

ORIGINAL

IN THE SUPREME COURT OF OHIO

Sandra Havel, as the Personal)	CASE NO. 2010-2148
Representative of the Estate of)	
John Havel (Deceased),)	On Appeal from the Eighth District
)	Court of Appeals, Case No. CA 94677
Appellee,)	
)	
vs.)	
)	
Villa St. Joseph, et al.,)	
)	
Appellants.)	

MERIT BRIEF OF APPELLEE SANDRA HAVEL

Blake A. Dickson (0059329)
 THE DICKSON FIRM, L.L.C.
 Enterprise Place, Suite 420
 3401 Enterprise Parkway
 Beachwood, Ohio 44122

Telephone (216) 595-6500
 Facsimile (216) 595-6501
 E-Mail BlakeDickson@TheDicksonFirm.com

Attorney for Plaintiff-Appellee Sandra Havel,
 as the Personal Representative of the
 Estate of John Havel (Deceased)

Bret C. Perry (0073488)
 Steven J. Hupp (0040639)
 Donald J. Richardson (0068786)
 BONEZZI SWITZER MURPHY POLITO &
 HUPP Co., L.P.A.
 1300 East Ninth Street, Suite 1950
 Cleveland, Ohio 44114

Telephone (216) 875-2767
 Facsimile (216) 875-1570
 E-Mail bperry@bsmph.com
shupp@bsmph.com
drichardson@bsmph.com

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

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I. INTRODUCTION.

The Modern Courts Amendment of 1968 to the Ohio Constitution provides the Supreme Court of Ohio with the exclusive authority to prescribe the necessary and pragmatic rules of procedure and practice that govern all Ohio courts. *See* Section 5(B), Article IV of Ohio Constitution. This Court has exclusive and unfettered authority to promulgate all such procedural rules, including rules that facilitate the effective and efficient resolution of jury trials. This Court is empowered to declare that “All laws in conflict with [its] rules shall be of no further force or effect * * *.” *Id.*

Pursuant to the Ohio Constitution, this Court also has the authority to weigh the constitutionality of challenged laws and determine whether they violate provisions of the Constitution or usurp the powers of the non-legislative branches of government.

Despite the clear language of Civ.R. 42(B), the General Assembly enacted R.C. § 2315.21(B), which provides contrary procedures for bifurcating a jury trial into two parts, one for the presentation and determination of compensatory damages and one for punitive damages. Since R.C. § 2315.21(B) requires the bifurcation of the compensatory damages phase of trial from the punitive damages phase upon the request of a party, it is in direct conflict with Civ.R. 42(B), which provides trial courts with the discretion to bifurcate the trial upon the request of a party or sua sponte.

Given that procedural rules are the province of this Court, Appellee Sandra Havel respectfully requests this Court to hold that R.C. § 2315.21(B) is unconstitutional and in violation of the Modern Courts Amendment because it is a procedural law whose mandates irreconcilably conflict with Civ.R. 42(B). Thus, R.C. § 2315.21(B) is of no effect and Civ.R. 42(B) is the controlling rule for determining which requirements and procedures trial courts must adhere to when

a party requests the bifurcation of the compensatory damages phase of a trial from the punitive damages phase of a trial.

This case is solely about conflicting procedures. This case, and its resolution, does not affect the substantive tort reform provisions that have been enacted by the General Assembly, such as the statutory limits on the recovery of non-economic damages, limits on the recovery of punitive damages from small businesses, and a 10-year statute of repose for products liability actions.

More importantly, this case is not about extinguishing a tortfeasor's right to request and obtain bifurcation of issues and claims at trial - a right that precedes R.C. § 2315.21(B), as amended by S.B. 80, effective April 7, 2005. Civ.R. 42(B) enables a tortfeasor to request and obtain bifurcation.

To the extent that this case deals with tort actions and the process of bifurcation, this case is solely about which branch of government is vested with the authority to enact procedural rules. Appellee contends that it is the rightful province of this Court alone to promulgate and enforce procedural rules, including the procedures for the bifurcation of trials. The Ohio Constitution does not provide the General Assembly with any authority over procedural matters.

II. STATEMENT OF THE CASE AND OF THE FACTS.

On October 3, 2008, John E. Havel was admitted to the Villa St. Joseph nursing home in Garfield Heights, Ohio for rehabilitation for a broken hip following surgery. While under the exclusive care of Villa St. Joseph, Mr. Havel developed severe decubitus ulcers that required surgery. Later, on January 21, 2009 Mr. Havel was admitted to Maple Wood Care Center, a nursing home located in Streetsboro, Ohio to receive continued care and rehabilitative assistance. While under the exclusive care of the Maple Wood Care Center, Mr. Havel contracted bacterial sepsis and

was transported to Marymount Hospital on June 27, 2009. He was eventually admitted to Lakewood Hospital. As a direct and proximate cause of the Defendants' failure to provide proper care and treatment, Mr. Havel died on August 29, 2009 from bacterial sepsis due to skin ulcers.

On November 12, 2009, Plaintiff Sandra Havel, as the personal representative of the Estate of John Havel (deceased), filed a complaint in the Cuyahoga County Court of Common Pleas against Defendants Villa St. Joseph and Village of Marymount d.b.a. Villa St. Joseph, among others.¹ The complaint alleged personal injury, wrongful death, and violations of Ohio's Nursing Home Bill of Rights as set forth in R.C. § 3721.13. In her complaint, Plaintiff Sandra Havel sought compensatory damages, punitive damages, and other appropriate relief.

On December 28, 2009, Defendants Villa St. Joseph and Village at Marymount d.b.a. Villa St. Joseph (hereafter "Defendants") filed a Motion to Bifurcate pursuant to R.C. § 2315.21(B), urging the Trial Court to bifurcate the presentation of evidence and the jury's subsequent consideration of Plaintiff's compensatory damage claims from the presentation and consideration of Plaintiff's punitive damage claims.

On January 29, 2010, the Trial Court denied Defendants' Motion to Bifurcate. *Havel v. Villa St. Joseph*, Cuyahoga Co. No. CV-09-709632 (Jan. 29, 2010 Notice).

On February 12, 2010, Defendants appealed the Trial Court's decision to the Eighth District Court of Appeals, citing *Hanners v. Ho Wah Genting Wire & Cable SDN BHD* (10th Dist. 2009), Franklin App. No. 09AP-361, 2009 Ohio 6481, as support for its position that the Trial Court was required to bifurcate the presentation and determination of compensatory and punitive damage

¹See *Havel v. Villa St. Joseph* (8th Dist. 2010), Cuyahoga App. No. 94677, 2010 Ohio 5251, at ¶ 2 footnote 1 (listing the other defendants who were not parties to the appeal below and who are not parties to the present appeal).

claims pursuant to R.C. § 2315.21(B).

On October 28, 2010, the Eighth District Court of Appeals affirmed the Trial Court's decision, thereby finding that there was an irreconcilable conflict between the procedural laws contained in R.C. § 2315.21(B) and Civ.R. 42(B). As a result, the Trial Court held that R.C. § 2315.21(B) was unconstitutional, in violation of Section 5(B), Article IV of the Ohio Constitution. *Havel v. Villa St. Joseph* (8th Dist. 2010), 2010 Ohio 5251, at ¶ 12.

On November 22, 2010, upon Defendants' motion, the Eighth District Court of Appeals certified a conflict between its decision in *Havel* and the Tenth District Court of Appeals' decision in *Hanners*

On December 10, 2010, Defendants filed a Notice of Certified Conflict with this Court. On February 2, 2011, this Court certified the conflict between the Eighth District's decision in *Havel* and the Tenth District's decision in *Hanners* and agreed to hear the present appeal. *Havel v. Villa St. Joseph*, S. Ct. No. 2010-2148 (Journal Entry dated Feb. 2, 2011)

III. LAW AND ARGUMENT.

Whether a challenged statute is constitutional is a question of law that is reviewed de novo. *Am. Fed'n of State, Cty. and Mun. Employees Local # 74 v. City of Warren* (11th Dist. 2008), 177 Ohio App.3d 530, 535, 2008 Ohio 3805, 895 N.E.2d 238, citing *Wilson v. AC&S, Inc.* (12th Dist. 2006), 169 Ohio App.3d 720, 2006 Ohio 6704, 864 N.E.2d 682.

This Court may declare a statute unconstitutional where the statute is clearly incompatible with constitutional provisions. *Am. Fed'n of State, Cty. and Mun. Employees Local # 74*, 177 Ohio App.3d at 535, citing *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46, 47, 554 N.E.2d 97, quoting *State ex rel. Dickman v. Defenbacher* (1995), 164 Ohio St. 142, 128 N.E.2d 59. Where

a statute conflicts with the Ohio Rules of Civil Procedure, this Court's rule will control for all matters of procedural law. The statute will control for matters of substantive law. *Erwin v. Bryan* (2010), 125 Ohio St.3d 519, 2010 Ohio 2202, 929 N.E.2d 1019; *State ex rel. Sapp v. Franklin Cty. Court of Appeals* (2008), 118 Ohio St.3d 368, 2008 Ohio 2637, 889 N.E.2d 500; *Proctor v. Kardassilaris* (2007), 115 Ohio St.3d 71, 74, 2007 Ohio 4838, at ¶ 17, 873 N.E.2d 872; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454, 423 N.E.2d 100.

Thus, a statute that is procedural in nature and conflicts with the Ohio Rules of Civil Procedure is unconstitutional and has no force or effect. *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, 223, 1993 Ohio 174, 611 N.E.2d 789; *see also In re Coy* (1993), 67 Ohio St.3d 215, 219, 1993 Ohio 202, 616 N.E.2d 1105.

A. PROPOSITION OF LAW NO. 1: R.C. 2315.21(B)'s mandatory bifurcation procedures are unconstitutional because they are matters of procedural law that irreconcilably conflict with Ohio Civil Rule 42(B), thereby violating the Modern Courts Amendment.

On February 2, 2011, this Court certified the following question as a 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)?

Appellee Sandra Havel, as the personal representative of the Estate of John Havel (deceased), urges this Court to answer "Yes" to this question. The Modern Courts Amendment vests this Court with the exclusive authority to promulgate and modify the rules of procedure and trial practice for all Ohio state courts. This Court promulgated Civ.R. 42(B). Civ.R. 42(B) provides trial courts with the discretion to bifurcate individual cases where prejudice might result or the parties might be burdened by the trying of all claims and issues in a single action. Civ.R. 42(B) applies to the

bifurcation of the compensatory damages phase of a trial from the punitive damages phase of a trial.

R.C. § 2315.21(B) requires trial courts, upon the motion of a party, to bifurcate the presentation and determination of compensatory damages and punitive damage into two phases of the trial. This bifurcation of compensatory damages and punitive damages into two, separate stages of trial is clearly a matter of procedural law.

Whenever a statute and a rule of procedure irreconcilably conflict on a matter of procedural law, this Court's rule prevails over the statute, and the conflicting statute is considered unconstitutional and of no effect. *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, 223, 1993 Ohio 174, 611 N.E.2d 789; *see also In re Coy* (1993), 67 Ohio St.3d 215, 219, 1993 Ohio 202, 616 N.E.2d 1105. Since R.C. § 2315.21(B) conflicts with Civ.R. 42(B), and the statute is purely procedural in nature, this Court should hold that R.C. § 2315.21(B)'s mandatory bifurcation procedures are unconstitutional, both facially and as applied to the case at bar.

B. Pursuant to the Modern Courts Amendment to the Ohio Constitution, the Supreme Court of Ohio is vested with the exclusive authority to create, modify, and regulate all procedural rules that govern the proceedings of Ohio state courts.

This Court has the exclusive authority to promulgate procedural rules for all state courts in Ohio and to strike down procedural laws enacted by the General Assembly that conflict with this Court's rules.

Section 5(B), Article IV of the Ohio Constitution, also known as the Modern Courts Amendment, vests the Supreme Court of Ohio with 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.” See *Erwin v. Bryan* (2010), 125 Ohio St.3d 519, 525, 2010 Ohio 2202, 929 N.E.2d 1019, citing *Proctor v. Kardassilaris* (2007), 115 Ohio St.3d 71, 2007 Ohio 4838, 873 N.E.2d 872; *State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St.3d 86, 87, 2006 Ohio 161, 840 N.E.2d 1062; see also *State ex rel. Boylen v. Harmon* (2006), 107 Ohio St.3d 370, 2006 Ohio 7, 839 N.E.2d 934, quoting *State v. Slatter* (1981), 66 Ohio St.2d 452, 454, 423 N.E.2d 100.

This Court should interpret the Modern Courts Amendment broadly “in order to accomplish the manifest purpose of [the] amendment.” See *State v. Smith* (1997), 80 Ohio St.3d 89, 104, 1997 Ohio 355, 684 N.E.2d 668. The history leading up to the adoption of the Modern Courts Amendment, as detailed in the State of Ohio’s amicus brief, clearly shows that much confusion resulted from the code-based pleading system. The impetus in adopting the Modern Courts Amendment was to allow the courts to make decisions on matters of procedural law that the General Assembly had previously decided or refused to make through the legislative-oriented, code-based pleading system.

Pursuant to the authority expressed by the Modern Courts Amendment, this Court has promulgated, and regularly amended, the Ohio Rules of Civil Procedures since 1970. The Ohio Rules of Civil Procedure clearly state that they, collectively, “prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law.” Civ.R. 1(A). In addition, the Ohio Rules of Civil Procedure unequivocally state that “where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.” Civ.R. 1(C); see also *Crim.R. 1(C)*.

The purpose of the Modern Courts Amendment is to “ensure[] the separation of powers between the branches of government.” *Hanners v. Ho Wah Genting Wire & Cable SDN BHD* (10th

Dist. 2009), Franklin App. No. 09AP-361, 2009 Ohio 6481, at ¶ 12. While the General Assembly retains authority to make substantive public policy decisions and to create and regulate substantive rights, it is prohibited from infringing upon this Court's authority by dictating the procedures that must be followed in all Ohio state courts. Conversely, this Court is vested with exclusive authority over all procedural matters, and it is not permitted to impose its public policy decisions on the General Assembly by creating, modifying, or eliminating substantive rights that are within the General Assembly's domain.

Where statutes and rules of this Court conflict and are irreconcilable on matters of procedural law, this Court has the authority, and duty, to strike down the conflicting statutes and reaffirm the application and enforcement of its procedural rules which control on all matters of procedural law. "While this court has consistently expressed its reluctance to interfere with the legislative process, it will not, however, abdicate its duty to enforce the Ohio Constitution." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 496, 1999 Ohio 123, 715 N.E.2d 1062, 1099, citing *State ex rel. Dix v. Celeste* (1984), 11 Ohio St.3d 141, 144, 464 N.E.2d 153, 157.

C. Where R.C. § 2315.21(B) and Ohio Civil Rule 42(B) provide conflicting and irreconcilable bifurcation procedures, Civil Rule 42(B) will control, as it supersedes all conflicting statutes on matters of procedural law.

The mandatory bifurcation procedures set forth in R.C. § 2315.21(B)(1) conflict with Civ.R. 42(B)'s discretionary bifurcation procedures. Since these provisions both concern matters of procedural law, and their conflict is irreconcilable, Civ.R. 42(B) will control and govern the bifurcation procedures to be followed by all state trial courts. As a result, R.C. § 2315.21(B) is unconstitutional.

“To determine whether a statute enacted by the General Assembly infringes on [this Court’s] 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.” *Hanners v. Ho Wah Genting Wire & Cable SDN BHD* (10th Dist. 2009), Franklin App. No. 09AP-361, 2009 Ohio 6481, at ¶ 15; *see also State v. Smith* (1997), 80 Ohio St.3d 89, 99, 1997 Ohio 355, 684 N.E.2d 668, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59.

“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.” *Havel v. Villa St. Joseph* (8th Dist. 2010), Cuyahoga App. No. 94677, 2010 Ohio 5251, at ¶ 5, citing *State ex rel. Sapp v. Franklin Cty. Court of Appeals* (2008), 118 Ohio St.3d 368, 2008 Ohio 2637, at ¶ 28, 889 N.E.2d 500; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454, 423 N.E.2d 100; *see also State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St.3d 86, 2006 Ohio 161, 840 N.E.2d 1062; *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 346 N.E.2d 286, cert. denied 429 U.S. 889, 97 S. Ct. 245. To that effect, this Court has stated that “the Civil Rules should apply unless they are ‘clearly inapplicable.’” *Price v. Westinghouse Elec. Corp.* (1982), 70 Ohio St.2d 131, 132, 435 N.E.2d 1114, 1115, citing *Hous. Auth. v. Jackson* (1981), 67 Ohio St.2d 129, 423 N.E.2d 177. “The civil rules should be held to be clearly inapplicable only when their use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action.” *Price*, 70 Ohio St.2d at 133, 435 N.E.2d at 1116, citing *State ex rel. Millington v. Weir* (10th Dist. 1978), 60 Ohio App.2d 348, 349, 397 N.E.2d 770.

Thus, a statute that conflicts with the Ohio Rules of Civil Procedure, and is procedural in nature, is unconstitutional and has no effect on the Civil Rules or the Ohio state courts’ adherence

to these Rules. *Havel*, 2010 Ohio 5251, citing *In re Coy* (1993), 67 Ohio St.3d 215, 219, 1993 Ohio 202, 616 N.E.2d 1105; *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, 223, 1993 Ohio 174, 611 N.E.2d 789.

In order to understand the conflict that was certified by this Court, it is necessary to briefly examine the two decisions that reflect the split among the courts of appeals in the application of R.C. § 2315.21(B).

In *Hanners v. Ho Wah Genting Wire & Cable SDN BHD* (10th Dist. 2009), Franklin App. No. 09AP-361, 2009 Ohio 6481, the Tenth District Court of Appeals held that a request by a party to a tort action to bifurcate the presentation and determination of compensatory and punitive damage claims pursuant to R.C. § 2315.21(B) required the trial court to bifurcate the proceedings in the manner prescribed by the statute. As an initial matter, the Tenth District determined that the “there is no ambiguity” in the language of R.C. § 2315.21(B) and its mandatory bifurcation procedures, and thus there was no need for the court to interpret the meaning of the statute. *Hanners*, 2009 Ohio 6481, at ¶¶ 17-18. The Tenth District went on to conclude that the statute did not irreconcilably conflict with Civ.R. 42(B): “Admittedly, Civ.R. 42(B) will not *always* conflict with R.C. § 2315.21(B) in *every* case because R.C. § 2315.21(B) only requires bifurcation (1) in ‘tort actions,’ as defined by the statute, where (2) a plaintiff brings claims for both compensatory damages and punitive or exemplary damages, and (3) a party moves for bifurcation.” *Id.* at ¶ 22. Nonetheless the Tenth District stated that in instances where R.C. § 2315.21(B) applies, there is a “clear and unavoidable conflict” with Civ.R. 42(B) because the statute removes the discretion that Civ.R. 42(B) grants to trial courts on the issue of whether and how to bifurcate trial proceedings. *Id.* Having

found such a conflict, the Tenth District continued with its analysis to determine whether R.C. § 2315.21(B) is a substantive or procedural law.

The Tenth District stated that the statute appears to be procedural in nature. However, despite the unambiguous language of the statute, the Tenth District turned to the uncodified language of Section 3 of Am.Sub. S.B. 80 to reach the opposite conclusion, that the statute was a substantive law. The Tenth District reasoned that R.C. § 2315.21(B)'s mandatory bifurcation procedures created and defined a defendant's right to request bifurcation. *Id.* at ¶ 28. As a result, the Tenth District held that the substantive provisions of R.C. § 2315.21(B) trump Civ.R. 42(B)'s procedural rule whenever there is a conflict between the statute and rule. Therefore, the Tenth District upheld the constitutionality of R.C. § 2315.21(B) and determined that it did not violate the Modern Courts Amendment.

In *Havel v. Villa St. Joseph* (8th Dist. 2010), Cuyahoga App. No. 94677, 2010 Ohio 5251, the Eighth District Court of Appeals held that R.C. § 2315.21(B) is unconstitutional after reviewing the Tenth District's *Hanners* decision.

In its analysis, the Eighth District determined that there was an irreconcilable conflict between R.C. § 2315.21(B) and Civ.R. 42(B). The Eighth District reasoned that such a conflict exists because the statute requires a trial court to bifurcate the presentation and consideration of compensatory damages from punitive damages upon request, while Civ.R. 42(B) does not require such bifurcation. *Havel*, 2010 Ohio 5251, at ¶ 8. The Eighth District also acknowledged that mandatory bifurcation would often result in two prolonged proceedings involving essentially the same witnesses, same testimony, and same evidence. *Id.* at ¶ 9.

The Eighth District next determined that bifurcation is a matter of procedural law. *Id.* at ¶ 22. Applying this Court’s analysis from *Norfolk S. Ry. Co. v. Bogle* (2007), 115 Ohio St.3d 455, 2007 Ohio 5248, 875 N.E.2d 919, the Eighth District concluded that R.C. § 2315.21(B) was a purely procedural law because the bifurcation of damages “does not grant a right or impose a duty that gives rise to a cause of action.” *Id.* at ¶ 27 (internal quotations omitted). The Eighth District stated that the Tenth District incorrectly reached its determination that R.C. § 2315.21(B) is a substantive law by referring to sources outside of the unambiguous language of the statute. *Id.* at ¶ 29. *See also Myers v. Brown* (5th Dist. 2011), Stark App. No. 2010 CA 00238, 2011 Ohio 892 and *Plaugher v. Oniala* (5th Dist. 2011), Stark App. No. 2010 CA 00204, 2011 Ohio 1207 in which the Fifth District Court of Appeals concluded that the Eighth District’s analysis in *Havel* was correct after reviewing the decisions in both *Hanners* and *Havel*.

1. There is an irreconcilable conflict between the bifurcation procedures established by R.C. § 2315.21(B) and Ohio Civil Rule 42(B).

In order to address the constitutionality of R.C. 2315.21(B), this Court must first determine whether R.C. 2315.21(B), as amended by S.B. No. 80, effective April 7, 2005, conflicts with Civ.R. 42(B) and, if so, whether that conflict is irreconcilable.

The mandatory bifurcation procedures set forth in R.C. § 2315.21(B) conflict with the discretionary bifurcations procedures established in Civ.R. 42(B). This conflict is irreconcilable.

R.C. 2315.21(B) provides, in relevant part, that:

(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.

R.C. § 2315.21(B)(1) (emphasis added).

“When analyzing a statute, [this Court’s] primary goal is to apply the legislative intent manifested in the *words of the statute*.” *Proctor v. Kardassilaris* (2007), 115 Ohio St.3d 71, 73, 2007 Ohio 4838, 873 N.E.2d 872, citing *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995 (emphasis added). “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning this is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413, paragraph five of the syllabus; *see also Erwin v. Bryan* (2010), 125 Ohio St.3d 519, 524, 2010 Ohio 2202, 929 N.E.2d 1019; *Lake Hosp. Sys. v. Ohio Ins. Guar. Ass’n* (1994), 69 Ohio St.3d 521, 524, 1994 Ohio 330, 634 N.E.2d 611; *Drake-Lassie v. State Farm Ins. Cos.* (10th Dist. 1993), 129 Ohio App.3d 781, 1999 Ohio 40, 788, 719 N.E.2d 64, citing *Kroff v. Amrhein* (1916), 94 Ohio St. 282, 114 N.E. 267. “[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.” *Sears*, 143 Ohio St. at 316. This Court has further stated, “The question is not what did the [G]eneral [A]ssembly intend to enact, but what is the meaning of that which it did enact.” *Id.*

“In construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings.” *Proctor*, 115 Ohio St.3d at 73, citing *State ex rel. Solomon v. Police & Firemen’s Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 65, 1995 Ohio 172, 647 N.E.2d 486, citing R.C. § 1.42. “[A] statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation.” *Bernardini v. Conneaut Area City Sch. Dist. Bd. of Educ.* (1979), 58 Ohio St.2d 1, 4, 387 N.E.2d 1222.

In the case *sub judice*, there is no ambiguity over the meaning of the language codified in R.C. § 2315.21(B). The statute clearly requires a trial court, upon the motion of a party, to bifurcate the presentation and determination of a plaintiff’s compensatory damages from the plaintiff’s punitive damages during a jury trial. Neither the Appellants, nor any amicus curiae, contend that R.C. § 2315.21(B) is ambiguous. Appellants’ Brief at 10-11. Although there has been a split among the courts of appeals as to whether the statute’s mandatory bifurcation provisions are to be given effect, all of the courts that have ruled on this issue have stated that the statute’s language is plain and its meaning is clear. *Myers v. Brown* (5th Dist. 2011), Stark App. No. 2010-CA-00238, 2011 Ohio 892; *Plaugher v. Oniala* (5th Dist. 2011), Stark App. No. 2010 CA 00204, 2011 Ohio 1207; *Havel v. Villa St. Joseph* (8th Dist. 2010), Cuyahoga App. No. 94677, 2010 Ohio 5251, at ¶¶ 29-30; *Hanners v. Ho Wah Genting Wire & Cable SSDN BHD* (10th Dist. 2009), Franklin App. No. 09AP-361, 2009 Ohio 6481, at ¶¶ 29-30; *Barnes v. Univ. Hosps. of Cleveland* (8th Dist. 2006), Cuyahoga App. Nos. 87247, 87285, 87710, 87903, and 87946, 2006 Ohio 6266. The statute clearly mandates

the bifurcation of compensatory and punitive damage claims when requested by a party, and it prescribes specific procedures for this two-stage bifurcation.

Juxtaposed to R.C. § 2315.21(B)'s mandatory bifurcation procedures are Civ.R. 42(B)'s discretionary bifurcation procedures. Civ.R. 42(B) provides, in relevant part, 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).

In contrast to the statute's mandatory language, Civ.R. 42(B) provides that trial courts may bifurcate compensatory and punitive damage claims or other civil claims when they find that such bifurcation will further convenience, lead to increased judicial economy, or assist in the avoidance of prejudice during the resolution of a given action. The trial courts may bifurcate claims pursuant to Civ.R. 42(B) upon the motion of any party or sua sponte. When a party moves the trial court to bifurcate the presentation and determination of compensatory and punitive damage claims pursuant to Civ.R. 42(B), the trial court is permitted to weigh the necessity of bifurcation and the effect of bifurcation upon the proceedings and parties. As a result, Civ.R. 42(B) allows the trial court to retain discretion over whether to grant or deny a party's motion to bifurcate. Thus, the presentation and consideration of compensatory and punitive damage claims may be bifurcated under Civ.R. 42(B) at the sound discretion of the court. *See Sheets v. Norfolk* (3rd Dist. 1996), 109 Ohio App.3d 278, 288, 671 N.E.2d 1364.

Since the language of R.C. § 2315.21(B) clearly obligates trial courts to bifurcate the presentation and determination of compensatory and punitive damage claims whenever a party

moves the court for a bifurcated trial, while the language of Civ.R. 42(B) expressly gives trial courts the discretion to choose whether to bifurcate such claims, there is a conflict between the requirements imposed on the trial courts for bifurcation pursuant to R.C. § 2315.21(B) and Civ.R. 42(B).

Since it is clear that a conflict exists between the bifurcation procedures required by R.C. § 2315.21(B) and Civ.R. 42(B), this Court must next determine whether that conflict is irreconcilable.

The conflict between the provisions is, in fact, irreconcilable.

Based upon the conflict noted above, there is no doubt that the mandatory bifurcation provisions in R.C. § 2315.21(B) and the corresponding provisions of Civ.R. 42(B) conflict in all possible ways and are thus irreconcilable on the face of their language. As a result, this Court is left to determine only whether this conflict between R.C. § 2315.21(B) and Civ.R. 42(B) exists in all circumstances. If so, then the conflict is irreconcilable.

Appellants, and the amici who support their position, have attempted to overlook and minimize the conflict that exists between R.C. § 2315.21(B) and Civ.R. 42(B). They contend that the statute and rule are not irreconcilable because, as they propose, there are several situations where they do not find any conflicts whatsoever between the statute and the rule.

For example, Appellants argue that there is no irreconcilable conflict because trial courts retain their discretion to bifurcate claims in non-tort actions and in tort actions seeking only compensatory damages. Appellants further argue that the conflict is minimal because it only applies when bifurcation is requested. Thus, a trial court can exercise its discretion to bifurcate where such bifurcation is not requested, even though the trial court may be presiding over a tort action involving both compensatory and punitive damage claims. Appellants conclude that because Civ.R. 42(B) can

be applied in each of these situations without conflicting with R.C. § 2315.21, that any conflict between the statute and rule is not irreconcilable.

However, Appellants miss the point. They rely on situations where R.C. § 2315.21(B) does not operate or does not apply to prove that there is no conflict between it and Civ.R. 42(B). Of course, there is no conflict in those instances where the statute could not be invoked. Those situations are irrelevant.

When faced with the ultimate question of whether R.C. § 2315.21(B) is constitutional, the standard for determining the constitutionality of the statute is not whether every other rule or law can be faithfully applied where the statute is inoperable or inapplicable. Instead, this Court must focus on every situation where R.C. § 2315.21(B) applies, and determine whether there are any situations where the statute applies that it does not conflict with Civ.R. 42(B). There are no such situations. In each situation where R.C. 2315.21(B) is applicable, it directly conflicts with Civ.R. 42(B).

Despite Appellants' examples, it is clear that in every situation where R.C. § 2315.21(B) *applies*, it necessarily conflicts with Civ.R. 42(B), and there is no way to reconcile the statute with the rule where the statute mandates bifurcation. In every tort action, like the present case, where the plaintiff is seeking compensatory and punitive damages and one of the parties moves for mandatory bifurcation pursuant to R.C. 2315.21(B), such mandatory bifurcation always conflicts with the trial court's discretion to bifurcate the compensatory and punitive damage claims pursuant to Civ.R. 42(B), whether in response to a motion by a party or on its own accord. In all such instances, R.C. § 2315.21(B) prohibits the exercise of judicial discretion that is authorized by Civ.R. 42(B). Thus, there is a fundamental and irreconcilable conflict. Even the *Hanners* Court noted that there is a "clear and unavoidable conflict" between R.C. § 2315.21(B) and Civ.R. 42(B). *Hanners*, 2009 Ohio

6481, at ¶ 22.

There is an irreconcilable conflict between the mandatory bifurcation procedures set forth in R.C. § 2315.21(B) and the discretionary bifurcation procedures established by this Court in Civ.R. 42(B).

2. R.C. § 2315.21(B)'s mandatory bifurcation procedures concern matters of procedural, not substantive, law.

Having determined that an irreconcilable conflict exists between R.C. § 2315.21(B) and Civ.R. 42(B), this Court must next determine whether the bifurcation procedures of R.C. § 2315.21(B) are substantive or procedural in nature. If this Court determines that they concern matters of substantive law, then the statute will control on the issue of the bifurcation of compensatory and punitive damage claims in tort actions. If this Court determines that R.C. § 2315.21(B) is a matter of procedural law, then it is unconstitutional and Civ.R. 42(B) controls.

Appellants argue that R.C. § 2315.21(B) creates substantive rights. As a result, they conclude that the statute is a substantive law that prevails over Civ.R. 42(B).

Appellee contends that R.C. § 2315.21(B) concerns a matter of procedural law - the bifurcation of claims and proceedings. Appellee's position is well supported by this Court's review of the former R.C. § 2315.21(B), amended by Am.Sub. H.B. 350 (1995), which also concerned mandatory bifurcation, as well as this Court's past determinations and reasoning for declaring other statutes to be either substantive or procedural laws based upon their purpose and effect. Based upon the language and requirements of R.C. § 2315.21(B) and this Court's past holdings on procedural and substantive laws, it is clear that R.C. § 2315.21(B) is a procedural law aimed at establishing procedures for the bifurcation of compensatory and punitive damage claims. Since bifurcation is a

matter of procedural law, it is subject to, and properly regulated by, this Court's rules. The statute is of no effect and should be declared unconstitutional because it violates the Modern Courts Amendment.

This Court has stated that a "substantive" law is that which is derived from a body of law that "creates, defines and regulates the rights of the parties." *Proctor v. Kardassilaris* (2007), 115 Ohio St.3d 71, 74, 2007 Ohio 4838, at ¶ 17, 873 N.E.2d 872, citing *Krause v. State* (1972), 31 Ohio St.2d 132, 145, 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. Substantive laws "relate[] to rights and duties which give rise to a cause of action." *Norfolk S. Ry. Co. v. Bogle* (2007), 115 Ohio St.3d 455, 459, 2007 Ohio 5248, 875 N.E.2d 919, quoting *Jones v. Erie R.R. Co.* (1922), 106 Ohio St. 408, 412, 140 N.E. 366.

On the other hand, a "procedural" law refers to the "methods of enforcing rights or obtaining redress." *Hanners*, 2009 Ohio 6481, at ¶ 33 (Brown, J., concurring in part and dissenting in part), citing *Krause*, 31 Ohio St.2d at 145. Procedural rules address "the machinery for carrying on the suit." *Norfolk Southern Ry. Co.*, 115 Ohio St.3d at 459, quoting *Jones*, 106 Ohio St. at 412.

"Substantive rights exist in counterpoise to procedural rights and include all privileges and obligations arising from the legal nature of transactions and relations but separate from the means of effectuating those privileges and enforcing those obligations." *Viers v. Dunlap* (1982), 1 Ohio St.3d 173, 177, 438 N.E.2d 881.

This Court has already determined that R.C. § 2315.21(B)'s mandatory bifurcation provisions concern matters of procedural law.

a. This Court has already determined that the plain language of R.C. § 2315.21(B) concerns matters of procedural law.

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 497, 1999 Ohio 123, 715 N.E.2d 1062, 1100, this Court determined that the former R.C. § 2315.21(B) was a procedural, not substantive, law. Am.Sub.H.B. No. 350 (1995). This determination is significant because the provisions of former R.C. § 2315.21(B)(1) are substantively identical to the provisions of the current R.C. § 2315.21(B)(1) that are at issue in the present case.² In *Sheward*, while analyzing whether the enacted provisions of H.B. 350, the General Assembly's previous tort reform measure, were unconstitutional and in violation of the one-subject provision of Section 15(D), Article II of the Ohio Constitution, this Court stated that former R.C. § 2315.21(B)(1), "governs the procedural matter of bifurcating tort actions into compensatory and punitive damage stages * * *." *Id.*; see also *Hanners*, 2009 Ohio 6481, at ¶ 36 (Brown, J., concurring in part and dissenting in part), quoting *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, 2007 Ohio 6948, at ¶ 85, 880 N.E.2d 420 ("[t]he S.B. 80 amendments to [R.C. 2315.21] included a procedure for bifurcation of proceedings for compensatory and punitive damages.") (alteration in *Hanners*). This Court did not find that these mandatory bifurcation provisions created, defined, or regulated any substantive rights. See *Secrest v. Gibbs* (11th Dist. 2009), Lake App. No. 2008-L-137, 2009 Ohio 3308; *Hardy v. Country Club Acres, Inc.* (3rd Dist. 1998), Hancock App. No. 5-98-03, 1998 Ohio

² The only differences between the language of the two enactments is that the former R.C. § 2315.21(B)(1) refers to "the trier of fact" in several sentences, thus making it applicable to both bench and jury trials, while the current R.C. § 2315.21(B)(1) refers explicitly to "the jury" in those same instances, thus limiting its application to only jury trials. Despite these minor differences in the enacted versions of R.C. § 2315.21(B)(1), they are otherwise identical. They both apply to the same situations. They both require the same two-stage bifurcation process.

App. LEXIS 3192, at * 7 (“R.C. 2315.21 sets forth certain trial *procedures* in cases where the plaintiff has demanded both compensatory and punitive damages”) (emphasis added); *see also Johnson v. Metro. Life Ins. Co.* (W.D. Pa. 2006), Case No. 01-663, 2006 U.S. Dist. LEXIS 67863; *Butler v. Yamaha Motor Co., Ltd.* (E.D. Pa. 1993), Case No. 89-1380, 1993 U.S. Dist. LEXIS 4109 (*Johnson* and *Butler* denied bifurcation even where required by state law).

The fact that the General Assembly codified the provisions at issue in the present case at a later time, under another tort reform measure, does not change this Court’s previous determination that the virtually identical provisions of R.C. § 2315.21(B) concern matters of procedural law rather than substantive law. “[I]t is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered, nor require the courts to treat as valid laws those which are unconstitutional.” *Sheward*, 86 Ohio St.3d at 477, 715 N.E.2d at 1086, citing *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58, 75 N.E. 939, 941.

Thus, this Court’s analysis of whether R.C. § 2315.21(B) is a substantive or procedural law could very well stop here, as this Court has already held that the mandatory bifurcation procedures for bifurcating compensatory and punitive damage claims pursuant to R.C. § 2315.21(B) are matters of procedural law. *

b. The legislative history illustrates that the General Assembly intended for R.C. § 2315.21(B) to govern matters of procedural law.

Given the plain meaning and unambiguous language of R.C. § 2315.21(B), this Court should determine whether the statute is procedural or substantive law based upon its text. However, even if this Court finds it necessary to review the legislative history of R.C. § 2315.21(B), the uncodified

language of Section 3 of S.B. 80 reveals that R.C. § 2315.21(B) is a matter of procedural law. To the extent that legislative history is relevant, this Court has, as noted above, already determined that the language of R.C. § 2315.21(B) pertains to a matter of procedural law. *Sheward* (1999), 86 Ohio St.3d at 497.

Section 3(A) of S.B. 80 states the General Assembly's findings. It is evident from the General Assembly's findings that it was concerned about reducing the economic impact of litigation on Ohio's economy and development, curbing the number of frivolous lawsuits, and preventing excessive damage awards. The General Assembly stated, "Reform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system." Am.Sub. S.B. 80 § 3(A)(4)(a). When analyzing how the General Assembly specifically intended to restore balance, fairness, and predictability to the civil justice system, it focused on preventing courts from entering judgments for excessive punitive damages by creating a statutory cap on punitive damages and enacting statutes of repose to limit the uncertainty of potential liability over an extended period. Am.Sub. S.B. 80 § 3(A)(4)-(6). The emphasis on these areas is further evidenced in Section 3(E), where the General Assembly requests this Court to uphold its non-economic and punitive damage caps, its amendments to the collateral source rule, and its new statute of repose. Am.Sub. S.B. 80 § 3(E). All of these concerns will still be addressed even after R.C. § 2315.21(B) is found unconstitutional.

The General Assembly then 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." Am.Sub. S.B. 80 §3(A)(6)(f). Under Civ.R. 42(B), defendants do have

the right to request bifurcation and the trial judge can grant it in every case, so this concern is addressed as well.

The mandatory bifurcation provisions of R.C. § 2315.21(B) were not intended to create or define substantive rights, nor were they intended to modify existing substantive rights. Other provisions of S.B. 80 were clearly intended to confer and modify such substantive rights. R.C. § 2315.21(B) only creates a method for enforcing the pre-existing right to request bifurcation.

c. This Court's prior classifications of procedural and substantive laws support the classification of R.C. § 2315.21(B) as a procedural law.

While it may be difficult to categorize some statutes as substantive or procedural, it is instructive to look at other examples where this Court has had to evaluate whether a given statute or rule was substantive or procedural. In the situations where this Court has had to make such classifications, this Court's reasoning provides further support for finding that the mandatory bifurcation procedures in R.C. § 2315.21(B) concern a matter of procedural law.

This Court has often been faced with the task of determining whether enacted statutes conflict with this Court's rules. Such conflicts have not been confined to the Ohio Rules of Civil Procedure; they have also involved the Ohio Rules of Criminal Procedure, the Ohio Rules of Evidence, and the Rules for the Government of the Bar of Ohio, all of which are promulgated pursuant to this Court's rule-making authority under Section 5(B), Article IV of the Ohio Constitution. *See Smith v. Kates* (1976), 46 Ohio St.2d 263, 348 N.E.2d 320 in which this Court held that R.C. § 4705.02 was unconstitutional because it conflicted with this Court's authority under Gov.Bar R. V to institute disciplinary proceeding against attorneys). *See also South High Dev. v.*

Weiner, Lippe & Cromley Co., L.P.A. (1983), 4 Ohio St.3d 1, 4-5, 445 N.E.2d 1106 holding that Gov.Bar R. III superceded R.C. § 1785.04's provisions limiting liability for shareholders of legal professional associations.

In regards to the Ohio Rules of Civil Procedure, this Court has held that they provide the controlling procedures that govern most stages of litigation, from the filing of a complaint through discovery procedures to trial proceedings. *See, e.g., Poulos v. Parker Sweeper Co.* (1989), 44 Ohio St.3d 124, 125-27 footnotes 2, 4 and accompanying text, 541 N.E.2d 1031, citing *Walker v. Allstate Ins. Co.* (7th Dist. 1966), 7 Ohio App.2d 85, 219 N.E.2d 61 noting that the Rules of Civil Procedure control the scope and manner of discovery.

Often this Court has struck down procedural statutes that conflict with the Ohio Civil Rules, as well as analogous provisions of the Ohio Rules of Criminal Procedure:

In *Norfolk S. Ry. Co. v. Bogle* (2007), 115 Ohio St.3d 455, 2007 Ohio 5248, 875 N.E.2d 919, this Court held that R.C. §§ 2307.92 and 2307.93, which codified the filing requirements for asbestos claims pursuant to the Federal Employers' Liability Act and the Locomotive Boiler Inspection Act, were procedural laws. This Court reasoned that the statutes were procedural in nature because they only established a system to procedurally prioritize asbestos cases on a particular court's docket, so that such cases could be more efficiently resolved. The statutes did not alter the underlying cause of action for asbestos claims that existed prior to the statutes' enactment. *See Havel*, 2010 Ohio 5251, at ¶ 24.

In *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221, 1993 Ohio 174, 611 N.E.2d 789, this Court held that the pleading requirements of R.C. § 2309.01 conflicted with Civ.R. 8(A). R.C. § 2309.01 prohibited most plaintiffs from including an amount for damages sought in their complaints

(although it allowed for amendment closer to trial). However, the statute was in direct conflict with Civ.R. 8(A), which requires plaintiffs to state a specific amount of damages in their complaints. Thus, this Court declared R.C. § 2309.01 unconstitutional because Civ.R. 8(A) controlled on the procedural issues related to pleadings.

Similarly, in *Hiatt v. S. Health Facilities* (1994), 68 Ohio St.3d 236, 1994 Ohio 294, 626 N.E.2d 71, this Court held that R.C. § 2307.42, which required medical malpractice complaints to be accompanied by an affidavit stating that the plaintiff's attorney had requested medical records from the named defendants, was a procedural law because it related to the form and content of medical malpractice complaints. As a result, this Court held that the statute was in conflict with Civ.R. 11, which did not require affidavits to be submitted with such complaints, and therefore declared R.C. § 2307.42 unconstitutional.

In *Wells v. Maxwell* (1963), 174 Ohio St. 198, 200, 188 N.E.2d 160, 161, this Court held that “[t]he manner by which an accused is charged with a crime * * * is strictly a matter of procedure, and a change in such a procedure does not deprive an accused of any substantial right or protection * * *.” The latter phrase is instructive in the present case. If a change in procedure does not eliminate or in any way reduce a substantive right, then it must also be true that a change in procedure does not enlarge or otherwise modify a substantive right. Thus, the bifurcation procedures required by R.C. § 2315.21(B), though they may significantly affect the trial court's regulation of bifurcated proceedings, they do not affect the underlying substantive right to request bifurcation. That right remains intact regardless of whether the provisions of R.C. § 2315.21(B) are given effect.

Likewise, in *State ex rel. Silcott v. Spahr* (1990), 50 Ohio St.3d 110, 112, 552 N.E.2d 926, 928, this Court faced a conflict between Crim.R. 46 and App.R. 8, on one hand, and R.C. §§ 2949.02

and 2953.09, on the other. This Court determined that while the right to apply for bail is a substantive right, the procedure to follow in regulating that right - applying for bail - is a procedural matter. Although this Court recognized that the statutes at issue were “so constructed as to arguably make the purported limitation on trial courts’ authority jurisdictional and hence a substantive matter,” this Court reasoned that the limitations were not jurisdictional and did not affect matters of substantive law “because to do so would permit the General Assembly to invalidate any otherwise valid rule by withholding from a court, or all courts, authority to follow it.” *Id.* This is precisely what the General Assembly attempted to do through R.C. § 2315.21(B). The General Assembly attempted to alter or thwart an otherwise valid procedural rule by enacting a procedural law that eliminates the trial court’s discretion to grant or deny motions to bifurcate tort proceedings involving compensatory and punitive damage claims. Thus, R.C. §§ 2953.09(B) and 2949.02(B) were found to conflict with App.R. 8(B), and were subsequently struck down.

Trial courts have broad discretion to consider and rule on procedural questions, including the regulation of trial proceedings and the management of their dockets. *See Riedel v. Consol. Rail Corp.* (2009), 125 Ohio St.3d 358, 361, 2010 Ohio 1926, 928 N.E.2d 448 (Lundberg Stratton, J., concurring) (stating that the determination of whether non-asbestos claims should be adjudicated together with asbestos claims is “a matter of docket control that is best left to court administration at the local level”); *see also State v. Hochhausler* (1996), 76 Ohio St.3d 455, 469, 1996 Ohio 374, 668 N.E.2d 457 (discussing the inherent authority of trial courts to control and manage their dockets and proceedings); *Vorisek v. Vill. of North Randall* (1980), 64 Ohio St.2d 62, 64, 413 N.E.2d 793, 794 (stating that trial courts have discretion to decide how to “proceed to expedite the orderly flow of their dockets”).

This Court has stated that questions concerning the admissibility of evidence at trial are procedural matters. *State v. French* (1995), 72 Ohio St.3d 446, 450, 1995 Ohio 32, 650 N.E.2d 887, 891. The taking of evidence has been categorized as a procedural right. See *City of Warren v. Satterlee* (11th Dist. 2006), Trumbull App. No. 2005-T-0010, 2006 Ohio 1460, at ¶ 16, citing *Quirke v. Quirke* (11th Dist. 1996), Ashtabula App. No. 92-A-1755, 1996 Ohio App. LEXIS 4110, at * 6-7. The trial court is the “guardian of the admissibility of evidence.” *State v. Boczar* (2007), 113 Ohio St.3d 148, 152, 2007 Ohio 1251, 863 N.E.2d 155, 159; see also *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343, 348 (“The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.”).

The issue of bifurcation is an issue of the sequence in which evidence is presented to the jury. As such it is even more procedural in nature than the issue of the admissibility of evidence.

In *Denicola v. Providence Hosp.* (1979), 57 Ohio St.2d 115, 387 N.E.2d 231, this Court determined that a statute providing competency requirements for expert witnesses was a matter of procedural law. This Court supported its holding by noting that no one contemplates such competency requirements until he or she is called, or likely to be called, as an expert witness.

In *State v. Greer* (1988), 39 Ohio St.3d 236, 530 N.E.2d 382, this Court was presented with a conflict between Crim.R. 24, which permits six peremptory challenges in capital cases, and R.C. 2945.21, which permitted up to twelve peremptory challenges. While this Court acknowledged that the underlying right to peremptorily challenge jurors was a substantive right, this Court stated that the numerical limitation involved in these two provisions was a matter of procedural law. *Greer*, 39 Ohio St.3d at 245, 530 N.E.2d at 395. The Court emphasized that although Crim.R. 24 sets the manner in which the right to exercise peremptory challenges is realized at trial, the rule does not

impact the underlying substantive right because it “is not so restrictive as to constitute a *de facto* abrogation or modification of the right itself.” *Greer*, 39 Ohio St.3d at 246, 530 N.E.2d at 396.

The same can be said of Civ.R. 42(B), as it does not affect any party’s right and ability to request bifurcation for the presentation and determination of compensatory and punitive damage claims. R.C. § 2315.21(B) does not enlarge or reduce any party’s right to request bifurcated proceedings.

In *State v. Brown* (1988), 38 Ohio St.3d 305, 307, 528 N.E.2d 523, 530, this Court held that the number of jurors on a grand jury was a procedural right. As a result, this Court struck down R.C. §§ 2939.02 and 2939.20, which stated that all grand juries shall consist of fifteen (15) jurors and that twelve (12) jurors must agree before an indictment may be issued. These statutes clearly conflicted with Crim.R. 6(A), which states that grand juries shall consist of nine (9) jurors.

Furthermore, in *Rumley v. CESCO, Inc.* (10th Dist. 2001), Franklin App. No. 00AP-1228, 2001 Ohio App.LEXIS 4184, * 13-14, the Tenth District Court of Appeals held that R.C. § 2505.02 was procedural in nature and conflicted with Civ.R. 59 or 49. Civ.R. 59 required trial courts to state their grounds for granting a new trial, while R.C. § 2505.02 required such statements of grounds only when requested by a party.

Appellants point to this Court’s past decision in *State ex rel. Loyd v. Lovelady* to support their contention that R.C. § 2315.21(B) is a substantive law. However, this case does not support such a conclusion.

In *State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St.3d 86, 2006 Ohio 161, 840 N.E.2d 1062, this Court was presented with the question of whether R.C. §§ 3119.961 et seq. conflicted with Civ.R. 60(B), such that the statutes violate Section 5(B), Article IV of the Ohio Constitution.

Ultimately, this Court held that the statutes were constitutional because they establish a substantive right rather than a procedural right. *Lovelady*, 108 Ohio St.3d at 87. Civ.R. 60(B) provides that a court may relieve a party from a final judgment due to: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or misrepresentation of an adverse party; (4) satisfaction, release, or discharge of the judgment; or (5) any other justifiable reason. Meanwhile, R.C. §§ 3119.961 et seq. provide that a person ordered to pay child support may be granted relief from such an order where: (1) the male obligor has results from a recent genetic test indicating that there is a zero percent chance that he is the child's father; (2) he has not adopted the child; and (3) the child was not conceived by artificial insemination. The appellant argued that the statute conferred a procedural right that conflicted with Civ.R. 60(B).

Writing for a unanimous Court, Justice Pfeifer stated that it was not clear from the language of the statute whether it was intended to be substantive or procedural in nature. *Id.* at 89. As a result, this Court then reviewed the legislative history of Section 3 of H.B. No. 242, which related to former R.C. § 3113.2111. Section 3 stated that “[t]he General Assembly hereby declares that it is a person’s * * * substantive right to obtain relief from a final judgment, court order, or administrative determination or order that * * * requires the person * * * to pay child support for a child.” *Id.* at 89 (alterations and omissions in original). The legislative intent of former R.C. § 3113.2111 was important here because that provision had been recodified as R.C. §§ 3119.961 et seq. and the language of R.C. §§ 3119.961 et seq. was ambiguous on its face. Thus, the General Assembly’s original intent to create a substantive right to relief in order to eliminate the injustice that results from someone being forced to financially support another person’s child who is not his own, applied to, and was evidenced by, R.C. §§ 3119.961 et seq.

The present case significantly differs from the situation in *Lovelady*. R.C. § 2315.21(B) does not affect a plaintiff's right to seek punitive damages, as Appellants claim. That right is unaffected by the statute. A plaintiff can still seek relief in the form of punitive damages. That right has been limited by other provisions of the General Assembly's tort reform measure, such as mandatory caps and limitations on small businesses, which are matters of substantive law. However, a plaintiff's right to seek punitive damages and a defendant's right to request bifurcation are not affected, in any way, by R.C. § 2315.21(B). Punitive damages can still be sought and awarded. Bifurcation of the compensatory damages phase of a trial from the punitive damages phase of a trial may still be requested pursuant to Civ.R. 42(B) and obtained. In *State Farm Mut. Ins. Co. v. Blevins* (12th Dist. 1988), Warren App. No. CA87-12-103, 1988 Ohio App. LEXIS 3238, it was held that the elimination of punitive damages was substantive. But for the reasons just stated, R.C. § 2315.21(B) does not eliminate or modify the right to seek punitive damages.

Appellants concede that the language of R.C. § 2315.21(B) is clear and unambiguous. However, they rely upon *Lovelady* for the premise that this Court should look at the legislative history of R.C. § 2315.21(B) because some substantive laws are dressed in procedural wrapping.

Although the clear language of R.C. § 2315.21(B) requires this Court to look only at that language when determining its constitutionality,³ a closer look at the legislative history of R.C. § 2315.21(B) provides a second reason to distinguish the present case from *Lovelady*. Unlike R.C. §

³ As noted above, the Tenth District Court of Appeals, like the Eighth District Court of Appeals, acknowledged that the plain meaning of R.C. 2315.21(B) was clear and unambiguous from the statutory language itself. However, in *Hanners*, the Tenth District proceeded to reach its determination about the meaning of R.C. 2315.21(B) by referencing external sources that discussed the general legislative intent behind the General Assembly's tort reform measures, rather than focusing on the statute's plain language. See *Havel*, at ¶ 29.

3119.961 and former R.C. § 3113.2111, the legislative history of R.C. § 2315.21(B), as noted above, does not indicate that the General Assembly intended to create, define, or modify any substantive right. In addition, in *Lovelady*, this Court was not bound by a prior determination of the nature of the statute at issue. Here, the Supreme Court has already determined that the provisions relating to R.C. § 2315.21(B)'s mandatory bifurcation procedures are matters of procedural law. *Sheward*, 86 Ohio St.3d at 497.

Moreover, the subjects regulated in R.C. §§ 2315.21(B) and 3119.961 et seq. are vastly different. In *Greer*, this Court has stated that “[i]t is evident upon the face of the Constitution that [the procedural rules] propounded by this court prevail over conflicting state statutes so long as the subject of regulation is procedural.” *Greer*, 39 Ohio St.3d at 245, 530 N.E.2d at 395. R.C. §§ 3119.961 et seq. dealt with the right of a non-parent to seek review of a final judgment, which pertains to a substantive right. R.C. § 2315.21(B) clearly deals with the bifurcation of the compensatory damages phase of a trial from the punitive damages phase of a trial. Bifurcation has been found to be a procedural matter of law under both Ohio and federal law. *See Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, 2007 Ohio 6948, at ¶ 85, 880 N.E.2d 420; *Sheward*, 86 Ohio St.3d at 497; *State v. Slatter* (1982), 66 Ohio St.2d 452, 423 N.E.2d 100; *see also Tuttle v. Sears, Roebuck & Co.* (N.D. Ohio 2009), Case No. 1:08 CV 33, 2009 U.S. Dist. LEXIS 80980 (rejecting argument that R.C. § 2315.21(B) is a substantive statute); *Rosales v. Honda Motor Co., Ltd.* (5th Cir. 1984), 726 F.2d 259, 260, 262.

Laws are substantive only if they create, define, or regulate the rights and duties of the parties, or if they provide a remedy for the violation of such rights. *See Proctor v. Kardissilaris* (2007), 115 Ohio St.3d 71, 2007 Ohio 4838, 873 N.E.2d 872; *Van Fossen v. Babcock & Wilcox Co.*

(1988), 36 Ohio St.3d 100, 107, 522 N.E.2d 489, 496. R.C. § 2315.21(B) does not create, define, or regulate a substantive right, nor does it create a remedy for the violation of a substantive right.

Here, it is clear that R.C. § 2315.21(B) is a procedural law. It is certainly not a substantive law based upon comparing it to other laws that this Court has held to be substantive in nature. It is not a substantive law because it clearly does not confer a new right to request bifurcation or to seek punitive damages, nor does it modify an existing right to request bifurcation or to seek punitive damages. R.C. § 2315.21(B) neither broadens the rights of plaintiffs to seek punitive damages, nor does it prohibit trial courts and juries from entering judgments awarding punitive damages against defendants. Although the issue of whether a plaintiff may recover, and a defendant may be liable for, punitive damages is a question of substantive law, the manner in which evidence is presented and proved has been determined to be solely a matter of procedural law.

This Court's past determinations clearly establish that R.C. § 2315.21(B) and its mandatory bifurcation procedures are matters of procedural law. This conclusion is supported by the legislative history of R.C. § 2315.21(B), as well as this Court's past classifications of similar laws. Accordingly, R.C. § 2315.21(B) is a procedural law.

Since R.C. § 2315.21(B) is clearly a procedural law and that its mandatory bifurcation procedures irreconcilably conflict with the discretionary bifurcation procedures established in Civ.R. 42(B), as noted above, this Court should declare R.C. § 2315.21(B) unconstitutional. R.C. § 2315.21(B) is clearly incompatible with the Modern Courts Amendment and the authority that it gives exclusively to this Court to promulgate and enforce rules of procedure.

IV. CONCLUSION.

For the reasons discussed above, Appellee Sandra Havel respectfully requests that this Honorable Court affirm the decision of the Eighth District Court of Appeals, holding that the Trial Court has discretion to bifurcate compensatory damage claims from punitive damage claims pursuant to Ohio Civil Rule 42(B), and that R.C. § 2315.21 is unconstitutional as it mandates the bifurcation of claims in contravention of Ohio Civil Rule 42(B) and in violation of the Modern Courts Amendment to the Ohio Constitution. The Trial Court has been granted authority under Ohio Civil Rule 42(B) to decide whether to bifurcate the presentation and determination of compensatory and punitive damage claims; this authority is not affected by R.C. § 2315.21(B).

Respectfully submitted,
THE DICKSON FIRM, L.L.C.

By: 

Blake A. Dickson (0059329)
Enterprise Place, Suite 420
3401 Enterprise Parkway
Beachwood, Ohio 44122
Tel (216) 595-6500
Fax (216) 595-6501
E-Mail BlakeDickson@DicksonCampbell.com

Attorney for Appellee Sandra Havel, as the Personal Representative of the Estate of John Havel (Deceased).

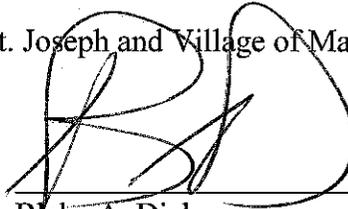
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Appellee's Merit Brief was sent by ordinary U.S. Mail **this 16th day of May, 2011**, to the following:

Bret C. Perry, Esq.
Steven J. Hupp, Esq.
Donald J. Richardson, Esq.
BONEZZI SWITZER MURPHY POLITO & HUPP CO., L.P.A.
1300 East Ninth Street, Suite 1950
Cleveland, Ohio 44114

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

By:



Blake A. Dickson

Attorney for Appellee Sandra Havel, as the Personal Representative of the Estate of John Havel (Deceased).