

ORIGINAL

**IN THE SUPREME COURT OF THE
STATE OF OHIO**

JOHN T. FLYNN, etc., et al.) **Supreme Court Case No. 2010-1881**
)
 Plaintiff- Appellees,) **On appeal from the Eighth Appellate**
) **District, Cuyahoga County, Case. No.**
 v.) **CA-10-095695**
)
 SABER HEALTHCARE GROUP,)
 LLC, et al.)
)
 Defendant- Appellant)

**PLAINTIFF-APPELLEES' MEMORANDUM IN OPPOSITION
TO JURISDICTION**

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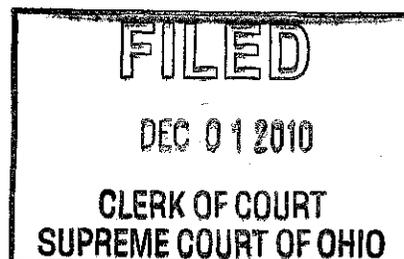


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I. Statement of Why Jurisdiction Should Not be Granted

The Eighth District Court of Appeals' dismissal of Defendant-Appellant's appeal of the Trial Court's denial of its Motion to Bifurcate Punitive Damages was appropriate. The Trial Court did not deny a simple Motion to Bifurcate Punitive Damages brought pursuant to ORC §2315.21(B)(1). Although Defendant-Appellant styled its motion as a Motion to Bifurcate Punitive Damages ("Motion to Bifurcate") and contended that it was predicated entirely on ORC §2315.21(B)(1), the Motion to Bifurcate requested relief well beyond that provided for in ORC §2315.21(B)(1).

The Motion to Bifurcate sought, as an argued consequence of bifurcation, sweeping discovery and evidentiary rulings *in limine*, precluding Plaintiff-Appellee from conducting discovery and producing evidence during any compensatory phase of Trial of Decedent. In sum, although now pretending otherwise, Defendant-Appellant's Motion to Bifurcate requested "everything but the kitchen sink" and was strategically calculated to force Plaintiff-Appellee to attempt to prove compensatory liability based on non-existent records for Decedent that Defendant-Appellant was required under Ohio law to prepare and maintain.

Moreover, the Trial Court, faced with a Motion to Bifurcate requesting a litany of consequential rulings, never addressed the constitutionality of ORC §2315.21(B)(1). Further, since Defendant-Appellant requested "everything but the kitchen sink" in its Motion to Bifurcate, the Trial Court's ruling denying the Motion to Bifurcate could hardly be construed as a determination of the constitutionality of ORC §2315.21(B)(1). Defendant-Appellant chose to request discovery and evidentiary rulings well beyond the

simple bifurcation provided in ORC §2315.21(B)(1). Having strategically elected to attempt that approach, Defendant-Appellant should not now be permitted to run back to that statute for purposes of appeal.

Lastly, Defendants have not been prejudiced and will not suffer any prejudice from the Trial Court's denial of the Motion to Bifurcate. ORC §2315.21(B)(1) is a trial bifurcation statute. The underlying case in this matter never went to Trial, and the Trial Court was never afforded an opportunity to determine simply whether the punitive damage phase of the case would be bifurcated from the compensatory phase. Indeed, Plaintiff-Appellees conceded in its Brief in Opposition to the Motion to Bifurcate that the Trial Court might revisit the issue of bifurcation down the road in the underlying litigation. Defendant-Appellant was apparently unhappy with that approach, as it thwarted what it's Motion to Bifurcate actually sought- not simply bifurcation of trial, but the preclusion of discovery and evidence of its failure to document the incidents and injuries to Decedent. This Court should deny Defendant-Appellant's Request for Jurisdiction.

II. Statement of Case

The case arises out of nursing home negligence and wrongful death of Decedent, Gladys Feran, an 83 year old resident of Defendant-Appellee's nursing home facility known as Larchwood Village Retirement Community ("Larchwood Village"). During her seventeen month residency at Larchwood Village, Mrs. Feran fell some sixteen times. The documentation of the facts and circumstances of each of these falls and corresponding injuries by the Larchwood Village staff is largely absent from the Larchwood Village records. In fact, the Ohio Department of Health cited Larchwood

Village for its failure to document at least one of Decedent's falls. (See Plaintiffs' Brief in Opposition to Defendant's Motion to Bifurcate, p. 2). Although discovery in this case is still in its infancy, at least two of Decedent's falls occurred when Larchwood Village staff had Decedent, an 83 year stroke victim with senile dementia, work pushing other residents in wheelchairs for transport within the facility. All in all, Mrs. Feran suffered a fractured clavicle, a fractured hip and a fractured pelvis while a resident of Larchwood Village, all as a result of falls. Her residency at Larchwood Village culminated with her "accidental" death on April 20, 2009, as a result of "blunt impact to trunk with fracture of pelvis." (See Complaint ¶13).

The Complaint was filed on January 15, 2010, asserting claims for nursing home negligence, violation of Mrs. Feran's Residents' Rights as a nursing home resident, wrongful death and punitive damages. Defendant-Appellant filed its Answer and Motion to Bifurcate. Plaintiff-Appellee filed its Brief in Opposition, arguing that the Defendant-Appellant's Motion to Bifurcate did not simply request the relief provided by ORC §2315.21(B)(1).¹ Plaintiff-Appellee noted that "[t]he real motive behind [the] Motion to Bifurcate is apparent from [the] Motion:

Plaintiffs are not permitted to present any evidence that relates to the issue of punitive damages until such time as the jury returns a verdict against this [sic] Defendants awarding compensatory damages . . ."

¹ It is significant that Defendant-Appellant's Motion to Bifurcate, requesting limitations on discovery and evidence was presented while Defendant-Appellant's were simultaneously opposing Plaintiff-Appellee's request for extension of time to produce an Affidavit of Merit. Pursuant to Civ. Rul. 10(D)(2), an Affidavit of Merit is required for medical claims and is based on expert review of the medical records of the patient. Defendant-Appellant embraced its failure to document as a complete defense, contending that Plaintiff's Complaint should be dismissed for failure to attach an Affidavit of Merit, knowing that Plaintiff could not produce an Affidavit of Merit since the nursing home records did not adequately document Mrs. Feran's falls in her nursing home record. It was against this backdrop that Defendant-Appellant's also sought the evidentiary rulings couched as a Motion to Bifurcate.

(Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Motion to Bifurcate, p.2 quoting Defendant-Appellant's Motion to Bifurcate, pp. 2-3). Simply put, under the guise of it's Motion to Bifurcate, Defendant-Appellant was trying to force Plaintiff-Appellee to prove its case at Trial without the documentation of the incidents and injuries to Decedent, and *without being able to reference that Larchwood Village failed to document these incidents and injuries and failed to maintain such records.* Thus, although Plaintiff-Appellee opposed the Motion to Bifurcate, he noted,

While the Court may eventually determine that ORC 2315.21(B)(1) might apply to this case, bifurcation at this stage is exceedingly premature. Discovery should proceed on all issues, including those listed in ORC §2315.21(G) . . . [the] Motion to Bifurcate should be denied and perhaps revisited at the appropriate time. However, Sabers' inherent request for an exclusionary evidentiary ruling as part of the requested bifurcation should be denied.

(Plaintiff-Appellee's Brief in Opposition to Motion to Bifurcate, p. 3). Thus, although Defendant-Appellant now slyly pretends that all it asked for was bifurcation of the punitive damages claims at Trial, that is decidedly *not* all it requested and decidedly *not* what it asked the Trial Court, or the Court of Appeals, to consider.

III. Law and Argument

A. **The Trial Court's denial of Defendant-Appellants' Motion to Bifurcate Punitive Damages was not a final appealable order.**

A court of appeals only has jurisdiction over orders that are final and appealable. ORC §2505.02; Civ. Rul. 54(B). Defendant-Appellant is contending that the Trial Court's Order denying it's Motion to Bifurcate is a final appealable order as a prevention of a "provisional remedy" under ORC §2505.02(B)(4):

(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 prevents 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 an effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.

A “provisional remedy” is a remedy sought in proceedings “ancillary to the action.” ORC §2505.02(A)(3). Without citation, Defendant-Appellant asserts that the issue of bifurcation of punitive damages is a “provisional remedy.”² (Defendant-Appellant Memorandum, p. 5). Defendant-Appellant also asserts (without citation) that the Trial Court’s denial of its Motion to Bifurcate “prevents the punitive damages proceeding from ever being conducted.” This strange assertion is completely baseless. Simply put, the Trial Court was not afforded that opportunity. Would Plaintiff-Appellee have produced evidence in support of its punitive damage claim? Would the claim have survived summary judgment? Would the claim have survived directed verdict? Would the trial Court have revisited the bifurcation issue before trial? None of these questions have been answered because of Defendant-Appellant’s premature (and overreaching) Motion to Bifurcate and subsequent appeal.

² Defendant-Appellant cites no authority for its conclusion, but a sentence later cite *Community First Bank & Trust v. Dafoe*, 2006-Ohio-1503, a commercial case that had nothing to do with nursing home negligence, wrongful death or even punitive damages. Notably, the denial of a premature request for how trial will be conducted is light years away from a denial of a preliminary injunction. The fact that Defendant-Appellant could cite no case to this Court for this proposition speaks volumes.

Defendant-Appellant ignores that Plaintiff-Appellee conceded that the issue of trial bifurcation might be revisited by the Trial Court prior to Trial. Thus, this Court (and the Eight Appellate District) has no final appealable order to consider in regard to the punitive damages issue.

Even if the bifurcation of punitive damages were a “provisional remedy,” the Trial Court’s denial of the Motion to Bifurcate is not a final appealable order under ORC §2505.02(B)(4)(a). Defendant-Appellant does not address or even mention that the Motion to Bifurcate was opposed because it was “premature” and requested evidentiary rulings not provided for in ORC §2315.21(B)(1). Although it ignored these issues, Defendant-Appellant simply never afforded the Trial Court to rule on the bifurcation issue at a time that was not premature. What Defendant-Appellant attempted to do was to combine the provisions of Civ. Rul. 10(D)(2) requiring an Affidavit of Merit based on records with the bifurcation provisions of ORC §2315.21(B)(1), and establish a complete defense to nursing home liability for negligence and wrongful death in Ohio: The defense strategy is simple: “Don’t write it down and they can’t prove it.” This is what Defendant-Appellant asked for, not simple trial bifurcation.

The Trial Court’s denial of the Motion to Bifurcate is likewise not a final appealable order under ORC §2505.02(B)(4)(b). Any judgment against Defendant-Appellant for punitive damages is obviously subject to appeal. *Stephenson v. Upper Valley Family Care, Inc.* 2010-Ohio-4390 (2nd. Dist.). Further, Defendant-Appellants statement that the appellate courts would not be able to distinguish between compensatory damages and punitive damages flies in the face of the Ohio Jury Instructions, distinct determination of compensatory damages and punitive damages and

essentially the basis of monetary judgments in personal injury cases involving punitive damages claims in Ohio.

B. This case is distinguishable from *Hanners, Finley* and *Havel* in that the Trial Court did not determine that ORC §2315.21(B)(1) was unconstitutional, nor did Plaintiff-Appellees ask it to do so in opposing Defendant-Appellants' Motion to Bifurcate Punitive Damages.

Since Defendant-Appellant's Motion to Bifurcate did not simply seek bifurcation, the Trial Court did not need to determine the constitutionality of 2315.21(B)(1). Thus, this case is distinguishable from *Hanners v. Ho Wah Genting Wire & Cable SDN BHD* 2009-Ohio-6481 (10th Dist.). In *Hanners* the trial court was asked to determine the **constitutionality** of ORC §2315.21(B)(1) (mandatory bifurcation of punitive damages) as opposed to the provisions of Civ. Rul. 42(B) (discretionary bifurcation of punitive damages).³ Further, in the inapposite case cited by Defendant-Appellant, *Finley v. First Realty Property Mgt. Ltd.* 2007-Ohio-2888 (9th Dist.), the trial court **also** determined the constitutionality of ORC §2315.21(B)(1). (See also, *Havel v. Villa St. Joseph, et al.* 2010-Ohio-5251 (8th Dist.)).

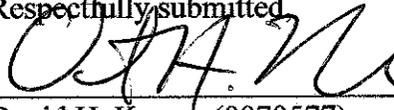
These cases **all** turned on the constitutionality of the statute as either a procedural or substantive statute, and whether the legislature violated the separation of powers by enacting a statute plainly contrary to Civ. Rul. 42(B), as adopted by the Supreme Court of Ohio, regarding bifurcation. That is not the issue before the Court in this case. Rather, it is whether a defendant can effectively halt underlying proceedings by filing a "motion in limine" couched as a Motion to Bifurcate with its Answer and then appeal when it's Motion is opposed as premature and the Trial Court denies it.

³ Although Plaintiff-Appellant will not address the constitutionality of ORC 2315.21(B)(1) herein, as he maintains that the bifurcation issue in this case did not turn on such analysis, he respectfully reserves the right, should this Court grant jurisdiction, to argue that issue in appellate proceedings.

IV. Conclusion

The trial court's denial of Defendant-Appellant's Motion to Bifurcate was not a final appealable order. Defendant-Appellant's Motion sought *in limine* evidentiary rulings in a case less than one month old, and was part of a strategy not to bifurcate trial, but to obtain those evidentiary rulings, and thus, diminish Plaintiff-Appellee's ability to prove liability for compensatory damages at Trial. As such, the Trial Court was never asked to determine the constitutionality of the bifurcation statute, and Defendant-Appellant's request for Jurisdiction should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

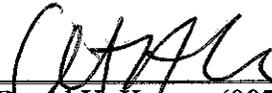
A copy of the foregoing has been forwarded by regular mail this 1st day
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