

ORIGINAL

IN THE SUPREME COURT OF OHIO

LOUISE A. MYERS)	Case No. 11-0529
)	
Appellee)	
)	On Appeal from the Fifth
vs.)	Appellate District, Stark County,
)	Case No. 2010 CA 00238
DAVID L. BROWN, JR., ET AL.,)	
)	
Appellant)	

**NOTICE OF JOINDER IN APPEAL OF CO-APPELLANT,
DAVID BROWN**

RALPH F. DUBLIKAR (0019235)
ERIC J. STECZ (0067220)
400 South Main Street
North Canton, OH 44720
Phone: 330/4099-6000; Fax: 330/499-6423
E-Mail: Dublikar@bakerfirm.com
Stecz@bakerfirm.com

ATTORNEYS FOR APPELLANT, AMCO INSURANCE COMPANY

JOYCE V. KIMBLER (0033767)
50 S. Main Street, Suite 502
Akron, Ohio 44308
Phone: 330/253-8877; Fax: 330/253-8875
E-mail Address: kimblej@nationwide.com

ATTORNEY FOR CO-APPELLANT, DAVID L. BROWN, JR.

STEVEN P. OKEY (0038697)
337 Third Street, N.W.
Canton, Ohio 44702-1786
Phone: 330/453-8261; Fax: 330/453-2715
E-mail: sokey@okeylawfirm.com

FILED
APR 13 2011
CLERK OF COURT
SUPREME COURT OF OHIO

ATTORNEY FOR APPELLEE, LOUISE A. MYERS

RECEIVED
APR 13 2011
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF CO- APPELLANT,
DAVID BROWN, JR.

Co-Appellant, David Brown, Jr., hereby gives notice of joinder in the appeal to the Supreme Court of Ohio from the judgment of the Stark County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 2010 CA 00238 on March 11, 2011 . Also on March 11, 2011, this case was certified by the Fifth District Court of Appeals to be in conflict with the Tenth District Court of Appeals case of *Hanners v Ho Wah Genting Wire & Cable Co.*, Franklin App. No. 09AP-361, 2009-Ohio-6481. A Notice of Certified Conflict has been previously filed by Appellant AMCO Insurance Co. David Brown, Jr. hereby files this notice of his intent to participate as a co-appellant in the event this Court agrees to accept this certified conflict.

Respectfully submitted,


JOYCE V. KIMBLER #0033767
Attorney for Co-Appellant, David Brown, Jr.
50 S. Main Street, Suite 502
Akron, Ohio 44308
Phone: 330/253-8877; Fax: 330/253-8875
E-Mail: kimblej@nationwide.com

CERTIFICATE OF SERVICE

A copy of the foregoing has been sent via facsimile and postage prepaid regular

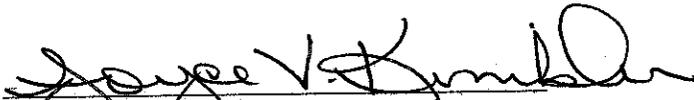
U.S. mail to the following on this 12th day of April, 2011:

Ralph F. Dublikar, Esq.
400 South Main Street
North Canton, OH 44720
Phone: 330/4099-6000; Fax: 330/499-6423
E-mail: Dublikar@bakerfirm.com

Attorney for Appellant,
AMCO Insurance Company

Steven P. Okey, Esq.
The Okey Law Firm, LPA
337 Third Street, N.W.
Canton, Ohio 44702-1786
Phone: 330/453-8261; Fax: 330/453-2715
E-mail: sokey@okeylawfirm.com

Attorney for Appellee,
Louise A. Myers


JOYCE V. KIMBLER #0033767
Attorney for Co-Appellant, David Brown, Jr.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LOUISE A. MYERS

Plaintiff-Appellee

-vs-

DAVID L. BROWN, JR., ET AL

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2010-CA-00238

11 MAR 17 PM 1:00

NANCY S. REINHOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

This cause comes before us on appellant's Motion to Certify, to the Ohio Supreme Court, a conflict between our judgment in the within and a judgment from the Tenth District Court of Appeals, *Hanners v. Ho Wah Genting Wire & Cable Co.*, Franklin App. No. 09AP-361, 2009-Ohio-6481.

We find our decision is in conflict with *Hanners supra*, and accordingly certify the matter to the Ohio Supreme Court for final determination on the question:

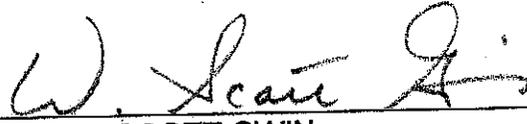
"Whether R.C. 2315.21(B), as amended by S.B. 80, effective April 7, 2005, is unconstitutional, in violation of Section 5(B), Article IV of the Ohio Constitution, because it is a procedural law that conflicts with Civ. R. 42(B)"

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We further find the identical issue is already pending before the Supreme Court in *Havel v. Villa St. Joseph*, Supreme Court Case No. 2010-2148.

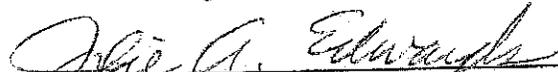
IT IS SO ORDERED.



HON. W. SCOTT GWIN



HON. SHEILA G. FARMER



HON. JULIE A. EDWARDS

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LOUISE A. MYERS

Plaintiff-Appellee

-vs-

DAVID L. BROWN, JR., ET AL

Defendant-Appellant

JUDGMENT ENTRY
NUNC PRO TUNC

B

CASE NO. 2010-CA-00238

NANCY S. REIBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
11 MAR -8 PM 2:17

This cause comes before us on appellee's motion for issuance of an opinion *nunc pro tunc* to correct our misidentification of the parties in three paragraphs of our opinion.

The motion is sustained.

IT IS SO ORDERED.

W. Scott Gwin
HON. W. SCOTT GWIN

Sheila G. Farmer
HON. SHEILA G. FARMER

Julie A. Edwards
HON. JULIE A. EDWARDS

3-8-11

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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LOUISE A. MYERS

Plaintiff-Appellee

-vs-

DAVID L. BROWN, JR., ET AL

Defendants-Appellants

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Julie A. Edwards, J.

Case No. 2010-CA-00238

OPINION

11 MAR - 8 PM 2:17
NANCY S. RENSHAW
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

CHARACTER OF PROCEEDING:

Civil appeal from the Stark County Court of
Common Pleas, Case No. 2009CV03124

JUDGMENT:

Affirmed

B

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

STEVEN P. OKEY
THE OKEY LAW FIRM
337 Third Street N.W.
Canton, OH 44702-1786

RALPH F. DUBLIKAR
ERIC J. STECZ
400 South Main Street
North Canton, OH 44720

JOYCE KIMBLER
50 South Main Street, Ste. 502
Akron, OH 44308

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Gwin, P.J.

{¶1} Defendant-appellant AMCO Insurance Company appeals a judgment of the Court of Common Pleas of Stark County, Ohio, which overruled its motion to bifurcate plaintiff-appellee Louise A. Myers' claim for punitive damages from her claim for compensatory damages. Appellant assigns a single error to the trial court:

{¶2} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO BIFURCATE PLAINTIFF'S PUNITIVE DAMAGES CLAIM PURSUANT TO R.C. 2315.21 (B)."

{¶3} The record indicates this case arose out of a traffic accident. Appellee alleged defendant David L. Brown¹ caused an accident while under the influence of alcohol and/or drugs, which resulted in personal injury to her. She alleged defendant Brown acted in malice, hatred, ill-will, a spirit of revenge, and/or a conscious disregard for the rights and safety of other persons, and she sought punitive damages. Her claim against appellant AMCO is for uninsured/underinsured motorist coverage and medical payment coverage. Appellant AMCO has filed a cross claim against defendant Brown for indemnification if appellee prevails on her claims against it.

{¶4} On July 2, 2010, appellant filed a motion to bifurcate the punitive damages claim from the compensatory damages claim pursuant to R.C. 2315.21. The court overruled the motion, finding the case appellant relied on, *Hanners v. Ho Wah Genting Wire & Cable*, Franklin App. No. 09AP-361, 2009-Ohio-6481, was not binding on the

¹ On October 9, 2009, Defendant David Brown moved the trial court to bifurcate the proceedings. The court overruled the motion on October 28, 2009. He renewed his motion on December 21, 2009. When the trial court overruled the motion a second time, he filed an appeal which he subsequently voluntarily dismissed. He filed no notice of appeal in the present case, and although he urges reversal of the trial court's decision, he designates himself an appellee. We will refer to him as a defendant.

trial court because it arose out of the Tenth District, and there was no case law from the Fifth District.

{15} Appellee relies on a conflicting case out of the Eighth District, *Havel v. Villa St. Joseph*, Cuyahoga App. No. 94677, 2010-Ohio-5251.

{16} The first question which arises is whether the denial of a motion to bifurcate is a final appealable order. On this issue, the *Hanners* and *Havel* cases both found the order is final and appealable. We agree.

{17} R.C. 2315.21 (B), as amended effective April 7, 2005, requires that in a tort action that will be tried to a jury, where there is a claim for compensatory damages and for punitive and exemplary damages, then if any party moves for bifurcation, the trial court shall bifurcate the matter.

{18} This court has jurisdiction to review the final orders or judgments of trial courts pursuant to Section 3 (B)(2), Article IV of the Ohio Constitution and R.C. 2501.02. R.C. 2505.02 lists the circumstances under which an order is final. Subsection 6 is the provision pertinent here: "An order determining the constitutionality of any changes to the Revised Code *** made S.B.80 of 125th General Assembly, including the amendments of *** 2315.21 of the Revised Code."

{19} Both the *Hanners* court and the *Havel* court found a trial court's order denying a motion to bifurcate implicitly determines that the mandatory bifurcation language in R.C. 2315.21(B) is unconstitutional. *Hanners*, supra, at paragraph 13; *Havel*, supra, at paragraph 19.

{¶10} We find the order appealed from implies the bifurcation language in the statute is unconstitutional, although it does not do so expressly. We conclude we have jurisdiction to review the matter.

{¶11} R.C. 2315.21 (B) makes bifurcation of a tort action mandatory if there are claims for both compensatory and punitive and exemplary damages and if any party requests it. By contrast, Civ. R. 42 (B) provides a court may order a separate trial of a claim, cross-claim, counterclaim or third-party claim or of any separate issue or of any number of claims. Thus, the Rule expressly vests the trial court with discretion in deciding whether bifurcation is necessary. The Rule contains no exception for tort actions. The statute and Rule are clearly in conflict.

{¶12} The Ohio Constitution, Section 5 (B), Article IV gives the Ohio Supreme Court exclusive authority to prescribe rules governing the practice and procedure in all courts of the state. The Constitution provides where a law conflicts with a rule promulgated by the Supreme Court, the law has no force or effect. This section articulates one of the basic concepts of United States jurisprudence, the separation of powers of the judicial and legislative branches. *State ex rel. Loyd v. Lovelady*, 108 Ohio St. 3d 86, 2006-Ohio-161, 840 N.E. 2d 1062.

{¶13} If there is a conflict between the Rule and the statute, the court's Rules prevail on procedural matters, but the legislature's statutes prevail on substantive matters. *State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St. 3d 368, 2008-Ohio-2637, 889 N.E. 2d 500. Substantive laws or rules relate to rights and duties giving rise to a cause of action, while procedural rules concern the "machinery" for carrying on the suit. *Norfolk Southern Railroad Company v. Bogle*, 115 Ohio St. 3d 455,

2007-Ohio-5248, 875 N.E. 2d 919, citing *Jones v. Erie Railroad Company* (1922), 106 Ohio St. 408, 140 N.E. 366.

{¶14} The *Hanners* court found R.C. 2315.21 (B) is a substantive law because even though it mandates particular procedures for tort actions, the legislative intent was to create and define a defendant's right to insure the jury does not inappropriately consider the defendant's misconduct when determining questions of liability or compensatory damages. *Hanners*, supra, at paragraph 28.

{¶15} By contrast, the *Havel* court found the statute is procedural, because it "plainly and unambiguously regulates the procedure at trial for determining compensatory and punitive damages in a tort action" *Havel* at paragraph 29. We agree.

{¶16} We find R.C.2315.21 (B) is not substantive, because it does not create or define rights and duties giving rise to a cause of action. The statute gives defendants no additional rights, but sets out the procedural rules whereby courts can better protect the rights to a jury and to due process that the parties have always possessed.

{¶17} We find R.C. 2315.21 (B) clearly conflicts with the Supreme Court's Rules and the Rule controls. We also conclude insofar as R.C.2315.21 (B) mandates bifurcation, it is unconstitutional, because it violates Section 5 (B) Article IV of the Ohio Constitution.

{¶18} The assignment of error is overruled.

{¶19} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

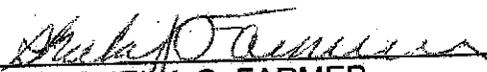
By: Gwin, P. J.,

Farmer, J., and

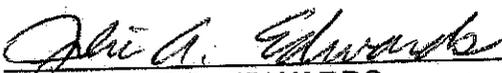
Edwards, J., concur



HON. W. SCOTT GWIN



HON. SHEILA G. FARMER



HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

11 MAR - 8 PM 2:17
NANCY S. DEARBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

LOUISE A. MYERS

Plaintiff-Appellee

-vs-

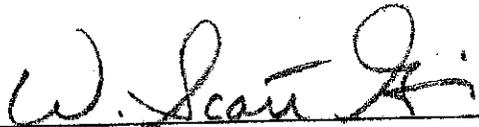
DAVID L. BROWN, JR., ET AL

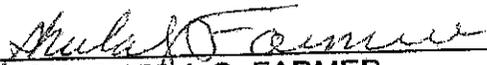
Defendant-Appellant

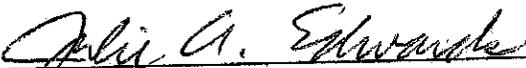
JUDGMENT ENTRY

CASE NO. 2010-CA-00238

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to appellant.


HON. W. SCOTT GWIN


HON. SHEILA G. FARMER


HON. JULIE A. EDWARDS

[Cite as *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 2009-Ohio-6481.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kathy S. Hanners et al.,

Plaintiffs-Appellees,

v.

Ho Wah Genting Wire & Cable
SDN BHD et al.,

Defendants-Appellants,

Big Lots Store, Inc. et al.,

Defendants-Appellees.

No. 09AP-361
(C.P.C. No. 08CVG10-15218)
(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on December 10, 2009

Cooper & Elliott, Rex H. Elliott, Charles H. Cooper, Jr., and John C. Camillus; Bryan K. Harris, P.C., and Bryan K. Harris; Watts Law Firm, L.L.P., and Mikal C. Watts, for plaintiffs-appellees.

Davis & Young, and Richard M. Garner, for defendants-appellants.

Jacob H. Huebert, Amicus Curiae Ohio Association of Civil Trial Attorneys.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

I. Introduction

{¶1} 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. Having done so, we must also address the issue of whether R.C. 2315.21(B), which requires bifurcation upon motion in tort actions, violates the Modern Courts Amendment of 1968, Section 5(B), Article IV of the Ohio Constitution, because it conflicts with Civ.R. 42(B). We conclude that, because the statute is substantive, it does not violate the separation of powers required by the Constitution.

A. Background

{¶2} Defendants-appellants, Ho Wah Genting Wire & Cable SDN BHD, Ho Wah Genting SDN BHD, Ho Wah Genting International Limited, Ho Wah Genting Trading SDN BHD, Ho Wah Genting Berhad, and Pt. Ho Wah Genting ("appellants"), appeal the judgment of the Franklin County Court of Common Pleas, which, among other things, denied in part their motion for bifurcation. The Ohio Association of Civil Trial Attorneys has filed an amicus curiae brief in support of appellants.

{¶3} On October 27, 2006, Mindy S. Hanners and her three children, Katelynn, Nevaeh, and Austin, died in a house fire. Kathy S. Hanners, individually, and as administrator of the estate of Katelynn and Mindy, and Harry F. Gillespie, III, individually, and as administrator of the estate of Nevaeh and Austin, plaintiffs-appellees ("appellees"), filed a wrongful death action against, among others, appellants, whom appellees

contended were the manufacturers of an electrical extension cord that caused the fire. Appellees sought compensatory and punitive damages.

{¶4} On December 12, 2008, appellants filed a motion to bifurcate the punitive damages proceedings pursuant to R.C. 2315.21(B)(1). On March 12, 2009, the trial court issued a journal entry, in which it, as pertinent to the present appeal, denied appellants' request to bifurcate the punitive damages proceedings.

B. Assignments of Error

{¶5} Appellants appeal the journal entry of the trial court. They assert the following assignments of error:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DECLARING R.C. 2315.21(B) TO BE UNCONSTITUTIONAL.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY VIOLATING OHIO'S SEPARATION OF POWERS DOCTRINE WHEN IT REFUSED TO APPLY R.C. 2315.21(B) IN THIS CASE.

II. Analysis

A. Final, Appealable Order

{¶6} As an initial matter, we must address whether the journal entry appealed from is a final, appealable order. On May 6, 2009, this court issued a show cause order requesting that appellants show cause as to why this appeal should not be dismissed for lack of a final, appealable order, and appellees filed a memorandum in response. It is well-established that a trial court's bifurcation determination under Civ.R. 42(B) is not a final, appealable order. See, e.g., *Doe v. Univ. of Cincinnati* (1991), 70 Ohio App.3d 354, 358 (a bifurcation order pursuant to Civ.R. 42(B) is not a final, appealable order); *Finley v.*

First Realty Property Mgt., Ltd., 9th Dist. No. 23355, 2007-Ohio-2888, ¶12, citing *King v. Am. Std. Ins. Co. of Ohio*, 6th Dist. No. L-06-1306, 2006-Ohio-5774, ¶19; *Goettl v. Edelstein* (Dec. 5, 1985), 5th Dist. No. CA 2339.

{¶7} Appellants contend, however, that the trial court's journal entry was a final, appealable order, pursuant to R.C. 2505.02(B)(6), which was added by S.B. No. 80 ("SB 80"), effective April 7, 2005. R.C. 2505.02(B)(6) includes within the definition of a final order "[a]n order determining the constitutionality of any changes" made by SB 80. SB 80 amended R.C. 2315.21(B) to require the bifurcation of the trial of a tort action. The question, then, is whether the trial court's entry "determin[ed] the constitutionality" of R.C. 2315.21. To answer that question, we look more closely at the proceedings below and the trial court's decision.

{¶8} In their complaint, as their thirteenth cause of action, appellees sought a declaration that "current enactments" of SB 80 are unconstitutional. Appellants denied the claim and thereafter moved to dismiss this request for declaratory relief.

{¶9} Appellants also moved to bifurcate appellees' punitive damage claims based on R.C. 2315.21(B). In the alternative, they argued that the court should exercise its discretion under Civ.R. 42(B) to bifurcate. In response, appellees argued that R.C. 2315.21(B) is unconstitutional because it is procedural and appears to conflict with Civ.R. 42(B). Appellees also argued that, despite R.C. 2315.21(B), bifurcation was not mandatory, and the court should not bifurcate the proceedings under the statute or Civ.R. 42(B).

{¶10} The trial court's March 12, 2009 entry denied appellants' motion to dismiss appellees' constitutional claims. The court expressed "doubt that the proper procedure"

had been followed to raise a claim for declaratory relief properly and "bifurcated" the constitutional question. The court stated: "If [appellees] recover a verdict and the tort reform statutes stand in the way of complete relief, the court will examine them — substantively and as to proper procedure — at that time. In the meantime, no court should reach-out to offer opinions on constitutional questions that might otherwise never need to be addressed."

{¶11} In the same order, the court addressed and denied appellants' motion to bifurcate the trial. The court found, first, that R.C. 2315.21(B)(1), which requires bifurcation, and Civ.R. 42(B), which gives the court discretion to bifurcate, "are plainly inconsistent." Noting the Supreme Court of Ohio's authority to promulgate the rules of civil procedure, and citing Supreme Court precedent, the court concluded that Civ.R. 42(B) controlled because bifurcation of punitive damages is a procedural matter. Without expressly declaring R.C. 2315.21(B) unconstitutional, the court denied appellants' motion to bifurcate.

{¶12} Section 5(B), Article IV of the Ohio Constitution, also known as the Modern Courts Amendment, grants to the Supreme Court of Ohio the exclusive authority to "prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. * * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." More than a rule of construction, the provision ensures the separation of powers between the branches of government. See, e.g., *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, ¶15, 15 (describing the issue as whether enactment of the statute at issue "violates the separation of powers between the judicial and legislative branches" and

concluding that the statute did not "violate the separation of powers required by Section 5(B), Article IV of the Ohio Constitution"). Where a conflict arises between a rule and a statute, the court's rule prevails on procedural matters; 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.

{¶13} Here, the trial court concluded that a conflict exists between R.C. 2315.21(B), which requires a trial court to grant bifurcation in tort cases, and Civ.R. 42(B), which gives the court discretion to bifurcate. By also concluding that bifurcation is a matter of procedure and refusing to apply R.C. 2315.21(B), the court necessarily determined that the statute (1) violated the constitutional division of authority between the court and the legislature, and (2) is of no force or effect in this matter. Therefore, although the trial court did not expressly declare the statute unconstitutional, the court "determin[ed] the constitutionality" of R.C. 2315.21(B), and this court has jurisdiction to review the trial court's determination under R.C. 2505.02(B).

B. R.C. 2315.21(B) and Civ.R. 42(B)

{¶14} In their first and second assignments of error, appellants contend that the trial court erred by declaring R.C. 2315.21(B) unconstitutional and violated the separation of powers doctrine by refusing to apply it. We will address these assignments together. Because they present constitutional questions, our review is de novo. *State v. Rodgers*, 166 Ohio App.3d 218, 2006-Ohio-1528, ¶6.

{¶15} As we noted, the Modern Courts Amendment grants to the Supreme Court of Ohio the exclusive authority to prescribe rules for court practice and procedure. To determine whether a statute enacted by the General Assembly infringes on this exclusive

authority, we must determine (1) whether there is a conflict between the statute and the rule and, if so, (2) whether the statute is substantive or procedural. If the statute is substantive, then it prevails; if the statute is procedural, the rule prevails, and the statute is of no force and effect. The statute at issue here is R.C. 2315.21(B); the rule at issue is Civ.R. 42(B).

{¶16} R.C. 2315.21(B) provides:

(B)(1) 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 as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action 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 for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant.

(3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.

{¶17} We begin with the principle that, "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. Thus, "[i]t is only where the words of a statute are ambiguous or are based upon an uncertain meaning or there is an apparent conflict of some provisions that a court has the right to interpret a statute." *Drake-Lassie v. State Farm Ins. Cos.* (1998), 129 Ohio App.3d 781, 788, citing *Kroff v. Amrhein* (1916), 94 Ohio St. 282.

{¶18} Here, there is no ambiguity. R.C. 2315.21(B) provides that, in a tort action in which a plaintiff makes a claim for compensatory damages and makes a claim for punitive or exemplary damages, upon any party's motion, the trial "shall be bifurcated" in accordance with the specific requirements in the statute.

{¶19} Civ.R. 42(B) also addresses bifurcation. It provides:

(B) Separate trials

The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury.

{¶20} In short, Civ.R. 42(B) allows a trial court to order separate trials of separate issues whenever bifurcation will further convenience, expedience, and judicial economy and avoid prejudice. The decision of whether to bifurcate the proceedings is a matter within the sound discretion of the trial court. *Sheets v. Norfolk S. Corp.* (1996), 109 Ohio App.3d 278, 288.

{¶21} Appellants contend that R.C. 2315.21(B), which addresses a specific category of claims by certain claimants, does not conflict with Civ.R. 42(B), a broad rule of general procedure. In support, they cite *Sapp*, in which the court considered whether R.C. 2323.52, which prescribes filing requirements for vexatious litigators, conflicts with general rules of appellate procedure. The court discerned no conflict. "App.R. 3 and 4 define the general requirements of how and when to file an appeal, and R.C. 2323.52 specifies the requirements for persons declared to be vexatious litigators who are filing and continuing legal cases." *Sapp* at ¶29.

{¶22} Admittedly, Civ.R. 42(B) will not *always* conflict with R.C. 2315.21(B) in every case because R.C. 2315.21(B) only requires bifurcation (1) in "tort actions," as defined by the statute, where (2) a plaintiff brings claims for both compensatory damages and punitive or exemplary damages, and (3) a party moves for bifurcation. In those actions fitting within the confines of R.C. 2315.21(B), however, there is a clear and unavoidable conflict, i.e., R.C. 2315.21(B) removes the discretion granted by Civ.R. 42(B). Therefore, we proceed to consider whether R.C. 2315.21(B) is substantive or procedural. If substantive, the statute prevails whether it conflicts with Civ.R. 42(B) or not.

{¶23} The Supreme Court has defined "substantive" for these purposes as the body of law that "'creates, defines and regulates the rights of the parties.'" *Proctor v.*

Kardassilaris, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶17, quoting *Krause v. State* (1972), 31 Ohio St.2d 132, overruled on other grounds, *Schenkolewski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St.2d 31, paragraph one of the syllabus.

{¶24} At first blush, R.C. 2315.21(B) appears procedural because it mandates a particular process for certain tort actions. The uncodified language associated with R.C. 2315.21(B), however, suggests a different legislative purpose.

{¶25} In uncodified section 3 of SB 80, the General Assembly made a "statement of findings and intent." That statement included the General Assembly's findings that the "current civil litigation system represents a challenge to the economy of the state of Ohio," and "that a fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued." *Id.* at section 3(A)(1) and (2). The General Assembly also found that "[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).

{¶26} Most important for our purposes here, 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). And it also found that "[i]nflated damage awards create an improper resolution of civil justice claims. The 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).

{¶27} On these grounds, the General Assembly concluded that, for certain injuries not subject to statutory caps, courts should instruct juries that evidence of misconduct should only be considered for purposes of awarding punitive damages, not non-economic damages. Then the General Assembly stated: "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).

{¶28} From these expressions of legislative intent, we conclude that R.C. 2315.21(B) is a substantive law. 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. The General Assembly defined this right as important to a fair and balanced system of civil justice.

{¶29} The Supreme Court of Ohio reached a similar conclusion in *Loyd*. In that case, the court considered whether a statute creating a method for obtaining relief from a child support order conflicts with Civ.R. 60(B), which allows relief from a judgment within a reasonable time or within one year, depending on the circumstances. Looking beyond the express language of the statute, the court considered the General Assembly's declaration that "it is a person's *** substantive right to obtain relief" from a child support order. *Id.* at ¶14. The court acknowledged that the statutory provisions "are necessarily packaged in procedural wrapping," but nevertheless concluded that "the General Assembly intended to create a substantive right to address potential injustice."

Id. Therefore, the court concluded, the statutes "do not conflict with Civ.R. 60(B) in such a way as to violate the separation of powers required by Section 5(B), Article IV of the Ohio Constitution." Id. at ¶15.

{¶30} Based on this precedent, we must similarly conclude that R.C. 2315.21(B) is necessarily packaged in procedural wrapping. Nevertheless, based on the General Assembly's express intent to create a right of bifurcation to address potential unfairness, we conclude that the law is substantive. In reaching this conclusion, we do not consider the wisdom of the General Assembly's public policy choices. See *Proctor* at ¶23, quoting *Bernardini v. Bd. of Edn. for the Conneaut Area City School Dist.* (1979), 58 Ohio St.2d 1, 4 (" [W]hether an act is wise or unwise is a question for the General Assembly and not this court."). Instead, having determined that the General Assembly's intent was to create a substantive right for certain litigants, we conclude that R.C. 2315.21(B) does not conflict with Civ.R. 42(B) in such a way as to violate the separation of powers required by Section 5(B), Article IV of the Ohio Constitution.

III. Conclusion

{¶31} For all these reasons, we sustain appellants' assignments of error. We reverse the trial court's denial of appellants' motion to bifurcate pursuant to R.C. 2315.21(B). We remand this matter to the Franklin County Court of Common Pleas for further proceedings consistent with this decision and applicable law.

Judgment reversed and cause remanded.

SADLER, J., concurs.
BROWN, J., concurs in part and dissents in part.

BROWN, J., concurring in part and dissenting in part.

{¶32} I concur with the majority's determination that the trial court's entry was a final appealable order under R.C. 2505.02(B)(6). Additionally, I agree R.C. 2315.21(B) conflicts with Civ.R. 42(B). However, because I believe R.C. 2315.21(B) governs a procedural matter expressly reserved for the Supreme Court of Ohio by Section 5(B), Article IV of the Ohio Constitution, I would overrule appellants' assignments of error. Therefore, I must respectfully dissent in this respect.

{¶33} The crux of the majority's decision is that, although Civ.R. 42(B) and R.C. 2315.21(B) conflict, the statute is substantive, not procedural, and, thus, the statute prevails. In considering the meaning of the word "substantive" as used in the Ohio Constitution, the Supreme Court of Ohio has ruled that "substantive" is in contradistinction to the word "procedural"; "substantive" means that body of constitutional, statutory, and common law which creates, defines, and regulates the rights of the parties, whereas "procedural" pertains to the method of enforcing rights or obtaining redress. *Krause v. State* (1972), 31 Ohio St.2d 132, 145.

{¶34} As this court has noted before, "[w]hile these general rules are easily stated, they are not so easily applied." *State v. Weber* (1997), 125 Ohio App.3d 120, 130. The Supreme Court has commented on several occasions that it is sometimes difficult to draw a distinction between substantive and procedural law. See, e.g., *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 56; citing Chamberlayne, *Modern Law of Evidence* (1911), 217 ("[t]he distinction between substantive and procedural law is artificial and illusory"); *French v. Dwiggin* (1984), 9 Ohio St.3d 32, 33-34 ("[t]he remedial-procedural versus substantive dichotomy is seldom an easy distinction to make"); *Cook v. Matvejs* (1978),

56 Ohio St.2d 234, 237 (conceding there is a "somewhat muddled distinction" between procedural and substantive rights). Nevertheless, courts continue to be called upon to draw such a distinction.

{¶35} Here, the majority concludes that, despite the appearance that the statute addresses a procedural issue, the uncodified language associated with R.C. 2315.21(B) suggests the legislative purpose of the statute is to create and define a defendant's right to request bifurcation to ensure that the jury does not inappropriately consider the defendant's misconduct when also determining liability and compensatory damages. The majority reasons that the General Assembly's intent was to address potential unfairness and injustice.

{¶36} However, I would find that R.C. 2315.21(B) addresses a procedural matter. Many authorities have termed bifurcation a procedural matter. For example, in *Martin v. Grange Mut. Ins. Co.*, 11th Dist. No. 2004-G-2558, 2004-Ohio-6950, ¶49, the court held that the trial court has wide discretion in applying various "procedural devices" used to manage a class action, including bifurcation of common and individual liability issues. This court stated the same in *Grant v. Becton Dickinson & Co.*, 10th Dist. No. 02AP-894, 2003-Ohio-2826, ¶65, in which we held that various "procedural devices" were within the trial court's wide discretion in managing a class action, including bifurcation of common and individual liability issues. In addressing the same statute at issue here, the Supreme Court has also couched bifurcation as an issue of procedure, stating "[t]he S.B. 80 amendments to [R.C. 2315.21] included a procedure for bifurcation of proceedings for compensatory and punitive damages." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶85. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*

(1999), 86 Ohio St.3d 451, the Supreme Court even more explicitly deemed bifurcation under R.C. 2315.21(B) procedural in nature. In finding H.B. No. 350, a predecessor "tort reform" attempt, to be unconstitutional in toto, the Supreme Court of Ohio in *Sheward* indicated R.C. 2315.21(B)(1) "governs the procedural matter of bifurcating tort actions into compensatory and punitive damage stages." *Id.* at 487. The Supreme Court's procedural depiction in *Sheward* is powerfully persuasive.

{¶37} Notwithstanding the above authorities, the majority finds R.C. 2315.21 is substantive because it creates and defines a defendant's right to request bifurcation to ensure fairness and justice. I disagree on two counts. I do not believe the statute "creates" any right that was not in existence prior to its enactment. The right to request bifurcation existed long before R.C. 2315.21(B), and the right to a fair trial has been in formal existence since at least 1851, when Section 16, Article I of the Ohio Constitution became effective. In addition, Civ.R. 42(B) has already been promulgated by the Supreme Court of Ohio to ensure fairness and justice. Civ.R. 42(B) specifically provides that a court may order a separate trial to avoid prejudice. Further, one of the express purposes of all of the rules in the Ohio Rules of Civil Procedure, per Civ.R. 1(B), is "to effect just results" and administer justice. These purposes address the precise ills that the majority indicates R.C. 2315.21(B) was enacted to ward against. Like Civ.R. 42(B), R.C. 2315.21(B) enacts procedural rules to address a method of enforcing rights in the courtroom. In addition, that R.C. 2315.21(B) was enacted to promote fairness for a specific class of litigants in a specific type of case does not render it any different from the procedural law in Civ.R. 42(B), which promotes fairness for all litigants in all cases. Under the majority's analysis, the legislature could enact any legislation designed to address

