

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN T. FLYNN, et al.

Case No. 10-1881

Appellees,

On Appeal from the Cuyahoga County Court
of Appeals, Eighth Appellate District
Case No. CA-10-095695

v.

SABER HEALTH CARE GROUP,
LLC, et al.,

Civil Action No. 2009-3975 MT

Appellants.

MERIT BRIEF OF APPELLEES, JOHN FLYNN AND JUDY-GORDON, CO-EXECUTORS OF THE ESTATE OF GLADYS FERAN, DECEASED

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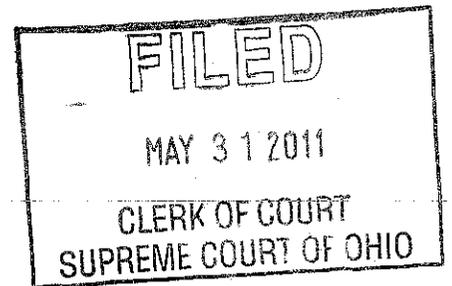


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I. STATEMENT OF CASE AND PROCEDURAL HISTORY

The case arises out of nursing home negligence and wrongful death of Decedent, Gladys Feran, an 83 year old resident of Defendant-Appellee's nursing home facility known as Larchwood Village Retirement Community ("Larchwood Village"), owned and operated by Defendant-Appellants, Saber Healthcare Group, LLC, Saber Management, Inc. and Fairview Village Retirement Community d/b/a Larchwood Village Retirement Community.

During her seventeen month residency at Larchwood Village, Mrs. Feran fell some sixteen times. The documentation of the facts and circumstances of each of these falls and the corresponding injuries by the Larchwood Village staff is largely absent from the Larchwood Village records. In fact the Ohio Department of Health cited Larchwood Village for its failure to document the facts and circumstances of at least one of Mrs. Feran's falls. (See Plaintiff-Appellees' Motion for Extension of Time to Produce Affidavit of Merit, p. 2 and Exhibit B, Ohio Department of Health Survey Report, attached thereto).

Although discovery in this case is still in its infancy, at least two of Decedent's falls occurred when Larchwood Village staff had Decedent, an 83 year stroke victim with senile dementia, work pushing other residents in wheelchairs for transport within the facility. All in all, Mrs. Feran suffered a fractured clavicle, a fractured hip and a fractured pelvis while a resident of Larchwood Village, all as a result of falls. Her residency at Larchwood Village culminated with her "accidental" death on April 20, 2009, as a result of "blunt impact to trunk with fracture of pelvis." (See Complaint ¶13).

Against this backdrop, Plaintiff-Appellees, the children of Decedent, filed their Complaint alleging nursing home negligence and wrongful death. As well, the Complaint included a claim for punitive damages due to Defendant-Appellants failure to appropriately

document Mrs. Feran's falls and injuries, allegedly an attempt by Defendant-Appellants to hide these facts and circumstances and avoid liability to Plaintiff-Appellees. (See Complaint, ¶¶31-33).

Defendant-Appellants simultaneously asked the trial court to dismiss Plaintiff-Appellees' Complaint for failure to attach an Affidavit of Merit and filed a motion styled as a "Motion to Bifurcate." Defendant-Appellants actually contended that the trial court should dismiss the case because Plaintiff-Appellees did not provide an Affidavit of Merit, which must be based on medical records, where Defendant-Appellants were cited for failing to document Mrs. Feran's falls and injuries in the same records. Defendant-Appellants' Motion to Bifurcate did not request simple bifurcation pursuant to ORC §2315.21(B), but processes and rulings under the guise of that statute which were contrary to it:

- (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)).

~~Simply put, Defendant-Appellants did not request bifurcation provided under ORC~~ §2315.21(B). What they sought was for the trial court to preclude evidence of their own failure to document during the compensatory phase, essentially forcing Plaintiff-Appellees to try and prove their case with records that did not describe the facts and circumstances of Mrs. Feran's injuries,

all without mentioning to the jury that Defendant-Appellants were supposed to record such facts and circumstances in the medical record, and failed to do so. Essentially, Defendant-Appellants asked the trial court to have Plaintiff-Appellees take the case to trial with the proverbial “both hands tied behind their backs.” The trial court denied Defendant-Appellants’ novel request. Defendant-Appellants appealed the decision to the 8th District Court of Appeals, which dismissed the appeal for want of a final appealable order.

II. LAW AND ARGUMENT

A. **Proposition of Law 1: An implicit declaration that a statute is unconstitutional should not be presumed where the lower courts did not address constitutionality and there exist reasons other than constitutionality as the basis of the trial court’s decision.**

Appellants’ Merit Brief suggests Propositions of Law regarding whether the denial of a Motion to Bifurcate Pursuant to ORC §2315.21(B) is a final appealable order. Before engaging in the analysis advanced in Appellants’ Merit Brief, this Court should ask itself a rather simple question:

What did Appellants’ “Motions to Bifurcate” really ask the trial court to do?

This question is a fundamental part of the analysis, but ignored in Appellants’ Merit Brief, as they rush to the conclusion that the trial court found ORC §2315.21(B) unconstitutional. Before this Court determines whether the denial of a Motion to Bifurcate pursuant to ORC §2315.21(B) is a final appealable order, it should first determine whether Appellants presented the trial court with a Motion to Bifurcate seeking the relief provided in ORC §2315.21(B). The next step of the analysis is to determine whether the trial court determined that the statute was unconstitutional as a necessary consequence of the denial of the Motion to Bifurcate.

Admittedly, Appellants' Motions to Bifurcate sought some type of "bifurcation" and referenced ORC §2315.21(B)(1). However, that is where the similarity ends. Appellants' Motions to Bifurcate sought an undefined bifurcation not provided in the statute, and evidentiary rulings *in limine* that were plainly contrary to it. Precisely, Appellants requested the following:

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).

The trial court did not need to find ORC §2315.21(B) unconstitutional to deny the Motions to Bifurcate. In fact, the Motions to Bifurcate, though styled as if requesting bifurcation pursuant to the statute, did not request bifurcation as provided therein. All legislative actions enjoy a presumption of constitutionality, and courts should avoid addressing constitutionality where it need not be. *Fairview General Hospital v. Fletcher* (1992), 63 Ohio St. 3d. 146, citing *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App. 3d. 183 (10th Dist.). Interestingly, neither the trial court, nor the appellate court, stated that ORC §2315.21(B) was unconstitutional, and Plaintiff-Appellees did not contend that it was in their opposition to Defendant-Appellants' Motions to Bifurcate. Thus, if this Court addresses such constitutionality, it would be the first court to do so. As set forth herein, there were ample reasons for the trial court to deny the Motions to Bifurcate other than an implicit determination that ORC §2315.21(B) was unconstitutional.

B. Proposition of Law 2: The denial of a motion couched as Motion to Bifurcate Punitive Damages pursuant to ORC §2315.21(B)(1), but actually requesting undefined “claim” bifurcation and an undefined evidentiary process not provided in ORC §2315.21(B)(1), is not a final appealable order.

Defendant-Appellants submitted their Motions to Bifurcate under the guise of requesting mandatory bifurcation as set forth in ORC 2315.21(B), which provides for bifurcation of punitive damages from compensatory damages:

(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.

ORC 2315.21(B).

However, Defendant-Appellants disingenuously attempted to have the trial court adopt, **not the bifurcation procedure of the statute, but their own selective reinterpretation of the statute.** As set forth in the statute, the determination of “compensatory damages” would be bifurcated at the same trial from any determination of “punitive or exemplary damages.” *Id.* There is no evidentiary process between the two bifurcated portions of the trial, other than the

presentation of the evidence regarding punitive damages to the jury, once compensatory damages are awarded. Defendant-Appellants' Motions to Bifurcate sought "claim bifurcation" not "trial bifurcation" and in so doing, would have had the trial court conduct a trial on compensatory damages, and, if awarded by the jury, engage in another trial of the punitive damage "claim", not necessarily by the same jury that determined the compensatory award. (Appellants' Brief in Support of Motion to Bifurcate, pp. 2-3).

Even more telling, Defendant-Appellants' Motions to Bifurcate sought to impose some type of undefined evidentiary hearing before the trial court, without the jury: "[Plaintiff cannot proceed in the punitive damage phase] . . . 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." *Id.* This "Court . . . determination" is notably absent from ORC 2315.21(B). The statute provides that once a plaintiff prevails on compensatory damages, the evidence of punitive damages if presented to the same jury who then determine whether to award punitive damages. There is not intermediate evidentiary hearing conducted by the Court in ORC 2315.21(B).

Since Defendant-Appellants requested some other process, not set forth in the bifurcation statute, this Court can hardly determine that the trial court found ORC 2315.21(B) unconstitutional. Rather, the trial court rejected Defendant-Appellants tortuous rewriting of the bifurcation statute. "The principles of statutory construction require courts to first look at the specific language contained in the statute, and, if the language is unambiguous, to then apply the clear meaning of the words used." *Mechanical Contractors Association of Cincinnati v. University of Cincinnati* (2001), 141 Ohio App. 3d. 333 (10th Dist.), quoting *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127. "Courts do not have authority to

ignore the plain and unambiguous language of a statute under the guise of statutory interpretation, but must give effect to the words used.” *Id.*, quoting, *In Re Collier* (1993), 85 Ohio App. 3d. 232, 237 (4th Dist.).

In the instant matter, Defendant-Appellants asked the trial court to impose bifurcation pursuant to the statute, but not the bifurcation process set forth in the very same statute. The trial court’s denial of such a request would, under no circumstances, be construed as a final appealable order and determination that the statute itself was unconstitutional.

C. Proposition of Law 3: The denial of a Motion couched as a Motion to Bifurcate Punitive Damages pursuant to ORC §2315.21(B)(1), but actually seeking evidentiary rulings *in limine*, contrary to ORC §2315.21(B)(1) is not a final appealable order.

The real motivation for Defendant-Appellants curious request for a bifurcation process under the guise of ORC 2315.21(B), but contrary to the same statute, is set forth in their *in limine* request that the trial court not hold that “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.” (Emphasis added; Appellants’ Brief in Support of Motion to Bifurcate, pp. 2-3). Defendant-Appellants wanted to force Plaintiff-Appellees to try and prove the elements for nursing home negligence and wrongful death (the compensatory damages phase) without documentation that Defendant-Appellants were required to record and **without mentioning to the jury that they failed to record the facts and circumstances of the case, and were cited by the Ohio Department of Health for failing to do so.** Defendant-Appellants, having kept primarily silent in Mrs. Feran’s records as to the facts and circumstances of her falls and injuries, wanted the trial court to gag Plaintiff-Appellee from referencing this omission as the jury determined compensatory damages, placing Plaintiff-Appellee at a decided disadvantage in a case little more than a few months old.

Defendant-Appellants' request for preclusion of "any" evidence that relates to the issue of punitive damages is plainly contrary to the statute, which provides:

During this stage [compensatory], 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.

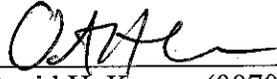
ORC 2315.21(B)(1).

Defendant-Appellants' briefing on this issue artfully ignores their request for preclusion of "any" evidence. In fact, it is worth noting that Plaintiff-Appellees opposed the Motions to Bifurcate by conceding that the trial court might bifurcate trial **under ORC 2315.21(B), but that Defendant-Appellants were requesting relief different than that provided in the statute.** (See Plaintiff-Appellees Brief in Opposition to Motions to Bifurcate, pp. 3-4). The denial of an evidentiary motion *in limine* is not a final appealable order. *Henderson v. Henderson* (2002), 150 Ohio App. 3d 339 (10th Dist.); see also *State v. Taylor* 2004-Ohio-3115 (8th Dist.).

III. CONCLUSION

For all the foregoing reasons, the trial court's denial of Defendant-Appellants' Motions to Bifurcate was not a final appealable order. Indeed, it is unknown whether the trial court would have granted bifurcation had Defendant-Appellants actually moved for bifurcation pursuant to the actual statute they cited, as opposed to their own edited version. The 8th District appropriately dismissed Defendant-Appellants appeal. This Honorable Court need not engage in the complex analysis of the constitutionality of ORC 2315.21(B) in this matter, as Defendant-Appellees did not request bifurcation as set forth in that statute.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by email and regular U.S. Mail this 31st day of May, 2011 to the following:

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