

IN THE SUPREME COURT OF OHIO

Ronald Luri,	:	Supreme Court Case No.
	:	
Plaintiff-Appellee,	:	11-1097
	:	
v.	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
Republic Services, Inc., et al.,	:	Eighth Appellate District
	:	Case No. 10-094908
	:	
Defendant-Appellant.	:	

**NOTICE OF CERTIFIED CONFLICT OF APPELLANT
REPUBLIC SERVICES, INC., REPUBLIC SERVICES OF OHIO HAULING LLC,
REPUBLIC SERVICES OF OHIO I, LLC, JAMES BOWEN, AND RONALD KRALL**

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NOTICE OF CERTIFIED CONFLICT

On May 27, 2011, Republic Services, Inc., Republic Services of Ohio Hauling LLC, Republic Services of Ohio I, LLC, James Bowen, and Ronald Krall ("Republic") filed with the Eighth Appellate District Court of Appeals a motion to certify a conflict pursuant to Ohio App. R. 25 and Ohio S.Ct. Prac. R. 4.1. On June 7, 2011, the Eighth District granted this motion, certifying a conflict between its decision in this case and the Tenth District Court of Appeals' decision in *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, Franklin App. No. 09AP-361, 2009-Ohio-6481. The Eighth District certified the precise issue that this Court already accepted jurisdiction over in Supreme Court Case No.2010-2148, *Havel v. Villa St. Joseph*:

Whether R.C. 2315.21(B), as amended by S.B. 80, Effective April 7th, 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).

Pursuant to S.Ct. Prac. R. 4.1, a copy of the Court of Appeals' order certifying a conflict and copies of the conflicting court of appeals opinions are attached.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular U.S. Mail this 28th day of June 2011

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

RONALD LURI

Appellee

COA NO.
94908

LOWER COURT NO.
CP CV-633043

COMMON PLEAS COURT

-vs-

REPUBLIC SERVICES INC., ET AL.

Appellant

MOTION NO. 444855

Date 06/07/11

Journal Entry

MOTION BY APPELLANTS TO CERTIFY CONFLICT IS GRANTED. THIS COURT'S JUDGMENT IN LURI V. REPUBLIC SERVS., INC., CUYAHOGA APP. NO. 94908, 2011-OHIO-2389, IS IN CONFLICT WITH THE FOLLOWING DECISION FROM THE TENTH DISTRICT COURT OF APPEALS OF OHIO: HANNERS V. HO WAH GENTING WIRE & CABLE SDN BHD, FRANKLIN APP. NO. 09AP-361, 2009-OHIO-6481.

THIS COURT HEREBY CERTIFIES THE FOLLOWING QUESTION TO THE OHIO SUPREME COURT PURSUANT TO APP.R. 25(A) AND ARTICLE IV, SECTION 3(B)(4) OF THE OHIO CONSTITUTION FOR RESOLUTION OF THE FOLLOWING ISSUE:

"WHETHER R.C.2315.21(B), AS AMENDED BY S.B.80, EFFECTIVE APRIL 7TH, 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)."

THIS ISSUE IS PENDING BEFORE THE SUPREME COURT OF OHIO ON THE CERTIFICATION OF A CONFLICT BY THE COURT OF APPEALS FOR CUYAHOGA COUNTY IN SUPREME COURT CASE NO.2010-2148, HAVEL V. VILLA ST. JOSEPH.

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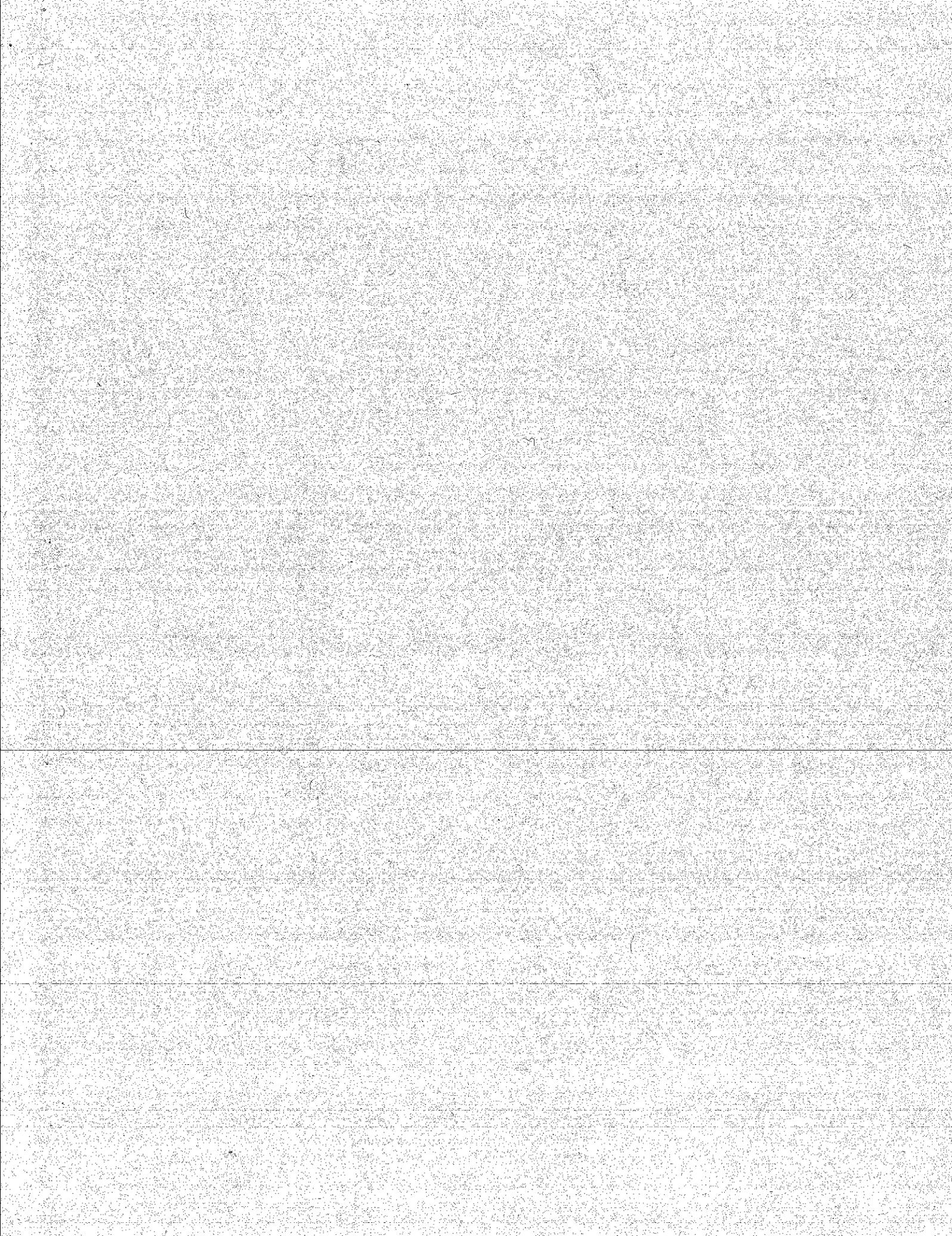
JUN 07 2011
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP

Adm. Judge, MARY EILEEN KILBANE, Concur

Judge SEAN C. GALLAGHER, Concur

Judge FRANK D. CELEBREZZE JR.

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ALL PARTIES.-COSTS TAXED



MAY 19 2011

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94908

RONALD LURI

PLAINTIFF-APPELLEE

vs.

REPUBLIC SERVICES, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-633043

BEFORE: Celebrezze, J., Kilbane, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 19, 2011

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ALL PARTIES--COSTS TAXED

**FILED AND JOURNALIZED
PER APP.R. 22(C)**

MAY 19 2011
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

FRANK D. CELEBREZZE, JR., J.:

Appellants, Republic Services, Inc. (“Republic”), Republic Services of Ohio I, L.L.C. (“Republic Ohio”), Republic Services of Ohio Hauling, L.L.C. (“Ohio Hauling”), James Bowen, and Ronald Krall, appeal from an adverse judgment and the largest retaliatory discharge jury award in Ohio history — over \$46 million. We affirm the jury’s verdict, but remand for imposition of statutory punitive damage limits.

Ronald Luri was employed as the general manager in charge of the Cleveland division of Ohio Hauling. His direct supervisor, Bowen, was employed by Republic Ohio. Luri also reported to Bowen’s supervisor, Krall, who was employed by Republic.

According to Luri, sometime in November 2006, Bowen approached him with an action plan that called for, among other things, the termination of three employees. Luri testified that Bowen instructed him to fire Frank Pascuzzi, George Fiser, and Louis Darienzo, Luri’s three oldest employees. Luri testified that he informed Bowen that Pascuzzi had strong performance evaluations, and terminating him without reason could result in a discrimination lawsuit. He also informed Bowen that Pascuzzi had a medical condition that could result in a disability discrimination suit. Luri testified that he refused to fire the three individuals.

Thereafter, Luri's performance evaluations were worse than in previous years, and Bowen instituted "Improvements Directives" for Luri to complete, including conducting weekly meetings and providing more information to Bowen. Appellants claim these directives were not accomplished and, as a result, Luri was terminated on April 27, 2007.

Luri then filed suit on August 17, 2007, alleging claims of retaliatory discharge under R.C. 4112.02(I). After receiving notice of the litigation as a named party, it appears from the evidence presented at trial that Bowen altered at least one piece of evidence to justify Luri's termination. Luri claims as many as three pieces of evidence were altered or fabricated and submitted to him during discovery.

Appellants twice moved to bifurcate the trial pursuant to the Ohio Tort Reform Statutory provisions in R.C. 2315 et seq., as well as Civ.R. 42(B). The court denied these motions, and trial commenced on June 24, 2008. This lengthy trial concluded with a jury verdict finding against all defendants and awarding Luri \$3.5 million in compensatory damages, jointly and severally against all defendants, and \$43,108,599 in punitive damages.¹ Appellants moved for remittitur, a new trial, and for judgment notwithstanding the verdict. These

¹ The jury awarded punitive damages as follows: \$21,500,000 against Republic, \$10,750,000 against Republic Ohio, \$10,750,000 against Ohio Hauling, \$83,394 against Krall, and \$25,205 against Bowen.

motions were all denied. Luri sought an award for attorney fees and for prejudgment interest on the compensatory damages from the date of his termination. The trial court awarded Luri over one million dollars in attorney fees and prejudgment interest on the entire compensatory damages award.

Law and Analysis

Bifurcation

Appellants first argue that the trial court “erred by failing to apply R.C. 2315.21(B)(1), which requires mandatory bifurcation.” Appellants assert that bifurcation is mandatory upon motion.² This court disagrees.

In *Barnes v. Univ. Hosps. of Cleveland*, Cuyahoga App. Nos. 87247, 87285, 87710, 87903, and 87946, 2006-Ohio-6266, ¶34, affirmed in part and reversed in part on other grounds 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, we held that a court retains discretion to determine whether bifurcation is appropriate even in the face of R.C. 2315.21(B) and its mandatory language. Generally, a court’s jurisdiction is set by the legislature, but as the Ohio Supreme Court noted, “the Modern Courts Amendment of 1968, Section 5(B), Article IV, Ohio Constitution, empowers this court to create rules of practice and

² R.C. 2315.21(B)(1) states, “[i]n 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 * * *.”

procedure for the courts of this state. As we explained in *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, Section 5(B), Article IV ‘expressly states that rules created in this manner “shall not abridge, enlarge, or modify any substantive right.”’ Id. at ¶17. “Thus, if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law.’ Id.” *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶28. Since bifurcation is a procedural matter, the trial court retains discretion in determining if such an action is warranted.

This determination is further buttressed by this court’s decision in *Havel v. Villa St. Joseph*, Cuyahoga App. No. 94677, 2010-Ohio-5251³ where we held that R.C. 2315.21(B)(1) is an unconstitutional usurpation of the judiciary’s ability to control procedural matters because it conflicts with Civ.R. 42(B).⁴ Id. at ¶9. The Fifth District has agreed with this determination. *Myers v. Brown*, Stark App. No. 2010-CA-00238, 2011-Ohio-892; *Plaugher v. Oniala*, Stark App. No. 2010 CA 00204, 2011-Ohio-1207, ¶19-20. However, the Tenth District, in

³ This issue is currently before the Ohio Supreme Court to resolve a conflict between districts. See *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010-2148.

⁴ This rule states, “[t]he 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 * * *.”

Hanners v. Ho Wah Genting Wire & Cable SDN BHD, Franklin App. No. 09AP-361, 2009-Ohio-6481, ¶30, held that R.C. 2315.21 is substantive law in a procedural package. This interpretation deprives courts of the power granted under the constitution of this state. "If then courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison* (U.S. Dist. Col. 1803), 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60.

Appellants also argue that their motion was unopposed and, therefore, should have been granted whether based on R.C. 2315.21 or Civ.R. 42(B). However, under the above cases, the trial court retains discretion to decide the issue. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

The *Barnes* court found that "[t]he issues surrounding compensatory damages and punitive damages in this case were closely intertwined. [Appellant's] request to bifurcate would have resulted in two lengthy proceedings where essentially the same testimony given by the same witnesses would be presented. Knowing that bifurcation would require a tremendous amount of

duplicate testimony, the presiding judge determined it was unwarranted.” Id. at ¶35.

Here, the malice evidence required for punitive damages was also the evidence used to rebut appellants’ arguments that Luri was terminated for cause. The manufacture of evidence was intertwined in arguments relating to both compensatory and punitive damages. Appellants also argue that the trial court should not have allowed testimony about the financial position of appellants, but it was Krall, while on cross-examination, who introduced this line of questioning without prompt from Luri. Therefore, the trial court did not abuse its discretion in denying appellants’ bifurcation motion.

Application of Other Ohio Tort Reform Provisions

In their second and third assignments of error, appellants argue that the trial court committed plain error when it failed to apply various provisions of R.C. 2315. First, appellants claim the trial court failed to instruct the jury pursuant to R.C. 2315.18(C).⁵ However, appellants never requested such an instruction and specifically agreed to their propriety before submission to the jury.⁶

⁵ Appellants’ statement of this error reads, “[t]he trial court erred in failing to submit an instruction regarding noneconomic damages, as required by R.C. 2315.18(C).”

⁶ Appellate counsel for appellants would like it known that they were not trial counsel.

We must first determine if these provisions apply to an action based on R.C. 4112. In analyzing whether the punitive damages caps within R.C. 2315.21 applied to a claim of a breach of fiduciary duty under R.C. 1751.09, Ohio's Southern District Court determined that they do not apply based on the language in R.C. 1751.09 and the intent of the legislature. *Kramer Consulting, Inc. v. McCarthy* (Mar. 8, 2006), S.D. Ohio No. C2-02-116. While the same reasoning would appear to apply to claims under R.C. 4112, the same court later held that "an action brought under Ohio Rev. Code 4112 is a 'tort action' as it is 'a civil action for damages for injury or loss to person or property.'" *Geiger v. Pfizer, Inc.* (Apr. 10, 2009), S.D. Ohio No. 2:06-CV-636, quoting *Ridley v. Fed. Express*, Cuyahoga App. No. 82904, 2004-Ohio-2543, ¶189, citing former R.C. 2315.21(A)(1). This finding would include such actions within the umbra of Ohio's Tort Reform provisions.

The Ohio Supreme Court has also noted the types of actions to which R.C. 2315.18 does not apply and found them to include "tort actions in the Court of Claims or against political subdivisions under R.C. Chapter 2744, * * * actions for wrongful death, medical or dental malpractice, or breach of contract. R.C. 2315.18(A)(7) and (H)(1) through (3)." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, fn. 3. Absent from this list are actions based on statutory remedies including, among others, discrimination

suits. When coupled with the holdings above, R.C. 2315 et seq. applies to retaliatory discharge actions brought under R.C. 4112, and the trial court was required to apply its provisions if appropriately asked.

R.C. 2315.18(C) provides that, “[i]n determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact shall not consider any of the following:

“(1) Evidence of a defendant’s alleged wrongdoing, misconduct, or guilt;

“(2) Evidence of the defendant’s wealth or financial resources;

“(3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.”

Because appellants never requested instructions based on R.C. 2315.18, we review this assigned error under a plain error analysis. “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, at the syllabus. Therefore, to constitute plain error, the error must be “obvious and prejudicial error, neither objected to nor affirmatively waived,” and, “if permitted, would have a material

adverse effect on the character and public confidence in judicial proceedings.”
Hinkle v. Cleveland Clinic Found., 159 Ohio App.3d 351, 2004-Ohio-6853, 823
N.E.2d 945, ¶78.

Here, appellants collaborated with the court and Luri in crafting the jury instructions given. Several courts of appeals have held that an agreed upon jury instruction that forms the basis for error on appeal is invited error. See *State v. Briscoe*, Cuyahoga App. No. 89979, 2008-Ohio-6276, ¶33 (holding that objection to an agreed jury instruction on appeal constituted invited error, which was not grounds for reversal); *Merkl v. Seibert*, Hamilton App. Nos. C-080973 and C-081033, 2009-Ohio-5473, ¶48, (“Not only did Merkl fail to object to the court’s instruction, but she collaborated with the court and defense counsel on its wording and specifically agreed to the instruction as given. Merkl cannot take advantage of an error that she invited or induced the court to make.”).

Appellants did not submit such a limiting instruction or even mention R.C. 2315 when proposing jury instructions. Appellants’ initial proposed jury instructions for compensatory damages stated, in part, “you will decide by the greater weight of the evidence an amount of money that will reasonably compensate [Luri] for the actual damage proximately caused by the conduct of [appellants]. In deciding this amount, if any, you will consider the nature, character, seriousness, and duration of any emotional pain, suffering or

inconvenience [Luri] may have experienced.” The amended proposed instructions are substantially the same. Appellants never raised this issue before the trial court when it could have been addressed, and their oversight should not result in reversal. See *Friedland v. Djukic*, Cuyahoga App. Nos. 94319 and 94470, 2010-Ohio-5777, ¶40.

Similarly, appellants’ issue with the failure of the court to provide a jury interrogatory detailing findings on noneconomic damages was invited.⁷ The invited error doctrine equally applies here where the jury instructions, verdict forms, and jury interrogatories were approved by appellants, without even suggesting the now complained of error. See *Siuda v. Howard*, Hamilton App. Nos. C-000656 and C-000687, 2002-Ohio-2292.

R.C. 2315.18(D) states that “[i]f a trial is conducted in a tort action to recover damages for injury or loss to person or property and a plaintiff prevails in that action, * * * the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following: (1) The total compensatory damages recoverable by the plaintiff; (2) [t]he portion of the total compensatory damages that represents damages for economic loss;

⁷ Appellants’ assigned error states “[t]he trial court erred by failing to provide the interrogatory required by R.C. 2315.18(D) and by failing to apply the cap on noneconomic compensatory damages in R.C. 2315.18(B)(2).”

(3) [t]he portion of the total compensatory damages that represents damages for noneconomic loss.”

In *Faieta v. World Harvest Church*, Franklin App. No. 08AP-527, 2008-Ohio-6959, ¶¶84-85, the Tenth District noted that “defendants not only failed to object to the jury interrogatories and verdict forms, they invited the alleged error. Defendants drafted verdict forms and interrogatories and submitted them to the trial court. Like those actually submitted to the jury, defendants’ drafts asked the jury to determine the amount of damages awarded to ‘plaintiffs’ collectively, not individually, and they did not ask the jury to apportion each type of damages between each defendant.”

In the present case, appellants submitted interrogatories and agreed upon the final versions submitted to the jury. Those interrogatories did not separate past and future economic damages nor economic and noneconomic damages. Appellants’ failure to raise the issue and their proffering of the relied upon interrogatories invited the error.

Appellants never sought the application of Ohio Tort Reform provisions during trial apart from bifurcation. It was only in post-verdict motions that appellants asked the trial court for their application. This error on appellants’ part should not serve as the basis for obtaining a new trial when it could have so easily been addressed and corrected if properly raised.

By failing to request an interrogatory distinguishing noneconomic damages, the trial court could not apply the damages limits set forth in R.C. 2315.18(B)(2),⁸ which appellants requested in their post-trial motions. This failure was precipitated by appellants' submission of interrogatories and jury instructions that did not provide for such details. Appellants failed to raise these issues at the proper time, and their nescience should not result in a new trial. Accordingly, these assignments of error are overruled.

Punitive Damage Caps

Appellants next argue that, when presented with a proper post-trial motion, the trial court "fail[ed] to apply the Ohio Tort Reform provision in R.C. 2315.21(D)(2)(a), which require[d] the trial court to apply a cap on punitive damages equal to twice the amount of compensatory damages."

R.C. 2315.21(D)(2)(a) provides that, "[i]n a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages. * * * Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary

⁸ "[T]he amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action."

damages in a tort action: (a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.”

Our holding above, that Ohio Tort Reform provisions apply to discrimination actions, means that, upon proper motion, the trial court was required to limit the award of punitive damages to two times the amount of compensatory damages. In this case, the trial court was not prevented from applying this provision by appellants’ failure to call it to the court’s attention when it had the ability to address such a request. This is because the trial court could apply the limit without engaging in the type of guessing game required in applying the compensatory damage provisions. See *Srail v. RJF Internatl. Corp.* (1998), 126 Ohio App.3d 689, 702, 711 N.E.2d 264. Therefore, the trial court erred in failing to limit the amount of punitive damages to seven million dollars.

Luri argues that the amount of punitive damages should be calculated for each defendant, meaning that each would be subject to punitive damages up to \$7 million. While there may be cases where Luri’s calculation would apply, that is not the case here, where Luri advanced a single-employer theory of liability to impute wrongdoing to multiple business entities in this case. Because Luri can collect at most \$3.5 million in compensatory damages, the trial court should

have limited the amount of punitive damages to \$7 million. Its failure to do so necessitates reversal and remand.

Due Process

In appellants' fifth assignment of error, they argue that the award of \$43 million in punitive damages violates their due process rights under the federal and state constitutions.⁹ While our holding above limits this argument, it does not completely dispose of it.

In *BMW v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, the Supreme Court attempted to outline the permissible bounds of punitive damage awards under the Due Process Clause of the Constitution. It recognized that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." (Internal citations omitted.) *Id.* at 568.

⁹ This assigned error states "[t]he trial court erred by failing to reduce the punitive damages because they are violative of the U.S. Constitution and Ohio law."

The Court set forth three factors it used to analyze the punitive damages award before it: The reprehensibility of the conduct, the disparity between the harm or potential harm suffered and the amount of the award, and the difference between the award and the civil penalties authorized or imposed in comparable cases. *Id.* at 575. See, also, *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585. The Ohio Supreme Court has directed this court to apply the *Gore* factors to independently determine whether an award is excessive. *Barnes*, *supra*, at ¶40.

Appellants demonstrated reprehensible conduct in this case. After Luri refused to engage in what he thought was discriminatory conduct, Bowen devised a plan to terminate him, fabricated evidence, and submitted this evidence during discovery to justify his actions. Krall then used this fabricated evidence for the same justification. After terminating Luri from a job in a specialized, consolidated industry, appellants refused to waive the non-compete clause in his employment contract, which further hampered Luri's ability to support himself and his family. This conduct weighs heavily in favor of a large punitive damage award and is the most important factor in the *Gore* analysis. See *Gore* at 575. The trial court also found that this conduct demonstrated a pattern of repeated retaliatory and discriminatory conduct. Nothing in the record demonstrates to this court that this finding was incorrect. From an action

plan calling for the termination or demotion of some of appellants' oldest employees, to fabricating evidence in an attempt to justify Luri's termination, there is evidence in the record supporting a pattern of conduct justifying substantial punitive damages.

The harm suffered by Luri was also significant in this case. Appellants would have this court determine that a ratio of compensatory to punitive damages of one-to-one is appropriate in this case because the harm was economic and Luri was a well-paid executive who was not economically vulnerable. While Luri did earn a substantial salary, as the trial court noted, a "punitive damage award is more about a defendant's behavior than the plaintiff's loss." Citing *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546.

Here, comparable jury verdicts imposed where a pattern of persistent conduct was shown demonstrate that a two-to-one ratio is not beyond the bounds of due process. *Merrick v. Paul Revere Life Ins. Co.* (D.Nev. 2008), 594 F.Supp.2d 1168, 1190; *Burns v. Prudential Secs., Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550. This court has also upheld a five-to-one ratio in an employment discrimination case. *Griffin v. MDK Food Serv., Inc.*, 155 Ohio App.3d 698, 2004-Ohio-133, 803 N.E.2d 834, ¶49, 57.

In this case, the appellants' behavior speaks to an award of punitive damages in the full amount authorized by the legislature. On remand, the trial court should feel free to enter an amount of punitive damages up to the bounds imposed by R.C. 2315.21.

Pre-Judgment Interest

Appellants finally argue that the trial court erred in awarding pre-judgment interest on the full amount of compensatory damages when that amount included pay Luri would not have yet earned, or "future damages."¹⁰

R.C. 1343.03(C)(1) states, "[i]nterest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

This statute encourages the "settlement of meritorious claims, and the compensation of a successful party for losses suffered as the result of the failure

¹⁰ This assigned error states "[t]he trial court erred by awarding prejudgment interest on front-pay compensatory damages."

of an opposing party to exercise good faith in negotiating a settlement.” *Lovewell v. Physicians Ins. Co. of Ohio*, 79 Ohio St.3d 143, 147, 1997-Ohio-175, 679 N.E.2d y1119. “Therefore, an injured party in a tort action is, under appropriate circumstances, entitled to recover interest from the date the cause of action accrues.” *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, 797 N.E.2d 132, ¶7.

Appellants did not request that the jury parse the amount of compensatory damages into any categories. As with the application of provisions of Ohio’s Tort Reform statutes, appellants invited this error by submitting instructions and interrogatories that did not separate out future damages. Appellants’ error will not induce this court “to speculate concerning the specifics of the jury’s award.” *Srail* at 702. This assignment of error is overruled.

Conclusion

Appellants caused a great many of the supposed errors complained of in this case, which should not result in reversal. However, on proper motion, the trial court should have applied the damages caps set forth in R.C. 2315.21(D)(2)(a). Accordingly, this case must be remanded.

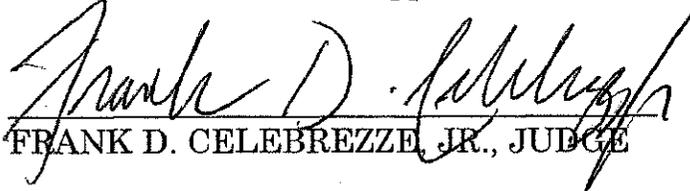
This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, J., CONCURS;
MARY EILEEN KILBANE, A.J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, A.J., DISSENTING IN PART:

I respectfully dissent from the majority's determination that the trial court should have limited the amount of punitive damages to \$7 million. I would conclude that plaintiff is entitled to \$7 million in punitive damages *from each defendant*, rather than \$7 million in total punitive damages.

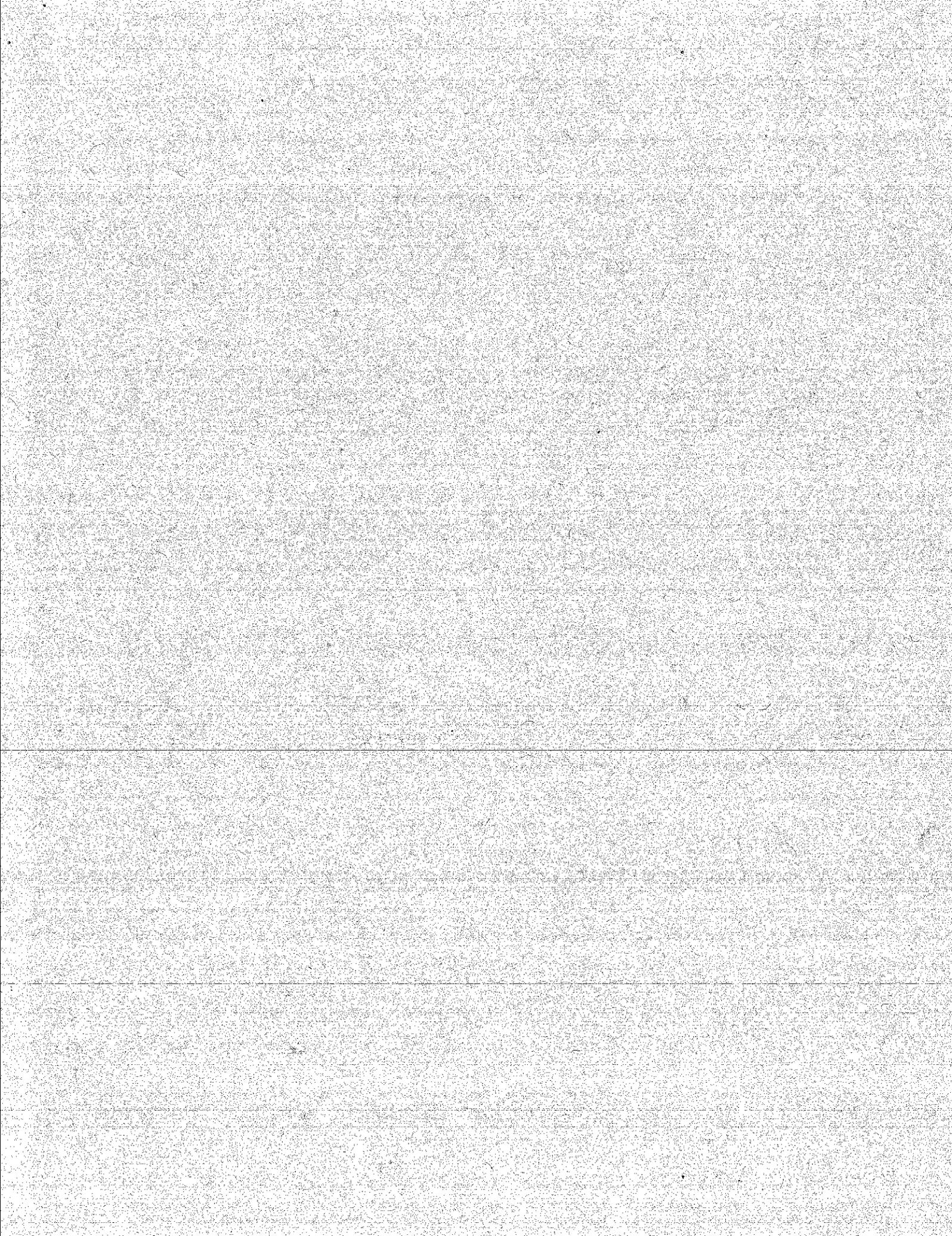
R.C. 2315.21(D) sets forth certain limits on punitive damages and provides in relevant part as follows:

“(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.”

The defendants maintain that because the trial court determined that they were jointly and severally liable to Luri in the amount of \$3.5 million, this is the amount “awarded to the plaintiff.” Therefore, defendants claim that plaintiff’s recovery of punitive damages is limited to two times this amount or a total of \$7 million in punitive damages. This interpretation omits key terms of the statute, however, which calculates the punitive damages as “two times the amount of the compensatory damages awarded to the plaintiff *from that defendant[.]*” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. (“The statute limits punitive damages in tort actions to a maximum of two times the total amount of compensatory damages awarded to a plaintiff per defendant.”) The determination of joint and several liability does not alter this analysis, as plaintiff has been awarded compensatory damages “from that defendant.” There is no provision for limiting the awards where there are joint and several tortfeasors. I therefore dissent insofar as the

majority has limited plaintiff's recovery to punitive damages in this matter to \$7 million.



[Cite as *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 2009-Ohio-6481.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kathy S. Hanners et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 09AP-361
Ho Wah Genting Wire & Cable	:	(C.P.C. No. 08CVG10-15218)
SDN BHD et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellants,	:	
Big Lots Store, Inc. et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 10, 2009

Cooper & Elliott, Rex H. Elliott, Charles H. Cooper, Jr., and John C. Camillus; Bryan K. Harris, P.C., and Bryan K. Harris; Watts Law Firm, L.L.P., and Mikal C. Watts, for plaintiffs-appellees.

Davis & Young, and Richard M. Garner, for defendants-appellants.

Jacob H. Huebert, Amicus Curiae Ohio Association of Civil Trial Attorneys.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

I. Introduction

{¶1} This appeal presents the issue of whether a trial court's entry denying a defendant's motion to bifurcate the plaintiff's claims for compensatory damages from the plaintiff's claims for punitive damages in a tort action is a final, appealable order pursuant to R.C. 2505.02(B)(6). We hold that it is. Having done so, we must also address the issue of whether R.C. 2315.21(B), which requires bifurcation upon motion in tort actions, violates the Modern Courts Amendment of 1968, Section 5(B), Article IV of the Ohio Constitution, because it conflicts with Civ.R. 42(B). We conclude that, because the statute is substantive, it does not violate the separation of powers required by the Constitution.

A. Background

{¶2} Defendants-appellants, Ho Wah Genting Wire & Cable SDN BHD, Ho Wah Genting SDN BHD, Ho Wah Genting International Limited, Ho Wah Genting Trading SDN BHD, Ho Wah Genting Berhad, and Pt. Ho Wah Genting ("appellants"), appeal the judgment of the Franklin County Court of Common Pleas, which, among other things, denied in part their motion for bifurcation. The Ohio Association of Civil Trial Attorneys has filed an amicus curiae brief in support of appellants.

{¶3} On October 27, 2006, Mindy S. Hanners and her three children, Katelynn, Nevaeh, and Austin, died in a house fire. Kathy S. Hanners, individually, and as administrator of the estate of Katelynn and Mindy, and Harry F. Gillespie, III, individually, and as administrator of the estate of Nevaeh and Austin, plaintiffs-appellees ("appellees"), filed a wrongful death action against, among others, appellants, whom appellees

contended were the manufacturers of an electrical extension cord that caused the fire. Appellees sought compensatory and punitive damages.

{¶4} On December 12, 2008, appellants filed a motion to bifurcate the punitive damages proceedings pursuant to R.C. 2315.21(B)(1). On March 12, 2009, the trial court issued a journal entry, in which it, as pertinent to the present appeal, denied appellants' request to bifurcate the punitive damages proceedings.

B. Assignments of Error

{¶5} Appellants appeal the journal entry of the trial court. They assert the following assignments of error:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DECLARING R.C. 2315.21(B) TO BE UNCONSTITUTIONAL.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY VIOLATING OHIO'S SEPARATION OF POWERS DOCTRINE WHEN IT REFUSED TO APPLY R.C. 2315.21(B) IN THIS CASE.

II. Analysis

A. Final, Appealable Order

{¶6} As an initial matter, we must address whether the journal entry appealed from is a final, appealable order. On May 6, 2009, this court issued a show cause order requesting that appellants show cause as to why this appeal should not be dismissed for lack of a final, appealable order, and appellees filed a memorandum in response. It is well-established that a trial court's bifurcation determination under Civ.R. 42(B) is not a final, appealable order. See, e.g., *Doe v. Univ. of Cincinnati* (1991), 70 Ohio App.3d 354, 358 (a bifurcation order pursuant to Civ.R. 42(B) is not a final, appealable order); *Finley v.*

First Realty Property Mgt., Ltd., 9th Dist. No. 23355, 2007-Ohio-2888, ¶12, citing *King v. Am. Std. Ins. Co. of Ohio*, 6th Dist. No. L-06-1306, 2006-Ohio-5774, ¶19; *Goettl v. Edelstein* (Dec. 5, 1985), 5th Dist. No. CA 2339.

{¶7} Appellants contend, however, that the trial court's journal entry was a final, appealable order, pursuant to R.C. 2505.02(B)(6), which was added by S.B. No. 80 ("SB 80"), effective April 7, 2005. R.C. 2505.02(B)(6) includes within the definition of a final order "[a]n order determining the constitutionality of any changes" made by SB 80. SB 80 amended R.C. 2315.21(B) to require the bifurcation of the trial of a tort action. The question, then, is whether the trial court's entry "determin[ed] the constitutionality" of R.C. 2315.21. To answer that question, we look more closely at the proceedings below and the trial court's decision.

{¶8} In their complaint, as their thirteenth cause of action, appellees sought a declaration that "current enactments" of SB 80 are unconstitutional. Appellants denied the claim and thereafter moved to dismiss this request for declaratory relief.

{¶9} Appellants also moved to bifurcate appellees' punitive damage claims based on R.C. 2315.21(B). In the alternative, they argued that the court should exercise its discretion under Civ.R. 42(B) to bifurcate. In response, appellees argued that R.C. 2315.21(B) is unconstitutional because it is procedural and appears to conflict with Civ.R. 42(B). Appellees also argued that, despite R.C. 2315.21(B), bifurcation was not mandatory, and the court should not bifurcate the proceedings under the statute or Civ.R. 42(B).

{¶10} The trial court's March 12, 2009 entry denied appellants' motion to dismiss appellees' constitutional claims. The court expressed "doubt that the proper procedure"

had been followed to raise a claim for declaratory relief properly and "bifurcated" the constitutional question. The court stated: "If [appellees] recover a verdict and the tort reform statutes stand in the way of complete relief, the court will examine them – substantively and as to proper procedure – at that time. In the meantime, no court should reach-out to offer opinions on constitutional questions that might otherwise never need to be addressed."

{¶11} In the same order, the court addressed and denied appellants' motion to bifurcate the trial. The court found, first, that R.C. 2315.21(B)(1), which requires bifurcation, and Civ.R. 42(B), which gives the court discretion to bifurcate, "are plainly inconsistent." Noting the Supreme Court of Ohio's authority to promulgate the rules of civil procedure, and citing Supreme Court precedent, the court concluded that Civ.R. 42(B) controlled because bifurcation of punitive damages is a procedural matter. Without expressly declaring R.C. 2315.21(B) unconstitutional, the court denied appellants' motion to bifurcate.

{¶12} Section 5(B), Article IV of the Ohio Constitution, also known as the Modern Courts Amendment, grants to the Supreme Court of Ohio 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." More than a rule of construction, the provision ensures the separation of powers between the branches of government. See, e.g., *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, ¶5, 15 (describing the issue as whether enactment of the statute at issue "violates the separation of powers between the judicial and legislative branches" and

concluding that the statute did not "violate the separation of powers required by Section 5(B), Article IV of the Ohio Constitution"). Where a conflict arises between a rule and a statute, the court's rule prevails on procedural matters; the legislature's statute prevails on substantive matters. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶28; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454.

{¶13} Here, the trial court concluded that a conflict exists between R.C. 2315.21(B), which requires a trial court to grant bifurcation in tort cases, and Civ.R. 42(B), which gives the court discretion to bifurcate. By also concluding that bifurcation is a matter of procedure and refusing to apply R.C. 2315.21(B), the court necessarily determined that the statute (1) violated the constitutional division of authority between the court and the legislature, and (2) is of no force or effect in this matter. Therefore, although the trial court did not expressly declare the statute unconstitutional, the court "determin[ed] the constitutionality" of R.C. 2315.21(B), and this court has jurisdiction to review the trial court's determination under R.C. 2505.02(B).

B. R.C. 2315.21(B) and Civ.R. 42(B)

{¶14} In their first and second assignments of error, appellants contend that the trial court erred by declaring R.C. 2315.21(B) unconstitutional and violated the separation of powers doctrine by refusing to apply it. We will address these assignments together. Because they present constitutional questions, our review is de novo. *State v. Rodgers*, 166 Ohio App.3d 218, 2006-Ohio-1528, ¶6.

{¶15} As we noted, the Modern Courts Amendment grants to the Supreme Court of Ohio the exclusive authority to prescribe rules for court practice and procedure. To determine whether a statute enacted by the General Assembly infringes on this 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. If the statute is substantive, then it prevails; if the statute is procedural, the rule prevails, and the statute is of no force and effect. The statute at issue here is R.C. 2315.21(B); the rule at issue is Civ.R. 42(B).

{¶16} R.C. 2315.21(B) provides:

(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.

(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.

{¶17} We begin with the principle that, "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there 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, paragraph five of the syllabus. Thus, "[i]t is only where the words of a statute are ambiguous or are based upon an uncertain meaning or there is an apparent conflict of some provisions that a court has the right to interpret a statute." *Drake-Lassie v. State Farm Ins. Cos.* (1998), 129 Ohio App.3d 781, 788, citing *Kroff v. Amrhein* (1916), 94 Ohio St. 282.

{¶18} Here, there is no ambiguity. R.C. 2315.21(B) provides that, in a tort action in which a plaintiff makes a claim for compensatory damages and makes a claim for punitive or exemplary damages, upon any party's motion, the trial "shall be bifurcated" in accordance with the specific requirements in the statute.

{¶19} Civ.R. 42(B) also addresses bifurcation. It provides:

(B) Separate trials

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.

{¶20} In short, Civ.R. 42(B) allows a trial court to order separate trials of separate issues whenever bifurcation will further convenience, expedience, and judicial economy and avoid prejudice. The decision of whether to bifurcate the proceedings is a matter within the sound discretion of the trial court. *Sheets v. Norfolk S. Corp.* (1996), 109 Ohio App.3d 278, 288.

{¶21} Appellants contend that R.C. 2315.21(B), which addresses a specific category of claims by certain claimants, does not conflict with Civ.R. 42(B), a broad rule of general procedure. In support, they cite *Sapp*, in which the court considered whether R.C. 2323.52, which prescribes filing requirements for vexatious litigators, conflicts with general rules of appellate procedure. The court discerned no conflict. "App.R. 3 and 4 define the general requirements of how and when to file an appeal, and R.C. 2323.52 specifies the requirements for persons declared to be vexatious litigators who are filing and continuing legal cases." *Sapp* at ¶29.

{¶22} 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. In those actions fitting within the confines of R.C. 2315.21(B), however, there is a clear and unavoidable conflict, i.e., R.C. 2315.21(B) removes the discretion granted by Civ.R. 42(B). Therefore, we proceed to consider whether R.C. 2315.21(B) is substantive or procedural. If substantive, the statute prevails whether it conflicts with Civ.R. 42(B) or not.

{¶23} The Supreme Court has defined "substantive" for these purposes as the body of law that "'creates, defines and regulates the rights of the parties.'" *Proctor v.*

Kardassilaris, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶17, quoting *Krause v. State* (1972), 31 Ohio St.2d 132, overruled on other grounds, *Schenkolewski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St.2d 31, paragraph one of the syllabus.

{¶24} 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.

{¶25} In uncodified section 3 of SB 80, the General Assembly made a "statement of findings and intent." That statement included the General Assembly's findings that the "current civil litigation system represents a challenge to the economy of the state of Ohio," and "that a fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued." *Id.* at section 3(A)(1) and (2). The General Assembly also found that "[r]eform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system." *Id.* at section 3(A)(4)(a).

{¶26} Most important for our purposes here, the General Assembly distinguished between non-economic damages, which compensate a plaintiff, and punitive damages, which punish a defendant. The General Assembly expressed its belief that "inflation of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages." *Id.* at section 3(A)(6)(d). And it also found that "[i]nflated damage awards create an improper resolution of civil justice claims. The increased and improper cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services." *Id.* at section 3(A)(6)(e).

{¶27} On these grounds, the General Assembly concluded that, for certain injuries not subject to statutory caps, courts should instruct juries that evidence of misconduct should only be considered for purposes of awarding punitive damages, not non-economic damages. Then the General Assembly 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." *Id.* at section 3(A)(6)(f).

{¶28} From these expressions of legislative intent, we conclude that R.C. 2315.21(B) is a substantive law. While it mandates a particular procedure for tort actions, that mandate is for the purpose of creating and defining a defendant's right to request bifurcation to ensure that the jury does not inappropriately consider the defendant's misconduct when also determining questions of liability and compensatory damages. The General Assembly defined this right as important to a fair and balanced system of civil justice.

{¶29} The Supreme Court of Ohio reached a similar conclusion in *Loyd*. In that case, the court considered whether a statute creating a method for obtaining relief from a child support order conflicts with Civ.R. 60(B), which allows relief from a judgment within a reasonable time or within one year, depending on the circumstances. Looking beyond the express language of the statute, the court considered the General Assembly's declaration that "it is a person's * * * substantive right to obtain relief" from a child support order. *Id.* at ¶14. The court acknowledged that the statutory provisions "are necessarily packaged in procedural wrapping," but nevertheless concluded that "the General Assembly intended to create a substantive right to address potential injustice."

Id. Therefore, the court concluded, the statutes "do not conflict with Civ.R. 60(B) in such a way as to violate the separation of powers required by Section 5(B), Article IV of the Ohio Constitution." Id. at ¶15.

{¶30} Based on this precedent, we must similarly conclude that 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. In reaching this conclusion, we do not consider the wisdom of the General Assembly's public policy choices. See *Proctor* at ¶23, quoting *Bernardini v. Bd. of Edn. for the Conneaut Area City School Dist.* (1979), 58 Ohio St.2d 1, 4 (" ' [W]hether an act is wise or unwise is a question for the General Assembly and not this court.' "). Instead, having determined that the General Assembly's intent was to create a substantive right for certain litigants, we conclude that R.C. 2315.21(B) does not conflict with Civ.R. 42(B) in such a way as to violate the separation of powers required by Section 5(B), Article IV of the Ohio Constitution.

III. Conclusion

{¶31} For all these reasons, we sustain appellants' assignments of error. We reverse the trial court's denial of appellants' motion to bifurcate pursuant to R.C. 2315.21(B). We remand this matter to the Franklin County Court of Common Pleas for further proceedings consistent with this decision and applicable law.

Judgment reversed and cause remanded.

SADLER, J., concurs.
BROWN, J., concurs in part and dissents in part.

BROWN, J., concurring in part and dissenting in part.

{¶32} I concur with the majority's determination that the trial court's entry was a final appealable order under R.C. 2505.02(B)(6). Additionally, I agree R.C. 2315.21(B) conflicts with Civ.R. 42(B). However, because I believe R.C. 2315.21(B) governs a procedural matter expressly reserved for the Supreme Court of Ohio by Section 5(B), Article IV of the Ohio Constitution, I would overrule appellants' assignments of error. Therefore, I must respectfully dissent in this respect.

{¶33} The crux of the majority's decision is that, although Civ.R. 42(B) and R.C. 2315.21(B) conflict, the statute is substantive, not procedural, and, thus, the statute prevails. In considering the meaning of the word "substantive" as used in the Ohio Constitution, the Supreme Court of Ohio has ruled that "substantive" is in contradistinction to the word "procedural"; "substantive" means that body of constitutional, statutory, and common law which creates, defines, and regulates the rights of the parties, whereas "procedural" pertains to the method of enforcing rights or obtaining redress. *Krause v. State* (1972), 31 Ohio St.2d 132, 145.

{¶34} As this court has noted before, "[w]hile these general rules are easily stated, they are not so easily applied." *State v. Weber* (1997), 125 Ohio App.3d 120, 130. The Supreme Court has commented on several occasions that it is sometimes difficult to draw a distinction between substantive and procedural law. See, e.g., *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 56, citing Chamberlayne, *Modern Law of Evidence* (1911), 217 ("[t]he distinction between substantive and procedural law is artificial and illusory"); *French v. Dwiggin*s (1984), 9 Ohio St.3d 32, 33-34 ("[t]he remedial-procedural versus substantive dichotomy is seldom an easy distinction to make"); *Cook v. Matvejs* (1978),

56 Ohio St.2d 234, 237 (conceding there is a "somewhat muddled distinction" between procedural and substantive rights). Nevertheless, courts continue to be called upon to draw such a distinction.

{¶35} Here, the majority concludes that, despite the appearance that the statute addresses a procedural issue, the uncodified language associated with R.C. 2315.21(B) suggests the legislative purpose of the statute is to create and define a defendant's right to request bifurcation to ensure that the jury does not inappropriately consider the defendant's misconduct when also determining liability and compensatory damages. The majority reasons that the General Assembly's intent was to address potential unfairness and injustice.

{¶36} However, I would find that R.C. 2315.21(B) addresses a procedural matter. Many authorities have termed bifurcation a procedural matter. For example, in *Martin v. Grange Mut. Ins. Co.*, 11th Dist. No. 2004-G-2558, 2004-Ohio-6950, ¶49, the court held that the trial court has wide discretion in applying various "procedural devices" used to manage a class action, including bifurcation of common and individual liability issues. This court stated the same in *Grant v. Becton Dickinson & Co.*, 10th Dist. No. 02AP-894, 2003-Ohio-2826, ¶65, in which we held that various "procedural devices" were within the trial court's wide discretion in managing a class action, including bifurcation of common and individual liability issues. In addressing the same statute at issue here, the Supreme Court has also couched bifurcation as an issue of procedure, stating "[t]he S.B. 80 amendments to [R.C. 2315.21] included a procedure for bifurcation of proceedings for compensatory and punitive damages." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶85. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*

(1999), 86 Ohio St.3d 451, the Supreme Court even more explicitly deemed bifurcation under R.C. 2315.21(B) procedural in nature. In finding H.B. No. 350, a predecessor "tort-reform" attempt, to be unconstitutional in toto, the Supreme Court of Ohio in *Sheward* indicated R.C. 2315.21(B)(1) "governs the procedural matter of bifurcating tort actions into compensatory and punitive damage stages." *Id.* at 487. The Supreme Court's procedural depiction in *Sheward* is powerfully persuasive.

{¶37} Notwithstanding the above authorities, the majority finds R.C. 2315.21 is substantive because it creates and defines a defendant's right to request bifurcation to ensure fairness and justice. I disagree on two counts. I do not believe the statute "creates" any right that was not in existence prior to its enactment. The right to request bifurcation existed long before R.C. 2315.21(B), and the right to a fair trial has been in formal existence since at least 1851, when Section 16, Article I of the Ohio Constitution became effective. In addition, Civ.R. 42(B) has already been promulgated by the Supreme Court of Ohio to ensure fairness and justice. Civ.R. 42(B) specifically provides that a court may order a separate trial to avoid prejudice. Further, one of the express purposes of all of the rules in the Ohio Rules of Civil Procedure, per Civ.R. 1(B), is "to effect just results" and administer justice. These purposes address the precise ills that the majority indicates R.C. 2315.21(B) was enacted to ward against. Like Civ.R. 42(B), R.C. 2315.21(B) enacts procedural rules to address a method of enforcing rights in the courtroom. In addition, that R.C. 2315.21(B) was enacted to promote fairness for a specific class of litigants in a specific type of case does not render it any different from the procedural law in Civ.R. 42(B), which promotes fairness for all litigants in all cases. Under the majority's analysis, the legislature could enact any legislation designed to address

fairness and injustice, and the legislation would constitute substantive law that would usurp the Ohio Rules of Civil Procedure. For these reasons, I would find that the bifurcation of court proceedings is procedural as it pertains to the method of enforcing rights and obtaining redress rather than creating, defining or regulating the rights of the parties.

{¶38} Accordingly, I would overrule appellants' assignments of error.
