

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

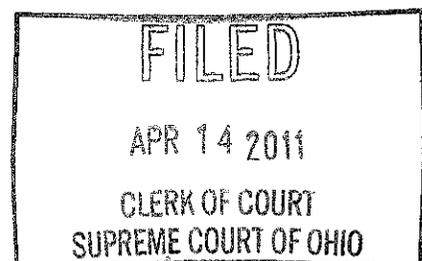
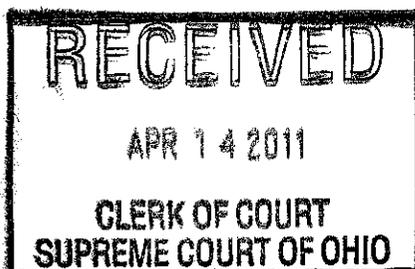
AMICUS CURIAE BRIEF OF
THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS
URGING REVERSAL ON BEHALF OF APPELLANTS

RICHARD M. GARNER (0061734)
DAVIS & YOUNG
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, Ohio 44114
(216) 348-1700
(216) 621-0602-Fax
Email: rgarner@davisyoung.com

*Counsel for Amicus Curiae
The Ohio Association of Civil Trial Attorneys*

BRET C. PERRY (0073488)
STEPHEN J. HUPP (0040639)
DONALD J. RICHARDSON (0068786)
BONEZZI SWITZER MURPHY POLITO
& HUPP, CO. LPA
1300 East Ninth Street, Suite 1950
Cleveland, Ohio 44114-1501
(216)875-2767
(216) 875-1570-Fax
Email: bperry@bsmph.com

Counsel for Appellants



BLAKE A. DICKSON (0059329)
THE DICKSON FIRM
3401 Enterprise Parkway, Suite 420
Cleveland, Ohio 44122
(216) 595-6500
(216) 595-6501-Fax
Email: BlakeDickson@TheDicksonFirm.com

Counsel for Appellee

MICHAEL DEWINE (0009181)
ALEXANDRA T. SCHIMMER (0075732)
LAURA EDDLEMAN HEIM (0084677)
OFFICE OF THE OHIO ATTORNEY
GENERAL, SOLICITOR GENERAL
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087-Fax
Email:
alexandra.schimmer@ohioattorneygeneral.gov

*Counsel for Amicus Curiae
State of Ohio*

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INTRODUCTION

This appeal is about whether a critical component of Ohio's recent attempts at tort reform is constitutional and enforceable. Six years ago, the Ohio General Assembly amended R. C. 2315.21 to provide for mandatory bifurcation of the punitive damages phase of civil jury trials upon proper motion made by any party. As explained in detail below, in doing so, the legislature expressly stated that it was seeking to safeguard the newly minted distinctions between economic and non-economic damages which formed a fundamental component of its tort reform efforts.

R. C. 2315.21 is clear and unambiguous. The sole issue before this Court is whether its mandatory bifurcation provisions are constitutional and enforceable.¹ Because they are, this Court should reverse the Eighth Appellate District's decision to the contrary² and remand this case for further proceedings.

This issue has drawn the interest of at least two amici urging reversal.

The first is the State of Ohio. Ohio's Attorney General vigorously defends the constitutionality of R. C. 2315.21 in its Amicus Brief on behalf of both the General Assembly and the Governor. This Court should weigh the words and arguments of the State's legal counsel on behalf of the other two co-equal branches of government very carefully before deciding this case. The issue in this case is no mere monetary dispute between civil litigants. It will substantially impact the

¹In the related case of *John T. Flynn v. Saber Healthcare Group, LLC*, Case No. 2010-1881, this Court is being asked to consider when the denial of such a motion to bifurcate constitutes a final appealable order. To the extent the issues in *Flynn* are or become relevant to this case, the Ohio Association of Civil Trial Attorneys adopts the arguments made by the State of Ohio in its well-written Amicus Brief in that case.

²*Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251.

substantive civil rights of all Ohioans and further define the relationship and power between Ohio's three branches of government.

The second, upon whose behalf this Amicus Brief is filed, is The Ohio Association of Civil Trial Attorneys ("OACTA") which is an organization of over 800 attorneys, corporate executives and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities. For nearly half a century, OACTA's mission has been to provide a forum where such professionals can work together on common problems and promote and improve the administration of justice in Ohio. In furtherance of this mission, OACTA maintains a robust amicus curiae program by which it can provide expert legal services to support suitable litigation efforts of its constituents. These amicus curiae efforts are limited to those cases addressing legal principles that may impact the fair and efficient administration of justice in Ohio. This case is such a case.

OACTA is proud to join the State in defending Ohio public policy in this case.

STATEMENT OF THE CASE AND FACTS

OACTA adopts, and defers to, the Statement of the Facts and Statement of the Case set forth by Appellants in their Merit Brief.

LAW AND ARGUMENT

CERTIFIED CONFLICT ISSUE: 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)?

A. Legal standards.

This Court's review of the constitutionality of R. C. 2315.21(B) is de novo.³ In undertaking such review, this Court is to strongly presume that R. C. 2315.21(B) is constitutional unless and until the Appellee can prove that it is unconstitutional beyond a reasonable doubt.⁴ Whether R. C. 2315.21 "is wise or unwise is a question for the General Assembly and not this court."⁵ Rather, this Court's role is limited to: (1) ascertaining the meaning of R. C. 2315.21 based upon the plain language used and the normal meaning of that language and; (2) determining whether that meaning is permitted by the state and federal constitutions. With respect to this latter responsibility, it is important to recall that this Court has already found most aspects of R. C. 2315.21 to be constitutional.⁶

B. R. C. 2315.21(B) clearly and unambiguously requires bifurcation of punitive damages in this case.

R. C. 2315.21 (eff. Apr. 7, 2005) provides, in pertinent part:

³ *State v. Rodgers* (10th Dist. 2006), 166 Ohio App.3d 218, 2006-Ohio-1528, at ¶6; *Ohio Bell Telephone Co. v. PUCO*, (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286.

⁴ *Rodgers*, at ¶9; *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, at ¶4.

⁵ *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, at ¶76. Additionally, wise or unwise, Ohio courts have experienced little difficulty applying the mandatory bifurcation provisions of R. C. 2315.21. See *Kleinholz v. Goettke* (1st Dist. 2007), 173 Ohio App.3d 80, 82, 2007-Ohio-4880; *Geiger v. Pfizer* (S.D. Ohio Apr. 15, 2009), No. 2:06-CV-636, 2009 U.S. Dist. LEXIS 34982; *Maxey v. State Farm Fire & Cas. Co.* (S.D. Ohio 2008), 569 F.Supp.2d 720.

⁶ *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at syllabus paragraph two.

(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.

* * *

(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 of the jury, with respect to the 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 determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive damages 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.

* * *

- (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. (Emphasis added).

It is undisputed that the instant action qualifies as a “tort action”. Likewise, it is undisputed that the Appellee demanded a jury trial on all issues. Accordingly, the instant action falls within the scope of R. C. 2315.21. Under such circumstances, R. C. 2315.21(B)(1) mandates that when the Appellants filed their motion to bifurcate, the trial court was required to bifurcate the proceedings as set forth in the statute unless R. C. 2315.21(B) is unconstitutional.⁷

⁷ *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, at ¶62 (holding that use of the word “shall” denotes that compliance with the commands of a statute is mandatory rather than discretionary); *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, at ¶19 (holding the same).

The Fifth, Eighth and Tenth Appellate Districts all agree with this conclusion.⁸ If the statute is constitutional, no other result should be possible based upon the plain language of the statute.

C. R. C. 2315.21(B) does not violate Art. IV, §5(B) of the Ohio Constitution.

The Eighth Appellate District circumvented the foregoing mandatory language of R. C. 2315.21(B) by finding it unconstitutional under Art. IV, §5(B) of the Ohio Constitution—the so-called “Modern Courts Amendment”. This Court has succinctly explained application of the Modern Courts Amendment as follows:

The Modern Courts Amendment empowers this court to create rules of practice and procedure for the courts of this state, including the Rules of Civil Procedure. Section 5(B), Article IV, Ohio Constitution. However, it expressly states that rules created in this manner “shall not abridge, enlarge, or modify any substantive right.” *Id.* 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. See *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86, 75 O.O.2d 156, 346 N.E.2d 286. We have defined “substantive” in this context as “that body of law which creates, defines and regulates the rights of the parties.” See *Krause v. State* (1972), 31 Ohio St.2d 132, 145, 60 O.O.2d 100, 285 N.E.2d 736, overruled on

⁸*Myers v. Brown*, 5th Dist. No. 2010-CA-00238, 2011-Ohio-892, at ¶11 (“R. C. 2315.21(B) makes bifurcation of a tort action mandatory if there are claims for both compensatory and punitive and exemplary damages and if any party requests it.”); *Havel*, at ¶8 (“[T]he statute and the rule are in conflict. One requires bifurcation in a tort action; the other does not.”); *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481, at ¶18 (“Here, there is no ambiguity. R. C. 2315.21(B) provides that, in a tort action in which a plaintiff makes a claim for compensatory damages and makes a claim for punitive or exemplary damages, upon any party’s motion, the trial “shall be bifurcated” in accordance with the specific requirements in the statute.”); see also *Maxey*, 569 F.2d at 724; *Geiger*, at *1-2. The Eighth Appellate District purported to rely upon *Barnes v. University Hospitals of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903, 87946, 2006-Ohio-6266, at ¶¶31-36, *aff’d in part on other grounds and rev’d in part on other grounds* by 119 Ohio St.3d 173, 2008-Ohio-3344, for the proposition that bifurcation under R. C. 2315.21 is discretionary. *Havel*, at ¶¶9-10, 21. However, *Barnes* is plainly a pre-S.B. 80 case that was filed in 2001 and did not examine R. C. 2315.21(B) in detail. 2006-Ohio-6266, at ¶¶2, 31-36. Accordingly, it adds nothing of value to the issues in this case.

other grounds, *Schenkolewski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St.2d 31, 21 O.O.3d 19, 426 N.E.2d 784, paragraph one of the syllabus.⁹

Based upon the foregoing, the principal questions in this case are: (1) do R. C. 2315.21(B) and Civ. R. 42(B) conflict for purposes the Modern Courts Amendment? (2) if so, is R. C. 2315.21(B) part of a statutory framework that “creates, defines and *regulates* the rights of the parties”, or is it a simple procedural statute unencumbered with substantive right concerns? If the first question is answered in the negative, then the Modern Courts Amendment is not implicated. If the answer to the second question is that R. C. 2315.21(B) is part of a statutory framework that creates or protects a substantive right, then R. C. 2315.21(B) does not violate the Modern Courts Amendment and must be followed. Analysis of these questions under the standards applicable to this case demonstrates that R. C. 2315.21(B) does not violate the Modern Courts Amendment

In response to the first question, R. C. 2315.21(B) and Civ. R. 42(B) do not necessarily conflict for purposes of the Modern Courts Amendment. In this regard, Civ. R. 42(B) 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 any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury.

⁹*Kardassilaris*, at ¶17. See also, *State v. Slatter* (1981), 66 Ohio St.2d 452, 454-458, 423 N.E.2d 100; *State ex. rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio161, at ¶¶7-15 (holding Modern Courts Amendment will not invalidate statutes that “are necessarily packaged in procedural wrapping [where] it is clear . . . that the General Assembly intended to create a substantive right to address potential injustice”). The State provides an excellent history and commentary on the Modern Courts Amendment in its Amicus Brief

Such language simply restates the general common law discretion of trial courts to order their proceedings in a reasonable manner.¹⁰ Under Civ. R. 42(B), punitive damages may be bifurcated, but they are not required to be. R. C. 2315.21(B), on the other hand, gives a litigant a substantive right to bifurcation under circumstances governed by the statute. There are several scenarios under which treatment of punitive damages under Civ. R. 42(B) and R. C. 2315.21(B) would not “conflict”. For instance:

- (1) a trial court could exercise its discretion under Civ. R. 42(B) to bifurcate punitive damages;
- (2) if neither party moved for bifurcation, then presumably the punitive damages would be tried with the compensatory damages;
- (3) the lawsuit may not constitute a “tort action” as to implicate R. C. 2315.21.¹¹

Accordingly, R. C. 2315.21(B) cannot be *facially* unconstitutional under the Modern Courts Amendment because there are circumstances under which the treatment of punitive damages would be the same under both R. C. 2315.21(B) and Civ. R. 42(B).¹² The constitutional challenge to R. C. 2315.21(B), therefore, must be limited to arguments that R. C. 2315.21(B) is unconstitutional *as applied in this case*.¹³ Such a narrow constitutional attack, of course, undermines the whole argument

¹⁰See *Cassidy v. Glossip* (1967), 12 Ohio St.2d 17, 231 N.E.2d 64, at syllabus paragraph three. See also Civ. R. 1(B) (“These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice”).

¹¹See *Hanners*, at ¶22.

¹²*Arbino*, at ¶26 (to prove a statute is facially unconstitutional the challenger must prove that there is no set of circumstances under which the statute would be valid).

¹³*Id.*

that the legislature has somehow usurped this Court's exclusive constitutional authority to promulgate and govern procedural matters. For purposes of the Modern Courts Amendment, it is well-established that statutes tailored to regulate specific categories of claims, cases, evidence or issues will not be deemed to be in conflict with broad rules governing general procedure.¹⁴ The reason the Eighth Appellate District missed the mark so badly on this issue is because it made the conflict analysis about the rights and authority of *trial judges* rather than about the rights of the *litigants*.¹⁵ As important as the judicial discretion is that oils the efficiency of trial courts, it cannot take precedent over the substantive rights of the parties set forth in statutory law. Because R. C. 2315.21(B) is narrowly tailored to regulate the right to a fair trial with respect to a limited set of damages and

¹⁴See *State ex. rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, at ¶¶28-29 (finding no conflict between general rule in App. R. 3 and 4 and specific law in R. C. 2323.52 governing vexatious litigators); *State v. Slatter* (1981), 66 Ohio St.2d 452, 457-458, 423 N.E.2d 100 (finding no conflict between general rule in Crim. R 4.1 and specific law in R. C. 2935.26); *State v. Cross*, 11th Dist. No. 2004-L-208, 2006-Ohio-1679, at ¶¶13-23 (finding no conflict between general rule in Evid. R. 702 and specific law in R. C. 4511.19(D)(4)(b)). This approach is consistent with well-established law governing statutory interpretation. See R. C. 1.51 ("If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail").

¹⁵*Havel*, at ¶27. While it seems axiomatic that the party availing itself of mandatory bifurcation will usually be a defendant, R. C. 2315.21(B) requires bifurcation on motion from *any* party—not just defendants. It is conceivable that there may be cases where a plaintiff would deem it advantageous to try punitive damages separately whether due to evidentiary concerns that may increase the likelihood of appeal, a desire to forestall expensive and unnecessary discovery not aimed directly at liability and/or compensatory damages or for some other reason. See e.g. Landsman, et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages* (1998), 1998 Wis. L. Rev. 297, 323-326 (citing studies that the likelihood of punitive damages being awarded by a jury that had already awarded compensatory damages was about 17% higher and the mean damage awards were about four times greater in a bifurcated trial as compared with a unitary trial).

evidence, it does not conflict with the general rule in Civ. R. 42 for purposes of the Modern Courts Amendment.

In response to the second question, R. C. 2315.21(B) is part of a statutory framework that regulates and protects the substantive rights of litigants in tort actions to have a fair trial with respect to liability and damages, and therefore would control even if it were in conflict with Civ. R. 42(B). The substantive nature of the mandatory bifurcation provisions is revealed by the plain language of the statute and by the uncodified provisions of S. B. 80 which explain the General Assembly's reasons for adopting R. C. 2315.21(B). While the statutory language has been previously addressed, the uncodified provisions of S. B. 80 provide, in pertinent part:

(A) The General Assembly finds:

* * *

- (4) (a) Reform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system.
- (b) (i) Punitive or exemplary damages awarded in tort actions are similar in nature to fines and additional court costs imposed in criminal actions, because punitive or exemplary damages, fines, and additional court costs are designed to punish a tortfeasor for certain wrongful actions or omissions.

* * *

- (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) With respect to noneconomic loss for either: (1) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; or (2) permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities [*ie.* noneconomic loss that is not subject to statutory caps], the 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.
- (e) Improper damage awards create an improper resolution of civil justice claims. The increased and improper cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.
- (f) Therefore . . . the 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 damages 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).

These findings have already been subjected to judicial scrutiny by this Court. In *Arbino*, this Court accepted them and held that “in seeking to correct these problems, the General Assembly acted in the public’s interests”.¹⁶ Even if this Court did not agree with all of the findings, it reminded Ohioans “it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.”¹⁷ This Court then addressed the General Assembly’s findings with respect to R.C. 2315.21 as follows:

[W]e accept the evidence cited sufficiently demonstrated the need to reform the civil litigation system in the state. Using this evidence, 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-damage calculation, something the General Assembly believed was contributing to the uncertainty.* (Emphasis added).¹⁸

Based upon the foregoing, the General Assembly clearly linked the mandatory bifurcation provisions of R. C. 2315.21(B) with a tort litigant’s right to a fair trial.¹⁹ This right includes the right

¹⁶*Id.*, at ¶¶53-58, 67-72, 100-102,

¹⁷*Id.*, at ¶58.

¹⁸*Id.*, at ¶101.

¹⁹Refusing to allow mandatory bifurcation not only violates R. C. 2315.21(B), but also undermines important substantive limitations on non-economic damages guarded by R. C. 2315.18(C), which provides:

(C) In determining an award of compensatory damages for noneconomic

to a trial on liability and compensatory damages free from allegations and evidence designed to inflame the jury to punish the defendant rather than compensate the plaintiff. As explained by the Tenth Appellate District in *Hanners*, the General Assembly was trying “to ensure that the jury does not inappropriately consider the defendant’s misconduct when also determining questions of liability and compensatory damages.”²⁰ This is why the bifurcation is mandatory—if the trial court has discretion, then the defendant’s right to a fair trial may be compromised.²¹

loss in a tort action, the trier of fact shall not consider any of the following:

- (1) Evidence of a defendant's alleged wrongdoing, misconduct, or guilt;
- (2) Evidence of the defendant's wealth or financial resources;
- (3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

²⁰*Hanners*, at ¶28.

²¹In *Slatter*, 66 Ohio St.2d at 456, FN 5, this Court (quoting earlier decisions) further elaborated:

The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a *brutem fulmen*, *i.e.*, no law at all. While it may be convenient to distinguish between the right or liability, the remedy or penalty by which it is enforced, on the one hand, the machinery by which the remedy is applied to the right, on the other, *i.e.*, between substantive law and procedural law, it should not be forgotten that so far as either is law at all, it is the litigant’s right to insist upon it, *i.e.*, it is part of his right. In other words, it is substantive law.

Ohio law is well-established that when a statute addresses a substantive right, even if it is “necessarily packaged in procedural wrapping,” the statute will control over any court rule promulgated pursuant to the Modern Courts Amendment.²² Such a result is required by the Modern Courts Amendment because rules promulgated thereunder are not permitted to “abridge, enlarge, or modify any substantive right.” Mandatory bifurcation under R. C. 2315.21(B) is part of the substantive rights provided to tort action litigants under S. B. 80. As the Tenth Appellate District has observed: “[W]e must . . . conclude that R. C. 2315.21(B) is necessarily packaged in procedural wrapping. Nevertheless, based upon the General Assembly’s express intent to create a right of bifurcation to address potential unfairness, we conclude the law is substantive.”²³ Therefore, even if R. C. 2315.21(B) conflicts with Civ. R. 42(B), R. C. 2315.21(B) controls. To hold otherwise would itself constitute a violation of the separation of powers.²⁴

²²*Lovelady*, at ¶¶7-15 (holding that statutes allowing genetic-testing challenge to child support orders controlled over Civ. R. 60 because statutes created a substantive right); *Sapp*, at ¶¶23-30 (holding that statutes governing limitations on vexatious litigators controlled over Rules of Appellate Procedure because statutes limited a substantive right); *Krause v. State* (1972), 31 Ohio St.2d 132, 143-145, 285 N.E.2d 736 (holding that Rules of Civil Procedure could not create an exception to sovereign immunity because immunity was a substantive right); *In re McBride*, 110 Ohio St.3d 19, 2006-Ohio-3454, at ¶¶12-14 (holding that statutes governing termination of parental rights controlled over Rules of Juvenile Procedure because statutes limited substantive rights of parents); *Kardassilaris*, at ¶¶16-23 (holding that statute governing where state director of transportation can be sued controls over Rules of Civil Procedure because statute provides state with substantive right to be free from suit elsewhere); *Slatter*, 66 Ohio St.2d at 454-458 (holding that statute limiting police authority to arrest for minor misdemeanors controlled over Rules of Criminal Procedure because statute created “substantive right of freedom from arrest”).

²³*Hanners*, at ¶30.

²⁴*See State v. Smorgala* (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672, *superseded by statute as stated in State v. Meyers*, 146 Ohio App.3d 563, 2001-Ohio-2282. In *Smorgala*, this Court was called upon to use its power under the Modern Courts Amendment to create an evidentiary exception to the patient-physician statutory privilege in drunk driving cases. Despite the catastrophic casualty toll caused by drunk driving every year, this Court correctly refused the invitation. It

While this Court does not sit as final arbiter of public policy in Ohio at to second guess the General Assembly, it is worth noting that the public policy concerns behind R. C. 2315.21(B) are well-supported and Ohio is far from alone in embracing bifurcation of punitive damages. Many states have enacted similar bifurcation legislation.²⁵ The highest courts of Alabama, Tennessee, Texas and Wyoming have determined that bifurcation of punitive damages are necessary to ensure that defendants receive due process or otherwise receive a fair trial.²⁶ Some of the nation's most

explained that it could not use its rule-making authority: “[b]ecause the law of privilege has been determined to be substantive in nature, this court is not free to propose an amendment to the Rules of Evidence which would deny the privilege in drunk driving cases.” 50 Ohio St.3d at 225. Nor could it constitutionally trammel on the statutory privilege: “[s]ince the legislature has enacted a specific provision in R. C. 2317.02(B) to establish and control the physician-patient privilege, there is no vacuum within which can proceed by common-law pronouncement.” *Id.* It concluded: “In keeping with the constitutional principle of separation of powers, we cannot adopt such a position. Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” 50 Ohio St.3d at 223.

²⁵See e.g. Ark. Code Ann. §16-55-211 (allowing bifurcation of punitive damages on liability and amount at either party's request); Cal Civ. Code §3295 (at defendant's request, amount only); Conn. Gen. Stat. §52-240b (mandatory, amount only); Ga. Code Ann. §51-12-5.1(d)(mandatory, amount only); Ill. Stat. 5/2-1115.05 (at defendant's request, on punitive liability and amount); Kan. Stat. Ann. §60-3701(a)(mandatory, amount only); Minn. Stat. Ann. §549.20(4)(at either party's request, for punitive liability and amount); Miss. Code Ann. §11-1-65 (mandatory, for punitive liability and amount); Mo. Ann. Stat. §510.263 (at either party's request, amount only); Mont. Code Ann. §27-1-221(7)(mandatory, amount only); Nev. Rev. Stat. Ann. §42.005(3)(mandatory, amount only); N.C. Gen. Stat. §1D-30(at defendant's request, for punitive liability and amount); N.D. Cent. Code §32-03.2-11(2)-(3)(at either party's request, on punitive liability and amount); Okla. Stat., Tit. 23, §9.1(D)(mandatory, on amount only); Utah Code Ann. §78-18-1(2)(allowing discovery on wealth or financial condition only after punitive liability is found).

²⁶See *Life Ins. Co. of Ga. v. Johnson* (Ala. 1996), 684 So.2d 685, 701, *vacated and remanded on other grounds by* (1996) 519 U.S. 932; *Hodges v. S.C. Toof & Co.* (Tenn. 1992), 833 S.W.2d 896, 901-902; *Transp. Ins. Co. v. Moriel* (Tex. 1994), 879 S.W.2d 10, 30; *Campen v. Stone* (Wyo. 1981), 635 P.2d 1121, 1132.

prominent legal organizations support bifurcation of punitive damages.²⁷ Likewise, many of the nation's legal scholars have concluded that mandatory bifurcation of punitive damages is good public policy.²⁸ Such legal authorities demonstrate that R. C. 2315.21(B) was the product of sound legislative process.

CONCLUSION

In the end, those that argue that R. C. 2315.21(B) violates the Modern Courts Amendment really want this Court to ignore the plain language of R. C. 2315.21, the uncodified sections of S.B.80 and the foregoing analysis from *Arbino*, and simply declare--by judicial fiat--that bifurcation was, is and always shall be procedural such that the General Assembly is forever prohibited from limiting a trial court's discretion with respect to bifurcation of punitive damages. Discretion without end. Amen.

Of course, this is not the purpose of the Modern Courts Amendment.

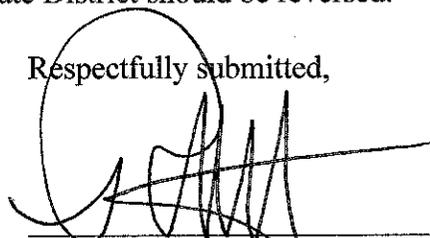
Rather, the Modern Courts Amendment is designed to keep issues of substantive law in the hands of the People's elected representatives. Those representatives may make wise legislative

²⁷See American Bar Association, Special Committee on Punitive Damages of the American Bar Association, Section on Litigation, *Punitive Damages: A Constructive Examination* 19 (1986); American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice*, 15-16 (1989); National Conference of Commissioners on Uniform State Laws, Uniform Law Commissioners' *Model Punitive Damages Act*, 5 (approved July 18, 1996); American Law Institute, 2 *Enterprise Responsibility for Personal Injury—Reporters' Study*, 248-49 (1991).

²⁸See Schwartz, Behrens & Mastosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures* (1999), 65 Brooklyn L. Rev. 1003, 1018; Mallor & Roberts, *Punitive Damages: On the Path to a Principled Approach* (1999), 50 Hastings L.J. 1001, 1012; Mabry, *Warning! The Manufacturer of This Product May Have Engaged In Cover-Ups, Lies, and Concealment: Making The Case for Limitless Punitive Awards in Product Liability Lawsuits* (1997), 73 Ind. L.J. 187, 239; Landsman, et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages* (1998), 1998 Wis. L. Rev. 297.

decisions or they may make foolish ones, but Ohio's Constitution makes clear that such power rests with them. Once legislation is promulgated, legislative change is designed to be primarily a political process which requires the electorate to become engaged in any change. While there will be rare times when the legislature oversteps its bounds and must be restrained by the other branches of government, legislative pronouncements about what is substantive and what is not are entitled to great deference. In this case, Appellee cannot demonstrate that R. C. 2315.21(B) is unconstitutional, and therefore the decision of the Eighth Appellate District should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Garner', is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

RICHARD M. GARNER (0061734)

Email: rgarner@davisyoung.com

DAVIS & YOUNG

1200 Fifth Third Center

600 Superior Avenue, East

Cleveland, OH 44114

(216) 348-1700

Fax: (216) 621-0602

Counsel for Amicus Curiae

The Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by regular U.S. Mail upon the following on this

13th day of April, 2011:

BRET C. PERRY (0073488)
STEPHEN J. HUPP (0040639)
DONALD J. RICHARDSON (0068786)
BONEZZI SWITZER MURPHY POLITO
& HUPP, CO. LPA
1300 East Ninth Street, Suite 1950
Cleveland, Ohio 44114-1501

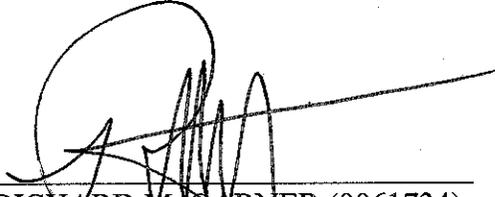
Counsel for Appellants

MICHAEL DEWINE (0009181)
ALEXANDRA T. SCHIMMER (0075732)
LAURA EDDLEMAN HEIM (0084677)
OFFICE OF THE OHIO ATTORNEY
GENERAL, SOLICITOR GENERAL
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

*Counsel for Amicus Curiae
State of Ohio*

BLAKE A. DICKSON (0059329)
THE DICKSON FIRM
3401 Enterprise Parkway, Suite 420
Cleveland, Ohio 44122

Counsel for Appellee



RICHARD M. GARNER (0061734)
*Counsel for Amicus Curiae The Ohio
Association of Civil Trial Attorneys*