

IN THE SUPREME COURT OF OHIO

SANDRA HAVEL)	
)	
Plaintiff-Appellee,)	Supreme Court Case No. 2010-2148
)	
vs.)	On Appeal from the Cuyahoga County
)	Court of Appeals, Eighth Appellate
VILLA ST. JOSEPH, et al.)	District Case No. CA 94677
)	
Defendants-Appellants.)	
)	

MERIT BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS VILLA ST. JOSEPH AND VILLAGE AT MARYMOUNT

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INTRODUCTION

Before this Court is the opportunity to confirm civil defendants' statutorily enacted guarantee to bifurcation of the liability and punitive damages phases of trial in tort actions, pursuant to R.C. 2315.21, while simultaneously ensuring that the civil justice system remains fair and predictable to all litigants. Punitive damages awards implicate constitutional rights, and the U.S. Supreme Court has recognized that punitive damages pose an acute danger of arbitrary deprivation of property and the risk of an unconstitutionally excessive damages awards. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 416-18. (citations and quotations omitted); *see also, Barnes v. Univ. Hosp. of Cleveland*, 119 Ohio St. 3d 173, 2008-Ohio-3344.

In order to ensure a civil defendant's right to due process, the General Assembly enacted wide-ranging tort reform measures to make 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). By enacting R.C. 2315.21(B), the General Assembly sought to guarantee that evidence of a defendant's misconduct did not poison the jury's assessment of liability and that evidence of a plaintiff's injury did not cloud the jury's judgment in considering punitive damages providing all parties a fair and unbiased assessment of the evidence.

In that R.C. 2315.21(B) "creates, defines and regulates the rights" of parties in tort actions, the statute is, by definition, substantive in nature and constitutional. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, at ¶ 17 (citation omitted). This statute unequivocally confers and regulates a substantive right which falls squarely within the policymaking powers of the General Assembly without unduly conflicting with the Rule making authority of this Court. Accordingly, this Court should find R.C. 2315.21(B) constitutional and reverse the

decision of the trial and appellate courts, remanding this case with instruction that the trial court bifurcate the compensatory and punitive damages portion of the trial in this matter pursuant to R.C. 2315.21(B).

I. STATEMENT OF FACTS

On November 12, 2009, Plaintiff filed a Complaint for medical malpractice, wrongful death and violation of Ohio Nursing Home Bill of Rights pursuant to R.C. 3721.13. (Trial Court docket (“T.d.”), November 12, 2009).

On December 28, 2009, Defendants-Appellants Villa St. Joseph and Village at Marymount (“Defendants”) filed a Motion to Bifurcate the compensatory damages phase of the trial from the punitive damages phase of the trial, pursuant to R.C. 2315.21(B). On January 29, 2010, the trial court denied Defendants’ Motion to Bifurcate. (T.d. January 29, 2010).

On February 12, 2010, Defendants filed a timely Notice of Appeal indicating on the docketing statement that the appeal is premised on the application and interpretation of *Hanners v. Ho Wah Genting Wire & Cable*, 10th Dist. No. 09 AP-361, 2009 Ohio 6481 and R.C. 2315.21(B) wherein the Tenth District Court of Appeals held that R.C. 2315.21(B) mandates bifurcation of compensatory and punitive damages. (T.d. February 12, 2010).

On October 28, 2010, the Eighth District Court of Appeals affirmed the decision of the trial court and further held, *sua sponte*, that R.C. 2315.21(B) was unconstitutional. (Appellate Court docket (“A.d.”), October 28, 2010). On November 3, 2010, Defendants-Appellants moved to certify a conflict between the Eighth District’s decision in this case and the Tenth District’s decision in *Hanners, supra*. (A.d. November 3, 2010). Defendants-Appellants’ Motion was granted on November 22, 2010, (A.d. November 22, 2010) and Defendants-Appellants filed a

Notice of Certified Conflict with this Court on December 10, 2010. (Court's docket December 10, 2010).

This Court certified the conflict between the rulings in the Eighth and Tenth Districts on February 2, 2011. (Court's docket February 2, 2011).

II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

R.C. 2315.21(B) AS AMENDED BY S.B. 80, EFFECTIVE APRIL 7, 2005, IS CONSTITUTIONAL IN THAT IT CREATES A SUBSTANTIVE RIGHT THAT IS THEREFORE NOT IN VIOLATION OF SECTION 5(B), ARTICLE IV OF THE OHIO CONSTITUTION

A. STANDARD OF REVIEW

The Court's review of the constitutionality of R.C. 2315.21(B) is *de novo*. *State v. Perry*, (2008), 8th Dist. No. 89819, 2008 Ohio 2368 at ¶22; *Alliance v. Carbone*, 181 Ohio App. 3d 500; 2009 Ohio 1197, at ¶13. The Eighth District Court of Appeals in *Perry* quoting *Lima v. State*, 177 Ohio App. 3d 744; 2007 Ohio 6419, at ¶8-9, stated:

Whether a **statute** is constitutional is a question of law reviewed *de novo*. *De novo* review is independent and without deference to the trial court's determination. 'All statutes are presumed constitutional, and the party challenging has the burden of proving otherwise' beyond a reasonable doubt. *** All presumptions and applicable rules of statutory construction are applied to uphold a statute from constitutional attack.

[I]t is not the function of the reviewing court to assess the wisdom or policy of a statute but, rather, to determine whether the General Assembly acted within its legislative power. (Internal citations omitted).

(Emphasis added).

Thus, this Court's role is limited to: (1) ascertaining the meaning R.C. 2315.21 based upon the plain and normal meaning of the language and; (2) determining whether that meaning is permitted by the state and federal constitution. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007 Ohio 4838, at ¶12; 17-19. With respect to the latter responsibility, it is important to note

that this Court has already determined that most aspects of R.C. 2315.21 are constitutional; however, it did not address the constitutionality of the mandatory bifurcation provision. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007 Ohio 6948, at paragraph two of the syllabus. Nonetheless, Ohio courts have experienced little difficulty applying the mandatory bifurcation provision of R.C. 2315.21. See, *Kleinholz v. Goettke*, 173 Ohio App. 3d 80, 2007 Ohio 4880, at ¶2-4; *Geiger v. Pfizer*, No. 2:06-CV-636, 2009 U.S. Dist. LEXIS 34982, (S.D. Ohio Apr. 15, 2009); *Maxey v. State Farm Fire & Cas. Co.*, No. 1:07-CV-00158, 569 F. Supp. 2d 720; 2008 U.S. Dist. LEXIS 39068, (S.D. Ohio May 14, 2008).

1. The Modern Courts Amendment

“[T]he Modern Courts Amendment of 1968, Section 5(B), Article IV, Ohio Constitution, empowers this court to create rules of practice and procedure for the courts of this state. As we explained in *Proctor*, [supra], Section 5(B), Article IV ‘expressly states that rules created in this manner ‘shall not abridge, enlarge, or modify any substantive right.’ ‘Thus, if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law.’” *Erwin v. Bryan*, (2010), 125 Ohio St. 3d 519. (Internal citations omitted).

Accordingly, this Court must first determine whether Civ. R. 42(B) conflicts with R.C. 2315.21(B). If the answer to this inquiry is in the affirmative, the Court must then determine whether R.C. 2315.21(B) is substantive or procedural. Based on the following, R.C. 2315.21 is constitutional because it does not conflict with Civ. R. 42 and the substantive law created by R.C. 2315.21(B) would nevertheless control, pursuant to the Modern Courts Amendment.

A. There is no conflict between Civ. R 42(B) and R.C. 2315.21(B)

There is no conflict between the application of Civ. R. 42(B) and R.C. 2315.21(B). Civ.

R. 42(B) states:

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.

(Emphasis added).

Civ. R. 42(B) permits a court to order a separate trial of *any* claim in the furtherance of convenience, to avoid prejudice, or in the interests of economy. However, where the cause of action before the court is a *tort*, punitive damages have been alleged and a party has moved for a bifurcated trial, the court shall bifurcate. See R.C. 2315.21(B). R.C. 2315.21(A)(1) defines a “tort action” as “a civil action for damages for injury or loss to person or property” including “a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or other agreement between persons.” R.C. 2315.21(B) specifically states:

(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.

R.C. 2315.21(B) specifically limits the types of actions and the underlying claims and party actions which must be present in order for a court to bifurcate a trial as mandated by statute. *Id.* Further, R.C. 2315.21(B)(1) specifically provides the order for the proceedings and what type of evidence may be admitted during each part of the bifurcated trial whereas Civ. R. 42(B) lacks any direction as to how the separate trial shall progress. See R.C. 2315.21(B)(1).

The Tenth District applied this reasoning in *Hanners v. Ho Wah Genting Wire & Cable*, (2009), 10th Dist. No. 09AP-361, 2009 Ohio 6481. The court stated, “[a]dmittedly, 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.” *Hanners*, at ¶22. R.C. 2315.21(B) and Civ. R. 42(B) will only conflict when the cause of action fits within the confines of R.C. 2315.21(B). *Hanners*, at ¶22.

However, this conflict is not irreconcilable as a court’s discretion to bifurcate shall only be removed in specific situations under the statute.¹ In *State, ex rel. Sapp v. Franklin County Court of Appeals*, (2008), 118 Ohio St. 3d 368, the Court determined that there was no conflict between App R. 3 and 4, which expressly define the general requirements of how and when to file an appeal, and R.C. 2323.52, which provides specific instructions when the appellant has been determined a “vexatious litigator.” *Sapp*, at 372. Not every appeal will conflict with R.C. 2323.52; similar to the case at bar, App. R. 3 and 4 will only conflict with R.C. 2323.52 where the cause of action fits within the confines of R.C. 2323.52. See App. R. 3 and 4; R.C. 2323.52.

Similarly, courts have determined that there is no conflict between Civ. R. 11 and R.C. 2323.51 despite the need for separate standards when determining whether sanctions are warranted for frivolous conduct. See, *Sigmon v. Southwest General Health Center*, (2007), 8th Dist. No. 88276, 2007 Ohio 2117 and *Omerza v. Bryant & Stratton*, (2007), 11th Dist. No. 2006-L-147, 2007 Ohio 5216.

“Ohio law provides two separate mechanisms for an award of sanctions for frivolous litigation: R.C. 2323.51 and Civ. R. 11. Pursuant to R.C. 2323.51(B)(1), a court may award reasonable attorney fees to any party in a civil action adversely affected by frivolous conduct. *** Similarly, under Civ. R. 11, a court may

¹ The Tenth District in *Hanners* found that the conflict was “unavoidable” but failed to discuss whether R.C. 2315.21(B) and Civ. R. see 42(B) were “irreconcilable” or “incompatible.” *Hanners*, at ¶22.

award a party attorney fees and expenses if an opposing attorney filed a pleading or motion in violation of the rule.”

Sigmon, at ¶¶14-16. (Emphasis added).

The Eighth District determined that despite the different separate mechanisms necessary to prove frivolous conduct, “R.C. 2323.51 is not in conflict with Civ. R. 11.” *Sigmon*, at ¶23.

Further:

Civ. R. 11 requires an attorney to have “good ground to support the claims set forth in the complaint. R.C. 2323.51 prohibits an attorney from filing and prosecuting claims that are (1) not warranted under existing law or (2) that cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. A plain reading of R.C. 2323.51 and Civ. R. 11 reveals that although different language is used, both statute and the rule impose the same requirement on an attorney: to prosecute only claims having merit under existing law.

Sigmon, at ¶23.

The Eleventh District, citing the *Sigmon* decision expounded upon the differences necessary to prove frivolous conduct on the purportedly non-conflicting mechanisms.

Specifically:

“The proof necessary to support an award of sanctions depends upon which mechanism the litigant is relying upon. Civ. R. 11 requires a willful violation of the rule and ‘applies a subjective bad faith standard.’ *** In contrast, ‘R.C. 2323.51 employs an objective standard in determining whether sanctions may be imposed for frivolous conduct.’ *** Thus, ‘R.C. 2323.51 is broader in scope than Civ. R. 11.’”

Omerza, at ¶¶14-15. (Internal citations omitted).

The Eleventh District also found it possible to employ solely the standard set forth in Civ. R. 11 as that is the mechanism defendant had chosen to prove plaintiff’s frivolous conduct.

Omerza, at ¶16. “Despite the more onerous task of proving willfulness under Civ. R. 11,

[defendant] has nevertheless relied upon Civ. R. 11 to allege frivolous conduct rather than R.C. 2323.51. Therefore, we will analyze [defendant's] claim under Rule 11." *Omerza*, at ¶16.

Missouri views a bifurcation rule analogous to Civ. R. 42(B) as a method for separating parties joined in litigation. See *Collins v. Hertenstein*, 90 S.W.3d 87, (Mo. Ct. App. Sept. 3, 2002). Missouri Rule of Civil Procedure 66.02 states, "[t]he court, 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, third-party claims, or issues." Missouri's bifurcation statute, Section 510.263 R.S. Mo., states, "[a]ll actions tried before a jury involving punitive damages, including tort actions based on improper health care, shall be conducted in a bifurcated trial before the same jury if requested by any party." *Id.* at subsection one.

The Missouri Court of Appeals in *Collins, supra* found that the language of the statute mandated a bifurcated trial when requested by a party. *Collins, supra*. Notwithstanding this determination, the Court of Appeals held that the trial court did not abuse its discretion when it did not order separate trials for each defendant because the defendant in *Collins* moved to bifurcate pursuant to Mo. Civ. R. 66.02 and not under the statute. *Collins, supra*. The discretionary nature of the Rule of Civil Procedure and the mandatory language of the bifurcation statute were not conflicting as each method of separation was directed at completely different purposes. *Collins, supra*.

For the purposes of this case, a court in any case may order a separate trial in the furtherance of convenience, to avoid prejudice, or in the interests of economy. Civ. R. 42(B). A court shall bifurcate the trial of a tort action when compensatory and punitive or exemplary

damages have been claimed and a party has moved for bifurcation. R.C. 2315.21(B). Much like the special requirements for the “vexatious litigator” set forth in R.C. 2323.52, there shall be a conflict with Civ. R. 42(B) **only** when the cause of action fits within the confines of R.C. 2315.21(B). See *Hanners, supra*. However, where R.C. 2315.21(B) is not applicable, the general provision of Civ. R. 42(B) shall apply, similarly to the general provisions contained in *Sapp, supra*. Additionally, there exists the possibility that a court could exercise discretion when a movant seeks bifurcation pursuant to Civ. R. 42(B); but, where the movant seeks bifurcation pursuant to R.C. 2315.21(B), bifurcation shall be mandatory. See, *Omerza, supra*. See also, *Collins, supra*. Accordingly, the general provision set forth in Civ. R. 42(B) does not conflict with the specific instructions contained in R.C. 2315.21(B).

For the reasons set forth above, R.C. 2315.21(B) is constitutional as there is no conflict with Civ. R. 42(B) for purposes of the Modern Courts Amendment as set forth in Sec. 5(B), Art. IV of the Ohio Constitution.

B. R.C. 2315.21(B) creates a substantive right that controls in the face of conflict with Civ. R. 42(B)

Assuming *arguendo* that the Court finds a conflict exists between R.C. 2315.21 and Civ. R. 42(B) and the reasoning in *Sapp, supra* and *Sigmon, supra* inapplicable, R.C. 2315.21(B) nonetheless creates substantive rights and controls despite conflict with Civ. R. 42(B). See Sec. 5(B), Art. IV of the Ohio Constitution.

Where courts have been forced to analyze R.C. 2315.21(B), the consensus is that “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” is clear and unambiguous. See, R.C. 2315.21(B)(1). See also,

Hanners, supra, at ¶¶17-18; *Havel v. Villa St. Joseph*, (2010), 8th Dist. No. 94677, 2010 Ohio 5251 at ¶¶29-30; and *Myers v. Brown*, (2011), 5th Dist. No. 2010-CA-00238, 2011 Ohio 892 at ¶15. However, where courts have analyzed the intent of R.C. 2315.21(B), there has been a divergence of opinion as to whether the statute was intended to be a “procedural” or “substantive” law. *See Hanners, supra*, at ¶¶17-18; *Havel v. Villa St. Joseph*, (2010), 8th Dist. No. 94677, 2010 Ohio 5251 at ¶¶29-30; and *Myers v. Brown*, (2011), 5th Dist. No. 2010-CA-00238, 2011 Ohio 892 at ¶15.

This Court has defined “substantive” law as “that body of law which creates, defines and regulates the rights of the parties.” *Proctor v. Kardissilaris*, (2007), 115 Ohio St. 3d 71. (Citations omitted). In contrast, the Court has defined “procedural” law as concerning “the machinery for carrying on the suit.” *Norfolk Southern Railway Co. v. Bogle*, (2007), 115 Ohio St. 3d 455.

R.C. 2315.21(B) relates to the rights and duties that give rise to a claim for punitive damages by limiting the presentation of evidence of punitive wrongdoing until such time that compensatory damages are determined. *Id. See, Norfolk, supra*, at 460.

In *State, ex rel. Loyd v. Lovelady*, (2006), 108 Ohio St. 3d 86, the Court, facing a similar situation to this case, considered whether R.C. 3119.961 *et seq.* intruded upon Civ. R. 60(B) in violation of Sec. 5(B), Art. IV of the Ohio Constitution. The Court stated:

An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. In interpreting a statute, a court’s principal concern is the legislative intent in enacting the statute. Ordinarily, we must first look at the words of the statute itself to determine legislative intent. If the legislature intended the enactment to be substantive, then no intrusion on this court’s exclusive authority over procedural matters has occurred.

In this case, it is not clear from the statute itself whether it was intended to be substantive or procedural.

Lovelady, at 88. (Internal citations and quotations omitted, emphasis added). See also *Hanners*, *supra*.

The Court then went on to consider the former analogous sections of the statute and the uncodified language of the House Bill in enacting the former statute. *Lovelady*, at 89. The Court determined, through the use of the uncodified language, that although the statute was “necessarily packaged in procedural wrapping, it is clear to [the Court] that the General Assembly intended to create a substantive right to address potential injustice.” *Id.* See also, *Hanners*, *supra*, at ¶30 (“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.”)

Accordingly, contrary to the determination by the Eighth and Fifth Districts, the Tenth District in *Hanners*, *supra*, was correct in examining the legislative intent of R.C. 2315.21(B); specifically, whether it was intended to be substantive or procedural. See *Lovelady*, *supra*.² The issue of ambiguity lies not with when or how a trial shall be bifurcated, but the rights created by the statute itself. *Lovelady*, *supra*. See also, *Hanners*, *supra*, (R.C. 2315.21(B) is a substantive law packaged in procedural wrapping.)

Further, the uncodified language of S.B. 80, from which R.C. 2315.21(B) was enacted, clearly demonstrates that the General Assembly intended to create a substantive right to address

² For comparison, *Havel*, “the legislative intent is clear from the statute: R.C. 2315.21(B) plainly and unambiguously regulates the procedure at trial for determining compensatory and punitive damages in a tort action. Thus, the Tenth District’s determination in *Hanners*, reached by reference to sources other than this clear and unambiguous statute, conflicts with well-settled rules of statutory construction.” *Havel*, at ¶29.

potential injustice where punitive damages were alleged. *See, Lovelady, supra*. In enacting S.B. 80, “the General Assembly found that the uncertainty and subjectivity associated with the civil justice system was harming the state’s economy. The reforms codified in R.C. 2315.21 were an attempt to limit the subjective process of punitive-damages calculations, something the General Assembly believed was contributing to this uncertainty.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007 Ohio 6948. Specifically, Sec. (A) of S.B. 80 states in pertinent part:

(3) This state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior *** .

(4)(a) Reform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system.

(d) The limits on punitive or exemplary damages as specified in section 2315.21 of the Revised Code, as amended by this act, are based on testimony asking members of the General Assembly to recognize the economic impact of occasional multiple punitive damages awards and stating that a number of other states have imposed limits on punitive or exemplary damage awards.

(6)(a) Noneconomic damages include such things as pain and suffering, emotional distress, and loss of consortium or companionship, which do not involve an economic loss and have, therefore, no precise economic value. Punitive damages are intended to punish a defendant for wrongful conduct. Pain and suffering awards are distinct from punitive damages. Pain and suffering awards are intended to compensate a person for the person’s loss. They are not intended to punish a defendant for wrongful conduct.

(c) *** [T]he General Assembly recognizes that evidence that juries may consider in awarding pain and suffering damages for these types of injuries is different from evidence courts may consider for punitive damages. **For example, the amount of a plaintiff's pain and suffering is not relevant to a decision on wrongdoing, and the degree of the defendant's wrongdoing is not relevant to the amount of pain and suffering.**

(d) **While pain and suffering awards are inherently subjective, it is believed that this inflation of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.**

(f) *** [T]he General Assembly finds that courts should provide juries with clear instructions about the purpose of pain and suffering damages. Courts should instruct juries that evidence of misconduct is not to be considered in deciding compensation for noneconomic damages for those types of injuries. Rather, it is to be considered solely for the purpose of deciding punitive damage awards. **In cases in which punitive damages are requested, defendants should have the right to request bifurcation of a trial to ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages.** As additional protection, trial and appellate courts should rigorously review pain and suffering awards to ensure that they properly serve compensatory purposes and are not excessive.

(Emphasis added)

After a proper review of the legislative intent, it is unequivocal that the General Assembly set forth to create a substantive right for defendants where punitive damages were sought in tort actions brought against them in an attempt to restore balance, fairness and predictability to the civil justice system. Sec. 3 of S.B. 80, *supra*. The Tenth District, after reviewing the codified language as required by *Lovelady*, succinctly stated, “[a]t 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.” *Hanners*, at ¶24.

In *Hanners*, the Tenth District interpreted R.C. 2315.21(B) in light of the uncodified language of S.B. 80, *supra*, similar to the analysis performed by this Court in *Lovelady, supra*. *Hanners*, at ¶¶24-28. The court stated:

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 justice.

Id. at ¶28. (Emphasis added).

Stating the Tenth District’s conclusion differently, “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.” *Hanners, supra*.

Other courts from different jurisdictions have found similar language to create substantive rights for defendants where punitive damages are alleged. North Carolina’s Rule of Civil Procedure 42(b) states, “[t]he court in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, cross-claim, counter claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.” *See also*, Ohio Civ. R. 42(B). North Carolina’s bifurcation statute requires separate trials for compensatory and punitive damages

when the defendant so moves. N.C. Gen. Stat. §1D-30. North Carolina's bifurcated trial statute specifically states, "[u]pon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages." *Id. See also*, Ohio R.C. 2315.21(B).

When analyzing the conflict between the discretionary nature of North Carolina's Rule 42(b) and the mandatory language of N.C. Gen. Stat. §1D-30, the Court of Appeals of North Carolina held, "when a motion to bifurcate is pursuant to N.C. Gen. Stat. §1D-30, then **the trial court is obliged to follow the procedures set forth in that statute**. However, where the motion to bifurcate is made under the more general provision of Rule 42(b) of the Rules of Civil Procedure, the trial court is not so bound." *Land v. Land*, (2010), 687 S.E.2d 511, review denied by *Land v. Land*, 2010 N.C. LEXIS 498 (N.C., June 16, 2010).

The Court of Appeals of Minnesota, applying a plain language statutory interpretation found that Minn. Stat. §549.20 subd. 4 mandates a second proceeding. *Markegard v. Von Ruden*, (2006), 2006 Minn. App. Unpub. LEXIS 84. "The purpose of all statutory interpretation is to discern the intention of the legislature." Minn. Stat. §645.16. Minn. Stat. §549.20 subd. 4 specifically states, "[i]n a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages are not admissible in that proceeding. After a determination has been made,

the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.” The mandatory language is in conflict with the discretionary language of Minnesota Rule of Civil Procedure 42.02 which states, “[t]he court, 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 one or any number of claims, cross-claims, counterclaims, or third party claims, or of any separate issues.” However, the *Markegard* court noted that its interpretation of Minn. Stat. §549.20, including mandatory bifurcation upon request, was consistent with the statute’s underlying purpose and intention of the legislature. *Markegard, supra*, at 11-12.

As fully detailed, the express intent of the General Assembly in enacting R.C. 2315.21 highlights concerns that Ohio juries were improperly considering evidence related to punitive damages during the compensatory damage phase of a trial. The improper consideration of evidence at the compensatory phase of trial has resulted in inflated compensatory awards. In the absence of bifurcation, the jury is permitted to consider evidence otherwise inadmissible during the compensatory phase of trial which serves to only improperly inflate non-economic damage awards as duly recognized by the General Assembly. In order to eliminate this inherent risk, the General Assembly provided that a party may request a bifurcation, pursuant to R.C. 2315.21, in order to remedy the prejudicial effect that the improper consideration of evidence might have on a jury in action alleging a tort.

For the reasons set forth above, R.C. 2315.21(B) is constitutional as the statute creates a substantive right to a bifurcated trial in a tort action where punitive damages are alleged. The General Assembly’s express intent, set forth in 2003 S.B. 80, to create a right of bifurcation to

address potential unfairness establish a substantive right and R.C. 2315.21(B) controls despite any conflict with Civ. R. 42(B) pursuant to the Modern Courts Amendment.

2. The Eighth District improperly applied the doctrine of *stare decisis*

The Eighth District improperly decided the issues set forth herein under the principal of *stare decisis*. See, *Havel v. Villa St. Joseph*, 2010 Ohio 5251 at ¶21. The Eighth District followed the decision in *Barnes v. University Hospitals of Cleveland*, (2006), 8th Dist. Nos. 87247, 87285, 87710, 87903 and 87946, 2006 Ohio 6266, blindly following the court's unsupported opinion despite drastic changes in Ohio's litigation landscape. Specifically, the trial in *Barnes* started a mere eighteen (18) days after R.C. 2315.21 became effective. See *Barnes*, at ¶3, (trial commenced on April 25, 2005); R.C. 2315.21 effective April 7, 2005. The appellant in *Barnes* argued that the trial court abused its discretion when it denied the motion to bifurcate. *Id.* at ¶34.

In response the Eighth District stated in *Barnes*:

Although [appellant] argues that R.C. 2315.21(B) mandates that compensatory and punitive damages be bifurcated upon request, the trial court may exercise its discretion when ruling upon such a motion.

The issues surrounding compensatory damages and punitive damages were closely intertwined. [Appellant's] request to bifurcate would have resulted in two lengthy proceedings where essentially the same testimony given by the same witnesses would be presented. Knowing that bifurcation would require a tremendous amount of duplicate testimony, the presiding judge determined it was unwarranted.

The trial court's actions were not unreasonable, arbitrary, or unconscionable when it denied [appellant's] motion for bifurcation. Accordingly, the trial court did not abuse its discretion

Id. at ¶¶34-36.

It is clear from this limited discussion regarding bifurcation that the Eighth District did not attempt to apply R.C. 2315.21(B) in *Barnes*, yet the court seems to have attached significant weight to these six (6) paragraphs. See *Barnes*, at ¶¶31-36. Despite the apparent conflict between the language of R.C. 2315.21(B) and discretionary authority with regard to bifurcation, presumably afforded by Civ. R. 42(B), the Eighth District did not conduct a *de novo* review, instead applying an abuse of discretion standard. *Barnes*, at ¶¶31-36. See also, *State v. Perry, supra* and *Alliance v. Carbone, supra* (“[w]hether a statute is constitutional is a question of law reviewed *de novo*.”). Additionally, as the injury in *Barnes* occurred on December 4, 2001, more than three (3) years prior to the effective date of R.C. 2315.21, it would have been unconstitutional to retroactively apply the substantive law contained in R.C. 2315.21(B) in *Barnes* pursuant to Sec. 28, Art II of the Ohio Constitution. See *Van Fossen v. Babcock & Wilcox, Co.*, (1988), 36 Ohio St.3d 100, 105 and *Bielat v. Bielat*, (2000), 87 Ohio St. 3d 350. Finally, *Barnes* offered no discussion or analysis as to whether R.C. 2315.21(B) was intended to create procedural or substantive law as contemplated by the Tenth District in *Hanners, supra*. Instead, the Eighth District’s merely concluded without stating its grounds for support that R.C. 2315.21(B) was of no effect. *Barnes*, at ¶¶31-36.

The doctrine of *stare decisis* is to be applied “when the same points arise again in litigation.” *Havel*, at ¶21, citation omitted. See also, *Arbino v. Johnson & Johnson*, (2007), 116 Ohio St. 3d 468, (“[w]hile *stare decisis* applies to the rulings rendered in regard to specific statutes, it is limited to circumstances “where the facts of a subsequent case are substantially the same as a former case.”). The Eighth District’s application of *stare decisis* was improper as the facts surrounding the applicable law in *Havel* and *Barnes* differed so that the subsequent case

was not substantially the same. *Arbino, supra*. The court in *Barnes* failed to account for the apparent conflict between R.C. 2315.21(B) and the unidentified authority affording the court discretion as to whether to bifurcate and applied an abuse of discretion despite the constitutional issues which are at issue herein. *Barnes, supra*.

Further, even if the court in *Barnes* would have applied R.C. 2315.21(B), it would have been unconstitutional to apply R.C. 2315.21(B) retroactively as it is a substantive law. See Sec. 28, Art. II of the Ohio Constitution. Accordingly, applying the Eighth District's decision in *Barnes* at either the trial or lower appellate level as required by *stare decisis* is an improper use of the doctrine as the cases are not substantially the same.

Herein, the Eighth District Court of Appeals incorrectly applied the doctrine of *stare decisis* to this case. The Eighth District did not apply the proper standard of review to the precedent relied upon in this case and a substantially different set of circumstances were at issue in *Barnes, supra*. Moreover, it is apparent that other jurisdictions in Ohio are utilizing the Eighth District's decision in *Havel* to continue the use of the discretionary authority granted by Civ. R. 42(B) further compounding error. See, *Meyers v. Brown, supra*, at ¶15. Notably, the Fifth District determined that R.C. 2315.21(B) was procedural in accordance with the decision in *Havel* without considering the flawed reasoning by which the Eighth District arrived at its decision. *Myers*, at ¶15. See also, *Plaugher v. Oniala*, (2011), 5th Dist. No. 2010 CA 00204.

Accordingly, for the reasons set forth above, the Eight District erred in applying the doctrine of *stare decisis* in this case.

III. CONCLUSION

R.C. 2315.21(B) creates a substantive right to a bifurcated trial in a tort action where punitive damages are asserted. Although appearing to be procedural in nature, an analysis of

R.C. 2315.21(B) in consideration of the legislative intent of S.B. 80 clearly establishes that the General Assembly intended to ensure damage awards were fair and predictable. The General Assembly enacted R.C. 2315.21 to limit the type of evidence a jury could consider during a determination of compensatory damages by bifurcating the trial. In order to ensure that the trial proceeded in a fair and predictable manner, the General Assembly removed the discretion afforded by Civ. R. 42(B) and made bifurcation mandatory in limited instances involving tort actions wherein punitive damages are claimed.

This Court has previously found limited encroachments by the General Assembly upon rules created by the Court to be in accordance with Sec. 5(B), Art. IV. See *State, ex rel. Sapp, supra*. Further, in other situations where there appears to be conflict between statutes and the Rules of Civil Procedure, courts from this state and others have determined that the statute and rule are compatible and not in irreconcilable conflict.

Should this Court find that R.C. 2315.21(B) and Civ. R. 42(B) conflict, the fact remains that the General Assembly created a substantive right for defendants in tort actions where punitive damages were asserted “to ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages.” Sec. (A)(6)(f), S.B. 80. The right of fairness and predictability in a tort action furthered by the General Assembly in R.C. 2315.21(B) goes beyond the mechanisms necessary to carry out litigation and accordingly, R.C. 2315.21(B) creates a substantive right. Despite the apparent conflict between this substantive right in procedural wrapping and Civ. R. 42(B), the Modern Courts Amendment requires that R.C. 2315.21(B) control.

For the reasons set forth above, R.C. 2315.21(B) is constitutional and Defendants request that this Court reverse the decision of the trial and appellate courts and remand this case with instructions for the trial court to bifurcate the compensatory and punitive damages portion of the trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was served by ordinary United States mail, postage prepaid, this 17th day of April, 2011, upon the following:

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APPENDIX

ATTACHMENT	Page(s)
Notice of Certified Conflict filed with the Supreme Court of Ohio, dated December 12, 2010.....	1-18
A. Order from Eighth District Journal Entry certifying conflict	
B. Certified copy from Eighth District Clerk of Courts	
C. Journal Entry from Eighth District certifying conflict	
D. Certified copy from Eighth District Clerk of Courts	
E. <i>Havel v. Villa St. Joseph</i> , (2010), 8 th Dist. No. 94677, 2010 Ohio 5251, Opinion	
F. <i>Hanners v. Ho Wah Genting Wirger & Cable</i> , (2009), 10 th Dist. No. 09AP-361, 2009 Ohio 6481, Opinion	
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ORIGINAL

IN THE SUPREME COURT OF OHIO

SANDRA HAVEL)
)
Plaintiff-Appellee,)
)
vs.)
)
VILLA ST. JOSEPH, et al.)
)
Defendants-Appellants.)

Supreme Court Case No. 10-2148
On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District Case No. CA 94677

NOTICE OF CERTIFIED CONFLICT

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Sandra Havel

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DEC 10 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
DEC 10 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of certified Conflict between Decisions of the Eighth and Tenth Appellate Districts

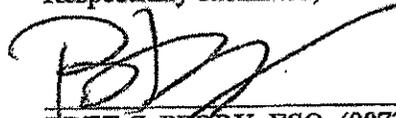
Pursuant to S. Ct. Prac. R. IV, §1, Appellants Villa St. Joseph and Village of Marymount hereby give notice to the Supreme Court of Ohio that the Eighth Appellate District has issued an order certifying a conflict with the Tenth Appellate District in the following decisions: *Havel v. Villa St. Joseph*, (2010), 8th Dist. No. 94677, 2010 Ohio 5251 and *Hanners v. Ho Wah Genting Wire & Cable*, (2009), 10th Dist. No. 09AP-361, 2009 Ohio 6481.

The Eighth Appellate District certified the following question as being in conflict between the two aforementioned decisions:

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).

Copies of the Eighth Appellate District's November 22, 2010 Order granting "Appellants' Motion to Certify Conflict" and the corresponding "Journal Entry" are attached hereto. Copies of the aforementioned decisions in *Havel* and *Hanners, supra*, are also attached.

Respectfully submitted,



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Attorneys for Defendants-Appellants
Villa St. Joseph and Village of Marymount

CERTIFICATE OF SERVICE

A true copy of the foregoing Motion to Certify a Conflict was served by Regular US Mail, postage prepaid, this 9th day of December, 2010 upon the following:

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Attorneys for Defendants-Appellants
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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

SANDRA HAVEL

Appellee

COA NO.
94677

LOWER COURT NO.
CP CV-709632

COMMON PLEAS COURT

-vs-

VILLA ST. JOSEPH, ET AL.

Appellant

MOTION NO. 438986

Date 11/22/2010

Journal Entry

MOTION BY APPELLANTS TO CERTIFY CONFLICT IS GRANTED. SEE JOURNAL ENTRY OF SAME DATE.

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RECEIVED FOR FILING

NOV 22 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.



Judge PATRICIA A. BLACKMON, Concur

Judge LARRY A. JONES, Concur

[Signature]
Presiding Judge

CHRISTINE T. MCMONAGLE

NOV 22 2010 0717 00892



The State of Ohio, }
Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of

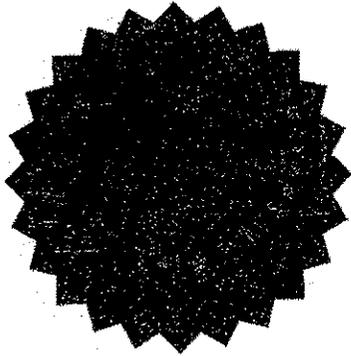
Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal Entry, Vol. 717 Page 892 Dated: 11-22-10 CA 94677

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Entry, Vol. 717 Pg 892 Dated: Nov. 22, 2010 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 9th day of December A.D. 20 10

GERALD E. FUERST, Clerk of Courts

By C. Prusack Deputy Clerk



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

SANDRA HAVEL

Plaintiff/Appellee

COA NO.
94677

LOWER COURT NO.
CP CV-709632

COMMON PLEAS COURT

-vs-

VILLA ST. JOSEPH, ET AL.

Defendants/Appellants

MOTION NO. 438986

Date: 11/22/2010

Journal Entry

Defendants-appellants' motion to certify a conflict is granted. This court's decision in *Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251, is in conflict with *Hanners v. Ho Wah Genting Wire & Cable*, 10th Dist. No. 09 AP-361, 2009-Ohio-6481. In *Havel*, this court declined to follow the reasoning in *Hanners*, which held that R.C. 2315.21(B) is constitutional and substantive in nature, and thereby prevails over Civ.R. 42(B).

We hereby certify the following issue to the Ohio Supreme Court pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution and App.R. 25:

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).

Judge PATRICIA A. BLACKMON and

Judge LARRY A. JONES, Concur



Presiding Judge
CHRISTINE T. McMONAGLE

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GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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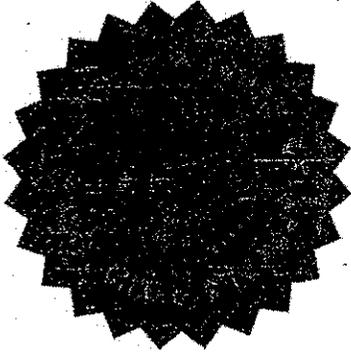
The State of Ohio, }
Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal Entry, Vol. 717 Page 893 Dated: 11-22-10 CA-94677 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Entry, Vol. 717 Pg 893 Dated: Nov. 22, 2010 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 9th day of December A.D. 20 10

By C. Prusak GERALD E. FUERST, Clerk of Courts Deputy Clerk





LEXSEE 2010 OHIO 5251

SANDRA HAVEL, PLAINTIFF-APPELLEE vs. VILLA ST. JOSEPH, ET AL.,
DEFENDANTS-APPELLANTS

No. 94677

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYA-
HOGA COUNTY

2010 Ohio 5251; 2010 Ohio App. LEXIS 4433

October 28, 2010, Released
October 28, 2010, Journalized

PRIOR HISTORY: [**1]

Civil Appeal from the Cuyahoga County Court of
Common Pleas. Case No. CV-709632.

DISPOSITION: AFFIRMED.

COUNSEL: FOR Villa St. Joseph and Village of Marymount, APPELLANTS: Bret C. Perry, Jennifer R. Becker, Donald J. Richardson, Beth A. Sebaugh, Bonezzi Switzer Murphy Pofito & Hupp Co. L.P.A., Cleveland, OH.

FOR Maple Wood Care Centre, Northern Health Facilities, Inc. d.b.a Maple Wood Care Centre and Extendicare Health Services, Inc., APPELLANTS: Christopher S. Humphrey, Canton, OH.

FOR APPELLEE: Blake A. Dickson, The Dickson Firm, L.L.C., Beachwood, OH.

JUDGES: BEFORE: McMonagle, P.J., Blackmon, J., and Jones, J. PATRICIA A. BLACKMON, J., and LARRY A. JONES, J., CONCUR.

OPINION BY: CHRISTINE T. McMONAGLE**OPINION****JOURNAL ENTRY AND OPINION**

CHRISTINE T. McMONAGLE, P.J.:

[*P1] Defendants-appellants Villa St. Joseph and Village of Marymount appeal from the trial court's order

denying their motion to bifurcate the punitive damage phase of the jury trial of this case from the compensatory damage phase of trial. We affirm.

I

[*P2] Plaintiff-appellee, Sandra Havel, as the personal representative of the Estate of John Havel, filed a complaint for medical malpractice, wrongful death, and violation of Ohio's Nursing Home Bill of Rights against defendants-appellants. [**2] She sought compensatory and punitive damages.

I Her complaint also included claims against defendants Maple Wood Care Centre, Northern Health Facilities, Inc., d.b.a Maple Wood Care Centre and Extendicare Health Services, Inc., who are not parties to this appeal.

[*P3] Appellants answered, denying the allegations of the complaint and asserting various affirmative defenses. They also filed a motion pursuant to R.C. 2315.21(B)(1) to bifurcate the punitive damages phase of the trial from the compensatory damages phase. The trial court subsequently denied the motion and appellants appealed from that order. Havel filed a motion to dismiss the appeal for lack of a final appealable order. For the reasons discussed below, the motion is denied.

II

[*P4] Section 5(B), Article IV of the Ohio Constitution states that the Ohio Supreme Court is vested with exclusive authority to "prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substan-

tive right. * * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Pursuant to this constitutional authority, the Supreme Court has [*3] adopted the Rules of Civil Procedure, which "prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction." Civ.R. 1(A).

[*P5] Where a conflict arises between a rule and a statute, the court's rule will control for procedural matters; the legislature's statute will control for matters of substantive law. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008 Ohio 2637, P28, 889 N.E.2d 500; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454, 423 N.E.2d 100. A statute is invalid and has no force or effect if it conflicts with the Ohio Rules of Civil Procedure. *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, 223, 611 N.E.2d 789; *In re Coy* (1993), 67 Ohio St.3d 215, 219, 1993 Ohio 202, 616 N.E.2d 1105.

[*P6] The statute at issue here, R.C. 2315.21(B), as amended by S.B. No. 80, effective April 7, 2005, states 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 * * *." (Emphasis added.)

[*P7] Civ.R. 42(B) of the Ohio Rules of Civil Procedure also addresses bifurcation [*4] and provides that "[t]he 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 * * *." (Emphasis added.)

[*P8] Hence, the statute and the rule are in conflict. One requires bifurcation in a tort action; the other does not.

[*P9] In *Barnes v. Univ. Hosps. of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903, and 87946, 2006 Ohio 6266, decided after R.C. 2315.21(B) was amended by S.B. No. 80, this court specifically addressed the argument that "R.C. 2315.21(B) mandates that compensatory and punitive damages be bifurcated upon request." *Id.* at P34. The court found no error in the trial court's denial of the defendant's motion to bifurcate and held that despite the requirements of R.C. 2315.21(B) regarding bifurcation of the determination of compensatory and punitive damages, "the trial court may exercise its discretion when ruling upon such a motion." The court stated, "[t]he issues surrounding compensatory damages and punitive damages in this case were closely intertwined. [*5] [Defendant's] request to bifurcate would have resulted in two lengthy proceedings where essentially the same testimony given by the same witnesses

would be presented. Knowing that bifurcation would require a tremendous amount of duplicate testimony, the presiding judge determined it was unwarranted." *Id.* at P35. Without specifically addressing the procedural/substantive distinction, this court apparently concluded that the mandatory bifurcation language of R.C. 2315.21(B) addresses a procedural matter governed by Civ.R. 42(B) and, is of no force and effect.

2 Hence, appellant's argument that *Barnes* is not relevant because it was decided prior to the enactment of R.C. 2315.21(B) is without merit.

[*P10] Despite this holding in *Barnes*, appellants urge us to follow *Hammers v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009 Ohio 6481, in which the Tenth District held that (1) the appellants' appeal of the trial court's denial of their motion to bifurcate was a final, appealable order; and (2) R.C. 2315.21(B) is a substantive law that prevails over Civ.R. 42(B).

III

[*P11] Appellate courts in Ohio have jurisdiction to review the final orders or judgments of inferior courts within their [*6] district. Section 3(B)(2); Article IV of the Ohio Constitution; R.C. 2501.02. If a judgment is not final, an appellate court has no jurisdiction to review the matter and it must be dismissed. *Prod. Credit Assn. v. Hedges* (1993), 87 Ohio App. 3d 207, 210, 621 N.E.2d 1360.

[*P12] Under R.C. 2505.02(B), an order is a final order if it is one of the following:

[*P13] "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment; (2) An order that affects a substantial right made in a special proceeding; (3) An order that vacates or sets aside a judgment or grants a new trial; (4) An order that grants or denies a provisional remedy * * *; (5) An order that determines that an action may or may not be maintained as a class action; (6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly * * * or any changes made by S.B. 80 of the 125th general assembly, including the amendments of sections * * * 2315.21 of the Revised Code; (7) An order in an appropriation proceeding * * *."

[*P14] The trial court's order in this case denying appellants' motion to bifurcate proceedings did [*7] not determine the action or prevent a judgment, was not made in a special proceeding, did not vacate or set aside a judgment or grant a new trial, did not grant or deny a provisional remedy, did not make any determination regarding class action status, and was not an order in an

appropriation proceeding. Accordingly, the order is a final, appealable order only if, by denying appellants' motion to bifurcate, it determined the constitutionality of R.C. 2315.21(B).

3 "Special proceeding' means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2).

4 "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 * * *." R.C. 2505.02(A)(3).

[*P15] In *Hammers*, supra, the Tenth District found that the trial court's judgment denying a motion to bifurcate pursuant to R.C. 2315.21(B) implicitly determined the constitutionality of the statute and, therefore, was a final, appealable order. In *Hammers*, plaintiffs filed a wrongful death action seeking compensatory [*8] and punitive damages. Defendants moved to bifurcate the plaintiffs' punitive damages claim pursuant to R.C. 2315.21(B), or, in the alternative, under Civ.R. 42(B). In response, plaintiffs argued that R.C. 2315.21(B) is unconstitutional because it is a procedural law that conflicts with Civ.R. 42(B).

[*P16] In its order denying the motion to bifurcate the trial, the trial court held 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." Id. at P11. Further, "[n]oting the Supreme Court of Ohio's authority to promulgate the rules of civil procedure, and citing Supreme Court precedent, the [trial] court concluded that Civ.R. 42(B) controlled because bifurcation of punitive damages is a procedural matter." Id.

[*P17] The Tenth District found that by this judgment entry, the trial court implicitly determined that R.C. 2315.21(B) was unconstitutional and, therefore, the judgment was a final, appealable order. It stated:

[*P18] "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 [*9] 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 'determine[d] 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)." Id. at P13.

[*P19] We agree that, as in *Hammers*, the trial court's order in this case denying appellants' motion to bifurcate implicitly determined that the mandatory bifurcation language of R.C. 2315.21(B) is unconstitutional. Although the trial court made no express findings in its judgment entry, ' by refusing to apply R.C. 2315.21(B) and bifurcate the proceedings, the trial court implicitly determined that R.C. 2315.21(B) conflicts with Civ.R. 42(B) in violation of the separation of powers required by Section 5(B), Article IV of the Ohio Constitution. Accordingly, the judgment is a final appealable order under R.C. 2505.02(B)(6) and [*10] appellee's motion to dismiss for lack of a final appealable order is denied.

5 The trial court's order stated only, "Defendants' Villa St. Joseph and Village of Marymount Motion (# 2875841) to Bifurcate is denied."

IV

[*P20] Appellants argue that R.C. 2315.21(B) is a substantive law and prevails over Civ.R. 42(B); they admit that their appeal is premised on the application and interpretation of R.C. 2315.21(B) by the Tenth District in *Hammers*.

[*P21] That case is not binding on this court. Furthermore, appellants do not mention this court's interpretation of R.C. 2315.21(B) in *Barnes* and make no attempt whatsoever to distinguish *Barnes* from *Hammers*. Under principles of stare decisis, we are required "to follow earlier judicial decisions when the same points arise again in litigation." *Missig v. Civ. Svc. Comm.*, 8th Dist. No. 91699, 2009 Ohio 966, P16, reversed on other grounds, 123 Ohio St.3d 239, 2009 Ohio 5256, 915 N.E.2d 642; *DeMell v. Cleveland Clinic Found.*, 8th Dist. No. 88505, 2007 Ohio 2924, P30. Accordingly, we conclude that *Barnes* is the controlling authority on this issue and, therefore, the trial court did not abuse its discretion in denying appellants' motion to bifurcate.

V

[*P22] Moreover, we [*11] agree with *Barnes* that bifurcation is procedural and, hence, Civ.R. 42(B) prevails over R.C. 2315.21(B).

[*P23] Recently, in *Norfolk S. RR Co. v. Bogle*, 115 Ohio St. 3d 455, 2007 Ohio 5248, 875 N.E.2d 919, the Ohio Supreme Court reiterated its statement from *Jones v. Erie RR Co.* (1922), 106 Ohio St. 408, 412, 1 Ohio Law Abs. 104, 140 N.E.366, that substantive laws or rules are those that "relate[] to rights and duties which give rise to a cause of action." *Norfolk S. RR Co.*, P16, quoting *Jones*. By contrast, the court stated, "pro-

cedural rules concern 'the machinery for carrying on the suit.'" *Id.*, quoting *Jones*.

[*P24] Relying on these definitions, in *Norfolk S. RR Co.*, the Ohio Supreme Court analyzed whether R.C. 2307.92 and 2307.93, which codified filing requirements for asbestos claims arising out of the Federal Employers' Liability Act and the Locomotive Boiler Inspection Act, infringed upon the Supremacy Clause of the United States Constitution and were therefore preempted by federal law. The Supreme Court held that the statutes were unequivocally procedural statutes. It stated:

[*P25] "A review of the statutes reveals that they do not grant a right or impose a duty that 'give[s] rise to a cause of action.' *Id.* Instead, [*12] the impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more. Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. * * *

[*P26] "[T]he provisions of the statutes do not relate to the rights and duties that give rise to this cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Rather, they pertain to the machinery for carrying on a suit. They are therefore procedural in nature, not substantive." *Id.*, P16-17.

[*P27] Applying the Ohio Supreme Court's analysis in *Norfolk S. RR Co.* to this case, we can only conclude that the mandatory bifurcation language of R.C. 2315.21(B) is unconstitutional because it purports to legislate a strictly procedural matter already addressed by the Civil Rules. It is readily apparent that the language of R.C. 2315.21(B) regarding bifurcation of the damages portion of a trial does not "grant a right or impose a duty that gives rise to a cause of action," or even relate to those rights. Instead, the statute clearly and unambiguously specifies "the machinery for carrying [*13] on the suit" by telling courts the "procedural prioritization" for determining compensatory and punitive damages at trial. Furthermore, it purports to tell courts what evidence a jury may consider, and when — another area governed by the Civil and Evidence Rules.

[*P28] In *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006 Ohio 161, 840 N.E.2d 1062, the Ohio Supreme Court analyzed whether R.C. 3119.961 et seq. violates the separation of powers between the judicial and legislative branches. Beginning its analysis of the statute, the court stated that "[i]n interpreting a statute, a court's principal concern is the legislative intent in enacting the statute." *Id.*, P13, quoting *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004 Ohio 7107, P16, 821 N.E.2d 180. The court continued, "ordinarily, we 'must first look at the word of the statute itself' to determine legislative intent." *Id.*, quoting *Carnes*. The court then reasoned that

it had to look outside the statute to determine legislative intent because "it [was] not clear from the statute itself whether it was intended to be substantive or procedural." *Id.*

[*P29] Here, however, the legislative intent is clear from the statute: R.C. 2315.21(B) plainly [*14] and unambiguously regulates the procedure at trial for determining compensatory and punitive damages in a tort action. Thus, the Tenth District's determination in *Hammers*, reached by reference to sources other than this clear and unambiguous statute, "conflicts with well-settled rules of statutory construction. See, e.g., *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (a court must first look to the language of the statute itself to determine legislative intent, and if that inquiry reveals that the statute conveys a meaning that is clear, unequivocal, and definite, at that point the interpretive effort ends, and the statute must be applied accordingly); *Katz v. Dept. of Liquor Control* (1957), 166 Ohio St. 229, 231, 141 N.E.2d 294 ("Where the language itself clearly expresses the legislative intent, the courts need look no further."); *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413 ("[T]he intent of the lawmakers is to be sought first of all from the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. [*15] *The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.* That body should be held to mean what it has plainly expressed, and hence no room is left for construction.") (Emphasis added.)

6 An uncodified section of S.B. 80. *Hammers*, P25-28.

[*P30] The language of R.C. 2315.21(B) plainly and unambiguously purports to regulate bifurcation procedure in trials of tort cases — a matter already regulated by Civ.R. 42(B). Where a statute conflicts with a rule of procedure, the rule controls on procedural matters. Accordingly, insofar as R.C. 2315.21(B) conflicts with Civ.R. 42(B), we find it unconstitutional, in violation of Section 5(B), Article IV of the Ohio Constitution. See, also, *Tuttle v. Sears, Roebuck & Co.* (Sept. 4, 2009), N.D. Ohio No. 1:08 CV 333, 2009 U.S. Dist. LEXIS 80980 (rejecting defendants' argument that R.C. 2315.21(B) is a substantive statute).

Affirmed.

Appellants' assignment of error is overruled.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this [**16] entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING
JUDGE

PATRICIA A. BLACKMON, J., and

LARRY A. JONES, J., CONCUR



LEXSEE 2009 OHIO 6481

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

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2009 Ohio 6481; 2009 Ohio App. LEXIS 5432

December 10, 2009, Rendered

PRIOR HISTORY: [**1]

APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 08CVG10-15218).

DISPOSITION: Judgment reversed and cause remanded.

COUNSEL: 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. Hnebert, Amicus Curiae Ohio Association of Civil Trial Attorneys.

JUDGES: FRENCH, P.J. SADLER, J., concurs. BROWN, J., concurring in part and dissenting in part.

OPINION BY: FRENCH**OPINION**

(ACCELERATED CALENDAR)

DECISION

FRENCH, P.J.

I. Introduction

[*P1] This appeal presents the issue of whether a trial court's entry denying a defendant's motion to bifur-

cate 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 [**2] statute is substantive, it does not violate the separation of powers required by the Constitution.

A. Background

[*P2] 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.

[*P3] 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.

[*P4] On December 12, 2008, appellants filed a motion to bifurcate the punitive [**3] 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

[*P5] 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

[*P6] 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, 591 N.E.2d 9 (a bifurcation order pursuant [**4] 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, P12, citing *King v. Am. Std. Ins. Co. of Ohio*, 6th Dist. No. L-06-1306, 2006 Ohio 5774, P19; *Goettl v. Edelstein* (Dec. 5, 1985), 5th Dist. No. CA 2339, 1985 Ohio App. LEXIS 9815.

[*P7] 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.

[*P8] 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.

[*P9] Appellants also moved to bifurcate [**5] 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).

[*P10] 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."

[*P11] In the same order, the court addressed and denied appellants' motion to bifurcate the trial. The [**6] 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.

[*P12] 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 se-

paration of powers between the branches of government. See, e.g., *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006 Ohio 161, P5, 15, 840 N.E.2d 1062 (describing the issue as whether enactment of the statute [**7] 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, P28, 889 N.E.2d 500; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454, 423 N.E.2d 100.

[*P13] 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 [**8] 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)

[*P14] 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, P6, 850 N.E.2d 90.

[*P15] 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).

[*P16] R.C. 2315.21(B) provides:

(B)(1) In a tort action that is tried [**9] 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 [**10] 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.

[*P17] 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 [*11] be applied, not interpreted." *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413, 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, 719 N.E.2d 64, citing *Kroff v. Amrhein* (1916), 94 Ohio St. 282, 114 N.E. 267, 14 Ohio L. Rep. 204.

[*P18] 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.

[*P19] 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 [*12] to trial by jury.

[*P20] 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, 671 N.E.2d 1364.

[*P21] 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 P29.

[*P22] 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, [*13] 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.

[*P23] 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, P17, 873 N.E.2d 872, quoting *Krause v. State* (1972), 31 Ohio St.2d 132, 285 N.E.2d 736, overruled on other grounds, *Schenkolewski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St.2d 31, 426 N.E.2d 784, paragraph one of the syllabus.

[*P24] 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.

[*P25] In uncodified section 3 of SB 80, the General Assembly made a "statement of findings [*14] 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).

[*P26] 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 [**15] on to the general public through higher prices for products and services." *Id.* at section 3(A)(6)(e).

[*P27] 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).

[*P28] From these expressions of legislative intent, we conclude that R.C. 2315.21(B) [**16] 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.

[*P29] 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 P14. The court acknowledged that the statutory provisions "are necessarily packaged in procedural wrapping," but nevertheless concluded that "the [**17] 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 P15.

[*P30] 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 P23, quoting *Bernardini v. Bd. of Edn. for the Connecticut Area City School Dist.* (1979), 58 Ohio St. 2d 1, 4, 387 N.E.2d 1222 ("[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. [**18] Conclusion

[*P31] 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.

CONCUR BY: BROWN (In Part)

DISSENT BY: BROWN (In Part)

DISSENT

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

[*P32] 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.

[*P33] 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" [**19] 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, 285 N.E.2d 736.

[*P34] 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, 707 N.E.2d 1178. 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, 290 N.E.2d 181, 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, 9 Ohio B. 123, 458 N.E.2d 827 ("[t]he remedial-procedural versus substantive dichotomy is seldom an easy distinction to make"); *Cook v. Matvejs* (1978), 56 Ohio St.2d 234, 237, 383 N.E.2d 601 (conceding there is a "somewhat muddled distinction" between procedural and substantive [*20] rights). Nevertheless, courts continue to be called upon to draw such a distinction.

[*P35] 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.

[*P36] 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, P49, 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, P65, in which we held that various "procedural devices" were [*21] 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 compensa-

tory and punitive damages." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007 Ohio 6948, P85, 880 N.E.2d 420. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 1999 Ohio 123, 715 N.E.2d 1062, 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.

[*P37] 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. [*22] 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 [*23] cases. Under the majority's analysis, the legislature could enact any legislation designed to address fairness and injustice, and the legislation would constitute substantive law that would usurp the Ohio Rules of Civil Procedure. For these reasons, I would find that the bifurcation of court proceedings is procedural as it pertains to the method of enforcing rights and obtaining redress rather than creating, defining or regulating the rights of the parties.

[*P38] Accordingly, I would overrule appellants' assignments of error.

FILED

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The Supreme Court of Ohio

CLERK OF COURT
SUPREME COURT OF OHIO

Sandra Havel

Case No. 2010-2148

v.

ENTRY

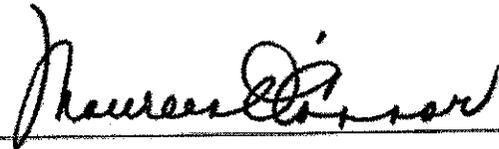
Villa St. Joseph et al.

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Cuyahoga County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated in the court of appeals' Journal Entry filed November 22, 2010, as follows:

"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)."

It is ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 94677)



Maureen O'Connor
Chief Justice

2315.21 Punitive or exemplary damages.

(A) As used in this section:

(1) "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(2) "Trier of fact" means the jury or, in a nonjury action, the court.

(3) "Home" has the same meaning as in section 3721.10 of the Revised Code.

(4) "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual shall be considered an employer under this section only if the subject of the tort action is related to the individual's capacity as an employer.

(5) "Small employer" means an employer who employs not more than one hundred persons on a full-time permanent basis, or, if the employer is classified as being in the manufacturing sector by the North American industrial classification system, "small employer" means an employer who employs not more than five hundred persons on a full-time permanent basis.

(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.

(C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

(D)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

(b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

(c) Any attorneys fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

(3) No award of prejudgment interest under division (C)(1) of section 1343.03 of the Revised Code shall include any prejudgment interest on punitive or exemplary damages found by the trier of fact.

(4) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

(5)(a) In any tort action, except as provided in division (D)(5)(b) or (6) of this section, punitive or exemplary damages shall not be awarded against a defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds the maximum amount of punitive or exemplary damages that may be awarded under division (D)(2) of this section against that defendant in the tort action.

(b) Notwithstanding division (D)(5)(a) of this section and except as provided in division (D)(6) of this section, punitive or exemplary damages may be awarded against a defendant in either of the following types of tort actions:

(i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing

evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(i) of this section.

(ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior of a type described in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(ii) of this section.

(6) Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action.

(E) This section does not apply to tort actions against the state in the court of claims, including, but not limited to, tort actions against a state university or college that are subject to division (B)(1) of section 3345.40 of the Revised Code, to tort actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code, or to the extent that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud or on a basis other than that the defendant in question as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages.

(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence.

(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

(F) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limits on punitive or exemplary damages pursuant to division (D) of this section, and neither counsel for any party or a witness shall inform the jury or potential jurors of those limits.

(G) When determining the amount of an award of punitive or exemplary damages against either a home or a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:

(1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;

(2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;

(3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.

Effective Date: 11-07-2002; 04-07-2005

RULE 42. Consolidation; Separate Trials

(A) Consolidation.

(1) *Generally.* When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(2) *Asbestos, silicosis, or mixed dust disease actions.* In tort actions involving an asbestos claim, a silicosis claim, or a mixed dust disease claim, the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person's household.

(3) As used in division (A)(2) of this rule:

(a) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code;

(b) "Silicosis claim" and "mixed dust disease claim" have the same meaning as in section 2307.84 of the Revised Code;

(c) In reference to an asbestos claim, "tort action" has the same meaning as in section 2307.91 of the Revised Code;

(d) In reference to a silicosis claim or a mixed dust disease claim, "tort action" has the same meaning as in section 2307.84 of the Revised Code.

(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.

[Effective: July 1, 1970; amended effective July 1, 2005.]

Staff Note (July 1, 2005 Amendment)

Civ. R. 42 is amended in response to requests from the General Assembly contained in Section 3 of Am. Sub. H.B. 342 of the 125th General Assembly, effective September 1, 2004, and Section 4 of Am. Sub. H.B. 292 of the 125th General Assembly, effective September 2, 2004. These acts contain provisions governing tort claims that allege exposure and injury by persons exposed to asbestos, silica, or mixed dust.

Each act includes a request that the Supreme Court amend the Rules of Civil Procedure "to specify procedures for venue and consolidation" of asbestosis, silicosis, and mixed dust disease claims.

Rule 42(A) Consolidation

Civ. R. 42(A)(2) provides that a trial court must have the consent of the parties before consolidating actions for trial that involve an asbestos claim, a silicosis claim, or a mixed dust disease claim. Absent the consent of the parties, the court may consolidate for trial only those claims that involve the same exposed person and members of the exposed person's household. The rule expressly permits the consolidation of pending actions for case management purposes. Division (A)(3) incorporates the statutory definitions of "asbestos claim," "silicosis claim," "mixed dust disease claim," and "tort action" for purposes of Civ. R. 42(A)(2).

				
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§ 4.05 Other powers of the Supreme Court

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(A)(1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court.

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the Supreme Court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

(Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968.)

Not analogous to former

§ 5 , repealed Oct. 9, 1883.

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