

Testimony in support of SB 46
Before the Senate Government Oversight and Reform Committee
Offered by Todd Petersen
March 19, 2019

Good morning, Chairman Coley, Vice Chairman Huffman, Ranking Member Craig, Members of the Committee,

I appreciate the opportunity to give testimony on Senate Bill 46, which will increase the deterrent effect of punitive damages through a narrow and reasoned expansion of the exemption set forth in Ohio Revised Code 2315.21(D)(6).

My name is Todd Petersen. I am an attorney by trade, and in that regard, very proud to be speaking on behalf of my colleagues with the Ohio Association for Justice. I am a native of Ohio by birth, but remain a resident of Ohio and Geauga County by choice. I am a married father of four, and together with my wife, a small business owner. My interest in this legislation is personal and professional. As a long-time member of his constituency, I thank Senator Eklund for taking action.

I contacted Senator Eklund after representing a local family involved in a head-on collision with an impaired driver. My wife and I represented a family of six – mom, dad and four minor children. After an evening of back-to-school shopping, their minivan was struck head-on by an SUV. The driver, high on a number of recreational drugs, crossed the center line directly into our clients' vehicle. Dad had to be extricated from the front passenger seat as mom watched helplessly. The remaining members of the family suffered a variety of injuries.

The defendant driver had a lengthy history of drug abuse. Afforded every opportunity to rehabilitate himself, he persisted in his drug use. We explored a punitive damage claim, aware the driver was charged with aggravated vehicular assault. Aggravated vehicular assault involving an impaired driver is a strict liability offense and, as we discovered, does not trigger any exemption to the limitation. That meant any punitive claim would be limited to ten percent of the defendant's net worth.

We found the defendant really had no reason to worry about punitive damages. He lived in a house funded by his parents. His monthly bills were paid by the same source. Even the SUV he drove into our clients' minivan was purchased for him the week before the accident. He lived the life of a man earning several hundred thousand dollars per year, but ten percent of his net worth amounted to less than ten thousand dollars.

Senator Eklund ably outlined the issue in his recent testimony: The legislature saw fit to cap damages available to a plaintiff in a tort case, both compensatory and punitive. S.B. 280 is not intended to take issue with that concept or the legislation as a whole; instead, it is intended to increase the deterrent effect of punitive damages without, in any way, injuring Ohio's business environment or otherwise impacting the State's fiscal well-being.

R.C. 2315.21 sets limits on the award of punitive damages in a tort action. It specifies the conduct necessary for such an award, i.e. malice or aggravated or egregious fraud. R.C. 2315.21(C)(1). It sets the burden of proof as "clear and convincing evidence." R.C. 2315.21(D)(4). It limits the amount of punitive damages in cases involving small businesses and individuals to "ten percent of the employer's or individual's net worth." R.C. 2315.21(D)(2)(b).

R.C. 2315.21(D)(6), the subsection S.B. 280 seeks to amend, carves an exemption to the punitive damage caps where the injury, death, or loss to person or property resulted from the defendant acting *purposely* or *knowingly*, as defined in the Revised Code. However, by failing to include *strict liability* offenses, the exemption creates inconsistent and anomalous results.

Strict liability offenses are those which do not require proof of a culpable mental state to result in conviction; a prosecutor must only prove the defendant engaged in the conduct, irrespective of whether it was intentional, purposeful, knowing or reckless. The act is declared criminal by statute regardless of the offender's state of mind because the conduct is such that the public welfare imposes a duty on the offender to understand the wrongful nature of the conduct and avoid it altogether.

This is not to suggest that one might inadvertently stumble into committing a strict liability offense; to the contrary, strict liability offenses tend to be those that are so clearly unacceptable in modern society that the purposefulness of the offender's conduct may be inferred. Senator Eklund correctly referred to them as "per se" offenses.

By way of example, among Ohio's strict liability offenses are:

1. Aggravated vehicular homicide (death as the result of impaired driving);
2. Aggravated vehicular assault (serious injury as the result of impaired driving);
3. Statutory rape of a child under 13 years of age;
4. Sexual battery by certain persons in positions of trust, e.g. guardians, coaches, teachers, troop leaders, mental health providers, etc.;

5. Importuning (soliciting sex with a minor);
6. Pandering obscenity (creating and disseminating obscene material involving a minor);
7. Endangering children (impaired driving with minors in the vehicle by a repeat offender or, on a first offense, that results in serious physical harm);
8. Abortion manslaughter (failing to take appropriate medical measures to preserve the life of a child that is alive when removed from the uterus).

By not including strict liability offenses, the current version of R.C. 2315.21(D)(6) leads to irreconcilable differences in the treatment of equally egregious conduct. For instance, as written R.C. 2315.21(D)(6):

1. Lifts the limitation on punitive damages if an intoxicated defendant causes serious injury or death to another patron in a bar fight, but leaves it in place if that same intoxicated defendant chooses to leave the bar, drive home and seriously hurts or kills someone;
2. Lifts the limitation on punitive damages in cases of rape charged under every section of R.C. Section 2907.02, except the section outlawing statutory rape involving a victim younger than 13 years old;
3. Lifts the limitation on punitive damages in cases involving sexual battery except, incredibly, in cases involving perpetrators in unique positions of trust and confidence, e.g. teachers, coaches, troop leaders and even mental health providers; and,
4. Leaves the limitation on punitive damages in place for those engaging in soliciting sex with a minor or creating and disseminating obscene material involving a minor.

When I contacted Senator Eklund, I focused on the application of R.C. 2315.21(D)(6) in cases of impaired driving. When he proposed including strict liability offenses as a whole, I feared it might be overreaching. It is not. The expansion is a narrow and thoughtful one and procedural safeguards are already in place to make certain the exemption addresses only the worst of the worst: The statute requires (1) clear and convincing evidence of “malice or aggravated or egregious fraud” and (2) a conviction or plea of guilty to a felony. R.C. 2315.21(C)(1), (D)(4) and (6).

Notably, a plea of “no contest” is not enough to invoke the exception. Criminal Rule 11(B)(2) states that a no contest plea “shall not be used against the defendant in any subsequent civil or criminal proceeding.” Evidence Rule 401(A)(2) provides that a no contest plea is not admissible in “any civil or criminal proceeding against the defendant who made the plea.”

The insufficiency of a “no contest” plea really is indicative of just how narrowly crafted this amendment is; SB 46 seeks only to include those offenses that are so “purposeful” and so “knowing” that the legislature already determined the prosecution doesn’t need to prove those states of mind to get a conviction. The proposed amendment does not create a new cause of action for punitive damages or change any standards defining under what circumstance they may be sought.

The truly limited scope of the proposed amendment was questioned during testimony before the Senate Judiciary Committee when it was first submitted last session. Then- Vice Chair Dolan asked whether, in a situation involving an impaired driver, this amendment would mean the liquor permit holder responsible for providing the alcohol would also be subject to uncapped punitive damages. It is important to address that question here, because it really must be made clear that this amendment can be implemented without impacting Ohio’s business climate.

The answer to Senator Dolan’s question was then and is now - “no.” The Ohio Revised Code is very specific when it comes to liability for the acts of an intoxicated person. In fact, R.C. 4399.18 is titled exactly that, i.e. “Liability for the acts of an intoxicated person.” According to R.C. 4399.18, a permit holder can only be held liable if they “knowingly” sold an intoxicating beverage to (1) an intoxicated person in violation of R.C. 4301.22; or (2) served an underage person in violation of R.C. 4391.69.

Those two sections, then, define the criminal offenses that would have to be considered in determining whether the prerequisites of R.C. 2315.21(D)(6) were met. In order for the punitive limitation to be lifted as it relates to the permit holder, R.C. 4301.22 or R.C. 4391.69 would have to be felony offenses (not to mention, there would have to be a guilty plea or conviction). In fact, neither section is a felony offense: R.C. 4301.99 is titled “Penalty” and it states violations of both statutes are misdemeanors.

I greatly appreciate the time extended to me by this Committee. I am hopeful you’ll agree the proposed amendment makes complete sense; the deterrence and punishment brought to bear by R.C. 2315.21(D)(6) in crimes with the element of *purposeful* or *knowing* conduct must also be implemented in Ohio’s fight against impaired drivers, sexual predators and drug traffickers. It is time to reference strict liability offenses in R.C. 2315.21(D)(6).

I am happy to answer any questions.