

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN T. FLYNN, et al

FILED
MAY 05 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Case No. 10-1881

Appellees,

On Appeal from the Cuyahoga County Court
of Appeals, Eighth Appellate District

v.

Case No. CA-10-095695

SABER HEALTH CARE GROUP,
LLC, et al.,

Civil Action No. 2009-3975 MT

Appellants.

10-2148

**APPELLEES BRIEF IN OPPOSITION TO APPELLANTS' JOINT MOTION TO
CONSOLIDATE ORAL ARGUMENT DATE**

Appellees, by and through undersigned counsel, hereby oppose Appellants' Joint Motion to Consolidate Oral Argument. Appellant's Joint Motion to Consolidate is nothing more than a thinly veiled attempt to mis-frame and mis-define the underlying issues to be determined by this Court, in this case. As demonstrated in Appellants' Merit Brief, (as well as the slew of *amicus* briefs submitted by the insurance industry and associated lobbyist organizations), Appellants are now contending that they requested bifurcation of trial as to Appellant's punitive damages claim, as provided in ORC §2315.21(B). Thus, Appellants want to link themselves arm in arm with the *Havel* appellants for purposes of oral argument. This case is not the *Havel* case. Appellees have the right to have their case heard and determined by this Court independently.

Appellants wish to argue this case as if it were *Havel* because their underlying Motion to Bifurcate now before this Court did not simply seek bifurcation as provided in ORC §2315.21(B). Although they requested "bifurcation" and referenced ORC §2315.21(B), an analysis of their Motion to Bifurcate reveals that they plainly sought relief not set forth in the statute:

R.C. 2315.21(B)(1) requires this Court to bifurcate Plaintiffs' claims for compensatory and punitive damages. Plaintiffs are not permitted to present any evidence that relates to the issue of punitive damages until such time that a jury returns a verdict against this Defendants [sic] awarding compensatory damages, and until such time that this Court makes a determination that Plaintiffs have presented evidence demonstrating malice or aggravated or egregious fraud as to permit the jury to consider the issue of punitive damages.

(Appellants' Brief in Support of Motion to Bifurcate, pp. 2-3).

Unlike *Havel*, in this case, the constitutionality of ORC §2315.21(B)(1), was not addressed by either the trial court or the appellate court. Appellees did not argue that ORC §2315.21(B)(1) was unconstitutional in the trial court or appellate court, and neither court found that it was. If this Court entertains arguments regarding constitutionality of ORC §2315.21(B)(1), it shall be the first to do so. Appellees opposed Appellants' Motion to Bifurcate because they did not request bifurcation as defined in ORC §2315.21(B)(1), but rather, sought a twisted and decidedly advantageous rewriting of the statute. For example: -

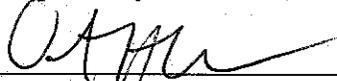
- (1) Appellants sought bifurcation of "Plaintiff's claims for compensatory and punitive damages," though the statute does not provide for any "claim bifurcation" and provides for bifurcation of damage determinations **as part of the same trial, by the same jury.** (Appellants' Brf. Sup. Mot. to Bif., p. 2-3).
- (2) Appellants sought some undefined evidentiary proceeding, to be conducted by the trial court after an award of compensatory damages, but before the presentation for the determination of punitive damages. (Appellants' Brf. Sup. Mot. to Bif., p. 2-3).
- (3) Appellants sought exclusion during the compensatory proceedings of "**any** evidence that relates to the issue of punitive damages," while the statute provides only for exclusion of "evidence that relates **solely** to the issue of whether plaintiff is entitled to recover punitive or exemplary damages." (Emphasis added, Appellants' Brf. Sup. Bif., p. 2-3; ORC §2315.21(B)(1)(a)).

The trial court refused to grant Appellants' Motion, which requested all of the above under the guise of ORC §2315.21(B)(1)(a), though the statute not only does not provide for these requests, and on at least one issue (the evidentiary issue of (3) above) is flatly contrary to what Appellants

requested. Although now Appellants very much want this Court to clairvoyantly divine that the trial court implicitly held ORC §2315.21 unconstitutional, it would have been nice of them to have actually asked the trial court to provide the relief stated in the statute, as opposed to what Appellants wish the statute provided. Had they done so, the trial court may have been faced with determining the constitutionality of the statute. Appellants did not, so the trial court was not. Since the trial court was not faced with that issue, the appellate court could not have been.

To now have this Court consolidate oral arguments in this matter with those to occur in *Havel* is nothing more than an attempt by Appellants to re-write their Motion to Bifurcate as if they had actually simply requested the statutory relief provided. Just as the trial court did not permit Appellants to re-write ORC §2315.21, this Court should not allow them to re-write their Motion to Bifurcate to get the benefits of the various arguments made in *Havel*. Accordingly, Appellees request that the Joint Motion of Appellants to Consolidate Oral Argument Date be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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