

IN THE SUPREME COURT OF OHIO

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| SANDRA HAVEL |) | |
| |) | |
| Plaintiff-Appellee, |) | Supreme Court Case No. 2010-2148 |
| |) | |
| vs. |) | On Appeal from the Cuyahoga County |
| |) | Court of Appeals, Eighth Appellate |
| VILLA ST. JOSEPH, et al. |) | District Case No. CA 94677 |
| |) | |
| Defendants-Appellants. |) | |
| |) | |

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS VILLA ST. JOSEPH AND VILLAGE AT MARYMOUNT

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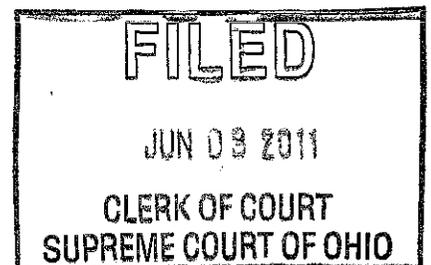
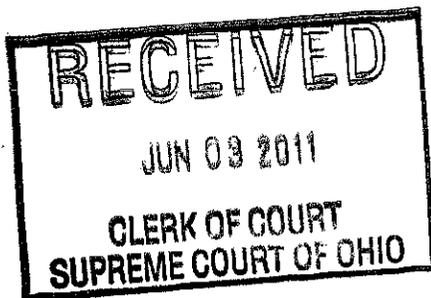
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INTRODUCTION

The sole issue before this Court is whether R.C. 2315.21(B) is substantive or procedural and therefore controlling or of no force and effect, respectively, pursuant to the Modern Courts Amendment, Section 5(B), Article IV of the Ohio Constitution.

Contrary to Appellee's argument, this issue was not decided by this Court in *State, ex rel. Ohio Academy of Trial Lawyers v. Sheward*, (1999), 86 Ohio St. 3d 451 and the Court is not required to blindly "apply *stare decisis* to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that [the Court] has deemed unconstitutional." *Arbino v. Johnson & Johnson*, (2007), 116 Ohio St. 3d 468. Appellee's reliance on *Sheward, supra*, is nothing more than a misguided attempt by Appellee to mislead this Honorable Court.

Specifically, Appellee argues that this Court's labeling of R.C. 2315.21(B), both former and current, as including "a procedure for bifurcation of proceedings for compensatory and punitive damages" is dispositive of this issue, despite any type of analysis of the exact statutory provision currently before this Court. *Arbino, supra*, and *Sheward, supra*. However, in those instances where the bifurcation provision of R.C. 2315.21(B) has been analyzed, different courts have reached different conclusions as to the intent of the General Assembly in enacting such a provision. (See Notice of Certified Conflict). Accordingly, a detailed analysis of the statute inclusive of an examination of the legislative history is required in order to determine whether R.C. 2315.21(B) is substantive or procedural in nature as duly noted by this Court in granting certification.

The purpose of R.C. 2315.21(B) is to provide a guarantee to civil defendants that certain prejudicial evidence would not be considered when liability and compensatory damages were

being determined by a jury. *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, (2009), 10th Dist. No. 09AP-361, 2009 Ohio 6481. The General Assembly intended that R.C. 2315.21(B) “restore balance, fairness, and predictability to the civil justice system.” S.B. 80, Sec. (A)(4)(a). By ensuring a bifurcated trial, a right that Civ. R. 42(B) does not guarantee, this regulation of a civil defendant’s right to a fair trial renders R.C. 2315.21(B) substantive in nature and thus constitutional under the Modern Courts Amendment. *See, Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007 Ohio 4838.

For these reasons, as more fully described below, Defendants-Appellants Villa St. Joseph and Village at Marymount request that the Court hold that R.C. 2315.21(B) is substantive in nature and thereby constitutional pursuant to Sec. 5(B), Art. IV of the Ohio Constitution.

I. THIS COURT DID NOT APPLY *STARE DECISIS* IN *ARBINO*, AND THUS, DID NOT RELY ON *SHEWARD*, AS THE STATUTES BEFORE THE COURT, INCLUDING R.C. 2315.21 WERE “SUFFICIENTLY DIFFERENT FROM THE PREVIOUS ENACTMENTS.”

Appellee’s reliance on *Sheward, supra*, is misplaced in that a plain reading of *Arbino, supra*, clearly demonstrates that where the statute before the Court is “sufficiently different from the previous enactments” the statute will avoid “the blanket application of *stare decisis*.” *Arbino*, at 472. In order for this Court to apply *stare decisis*, and therefore be controlled by *Sheward, supra*, this Court must determine that R.C. 2315.21(B) is “substantially the same as that which [have been] previously invalidated.” *Arbino*, at 472. A detailed review of the statute before this Court clearly establishes that the statute is in fact different from previous versions of punitive damages statutes enacted by the General Assembly. *See, R.C. 2315.21. See also, Arbino, supra.*

In *Sheward, supra*, the question pending before the Court was whether H.B. 350, and the multitude of tort-reform statutes enacted thereunder, including former R.C. 2315.21, was

constitutional. *Sheward*, at syllabus. The Court held that H.B. 350 usurped “judicial power in violation of the Ohio constitutional doctrine of separation of powers” and violated “the one-subject provision of Section 15(D), Article II of the Ohio constitution” and was therefore unconstitutional.¹ *Sheward*, at syllabus paragraphs one and two.

The Court analyzed the constitutionality of only the monetary damage cap limits for punitive damages set forth in former R.C. 2315.21 for purposes of deciding whether H.B. 350 usurped judicial power. *Sheward*, at 483. The Court did not discuss whether the bifurcation provision included in former R.C. 2315.21(B) usurped judicial power pursuant to the Modern Courts Amendment. *Sheward, supra*. In fact, the only discussion of the bifurcation provision set forth in former R.C. 2315.21(B) in the entirety of *Sheward* occurred in passing and for the purpose of emphasizing that H.B. 350 merely violated the one-subject provision. *Sheward*, at 497. Specifically, the Court stated, “[i]t could then be argued that R.C. 2315.21(B)(1), which governs the procedural matter of bifurcating tort actions into compensatory and punitive damage stages, correlates with these provisions under the expanded heading ‘tort damage matters.’” *Sheward*, at 497.

In *Arbino*, the Court stated, “the basic constitutionality of tort-reform statutes is hardly settled law. Our prior review has focused on certain unconstitutional facets of the prior tort-reform laws that can be addressed to create constitutionally valid legislation. We have not dismissed all tort reform as an unconstitutional concept.” *Id.* at 472.

Despite the utter lack of constitutional analysis with regard to the bifurcation provision of former R.C. 2315.21(B), Appellee would lead this Court to resolve the issue currently before it

¹ The Court determined that the violation of the one-subject provision of Sec. 15(D), Art. II rendered H.B. 350 unconstitutional *in toto*. *Sheward*, at syllabus paragraph two.

based on irrelevant and inapplicable language contained in *Sheward*. The Court in *Sheward* rendered no opinion as to whether the statute was intended to be substantive for purposes of Sec. 5(B), Art. II. Accordingly, *Sheward* offers no guidance to this Court regarding the issue posed by the certified conflict question at bar and Plaintiff-Appellee's assertions are a blatant misrepresentation in an attempt to mislead this Court.

This Court has previously determined that R.C. 2315.21 is facially constitutional despite numerous opinions from the Court which had previously struck down similar legislation. *Arbino*, at syllabus paragraph two. In fact, this Court has stated that “[t]he statutes before us here[, inclusive of R.C. 2315.21] are sufficiently different from the previous enactments to avoid the blanket application of *stare decisis* and to warrant a fresh review of their individual merits.” *Arbino*, at 472. Appellee invites this Court to ignore its decision in *Arbino* even though this Court stated “the basic constitutionality of tort-reform statutes is hardly settled law.” *Id.*, *supra*.

This Court should not be misled by Appellee's argument that *Sheward* is controlling in this case as it has been limited by *Arbino*, *supra*. Rather, this Court's analysis of whether R.C. 2315.21(B) is constitutional warrants a fresh review on its merits as prescribed in *Arbino*, *supra*.

II. AN ANALYSIS OF THE GENERAL ASSEMBLY'S LEGISLATIVE INTENT, PURSUANT TO *STATE, EX REL. LOYD V. LOVELADY*, ESTABLISHES THAT R.C. 2315.21(B) WAS INTENDED TO BE SUBSTANTIVE AND THEREBY CONSTITUTIONAL.

Appellee's argument focuses on the asserted lack of ambiguity in the language of R.C. 2315.21(B). (See Appellee's Brief). “[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 v. Weimer*, (1944), 143 Ohio St. 312. Due to the ambiguity

of R.C. 2315.21(B), whether the statute was intended to be substantive or procedural requires this Court to resort to other means of interpretation. *Hanners, supra*. See also, *State, ex rel. Loyd v. Lovelady*, (2006), 108 Ohio St. 3d 86; *contra, Sears, supra*. Specifically, a review of the General Assembly's legislative intent in enacting the instant statute is necessary. *Id.*

Appellee attempts to distinguish this case from *State, ex rel. Loyd v. Lovelady*, by stating that "R.C. 2315.21(B) does not affect a plaintiff's right to seek punitive damages ***." (See, Appellee's Merit Brief, p. 30). However, the above point of law was not the reason Appellant sought to invoke the guidance offered by *State, ex rel. Loyd v. Lovelady*; rather Appellant asserts that *State, ex rel. Loyd v. Lovelady*, sets forth a favorable precedent which permits this Court to analyze the uncodified language of a legislative bill where there is a question of whether the statute was meant to be substantive or procedural. *State, ex rel. Loyd v. Lovelady*, at 88-89. This Court in *State, ex rel. Loyd v. Lovelady*, "[looked] beyond the express language of the statute" to consider the General Assembly's declaration that the statute at issue created a substantive right. *Id.* at 89. Moreover, this Court, in following the traditional maxims, looked to the words of the statute itself first and was unable to determine whether the statute was intended to be substantive or procedural. *Id.* at 88. See also, *Hanners, supra*.

Specifically, R.C. 2315.21(B) states:

(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.

(2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant.

(3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.

With regard to R.C. 2315.21(B), *supra*, there has been a divergence of opinion as to whether the statute was intended to be substantive or procedural. (See, Notice of Certified Conflict). Therefore, there is some ambiguity, even if latent, as to whether R.C. 2315.21(B) was intended to be substantive or procedural. See, *Havel v. Villa St. Joseph*, (2010), 8th Dist. No. 94677, 2010 Ohio 5251 and *Hanners, supra*. See also, *State, ex rel. Loyd v. Lovelady, supra*. When “it is not clear from the statute itself whether it was intended to be substantive or procedural” an analysis of the statute in consideration of the General Assembly’s intent is

necessary. *Id.* at 88-89. In accordance, this Court must determine the legislative intent of the General Assembly when it enacted R.C. 2315.21(B). *State, ex rel. Loyd v. Lovelady, supra.*

Appellants, much like the Tenth District, rely on *State, ex rel. Loyd v. Lovelady* for the precedent that some statutes, including R.C. 2315.21(B), “are necessarily packaged in procedural wrapping.” *See, Hanners*, at ¶29, citing *State, ex rel. Loyd v. Lovelady*. “At first blush, R.C. 2315.21(B) appears procedural because it mandates a particular process for certain tort actions. The uncodified language associated with R.C. 2315.21(B), however, suggests a different legislative purpose.” *Hanners*, at ¶24. “R.C. 2315.21(B) is necessarily packaged in procedural wrapping. Nevertheless, based on the General Assembly’s express intent to create a right of bifurcation to address potential unfairness, we conclude that the law is substantive.” *Hanners*, at ¶30. *See, State, ex rel. Loyd v. Lovelady, supra.*

Similar to the scenario in *State, ex rel. Loyd v. Lovelady, supra*, this Court must determine whether a statute “packaged in procedural wrapping” is constitutional where a possible intrusion on the Court’s exclusive authority over procedural matters is at issue. *State, ex rel. Loyd v. Lovelady*, at 88. To aide in its interpretation, this Court has a statement from the General Assembly which is on point. *See, Sec. (A), S.B. 80. See also, State, ex rel. Loyd v. Lovelady*, at 89. Utilizing the uncodified language, this Court will unequivocally determine that this seemingly procedural statute will be of force and effect under the Modern Courts amendment because it is substantive in nature. *Hanners, supra.*

In this case, an examination of the uncodified language contained in S.B. 80, much like the examination of the language in Sec. 3 of H.B. 242 in *State, ex rel. Loyd v. Lovelady, supra*, reveals that the General Assembly intended R.C. 2315.21(B) to be a substantive law as it was enacted “to restore balance, fairness, and predictability to the civil justice system.” Sec. (A)(4)(a)

of S.B. 80. *See also, Hanners, supra.* Further, “[i]n 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.” Sec. (A)(6)(f) of S.B. 80 (emphasis added).

Appellee’s argument that R.C. 2315.21(B) is “procedural” because it grants nothing more than what is provided in Civ. R. 42(B) hinges on the “right to request bifurcation of a trial” language set forth above in Sec. (A)(6)(f) of S.B. 80 is incorrect and shortsighted. The emphasis on the uncodified language continues to include “the right to request bifurcation of a trial *to ensure that evidence of misconduct is not inappropriately considered by the jury.*” *Id.* (Emphasis added). Any question as to whether R.C. 2315.21(B) is procedural or substantive is put to rest when this additional language is considered as R.C. 2315.21(B) **ensures** that a trial will be bifurcated and Civ. R. 42 merely grants a court **discretion** to determine whether a trial should be bifurcated. *See, R.C. 2315.21(B) and Civ. R. 42.* The fairness and predictability sought by the General Assembly in enacting R.C. 2315.21(B) **can only be achieved** if a tort defendant is guaranteed a bifurcated trial which would prevent a jury from inappropriately considering evidence of misconduct when determining liability. *See, Sec. (A) of S.B. 80. See also, Hanners, supra.*

Furthermore, R.C. 2315.21(B) regulates the rights of a civil defendant by prohibiting evidence of malice from being presented to a jury before the jury has determined whether liability for the underlying tort exists. *See, Proctor v. Kardassilaris, (2007), 115 Ohio St. 3d 71* (“Substantive” laws are those which create, define, and regulate the rights of the parties). Contrary to Appellee’s assertion, this regulation of evidence is more than the “machinery for carrying on the suit.” *See, Norfolk Southern Railway Co. v. Bogle, (2007), 115 Ohio St. 3d 455.*

Rather, this timing of evidence acts beyond the scope of the mechanistic process prescribed in *Norfolk, supra*, as R.C. 2315.21(B) seeks to ensure a civil defendant's right to a fair trial by prohibiting evidence of misconduct before liability has been established. R.C. 2315.21(B). *See also*, Sec. (A) of S.B. 80.

Accordingly, analyzing the uncodified language of S.B. 80, similarly to the Court's analysis of H.B. 242 in *State, ex rel. Loyd v. Lovelady*, it is apparent that R.C. 2315.21(B) is substantive in nature and therefore controls pursuant to the Modern Courts Amendment, Section 5(B), Article IV of the Ohio Constitution.

III. R.C. 2315.21(B) IS NOT INCOMPATIBLE WITH CIV. R. 42(B).

Appellant maintains that there will not always be a conflict between R.C. 2315.21(B) and Civ. R. 42(B), and thereby the rule and statute are not incompatible. *See, Hanners*, at ¶22. In tort cases where punitive damages are not alleged, there is no need to insulate the defendant from the possibility that evidence of wrongdoing will be presented contemporaneously with evidence going towards liability. *See*, Sec. (A) of S.B. 80. It is only when a jury will be presented with evidence of the type of wrongdoing necessary to establish the propriety of punitive damages that the court's discretion with regard to the bifurcation of the trial is removed in the interests of fairness and predictability. *See, Id.*

This Court historically has found statutes constitutional where at first glance it appears there is a conflict with an Ohio Rule of Civil Procedure. *See, State, ex rel. Sapp v. Franklin County Court of Appeals*, (2008), 118 Ohio St. 3d 368 and *State, ex rel. Loyd v. Lovelady, supra*. This Court has allowed the statute and the civil rule to coexist where the two are not incompatible as any "conflict" is resolved by the substantive nature of the statute. *Id.* In this case, any conflict between R.C. 2315.21(B) and Civ. R. 42(B) is resolved by the substantive nature of

R.C. 2315.21(B). *See, Hanners, supra*. This conflict is not incompatible as both R.C. 2315.21(B) and Civ. R. 42(B) each have their own function and means for bifurcating a trial. *See, R.C. 2323.51 and Civ. R. 11* (Statute and Ohio Rule of Civil Procedure both used as separate mechanisms for seeking sanctions against opposing party).

The term “incompatible” has been defined as “incapable of association or harmonious coexistence.” Merriam-Webster Dictionary. R.C. 2315.21(B) and Civ. R. 42(B) are not “incompatible” as R.C. 2315.21(B) is specifically limited to tort cases, where punitive damages have been alleged and bifurcation has been requested. R.C. 2315.21(B). Civ. R. 42(B) on the other hand applies in all other civil litigation scenarios where a bifurcated trial may be requested. In the realm of civil litigation, both R.C. 2315.21(B) and Civ. R. 42(B) are capable of “harmonious coexistence.”

R.C. 2315.21(B) and Civ. R. 42 are not incompatible and other jurisdictions with similar statutes and rules of civil procedure have permitted both to function as a means for bifurcation. *See, Collins v. Hertenstein*, 90 S.W.3d 87, (Mo. Ct. App. Sept. 3, 2002) and Missouri Rule of Civil Procedure 66.02; *Land v. Land*, (2010), 687 S.E.2d 511, *Land v. Land*, 2010 N.C. LEXIS 498 (N.C., June 16, 2010) and North Carolina Rule of Civil Procedure 42(b); and *Markegard v. Von Ruden*, (2006), 2006 Minn. App. Unpub. LEXIS 84 and Minnesota Rule of Civil Procedure 42.02. Where there is any type of overlap, the statutes in these jurisdictions control; in Ohio R.C. 2315.21(B) would control as it is substantive in nature as set forth above and this Court should similarly find in concurrence with the multitude of jurisdictions considering this similar issue.

CONCLUSION

Consistent with this Court’s ruling in *Arbino, supra*, a review of R.C. 2315.21(B) is warranted as this Court has not conducted a detailed review of the bifurcation provision set forth

in both former and current R.C. 2315.21. Accordingly, *Sheward, supra*, is not dispositive in this case as this Court has already determined that R.C. 2315.21 is “sufficiently different” from the version previously before this Court and is “constitutional on its face.” *Arbino, supra*.

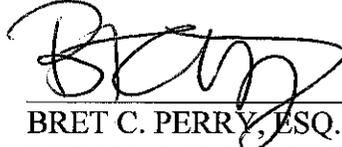
R.C. 2315.21(B) is a substantive statute necessarily packaged in procedural wrapping. *Hanners, supra*. The ambiguity in the language of R.C. 2315.21(B) requires an interpretation of the legislative intent necessary to determine whether the statute is in fact substantive in nature and thereby constitutional for purposes of the Modern Courts Amendment, Section 5(B), Article IV of the Ohio Constitution. *State, ex rel. Loyd v. Lovelady, supra*.

An analysis of the uncodified language contained in Sec. (A), of S.B. 80 will unequivocally guide this Court to make the same decision that the Tenth District made in *Hanners, supra*; R.C. 2315.21(B) is substantive in nature and thereby constitutional. *Hanners, supra*. R.C. 2315.21(B) guarantees that a tort defendant will have a bifurcated trial and this bifurcation goes beyond the machinery of carrying on a suit as it regulates the tort defendant’s right to a fair trial by prohibiting evidence of malice before liability has been established. *Id.*

Despite the potential conflict between R.C. 2315.21(B) and Civ. R. 42(B), the methods for bifurcation of a trial are not incompatible. However, in the event of any such conflict, R.C. 2315.21(B) will control pursuant to the Modern Courts Amendment because R.C. 2315.21(B) is a substantive law.

For the reasons set forth above, Defendants-Appellants Villa St. Joseph and Village at Marymount request that this Court find R.C. 2315.21(B) to be constitutional for purposes of the Modern Courts Amendment, Section 5(B), Article IV of the Ohio Constitution, because R.C. 2315.21(B) is substantive in nature and that this Court reverse the decision of the Eighth District Court of Appeals herein.

Respectfully submitted,



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A copy of the foregoing document was served by ordinary United States mail, postage prepaid, this 2nd day of June, 2011, upon the following:

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