

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

SABER HEALTHCARE GROUP, LLC., :  
et al., :  
:  
Appellant :  
:  
:  
vs. :  
:  
JOHN T. FLYNN, et al., :  
:  
Appellee :

CASE NO. 2010-1881

On Appeal from the  
Court of Appeals of  
Cuyahoga County, Ohio  
Eighth Appellate District

Court of Appeals  
Case No. CA-10-095695

MERIT BRIEF OF AMICUS CURIAE, OHIO HEALTH CARE ASSOCIATION

David Krause (0070577)  
Joyce Carlozzi (0038936)  
SEMAN GARSON, LLC  
1600 Rockefeller Bldg.  
614 West Superior Ave.  
Cleveland, Ohio 44113  
p-(216) 830-1000  
f-(216) 696-8558  
E-mail: dhkrausegseamangarson.com  
jcarlozzigseamangarson.com  
*COUNSEL FOR PLAINTIFFS-APPELLEES  
JOHN T. FLYNN, ETC.*

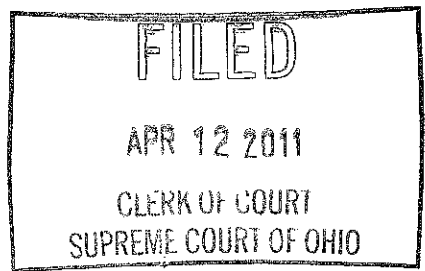
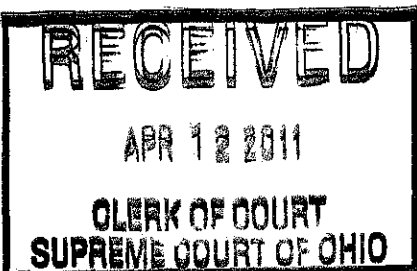
Robert C. Pivonka (0067311)  
Christopher G. Kuhn (0082822)  
(COUNSEL OF RECORD)  
Rolf & Goffman Co., L.P.A.  
30100 Chagrin Blvd., Suite 350  
Cleveland, OH 44124-5705  
Phone: 216-514-1100  
Fax: 216-514-0030  
Email: rolf@rolfgoffman.com  
pivonka@rolfgoffman.com

*COUNSEL FOR AMICUS CURIAE, OHIO  
HEALTH CARE ASSOCIATION*

Brant E. Poling (0063378)  
James P. Myers (0075556)  
POLING I PETRELLO  
1100 Superior Ave., Suite 1100  
Cleveland, OH 44114  
p- (216) 456-8800  
f- (216) 456-8862  
E-mail: bnolingpoling-law.com  
jmyersna poling-law.com  
*COUNSEL FOR DEFENDANT-  
APPELLANTS  
SABER HEALTHCARE GROUP, ETC.*

COUNSEL FOR APPELLEE,

COUNSEL FOR APPELLANT,



**TABLE OF CONTENTS**

	<u>Page</u>
I. STATEMENT OF THE INTEREST OF AMICUS CURIAE.....	1
II. STATEMENT OF THE CASE AND FACTS .....	1
III. SUMMARY OF ARGUMENT .....	2
IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	3
 <b><u>Proposition of Law No. 1: THE BIFURCATION REQUIREMENT CONTAINED IN REVISED CODE SECTION 2315.21 IS CONSTITUTIONAL AND MANDATORY.....</u></b>	
A. Standard for Determining the Constitutionality of R.C. 2315.21.....	5
B. Revised Code Section 2315.21(B) and Civil Rule 42(B) Do Not Conflict.....	6
C. Even If There Were a Conflict, Which There is Not, Revised Code 2315.21(B) Is Constitutional Because It Creates a Substantive Right.....	7
1. The Intent of the Legislature Is Paramount When Determining Whether a Law Creates a Substantive Right. ....	8
2. The Express Legislative Purpose of Section 2315.21(B) Is To Create a Substantive Right to Bifurcation to Address Potential Injustice. ....	9
3. The General Assembly’s Intent in Creating the Bifurcation Right is Clear when the Statue is Considered In Its Entirety. ....	11
4. The Court Should Uphold the Bifurcation Right As it Has in Other Circumstances. ....	12
5. The Eighth District’s <i>Havel</i> Decision Should be Reversed.....	14
 <b><u>Proposition of Law No. 2: THE DENIAL OF A MOTION TO BIFURCATE PUNITIVE DAMAGES PURSUANT TO R.C. 2315.21(B) IS A FINAL APPEALABLE ORDER.....</u></b>	
A. A Request for Bifurcation of Punitive Damages is a Provisional Remedy.....	17
B. Denying Bifurcation Determines the action Related to the Provisional Remedy.....	17
C. Denying Bifurcation Prevents Appealing Party from Obtaining Meaningful and Effective Relief.....	17

IV. CONCLUSION .....21  
 CERTIFICATE OF SERVICE .....22

TABLE OF AUTHORITIES

CASES

*Arbino v. Johnson & Johnson*,  
 116 Ohio St. 3d 468, 2007-Ohio-6948.....10, 12

*Armstrong v. Marusic*,  
 Lake App. No. 2001-L-232, 2004-Ohio-2594.....18

*Baby Girl Baxter*  
 (1985), 17 Ohio St.3d at 233, 17 OBR 469, 479 N.E.2d 257.....18, 19

*Boley v. Goodyear Tire & Rubber Co.*,  
 125 Ohio St. 3d 510, 2010-Ohio-2550, 929 N.E.2d 448.....9, 11

*Butler v. Rejon*  
 (Feb. 2, 2000), 9<sup>th</sup> Dist. No. 19699.....16

*Columbus Steel Castings Co. v. Transportation & Transit Associates, LLC*,  
 10<sup>th</sup> Dist. No. 06AP-1247, 2007-Ohio-6640 .....8

*Finley v. First Realty Prop. Management, Inc.*,  
 9<sup>th</sup> Dist. No. 23355, 2007-Ohio-2888.....2

*Hanners v. Ho Wah*,  
 10<sup>th</sup> Dist. No. 09AP-361, 2009-Ohio-6481.....5, 6, 10

*In re Hattery*  
 (Aug. 28, 1986), 3<sup>rd</sup> Dist. Nos. 9-85-11, 9-85-12.....13, 14

*Havel v. Villa St. Joseph*,  
 8<sup>th</sup> Dist. No. 94677, 2010-Ohio-5251.....1, 2, 3, 4, 5, 14

*State ex rel. Loyd v. Lovelady*,  
 108 Ohio St.3d 86, 2006-Ohio-161, 840 N.E.2d 1062.....5, 9, 11, 12, 13, 15

*In re McBride*,  
 110 Ohio St.3d 19, 2006-Ohio-3454.....15

*Proctor v. Kardassilaris*,  
 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872.....7, 15

<i>S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.</i> (C.A.7 1995), 60 F.3d 305 .....	9
<i>Schottenstein, Zox &amp; Dunn v. McKibben,</i> Franklin App. No. 01AP-1384, 2002-Ohio-5075.....	8
<i>Sinnott v. Aqua-Chem, Inc.,</i> 116 Ohio St. 3d 158, 2007-Ohio-5584, 876 N.E.2d 1217.....	17, 18
<i>Sirca v. Medina Cty. Dept. of Human Services</i> (2001), 145 Ohio App.3d 182, 762 N.E.2d 407.....	18
<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,</i> (2010) 130 S. Ct. 1431, 1450, 176 L. Ed. 2d 311.....	9
<i>Sheets v. Norfolk S. Corp.</i> (1996), 109 Ohio App.3d 278, 288, 671 N.E.2d 1364 .....	6
<i>State v. Cross,</i> 11 <sup>th</sup> Dist. No. 2004-L-208, 2006-Ohio-1679.....	7
<i>State v. Davidson</i> (1985), 17 Ohio St. 3d 132, 477 N.E.2d 1141.....	16
<i>State v. Muncie,</i> 91 Ohio St.3d 440, 450, 2001-Ohio-93, 746 N.E.2d 1092.....	17
<i>State ex. Rel. Sapp v. Franklin Cty. Court of Appeals,</i> 118 Ohio St. 3d 368, 2008-Ohio-2637.....	6
<i>State v. Slatter</i> (1981), 20 O.O.3d 383, 423 N.E.2d 100.....	7
<i>State v. Upshaw,</i> 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711.....	17
<i>State v. Weber</i> (1997), 125 Ohio App.3d 120, 707 N.E.2d 1178.....	13, 15
<i>Talley v. Warner,</i> (Clev. Municipal Ct. 1999), 99 Ohio Misc.2d 42, 715 N.E.2d 635.....	8
<i>Wagner v. McDaniels</i> (1984), 9 Ohio St. 3d 184, 186, 459 N.E.2d 561.....	10

<i>Williams v. Nationwide Mut. Ins. Co.</i> , 4 <sup>th</sup> Dist. No. 05CA15, 2005-Ohio-6798.....	18
--	----

STATUTES and RULES

Art. IV, §5(B) .....	3, 4, 5
R.C. 1.51.....	7
R.C. 2151.35(B)(1).....	18
R.C. 2151.414.....	13
R.C. 2315.21.....	1, 2, 3, 11, 15, 16
R.C. 2315.21(B).....	4, 5, 6, 7, 9, 14, 15
R.C. 2315.21(C) and (D).....	19
R.C. 2505.02.....	3, 4, 5, 15, 20
R.C. 2505.02(A)(3).....	16
R.C. 2505.02(B)(4).....	15, 16, 17
R.C. 3119.961 <i>et seq.</i> .....	12
Civ R. 1(B).....	7
Civ. R. 42(B).....	6, 7, 14
Civ. R. 60 .....	12
Juv.R. 34(A).....	18
S.B. 80, 150 Ohio Laws, Part V, 8021-8025.....	9, 10, 11, 16

OTHER

Black's Law Dictionary (8 <sup>th</sup> Ed. Rev. 2004).....	8
---	---

**I. STATEMENT OF THE INTEREST OF AMICUS CURIAE**

The Ohio Health Care Association (“OHCA”) represents nearly 750 nursing facilities, assisted living communities, and intermediate care facilities. These facilities, and the more than 100,000 women and men who work as long-term care professionals, provide Ohio’s elderly and disabled citizens with critical health care services, including skilled nursing, personal care, and rehabilitation. OHCA strives to identify best practices to ensure quality improvement in long-term care and to keep member facilities informed of laws and regulations governing the profession.

Because of the nature of their industry and the services they provide, OHCA’s members have a special interest in protecting themselves from being wrongfully sued or assessed unreasonable damages in tort claims. These interests are apparent as the Appellants in both this case and its companion case, *Havel v. Villa St. Joseph*, are nursing homes. Indeed, the General Assembly recognized the particular interest of nursing homes when enacting the statute at issue, R.C. 2315.21, which sets forth specific, additional requirements for proving or pursuing punitive claims against nursing facilities in section (G).

**II. STATEMENT OF THE CASE AND FACTS**

John Flynn and Judy Gordon filed suit against Fairview Village Retirement Center on behalf of the Estate of Gladys T. Feran in Cuyahoga Common Pleas Court on January 15, 2010. Case No. CV-715680. The underlying case alleges negligence related to the care of Plaintiffs’ decedent in a nursing home facility. Defendants denied all allegations of tortious conduct. The Plaintiffs also sought punitive damages.

On March 3, 2010, Defendants moved to bifurcate the claims for punitive damages pursuant to R.C. 2315.21(B). The trial court denied Defendants' Motion to Bifurcate on August 16, 2010. Defendants timely appealed to the Eighth District, which dismissed the Appeal *sua sponte* for lack of jurisdiction and, in a one-sentence decision, asserted the denial of bifurcation was not a final appealable order pursuant to R.C. 2505.02 and *Finley v. First Realty Prop. Management, Inc.*, 9<sup>th</sup> Dist. No. 23355, 2007-Ohio-2888. This Court accepted the Appeal on February 2, 2011.

Concurrent with the present case, the Eighth District upheld the denial of another nursing home's request to bifurcate punitive damages in *Havel v. Villa St. Joseph*, 8<sup>th</sup> Dist. No. 94677, 2010-Ohio-5251. In the *Havel* case, the court gave a more detailed, though equally unconvincing, reason for upholding the denial. First, the *Havel* court accepted the appeal because the denial of bifurcation was appealable because it determined the constitutionality of Ohio's Tort Reform law. However, the *Havel* court upheld the denial of bifurcation because it concluded the statutory provision was unconstitutional. The *Havel* case was accepted for review by this court as a certified conflict on February 2, 2011 (Case No. 2010-2148).

### **III. SUMMARY OF ARGUMENT**

Ohio's Revised Code *requires* that upon the motion of a party, the trial court *must* bifurcate the trial of the liability and punitive damages phases of cases such as the case below. Revised Code Section 2315.21(B)(1) states:

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.

The clear language of the statute is mandatory and the trial court has no discretion to deny bifurcation. Yet the *Flynn* and *Havel* courts both disregarded the bifurcation mandate, and the reviewing courts declined to enforce the mandate – but for different reasons. *Flynn* asserts the denial of bifurcation is not a final appealable order. *Havel* asserts the bifurcation provision is unconstitutional. Both decisions are incorrect. As addressed herein, the clear intent of the legislature in mandating bifurcation in such cases was to create a substantive right for civil litigants. Because the law creates a substantive right, the bifurcation requirement is constitutional. Further, the policies inherent in creating the bifurcation provision clearly establish that denying a motion to bifurcate punitive damages is a final and appealable order.

**PROPOSITION OF LAW NUMBER 1:**

**THE BIFURCATION REQUIREMENT CONTAINED IN R.C. 2315.21(B) IS CONSTITUTIONAL AND MANDATORY.**

The General Assembly has mandated bifurcation of punitive damages when requested by a party and the denial of such a motion is an implied determination that the statute is unconstitutional – which it is not. R.C. 2505.02(B)(6). This issue necessarily requires the Court to consider whether the General Assembly’s creation of a substantive right that involves a “procedural wrapping” runs afoul of Section 5(B), Article IV of the Ohio Constitution (The Modern Courts Amendment). Appellees essentially argue that any law implemented by the



General Assembly is unconstitutional where it touches upon procedure. This is clearly not the case. Section 5(B), Art. IV of the Ohio Constitution, grants this Court the power to prescribe rules governing practice and procedure in all courts, but also specifically prohibits those rules from modifying any substantive right. The right to bifurcation of punitive damages in a jury trial, established by the General Assembly in Section 2315.21(B)(1) (“the Bifurcation Right”), is a substantive right. Accordingly, this right cannot be modified by rules governing practice and procedure.

The Bifurcation Right is one of several measures created by the General Assembly in Section 2315.21 of the Revised Code, as part of the carefully crafted balance between the rights of individuals seeking recovery for injuries and those who have been sued. This “tort reform” statute, as a whole, includes numerous provisions addressing litigants’ rights, including: establishing limits on punitive damages, identifying the parties’ burdens of proof, requiring a finding of liability on the underlying claim before punitive damages can be considered, and creating an inviolate right to bifurcation. These provisions must be considered as a whole, and excluding the Bifurcation Right solely because it has a “procedural wrapping” undermines the overarching substantive purpose of the law.

Although not addressed by the reviewing court in *Flynn*, there can be little dispute that a trial court’s decision denying Appellant’s Motion to Bifurcate the trial is a final and appealable order because such a decision effectively determines the constitutionality of Section 2315.21(B). Ohio Revised Code 2505.02 provides in relevant part:

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

\* \* \*

(6) An order determining the constitutionality of any changes to the Revised Code made by . . . Sub. S.B. 80 of the 125<sup>th</sup> general assembly,

including the amendment of sections . . . 2315.21 . . . of the Revised Code.

(Emphasis added.) Here, Section 2315.21(B)(1) mandates that “upon the motion of any party, the trial of the tort action shall be bifurcated.” Because Appellant moved for bifurcation pursuant to Section 2315.21(B)(1), the trial court was required to bifurcate the claims as set forth in the statute. A trial court cannot ignore a statutory mandate absent a finding that the statute is unconstitutional.<sup>1</sup> See *Hanners v. Ho Wah*, 10<sup>th</sup> Dist. No. 09AP-361, 2009-Ohio-6481, ¶13; *Havel v. Villa St. Joseph*, 8<sup>th</sup> Dist. No. 94677, 2010-Ohio-5251, ¶19. By ignoring the bifurcation mandate, the trial court below necessarily determined that that Section 2315.21(B) is unconstitutional. Because the supposed unconstitutionality of Section 2315.21 is the only grounds upon which the trial court could have denied a request for bifurcation, Amicus will address the constitutionality of Section 2315.21 herein.

**A. Standard for Determining the Constitutionality of Revised Code Section 2315.21.**

Section 5(B), Article IV of the Ohio Constitution, also known as the Modern Courts Amendment, provides:

The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right....Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

---

<sup>1</sup> In this case, the lower courts made no such finding on the record. Instead, the Appellate Court cited a Ninth District Court of Appeals decision that completely ignored the mandate of Revised Code 2315.21(B), relying on case law that a Rule 42 motion to bifurcate is not final and appealable. The absence of any analysis of the statute should result in the reversal of the underlying decisions in *Flynn* denying bifurcation.

This provision of the Constitution helps to ensure a separation of powers between the legislative and judicial branches of Ohio's government. See, e.g., *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, 840 N.E.2d 1062 at ¶¶5, 15.

It is well established that “[w]here a conflict arises between a rule and a statute, the court’s rule prevails on procedural matters; the General Assembly’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. Accordingly, to determine whether Section 2315.21(B) infringes on the exclusive authority of the Ohio Supreme Court to prescribe rules for court practice and procedure, this Court must determine: (1) whether there is a conflict between the statute and Civil Rule 42(B) and, if so, (2) whether the Bifurcation Right is substantive or procedural. *Hanners*, 2009-Ohio-6481 at ¶13. Under this framework, if there is no conflict between Rule 42(B) and the Bifurcation Right, the Bifurcation Right is constitutional.

**B. Revised Code Section 2315.21(B) and Civil Rule 42(B) Do Not Conflict.**

Revised Code Section 2315.21(B) provides a right to bifurcation in certain, narrow circumstances: in a tort action, where a party seeks both compensatory and punitive damages, the case is tried to a jury, and one party seeks bifurcation. Civil Rule 42(B), on the other hand, generally applies to all civil cases and relates to bifurcation 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.” Thus, the only circumstance where the Bifurcation Right would potentially intersect with the general Rule 42(B) is if: (1) civil claim

alleging punitive damages is filed; (2) a jury trial is requested; (3) one of the parties to the action moves for bifurcation; and (4) the trial court chooses to deny the motion.<sup>2</sup>

The specific Bifurcation Right should prevail over the generalized civil rule addressing bifurcation. It is a well established principle of statutory interpretation that, where possible, general provisions and narrowly tailored statutes should be construed to give effect to both provisions. However, if there is an irreconcilable conflict between the two, “the special or local provision prevails as an exception to the general provision...” R.C. 1.51. Rule 42 is a general provision, simply restating the common law standards allowing a court to reasonably conduct proceedings. See, e.g. Civ. R. 1(B). Ohio courts have found that statutes providing specific requirements do not conflict with more general discretionary rules of court. See e.g. *State v. Cross*, 11<sup>th</sup> Dist. No. 2004-L-208, 2006-Ohio-1679 (upholding a statute regarding the admissibility of sobriety tests as not in conflict with the Rules of Evidence); cf. *State v. Slatter* (1981), 20 O.O.3d 383, 423 N.E.2d 100, 104 (upholding specific local procedural rules as harmonious with more general statutory provisions). Because Section 2315.21(B) is a specific provision directed to narrowly-tailored circumstances, it does not conflict with the broader discretion provided to the trial court in Rule 42(B).

Accordingly, inasmuch as there is no conflict between the Bifurcation Right in Section 2315.21(B) and Rule 42(B), Section 2315.21(B) is not unconstitutional. It was reversible error for the trial court to ignore the bifurcation mandate contained in Section 2315.21(B), and for the appellate court to fail to exercise its jurisdiction over the trial court’s order and enforce the statute.

---

<sup>2</sup> Revised Code Section 2315.21(B) provides that the trial “shall be bifurcated” in accordance with the specific requirements of the statute; Rule 42(B) allows a trial court to order separate trials of separate issues within in its discretion. *Sheets v. Norfolk S. Corp.* (1996), 109 Ohio App.3d 278, 288, 671 N.E.2d 1364.

**C. Even If There Were a Conflict, Which There is Not, Revised Code 2315.21(B) Is Constitutional Because It Creates a Substantive Right.**

Even if there were a conflict between Section 2315.21(B) and Rule 42(B), (which there is not), the Bifurcation Right still would be constitutional because it is a substantive right. The Supreme Court has defined “substantive,” for purposes of determining whether a statute is substantive or procedural, 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, 873 N.E.2d 872, ¶ 17, quoting *Krause v. State* (1972), 31 Ohio St.2d 132, 285 N.E.2d 736, *overruled on other grounds*, *Schenkolewski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St.2d 31, 426 N.E. 2d 784, syllabus ¶ 1. Procedural law is defined as rules governing the steps for enforcing a right. Black’s Law Dictionary (8<sup>th</sup> Ed. Rev. 2004) 1241. See, e.g., *Talley v. Warner*, (Clev. Municipal Ct. 1999), 99 Ohio Misc.2d 42, 715 N.E.2d 635, 638-39 (finding that statute purporting to allow service of process by ordinary mail, rather than certified mail, was procedural).

**1. The Intent of the Legislature Is Paramount When Determining Whether a Law Creates a Substantive Right.**

Despite these definitions, courts have consistently recognized that the line between substantive rights and procedural rules is difficult, if not impossible, to discern from the face of a statute. Consequently, courts must view the statute in light of its legislative purpose:

Such definitions, however, presuppose that the demarcation between substantive law and procedural law is mutually exclusive. See, e.g., *Ludenburg v. Port Auth. of Allegheny Cty.* (1981), 496 Pa.52, 56-57, 436 A.2d 147, appeal dismissed (1982) sub. nom. *Buchheit v. Laudenberg* (1982), 456 U.S. 940, 102 S.Ct. 2002. “Procedural law is undeniably an integral thread in the fabric of the law. As threads are woven into cloth, so does procedural law interplay with substantive law. Together, they create a cohesive whole. However, it is this very proximity which often leads to difficulty in identifying one thread as procedural and another as substantive.” *Laudenberg*, at 57. “The tacit assumption that the precise point at which the line between the two is to be drawn is the same for all purposes . . . is of course connected with the other assumptions . . .

namely, that the “line” is to be “discovered” rather than “drawn” and that it cannot be located without keeping in mind the purpose of the classification. If once we recognize that the “line” can be drawn only in the light of the purpose in view, it cannot be assumed without discussion that as our purposes change the line can be drawn at precisely the same point.” *Id.* at 57-58, quoting W. Cook, *Logical and Legal Bases of the Conflict of Law* (1942) 158-159.

*Columbus Steel Castings Co. v. Transportation & Transit Assocs., LLC*, 10<sup>th</sup> Dist. No. 06AP-1247, 2007-Ohio-6640 at ¶ 65 (emphasis added). The often blurred overlap between substantive and procedural statutes also has been recognized by the U.S. Supreme Court. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1450, 176 L. Ed. 2d 311 (Stevens, J. concurring) (2010) (finding that the line between procedural and substantive law is hazy and so interwoven that the rational separation is near impossible) (citing (1938), *Erie R. Co. v. Tompkins*, 304 U.S. 64, 92, 58 S.Ct. 817, 82 L.Ed. 1188 (Reed, J., concurring) and *Cohen v. Beneficial Indus. Loan Corp.* (1949), 337 U.S. 541, 559, 69 S.Ct. 1221, 93 L.Ed. 1528 (Rutledge, J., dissenting)). See also *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.* (C.A.7 1995), 60 F.3d 305, 310 (Posner, J) (“state procedural rules, though undeniably ‘procedural’ in the ordinary sense of the term,” may exist “to influence substantive outcomes”).

As this Court has previously noted, when interpreting a statute, its “paramount concern is the legislative intent in enacting the statute.” *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St. 3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 20 quoting *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 29; and *State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St. 3d 86, 2006-Ohio-161, 840 N.E. 2d 1062 at ¶13 (quoting *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, 821 N.E.2d 180, ¶ 16). Accordingly, to determine whether a statute is substantive or procedural in nature, the Court must consider the General Assembly’s purpose in enacting the statute.

## **2. The Express Legislative Purpose of Section 2315.21(B) Is To Create a Substantive Right to Bifurcation to Address Potential Injustice.**

The General Assembly enacted Section 2315.21(B) of the Revised Code as part of a larger effort to establish a balance between the rights of the injured with those who are unfairly sued. Uncodified S.B. 80, at Section 3(A)(2). The General Assembly enacted the law to reform a tort system it found had resulted in (1) “inflation of noneconomic damages in part due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages,” (2) “improper resolution of civil justice claims,” and (3) a “rise in insurance premiums [that] is passed on to the general public through higher prices for products and services.” S.B. 80, Section 3(A)(1) through (3), (4)(a) and (b), (6)(d)-(f), 150 Ohio Laws, Part V, 8021-8025. See also *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 at ¶¶ 54, 100.

In light of this broad purpose, the General Assembly’s specific stated intent in creating the Bifurcation Right was to permit parties 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). *Hanners*, 2009-Ohio-6481 ¶27. This stated purpose of the Bifurcation Right directly corresponds with two of three stated risks that Section 2315.21 was enacted to address. Specifically, it helps prevent the inflation of damages due to the improper consideration of evidence and the improper resolution of claims.

And while the bifurcation right appears to be more in the interest of a defendant, this too corresponds with the stated purpose of balancing the rights of the injured with those of the unfairly sued. As has been repeatedly recognized by this Court and others, the purposes of punitive damages are to: “(1) to punish the wrongdoer, and (2) to deter others from similar conduct.” *Wagner v. McDaniels* (1984), 9 Ohio St. 3d 184, 186, 459 N.E.2d 561, 564 citing *Atlantic & G.W. Ry. Co. v. Dunn* (1869), 19 Ohio St. 162, 170. In this respect, punitive damages

are more akin to criminal sanctions than to civil damages. *Arbino*, at ¶ 94 citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 433, 121 S.Ct. 1678, 149 L.Ed.2d 674, and *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809. Because punitive damages are more akin to criminal fines than civil damages, protecting the rights of the accused are even more important.

Because the Bifurcation Right is an integral part of the General Assembly's stated intent in creating Section 2315.21, it clearly is a substantive right. See e.g. *Lovelady*, 2006-Ohio-161 at ¶ 14 (upholding a statute "packaged in procedural wrapping" based on the statement of purpose issued by the General Assembly).

### **3. The General Assembly's Intent in Creating the Bifurcation Right is Clear when the Statute is Considered In Its Entirety.**

The intent of the bifurcation right is apparent not only by looking at the expressed intent of the General Assembly, but also by considering it as part of the entire tort reform law. It is well established that when in interpreting a statute, the Court should evaluate it as a whole, and interpret it in a way "as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *Boley*, 2010-Ohio-2550 at 21, citing *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.* (1917), 95 Ohio St. 367, 373, 116 N.E. 516 and *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079. Therefore, the right to bifurcation should not be considered in isolation, but should be viewed in conjunction with all of the other provisions contained in Section 2315.21. By reviewing the bifurcation provision in the context of the entire statute, it is clear that it provides a substantive right.



As stated above, Section 2315.21 was enacted to achieve a balance between the rights of the injured with those who are unfairly sued. Uncodified S.B. 80, at Section 3(A)(2). In creating this balance, the General Assembly established several rights, limitations, and exceptions. These include: requiring that separate findings be made by the fact-finder regarding the amount of compensatory damages and punitive damages; limiting punitive damages to instances of malice, or aggravated or egregious fraud; capping the amount of damages that can be assessed; establishing that the plaintiff's burden of proof for punitive damages is by clear and convincing evidence; and allowing either party to bifurcate punitive damage claims. Considered as parts of a unified whole, these various provisions demonstrate that the General Assembly put a great deal of thought into striking this balance of interests in enacting Section 2315.21. *Arbino*, at ¶103. To strike any one of these rights because it is "procedural" would risk upsetting the carefully planned balancing of the parties' rights.

Simply put, Revised Code Section 2315.21 has already been upheld as constitutional by this Court. The Court should consider the statute in its entirety, and give effect to every provision. Because the bifurcation right in subsection (B) is an integral part of the statute as a whole, it must be read as substantive.

#### **4. The Court Should Uphold the Bifurcation Right As it Has in Other Circumstances.**

In reviewing another potential conflict between a statute and a procedural rule, this Court considered the legislative intent by the statute and concluded that the law created a substantive right. In *State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St. 3d 86, 2006-Ohio-161, 840 N.E. 2d 1062, this Court was presented with the issue of whether R.C. 3119.961, *et seq.*, established a procedural right in violation of the constitutional separation of powers. These sections set forth a right for an individual to obtain relief from a final judgment requiring payment of child support.

Noting that “a court’s principal concern is the legislative intent in enacting the statute,” this Court upheld the statutory substantive rights provided in Sections 3119.961, *et seq.*, even though such rights arguably conflicted with the procedural provisions in Civil Rule 60. *Id.* at ¶13 (quoting *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, 821 N.E.2d 180, ¶ 16). The Court concluded that, although the statutory provisions were “*necessarily packaged in procedural wrapping, it is clear to us that the General Assembly intended to create a substantive right to address potential injustice.*” *Lovelady*, at ¶¶14-15 (emphasis added).

Further, the Court has upheld other laws as substantive that were facially procedural where they created a right that did not previously exist. In *State v. Weber* (1997), 125 Ohio App.3d 120, 707 N.E.2d 1178 (discretionary appeal not allowed, (1998) 81 Ohio St. 3d 1521), the Court considered the constitutionality of a statute requiring courts to advise non-citizen defendants of deportation consequences of a guilty plea, and mandating that defendant be allowed to withdraw a guilty plea if the statutory advisement was not given. The court held that, “[w]hile generally dealing with what purports to be a matter of procedure, *i.e.*, the acceptance and withdrawal of guilty pleas, the statute also creates specific substantive rights where no such rights existed before.” *Id.* at 1186.

Here, like the statute at issue in *Weber*, Revised Code Section 2315.21(B) creates a substantive right to a bifurcated jury trial where no such right existed before. That is, prior to the enactment of Section 2315.21(B), parties could seek bifurcation by filing a motion pursuant to Rule 42(B). The trial court had discretion to grant the motion – but there was no inviolate right to a bifurcated trial. Under Section 2315.21(B), parties now have an unfettered right to bifurcation upon their request in a tort action tried to a jury, which cannot be denied by a court.

In another bifurcation case, *In re Hattery* (Aug. 28, 1986), 3<sup>rd</sup> Dist. Nos. 9-85-11, 9-85-12, an Ohio Appellate Court considered whether bifurcation was a procedural or substantive issue in the context of a different statute, R.C. 2151.414.<sup>3</sup> The court determined that that statute regarding bifurcation was substantive, because it not only set forth rules for bifurcation of the issues to be presented, but also articulated the substantive issues the court must address before considering a damage award:

It appears to this court that R.C. 2151.414 is not procedural, but, rather, is substantive in nature. . . . *Rather than describing mere procedure which the State must follow to gain permanent custody, R.C. 2151.414 sets forth the specific “substantive” issues the court must determine before granting the motion.* In contrast, the case cited in *In re Vickers Children* (1983), 14 Ohio App.3d 201, for support of its procedural definition referred to the time for filing a petition for the removal of an action from another court to the Court of Claims. *Jacobs v. Shelly & Sand, Inc.* (1976), 51 Ohio App.2d 44. Such time requirements are often classified as procedural. In contrast, R.C. 2151.414 creates, defines and regulates the rights of the parties in a hearing for permanent custody, rather than being limited to the method of enforcing those rights.

*Id.* (Emphasis added).

Like the statute in *In re Hattery, supra*, Ohio Revised Code Section 2315.21(B) addresses substantive issues the court (and a jury) must determine *before* considering punitive damages. Specifically, Section 2315.21(B) requires a substantive finding by the jury that the plaintiff is entitled to compensatory damages before a jury may even consider a claim for punitive damages, thereby regulating the right of the plaintiff to seek punitive damages.

##### **5. The Eighth District’s *Havel* Decision Should be Reversed.**

The Eighth District Court of Appeals in *Havel*, 2010-Ohio-5251 ¶ 29, wrongly and hastily concluded that Section 2315.21(B) is unconstitutional. The *Havel* court concluded that the statute “plainly and unambiguously regulates the procedure at trial” without considering the

---

<sup>3</sup> In *Hattery*, the court was confronted with the opposite bifurcation issue as it is here: the statute granted the court discretion as to bifurcation while the Rules of Juvenile Procedure rendered bifurcation mandatory.

stated intent of the General Assembly or the purpose of the statutory scheme as a whole. The *Havel* court's conclusion – that Section 2315.21(B) is procedural – appears to be based solely upon the fact that the matter of bifurcation is addressed by Rule 42(B). By that definition, any statute that touches upon a civil rule would always be deemed procedural, which is not the case. Rather, courts have scratched below the surface and found statutes to be substantive that at first blush might have appeared procedural. See, e.g., *Loyd*, 2006-Ohio-161 at ¶¶7-15 (holding Modern Courts Amendment will not invalidate statutes that “are necessarily packaged in procedural wrapping [where] it is clear . . . that the General Assembly intended to create a substantive right to address potential injustice”); *Weber*, 707 N.E.2d at 1186 (“While generally dealing with what purports to be a matter of procedure, *i.e.*, the acceptance and withdrawal of guilty pleas, the statute also creates specific substantive rights where no such rights existed before.”); *In re McBride*, 110 Ohio St.3d 19, 2006-Ohio-3454, at ¶¶ 12-14 (holding that statutes governing termination of parental rights that conflicted with Rules of Juvenile Procedure is controlling because statutes limited substantive rights of parents); *Kardassilaris*, at ¶¶ 16-23 (holding that statute governing *where* state director of transportation can be sued, which conflicted with Rules of Civil Procedure, is controlling because statute provides state with substantive right to be free from suit elsewhere).

As is the case with this line of cases, the intent of the General Assembly in creating the Bifurcation Right, was that it be substantive. Accordingly, Revised Code Section 2315.21(B) is constitutional.

**PROPOSITION OF LAW 2:**

**THE DENIAL OF A MOTION TO BIFURCATE PUNITIVE DAMAGES IS A FINAL APPEALABLE ORDER.**

Even if the language of Section 2315.21 was not mandatory, the denial of a request to bifurcate punitive damages is an order relating to a provisional remedy from which the moving party has no other adequate relief. R.C. 2505.02(B)(4). Revised Code Section 2505.02 lists the types of final orders that are subject to appeal. This list specifically includes orders that (1) determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party; and (2) prevent the appealing party from a meaningful or effective remedy by appeal following final judgment as to all the proceedings, issues and claims. R.C. 2505.02(B)(4). The denial of a request for bifurcation of punitive damage claims is such a provisional order. When a party requests the bifurcation of punitive claims in a jury trial, the party is seeking to split the presentation of the case to the jury into theories of liability and theories of punishment. A trial court's refusal to bifurcate the presentation of the claims could result in the jury inappropriately determining the merits of remedial claims based on evidence relevant only to punishment. On Appeal, it may be impossible to untangle any jury bias resulting from prejudicial evidence that affects its verdict on the remedial tort, therefore denying meaningful or effective relief for the defendant.<sup>4</sup>

**A. A Request for Bifurcation of Punitive Damages is a Provisional Remedy.**

---

<sup>4</sup> The risk of a jury being improperly biased by the ability to pay is implicitly recognized by R. Evid. 411, which prohibits the introduction of liability insurance on the issue of whether an actor was negligent. See also *Butler v. Rejon* (Feb. 2, 2000), 9<sup>th</sup> Dist. No. 19699 (upholding the decision to bifurcate claims against an insurer as its presence at the trial relating the underlying claims against its insured would be highly prejudicial).

A provisional remedy is defined as “a proceeding ancillary to an action including, *but not limited to*, a proceeding for preliminary injunction, attachment, discovery of a privileged matter, suppression of evidence, [etc.]....” R.C. 2505.02(A)(3) (emphasis added). A motion to bifurcate is, in essence, a motion to suppress evidence. *See e.g. State v. Davidson* (1985), 17 Ohio St. 3d 132, 132, 477 N.E.2d 1141, 1142, Syllabus (recognizing that a motion, however labeled, that results in suppression of evidence is final and appealable). The procedural result of bifurcating punitive claims until after liability has been assessed is that in cases where no liability is found, certain evidence will never be presented to the jury. Indeed, the exclusion of prejudicial evidence is the very essence of the Bifurcation Right. S.B. 80 Section 3(A)(4)(b)(ii) (identifying one purpose of enacting Section 2315.21 is previous awards of punitive damages with no rational connection to the tortfeasors’ wrongful actions). Accordingly, because the bifurcation of punitive damage evidence is intended to suppress evidence, it is a “provisional remedy” as defined by the statute.

### **B. Denying Bifurcation Determines the Provisional Remedy.**

When a trial court denies a motion to bifurcate punitive damages, the trial proceeds with evidence related to punitive damages presented concurrently with evidence of the underlying tort claims. In other words, the denial of bifurcation determines the moving party’s provisional remedy to have punitive damage claims segregated. In considering subsection (a) of Section 2505.02(B)(4), this Court has ruled that “the statute clarifies that the trial court’s order need not determine the action overall but must simply determine the action *as it relates to the provisional remedy itself*.” *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St. 3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 20 (determining that an appeal of the prima facie ruling regarding an asbestos claim is final and appealable)(emphasis added), citing *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-

4253, 852 N.E.2d 711, ¶ 17 (upholding an order finding defendant incompetent determined the action with respect to competency proceeding), and *State v. Muncie*, 91 Ohio St.3d 440, 450, 2001-Ohio-93, 746 N.E.2d 1092 (upholding an order that determined action with respect to petition for forced medication). Here, denying the motion to bifurcate will result in the multiple issues and the corresponding evidence being presented to the jury at once. Defendants will have no opportunity to address bifurcation again. Accordingly, the denial of a motion to bifurcate “determines the action related to the provisional remedy” and, therefore, meets the first requirement of a final order relating to a provisional remedy.

**C. Denying Bifurcation Prevents Appealing Party from Obtaining Meaningful and Effective Relief.**

The second requirement for a provisional remedy order to be a final and appealable order is that it deny the moving party meaningful, effective relief. R.C. 2505.02(B)(4)(b). In the case of a motion for bifurcation, the moving party seeks to prevent the jury from hearing evidence solely related to the claim of punitive damages when determining liability for compensatory and exemplary damages. Because this evidence poses a risk of bias that may not be corrected or apparent through subsequent appeal, denying bifurcation prevents the moving party from obtaining meaningful and effective relief on appeal. As this Court has previously stated:

In considering this requirement, we have noted that there are times when “a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment.” *Muncie*, 91 Ohio St.3d at 451, 746 N.E.2d 1092. In so holding, we recognized that “[i]n some instances, ‘[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage’ suffered by the appealing party.” *Id.*, quoting *Gibson-Myers & Assoc. v. Pearce* (Oct. 27, 1999), Summit App. No. 19358, 1999 WL 980562.

*Sinnott*, 2007-Ohio-5584 at ¶23 (emphasis added), see also *Williams v. Nationwide Mut. Ins. Co.*, 4<sup>th</sup> Dist. No. 05CA15, 2005-Ohio-6798; *Sirca v. Medina Cty. Dept. of Human Services* (2001),

145 Ohio App.3d 182, 762 N.E.2d 407 (holding that a trial court's denial of motion for protective order as to medical records and testimony of treating mental health professionals was final appealable order); *Armstrong v. Marusic*, Lake App. No. 2001-L-232, 2004-Ohio-2594 (holding that a court's order allowing plaintiff to inspect information containing defendant's trade secrets was final appealable order because once information was disclosed, defendant would not have an effective remedy), and; *Schottenstein, Zox & Dunn v. McKibben*, Franklin App. No. 01AP-1384, 2002-Ohio-5075 (holding that a court's order allowing discovery of attorney's client file was final appealable order because no meaningful relief is possible once information is disclosed).

Indeed, the Court has previously determined that the refusal to bifurcate a proceeding is a final and appealable order. *See Baby Girl Baxter* (1985), 17 Ohio St.3d at 233, 17 OBR 469, 479 N.E.2d 257 (finding that a trial court's failure to bifurcate proceedings, as required both by R.C. 2151.35(B)(1) and Juv.R. 34(A) constitutes reversible error). In *Baby Girl Baxter*, the Court recognized that the statutory and procedural requirement of bifurcation was necessary because the issues raised in the two phases are different. Specifically, the adjudicatory stage of a dependency case determines whether petitioner has proven, by clear and convincing evidence, that the child is in fact dependent. On the other hand, the dispositional stage involves a determination of what is in the child's best interests. *Id.* at 233. Because the evidence, interests, and burden of proof in the two phases is different, they cannot be combined.

Likewise, the admission of evidence relating to claims for punitive damages *before* the jury has made a determination on the underlying claim, is a bell that cannot be "unrung." In Revised Code Section 2315.21, the General Assembly made it clear that punitive damages cannot apply unless the trier of fact *first* finds liability for a remedial tort. This segregation of the punitive claims is a reoccurring theme throughout the statute. Sub-section (C) prohibits any



award of punitive damages without a finding of malice, a verdict or separate determination of liability for compensatory claims, and the amount of those claims. Sub-section (D) requires the finder of fact to make a separate determination on the amount of punitive damages awarded, and provides specific evidentiary factors that can be considered in making the award. In order to ensure that the jury's finding of liability for a compensatory claim is free from the taint of evidence solely related to punitive damages, the statute also provides *either party* the right to seek bifurcation of evidence related to punitive claims. This right is important because, when exercised, it helps both sides ensure that the remedial claims have been determined based on relevant evidence and are not contaminated by unrelated and highly prejudicial evidence.

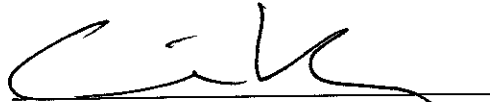
The risk of prejudice arising from consideration of inappropriate evidence is readily apparent when we consider the specific example of nursing homes. The organizations operating nursing homes can vary from 80-facility for-profit corporations to single facility family-owned businesses, with balance sheets to match. These differences in net worth have no bearing on the question of whether a nursing home failed to provide appropriate care ( i.e., is liable for a resident's injury). Yet it is not difficult to imagine that a jury would be more likely to find against a facility that is able to pay and in favor of one that is not – regardless of its findings related to punitive damages. This concern was at the heart of the General Assembly's creation of the Bifurcation Right. Thus, the denial of bifurcation of punitive damages “prevents the appealing party from obtaining meaningful and effective relief” and, therefore, meets the second requirement of the provisional remedy final order law.

Accordingly, inasmuch as denying a motion to bifurcate punitive damages satisfies all of the elements of a final and appealable order under Revised Code Section 2505.02, the decision of the appellate court that the denial of bifurcation was not appealable, should be reversed.

IV. CONCLUSION

For the foregoing reasons, Amicus respectfully request that this Court reverse the order the appellate court finding that the trial court's order was not a final and appealable order and reverse the order of the trial court denying Appellant's Motion to Bifurcate.

Respectfully submitted,



ROBERT C. PIVONKA (0067311)  
CHRISTOPHER G. KUHN (0082822)  
*COUNSEL FOR AMICUS CURIAE,  
OHIO HEALTH CARE ASSOCIATION*

CERTIFICATE OF SERVICE

I certify that a copy of this Merits Brief of Amicus Curiae, Ohio Health Care Association, has been served upon the following persons, by Regular U.S. Mail on this 11<sup>th</sup> day of April, 2011:

David Krause (0070577)  
Joyce Carlozzi (0038936)  
SEMAN GARSON, LLC  
1600 Rockefeller Bldg.  
614 West Superior Ave.  
Cleveland, Ohio 44113  
E-mail: dhkrausegseamangarson. com  
j carlozzigseamangarson. com  
*COUNSEL FOR PLAINTIFFS-APPELLEES*  
*JOHN T. FLYNN, ETC.*

Brant E. Poling (0063378)  
James P. Myers (0075556)  
POLING I PETRELLO  
1100 Superior Ave., Suite 1100  
Cleveland, OH 44114  
*COUNSEL FOR DEFENDANT-APPELLANTS*  
*SABER HEALTHCARE GROUP, ETC.*



CHRISTOPHER G. KUHN (0082822)  
*COUNSEL FOR AMICUS CURIAE,*  
*OHIO HEALTH CARE ASSOCIATION*