

ORIGINAL

In the
Supreme Court of Ohio

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| SANDRA HAVEL, | : | Case No. 2010-2148 |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | On Appeal from the |
| v. | : | Cuyahoga County |
| | : | Court of Appeals, |
| VILLA ST. JOSEPH, <i>et al.</i> , | : | Eighth Appellate District |
| | : | |
| Defendants-Appellants. | : | Court of Appeals Case |
| | : | No. CA 94677 |

**AMENDED MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF DEFENDANTS-APPELLANTS VILLA ST. JOSEPH, ET AL.**

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INTRODUCTION

The Modern Courts Amendment of the Ohio Constitution authorizes this Court to “prescribe rules governing practice and procedure in all courts of the state.” Ohio Const. Art. IV, § 5(B). Enacted in the wake of a national procedural reform movement, the Amendment empowered the Court to abandon Ohio’s arcane statute-based pleading system in favor of a more efficient rules-based system. To ensure that vestiges of code-pleading did not persist into the new, modern court system, the Amendment instructed that “[a]ll laws in conflict” with court rules would have “no further force or effect.” *Id.*

Although the Amendment had the important effect of “[p]ut[ting] somebody in charge’ of the state’s courts,” Ohio Legislative Service Commission, Staff Research Report No. 75, *Problems of Judicial Administration* (1965) (“LSC Report”), 75, it did not diminish the General Assembly’s power over matters of public policy. Instead, the Amendment confined the Court’s rulemaking power to purely procedural matters, leaving matters of substantive law to the General Assembly. When a conflict arises between a court rule and a state statute, the rule controls if the matter is procedural, and the statute controls if it is substantive.

This case involves one such conflict. In 2005, the General Assembly passed wide-ranging tort reform to “mak[e] certain” that Ohio’s system of civil justice was “fair[] [and] predictable,” not only for civil plaintiffs seeking redress for injuries, but also for civil defendants. Am Sub. S.B. No. 80 (“S.B. 80”), § 3(A)(3). As part of this reform, the General Assembly gave civil defendants a new statutory right: In any tort action “tried to a jury” “in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages,” the trial court “shall,” upon request, bifurcate the compensatory damages phase and the punitive damages phase. R.C. 2315.21(B). In other words, the statute makes bifurcation mandatory in tort trials when the defendant requests it. By contrast, Civil Rule 42(B) places bifurcation decisions within

the discretion of the trial court. Because the statute is at odds with Civil Rule 42(B), the statute is constitutional under the Modern Courts Amendment only if it is substantive rather than purely procedural.

The statute here is substantive. The Federal Constitution's due process guarantee protects civil defendants from exorbitant and arbitrary punitive damages awards. The bifurcation statute builds on that constitutional floor: The General Assembly enacted R.C. 2315.21(B) to ensure that evidence of a defendant's misconduct does not infect the jury's assessment of liability and that evidence of a plaintiff's injury does not cloud the jury's judgment about punitive damages. It is true that the statute confers a right that can only be exercised during a court proceeding, and accordingly comes "necessarily packaged in procedural wrapping." *State ex rel. Loyd v. Lovelady*, 108 Ohio St. 3d 86, 2006-Ohio-161, at ¶ 14. But the statute confers a substantive right all the same; "procedural wrapping" does not take the statute out of the substantive realm and into the procedural. See *id.* By ensuring that civil defendants have substantial protection from unjust verdicts, the statute "creates, defines and regulates the rights" of parties, and is therefore a substantive law. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, at ¶ 17 (citation omitted).

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General is the State's chief law officer. The Attorney General therefore has a strong interest in ensuring that Ohio's statutes are upheld against constitutional attack. In addition, the State has a significant interest in the fair adjudication of civil disputes. A predictable and effective civil litigation system is vital to the economic well-being of the State and its corporate and individual citizens. The bifurcation statute passed as part of the General Assembly's tort reform efforts provides meaningful protection against tainted compensatory and punitive damage awards and protects civil defendants' fundamental due-process rights.

STATEMENT OF THE CASE AND FACTS

Sandra Havel, as personal representative of the Estate of John Havel, filed a complaint against nursing homes Villa St. Joseph and Village of Marymount. *Havel v. Villa St. Joseph, et al.* (8th Dist.), 2010-Ohio-5251, ¶ 2 (“App. Op.”). Alleging medical malpractice, wrongful death, and violation of Ohio’s Nursing Home Bill of Rights, Havel sought both compensatory and punitive damages on behalf of the estate. *Id.* The nursing homes filed an answer denying the allegations and raising a number of affirmative defenses. *Id.* ¶ 3.

In a separate motion, the nursing homes asked that the trial court bifurcate the punitive damages phase of the trial from the compensatory damages phase, invoking the statutory mandate that “[i]n 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.” R.C. 2135.21(B)(1). The trial court denied the motion, and the nursing homes appealed. App. Op. ¶ 3.

The Eighth District, as an initial matter, recognized that the trial court’s refusal to apply the mandatory bifurcation provision of R.C. 2135.21(B) amounted to an implicit determination that the statute was unconstitutional. *Id.* at ¶ 19. This implicit determination made the district court’s order final and appealable under R.C. 2505.02(B)(6), which says that “[a]n order determining the constitutionality of . . . [R.C.] 2315.21” is a final order. *Id.*; see Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine, *Flynn v. Saber Healthcare Group*, Case No. 2010-1881 (filed April 8, 2011).

Turning to the merits, the Eighth District agreed with the trial court’s decision to deny bifurcation and held that R.C. 2315.21(B) unconstitutionally trespassed on the rulemaking powers of this Court. App. Op. ¶ 30. It reasoned that the statute, which “requires bifurcation in a tort action,” conflicted with Civil Rule 42(B), which “does not.” *Id.* ¶ 8. Concluding that bifurcation

was procedural, not substantive, the court held that “the rule controls on procedural matters” and struck the statute as a violation of the Modern Courts Amendment. *Id.* ¶ 30.

On the nursing homes’ motion, the Eighth District certified a conflict to this Court. The appellate court determined that its decision conflicted with *Hanners v. Ho Wah Genting Wire & Cable* (10th Dist.), 2009-Ohio-6481, which held that S.B. 80’s bifurcation provision was substantive, not procedural, and therefore not a violation of the Modern Courts Amendment. This Court found that a conflict existed and agreed to consider “[w]hether R.C. 2315.21(B), as amended by S.B. 80, effective April 7, 2005, is unconstitutional, in violation of Section 5(B), Article IV of the Ohio Constitution, because it is a procedural law that conflicts with Civ. R. 42(B).” Order, Case No. 2010-2148 (Feb. 2, 2011).

ARGUMENT

Amicus Curiae State of Ohio’s Proposition of Law:

R.C. 2135.21(B)’s mandatory bifurcation guarantee is a substantive law and therefore trumps the discretionary bifurcation procedure outlined in Civil Rule 42(B).

The General Assembly did not impinge upon this Court’s rulemaking power when it gave civil defendants a statutory right to have the compensatory and punitive damages phases of a tort trial bifurcated. In enacting R.C. 2135.21(B), the General Assembly built on the range of protections already available to civil defendants under the Federal Constitution. And because the statute has the effect of creating, defining, and regulating the rights of parties, it is a substantive measure that falls within the General Assembly’s power. The Court should not use the Modern Courts Amendment, regarded at its inception as a limited delegation of authority to this Court, to strike the General Assembly’s legitimate attempt to protect the substantive rights of civil defendants.

A. The Modern Courts Amendment vests the Ohio Supreme Court with authority over procedural matters; it does not affect the General Assembly’s authority to regulate substantive rights.

The Modern Courts Amendment of the Ohio Constitution gives the Ohio Supreme Court rulemaking authority over procedural matters in Ohio’s courts. Art. IV, § 5(B). That power, though significant, is of limited scope. While the Amendment authorizes the Court to regulate purely procedural matters, substantive matters—including those cloaked in procedural terms—remain the exclusive province of the General Assembly.

1. The Modern Courts Amendment sprung out of an effort to modernize Ohio’s court system, not to enlarge the judiciary’s policymaking power.

The history of the Modern Courts Amendment confirms its limited scope. Prior to the adoption of the Modern Courts Amendment, “[p]roblems in the administration of justice ha[d] been a matter of continual concern in Ohio.” LSC Report 5. Judges, practitioners and legislators alike recognized a need for wide-ranging reforms that touched nearly every facet of the judicial system. See generally William W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution* (1968), 29 Ohio St. L.J. 811.

The “overly complicated and disorganized” code-pleading system was one aspect of the judicial system badly in need of reform. *Id.* at 829. In states like Ohio, where court procedure was governed primarily by statutory code, pleading and procedure had grown cumbersome and complex. See LSC Report 54-56. The complexities were a trap for the unwary and susceptible to gamesmanship, and confusion about code-pleading “resulted in numerous delays and dismissals on procedural grounds, denying to the parties their opportunity to have rights considered on the merits.” *Id.* at 55.

By the mid-1960s, Ohio’s code-based procedures were something of a relic. Popular sentiment had turned against code-pleading in the earlier part of the century. See, e.g., Roscoe

Pound, *The Rule-Making Power of the Courts* (1926), 12 A.B.A. J. 599, 603 (States cannot “go on in the urban, industrial America of today under the heavy weight of procedural detail with which [their] courts are struggling.”). And after the adoption of the Federal Rules of Civil Procedure in 1938, “over half of the states” followed the federal government’s lead. LSC Report 54.

One by one, states abandoned their ponderous code-pleading systems in favor of judicially crafted, rule-based systems that drew extensively from the federal rules. See *Id.*; A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision* (1958), 107 U. Penn. L. Rev. 1, 3-5, 11. On the theory that entrusting procedure to those who administered it on a daily basis would lead to a simpler, more efficient system, states saw judicial rulemaking—and abrogation of statutes inconsistent with that rulemaking—as a way out from under the strictures of code-pleading. See, e.g., Pound, 12 A.B.A. J. at 601.

Ohio lagged behind this wave of procedural reform. W. Glenn Forrester, *Substance and Procedure: The Scope of Judicial Rulemaking Authority in Ohio* (1976), 37 Ohio St. L.J. 364, 364. The delay was not for lack of recognition about problems with the code—the Ohio State Bar Association had actively proposed reform for decades—but due to uncertainty about *who* had the power to fix it. See LSC Report 58-59; Milligan & Pohlman, 29 Ohio St. L.J. at 829. Persistent questions “as to whether the General Assembly or any other body could take full administrative charge of the court system” and “as to whether the Supreme Court specifically had sufficient management powers” left both the legislative and judicial branches unsure about who was in the driver’s seat. LSC Report 76.

The General Assembly had previously conferred rulemaking power on this Court through statute, but “judicial reticence and doubts as to the validity of such a delegation” left that power untapped. LSC Report 59. By the time the Legislative Service Commission issued its report on problems with the court system in 1965, the path to a rule-based system was apparent: if reform was to come, it would have to come through a constitutional amendment. LSC Report 59.

The Modern Courts Amendment was proposed as a way to “[p]ut[] somebody in charge of the state’s courts.” LSC Report 75. Along with general superintendence over the court system, the Amendment gave this Court the power to “prescribe rules governing practice and procedure in all courts of the state.” Article IV, § 5(B). The theory was that, by clearing up confusion over which branch should be doing the reforming, the Amendment would mobilize the Court to adopt a more modern, rule-based system free from the constraints of code-pleading. See generally LSC Report 47. To ensure that remnants of code-pleading did not persist into the new rule-based era, the Amendment declared that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” Art. VI, § 5(B); see also LSC Report 56-57.

The Court quickly took its cue. Shortly after Ohio voters adopted the Amendment in 1968, this Court exercised its power under the Amendment to promulgate rules based in part on the Federal Rules of Civil Procedure. Jeffrey A. Parness & Christopher C. Manthey, *Public Process and Ohio Supreme Court Rulemaking* (1979), 28 Clev. St. L. Rev. 249, 260-62.

2. Though couched in terms of judicial power, the Modern Courts Amendment is modest in scope.

The Amendment’s delegation of rulemaking authority to this Court was a significant step toward modernizing the court system, but the scope of the Amendment must be kept in perspective. Though the Amendment spoke in terms of judicial power—and though separation-

of-powers interests animated it, see LSC Report 76—the Amendment was, as described above, an effort to modernize the court system, not to confer far-reaching substantive power on the Court. See *id.* at 57, 76; Milligan & Pohlman, 29 Ohio St. L.J. at 829.

The text of the Amendment confirms its limited scope, explaining that rules that “abridge, enlarge, or modify any substantive right” are not part of the Court’s rulemaking power. Art. IV, § 5(B). The Amendment draws a line between the procedural powers that belong to the Court and the substantive powers that remain the province of the General Assembly.

From the beginning, there was uncertainty as to whether this substantive/procedural distinction would adequately preserve the delegation of public policy matters to the General Assembly. The Legislative Service Commission’s report acknowledged that “[f]ear . . . persists that rule-making will impinge upon substantive rights because procedure and substance are inextricable.” LSC Report 57. It further nodded to the idea that “difficulties of categorization” between substance and procedure would “complicate” “judicial interpretations of what constitutes procedure.” *Id.* at 61. Commentators that explored the substantive/procedural distinction identified the same categorization problem but offered few solutions. See, e.g., Levin & Amsterdam, 107 U. Penn. L. Rev. at 20 (noting “the difficulty of delineating substance from procedure” and acknowledging the reality that “[n]o clearly preferable alternatives have been forthcoming”); Paul C. Gianelli (1978), *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence and Rulemaking*, 29 Case W. Res. L. Rev. 16, 36 (“Defining substance and procedure has proved as difficult in Ohio as it has in other jurisdictions.”); C. Wright & A. Miller, *Federal Practice and Procedure* (1971) § 59, at 272 (disapproving an unnuanced approach to the substantive/procedural distinction, warning that it could lead “to a barren and misleading conceptualism”).

Perhaps because of concerns about trenching on matters rightfully within the General Assembly's domain, this Court's earliest cases interpreting the Modern Courts Amendment take a "cautious approach . . . toward its rule making authority" by embracing "a broader view of what [is] substantive than what the federal or some other state courts might have taken." W. Glenn Forrester, 37 Ohio St. L.J. at 384 (analyzing *State v. Hughes* (1975), 41 Ohio St. 2d 208).

In *State v. Hughes*, for example, the Court held that a statute outlining the procedure prosecutors had to follow to appeal trial-court judgments superseded the less restrictive process contained in Appellate Rule 4(B). 41 Ohio St. 2d at 210-11. Even though the statute "specif[ie]d the procedure to be followed in bringing an appeal," the Court reasoned that it also regulated a "substantive right"—the prosecutors' right to appeal unfavorable judgments. *Hughes*, 41 Ohio St. 2d at 211; see also *State v. Wallace* (1975), 43 Ohio St. 2d 1, 2 (recognizing that the statute at issue in *Hughes* was "facially procedural," but that it conferred "a substantive legislative grant giving the state a right of appeal in criminal cases").

In a similar vein, *Krause v. State* recognizes that substantive and procedural law "are not always mutually exclusive," and emphasizes that the Modern Courts Amendment should not be read too broadly: Sharp "change[s] in public policy of this state," the Court said, "ought not to be so lightly inferred from a general authorization to formulate 'rules governing practice and procedure in all courts of the state.'" 31 Ohio St. 2d 132, 145 (1975), *overruled in part on other grounds by Schenkolewski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St. 2d 31; see also *State v. Slatter* (1981), 66 Ohio St. 2d 452, 455 n.4.

This Court's early caution in both protecting the policy-making power of the legislature and cabining the reach of the Court's rulemaking power confirms that the scope of the Modern

Courts Amendment is limited. Indeed, in the decades since the Amendment's enactment, this Court has routinely recognized that its rulemaking power is no hindrance to the General Assembly's efforts to confer substantive rights on litigants ranging from prosecutors to criminal defendants to everyone in between, as well as to establish public policy for the State. See, e.g., *Hughes*, 41 Ohio St. 2d at 210-11; *City of Cuyahoga Falls v. Bowers* (1984), 9 Ohio St. 3d 148, 149 (statute requiring trial judge to "take an explanation of circumstances on a plea of no contest before making a finding of guilty or not guilty" gives criminal defendants a substantive right); *Boyer v. Boyer* (1976), 46 Ohio St. 2d 83, 86 (statute providing standard for determining custody of a child protects the substantive rights of children "to be placed with the relative whose custodianship would be in the child's best interest"); *Erwin v. Bryan*, 125 Ohio St. 3d 519, 2010-Ohio-2202, at ¶ 4 (statutes of limitations are matters of "state policy" and therefore "the province of the legislative, not the judicial, branch of government"). That guarded approach demonstrates that the Court's rulemaking powers should not lightly be read as preempting a substantive field in which the General Assembly has chosen to legislate.

B. R.C. 2135.21(B) protects civil defendants' due process rights by creating a substantive right to bifurcate the liability phase and the punitive damages phase of a trial.

Analyzing R.C. 2135.21(B) in light of the history and purpose of the Modern Courts Amendment confirms that the statute regulates a matter of substance, not procedure. Though perhaps cast in procedural terms, the statute creates a substantive right previously unavailable to civil defendants: the right to bifurcation of the liability and punitive damages phases. This right, viewed by the General Assembly as necessary to ensure that civil trials are fair and predictable, builds on the due process guarantees the Federal Constitution offers civil defendants. The Modern Courts Amendment is no obstacle to that type of legislative policymaking.

1. A statute that is procedural on its face, but substantive in its intent and effect, is a substantive law that trumps any conflicting rule.

Under the Modern Courts Amendment, when a statute conflicts with a court rule, the General Assembly's statute controls for matters of substance and the Court's rule controls for matters of procedure. See *Slatter*, 66 Ohio St. at 455. Here, the conflict is that Civil Rule 42(B), enacted under this Court's rulemaking power, gives trial courts discretion to bifurcate trials. R.C. 2315.21(B), in contrast, makes bifurcation mandatory in certain situations—it says that trial courts shall, upon request, bifurcate the compensatory and punitive damages phases of any tort action being tried before a jury.

Given this conflict, the constitutionality of R.C. 2315.21(B) turns on whether the statute is purely procedural or whether it furthers some substantive right. A matter is substantive if it “creates, defines and regulates the rights of the parties.” *Krause*, 31 Ohio St. 2d at 145. Procedural matters, in contrast, are those which prescribe “methods of enforcing rights or obtaining redress.” *Id.*

These definitions are as easy to recite as they are difficult to apply. This Court has long recognized that “[t]he remedial-procedural versus substantive dichotomy is seldom an easy distinction,” *French v. Dwiggins* (1984), 9 Ohio St. 3d 32, 33; that “the substantive-procedural distinction . . . is not without difficulty,” *Slatter*, 66 Ohio St. 2d at 454-55; and that “[p]rocedural and substantive law are not always mutually exclusive,” *Krause*, 31 Ohio St. 2d 132, 148. Indeed, trying to distinguish clearly between substantive and procedural law has, to some, become so unsatisfying as to be “artificial and illusory.” *Gregory v. Flowers* (1972), 32 Ohio St. 3d 48, 57 (quoting 1 Chamberlayne, *Modern Law of Evidence*, 217, § 170).

One reason that distinguishing between substantive and procedural matters is so complex is that, at times, the nature of the substantive right the General Assembly is trying to create comes

“necessarily packaged in procedural wrapping.” *Loyd*, 2006-Ohio-161, ¶ 14. In *Loyd*, for instance, this Court recognized that a statute laying out how to seek relief from a child support order, though it had a procedural ring to it, “create[d] a substantive right to address potential injustice” and therefore trumped conflicting language in Rule 60(B). *Id.*; see also *Hughes*, 41 Ohio St. 2d 208 (described *supra*, 9).

Because substantive matters may come packaged as procedural, the substantive/procedural inquiry must be steered by “the legislative intent in enacting the statute.” *Loyd*, 2006-Ohio-161, ¶ 13 (citation and quotations omitted). As the Tenth District rightly observed: “While [the statute] 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*, 2009-Ohio-6481, ¶ 28. In short, a statute cast in procedural terms does not tread on this Court’s rulemaking power if the General Assembly, when enacting the statute, “intended to create a substantive right to address potential injustice.” *Loyd*, 2006-Ohio-161, ¶ 14.

2. When the General Assembly enacted R.C. 2135.21(B), it created a substantive right to bifurcation to address potential injustice in civil litigation.

R.C. 2135.21(B) creates a substantive right. Enacted in recognition of the reality “that a fair system of civil justice” requires preservation of the “essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued,” S.B. 80, § 3(A)(2), the statute “address[es] potential injustice” by protecting civil defendants from jury verdicts influenced by passion or prejudice. See *Loyd*, 2006-Ohio-161, ¶ 14. This places the statute at the very core of substantive law.

Both this Court and the United States Supreme Court have repeatedly recognized that punitive damages awards implicate constitutional rights. See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 416-18; *Barnes v. Univ. Hosp. of Cleveland*, 119 Ohio St. 3d 173, 2008-Ohio-3344; cf. *Osai v. A&D Furniture Co.* (1981), 68 Ohio St. 2d 99, 100 (statute imposing treble damages “affects a substantive right”). “[P]unitive damages,” the U.S. Supreme Court has said, “pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts,” opening the door to unconstitutionally excessive damages awards. *State Farm*, 538 U.S. at 417 (citations and quotations omitted). Adding to the risk of unconstitutional deprivation of rights, punitive damages “serve the same purposes as criminal penalties,” without affording defendants “the protections applicable in a criminal proceeding.” *Id.* To protect civil defendants’ due-process rights, courts routinely review punitive damages awards to ensure that they are neither “grossly excessive” nor “arbitrary punishments.” *Id.*; *Barnes*, 2008-Ohio-3344, ¶¶ 32-40.

Through R.C. 2135.21(B), the General Assembly built on the existing layer of constitutional protection available to civil defendants. Mandatory bifurcation gives civil defendants the opportunity to cut grossly excessive punitive damages awards off at the pass by curbing the jury’s ability to factor inappropriate considerations into its assessments at the liability and punitive damages phases. When coupled with the preexisting right to seek judicial review of punitive damages awards, mandatory bifurcation insulates civil defendants from the risk of injustice in proceedings where punitive damages are sought.

Not only are punitive damages widely recognized as implicating substantive rights, but so too with bifurcation itself. In the very different context of capital punishment, both this Court and the U.S. Supreme Court have recognized that bifurcation protects defendants’ substantive

rights. Because imposing the penalty of death in an arbitrary or capricious manner violates the Eighth and Fourteenth Amendments, see *Furman v. Georgia* (1972), 408 U.S. 238, Ohio, like other states, bifurcates the guilt and penalty phases of a capital trial through “carefully drafted statute[s]” designed to ensure that the jury considers appropriate factors before imposing the death penalty, *Gregg v. Georgia* (1976), 428 U.S. 153, 195; R.C. 2929; see also *State v. Jenkins* (1984), 15 Ohio St. 3d 164.

Although the stakes are of course far more severe in the context of capital punishment than in civil tort suits, the underlying purpose of bifurcation—to protect substantive rights—is very much the same. A statutory right to bifurcation diffuses the threat of unconstitutional jury verdicts and is therefore substantive in nature.

The General Assembly’s statement of intent, found in uncodified language of S.B. 80, confirms that R.C. 2135.21(B) “creates, defines and regulates” the rights of civil defendants and therefore addresses a matter of substantive law. See *Proctor*, 2007-Ohio-4838, ¶ 17 (citation omitted). The General Assembly recognized that the problem with inflated non-economic damages awards in Ohio was “partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.” S.B. 80, § 3(A)(6)(d). And “[i]nflated damage awards,” the General Assembly found, “create an improper resolution of civil justice claims.” S.B. 80, § 3(A)(6)(e). Given those findings, the General Assembly deemed it necessary to give “defendants . . . 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.” S.B. 80, § 3(A)(6)(f).

That this right comes “necessarily packaged in procedural wrapping” does not make it procedural. *Loyd*, 2006-Ohio-161, ¶ 14. The right to bifurcation created by R.C. 2135.21(B) is

in many ways similar to the other facially procedural matters that this Court has found to be substantive. See *id.* (statute creating a method for obtaining relief from a child support order was found substantive because the General Assembly intended to confer a “substantive right to obtain relief.”); *Hughes*, 41 Ohio St. 2d at 211 (statute establishing a procedure for prosecutors to follow when appealing trial-court judgments granted a “substantive right of appeal”); *In re McBride*, 110 Ohio St. 3d 19, 2006-Ohio-3453, at ¶ 13 (statute outlining the procedure for filing a custody petition, “[was] substantive”). As in those cases, so too here: statutes that confer or regulate a substantive right, even if they appear to touch on matters of procedure, fall within the policymaking powers of the General Assembly.

In light of the General Assembly’s intent to give civil defendants a substantive right to bifurcation—in addition to this Court’s traditionally hesitant approach to striking statutes under the Modern Courts Amendment—Havel cannot overcome the strong presumption of constitutionality that attaches to legislative enactments. See *City of Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, at ¶ 6. The Court should reverse the judgment of the Eighth District and answer “no” to the certified question.

CONCLUSION

For these reasons, the court should answer “no” to the certified question and find that R.C. 2315.21(B) is constitutional.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amended Merit Brief of *Amicus Curiae* State of Ohio in Support of Defendant-Appellants Villa St. Joseph, et al., was served by U.S. mail this 11th day of April, 2011 upon the following counsel:

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