OAJ Insurance Law Section Article January 2014

HAVEL V. VILLA ST. JOSEPH: A Trial without a Roadmap

By: Hon. Frank G. Forchione, The Court of Common Pleas Stark County, Canton, OH

On February 18,2012, the Ohio Supreme Court in the case of *Havel* v. *Villa St. Joseph*, 131 Ohio St.3d 235, upheld an important part of the Tort Reform Bill enacted in 2005 which requires a trial to be split into two phases - or "bifurcated" - when a party files a complaint seeking both compensatory and punitive damages. By a 5 -2 vote, the Court's majority held that the Ohio Assembly intended the bifurcation provision to be a substantial right and was therefore not an unconstitutional encroachment on the Court's powers to set procedural rules. Under the holding, trials must now be held pursuant to the statute. The end result strips away the trial court's discretion to decide on a case-by-case basis whether bifurcation is warranted. In turn, if a jury finds that a party is entitled to punitive damages, the trial court is now required to conduct an additional trial on punitive damages. Unfortunately, the decision leaves the trial court with many unanswered questions as to how the second trial should proceed - and additional anticipated litigation to fill in the gap.

In *Havel*, the Ohio Supreme Court examined the language in both R.C. 2315.21(B) and Civ.R. 42(B) which offer conflicting views on whether the trial of a tort action should be bifurcated for purposes of addressing claims for compensatory and punitive damages.

Civil Rule 42(B) provides that:

> 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."

Civ.R. 42(B) (Emphasis added.)

On the other hand, R.C. 2315.21(B) only addresses the specific instance of bifurcation of a claim for punitive damages in tort actions:

(B) 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 recovery 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 language inserted in both the statute and civil rule fosters ambiguity. Civ.R. 42(B) vests the trial court with the power to order separate trials, while R.C. 2315.21(B) requires the trial court to bifurcate the trials upon the motion of any party. Observing this inconsistency, the Ohio Supreme Court in *Havel* focused on the constitutionality of the statute, stating that it "depends upon whether the statute is a substantive or procedural law. "The Supreme Court pointed out that substantive law "refers to common law, statutory and constitutionally recognized rights" whereas procedural law "prescribes methods of enforcement of rights or obtaining redress." Thus, the Supreme Court reasoned that classification of substantive or procedural law depends on whether the statute creates a right.

The Ohio Supreme Court considered other statutes that conflicted with the Civil Rules (i.e. R.C.
2945.68, which grants appellate courts the discretion to allow the state to file a bill of exception in a criminal matter and R.C. 2945.42 which conferred upon an accused in a criminal trial the right to exclude privileged spousal testimony) while centering their analysis on the operative effect of the statute – which creates a right of bifurcation. As a result, the Ohio Supreme Court found that R.C. 2315.21(B) created a substantive right to bifurcation in tort actions when claims for compensatory and punitive damages have been asserted since they create, define and regulate an enforceable right to separate stages of trial relating to the presentation of evidence. Therefore, the *Havel* court held R.C. 2315.21(B) takes precedent over Civ.R. 42(B) and does not violate the Ohio Constitution.

The result of the Havel decision places the trial court in the same position of the dog who chases his tail and then catches it. What do we do now? As Justice Pfeiffer asked in the oral arguments:

"How is this gonna work, bifurcation - if the jury comes back and says yes there are compensatory - and punitives have been pled and up to that point not knocked out, so they're still alive in the case - once the jury comes back, does the Judge say, ok tomorrow morning be back in the courthouse - and will begin the punitive part of the case?"

The uncertainty of the bifurcation statute places burdens on everyone - the courts, counsel, the parties, and even the jurors. The lack of instruction in the statute creates significant evidentiary difficulties. In a sense, the trial court will now be required to conduct a second trial without a roadmap as to the manner in which it shall take place.

The initial question to determine is whether the statute requires two separate juries. Justice
Pfeiffer again raised this concern when analyzing Civ.R. 42(B) which refers to "separate trials".

> "Am I wrong to think that separate trials mean separate trials? Not two parts of the same trial?"

If this is the case, the parties, in a sense, may be trying the same case two different times since the majority of the same witnesses and exhibits used in the first trial would clearly be required for the second. The expenses for expert witnesses, subpoenas and other litigation costs would practically double. Would this truly provide judicial economy?

On the other hand, Justice Cupp did not appear convinced that the statute demanded two different juries:

> "Where in the statute does it say you have separate juries?"

Justice Stratton hints that perhaps the best method for the trial courts to follow would be the form of a criminal capital case.

> “If we're to distinguish between the rule discretionary, state for many different types of trials versus this one - that requires the bifurcation but make clear to trial judges that it should be made with the same jury - could you conduct it similar to a death penalty - where you simply move to admit evidence, you've already admitted in the first part, in the second party, because they've already heard it - then do the additional. It would seem that most practitioners would rather try the case to the same jury twice, than face a brand new audience for the punitive stage. Especially since the new jury would have no background of the evidence presented in the prior trial. But even keeping the same jury for both trials brings a level of peril to the plaintiffs. For example, if the plaintiff were to receive a verdict in their favor by only six out of the eight jurors, the plaintiffs enter the second phase with two jurors presumed to be already against their case. Does this promote fairness?

Another major concern not addressed at the oral argument is - when do you tell the jury about the potential for a second phase of the trial? In a capital case the jury is advised during the initial voir dire of the possibility of a second phase of the trial. Most are not surprised, having become familiar with the process through newspapers, other media outlets, or news sources. On the other hand, R.C. 2315.21(B) places the trial court in a quandary. The statute is clear that punitive damages are not to be discussed during the first trial. So how does the trial court explain to the jury that there may be a second trial? If the trial court advises the jury during the initial voir dire that there may be a second phase to the trial, with no explanation, doesn't that confuse the jury even more? This may lead to a "guessing game" amongst the jurors as to what the second phase is about, or even give them the impression the second phase may involve some type of penalty. Could this affect their judgment in considering compensatory damages? If so, this would defeat the whole purpose of the second trial.

In contrast, failure by the trial court to disclose the second phase of the trial to the jury until they reach their verdict on compensatory damages may create a new set of problems: When do you then schedule the second trial? Any delay in the second trial creates a greater chance that jurors may forget critical parts of the testimony. Juror deliberations could be more difficult, confusing, and possibly inspire them to reach a verdict unsupported by the evidence. If the second trial were to begin immediately thereafter, the parties may not have enough time to issue new subpoenas and obtain service on the witnesses. Expert witnesses who may be out of state could be reluctant to travel back again to the courthouse for additional, testimony. Finally, how will the jury react when they now learn that they will be required to sit through another trial, especially if the first trial takes a considerable amount of time to litigate? Many jurors find jury service intrusive and look forward to the end of the trial to reunite with families and get back to their daily lives. Jurors may become bitter and feel a bit betrayed when the second trial is sprung on them without warning. Their ambivalence or anger could affect their consideration of punitive damages.

Lastly, the trial court will have to decide on its own what evidence will be presented at the second trial. The only guidance the statute provides is that no party may present evidence "that relates solely to the issue of whether the plaintiff is entitled to punitive damages." Obviously, if it's a brand new jury, the parties could be retrying the_ whole case. If it's the same jury, the trial court will have the difficult role of weeding out duplicative testimony. More than likely the trial court will limit the testimony to evidence of "malice, willful or egregious conduct, or ill will." Justice Lanzinger commented that the second trial will probably focus on the issue of "deep pocket"

> "When push comes to shove, isn't the only evidence that has to be kept out of the first phase is how much the defendant can afford to pay?"

In conclusion, it's obvious that tort reform advocates are in support of the *Havel* decision. They argue bifurcation protects unjust damage awards, and R.C. 2315.21 (B) will keep jury awards from being inflated. Advocates request a higher level of due process since punitive damages are the closest thing in the civil justice system to imposing criminal punishment 011 a particular defendant. Opponents claim that stripping away the discretion from the trial court is a huge mistake. They assert that trial judges are best suited to determine what evidence needs to come in and the guidelines posted in Civ.R. 42(B) –should remain in effect. Until more guidance is provided, parties will continue to drift in uncharted waters.