

IN THE SUPREME COURT OF OHIO

WASSIM EL-HITTI, M.D., *et al.*,) ON APPEAL FROM THE CUYAHOGA
Appellants,) COUNTY COURT OF APPEALS, EIGHTH
v.) APPELLATE DISTRICT
AMERICARE KIDNEY INSTITUTE, LLC,) CA NO. 24-113650, TRIAL COURT CASE
et al.,) NO. CV-21-955156
Appellee.)
)

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS WASSIM EL-HITTI AND SAURABH BANSAL, M.D.

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

In *Havel v. Villa St. Joseph*, this Court held that R.C. 2315.21(B) creates a substantive right to bifurcation in tort actions where both compensatory and punitive damages are sought. 131 Ohio St.3d 235, 2012 Ohio 552, 963 N.E.2d 1270. After *Havel*, the rule in Ohio is clear – trial courts have no discretion to deny a motion to bifurcate the punitive damages issue in a tort case when a party files a motion requesting bifurcation. The Eighth District’s decision flies in the face of that mandate.

The Eighth District’s decision is contrary to law. If it is left to stand, every court in Ohio, with the exception of this Court, will have to consider this new ruling that bifurcation pursuant to R.C. 2315.21 is no longer mandatory. That is why this is a case of “Public” interest. Likewise, this is a case of “Great General” interest as every litigant facing claims seeking both compensatory and punitive damages will now face opposition to what was previously an automatic bifurcation.

Two of Appellee’s counterclaims – breach of fiduciary duty and unfair competition – seek both compensatory *and* punitive damages. These claims should be subject to mandatory bifurcation under R.C. 2315.21(B) pursuant to *Havel*. The Eighth District, however, stated that *this Court* held that R.C. 2315.21 is inapplicable to a breach of fiduciary duty claim. It cited to a federal trial court decision from the Southern District of Ohio—not a decision from *this Court*. *This Court*, of course, has never decided whether R.C. 2315.21 applies to a breach of fiduciary duty claim. Accordingly, the Eighth District’s ruling is a misstatement of the law. Moreover, allowing it to stand would be detrimental to the public interest as it creates inconsistency in rulings and undermines the predictability of bifurcation established in *Havel*.

Next, the Eighth District failed to follow its own precedent when it determined that a claim of unfair competition is outside of the purview of R.C. 2315.21. *See Westside Cellular v. Northern Ohio Cellular Tel. Co.*, 100 Ohio App. 3d 768, 769 (8th Dist. 1995) and *Landskroner v. Landskroner*, 154 Ohio App.3d 471 (8th Dist. 2003) (discussing the common law business tort of unfair competition or unfair business practice). The unfair competition claim that Appellants brought to institute this litigation for the purpose of destroying Appellee's business is a business tort claim. Appellants are unaware of any authority that does not treat unfair competition as a tort. Furthermore, the fact that unfair competition is not explicitly included in the list of claims defined as "tort actions" under R.C. 2315.21(A)(1)(a) does not mean it is not subject to mandatory bifurcation. If that were the case, *Havel* itself would not exist. *See also Flynn v. Fairview Vill. Ret.*, 2013-Ohio-569, 2013 Ohio App. LEXIS 501 (8th Dist. 2013) (negligence is not defined as a "tort action" in the statute but negligence claims are subject to mandatory bifurcation). Thus, allowing the Eight's District's ruling to stand would set a dangerous precedent permitting litigants to challenge bifurcation any time a claim is brought where the claim does not appear in the statute's list of "tort actions" under R.C. 2315.21(A)(1)(a).

In summary, the Eighth District's decision ignores the clear mandate set forth in R.C. 2315.21, and does so based on flawed reasoning. This issue arises frequently in civil cases and is likely to recur in trial courts throughout Ohio. The ruling stands to impact the consistency and fairness of how claims involving both compensatory and punitive damages will be handled in future cases.

Lastly, you will read more about this case below, but the heart of this case is about healthcare billing fraud and abuse in Ohio. The state's healthcare industry is built upon intricate business relations and fiduciary responsibilities. Medical professionals and hospitals routinely

engage in business arrangements that involve shared resources, referral networks, and joint ventures aimed at improving patient care and advancing medical innovation. There is a public and great general interest in maintaining the integrity of Ohio's healthcare industry, while encouraging partnerships and innovative healthcare business models.

Accordingly,, this Court should accept jurisdiction as its intervention is crucial to ensure clarity and uniformity in the application of the law in this critical industry.

STATEMENT OF THE CASE AND FACTS

Appellee Americare Kidney Institute, LLC (“AKI”) was formed in 2014 through a merger of Comprehensive Kidney Care and North Coast Nephrology, as a nephrology practice in North East Ohio consisting of roughly twenty nephrologists. It is split into four “pods”: Northwest, Southwest, Akron, and East Side. AKI physicians treat patients in three different areas at AKI offices, in area hospitals, and in dialysis units. All members of AKI are governed by an Amended and Restated Operating Agreement (“Operating Agreement”). From its formation until June 3, 2020, Dr. Hany Anton (“Dr. Anton”) served as AKI’s CEO.

This lawsuit involves the handling of the fraud and abuse investigation into one of AKI’s physicians (the “AKI Doctor”). The AKI Doctor has not only been the highest biller for AKI ever since he joined the company, but he is AKI’s highest biller despite spending significant amounts of time on professional activities outside of AKI. This became an emerging and troubling issue after complaints were made against him from referring doctors at the Akron General Hospital and the AKI billing department for improper billing and documentation, and complaints from AKI office staff and staff at dialysis units. This resulted in the initiation of a fraud and abuse investigation. For example, the AKI Doctor was caught submitting charges on a patient he did not see and did not write an encounter on. However, the investigation was prematurely stopped without completing the necessary steps outlined by the investigator after the removal of Dr. Anton who initiated the investigation.

Appellants Wassim El-Hitti, M.D. (“El-Hitti”) and Saurabh Bansal, M.D. (“Bansal”) (collectively, “Appellants”) approached AKI and requested to separate from AKI out of concern that they would suffer collateral damage to their reputations and professional careers because of the billing impropriety committed by the AKI Doctor. These concerns were amplified when an

insurer placed AKI on a prepayment plan and required AKI to submit proof of an encounter note with each charge on dialysis patients. Dr. Anton was investigating the same billing-related complaints regarding the AKI Doctor subject for review by the insurer when the investigation was prematurely halted.

AKI refused to release Plaintiffs from their restrictive covenants and refused to release the report from the investigation. Fearing exposure due to potential fraudulent activity by one of AKI's members, Appellants were forced to file suit against AKI for breach of contract, fraud, and a declaratory judgment that the non-compete was unreasonable as a matter of law. Appellants also filed suit against Dr. Keith Petras, M.D. ("Dr. Petras"), AKI's current CEO who halted the investigation, for the same claims as well as breach of fiduciary duty. AKI counterclaimed against Plaintiffs for unfair competition, breach of contract, and breach of fiduciary duty.

After cross-motions for summary judgment, the remaining claims were Appellants' declaratory judgment action and Appellee's counterclaims. Prior to trial, Appellants filed a motion to bifurcate the trial on issues of compensatory and punitive damages pursuant to R.C. 2315.21(B). The trial court denied Appellants' motion to bifurcate. The Eighth District affirmed the trial court's order.

Accordingly, Appellants seek this Court's review of the lower courts' decision to not honor the mandate set forth in R.C. 2315.21(B) and this Court's decision in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 26.

ARGUMENT

PROPOSITION OF LAW I: Bifurcation of compensatory and punitive damages for claims of breach of fiduciary duty and unfair competition is mandatory under R.C. 2315.21(B) pursuant to *Havel v. Villa St. Joseph*.

R.C. 2315.21(B)(1) provides that “[i]n a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated...” (emphasis added). R.C. 2315.21(B) does more than set forth the procedure for the bifurcation of tort actions: it makes bifurcation mandatory. *Havel* at ¶ 25 (emphasis added). “Under R.C. 2315.21(B), the trial court has no discretion to deny a motion to bifurcate the punitive damages issue in a tort case when a party files a motion requesting bifurcation.” *Flynn* at ¶ 6 (emphasis supplied). “R.C. 2315.21(B) creates a substantive right to bifurcation when claims for compensatory and punitive damages have been asserted.” *Id.*, citing *Havel* at ¶ 36.

Appellants timely moved for bifurcation of the compensatory and punitive damages issues. However, the trial court determined that bifurcation was not mandatory, because (according to the trial court) the causes of action—breach of fiduciary duty and unfair competition—are not tort claims subject to mandatory bifurcation under Ohio law. The Court of Appeals concurred with this conclusion, but its reasoning was flawed for two primary reasons. These reasons will impact how similar claims are handled across Ohio, affecting the predictability and consistency of R.C. 2315.21(B). This forms the basis for why this Court must accept jurisdiction. Before we expand on the potential detriment of the lower court’s decision, let us revisit *Havel*.

Havel was a wrongful death case stemming from a patient’s death at a nursing-home facility. The patient’s estate filed a complaint seeking both compensatory and punitive damages from the nursing home, alleging claims of medical malpractice, wrongful death, and violations of

the Ohio Nursing Home Patients' Bill of Rights. The defendant moved to bifurcate the trial into two stages pursuant to R.C. 2315.21(B): an initial stage relating only to the presentation of evidence and determination by the jury as to the recovery of compensatory damages, and, if necessary, a second stage involving the presentation of evidence and determination by the jury with respect to the recovery of punitive damages. The trial court denied the motion to bifurcate and the Eighth District Court of Appeals affirmed the judgment of the trial court.

This Court stepped in and held that bifurcation is mandatory under R.C. 2315.21(B). This matter is no different than *Havel*. So, how did the lower courts come reach a conclusion that is contrary to this Court's ruling in *Havel*?

Let us start with the breach of fiduciary duty claim. The Eighth District's decision that R.C. 2315.21(B) is inapplicable to a breach of fiduciary claim is based upon an incorrect citation to precedent. The Court of Appeals stated, “[t]he Supreme Court held the R.C. 2315.21 is inapplicable to a breach-of-fiduciary claim.” It then cites to *McCarthy*, 2006 U.S. Dist. LEXIS 12857 (S.D. Ohio Mar. 8, 2006). However, *McCarthy* is not a decision from this Court. It is a case from the federal trial court for the Southern District of Ohio. The trial court for the Southern District of Ohio does not bind any state court of appeals. Thus, the Eighth District's reliance on *McCarthy* is misplaced. While *McCarthy* may be persuasive authority, the Eighth District treated it as binding which led to a flawed interpretation of law.

. Here, Appellee's breach of fiduciary duty claim is seeking damages for fiduciary duties of loyalty and care pursuant to Ohio law—not contract. Indeed, they have made separate claims in this case for breach of the parties' Operating Agreement and breach of fiduciary duties. If the jury sides with Appellee, it may award compensatory damages pursuant to the breach of contract and separate compensatory damages pursuant to Appellants' breach of fiduciary duties. The jury may

also award punitive damages for a breach of fiduciary duties. Ohio courts have held that "[a] claim of breach of a fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care." *Massara v. Henery*, 9th Dist. No. 19646, 2000 WL 1729457, *2 citing *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 2016. Negligence claims, like the claims in *Havel* and *Flynn*, are "tort actions" subject to mandatory bifurcation under R.C. 2315.21(B). Appellee's breach of fiduciary duty claim exists separately from its breach of contract claim. *Havel* mandates that it is to be bifurcated.

Moving to the unfair competition claim, the Eighth District agreed with Appellee's argument that unfair competition is not included in the list of claims defined as "tort actions" under R.C. 2315.21(A)(1)(a) and the primary goal is to give effect to the legislature's intent. Thus, the Court of Appeals held that it must apply the statute as written which does not include unfair competition as a tort claim. This is a flawed analysis and again, runs afoul of *Havel*.

There are many tort claims subject to mandatory bifurcation that are not listed in the statute's definition of "tort claims." Indeed, the claims in *Havel* – medical malpractice, wrongful death, and violations of Ohio Nursing Home Patients' Bill of Rights – are not found in the statute's definition of "tort actions." And as discussed, negligence actions are not defined as a "tort action" under R.C. 2315.21(A)(1)(a). Yet, since *Havel*, Ohio courts treat bifurcation as mandatory in those cases. See, e.g., *Flynn v. Fairview Vill. Ret.*, 2013-Ohio-569, 2013 Ohio App. LEXIS 501 (8th Dist. 2013). Indeed, almost every run-of-the-mill automobile accident case pending in an Ohio trial court will see a motion to bifurcate (which is more often than not, unopposed). Thus, the Eight District sets a dangerous precedent by allowing litigants to challenge bifurcation for any claim that is not explicitly listed as "tort actions" under R.C. 2315.21(A)(1)(a).

Furthermore, in finding that unfair competition is not a “tort action” subject to R.C. 2315.21(B), the Eighth District ignored multiple cases from its own appellate court that categorize unfair competition as a “business tort.” *See Westside Cellular v. Northern Ohio Cellular Tel. Co.*, 100 Ohio App. 3d 768, 769 (8th Dist. 1995) and *Landskroner v. Landskroner*, 154 Ohio App.3d 471 (8th Dist. 2003). Unfair competition extends to unfair commercial practices such as malicious litigation, circulation of false rumors, or publication of false statements designed to harm the business of another. Surely Appellee would agree that these sort of claims, along with intentional torts like defamation, slander, or libel, are all “tort actions” subject to R.C. 2315.21(B). Accordingly, Appellee’s unfair competition claim which alleges that Appellants instituted this litigation for purposes of destroying Appellee’s business, is subject to mandatory bifurcation.

Lastly, it is worth mentioning that a “hybrid lawsuit” - a lawsuit containing both claims that do and do not meet the definition of a “tort action” under R.C. 2315.21 – does not excuse a court from bifurcating as required under R.C. 2315.21. *See Stewart v. Siciliano*, 2012-Ohio-6123, 985 N.E.2d 226 (11th Dist.) (holding that bifurcation is mandatory for a case involving claims for bad faith and breach of contract and breach of duty of good faith). Thus, Appellants submit that even if this Court determines that only one of the claims – breach of fiduciary duty or unfair competition – is under the purview of R.C. 2315.21, Appellants are still entitled to bifurcate the presentation of evidence supporting an award of punitive damages.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Honorable Court to accept jurisdiction on the Proposition of Law set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 7, 2025, the foregoing *MEMORANDUM IN SUPPORT OF JURISDICTION* was filed electronically with the Clerk of Courts and served by email to counsel for Appellee Americare Kidney Institute, LLC pursuant to S.Ct.Prac.R. 3.11(C)(1) as follows:

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