ORIGINAL

No. 10-1881

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-10-095695

FILED
NOV 01 2010
CLERK OF COURT
SUPREME COURT OF OHIO

JOHN T. FLYNN, et al.,

Plaintiff-Appellee

v.

SABER HEALTHCARE GROUP, LLC., et al.

Defendants-Appellants

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS-APPELLANTS SABER HEALTHCARE GROUP, LLC., et al.

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I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Lower courts have issued conflicting opinions as to whether the denial of a motion to bifurcate punitive damages is a final appealable order. R.C. 2315.21(B) provides that the punitive damages stage of a trial **shall** be bifurcated from the compensatory damages stage. Regardless of the mandatory language in R.C. 2315.21(B), the trial court in this case denied Defendants-Appellants' Motion to Bifurcate.

Ohio Courts of Appeals are split on the issue of whether the denial of a motion to bifurcate is a final appealable order. The Ninth District Court of Appeals held in *Finley v. First Realty Property Mgt., Ltd.*, 9th District No. 23355, 2007-Ohio-2888 that the denial of a motion to bifurcate is not a final appealable order. Two years later, in *Hanners v. Ho Wah Genting Wire & Cable SDN BHD,* 10th Dist. No. 09AP-361, 2009-Ohio-6481, the Tenth District held that the denial of a motion to bifurcate is a final appealable order.

Hanners **10th District**	***Finley*** **9th District**
"This appeal presents the issue of whether a trial court's entry denying a defendant's motion to bifurcate the plaintiff's claims for compensatory damages from the plaintiff's claims for punitive damages in a tort action is a final, appealable order pursuant to R.C. 2505.02(B)(6). **We hold that it is."**	"This Court finds that the trial court's order denying appellant's motion to bifurcate **is not a final, appealable order**. See R.C. 2505.02. See, also, *King v. Am. Std. Ins. Co. of Ohio*, 6th Dist. No. L-06-1306, 2006-Ohio-5774, at ¶19. Therefore, this Court lacks jurisdiction to address appellant's first assignment of error.

In this case, Defendant's Motion to Bifurcate Punitive Damages was denied by the trial court. Defendant appealed this denial to the Eighth District Court of Appeals. The Eighth District, relying on the 9th District's decision in *Finley*, denied the appeal on the basis that the denial was not a final appealable order. Defendant-Appellants have filed the present appeal with

the Supreme Court of Ohio for clarification on this unsettled issue. Defendants assert that the Eighth District's decision is wrong because the denial of a motion to bifurcate should be treated as a final appealable order.

If the Eighth District's decision is permitted to stand and the practice of refusing jurisdiction on appeals based on the denial of motions to bifurcate punitive damages is permitted to continue, other trial courts across the state will be more likely to deny a party's motion to bifurcate punitive damages knowing that no immediate appeal can be filed to rectify the error. R.C. 2315.21(B)(1) will be rendered ineffective and parties will be forced to defend cases with merged compensatory and punitive damages all the way to verdict. At that point, after the jury will have heard "punitive damages" evidence and meaningful appeal will be impossible. The General Assembly's stated goal in enacting R.C. 2315.21(B)(1) of bringing "reform to punitive damages in Ohio" to "restore balance, fairness, and predictability" will be completely frustrated.

The legal conflict and inter-district confusion in the jurisprudence requires guidance and clarification from this Court. This Court now has the opportunity to provide all Ohio Appellate Courts and Trial Courts with much needed guidance on this issue. This Court should accept this case and rule that the denial of a motion to bifurcate is a final appealable order.

II. STATEMENT OF THE CASE AND FACTS

This is a nursing home negligence case filed by Plaintiffs-Appellees John T. Flynn and Judy Gordon on behalf of the Estate of Gladys Feran on January 15, 2010 against Defendants-Appellants Fairview Village Retirement Community, Ltd. d/b/a Larchwood Village Retirement Community, Saber Healthcare Group, LLC, Saber Management, LLC, Saber Management, Inc. and Michael Francus. The underlying case is based on allegations of nursing home negligence arising from a series of patient falls sustained in a nursing home facility by Plaintiffs' decedent

Gladys Feran. Defendants Answered this Complaint and denied all allegations of tortuous conduct.

In their Complaint, Plaintiffs asserted a claim for punitive damages. On March 3, 2010, Defendants Fairview Village Retirement Community, Ltd., Saber Healthcare Group, and Saber Management, Inc. filed a Motion to Bifurcate Punitive Damages based on R.C. 2315.21(B). This Motion was denied by the trial court on August 16, 2010. Defendants-Appellants appealed this denial to the Eighth District Court of Appeals on September 13, 2010. On September 16, 2010, the Eighth District dismissed the appeal sua sponte for lack of a final appealable order pursuant to R.C. 2505.02 and *Finley v. First Realty Prop. Management, Ltd.*, supra, 2007-Ohio-2888. (See decision attached as Appendix 1)

III. ARGUMENT

Proposition of Law #1:

THE DENIAL OF A MOTION TO BIFURCATE PUNITIVE DAMAGES PURSUANT TO R.C. 2315.21(B) IS A FINAL APPEALABLE ORDER

A. A MOTION TO BIFURCATE REQUESTS A PROVISIONAL REMEDY AND A TRIAL COURT'S ORDER DENYING THIS REQUEST IS FINAL AND IMMEDIATELY APPEALABLE PURSUANT TO R.C. 2505.02(B)(4)

The denial of a Motion to Bifurcate Punitive Damages meets the criteria for a final appealable order. The R.C. 2315.21(B) bifurcation statute is one of the "tort reform" provisions enacted by the General Assembly as part of Am.Sub.S.B. No. 80 of the 125th General Assembly ("S.B. 80"), made effective on April 7, 2005. According to the statement of findings and intent of the legislature as contained in the uncodified language in section 3 of SB 80, R.C. 2315.21(B) was enacted because "[r]eform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system." *Id.* at section 3(A)(4)(a). The General Assembly expressed its belief that "inflation of noneconomic damages is partially due to

the improper consideration of evidence of wrongdoing in assessing pain and suffering damages." *Id.* at section 3(A)(6)(d); *Hanners,* supra 2009-Ohio-6481 at ¶26. To rectify this problem, the General Assembly concluded that evidence of misconduct should only be considered for purposes of awarding punitive damages, not non-economic damages. *Id.* at ¶27. The language of the statute calls for mandatory bifurcation of punitive damages upon motion from either party:

> "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 "upon the motion of any party, the trial of the tort action *shall* be bifurcated..." R.C. 2315.21(B)(1).

The General Assembly determined that, as a matter of public policy, and to ensure fairness in proceedings, civil trials involving claims for punitive damages should be bifurcated.

The General Assembly chose mandatory language instead of the discretionary language included in Civ.R. 42(B). When a trial court chooses to ignore that language and denies a motion to bifurcate punitive damages, the party requesting the bifurcation should be entitled to immediate appellate review.

R.C. 2505.02(A) provides, in relevant part, as follows:

> (3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

R.C. 2505.02(B) provides, in relevant part, as follows:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

In *State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93, this Court set forth the test for determining when an order is final as a "provisional remedy." Thus, R.C. 2505.02(B)(4) establishes a three-part test for determining whether an order is final and appealable. *State v. Muncie* (2001), 91 Ohio St. 3d 440. As an initial matter, the order must grant or deny a provisional remedy; if so, the order must also determine the action and prevent a judgment in favor of the appealing party regarding the provisional remedy remedy, and the appealing party cannot have a meaningful or effective appellate remedy following final judgment. R.C. 2505.02(B)(4)(a) and (b). Not all provisional remedy orders are necessarily appealable; the conditions of R.C. 2505.02(B)(4)(a) and (b) must be satisfied before the order can be considered final and appealable. *Muncie*, 91 Ohio St. 3d at 450.

In this case, the three part *Muncie* test is satisfied. First, the denial of a request to bifurcate pursuant to R.C. 2315.21(B)(1) qualifies as a "provisional remedy." Like an injunction, the punitive damages bifurcated trial proceeding owes "its existence to the underlying action" while being a "definable offshoot from the main action." See, *Community First Bank & Trust v. Dafoe,* 108 Ohio St. 3d 472, 2006-Ohio-1503. Similarly, it is a proceeding that is "ancillary to an action." The first part of the *Muncie* test is satisfied since the punitive damages proceeding is a "provisional remedy."

The second part of the *Muncie* test is satisfied because the trial court's denial of the motion to bifurcate prevents the punitive damages proceeding from ever being conducted.

Therefore, the denial order satisfies the requirement that the order determines the action with respect to the provisional remedy. Finally, the third part of the test is satisfied because a meaningful remedy cannot be reached if appeal is delayed until after a trial with merged evidence has taken place. If defendants are not able to seek immediate appellate review, and are forced to wait until after a verdict has been issued in a trial with merged punitive and compensatory evidence, defendants will be denied the opportunity for meaningful appellate review. By the time the bifurcation issue is considered a final appealable order, the jury verdict based on merged evidence will have been rendered and it will be pure speculation on the part of the parties and the court as to determine whether the jury's consideration of the merged evidence influenced their liability verdict or compensatory damages award. At that point it will be impossible to "un-ring the bell" and dissect out what portion of a damages award was based on "punitive damages" evidence and what was based on "liability evidence."

The Eighth District's decision denying jurisdiction in this case meets the criteria as a final appealable order based on R.C. 2505.02(B)(4) and the test espoused in *Muncie*. The denial of a motion to bifurcate is a provisional remedy, which determines the action and prevents judgment; it also prevents meaningful or effective remedy following final judgment. The immediate review of this denial should be permitted as an appeal from a "provisional remedy" pursuant to R.C. 2505.02(B)(4).

B. THIS COURT SHOULD COME DOWN IN ALIGNMENT WITH THE TENTH DISTRICT IN *HANNERS* AND SHOULD PERMIT IMMEDIATE APPELLATE REVIEW OF THE DENIAL OF A MOTION TO BIFURCATE.

The Eighth District's decision to deny jurisdiction in this case for lack of final appealable order based on the *Finley* decision demonstrates that there is confusion in the District Courts of Appeal as to whether the denial of a motion to bifurcate constitutes a final appealable order.

There is a conflict between the Tenth District's decision granting appellate review in *Hanners* and the Ninth District's decision denying appellate review in *Finley*. This Court should follow the reasoning of the Tenth District in *Hanners* and should determine that the denial of a Motion to Bifurcate Punitive Damages is a final appealable order.

In *Hanners*, the trial court denied the defendant's motion to bifurcate and concluded that the R.C. 2315.21(B) bifurcation statute and the Civ.R. 42(B) separate trials provision were "plainly inconsistent" and thus, the bifurcation statute was unconstitutional. Civil Rule 42(B) grants the trial court discretion regarding whether to separate/bifurcate issues in a case. This statute was used as the basis for bifurcation requests since its effective date in 1970. The 2005 bifurcation statute, R.C. 2315.21(B)(1,) requires bifurcation on the issues of compensatory and punitive damages. The *Hanners* trial court determined that despite the mandatory language of R.C. 2315.21(B), bifurcation is a procedural matter and, therefore, Civ.R. 42(B) controls.

Upon appellate review, in a unanimous decision, the Tenth District reversed the trial court and decided that R.C. 2315.21(B) was substantive and therefore should control the bifurcation request. The Tenth District determined that the question of whether denial of a Motion to Bifurcate was a final appealable order turned on whether the statute was substantive or procedural. Pursuant to Section 5(B), Article IV of the Ohio Constitution, the Supreme Court of Ohio has the exclusive authority to "prescribe rules governing practice and procedure in all courts of the state." Thus, when a conflict arises between a rule and a statute, the court's rule prevails on procedural matters, while the legislature's statute prevails on substantive matters. *State ex rel. Sapp v. Franklin Cty. Court of Appeals,* 118 Ohio St.3d 368, 2008-Ohio-2637, ¶28; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454. To the extent there is conflict between R.C. 2135.21(B) and Civ.R. 42, the statute controls because it grants litigants the substantive right to a

trial on the issue of non-economic damages without the unfair prejudice caused by the presentation of punitive damages evidence at the same time. *Hanners,* supra 2009-Ohio-6481.

In determining that the statute was substantive, the Tenth District examined the legislative intent of the General Assembly. The court reviewed the uncodified section 3 of SB 80, which includes the General Assembly's "statement of findings and intent." In its stated findings, the General Assembly expressed concern with a party's right to a fair trial, and specifically, the prejudice the defendant could experience by the submission of evidence regarding punitive damages at the same time the jury was attempting to determine whether the defendant was even liable for plaintiff's injuries. The General Assembly stated:

> "Courts should instruct juries that evidence of misconduct is not to be considered in deciding compensation for non-economic damages for those types of injuries. Rather, it is to be considered solely for the purpose of deciding punitive damages awards."
>
> "In cases in which punitive damages are requested, defendants should have the right to request bifurcation of a trial to ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages."
>
> *Id.* at section 3(A)(6)(f).

In light of the General Assembly's stated intent, the Tenth District concluded in *Hanners* that R.C. 2315.21(B) was in fact substantive and therefore not in conflict with Civ.R. 42(B). R.C. 2315.21(B) is "necessarily packaged in procedural wrapping," but it is substantive in nature. *Id.* at ¶30. The Tenth District reversed the trial court's declaration that R.C. 2315.21(B) was unconstitutional and violated the separation of powers doctrine. *Id.* at 30. The Tenth District further held the trial court should have bifurcated the plaintiff's claims for punitive damages.

This Court should accept the reasoning put forth by the Tenth District in *Hanners* and should determine that the denial of a motion to bifurcate is a final appealable order. R.C. 2315.21(B)(1) provides for mandatory bifurcation of punitive damages claims. Civ. R. 42 is discretionary in nature. As addressed in *Hanners*, the General Assembly's intent in adopting this R.C.2315.21(1)(B) was to create a substantive right to bifurcation. To the extent that these provisions conflict, the statute should control. Denial of a motion to bifurcate is therefore tantamount to a determination by the trial court that the statute is not constitutional and violates the Modern Courts Amendment, Section 5(B), Article IV of the Ohio Constitution. This determination allows for immediate appeal:

Pursuant to R.C. 2505.02(B), an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

> (B)(6)An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code.

In determining whether a final appealable order existed in this case, the Eighth District should have ruled in conformity with the Tenth District's decision in *Hanners*. The denial of a motion to bifurcate under the 2005 tort reform bifurcation statute is a final appealable order.

Correspondingly, this Court should reject the Eighth District's reliance on *Finley v. First Realty Property Mgmt.* as grounds for refusal to accept this appeal based on lack of a final appealable order. Notably, the decision in *Finley* states that the underlying motion to bifurcate was filed pursuant to Civ.R. 42(B). The decision does not directly address a bifurcation made

pursuant to the 2005 statute, R.C. 2315.21(B). The decision does not address the language of R.C. 2315.21(B) and Civ.R. 42(B). Additionally, the underlying cause of action in *Finley* was commenced before the April 6, 2005 effective date of R.C. 2315.21(B)(1). The appellate court decision did not address the retrospective application of R.C. 2315.21(B)(1). The appellate court cited only Civ.R. 42(B) and did not address the new statute. Essentially, in determining that the issue of a denial of a motion to bifurcate is not a final appealable order, the Eighth District ignored the Tenth District's decision in *Hanners*, which specifically addressed R.C. 2315.21(B) and relied instead on Finley, a decision which did not address bifurcation under the new statute. *Finley* is not appropriate authority for the final appealable order determination. The Eighth District should have followed the *Hanners* decision and allowed immediate appeal of the denial.

There is clearly confusion in the districts as to whether this issue is a final appealable order. This Court should take this case an opportunity to rectify this confusion and provide guidance to all appellate districts as to the final appealable nature of decisions denying motions to bifurcate punitive damages. Upon review, this Court should accept the reasoning in *Hanners*, determine that a final appealable order exists, and allow the present case to proceed to immediate appellate review in the Eighth District.

C. DEFENDANT-APPELLANTS IN THIS CASE AND ALL SIMILARLY SITUATED DEFENDANTS WILL BE PREJUDICED IF THIS COURT DETERMINES THAT THE DENIAL OF A MOTION TO BIFURCATE IS NOT A FINAL APPELLABLE ORDER.

In this case, Appellants will suffer undue prejudice if this case is permitted to proceed to trial without appellate review of the decision as to bifurcation **before trial**. The Ohio Legislature determined that bifurcation should be mandatory. Some trial courts, like the Court in question have refused to apply this statute as written. There is no guidance yet from the Supreme Court

on the issue of mandatory bifurcation of punitive damages. Post-trial appellate review of the denial of a motion to bifurcate is too late. Allowing this case to proceed through trial before the issue of the denial of the motion to bifurcate can be addressed on appeal is a waste of judicial resources.

Appellants should be permitted to argue the merits of the bifurcation issue before the trial of this matter takes place. Appellants are unable to completely and accurately assess the risks posed by trial for purposes of settlement and trial strategy until the bifurcation question is answered. Likewise, all similarly situated litigants requesting bifurcation in pending and future cases are subject to this uncertainty until the final appealable order question is answered by this Court.

The conflicting decisions issued by the Ninth and Tenth District have created confusion as to whether the denial of a motion to bifurcate punitive damages is a final appealable order. This confusion is illustrated by the Eighth District's denial of jurisdiction in this case for lack of a final appealable order. To resolve this conflict, Defendants-Appellant request that this Court accept jurisdiction in and determine that the Tenth District is correct and the denial of a Motion to Bifurcate is a Final Appealable Order.

IV. CONCLUSION

This Court should accept this case as an appeal involving a matter of public and great general interest. This Court should resolve the conflict between the written opinions issued by the Ninth and Tenth Districts and the practice of the Eighth District, which is to refuse jurisdiction for appeals from the denial of Motions to Bifurcate. Guidance and clarification from this Court is needed as to the final appealable order status of the denial of a motion to bifurcate. It is time for this Court to resolve the conflict regarding final appealable order status. This will create conformity in the Appellate Districts as to how to address bifurcation. Accordingly,

Defendants-Appellants Fairview Village Retirement Community, Ltd. d/b/a Larchwood Village Retirement Community, Saber Health Care Group, LLC, Saber Management, LLC, Saber Management, Inc. request that this Court accept jurisdiction and allow this appeal to proceed so that the important issues presented can be reviewed on the merits and reconciled with the existing law in Ohio.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was sent via ordinary U.S. mail, postage prepaid, on this 29TH day of October, 2010 to the following:

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

JOHN T. FLYNN, ET AL.

Appellee

COA NO. 95695 | LOWER COURT NO. CP CV-715680

COMMON PLEAS COURT

-vs-

FAIRVIEW VILLAGE RETIREMENT,ETC.ETAL

Appellant

MOTION NO. 437529

Date 09/16/2010

Journal Entry

SUA SPONTE, CASE NO. 95695 IS HEREBY DISMISSED PER R.C. 2505.02. SEE ALSO FINLEY V. FIRST REALTY PROP. MANAGEMENT, LTD., CASE NO. 23355 (OHIO APP. 9TH DIST.), 2007-OHIO-2888.

FILED AND JOURNALIZED
PER APP.R. 22(C)

SEP 16 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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Judge MARY EILEEN KILBANE, Concurs

Administrative Judge
SEAN C. GALLAGHER

VOL 0713 PG 0080

APPENDIX 1

CC 97 / 2783

The State of Ohio, Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal vol 713 pg 80 9-16-2010 94, 95695 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal vol 713 pg 80 Sept. 16th, 2010 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this October day of Friday 29th A.D. 20 10

GERALD E. FUERST, *Clerk of Courts*

By Steve Kearson Deputy Clerk