ohio Judicial Conference and published in the Ohio Jury Instructions. Youssef v. Parr, Inc. (1990) 69 Ohio App. 3d. 679, 692. OJI § 330.03, the section dealing with malicious prosecution, does not contain any reference to a "rebuttable presumption" of probable cause. Furthermore, Appellant has cited no case supporting the contention that a trial court commits reversible error in failing to instruct on a "rebuttable presumption" of probable cause created by a grand jury indictment in a malicious prosecution case. This especially true in light of the fact that Appellant failed to submit or otherwise proffer any proposed instruction.

ARGUMENT IN RESPONSE TO PROPOSITION OF LAW NO. 5

Appellant argues that Oliver was not the real party in interest by virtue of the fact that, on April 12, 2005, Oliver had filed a petition for bankruptcy.

,With respect to real parties in interest, Civil Rule 17 provides:

> Every action shall be prosecuted in the name of the real party in interest. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. **Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.** (Emphasis added)

The purpose of the real party in interest rule is to enable a defendant to present the defenses it has against the real party in interest, to protect the defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have proper *res judicata* effect. In re Highland Holiday Subdivision (1971), 27 Ohio App.3d 237, 240.

At that time of trial, Oliver's counsel represented to the court that he had the authority of the bankruptcy trustee to proceed . (TR. 160.) Prior to trial, Oliver had filed a motion to reopen the bankruptcy case and made the trustee aware of the fact that this lawsuit constituted a potential asset of the estate. Moreover, it is a matter of public record that U.S. Bankruptcy Court Judge Pat Morgenstern-Clarren, issued the following order in connection with Oliver's bankruptcy case:

> Upon due consideration thereof, the court finds that the appointment of counsel for the trustee is in the best interest of the estate, that Chambers and Burke are both disinterested and qualified to act as such attorneys, and that they represent no interests adverse to the trustee or the estate in matters upon which they are to be engaged. Therefore, the application of Sheldon Stein, Chapter 7 trustee, for authority to employ John J. Chambers and James W. Burke, Jr., as special litigation counsel is granted, *nunc pro tunc,* as of the date of the filing of the petition. (See Exhibit 2 to Appellees' Brief on the Merits)

Where the real party in interest ratifies the commencement of the action by the named claimant within a reasonable time after the objection to lack of standing has

been inserted, the lack of standing is cured, and the action may proceed in the name of the named claimant. Dallas v. Childs (Ohio App. 8th Dist.), 1994 WL 284991: Marathon Farms v. Ritter (Ohio App. 12th Dist.), 1983 WL 4322. Pursuant to Rule 17(A), such ratification "shall have the same effect as if the action had been commenced in the name of the real party in interest." Newman v. Enriquez (Ohio App. 4th Dist.), 2007 Ohio 1934. (Trustee's ratification after lawsuit was filed would defeat defendant's claim that action was not prosecuted in name of real party in interest); Based upon the actions of the bankruptcy trustee and the bankruptcy court in ratifying Oliver's pursuance of this claim, Proposition of Law No. 5 is without merit.

CONCLUSION

Based upon the foregoing, Appellees, Donald Krieger and Clifton Oliver, request this court to refuse to accept jurisdiction on this matter.

Alternatively, if this Court is inclined to accept jurisdiction, Appellees would submit that jurisdiction should be limited to Proposition of Law No. 1, concerning the Eighth District's holding concerning the constitutionality of R.C. Section 2744.05.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum has been served by ordinary U.S. Mail, postage prepaid, this 20th day of August, 2008, upon:

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