

ORIGINAL

IN THE SUPREME COURT OF OHIO

John T. Flynn, et al.,	:	Case No. 10-1881
	:	
Appellees,	:	On Appeal from the
	:	Cuyahoga County Court
v.	:	of Appeals, Eighth
Saber Healthcare Group, LLC, et al.,	:	Appellate District
	:	Case No. CA-10-095695
Appellants	:	
	:	Civil Action No: 2009-3975 MT
	:	

REPLY BRIEF OF APPELLANT SABER HEALTHCARE GROUP, LLC, ET AL.

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INTRODUCTION

The sole issue in this appeal is whether or not the denial of a Motion to Bifurcate, made pursuant to R.C. 2315.21(B)(1), is a final appealable order within the meaning of R.C. 2505.02.

On March 3, 2010, Defendants Fairview Village Retirement Community, Ltd., Saber Healthcare Group, and Saber Management, Inc. filed a Motion to Bifurcate Punitive Damages based on R.C. 2315.21(B). The Motion was denied by the trial court on August 16, 2010. (Appx. 5 to Appellants' Merit Brief) Defendants-Appellants appealed this denial to the Eighth District Court of Appeals on September 13, 2010. On September 20, 2010, the Eighth District Court dismissed the appeal *sua sponte* for lack of a final appealable order pursuant to R.C. 2505.02 and upon the authority of *Finley v. First Realty Property Mgt., Ltd.*, 9th Dist. No. 23355, 2007-Ohio-2888, (Appx. 4 to Appellants' Merit Brief)

The trial court's decision did not provide any guidance for the basis of the denial of the Motion to Bifurcate. Assuming that the trial court did not simply reject the statutory mandate of R.C. 2315.21(B)(1), the only basis for the denial of the Motion was the trial court's determination that mandatory the bifurcation language of R.C. 2315.21(B)(1) conflicted with the permissive bifurcation language of Ohio Civil Rule 42(B). As such, the trial court implicitly determined that, in light of the purported conflict, that R.C. 2315.21(B) was unconstitutional. R.C. 2505.02(B)(6) provides that "an order determining the constitutionality of any changes to the Revised Code * * * made by S.B. 80 of the 125th General Assembly, including the amendments of sections * * * 2315.21 of the Revised Code * * *" are final appealable orders. R.C. 2505.02(B)(6). Accordingly, given the trial court's implicit determination that the mandatory bifurcation statute, R.C. 2315.21, is unconstitutional, the trial court's denial of Appellants' Motion to Bifurcate is a final appealable order.

As an initial matter, Appellees' Merit Brief appears to suggest agreement with Appellants as to the ultimate issue before this Court. That is, if indeed the trial court made a determination as to the Constitutionality of R.C. 2315.21(B), then such a decision is a final appealable order. Appellees do not argue this point.

Appellees concede that "Defendant-Appellants asked the trial court to impose bifurcation pursuant to the statute." (Appellees' Merit Brief at p. 10) However, Appellees assert that the trial court's denial of the Motion to Bifurcate was not based upon a determination that R.C. 2315.21(B) is unconstitutional. Rather, Appellees claim that the trial court's denial of the Motion to Bifurcate could have been on the basis of other reasons to include an assertion that Appellants were seeking "undefined 'claim' bifurcation and an undefined evidentiary process not provided in ORC §2315.21(B)(1)." (Appellees' Merit Brief at p. 8) Appellees proceed to argue that Appellants requested evidentiary rulings and procedures that are not provided for in R.C. 2315.21(B). Id. However, Appellees claim that Appellants sought bifurcation through a process not provided for in the statute. Id. Yet, the process is irrelevant. The Motion was made, in accordance with the statute, and the trial court was obligated to grant bifurcation consistent with the statutory mandate. While Appellees may disagree with the procedural and evidentiary issues discussed in Appellants' Motion to Bifurcate, the trial court was nonetheless required to bifurcate the claims and apply the procedure set forth in the statute. Given that the trial court denied the motion, there is only one reasonable explanation; that is, the trial court determined that R.C. 2315.21(B) was unconstitutional. Accordingly, the trial court's decision was a final appealable order within the meaning of R.C. 2505.02(B)(6).

ARGUMENT

A. Upon Defendants-Appellants Motion to Bifurcate, the trial court was required, pursuant to R.C. 2315.21(B), to bifurcate Plaintiffs-Appellees claims for compensatory and punitive damages.

On February 3, 2010, Defendants-Appellants Saber Healthcare Group, LLC and Saber Management Inc. filed a Motion to Bifurcate with the trial court. The Motion stated the relief sought and the statutory authority for the same. Plaintiffs-Appellees pose, in their Merit Brief, the question “What did Appellants’ ‘Motions to Bifurcate’ really ask the trial court to do?” (Plaintiffs-Appellees’ Merit Brief at p. 6) In order to answer this question, the Court need look no further than the first page of Appellants’ Motion to Bifurcate which provided:

Pursuant to 2315.21(B)(1), Defendants request that this Court issue an Order bifurcating Plaintiffs’ claims for compensatory damages and claims for punitive damages, as required under Ohio law.

(Motion to Bifurcate, p. 1, filed February 3, 2010)

Appellees argue, without any support from the record, that Appellants’ Motion to Bifurcate sought “some type of undefined evidentiary hearing” and “some other process, not set forth in the bifurcation statute.” (Appellees’ Merit Brief at p. 9) Following this argument, Appellees then assert that the trial court “rejected Defendant-Appellants tortuous [sic] rewriting of the bifurcation statute” and, accordingly, it is improper to assume that the trial court denied the Motion on the basis of Constitutional infirmity. *Id.* While perhaps a clever argument, a comparison to the relief requested in the Motion to Bifurcate to that provided in R.C. 2315.21(B) reflects that Appellants’ Motion was consistent with the statute.

R.C. 2315.21(B)(1) provides, in pertinent part:

(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 to person or property from the defendant.**

(Emphasis added.)

Appellants' Motion to Bifurcate provided, in pertinent part:

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 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.

(Appellant Brief in Support of Motion to Bifurcate at pp. 2-3, emphasis added)

Plainly, Appellants' Motion to Bifurcate mirrored those provisions of R.C. 2315.21(B)(1). As reflected in both the provisions of R.C. 2315.21(B)(1) and in Appellants' Motion to Bifurcate, evidence relating to the issue of whether Appellees are entitled to recovery of punitive damages is prohibited during the initial stage of the trial – the trial on the issue of liability and compensatory damages. It is accepted that punitive damages may be awarded in tort cases involving fraud, insult or malice. *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St. 2d 178, 183 citing *Roberts v. Mason* (1859), 10 Ohio St. 277; *Saberton v. Greenwald* (1946), 146 Ohio St. 414. Thus, a plaintiff bears the burden of establishing facts to support a punitive damage claim and a defendant may pursue dismissal of a punitive damage claim, through an Ohio Civ.R. 56(C) motion for summary judgment, if the facts do not support the standard for such a claim.

As such, Appellants' Motion to Bifurcate not only properly reflects the statutory procedure for bifurcation but also addresses the burden which rests upon the Appellees to establish their claim. Appellees' burden is indeed subject to the trial court's "determination" that Appellees' have presented sufficient evidence, in accordance with Ohio Civ.R. 56(C), to support the punitive damage claim. Accordingly, those portions of Appellants' Motion to Bifurcate, challenged by Appellees, is indeed consistent with those provisions of R.C. 2315.21(B)(1) as well as accepted Ohio law.

Appellees' argument, that the trial court may have denied the Motion to Bifurcate on the grounds that the evidentiary procedure discussed in the Motion was not consistent with the provisions of R.C. 2315.21(B)(1), is inconsistent with the mandate of the statute and is inconsistent with other analogous situations. For example, a plaintiff may file a civil complaint asserting medical negligence and make a jury demand. However, if the jury demand requests a jury of 5, the trial court would not simply strike the complaint and deny the cause of action. The trial court would instead grant a jury trial with the number of jurors required by the Ohio Constitution. Another example is when a plaintiff files a civil complaint asserting negligence against a political subdivision and seeks relief to include compensatory damages as well as punitive damages and attorneys fees. R.C. 2744.05(A) precludes any award of punitive damages against a political subdivision and R.C. 2744.05(B)(2)(f) precludes the award of attorney fees. Under this scenario, the trial court would not strike the complaint but, rather, simply would apply the governing law and preclude those specific claims.

Appellees' arguments are designed to draw this Court's attention from the issue central to this case - denial of a motion to bifurcate is not permissible under R.C. 2315.21(B)(1). If the trial court did in fact take issue with the procedure or perhaps evidentiary issues within Appellants'

Motion to Bifurcate, it was nonetheless required to bifurcate the case upon the Motion but then apply the procedure set forth in the statute. Appellants' Motion to Bifurcate was succinct and clear. While the Memorandum in Support of the Motion to Bifurcate addressed Appellants' understanding of the procedure and evidentiary issues related to bifurcation, it was nonetheless a motion to bifurcate Appellees' compensatory and punitive damage claims. As such, the trial court, while having authority to interpret the procedural and evidentiary aspects of the bifurcation statute differently, did not have the authority to deny the statutorily mandated bifurcation.

Appellees' arguments would have this Court ignore the plain language of R.C. 2315.21(B)(1) which provides, in pertinent part, "**upon the motion of any party, the trial of the tort action shall be bifurcated.**" (Emphasis added.) As more fully addressed in Appellants' Merit Brief, there can be only one legitimate basis for denial of the Motion to Bifurcate and that is, the trial court determined that R.C. 2315.21(B) was unconstitutional. Accordingly, the trial court's denial of the Motion to Bifurcate was a final appealable order pursuant to R.C. 2505.02(B)(6).

B. Appellees Seek Review of Matters Not Before This Court.

Interestingly, while Appellees assert that Appellants sought procedural and evidentiary relief not provided for in the bifurcation statute, they devote a significant portion of the Merit Brief arguing, both implicitly and expressly, the merits of what procedures and evidentiary processes Appellees believe are appropriate for bifurcation. Furthermore, Appellees "Proposition of Law 3" is devoted to conjecture and speculation. Appellees argue that Appellants' Motion to Bifurcate was in fact a motion *in limine* and then proceed to argue facts not found within the record of this case. These arguments are beyond the scope of this appeal and implicitly ask this

Court to render an impermissible advisory opinion as to the evidentiary and procedural processes of R.C. 2315.21(B). For these reasons, this Court must not consider the merits of these arguments and must disregard those matters not supported by the record of this appeal.

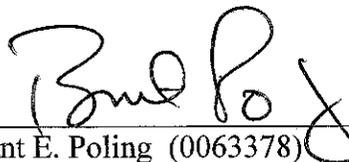
CONCLUSION

R.C. 2315.21(B)(1) mandates, “upon the motion of any party, the trial of the tort action shall be bifurcated.” This statutory provision is clear and unambiguous. R.C. 2315.21(B)(1) provides the trial court with no discretion to deny Defendants-Appellants’ Motion. The trial court below was mandated, upon Defendants-Appellants’ Motion to bifurcate, to bifurcate Plaintiffs-Appellees’ compensatory and punitive damage claims. Those procedural and evidentiary issues raised in Plaintiffs-Appellees’ Merit Brief are irrelevant to the statutory bifurcation mandate of R.C. 2315.21(B)(1).

As the trial court had no discretion to deny Defendants-Appellants’ Motion, the only basis upon which the trial court could have denied the Motion was a determination that R.C. 2315.21(B) was in conflict with Civ.R. 42(B) and, therefore, is unconstitutional. As R.C. 2505.02(B)(6) provides that “an order determining the constitutionality of any changes to the Revised Code * * * made by S.B. 80 of the 125th General Assembly, including the amendments of sections * * * 2315.21 of the Revised Code * * *” are final appealable orders, the trial court’s decision, denying the Motion to Bifurcate, was a final appealable order.

Defendants-Appellants respectfully request that this Court reverse the decision of the 8th District Court of Appeals and permit Defendants-Appellants appeal to proceed or, in the alternative, to order judgment consistent with this Court’s ultimate decision in *Havel v. Villa St. Joseph, et al.*, 8th Dist. No. 94677, 2010-Ohio-5251.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brant Poling", written over a horizontal line.

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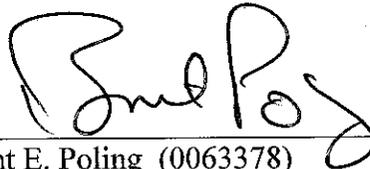
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CERTIFICATE OF SERVICE

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