

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF *AMICI CURIAE*, OHIO HOSPITAL ASSOCIATION,
OHIO ALLIANCE FOR CIVIL JUSTICE, AND
PHYSICIAN INSURERS ASSOCIATION OF AMERICA
IN SUPPORT OF APPELLANTS**

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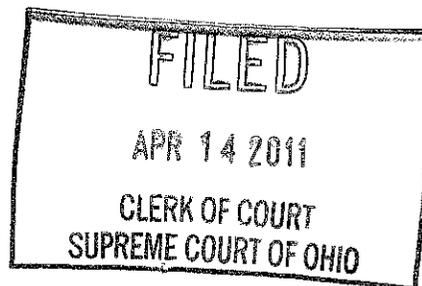


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STATEMENT OF INTEREST OF AMICI CURIAE

This case presents an issue of great importance to hospitals, physicians, and businesses, large and small, that operate in Ohio. The Eighth District's decision below unlawfully abrogates the substantive right of tort defendants to have liability determined untainted by the prejudice that evidence of punitive damages can produce.

The Ohio Hospital Association ("OHA"), Ohio Alliance for Civil Justice ("OACJ"), and Physician Insurers Association of America ("PIAA") (collectively, "Amici") have a strong interest in ensuring that their members are treated fairly should they find themselves as defendants in an Ohio court. To be treated fairly, they are entitled to exercise the full panoply of substantive rights accorded to them by the General Assembly, including the right to have liability and compensatory damages determined without the taint of evidence introduced to support punitive damages.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of 169 private, state, and federal government hospitals and more than 18 health systems, all located within the state of Ohio. The OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities. In this regard, the OHA actively supports patient safety initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio Patient Safety Institute¹ which is dedicated to improving patient safety in the State of Ohio, and

¹ <http://www.ohiopatientssafety.org>

created OHA Insurance Solutions, Inc.² to restore stability and predictability to Ohio's medical liability insurance market.

The OACJ is a group of over 200 small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. The OACJ strongly supports laws that provide stability and predictability in the civil justice system—such as Senate Bill 80 (which included the statutory provision at issue, R.C. 2315.21(B))—so that Ohio's businesses and professions may know what risks they assume as they carry on commerce in Ohio. OACJ members support a balanced civil justice system that not only awards fair compensation to injured persons, but also imposes safeguards to ensure that defendants are not unjustly penalized and plaintiffs are not unjustly enriched.

PIAA is a leading insurer trade association, representing domestic and international medical professional liability insurance companies owned and/or operated by physicians, hospitals, dentists, and other healthcare providers. PIAA domestic member companies include large national insurance companies, mid-size regional writers, single-state insurers, and specialty companies that serve specific healthcare-provider niche markets. Collectively, these companies provide insurance protection to more than 60% of America's private practice physicians. In 2009 (the last year for which data is available), PIAA member companies accounted for 46% of the direct written premium for medical liability insurance in Ohio. The PIAA is an advocate for sound public policy that fosters a healthy and competitive insurance marketplace.

Amici urge the Court to reverse the decision of the Eighth District and to hold—consistent with the Tenth District's decision in *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481—that R.C. 2315.21(B) does not present an

² <http://www.ohainsurance.com>.

irreconcilable conflict with Ohio Civil Rule 42(B), and that even if a conflict exists, R.C. 2315.21(B) does not violate the Modern Courts Amendment (Section 5(B), Article IV of the Ohio Constitution) because the statute creates a controlling substantive law.

STATEMENT OF THE FACTS AND OF THE CASE

The relevant facts giving rise to the appeal pending before this Court are set forth in Appellants' Merit Brief filed in the Ohio Supreme Court. Those facts are adopted by reference and incorporated herein.

QUESTION CERTIFIED ON BASIS OF CONFLICT

By accepting this case on the basis of a certified conflict, this Court indicated it would answer the following question:

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

The answer to this question is a resounding "no." The plain language of R.C. 2315.21(B) and Rule 42(B), the legislative intent behind R.C. 2315.21(B) to create a substantive right, this Court's previous decisions finding similar statutes to be constitutional, and guidance from other courts that have addressed similar statutes, all compel the conclusion that R.C. 2315.21(B) does not present an irreconcilable conflict with Civil Rule 42(B), and that even if a conflict exists, R.C. 2315.21(B) is the controlling substantive law.

LAW AND ARGUMENT

Proposition of Law:

R.C. 2315.21(B) Does Not Conflict with Civ. R. 42(B). But, if a Conflict is Found to Exist, R.C. 2315.21(B) Does not Violate the Modern Courts Amendment Because it Creates Controlling Substantive Law.

A. R.C. 2315.21(B) Enjoys a Strong Presumption of Constitutionality

The Eighth District found R.C. 2315.21(B) to be unconstitutional based upon its finding that the statute “purports to regulate bifurcation procedure in trials of tort cases” in conflict with Civil Rule 42(B) and in violation of the Modern Courts Amendment, Section 5(B), Article IV of the Ohio Constitution. *Havel v. Villa St. Joseph*, 8th Dist. No. CV-709632, 2010-Ohio-5251, at ¶30. But a closer look at R.C. 2315.21(B) reveals that the statute does not conflict with Civil Rule 42(B) and creates a substantive right—not merely a procedural rule.

The Modern Courts Amendment, which became part of the Ohio Constitution in 1968, authorizes the Court to create rules of practice and procedure for the courts of this state, including the Rules of Civil Procedure. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶17 (citing Section 5(B), Article IV, Ohio Constitution). The Modern Courts Amendment states in pertinent part:

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***... All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Section 5(B), Article IV, Ohio Constitution.

Thus, if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, but the statute will control for matters of substantive law. *Proctor*, 2007-Ohio-4838, at ¶17 (citing *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86, 346 N.E.2d 286). In this context, this Court has defined “substantive” as “that body of law which creates, defines and regulates the rights of the parties.” *Id.* (citations omitted). Accordingly, the General Assembly’s power to create substantive law and regulate the rights of parties was not altered in any way by the Modern Courts Amendment.

“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.” *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, ¶13 (citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus).

Therefore, if R.C. 2315.21(B) is not clearly incompatible, beyond a reasonable doubt, with Civil Rule 42(B) or is a substantive law, it does not violate the Modern Courts Amendment.

B. R.C. 2315.21(B) Comports with Article IV, Section 5(B) of the Ohio Constitution

Here, R.C. 2315.21(B) and Civil Rule 42(B) can be reconciled and, thus, R.C. 2315.21(B) should be presumed constitutional. Civil Rule 42(B) provides that:

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.”

Civ.R. 42(B) (Emphasis added.)

Civil Rule 42(B) is a general rule that gives courts discretion to conduct separate trials if it determines, after a hearing, that doing so will further convenience, be conducive to expedition and economy, or avoid prejudice to a party. The rule’s reference to separate trials and different types of pleadings allows the trial court to conduct separate, and perhaps even several, trials at different times against various parties to the same case. In short, this rule provides flexibility to trial courts to schedule proceedings in a manner that they determine is in the best interest of judicial economy and/or the parties. Unlike R.C. 2315.21(B), Civil Rule 42 does not segregate a single trial into two phases (the second of which is dependent on compensatory damages being

awarded in the first), does not bestow a right upon any party, and does not govern punitive damages.

On the other hand, R.C. 2315.21(B) only addresses the specific instance of bifurcation of a claim for punitive damages in tort actions³:

(B) 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.

R.C. 2315.21(B) (Emphasis added). As such, the statute only applies to specific litigants—those involved in tort actions in which punitive damages are sought and bifurcation of compensatory and punitive damages is requested.

In *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶29, this Court addressed a similar issue. The Court analyzed whether R.C. 2323.52, which required a vexatious litigator to file an application for leave to proceed in the court of appeals, conflicted with Ohio Appellate Rules 3 and 4, which set forth the general requirements

³ “Tort actions” to which R.C. 2315.21(B)’s mandatory bifurcation provision applies are defined in R.C. 2315.21(A)(1).

for filing an appeal. *Id.* This Court held that there was “no conflict” between the statute and the appellate rules because the appellate rules set forth the “general requirements of how and when to file an appeal” while the statute “specifies the requirements for persons declared to be vexatious litigators.” *Id.*; see also *Sigmon v. Southwest Gen. Health Ctr.*, 8th Dist. No. 88276, 2007-Ohio-2117, ¶23 (finding no conflict where R.C. 2323.51 and Civil Rule 11 impose the same requirements upon the attorney—to prosecute only claims having merit).

As in the above cited cases, the alleged conflict between Civil Rule 42(B) and R.C. 2315.21(B) is not irreconcilable because Civil Rule 42(B) sets forth the general parameters for when a court may determine to conduct separate trials, whereas R.C. 2315.21(B) mandates bifurcation within the context of tort claims where punitive damages are sought and bifurcation of compensatory and punitive damages is requested.

Ohio is not unique in enacting a bifurcation statute in the context of claims for punitive damages. Legislatures across the country have, like Ohio, made a policy decision to confer upon tort litigants the right to have punitive damages determined only after the trier of fact has determined liability and awarded compensatory damages. While the statutes in other states are not identical to Ohio’s mandatory bifurcation law, the thrust behind each of them is the same: tort defendants should have the right to have a jury decide liability and compensatory damages free from the taint of evidence related solely to the amount of a punitive damage award.⁴

Courts addressing challenges to other states’ punitive damage bifurcation statutes have found them to be reconcilable and not in conflict with Federal Rule of Civil Procedure 42(b)—

⁴ At a minimum, the following states have legislatively imposed mandatory bifurcation of punitive damages: Alaska (Alaska Stat. 09.17.020); Georgia (Ga. Code Ann. 51-12-5.1(d)(2)); Kansas (Kan. Stat. Ann. 60-370); Minnesota (Minn. Stat. Ann. 549.2); Missouri (Mo. Rev. Stat. 510.263(1)); Mississippi (Miss. Code Ann. 11-1-65(l)(e)); Montana (Mont. Code Ann 27-1-221), Nevada (Nev. Rev. Stat. Ann. 42.005), and North Carolina (N.C. Gen. Stat. 1D-30).

which is nearly identical to Ohio Civil Rule 42(B)—and to cover matters of substantive, and not procedural, law. See, e.g., *In re USA Commer. Mortg. Co.* (Nov. 12, 2010), D. Nev. No. 2:07-CV-00892-RCJ-GWF, 2010 U.S. Dist. LEXIS 127433, at *28-29 (holding that Nevada’s statute mandating bifurcation of punitive damages did not conflict with Federal Rule 42(b) and governed a matter of substantive law); *Schedin v. Johnson & Johnson (In re Levaquin Prods. Liab. Litig.)* (Nov. 23, 2010), D. Minn. No. 08-1943, 2010 U.S. Dist. LEXIS 139742, at *5 (analyzing Minnesota’s mandatory bifurcation statute, the district court held, “a court can bifurcate the punitive damages portion of a trial by the mandate of § 549.20 without conflicting with the discretion endowed in Federal Rule 42.”); *Land v. Land* (N.C. App. 2010), 687 S.E.2d 511, 517 (“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.”).⁵

Similarly here, Ohio Civil Rule 42(B) does not address punitive damages at all, and does not provide any specific guidance as to whether punitive damages must be determined in the same phase of a trial as liability. Thus, as in *In re USA Commer. Mortg. Co.* and *Schedin*, the obligation to bifurcate a single trial into separate phases in a tort action under R.C. 2315.21(B) is reconcilable with the court’s discretion to order two separate trials under Civil Rule 42(B).

Because Rule 42(B) and R.C. 2315.21(B) are not “clearly incompatible,” R.C. 2315.21(B) should be presumed to be constitutional. See *Lovelady*, 2006-Ohio-161, at ¶13.

⁵ Review denied in *Land v. Land* (2010), 364 N.C. 241, 698 S.E.2d 399.

C. Even if a Conflict Between R.C. 2315.21(B) and Civil Rule 42 is Found to Exist, the Substantive Law Created by R.C. 2315.21(B) Controls

As previously noted, in the context of the Modern Courts Amendment, this Court has defined a matter of “substantive law” as “that body of law which creates, defines and regulates the rights of the parties.” *Proctor*, 2007-Ohio-4838, at ¶17 (finding statute requiring claims against the director of transportation to be brought in Franklin County to be substantive and not procedural); see also *In re McBride*, 110 Ohio St.3d 19, 2006-Ohio-2454, ¶13 (finding statute conferring the right to file a petition for custody is substantive and not procedural); *State ex rel. Sapp*, 2008-Ohio-2637, at ¶¶29-30 (statute affecting the rights of vexatious litigators to sue or continue preexisting suits is a substantive law that controls over App.R. 3 and 4, governing appellate procedure); *In re Removal of Osuna* (1996), 116 Ohio App.3d 339, 341, 688 N.E.2d 42 (statute requiring leave to appeal decision on removal of public officer is a substantive law that controls over App.R. 3 and 4, which govern the appellate procedure). Because R.C. 2315.21(B) “creates, defines and regulates the rights of the parties,” it falls squarely within the definition of a substantive law, and as such is constitutional.

If there were any doubt, interpretation of the statute would lead to the same result. “In interpreting a statute, a court’s principal concern is the legislative intent in enacting the statute.” *Lovelady*, 2006-Ohio-161, at ¶13 (quoting *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, ¶16). “If the legislature intended the enactment to be substantive, then no intrusion on this court’s exclusive authority over procedural matters has occurred.” *Id.* Ordinarily, the Court “must first look at the words of the statute itself” to determine legislative intent. *Id.* However, where it is not clear from the statute itself, the Court looks to other clues to the General Assembly’s intent, such as uncodified law. *Id.*

Here, the General Assembly's intent in enacting S.B. 80 is set forth in the bill's uncodified law. See *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, 2007-Ohio-6948, ¶¶53-55. The overarching legislative intent of S.B. 80 was to reform Ohio's tort law so as to minimize uncertainty and unpredictability and ensure fairness for all litigants. See *id.* at ¶¶100-101; see also Am.Sub.S.B. 80, Section 3(A)(2) and (3). Consistent with this theme, the legislative intent underlying R.C. 2315.21(B) was to create a substantive right to have liability and compensatory damages determined untainted by the prejudice that evidence of punitive damages can produce. Moreover, the public policy behind mandatory bifurcation provides further support for the conclusion that R.C. 2315.21(B) confers a substantive right upon litigants.

1. The uncodified law associated with R.C. 2315.21(B) demonstrates that the General Assembly intended to create a substantive right for litigants against whom punitive damages were sought in tort actions.

As explained in *Hanners*, 2009-Ohio-6481, at ¶¶23-30, the uncodified law associated with R.C. 2315.21(B) suggests that the legislative purpose in enacting this statutory provision was to confer a substantive right upon tort defendants.

Hanners explains that in uncodified section 3 of Senate Bill 80, the General Assembly made a "statement of findings and intent," which 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." *Hanners*, 2009-Ohio-6481, at ¶25 (quoting Am.Sub.S.B. 80, Section 3(A)(1) and (2)).

Significantly, 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." *Hanners*, 2009-Ohio-6481, at ¶25 (quoting Am.Sub.S.B. 80, Section 3(A)(6)(d)). Further, the General Assembly found that "[i]nflated damage awards create

an improper resolution of civil justice claims. The increased and improper cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.” Id. (quoting Am.Sub.S.B. 80, Section 3(A)(6)(e)). Finally, 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. (quoting Am.Sub.S.B. 80, Section 3(A)(6)(f)) (emphasis added).

This Court’s prior examination of Senate Bill 80 and R.C. 2315.21 further demonstrates the General Assembly’s intent to create substantive rights for litigants in R.C. 2315.21(B). For example, as this Court explained in *Arbino*, in passing the reforms codified in R.C. 2315.21, “the General Assembly found that the uncertainty and subjectivity associated with the civil justice system was harming the state’s economy.” Id. at ¶101. Further, this Court noted that “[t]he reforms codified in R.C. 2315.21 were an attempt to limit the subjective process of punitive-damages calculation, something the General Assembly believed was contributing to the uncertainty.” Id. Although the *Arbino* Court did not specifically address the part of the punitive damage statute that requires mandatory bifurcation of a punitive damage claim upon request, other courts have recognized that statutes requiring the bifurcation of punitive damage claims serve as a check on the subjective process of calculating punitive damages. See *In re USA Commer. Mortg. Co.*, 2010 U.S. Dist. LEXIS 127433, at *28-29 (in addition to finding that the Nevada bifurcation statute did not conflict with Federal Rule 42(b), the District Court of Nevada held that “the bifurcation statute protects defendants’ substantive rights to have liability determined untainted by the prejudice that evidence of wealth can produce.”).

Based upon the expressions of legislative intent by the General Assembly, the *Hanners* court correctly concluded that R.C. 2315.21(B) is a substantive, and not a merely procedural, law. The Eighth District's conclusion to the contrary is erroneous and should not be adopted by the Court.

2. The General Assembly's policy decision to confer upon tort defendants the right to a bifurcated trial creates a fair playing field for all Ohio litigants and reduces unnecessary litigation.

For Amici's members and others who may find themselves as litigants from whom punitive damages are sought in tort litigation, the right to a bifurcated trial is an important substantive right that prevents the admission of evidence not relevant to liability—such as evidence of a defendant's net worth or profits—from being heard by the jury when it is determining liability and compensatory damages. Barring evidence of punitive damages from being presented during the liability phase of a trial prevents prejudice, ameliorates confusion of issues by the jury, and conserves the resources of the judiciary and the parties.

First, the General Assembly's decision to bar evidence of punitive damages during the liability stage prevents prejudice to the defendant. See, e.g., *Smith v. Lightning Bolt Prod., Inc.* (2d Cir. 1988), 861 F.2d 363, 373 (“it often would be prejudicial to a defendant to attempt to litigate its financial condition during the trial on the issues of liability and compensatory damages”); *Carter-Herman v. City of Philadelphia* (Dec. 23, 1996), E.D. Pa. No. CIV A 95-4030, 1996 WL 745227, at *6 (stating that a charge on punitive damages during the primary trial would prejudice defendant “severely” as the jury would be tempted “to award excessive compensatory damages against a defendant with deep pockets”).

Evidence of profits, for example, is highly prejudicial. See Schwartz & Behrens, Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court in *Haslip* (1993), 42 Am. U.L. Rev. 1365, 1382, fn. 104. A jury that is informed

that a hospital or company made substantial profits could be improperly influenced to issue a favorable plaintiff's verdict even though the case for liability is weak. *Id.* Bifurcation of punitive damages is a fair and reasonable way to minimize this type of bias or prejudice:

Bifurcated trials are equitable, because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. For example, plaintiffs' lawyers like to introduce evidence of a company's net worth. Although a jury is often instructed to ignore such evidence unless it decides to punish the defendant, it is difficult, as a practical matter, for jurors to do so. The net result may be that jurors overlook key issues regarding whether a defendant is liable for compensatory damages; ***they may make an award simply because they believe that the defendant "can afford it."*** Bifurcation would help prevent that unfair result because evidence of the defendant's net worth would be inadmissible in the first part (i.e., compensatory damages phase) of the case. (Emphasis added.)

Schwartz, Behrens & Mastro Simone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures* (1999), 65 *Brooklyn L. Rev.* 1003, 1018; see also Mallor & Roberts, *Punitive Damages: On the Path to a Principled Approach* (1999), 50 *Hastings L. J.* 1001, 1012 (noting that states have adopted bifurcation "[t]o prevent inappropriate awards of punitive damages that might result if the jury had access to financial information about the defendant during the liability phase of a trial").

Second, having the jury consider punitive damages only after liability is determined ameliorates the concern that the jury will confuse issues of liability and compensatory damages with issues of intentionality and punitive damages. See, e.g., *Bradfield v. Schwartz* (Miss. 2006), 936 So.2d 931 ("without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory damages with the contingent issue of wanton and reckless conduct which may or may not ultimately justify an award of punitive damages.") In this regard,

[b]ifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage

awards (i.e., proof by a preponderance of the evidence) from a higher burden of proof for punitive damages (i.e., proof by clear and convincing evidence).

Schwartz, Behrens & Mastrosimone, 65 Brooklyn L. Rev. at 1018.

The effect on jurors of bifurcating compensatory and punitive damages at trial can be dramatic:

*In a simulated products liability trial, we tested the effects of bifurcating decisions regarding compensatory and punitive damage awards. Fifty-nine groups of 5–7 jurors heard evidence in a unitary or bifurcated format, deliberated about the case to a unanimous decision, and awarded damages. **Trial bifurcation decreased variability in compensatory damage awards across juries hearing the same case, and also decreased the tendency for juries to award extremely high compensatory damages . . . Jurors reported that they were using evidence more appropriately when the decisions were bifurcated.***

Shea and Bourgeois, Separating Compensatory and Punitive Damage Award Decisions by Trial Bifurcation (2006), 30 Law and Human Behavior 11, abstract available at www.ncbi.nlm.nih.gov/pubmed/16729206 (Emphasis added).

Finally, bifurcating the issue of punitive damages is a policy decision by the General Assembly which saves the judiciary and litigants the time and expense of addressing punitive damages in cases where no liability is found or no compensatory damages awarded. See 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 (finding that bifurcating punitive damages from liability phase saves approximately 25% of trial time).

In order to ensure fairness to all litigants, the General Assembly created and conferred upon tort defendants the right to have liability determined first, avoiding any potential prejudice that a defendant's wealth or other evidence related solely to punitive damages may produce. This policy determination is consistent with well-established Ohio law which provides that no punitive damages can be awarded unless there first exists an award of actual compensatory damages. See *Richard v. Hunter* (1949), 151 Ohio St. 185, 85 N.E.2d 109, paragraph one of the

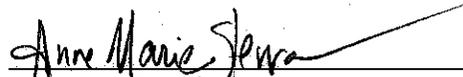
syllabus (“Exemplary or punitive damages may not be awarded in the absence of proof of actual damages.”); *Williams v. McCrory Corp.* (Jan. 11, 1985), 2d Dist. No. 8963, 1985 Ohio App. LEXIS 5680, at *14 (reasoning that “since appellant was awarded only nominal damages, she is not entitled to punitive damages”); R.C. 2315.21 (punitive damages are not recoverable in a tort action unless the plaintiff has adduced proof of actual damages that resulted from the tortious conduct).

Under R.C. 2315.21(B), litigants seeking punitive damages in tort actions are able to pursue such damages, but only after they have established the prerequisites for an award of punitive damages – liability and actual compensatory damages assessed against the litigant from whom punitive damages are sought.

CONCLUSION

The Eighth District Court of Appeals’ decision strips Ohio litigants of the right conferred upon them by the legislature to have the issue of punitive damages bifurcated from the liability and compensatory damage determination. Amici urge this Court to reverse the decision of the Eighth District, and to hold, consistent with the Tenth District’s decision in *Hanners*, that R.C. 2315.21(B) does not present an irreconcilable conflict with Civil Rule 42(B), and that even if a conflict exists, R.C. 2315.21(B) controls.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of *Amici Curiae*, The Ohio Hospital Association, the Ohio Alliance for Civil Justice, and the Physician Insurers Association of America was sent via regular U.S. mail, postage prepaid this 14th day of April, 2011 to the following:

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