

IN THE SUPREME COURT OF OHIO

Sandra Havel, :
 :
 Plaintiff-Appellee, : Supreme Court Case No. 2010-2148
 :
 v. : On Appeal from the Cuyahoga County
 : Court of Appeals
 Villa St. Joseph, et al., : Eighth Appellate District
 : Court of Appeals Case No. CA 94677
 Defendants-Appellants. :

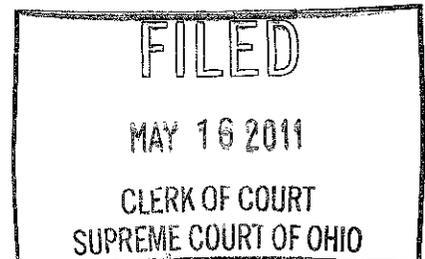
BRIEF OF *AMICUS CURIAE*
OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF APPELLEE

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STATEMENT OF AMICUS INTERESTS

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”), formerly known as the Ohio Academy of Trial Lawyers. The OAJ comprises approximately two thousand attorneys practicing personal injury and consumer protection law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The OAJ urges the Court to carefully consider the proper balance of power between the judicial branch and the legislative branch of Ohio government. The implications of deciding that the statute at issue in this case is constitutionally permissible are profound. It is critical for the proper functioning of the state government as a whole that this Court preserve the balance of power between the branches of government and reject Appellants’ request that this Court cede to the legislature the role of determining the constitutionality of legislative enactments. The OAJ therefore urges this Court to affirm the Eighth District decision.

ARGUMENT

PROPOSITION OF LAW NO. 1: R.C. 2315.21(B) CONFLICTS WITH CIVIL RULE 42(B) REGARDING A PROCEDURAL MATTER, AND IS THEREFORE UNCONSTITUTIONAL.

At its core, the issue before this Court relates to the proper role of the judiciary versus the legislature, as reflected in the Ohio Constitution. As recognized by the parties and various *amici* in this case, the Ohio Constitution makes clear that this Court has rule-making authority with regard to procedural issues in Ohio courts, and the legislature has policy-making authority over substantive issues of law. Where a rule and a statute conflict, the rule trumps the statute regarding procedural matters, and the statute trumps the rule regarding substantive matters. Thus, in the present case, this Court must address two issues: (1) whether in fact R.C. 2315.21(B) and Rule 42(B) conflict; and (2) whether the issue of bifurcating punitive damages is a substantive or a procedural issue.

Three Courts of Appeal across the state have now addressed these questions. First, in *Hanners v. Ho Wah Genting Wire & Cable* (10th Dist. 2009), 2009-Ohio-6481, the Tenth District Court of Appeals held unanimously that the statute and the rule were in conflict, and found, in a 2-1 decision, that the statute was substantive, and therefore was constitutionally permissible. Following *Hanners*, the Eighth District Court of Appeals ruled in the case now before this Court on appeal, disagreeing with the *Hanners* court, and unanimously finding that the rule and the statute conflicted, and that because bifurcation is a procedural issue, the statute was unconstitutional. Finally, since this Court accepted jurisdiction in this case, the Fifth District Court of Appeals, in *Myers v. Brown* (5th Dist. 2011), 2011-Ohio-892, agreed with the Eighth District, unanimously holding that the statute is unconstitutional.

I. R.C.2315.21(B) conflicts with Civil Rule 42(B).

Three appellate courts, and therefore nine appellate judges, have considered the issues before this Court, and all nine judges have concluded that the statute and the rule conflict.¹ *Hammers*, 2009-Ohio6481, at ¶ 22 (“In those actions fitting within the confines of R.C. 2315.21(B), however, there is a clear and unavoidable conflict.”); *Havel*, 2010-Ohio-5251, at ¶ 8 (“Hence, the statute and the rule are in conflict. One requires bifurcation in a tort action; the other does not.”); *Myers*, 2011-Ohio-892 (“The statute and rule are clearly in conflict.”).

The unanimity of the appellate court judges to have considered the question reflects the simplicity of the issue. Nevertheless, despite the unavoidable conflict, Appellants, as well as two of the *amici* in support of Appellants, maintain that the statute and the rule do not conflict. Despite its position that the statute is substantive, the State of Ohio, to its credit, concedes the obvious conflict. *See State of Ohio Amicus Brief*, p. 1 (“When a conflict arises between a court rule and a state statute, the rule controls if the matter is procedural, and that statute controls if it is substantive. This case involves one such conflict.”).

The arguments offered to support the position that there is no conflict between the statute mandating bifurcation and the rule making bifurcation discretionary are meritless, and deserve little response here. Nevertheless, those arguments will be briefly addressed.

Appellants, the *amicus* brief of the Ohio Hospital Association (“OHA”), and the *amicus* brief of the Ohio Association of Civil Trial Attorneys (“OACTA”), all argue that because R.C. 2315.21(B) only applies to tort actions, and Rule 42(B) applies more broadly, there is no conflict. For instance, the OACTA brief asserts that there are “several scenarios under which

¹ The Fifth District, which decided *Myers v. Brown*, has followed that ruling in *Plaugher v. Oniala* (5th Dist. 2011), 2011-Ohio-1207. Because *Plaugher* does not assess the merits of the arguments, but simply follows the prior ruling from the same Court of Appeals by which it is bound, it is being excluded from the tally.

treatment of damages under Civ. R. 42(B) and R.C. 2315.21(B) would not ‘conflict.’” OACTA *Amicus* Brief, p. 8. The OACTA provides, as an example, a situation in which “the lawsuit may not constitute a ‘tort action’ as to implicate R.C. 2315.21(B).” *Id.* This argument is nonsense. In a lawsuit that is not a tort action, R.C. 2315.21(B) does not apply. This is not an example of the statute and the rule working harmoniously together; it is an example of the rule operating in the absence of the statute. The question is not whether there is ever a scenario under which a trial court may apply Rule 42(B) without being handcuffed by R.C. 2315.21(B). The question is whether a trial court can ever apply the statute without it conflicting with the discretion conferred upon it by Rule 42(B). It cannot. *See Hanners, supra*, at ¶ 22 (“Admittedly, Civ. R. 42(B) will not *always* conflict with R.C. 2315.21(B) in *every* case In those actions fitting within the confines of R.C.2315.21(B), however, there is a clear and unavoidable conflict”).

Assessing this very same question, the Eastern District of California held that, even though there are specific instances in which the statute and the rule may be applied consistently, where a statute mandates bifurcation, it conflicts with the discretion conferred upon the trial court by rule 42.

It is thus possible to envision specific outcomes where the two rules may be applied consistently. The rules are nevertheless fundamentally inconsistent. Rule 42(b) explicitly grants the district court the discretion to determine whether to bifurcate issues . . . whereas section 3295(d) allows no discretion, and instead makes bifurcation mandatory whenever a defendant moves to preclude admission of its wealth.

Hamm v. Am. Home Prods. Corp. (E.D. Cal. 1995), 888 F. Supp. 1037, 1038. In the present case, as in *Hamm*, the statute cannot be applied without conflicting with Rule 42(B). The arguments to the contrary are pure obfuscation.

The other two “scenarios” presented in the OACTA brief in which the statute and the rule would not conflict are similarly misplaced. One such scenario is where “neither party moved for

bifurcation.” This situation, however, is akin to the prior situation – it is simply an example of the statute not being implicated. This is not the absence of a conflict, it is the absence of the statute. If the fact that a statute did not apply to, or was not used in, every lawsuit in the state was sufficient to render it impervious to any facial challenge, it would be impossible to have a facial challenge to any statute.

The final scenario presented in the OACTA brief is where a trial court exercises its discretion under Rule 42(B) to bifurcate punitive damages. For starters, this scenario is, in fact, not possible under the statute, because R.C. 2315.21(B) divests the trial court of that very discretion, and there is therefore no such discretion to exercise.

Additionally, this Court has previously considered a similar situation in which a statute may, but would not necessarily, conflict with a rule, yet nevertheless found that the statute was unconstitutional. In *State v. Greer* (1988), 39 Ohio St.3d 236, the Court considered the conflict between Criminal Rule 24, which permitted up to six peremptory challenges in capital cases, and R.C. 2945.21, which permitted up to twelve peremptory challenges. Because the use of peremptory challenges is, of course, optional, under both the rule and the statute, a party could elect to utilize six or fewer peremptory challenges. In such a scenario, under the reasoning put forth by Appellants’ position, there would be no “conflict.” As a result, under Appellants’ argument, the statute could not be held unconstitutional. But this Court disagreed. In fact, in *Greer*, though the defendant complained that the trial court restricted him to the six peremptory challenges allowed by rule rather than the twelve allowed by statute, he had only elected to exercise five such challenges at trial. This Court recognized this factor, yet nevertheless decided to *sua sponte* address the conflict between the rule and the statute, and held that the statute was

in conflict with the rule, and, as a result, was unconstitutional under the Modern Courts Amendment. *Id.* at 246.

In short, the entire argument that there is no conflict, or that any challenge to R.C. 2315.21(B) must be “as applied,” is woefully off base. It is true that R.C. 2315.21(B) does not always apply to a motion to bifurcate under Rule 42(B). But that is not the question. There are no circumstances in which the reverse is true – that is, that R.C. 2315.21(B) applies but does not conflict with Rule 42(B). This Court is not called upon here to determine the constitutionality of Rule 42. It is called upon to determine the constitutionality of R.C. 2315.21(B). Every R.C. 2315.21(B) motion to bifurcate strips the trial court of the discretion granted by Rule 42.

The rule may not always conflict with the statute, but the statute always conflicts with the rule. As a result, there is a conflict between the two, and the analysis must proceed to the question of whether bifurcation is procedural or substantive.

II. Bifurcating punitive damages is procedural, not substantive.

As noted previously, three appellate courts have ruled on this issue, with two appellate courts finding unanimously that the statute is procedural, and one finding, over a dissent, that the statute is substantive. Thus, of the nine Ohio appellate court judges to have considered this matter, seven have determined that the statute is procedural.

A. This Court’s own precedent compels a holding that the statute is procedural.

Setting aside for the time being the various other cases in which this Court has applied the Modern Courts Amendment, there are two distinct decisions of this Court that functionally compel a finding that R.C. 2315.21(B) is procedural: *Dir. of Highways v. Kleines* (1974), 38 Ohio St.2d 317, and *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451.

In *Kleines*, this Court addressed two statutes that required the consent of the parties before a trial court could consolidate land appropriation actions. Rule 42(A), however, governed consolidation, and provided trial courts with the ability to consolidate cases at their discretion, with no requirement that the parties consent. This Court unanimously held that the management of cases was within the discretion of trial courts, and that Rule 42 governed the question of consolidation, rather than the statutes that conflicted with the rule. *Kleines*, 38 Ohio St.2d at 320.

Kleines is particularly compelling precedent because it deals directly with Rule 42 itself, albeit Rule 42(A), rather than Rule 42(B). Nevertheless, Rule 42(A), governing consolidation, is simply the mirror image of Rule 42(B). That is, Rule 42(A) grants a trial court the discretion to combine multiple lawsuits into one trial. Rule 42(B) grants a trial court the discretion to separate one lawsuit into multiple trials. The *Kleines* case is strikingly similar to the case at bar, in that the parties with the statutory right not to have their cases consolidated without their consent could claim, just as Appellants do here, that the statutory right granted them is a substantive one, because it preserves their right to a fair trial. This Court, properly and unanimously, held that Rule 42 controlled. *Id.*

Sheward is also compelling in that it addressed a virtually identical statute, requiring bifurcation of punitive damages claims in the trial of tort actions. In addressing that statute, this Court stated that it “governs the **procedural** matter of bifurcating tort actions into compensatory and punitive damage stages.” *Sheward*, 86 Ohio St.3d 451, 497 (emphasis added). While it is true that the Court in *Sheward* was not specifically addressing the constitutionality of the bifurcation statute relative to the Modern Courts Amendment, the “Supreme Court’s procedural depiction in *Sheward* is powerfully persuasive.” *Hammers*, 2009-Ohio-6481, at ¶ 36 (Brown, J.,

dissenting in part). This Court can, and should, hold that R.C. 2315.21(B) is unconstitutional because it addresses a procedural matter based on the authority of *Kleines* and *Sheward* alone.

If this Court, however, is not persuaded by *Kleines* and *Sheward*, the merit brief of Appellee in this matter provides an outstanding review of myriad cases in which this Court assessed whether a matter was procedural or substantive for purposes of determining whether a statute violated the Modern Courts Amendment. *Compare* *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221 (holding that statute prohibiting plaintiffs from seeking specific monetary amount in complaint was unconstitutional because it conflicted with Rule 8, which required plaintiffs to do so); and *Hiatt v. Southern Health Facilities* (1994), 68 Ohio St.3d 236 (finding that statute requiring affidavit accompanying medical malpractice complaint was unconstitutional because it conflicted with Rule 11, which stated that pleadings need not be accompanied by an affidavit); with *State ex rel. Loyd v. Lovelady* (2006), 118 Ohio St.3d 368 (finding that statute providing right to relief from judgment of paternity to individuals cleared of paternity by genetic testing to be substantive, and therefore not in conflict with Civil Rule 60(B)). These cases, along with the others cited by Appellee as well as Appellants and the various *amici*, lend credence to the notion that the distinction between substantive matters and procedural matters is an imprecise and sometimes illusory one. *See* *State v. Slatter* (1981) 66 Ohio St.2d 452, 456 n.5.

Nevertheless, the Modern Courts Amendment requires the judiciary to draw the line between procedural and substantive matters. To be sure, this is not always an easy task. Every procedural rule has substantive implications. Every substantive law requires certain procedures to permit enforcement of the substantive rights it grants. Yet, from the myriad cases in which this Court addresses the distinction, a guiding principle is revealed: If a statute grants a

substantive right, and happens to prescribe the procedure by which a party can avail itself of that right, it is substantive. If, however, the statute merely grants a party the right to a certain procedure, even though (as with all procedural rules) it may impact a substantive right, it is procedural.

B. The overwhelming majority of other courts have found that bifurcation is a procedural matter, not a substantive one.

The overwhelming weight of federal authority addressing Federal Rule of Civil Procedure 42(b), which is substantially similar to Civ.R. 42(B), also supports that bifurcation is a procedural matter. Like Ohio's Modern Courts Amendment, the authority for the United States Supreme Court to adopt federal rules of procedure, including Rule 42(b), vests that Court with "the power to prescribe, by general rules . . . the practice and procedure of the district courts . . . [that] shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury." Section 2072, Title 28, U.S. Code (Rules Enabling Act).

Federal courts interpreting Rule 42(b) have regularly found it to be procedural and enforced their discretion to decide questions of bifurcation notwithstanding state laws which purported to prohibit any discretion.

The question to be decided is whether, in a diversity case, a federal district court is authorized within its discretion under Fed. R. Civ. P. 42(b) to order a bifurcated trial on the issues of liability and damages, despite an alleged state-law policy applicable in state courts that in personal-injury cases the issues are so intertwined that such bifurcated trials are impermissible. We hold that this mode of trying a dispute in federal court, specifically authorized by the federal rules of civil procedure, is primarily procedural in nature and that federal procedural law controls.

Rosales v. Honda Motor Co., Ltd. (5th Cir. 1984), 726 F.2d 259 (applying Rule 42(b)

notwithstanding argument that state law prohibited bifurcation).; *see also Lin v. Beavers* (W.D.

Ark. January 30, 2009), 2009 WL 361247, at 1 (“Bifurcation is primarily procedural in nature; therefore, Rule 42(b) controls.”)

Whether a plaintiff may recover punitive or any other form of damages in a particular cause of action is a question of substantive law. The manner in which proof is presented and various issues in a single case are litigated is a procedural matter.

Johnson v. Metropolitan Life Ins. Co. (W.D. Pa. 2006), 2006 WL 2604602, at 1 (internal citations omitted); *see also Moss v. Associated Transport, Inc.* (6th Cir. 1965), 344 F.2d 23, 27 (applying federal rule 42(b) instead of Tennessee law requiring that liability and damages be tried in a single proceeding); *Robinson v. Adco Metals, Inc.* (D. Del. 1987), 663 F. Supp. 826, 829 (finding that the court had the discretion to grant or deny bifurcation as a procedural matter and did not need to rely on the law of Delaware or Maryland on this point); *Hamm v. Am. Home Prods. Corp.* (E.D. Cal. 1995), 888 F. Supp. 1037, 1038 (“there is ample precedent holding that bifurcation is a procedural issue”); *Simpson v. Pittsburgh Corning Corp.* (2d Cir. 1990), 901 F.2d 277, 283 (applying Rule 42(b) instead of New York common law requiring that evidence of defendant's wealth be admitted only after jury has otherwise determined that punitive damages are appropriate).

C. R.C. 2315.21(B) is unambiguous, and it is therefore improper to resort to legislative history.

The legislative history of R.C. 2315.21(B) is irrelevant. It is axiomatic that a statute is to be applied based on the language contained in the statute, and that legislative history is only used where it is necessary to interpret the meaning of the statute. The Court of Appeals below recognized this legal principle, and properly applied it to the question of whether R.C. 2315.21(B) is procedural or substantive. The Court below stated:

Here, however, the legislative intent is clear from the statute: R.C. 2315.21(B) plainly and unambiguously regulates the procedure at trial for determining

compensatory and punitive damages in a tort action. Thus, the Tenth District's determination in *Hanners*, reached by reference to sources other than this clear and unambiguous statute, conflicts with well-settled rules of statutory construction. *See, e.g., Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (a court must first look to the language of the statute itself to determine legislative intent, and if that inquiry reveals that the statute conveys a meaning that is clear, unequivocal, and definite, at that point the interpretive effort ends, and the statute must be applied accordingly); *Katz v. Dept. of Liquor Control* (1957), 166 Ohio St. 229, 231, 141 N.E.2d 294 ("Where the language itself clearly expresses the legislative intent, the courts need look no further."); *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413 ("[T]he intent of the lawmakers is to be sought first of all from the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. *The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.* That body should be held to mean what it has plainly expressed, and hence no room is left for construction.") (Emphasis added.)

Havel at ¶ 29.

There is no need to "interpret" R.C. 2315.21(B). It holds plainly and clearly that, in a tort action, if a party moves to bifurcate the issue of punitive damages, a trial court is compelled to do so. Indeed, Appellants themselves concede that the "consensus" is that R.C. 2315.21(B) "is clear and unambiguous." Appellants' Brief p. 10; OACTA *Amicus* Brief, p. 1 ("R.C. 2315.21 is clear and unambiguous."). As a result, it is entirely improper to even consider the legislative history of the statute. The Court of Appeals in *Hanners* erred in doing so, and Appellants and the *amici* that support them improperly ask this Court to do so.

D. Relying on legislative intent improperly shifts a fundamental role of this Court – determining the constitutionality of the acts of the legislature – to the legislature itself.

Some of the confusion that can be found in the debate over the issue before this Court lies in the question of whether it is appropriate to assess the legislature's intent in enacting R.C. 2315.21(B) when assessing its constitutionality. There is substantial case law indicating that legislative intent is irrelevant. *See, e.g., Sears v. Weimer* (1944), 143 Ohio St. 312, 316 ("The

question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.”). Indeed, in most cases in which this Court has considered a potential conflict between a statute and a rule under the Modern Courts Amendment, it has mentioned only whether the matter was procedural or substantive, not whether the legislature intended it to be procedural or substantive. This makes sense, of course, because the fundamental rule is not “where there is a conflict between a statute and a rule, the statute controls where the legislature *intended* the statute to be substantive, and the rule controls where the legislature *intended* the statute to be procedural.” Rather, the fundamental rule, repeated throughout the case law, is that “where there is a conflict between a statute and a rule, the statute controls where the matter is substantive, and the rule controls where the matter is procedural.” *See, e.g., State v. Slatter* (1981), 66 Ohio St.2d 452, 454 (“Where a conflict arises between a rule and a statute, the rule will control the statute on matters of procedure.”); *State v. Brown* (1988), 38 Ohio St. 3d 305, 307 (“According to Section 5(B), Article IV, Ohio Constitution, where a conflict exists between a rule and statute, the rule prevails if the right involved is procedural. If the conflict involves a substantive right, the statute controls.”); *State v. Greer* (1988), 39 Ohio St. 3d 236, 245 (“It is evident upon the face of the Constitution that the Rules of Criminal Procedure as propounded by this court prevail over conflicting state statutes so long as the subject of regulation is procedural.”); *State ex rel. Boylen v. Harmon* (2006), 107 Ohio St.3d 370 (“It is true that where a conflict arises between a rule and a statute, the rule will control the statute on matters of procedure.”).

There is, however, some case law indicating that, when applying the Modern Courts Amendment, it is appropriate to look to the intent of the legislature. *See, e.g., State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St.3d 86, 88 (“If the legislature *intended* the enactment to be

substantive, then no intrusion on this court's exclusive authority over procedural matter has occurred.”).

This Court's decision in *Loyd*, which endorses reliance on the legislature's intention, appears to be inconsistent with the myriad cases focusing directly on whether the right actually is substantive or procedural, as opposed to what the legislature intended. Indeed, the language in *Loyd* appears to be inconsistent with this Court's admonition in *Sears*, where this Court stated that, in reading a statute, the “question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.” 143 Ohio St. 312, 316. *See also, Slingluff v. Weaver* (1902), 66 Ohio St. 621, ¶ 2 of syllabus (“The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.”); *Lancaster v. Fairfield Cty. Budget Comm'n* (1998), 83 Ohio St.3d 242, 245 (same, citing *Slingluff*). Indeed, this Court just this year reiterated this principle. *Zumwalde v. Madeira & Indian Hill Joint Fire, Dist.* (2011), 2011-Ohio-1603, ¶ 22.

Accordingly, there appears to be some inconsistent guidance as to whether or not it is appropriate to consider the legislature's intent in applying the Modern Courts Amendment to an unambiguous statute such as R.C. 2315.21(B). The better argument is that, when addressing an unambiguous statute, it is improper to look to the legislature's intent. This is the case for two reasons.

First, looking only at the language of the statute, rather than the intent of the legislature, is consistent with the Constitutional provision at issue. The Modern Courts Amendment does not say that the legislature shall not *intentionally* enact a statute that encroaches on the judiciary's rule-making authority. The Constitution states, “All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” Oh. Const. Art. IV, § 5.

The Constitution does not state that all laws *intended to be* in conflict with the civil rules shall be of no force or effect. There is no scienter or *mens rea* element to a Modern Courts Amendment analysis.

Second, if the analysis turns on the intent of the legislature, instead of the language of the statute, the perverse result is that the legislature is functionally tasked with determining the constitutionality of its legislative enactments. The legislature intended an act to be substantive, ergo it is substantive. This position leaves no room for judicial analysis. It is laudable for courts to defer to the legislature when it comes to setting public policy for the state. That is the role of the General Assembly. But it is irresponsible for courts to defer to the legislature when it comes to determining the constitutionality of the statutes enacted by the General Assembly. That is the role of the judiciary. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 493 (“To give the legislature and not the judiciary the final say on the meaning of the constitution, would undermine the separation of powers scheme by giving the legislature the means to overrule or circumvent the judiciary’s decision to strike down a statute as unconstitutional.”) (internal quotation omitted).

It is unconstitutional for the legislature to override a civil rule if the issue is procedural and not substantive. Thus, in this context, answering whether a statute is substantive or procedural is answering whether a statute is constitutional. To defer to legislative intent to resolve the question of substance versus procedure is, therefore, to defer to the legislature to resolve the very question of the statute’s constitutionality. That is the role of the judiciary, not the legislature.

Consider a situation in which the General Assembly enacted the very same statute, R.C. 2315.21(B), but the legislative history differed. Rather than purportedly attempting to impact a

substantive right, the legislative history demonstrated simply that the General Assembly believed that the procedures adopted by this Court in Rule 42(B) were inefficient, and the legislature indicated an intent to override this Court's judgment regarding optimal procedures in Ohio trial courts. If courts are to look at the intent of the legislature, this identical statute with a hypothetically different legislative history would have to be deemed procedural, and therefore of no force and effect under the Modern Courts Amendment. But this result is utterly illogical. The very same statute, with the very same unambiguous language, cannot reasonably be deemed procedural or substantive depending on legislative history unreflected in the statute itself.

Assessing the legislature's intent may make sense in a situation in which the statute is ambiguous, and it is necessary to determine precisely what the language employed by the legislature means. After all, a court can hardly determine whether a statute is procedural or substantive without first determining what the statute means. But it simply makes no sense when the language of the statute is clear, and it is only necessary to determine whether the statute is substantive or procedural. Under the right circumstances, legislative intent might impact the interpretation of an ambiguous statute, but it can never impact the substantive or procedural nature of an unambiguous statute.

E. The interpretation suggested by Appellants would lead to absurd results.

Consider the implications of adopting the position set forth by Appellants. Under their view, despite the discretion provided to trial courts by Rule 42(B), the General Assembly is empowered to mandate bifurcation of the issues of liability for and amount of punitive damages from the issues of liability for and amount of compensatory damages. There is no principled reason, however, why the legislature should have to stop there. The justification for mandatory bifurcation, according to Appellants, is "to restore balance, fairness and predictability in the civil

justice system.” Appellants’ Brief, p. 14. According to the State, the justification is “protecting civil defendants from jury verdicts influenced by passion or prejudice.” *Amicus* Brief of State, p. 12. Similarly, the OHA asserts that the purpose of the statute is to “have liability and compensatory damages determined untainted by the prejudice that evidence of punitive damages can produce.” *Amicus* Brief of OHA, p. 10. These justifications could just as easily support bifurcating various other aspects of trial.

For instance, if the General Assembly is permitted to mandate bifurcation of punitive damages, there is no principled reason why it cannot also require bifurcation of the question of *liability* for punitive damages from the question of the *amount* of punitive damages to be awarded. After all, the question of whether a defendant should have to pay punitive damages is distinct from the question of how much in punitive damages a defendant should have to pay. The legislature could readily conclude that fairness to defendants requires that a jury determine whether a defendant should have to pay punitive damages without being tainted by evidence regarding how much the defendant should have to pay, such as the net worth of the defendant or a defendant corporation’s annual profits. If evidence of a corporate defendant’s profits and revenues were admitted to a jury that had yet to decide whether that corporate defendant should be held liable for punitive damages, it could unfairly flame the passions and prejudices of the jurors, making them more likely to improperly find the defendant liable for punitive damages. So the General Assembly would be permitted to require that a full trial, where punitive damages are at issue, proceed in three stages, rather than two.

By the same token, the General Assembly could believe that protecting defendants from verdicts influenced by passion or prejudice requires that liability on the underlying cause of action be bifurcated from compensatory damages. After all, it is reasonable to believe that if

jurors are made aware of the way in which a plaintiff has been damaged, e.g., the jurors see the plaintiff's scars or burns or amputated leg, or hear the way the children were impacted by the death of their parents, or hear from the therapist that treated the plaintiff's post-traumatic stress disorder, they will be inclined to want to hold somebody accountable for that harm, and will be more likely to improperly find the defendant liable for those damages, seeking someone to blame. Accordingly, the General Assembly would be permitted to require that a full trial, where punitive damages are at issue, proceed in four stages (liability for compensatory damages, amount of compensatory damages, liability for punitive damages, and amount of punitive damages) rather than two.

The slippery slope, of course, does not end at a four-stage trial. The General Assembly, could enact a "substantive" statute, in an effort to achieve fairness for defendants who would otherwise be subject to the passions and prejudices of the Ohio citizens who sit on juries, that requires that each element of a cause of action in tort be tried separately. After all, the legislature could believe that, in a negligence action, a jury can be unfairly prejudiced by the fact that a defendant's conduct injured the plaintiff, and therefore desire to improperly find that the defendant breached a duty owed to the plaintiff.

Thus, the General Assembly could enact the following "substantive" requirements, which, though necessarily packaged in procedural wrapping, are actually substantive, in that they attempt to restore fairness to civil defendants: All elements of liability in a tort action must be tried separately, to be followed by a trial regarding compensatory damages, if liability is found. If compensatory damages are awarded, the jury will then hear a trial regarding whether it is appropriate to award punitive damages. If the jury answers that question in the affirmative, a subsequent trial shall be held to determine the amount of punitive damages. So, in a negligence

action, the trial court must first hold a trial in which the jury determines whether the defendant owed a duty to the plaintiff. Second, there will be a trial to determine if the defendant breached that duty, if one is found to be owed. Third, the jurors will hear evidence in an additional trial to determine if the breach of that duty caused injury to the plaintiff. Fourth, there will be a trial to determine the amount of compensatory damages to award. Fifth, the jury will hear a case regarding whether the defendant should be required to pay punitive damages. And, finally, the jury will hear a sixth trial, where evidence is presented to allow the jury to determine the amount of punitive damages to award.

If this Court finds that the legislature is permitted to mandate bifurcation of punitive damages, it would also have to find that the foregoing procedure can be required by the General Assembly as well. And it is no answer to this hypothetical that the likelihood of the legislature passing any such statute is infinitesimally small. The point here is not that the General Assembly is likely to promulgate any such requirements in the future. Rather, the point is that a ruling in favor of Appellants necessarily holds that the legislature is empowered to impose such a procedure should it choose to do so – in the interest of protecting the substantive rights of defendants. But the thought of the General Assembly having this much authority over the procedure by which trials are conducted is laughable. Clearly this type of mandatory piecemeal trial would violate the Modern Courts Amendment by imposing procedural requirements on the court system. If that is so, then even the relatively modest intrusion on the ability of trial courts to manage their cases, courtrooms, and trials that R.C. 2315.21(B) requires violates the Modern Courts Amendment as well. After all, courts cannot approve a statute on the grounds that it is “only a little bit unconstitutional.” *Citizens Concerned for Separation of Church and State v. City and County of Denver* (D.C. Colo. 1979), 481 F. Supp. 522, 527.

F. R.C. 2315.21(B), if anything, protects compensatory damage awards, not punitive damage awards, and the case law deeming the amount of punitive damages awarded “substantive” is therefore entirely irrelevant.

The State of Ohio’s *amicus* brief puts forth the creative, but ultimately meritless, argument that R.C. 2315.21(B) “builds on the constitutional floor” of the Federal Constitution’s due process guarantee that protects defendants from exorbitant and arbitrary punitive damages awards. In support of this position, the State argues that:

- “[P]unitive damages awards implicate constitutional rights.” State of Ohio *Amicus* Brief, p. 13.
- “Mandatory bifurcation gives civil defendants the opportunity to cut grossly excessive punitive damages awards off at the pass by curbing the jury’s ability to factor inappropriate considerations into its assessments at the liability and punitive damages phases.” *Id.*, p. 13.
- “A statutory right to bifurcation diffuses the threat of unconstitutional jury verdicts and is therefore substantive in nature.” *Id.*, p. 14.

Each of these assertions is either entirely irrelevant, or demonstrably false.

It is true, of course, that the United States Supreme Court has indicated that the due process clause of the Fourteenth Amendment imposes substantive limits on the discretion to award punitive damages.² *See State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408,

² It is worth noting that the position that there is a constitutional protection against large punitive damages awards is not without controversy. *See State Farm, supra*, at 429 (Scalia, J., dissenting) (“I adhere to the view . . . that the Due Process Clause provides no substantive protections against ‘excessive’ or ‘unreasonable’ awards of punitive damages.”). Moreover, there is a persuasive argument to be made that the nature of punitive damages are such that they should be potentially arbitrary and potentially unlimited in amount. After all, a primary purpose of punitive damages is the deterrence of wrongful, injurious conduct. Enhancing the “predictability” of punitive damages awards necessarily increases the ability of potential wrongdoers to engage in a cost-benefit analysis of the profitability of engaging in dangerous misconduct. Where the risk of a potentially devastating punitive damages award is both real and difficult to predict, it provides a strong incentive for potential wrongdoers to refrain from such conduct. Where the risk of a potentially devastating punitive damages award is both slight and predictable, rational, profit-maximizing entities are able to calculate the profitability of engaging

417. R.C. 2315.21(B), the statute at issue here, however, does nothing to minimize the possibility of an excessive punitive damages award. In so arguing, the State interprets the statute backwards. R.C. 2315.21(B) requires bifurcation, which, in turn, means that the jury will have no evidence related solely to punitive damages (such as, in certain cases, prior wrongful acts of the defendant, or the profitability of the defendant), when it makes its determination of liability and compensatory damages. This is designed to ensure that *compensatory damage awards* are not tainted by evidence relating to punitive damages. See Uncodified Sec. (3)(A)(6)(f) of S.B. 80 (“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.”). Thus, the mandatory bifurcation imposed by R.C. 2315.21(B) is designed to ensure that *compensatory damage awards* are not excessive. It has no bearing on whether *punitive damage awards* are excessive. This is evident, of course, because in a bifurcated trial, the jury will not have certain evidence before it related to punitive damages when it assesses liability and compensatory damages, unlike in a unitary trial. Even in a trial bifurcated under R.C. 2315.21(B), however, by the time the jury is deliberating at the conclusion of the punitive damages phase, it will have all of the same evidence that it would have had in a unitary trial. S.B. 80 protects against excessive punitive damages by capping punitive damages awards under R.C. 2315.21(D). Bifurcation

in wrongful, dangerous conduct. And the lower the likelihood of a substantial punitive damages award, the higher the probability that a potential wrongdoer will elect to engage in the dangerous misconduct that punitive damages are designed to deter. One need not be well-versed in behavioral economics to see this impact. Whatever the merits of restricting punitive damages awards may be, there is no doubt that the recent changes in Ohio law regarding the availability of, and awardable amount of, punitive damages has made our communities, and every Ohio citizen, less safe.

pursuant to R.C. 2315.21(B), however, does nothing to protect the “substantive right” to be free from excessive punitive damage awards.

This obvious point about R.C. 2315.21(B) not only demonstrates that the State’s argument that punitive damages awards implicate constitutional rights is irrelevant, but it also demonstrates that the State’s argument that the statute “gives civil defendants the opportunity to cut grossly excessive punitive damages awards off at the pass” is simply false. Even under the most favorable reading for Appellants, R.C. 2315.21(B) provides civil defendants with the opposite opportunity – the opportunity to cut off at the pass an award of compensatory damages that will be excessive due to juror passions heightened by evidence related to punitive damages. Again, the statute has no impact on the considerations a jury can factor into its award of punitive damages.

Finally, while the case law does indicate that punitive damages awards may implicate constitutional protections, there is no such thing as an “unconstitutionally excessive” award of compensatory damages. Thus, when the State suggests that R.C. 2315.21(B) is substantive in nature because it diffuses the threat of an unconstitutional verdict on punitive damages, it ignores the impact of the statute. Because R.C. 2315.21(B) impacts the evidence available to juries awarding compensatory damages, and does not impact the evidence available to juries awarding punitive damages.

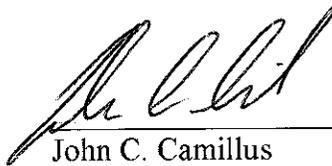
To be sure, an argument could be made, though not advanced by the State, that R.C. 2315.21(B)’s procedures also protect against unconstitutional punitive damages awards by (1) avoiding improper determinations of liability based on passion, which, in turn, prevents an excessive punitive damages award; or (2) minimizing compensatory damages awards, which, in turn, reduce punitive damages awards, because punitive damages awards are capped by statute at

two times the compensatory damages awarded. R.C. 2315.21(D)(2)(a). These arguments would fail, however, because the State's argument depends on relying on the legislature's intent in enacting the statute. And the legislative intent in enacting R.C. 2315.21(B) is to ensure that consideration of punitive damages evidence does not taint the compensatory damages award. *See* Uncodified Sec. (3)(A)(6)(d) of S.B. 80 ("While pain and suffering awards are inherently subjective, it is believed that this inflation is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages."). In short, the State's theory that R.C. 2315.21(B) is substantive because it "builds on the constitutional floor" of the federal Due Process guarantee against excessive punitive damage awards is meritless.

CONCLUSION

For the foregoing reasons, the OAJ urges this Court to affirm the Eighth District Court of Appeals in all respects.

Respectfully submitted,



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