

In the
Supreme Court of Ohio

SANDRA HAVEL,

Plaintiff-Appellee,

v.

VILLA ST. JOSEPH, *et al.*,

Defendants-Appellants.

: Case No. 2010-2148
:
:
: On Appeal from the
: Cuyahoga County
: Court of Appeals,
: Eighth Appellate District
:
: Court of Appeals Case
: No. CA 94677

**REPLY BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF DEFENDANTS-APPELLANTS VILLA ST. JOSEPH, ET AL.**

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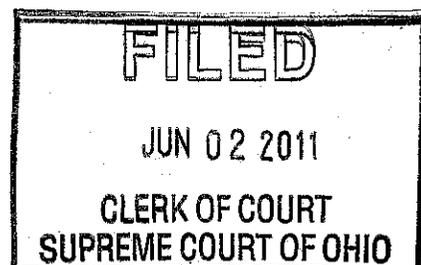


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INTRODUCTION

Havel and the *amicus* supporting her position have three primary theories as to why R.C. 2315.21(B) is unconstitutional: (1) this Court has “already determined” that the statute is procedural, Havel Br. 20; (2) the constitutional protection from excessive punitive damages is irrelevant to the analysis of this statute, which guards against only excessive compensatory damages, a cause they suggest is unworthy of concern, OAJ Br. 19-22; and (3) this Court has in other cases deemed *other* statutes procedural, Havel Br. 23-32. The first and second points are incorrect; the third is irrelevant.

First, this Court has never held that R.C. 2315.21(B) is procedural in the context of a challenge under the Modern Courts Amendment. Although Havel insists that this Court disposed of the question in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, that case did not address the issue. *Sheward*'s off-hand reference to R.C. 2315.21(B) as a procedural matter does not amount to a holding on the merits.

Second, the Federal Constitution's protection from excessive punitive damage awards should inform this Court's analysis of the substantive versus procedural distinction. In its *amicus* brief, the Ohio Association for Justice (formerly the Ohio Academy of Trial Lawyers) tries to distance the statute's protection against excessive compensatory damages awards from the due-process protection against excessive punitive damages awards. But R.C. 2315.21(B) does guard against excessive punitive damages awards by ensuring that compensatory damages awards do not themselves become punitive. The statute, at its core, has the same laudable goal as the existing due-process guarantee: preventing unjust damages awards. Thus, R.C. 2315.21(B) protects a *substantive* right.

Finally, Havel's citations to cases finding that other statutes are procedural do little to overcome the strong presumption of constitutionality afforded to state statutes. While these

cases certainly show that “the substantive-procedural distinction . . . is not without difficulty,” *State v. Slatter* (1981), 66 Ohio St. 2d 452, 454-55, they do not establish an affirmative case as to why *this* statute is unconstitutional. Neither Havel nor her *amicus* has offered a persuasive reason for striking this statute, and the Court therefore should answer “no” to the certified question.

ARGUMENT

A. *Sheward* did not decide whether R.C. 2315.21(B) is substantive or procedural.

Havel claims that this Court has “already held” that R.C. 2315.21(B)’s mandatory bifurcation provision is “a procedural, not substantive law.” Havel Br. 20-21 (citing *Sheward*, 86 Ohio St. 3d at 497). But as Havel’s own *amicus* points out, “the Court in *Sheward* was not specifically addressing the constitutionality of the bifurcation statute relative to the Modern Courts Amendment.” OAJ Br. 7.

The *Sheward* Court mentioned R.C. 2315.21(B) in the context of determining whether Am. Sub. H.B. 350, Ohio’s previous tort reform statute, violated the single-subject rule. Ticking through topics that H.B. 350 addressed, the Court referred to R.C. 2315.21(B) as a statute “which governs the procedural matter of bifurcating tort actions into compensatory and punitive damage stages.” 86 Ohio St. 3d at 497. Far from pronouncing the statute’s status under the Modern Courts Amendment, that off-hand reference does little more than confirm what no one here contests: Mandatory bifurcation, at least on its face, comes “necessarily packaged in procedural wrapping.” *State ex rel. Loyd v. Lovelady*, 108 Ohio St. 3d 86, 2006-Ohio-161, at ¶ 14. That does not mean, however, that R.C. 2315.21(B) is a procedural law invalid under the Modern Courts Amendment, see Am. State Br. 14-15; and the *Sheward* Court certainly never held that, see *Brecht v. Abrahamson* (1993), 507 U.S. 619, 630-31 (a decision is not firm precedent on a particular issue unless it “squarely address[es]” that issue).

Sheward's description of R.C. 2315.21(B) in the context of a wholly unrelated constitutional challenge—one that did not require any sort of decision on the substantive/procedural distinction, see *Sheward*, 86 Ohio St. 3d at 497-98—does not resolve the issue before the Court in this case.

B. Because mandatory bifurcation builds on the substantive protections already available to civil defendants, it is substantive in nature.

The Ohio Association for Justice argues that “the State’s theory that R.C. 2315.21(B) is substantive because it builds on . . . the [constitutional protection] against excessive punitive damage[s] . . . is meritless.” OAJ Br. 22 (internal quotation omitted). The Constitution, OAJ reasons, protects civil defendants only from excessive punitive damages, so the cases cited in the State’s brief are irrelevant to the analysis of R.C. 2315.21(B), which protects civil defendants from excessive *compensatory* damages. OAJ Br. 19-22.

OAJ’s argument fails. R.C. 2315.21(B) *does* build on the constitutional protections against excessive punitive damages awards by ensuring that compensatory damages do not assume a punitive cast. The logic is straightforward: When a compensatory damages award is infected by punitive concerns, that is an excessively punitive award.

The Federal Constitution protects civil defendants from excessive punitive damages awards. Am. State Br. 12-13; *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 416-18. Mandatory bifurcation adds an additional layer of protection—one that prevents the jury from punishing a defendant through the guise of a compensatory award. See Am. State Br. 13; S.B. 80, § 3(A)(6)(f) (R.C. 2154.21(B) will “ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages”).

By preventing evidence of a defendant's misconduct from coming in at the liability phase, bifurcation averts an injustice in many ways worse—and less curable—than a patently excessive punitive award: A punitive damages award disguised as a compensatory one would not be reviewable under the standards for excessive punitive damages set by the U.S. Supreme Court. See *State Farm*, 538 U.S. at 416-18; *Barnes v. Univ. Hosps. of Cleveland*, 119 Ohio St. 3d 173, 2008-Ohio-3344, ¶¶ 30-40. Indeed, because judicial review of compensatory damages is limited, the legislature's prophylaxis against punitively-tainted compensatory awards deserves great deference. Mandatory bifurcation, like the due-process protection already in place, protects civil defendants from excessive damages intended to punish, and it, like the due-process protection, is substantive.

The trial lawyers brush off concerns about compensatory damage awards being tainted by punitive considerations, presumably because they believe “there is no such thing as an ‘unconstitutionally excessive’ award of compensatory damages.” OAJ Br. 21. To be sure, the Constitution does not protect defendants from compensatory damages truly aimed at compensating injured parties. But that is not the issue here; OAJ misses the point entirely.

The Constitution *does* protect defendants from excessive awards influenced by passion and prejudice, and R.C. 2315.21(B) offers substantive protection against that same injustice, if in a slightly different context. Compensatory damages are intended to “measure [a party's] *actual loss*.” *Fantozzi v. Sandusky Cement Prods. Co.*, 64 Ohio St. 3d 601, 612, 1992-Ohio-138 (emphasis added). By contrast, “[t]he purpose of punitive damages is not to compensate a plaintiff, but to *punish and deter* certain conduct.” *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 651, 1994-Ohio-324 (emphasis added). When punitive concerns motivate a jury to enlarge a compensatory damages award, that award is by definition excessively punitive since it

should not include *any* punitive component. Accordingly, by guarding against the blurring of compensatory and punitive damages, R.C. 2315.21(B) does further defendants' due process rights.

The General Assembly identified a problem with inflated non-economic damages awards in Ohio, and concluded that it was "partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages." S.B. 80, § 3(A)(6)(d). The legislature therefore decided to enact reforms "to ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages." S.B. 80, § 3(A)(6)(f). Because those concerns are plainly substantive, the mandatory bifurcation procedure in R.C. 2315.21(B) is too.

C. Havel offers no affirmative reason why mandatory bifurcation is procedural.

Havel devotes much of her brief to explaining that the Court has "[o]ften . . . struck down procedural statutes that conflict with the Ohio Civil Rules," and to cataloguing cases that do so. See Havel Br. 23-28. But merely pointing to cases that strike other statutes does not satisfy the burden that a party challenging a statute's constitutionality must bear. Havel must not only overcome the "strong presumption of constitutionality" that attaches to Ohio statutes; she must also "prov[e] that the law is unconstitutional beyond a reasonable doubt." *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872, at ¶ 11 (internal quotation omitted).

She has not done so here. Absent from Havel's list of cases is any unifying principle that would require the Court to conclude that R.C. 2315.21(B) falls on the procedural side of the line. Though she insists that the cases she cites "clearly establish that R.C. 2315.21(B)" is a "procedural law," Havel Br. 32, none of them address either R.C. 2315.21(B) specifically or bifurcation generally. Havel's cases, at most, "lend credence to the notion that the distinction between substantive matters and procedural matters is an imprecise and sometimes illusory one,"

OAJ Br. 8, a proposition that no one debates and that does not get her very far. Given the strong presumption of constitutionality that accompanies state statutes—and the obviously substantive impulse behind protecting compensatory damages from a punitive taint—the imprecision of the substantive/procedural distinction should, if anything, tilt the scales toward finding that this statute is substantive and therefore constitutional.

The test OAJ proposes for separating the substantive from the procedural also fails to move the ball. OAJ suggests that the Court’s “myriad cases . . . address[ing] the distinction” reveal “a guiding principle”: that a statute is substantive if it “grants a substantive right, and happens to prescribe the procedure by which a party can avail itself of that right”; and that a statute is procedural if “the statute merely grants a party the right to a certain procedure, even though . . . it may impact a substantive right.” OAJ Br. 8-9. But this test does little more than reframe the well-worn definitions of substantive and procedural—definitions that do not on their own explain the difference between the two, or show why R.C. 2315.21(B) is one but not the other. See *Krause v. State* (1972), 31 Ohio St. 2d 132, 145 (A substantive law “creates, defines and regulates the rights of the parties”; a procedural law prescribes “method[s] of enforcing rights or obtaining redress.”). And anyway, applying OAJ’s test confirms that the statute is substantive: it grants litigants a substantive right (to be free from punitively-tainted compensatory damages) and prescribes the procedure by which a party can avail itself of that right R.C. 2315.21(B)(1) (“[U]pon the motion of any party, the trial of the tort action shall be bifurcated as follows . . .”).

As support for its claim that R.C. 2315.21(B) is procedural, OAJ argues that a contrary interpretation “would lead to absurd results.” OAJ Br. 15. According to OAJ, if the General Assembly can mandate bifurcation of liability and compensatory damages on the one hand and punitive damages on the other hand, then it also has authority to require a four-part trial, OAJ Br.

16-17 (describing hypothetical separate proceedings for: (1) determining initial liability; (2) fixing compensatory damages; (3) determining liability for punitive damages; and (4) fixing punitive damages), and could even require a separate trial for *every element* of a tort action, OAJ Br. 17.

Far from supporting OAJ's argument, this parade of horrors only confirms the legitimacy of R.C. 2315.21(B) as a substantive enactment. As OAJ concedes, "the likelihood of the legislature passing any such statute is infinitesimally small." OAJ Br. 18. That is correct—because those hypothetical provisions lack any substantive justification. Unlike R.C. 2315.21(B), which is clearly intended to (and does) curb inflated damages awards based on improper considerations, the OAJ's make-believe provisions would not further that end. Thus, even if the General Assembly did enact any of these requirements, the Court would not be obligated to uphold them. Instead, the Court would shine a spotlight on the law and determine whether it genuinely serves a substantive goal.

Here, the substantive purpose and effect of R.C. 2315.21(B) is clear, and is explained in the statute's uncodified language. See S.B. 80, § 3(A)(6). Bifurcation of the compensatory and punitive damages phases of a trial is fundamentally a substantive measure, not a far-fetched attempt to regulate a procedural matter by invoking empty substantive justifications, like the hypotheticals OAJ recites.

Because neither Havel nor OAJ provides a workable, unifying principle that illustrates why R.C. 2315.21(B) is procedural, they have not met the burden of proving the statute's unconstitutionality beyond a reasonable doubt. To the contrary, the mandatory bifurcation statute builds on due process guarantees against excessive punitive damages awards by guarding against improper compensatory damages awards. In guaranteeing civil defendants bifurcation,

the General Assembly conferred a new substantive right, even if it happens to be “necessarily packaged in procedural wrapping.” *Loyd*, 2006-Ohio-161, at ¶ 14. Accordingly, the Court should uphold the statute.

CONCLUSION

For these reasons, the court should answer “no” to the certified question and find that R.C. 2315.21(B) is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio In Support Of Defendant-Appellants Villa St. Joseph, et al., was served by U.S. mail this 2nd of June, 2011 upon the following counsel:

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