ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2010-1881

JOHN T. FLYNN, et al., Plaintiffs-Appellees, vs. FAIRVIEW VILLAGE RETIREMENT COMMUNITY, LLC, etc., et al., Defendants-Appellants.	)	On Appeal from the Cuyahoga County Court of Appeals, Ohio Eighth Appellate District Court of Appeals Case No. 10 CA 095695

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF THE FLYNN APPELLEES

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INTERESTS OF *AMICUS CURIAE* OHIO ASSOCIATION FOR JUSTICE

The Ohio Association for Justice ("OAJ") is Ohio's largest professional association of attorneys dedicated to representing injured persons. In this role, the Association frequently files Amicus briefs in this Court advocating the interests of injured persons or aggrieved consumers. Where the elderly and infirm are concerned, as is the case in litigation involving nursing homes, the Association recognizes a heightened need for advocacy of the interests of this vulnerable segment of society. OAJ also participates in cases pending in this Court to illustrate concerns for the health of the civil justice system in Ohio. The Appellants in this case filed motions not to bifurcate the trial, but to bifurcate the "claims." These motions were filed with the Defendants' Answers, and before an initial case management conference had even been *scheduled.* Then the Appellants took two appeals from the denial of a motion that was at very best premature. In fact, a motion to bifurcate "claims" is not recognized by any Civil Rule or statute.

Appellants and their *Amici* see this case as involving the protection of a procedure enacted as part of so-called "tort reform." OAJ submits that on this exact procedural posture, the real concern is abuse of process. If an appeal lies in this case, it lies in every single case where punitive damages are pleaded. And it lies before any discovery is had, before a single pre-trial is had, and before the trial court has any opportunity to weigh whether two separate phases of trial will be necessary as contemplated by the bifurcation statute. This is certainly not what the General Assembly intended in the enactment of R.C. 2315.21(B).

The only thing the Appellants have accomplished by pursuing this appeal is to delay justice for the family of a nursing home resident who died at the age of 83. Just as this Court would disapprove of a meritless claim, this case illustrates a meritless defense tactic. OAJ asks this Court to send a clear message of disapproval.

There are three dispositive facts on the record before this Court. The first is that the Motions to Bifurcate did not request that the eventual *trial* would be bifurcated. These Motions asked instead for the bifurcation of the Plaintiffs' "claims."

The second is that the motions for bifurcation were filed with the Defendants-Appellants' Answers. The parties and the trial court had not even begun the discussion of what issues would be headed to trial, as no initial pre-trial had even been scheduled.

Third, the Plaintiffs-Appellees never asserted that the bifurcation statute is unconstitutional. Instead, their opposition focused on the fact that no bifurcation of "claims" is contemplated by any statute or rule, and that even the bifurcation statute requires the same jury to decide both the compensatory and the punitive phases of trial. R.C. 2315.21(B)(1)(b). The Plaintiffs rightly argued that discovery therefore had to proceed as normal on all aspects of their claims, including those that might support an award of punitive damages. The only alternative would be for a new discovery stage to begin after trial, in the event that the trial court awarded compensatory damages. This is obviously not what the bifurcation statute contemplates, and would be an obvious waste of parties' time and judicial resources.

The trial court correctly denied motions that requested relief not contemplated by any statute or rule. The Court of Appeals correctly dismissed *sua sponte* for lack of a final, appealable order. Counsel for the moving Defendants still pursued this appeal.

ARGUMENT

There is no good faith argument supporting either a bifurcation of "claims," or an immediate appeal of a motion that is not permitted by Rule or statute. The *Amici* supporting the Appellants in this case would have done well to review the record of this case prior to expressing their ardor for "tort reform." Public discourse resounds with complaints of "frivolous lawsuits." This case illustrates a frivolous defense tactic.

The Appellants have pursued two appeals from a motion to bifurcate "claims." No such relief is contemplated by Civil Rule 42, nor by R.C. 2315.21. The issue of whether issues that would give rise to punitive damages should be tried separately cannot mature for the trial court to decide it until discovery is had, and at least one pre-trial conference allows the court and the parties to talk about the trial. By filing the motions to bifurcate with the Defendants' Answers, Counsel for the Appellants has interrupted that process. By pursuing appeals, Appellants have guaranteed the longest interruption possible.

In relevant part, the bifurcation statute 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.

R.C. 2315.21(B) (emphasis added). Civil Rule 42 also provides the trial court discretion to bifurcate

any issue in a trial in order to avoid undue prejudice to a party.

But Appellants asked for relief in this case that is not contemplated by either the statute or the rule. As aptly illustrated by the Appellees, the bifurcation of "claims" could not possibly be consistent with R.C. 2315.21(B)(1)(b), which provides for one jury to hear the case.

This case does not concern the constitutionality of R.C. 2315.21(B). The better reasoned approach on that issue is as stated in *Havel v. Villa St. Joseph*, 8th Dist., 2010-Ohio-5251, *accepted for review*, 2011-Ohio-376, 940 N.E.2d 985. *See also Myers v. Brown*, 5th Dist., 2011-Ohio-892. Those issues are under review, in other cases.

But that issue does not arise here for the simple reason that the Plaintiffs did not raise it. Instead of pleading constitutionality, the Appellees argued in essence that the bifurcation of "claims" was not allowed by either statute or Rule, and further would make no sense. There is therefore no conceivable basis for appellate jurisdiction. By contrast, where constitutionality is raised, the issue of appellate jurisdiction also arises. *Havel*, 2010-Ohio-5251, ¶ 27; *Myers*, 2011-Ohio-892, ¶¶ 15-17.

Appellate jurisdiction lies only over orders that are final. Ohio Constitution, Section 3(B)(2), Article IV; R.C. 2501.02. If a judgment is not final, an appellate court has no jurisdiction to review the matter and it must be dismissed. *Prod. Credit Assn. v. Hedges* (1993), 87 Ohio App.3d 207, 210, 621 N.E.2d 1360. There is no conceivable basis for appellate jurisdiction in this case.

CONCLUSION

The Appellants motions to bifurcate "claims" were denied because they were non-entities. Their appeal to the Eighth Appellate District was correctly dismissed *sua sponte* because that court had no jurisdiction. Unfortunately it appears that only one thing is accomplished by pursuing an immediate appeal of a motion not contemplated by rule or statute, but that is filed along with a

defendant's answer: delay.

Amicus Curiae the Ohio Association for Justice asks that this Court send a clear message regarding the tactics employed in this case.

Respectfully submitted,

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A copy of this brief was served by First Class U.S. Mail this 31st Day of May, 2011, upon:

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