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Opponent Testimony to HB 281

Konrad Kircher, Member

House Civil Justice Committee

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Chair Hillyer, Vice-Chair Mathews, Ranking Member Isaacsohn, and members of the Ohio House Civil Justice Committee, thank you for the opportunity to testify on this important legislation.

My name is Konrad Kircher, and I am an attorney in solo practice focusing on representation of child and adult victims of sexual assaults in civil cases throughout Ohio. I have represented more than 400 survivors of sexual assaults in civil claims in Ohio. I am also a member of the Legislative Committee of the Ohio Association for Justice (OAJ). As a voice of the plaintiff's bar in Ohio, OAJ is dedicated to preserving individuals' rights under the Seventh Amendment and Article I of Ohio's Constitution, both of which guarantee the citizens of Ohio the inviolate right to trial by a jury of their peers in civil cases.

HB 281 would reduce even further the rights and remedies available to victims of child and adult sexual assaults in Ohio and seeks to solve a problem which does not exist.

The Current Very Limited Rights and Remedies of Sexual Assault Victims in Ohio

Ohio is a very favorable jurisdiction for businesses and insurance companies defending civil claims arising out of sexual assaults. Child USA, the leading research organization regarding child protection, provides the following rankings to our state's laws:

- Concerning criminal statutes of limitations, we received a grade of D (on an A-F scale), and are ranked in the bottom six of states in the nation, with only two states receiving a lower F grade.
- Concerning civil statutes of limitations on age caps, we received an F along with 20 other states.
- Concerning civil statutes of limitations on revival and window legislation, we are among only two states receiving an F.

This legislature recently acknowledged the stringent effect on survivors of Ohio laws by passing the Scouts Honor Bill. That bill was an attempt to bring Ohio survivors to an equivalent level as their similarly-situated survivors in other states when their claims are being evaluated by the Boy Scout bankruptcy court. The bill modified the Ohio statute of limitations for child sex abuse



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survivors in civil claims, but only when those claims are brought in a bankruptcy proceeding, leaving all other Ohio survivors subject to Ohio's current archaic scheme.

But the Scouts Honor Bill was only partly successful, due to another Ohio law which benefits the business and insurance community to the detriment of injured persons: damages caps. The Boy Scout claimants were ranked lower in the bankruptcy matrix because Ohio's damages caps reduce the values of their claims compared to similarly-situated claimants in other states. In Ohio, a survivor of child sex abuse can be awarded millions of dollars by a reasonable jury for a lifetime of pain and suffering, but the judge in that case would have to reduce the non-economic damages to \$250,000. That limit has been in effect for almost 20 years and has never been updated for cost-of-living or any other reason. Only nine states have caps on non-economic damages in personal injury cases, ***and none as low as Ohio.***

With this background, it is puzzling that this legislature would want to punish its sexual assault survivor citizens even further by taking away a small legal remedy available to them.

A Problem Does Not Exist

Supporters of the bill argue that it will close some perceived loophole which allows overzealous lawyers to file frivolous lawsuits making outlandish claims of criminal conduct. The testimony to date seems to focus on anecdotal, isolated cases primarily in the employment law context. The proof that the problem is exaggerated is the relative dearth of reported cases analyzing R.C. 2307.60.

From the perspective of a lawyer pursuing civil claims in the sexual assault context, I can say that overzealous representation making frivolous claims is not a good business model. I don't have the time or resources to take losing cases. Ohio law is so bad for sexual assault victims that even worthy cases are sometimes not cost-effective to pursue. Businesses and insurance companies know they can only lose \$250,000 in pain and suffering, so they offer low-ball settlements as an incentive to the survivor to avoid expensive litigation. Frankly, there are only a handful of attorneys in Ohio who have a similar practice to mine, because there are many, more lucrative practice areas. Those of us who practice in this field find it very rewarding psychologically to participate in the healing process for victims, despite the significant hurdles of Ohio law.

Furthermore, defendants who are faced with frivolous claims have remedies. They are not helpless in their efforts to recover their expenses in defending such a suit. Both R.C. 2323.51 and Civ.R. 11 are designed to make a defendant whole in such circumstances.



The Current Version of R.C. 2307.60 is Useful for Sexual Assault Survivors

HB 281 seeks to add a prerequisite to a claim brought under R.C. 2307.60: a criminal conviction of the defendant. This will create a hurdle for sexual assault victims which is entirely out of their control.

There are many different ways prosecutors handle cases. Sometimes they decline to pursue them; perhaps there has been a mishandling of evidence or a key witness is missing or dead. Sometimes they accept pleas to reduced charges; a sexual battery charge can be amended to a non-sexual assault plea. Sometimes they choose to go to trial. Under Marsy's Law, the prosecutor is required to seek input from the victim on courses of action, but the prosecutor still has absolute discretion on the decision-making.

While the victim has no control over the criminal process, the victim has significant control over a civil case. The victim chooses whether to file suit, whether to settle, whether to go to trial. For this reason, a civil claim can be a powerful component of the healing process as the victim regains control over the victim's life, faces the perpetrator, and receives validation from the process. Denying the victim the remedies of R.C. 2307.60, due to circumstances which are totally out of the victim's control, is unfair and unreasonable.

Indeed, many calls I get are from victims who have gone through the criminal process, cooperating with everything the prosecutor and law enforcement have asked of them. They call me only after the outcome of the criminal process is unsatisfactory and they are looking for other avenues of accountability. Far too often, I receive those calls after the civil statute of limitations has expired (one year for an adult pursuing a civil claim for battery), and the prosecutor has not advised the victim that the civil claims were expiring during the criminal process. Prosecutors are focused on the criminal prosecution, not on preserving rights of the victim in civil claims.

The value of R.C. 2307.60 in these cases is twofold. First, it provides a cause of action for violations of criminal statutes that would not otherwise exist. It is true that the most egregious sexual offenses, such as rape and gross sexual imposition, fit into an existing civil claim: battery. But many other sexually-oriented offenses do not fit nicely into an existing civil cause of action other than one brought under R.C. 2307.60. **Examples include stalking, telephone harassment, non-assault violations of a protective order, kidnapping, importuning, and compelling prostitution.** The most closely analogous civil claim, absent an R.C. 2307.60 cause of action, for many of these crimes would be intentional infliction of emotional distress (IIED). But IIED has



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threshold elements which create higher hurdles than do the elements of the referenced crimes. For example, IIED requires that the plaintiff prove “outrageous conduct” which would “shock the conscience of the community,” resulting in “serious emotional distress.” If HB 281 becomes law, and a prosecutor fails or declines to prosecute the referenced crimes, a victim has little recourse in these situations.

Second, the statute allows victims to rehabilitate some of the damage caused by an ineffective criminal prosecution. It provides easier access to remedies for attorney fee reimbursement and punitive damages. If I can prove that my client was a victim of crime, then the statute allows for attorney fees and punitive damages without going through a second bifurcated trial wherein the jury makes an additional determination on entitlement to attorney fees and punitive damages.

The statute does not lower the burden of proof for a civil claim. The plaintiff must still prove her claims by a preponderance of the evidence. Because the defendant is being sued only for monetary damages, and will not be deprived of liberty with an adverse verdict as in a criminal prosecution, there is no requirement to prove R.C. 2307.60 beyond a reasonable doubt.

Conclusion

HB 281 is unnecessary and would harm sexual assault victims who already have significant hurdles bringing civil claims in Ohio.

Thank you to the committee for hearing from me, and I am happy to answer any questions the committee may have.