

IN THE SUPREME COURT OF OHIO

JOHN T. FLYNN, et al.,	:	
	:	Case No. 2010-1881
Plaintiffs-Appellees,	:	
	:	On Appeal from the Cuyahoga
vs.	:	County Court of Appeals, Eighth
	:	Appellate District
SABER HEALTHCARE GROUP, LLC,	:	
et al.,	:	Court of Appeals
	:	Case No. CA-10-095695
Defendants-Appellants.	:	

**BRIEF OF *AMICUS CURIAE* OHIO ACADEMY OF NURSING HOMES, INC.
IN SUPPORT OF DEFENDANTS-APPELLANTS SABER
HEALTHCARE GROUP, LLC, ET AL.**

David H. Krause (0070577)
 Joyce E. Carlozzi (0038936)
 SEAMAN GARSON, LLC
 1600 Rockefeller Building
 614 West Superior Avenue
 Cleveland, OH 44113
 (216) 830-1000
 (216) 696-8558 fax
 dhkrause@seamangarson.com
 jcarlozzi@seamangarson.com
*Counsel for Plaintiffs-Appellees
 John T. Flynn, etc.*

Brant E. Poling* (0063378)
**Counsel of Record*
 Colleen H. Petrello (0041628)
 POLING | PETRELLO
 1100 Superior Avenue, Suite 1100
 Cleveland, OH 44114
 (216) 456-8800
 (216) 456-8862 fax
 bpoling@poling-law.com
 cpetrello@poling-law.com
*Counsel for Defendants-Appellants
 Saber Healthcare Group, etc.*

Geoffrey E. Webster* (0001892)
**Counsel of Record*
 Gerhardt A. Gosnell II (0064919)
 CHESTER, WILLCOX & SAXBE LLP
 65 East State Street, Suite 1000
 Columbus, Ohio 43215
 (614) 221-4000
 (614) 221-4012 fax
 gewebster@cwslaw.com
 ggosnell@cwslaw.com
*Counsel for Amicus Curiae Ohio Academy
 of Nursing Homes, Inc.*

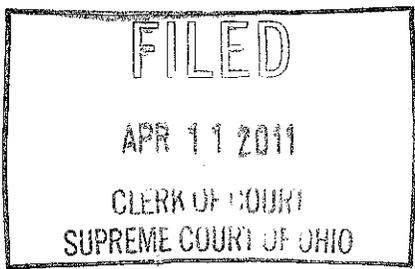


TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE*..... 1

INTRODUCTION 2

STATEMENT OF FACTS 3

ARGUMENT..... 3

 I. The denial of a motion to bifurcate punitive damages pursuant to R.C. 2315.21(B)(1) is a final appealable order.....3

 A. The right to bifurcation under R.C. 2315.21(B) is a key provision of tort reform and a substantive right granted by the General Assembly to ensure that the jury does not consider improper evidence when determining liability and compensatory damages.3

 B. The denial of a motion to bifurcate made under R.C. 2315.21(B) is a final appealable order pursuant to R.C. 2505.02(B)(6).....5

 C. The denial of a motion to bifurcate made under R.C. 2315.21(B) is a final appealable order pursuant to R.C. 2505.02(B)(4).....6

CONCLUSION..... 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases

<i>Arbino v. Johnson & Johnson</i> , 116 Ohio St.3d 468, 2007-Ohio-6948.....	2, 3, 4
<i>Finley v. First Realty Property Management, Ltd</i> (9 th Dist. 2007), 2007-Ohio-2888, 2007 WL 1695116	6
<i>Groch v. General Motors Corp.</i> , 117 Ohio St.3d 192, 2008-Ohio-546.....	2
<i>Hanners v. Ho Wah Genting Wire & Cable SDN BHD et al.</i> , 2009-Ohio-6481, 2009 WL 4698618.....	4, 5
<i>Havel v. Villa St. Joseph</i> (8 th Dist.), 2010-Ohio-5251, 2010 WL 4308208.....	5, 6
<i>Myers v. Brown</i> (5 th Dist.), 2011-Ohio-892, 2011 WL 684255.....	6
<i>State v. Muncie</i> (2001), 91 Ohio St.3d 440.....	7, 8

Statutes

R.C. 2125.02	5
R.C. 2305.10	2, 5
R.C. 2305.131	5
R.C. 2315.18	2, 5
R.C. 2315.19	5
R.C. 2315.21	2, 5, 6
R.C. 2315.21(B).....	passim
R.C. 2315.21(B)(1)	2, 3
R.C. 2315.21(B)(1)(a).....	2, 3
R.C. 2505.02	5, 6
R.C. 2505.02(A)(3).....	7
R.C. 2505.02(B)(4)	passim
R.C. 2505.02(B)(4)(a).....	8
R.C. 2505.02(B)(4)(b).....	8
R.C. 2505.02(B)(6)	3, 5, 6
S.B. No. 80.....	passim

Rules

Civ.R. 42(B).....	5, 6
-------------------	------

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1963, The Ohio Academy of Nursing Homes, Inc. (“the Academy”) is a statewide trade association representing the interests of the long-term care industry. The Academy’s membership consists of a cross-section of the skilled nursing facility profession, from small sole proprietorships to larger Ohio-based multi-facility companies, as well as those businesses that service such facilities. The mission of the Academy is to aggressively assert and represent the collective interests of its members regarding the delivery of health-related care and services to infirmed and disabled citizens in a professional manner, respecting the dignity of those served. Evaluation and advocacy regarding local, state, and federal issues is an integral part of this mission.

Consistent with its mission, the Academy has been a proponent of tort reform in Ohio. The Academy believes that these reforms are necessary to ensure the proper balance between those legitimately harmed and those unfairly sued, and to provide more fairness and predictability to Ohio’s civil justice system.

The Academy, therefore, submits this brief in support of Defendant-Appellants to address a fundamental error below, which if left uncorrected threatens to undercut a key statutory provision of tort reform – the right of a defendant in a tort action to bifurcate the issue of punitive damages and to immediately appeal the denial of such right.

INTRODUCTION

This case involves this Court yet-again in another challenge to a provision of the tort-reform legislation of Am.Sub.S.B. No. 80 of the 125th General Assembly (“S.B. 80”), effective April 7, 2005. S.B. 80 was enacted by the General Assembly upon its determination “that the uncertainty and subjectivity associated with [Ohio’s] civil justice system were harming the state’s economy.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶101. Recognizing that the legislature is “the ultimate arbiter of public policy,” *Arbino*, at ¶21 (internal quotations omitted), this Court has repeatedly rejected constitutional challenges to the validity of key provisions of S.B. 80. See generally *Arbino*, 2007-Ohio-6948 (upholding limitations on noneconomic damages and punitive damages in tort actions set forth in R.C. 2315.18 and 2315.21); *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546 (generally upholding statute of repose for products-liability actions contained in R.C. 2305.10).

A key component of S.B. 80 was amendment of R.C. 2315.21(B) to provide the right to, in trial of a tort action, bifurcation of a claim for punitive or exemplary damages. In particular, R.C. 2315.21(B)(1) provides, upon the motion of any party, the trial “shall be bifurcated” between an initial stage, relating only to the determination by the jury as to whether the plaintiff is entitled to recover compensatory damages from the defendant, and a second stage to determine (if necessary) whether the plaintiff is entitled to recover punitive damages. Significantly, during the initial stage of the trial, no party “shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages.” R.C. 2315.21(B)(1)(a).

Despite the mandatory language of R.C. 2315.21(B), the trial court in the instant case denied the Defendant-Appellants’ motion to bifurcate made pursuant to the statute. Inexplicably,

and on its own motion, the court of appeals dismissed Defendant-Appellants appeal of that order, even though courts of appeals throughout Ohio have recognized the immediate right to appeal a denial of a bifurcation motion made pursuant to R.C. 2315.21(B). To the parties in the underlying action (and all other similarly affected persons), it is as if S.B. 80 were never enacted.

The result below cannot stand. The denial of a motion to bifurcate made pursuant to R.C. 2315.21(B) is a denial of a substantive right, and a party prejudiced thereby has the right to an immediate appeal under R.C. 2505.02(B)(4) and (B)(6).

STATEMENT OF FACTS

The Academy adopts by reference the statement of the facts set forth in the Merit Brief of Defendant-Appellants Saber Healthcare Group, LLC, et al.

ARGUMENT

I. The denial of a motion to bifurcate punitive damages pursuant to R.C. 2315.21(B)(1) is a final appealable order.

A. The right to bifurcation under R.C. 2315.21(B) is a key provision of tort reform and a substantive right granted by the General Assembly to ensure that the jury does not consider improper evidence when determining liability and compensatory damages.

The mandatory bifurcation provisions set forth in R.C. 2315.21(B) ensures juries do not consider irrelevant and potentially prejudicial evidence when determining questions of liability or compensatory damages. Evidence solely related to punitive damages is limited to the second-stage of the trial, and then only if necessary. R.C. 2315.21(B)(1)(a).

The General Assembly recognized Defendant's right to limit the presentation of evidence solely related to punitive damages to a second-stage was vital to ensure a fair and balanced system of civil justice. As this Court recognized in *Arbino*, supra at ¶¶53-54, in uncodified section 3 of S.B. 80, the General Assembly made a "statement of findings and intent." In so

doing, the General Assembly distinguished between non-economic damages, which compensate a plaintiff, and punitive damages, which punish a defendant. 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). It also found that “[i]nflated damage awards create an improper resolution of civil justice claims, [and that] [t]he increased and improper cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.” *Id.* at section 3(A)(6)(e).

On these grounds, the General Assembly concluded that evidence of misconduct should only be considered for purposes of awarding punitive damages, not non-economic damages. Thus, the General Assembly stated: “[i]n 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).

R.C. 2315.21(B), therefore, provides a substantive right. “While it mandates a particular procedure for tort actions, that mandate is for the purpose of creating and defining a defendant's right to request bifurcation to ensure that the jury does not inappropriately consider the defendant's misconduct when also determining questions of liability and compensatory damages.” *Hanners v. Ho Wah Genting Wire & Cable SDN BHD et al.*, Tenth App. No. 09AP-361, 2009-Ohio-6481, 2009 WL 4698618, ¶28. This substantive right flows from the General Assembly's right “to make a policy decision to achieve a public good.” *Arbino*, *supra* at ¶61.

B. The denial of a motion to bifurcate made under R.C. 2315.21(B) is a final appealable order pursuant to R.C. 2505.02(B)(6).

S.B. 80 not only made substantive reforms to Ohio’s tort law, but also sought to ensure that legal challenges to such reforms were expeditiously reviewed by Ohio’s appellate courts and ultimately this Court. R.C. 2505.02 was therefore amended by S.B. 80 to add subsection (B)(6) to the definition of what constitutes a final appealable order. Specifically R.C. 2505.02(B)(6) provides that an order is final and appealable if it is “[a]n order determining the constitutionality of . . . 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.” (emphasis added).

As already noted, the bifurcation provisions of R.C. 2315.21(B) were changes made by S.B. 80 to R.C. 2315.21. Further, since the right of bifurcation set forth in R.C. 2315.21(B) is mandatory, the only possible basis for denying a motion to bifurcate made under R.C. 2315.21(B) is that the mandatory right to bifurcation is unconstitutional. See, e.g., *Havel v. Villa St. Joseph* (8th Dist.), 2010-Ohio-5251, 2010 WL 4308208 (holding that mandatory bifurcation pursuant to R.C. 2315.21(B) was unconstitutionally in conflict with Civ.R. 42(B)) (currently pending in this Court as a certified conflict in Case No. 2010-2148).

Accordingly, any denial of a motion to bifurcate made under R.C. 2315.21(B) is implicitly an “order determining the constitutionality” of its provisions, and as a result, any such order is immediately appealable under R.C. 2505.02(B)(6). Consistently, therefore, Ohio’s courts of appeals have repeatedly found that a denial of a motion to bifurcate made pursuant to R.C. 2315.21(B) is immediately appealable under R.C. 2505.02(B)(6), even where the order denying the motion does not expressly contain a determination of unconstitutionality. See, e.g., *Hanners*, supra, at ¶13 (order denying motion to bifurcate was immediately appealable even

though it did not expressly declare the statute unconstitutional); *Havel*, supra, at ¶19 (by refusing to apply R.C. 2315.21(B), the trial court implicitly determined its constitutionality, and therefore, the order denying bifurcation was immediately appealable under R.C. 2505.02(B)(6)); *Myers v. Brown* (5th Dist.), 2011-Ohio-892, 2011 WL 684255, ¶10 (order denying bifurcation motion was immediately appealable even though it did not expressly determine its constitutionality).

The right of immediate appeal cannot be dependent upon the trial court's failure to expressly state in the order itself the only possible basis for denying the motion to bifurcate. To hold otherwise would exult form over substance and create non-uniformity between cases simply based upon whether the trial court's order contained "magic language." And in the most extreme, it would invite mischief by allowing trial courts to effectively render the provisions of both R.C. 2315.21(B) and 2505.02(B)(6) a nullity based solely upon the language it uses in denying a motion to bifurcate.

Accordingly, this Court should hold that any denial of a motion to bifurcate made under R.C. 2315.21(B) is immediately appealable pursuant to R.C. 2505.02(B)(6).

C. The denial of a motion to bifurcate made under R.C. 2315.21(B) is a final appealable order pursuant to R.C. 2505.02(B)(4).

Ohio courts of appeals have traditionally held that a denial of motion to bifurcate made pursuant to Civ.R. 42(B) is not a final appealable order under R.C. 2505.02. For example, the case relied upon by the court of appeals to dismiss the appeal below involved a Civ.R. 42(B) motion. See *Finley v. First Realty Property Management, Ltd* (9th Dist. 2007), 2007-Ohio-2888, 2007 WL 1695116. A motion to bifurcate made pursuant to R.C. 2315.21 is different, however, and is a final appealable order under the 1998 amendments to R.C. 2505.02 contained in subdivision (B)(4).

R.C. 2505.02(B)(4) provides that an order is a “final order” if it satisfies each part of a three-part test: (1) the order must either grant or deny relief sought in a certain type of proceeding – a proceeding that the General Assembly calls a “provisional remedy,” (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, and (3) the reviewing court must decide that the party appealing from the order 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. *State v. Muncie* (2001), 91 Ohio St.3d 440, 446. Here, a denial of a motion to bifurcate made pursuant to R.C. 2315.21(B) satisfies all three of these requirements.

First, it involves an order denying a “provisional remedy.” A 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 [and other various statutory proceedings].” R.C. 2505.02(A)(3). The list of provisional remedies contained in R.C. 2505.02(A)(3) is “illustrative and not exhaustive.” *Muncie*, *supra* at 448. Thus, according to its terms, a provisional remedy is any proceeding that is “ancillary to” (meaning attendant upon, supplementary to, or subordinate to) another principal proceeding. *Muncie*, *supra* at 448-449.

Pursuant to R.C. 2315.21(B), the punitive-damages phase (or second-stage) of the trial of a tort action is undoubtedly a provisional remedy because it is “ancillary to” the principal (or initial) stage of the jury trial. In simple terms, a punitive damages trial supplements the initial, liability phase.

Second, an order denying bifurcation “effectively 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.” R.C. 2505.02(B)(4)(a). The provisional remedy here is having punitive damages heard in a second-stage trial. The order denying bifurcation definitively determines, however, that the action will be tried in a single stage. The order precludes the defendant’s right to a separate punitive-damages trial and precludes the defendant from the protections afforded under R.C. 2315.21(B) that evidence solely related to punitive damages be excluded from the initial, liability phase.

Third, an order denying bifurcation satisfies the requirements of R.C. 2505.02(B)(4)(b) because the defendant “would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties to the action.” While the order denying bifurcation is certainly reversible on an appeal at the conclusion of a full-blown trial on the merits, the test for purpose of this requirement under R.C. 2505.02(B)(4) goes to the practical adequacy of such a remedy. See *Muncie*, supra at 451-52.

Here, an appeal after a trial on the merits is not an effective remedy. Such a result would force defendants to expend significant amounts to defend a full jury trial, which pursuant to the clear mandates of R.C. 2315.21(B) is nothing more than a nullity. These costs can never be recouped. Further, without bifurcation, the defendant runs the risk that the jury will rely upon improper evidence to determine liability and compensatory damages. Again, while such a result would be subject to appeal, a defendant may be forced to post a significant appeal bond to ensure the appeal of an unjustified verdict. Finally, while such a verdict should be reversed summarily because it was the product of a trial in violation of the protections afforded R.C. 2315.21(B), a defendant on appeal might be placed in the impossible position of trying to convince the court of appeals that the jury did *in fact* rely upon improper evidence to refute an argument that the

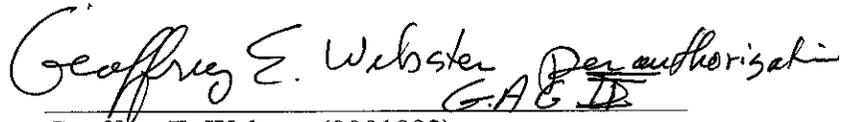
failure to grant bifurcation in the first place was harmless error. Thus, an appeal after trial is not an adequate remedy to protect the rights afforded under R.C. 2315.21(B).

In sum, the denial of a motion to bifurcate made pursuant to R.C. 2315.21(B) satisfies all three of the requirements of R.C. 2505.02(B)(4), and as a result, it is a final appealable order.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Ohio Academy of Nursing Homes, Inc. strongly supports the adoption of Defendant-Appellants' Propositions of Law.

Respectfully submitted,

 Geoffrey E. Webster *Per authorization*
G.A.G. II

Geoffrey E. Webster (0001892)
Gerhardt A. Gosnell II (0064919)
CHESTER, WILLCOX & SAXBE LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
(614) 221-4000
(614) 221-4012 fax
gewebster@cwslaw.com
ggosnell@cwslaw.com
*Counsel for Amicus Curiae Ohio Academy
of Nursing Homes, Inc.*

CERTIFICATE OF SERVICE

I certify that a copy of this *Brief of Amicus Curiae Ohio Academy of Nursing Homes, Inc. in Support of Defendants-Appellants Saber Healthcare Group, LLC, et al.*, was served by U.S. Mail this 11th day of April, 2011, upon the following:

Brant E. Poling
Colleen H. Petrello
POLING | PETRELLO
1100 Superior Avenue, Suite 1100
Cleveland, OH 44114
*Counsel for Defendants-Appellants
Saber Healthcare Group, etc.*

David H. Krause
Joyce E. Carlozzi
SEAMAN GARSON
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, OH 44113
*Counsel for Plaintiff-Appellees
John T. Flynn, etc.*

Dirk E. Riemenschneider
Tim Spirko
BUCKINGHAM, DOOLITTLE & BURROUGHS
1375 East 9th Street, Suite 1700
Cleveland, OH 44114
Counsel for Defendant Michael Francus


Gerhardt A. Gosnell II (0064919)