IN THE SUPREME COURT OF OHIO

WASSIM EL-HITTI, M.D., *et al.*, Appellants, AMERICARE KIDNEY INSTITUTE, LLC, Appellee.	On appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District CA No. 24-113650, TRIAL COURT CASE NO. CV-21-955156

APPELLEE'S SUPPLEMENTAL BRIEF

Christopher B. Congeni (0078160) Christopher R. Green(0096845) Marissa R. Borschke (0100369) **Amundsen Davis LLC** 500 S Front Street, Suite 1200 Columbus, OH 43215 Telephone: 614-229-4563 ccongeni@amundsendavislaw.com cgreen@amundsendavislaw.com mborschke@amundsendavislaw.com *Counsel for Appellants Wassim El-Hitti, M.D. and Saurabh Bansal, M.D.*	John F. Hill (0039675) Meleah M. Skillern (0096077) **LEWIS BRISBOIS BISGAARD & SMITH LLP** 1 Gojo Plaza, Suite 310 Akron, Ohio 44311 Telephone: 330.272.0000 John.Hill@lewisbrisbois.com Meleah.Skillern@lewisbrisbois.com *Counsel for Appellee Americare Kidney Institute, LLC*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

APPELLEE'S SUPPLEMENTAL BRIEF

I. INTRODUCTION

The trial court's February 15, 2024 order denying a bifurcated trial assumed the constitutionality of Ohio's tort reform bifurcation statute while simply finding the bifurcation statute inapplicable to the claims being tried. The Eighth District appellate court affirmed on the same general grounds. The lower court rulings involved routine statutory interpretation—not constitutional challenges to the bifurcation statute.

Because the trial court order (and Appellee's arguments supporting it) did not expressly or implicitly challenge the constitutionality of the tort reform bifurcation statute, and no section of R.C. 2505.02(B) applies to the order, this appeal does not seek review of a final appealable order and should be dismissed for lack of jurisdiction.

II. PROCEDURAL BACKGROUND

On December 19, 2025, this Court *sua sponte* requested the parties to submit supplemental briefs, no later than Monday, December 29, 2025, to "address whether the trial court's decision denying a bifurcated trial is a final and appealable order." Appellee Americare Kidney submits this brief in accordance with that Order.

On October 23, 2023, Appellants filed a motion to bifurcate the jury trial in this matter on issues of compensatory and punitive or exemplary damages pursuant to R.C. 2315.21(B)—a statute born out of the Ohio General Assembly's tort reform efforts. Americare Kidney opposed the motion to bifurcate, because the bifurcation statute does not apply to Americare Kidney's claims for breach of fiduciary duty and

unfair competition against members of an Ohio limited liability company. On February 15, 2024, the trial court denied the motion to bifurcate by reasoned opinion and ordered the jury trial to proceed that following week as scheduled (the "Trial Court Order"), agreeing that Americare Kidney's claims fall outside the purview of R.C. 2315.21.

Following the Trial Court Order, Appellants filed their Notice of Appeal to Ohio's Eighth District Court of Appeals. In Appellants' February 20, 2024 Praecipe and Docketing Statement, Appellants confirmed that the Trial Court Order did not "dispose of all claims against the parties" or articulate in any respect "no just reason for delay" under Civ. R. 54(B). Instead, Appellants invoked R.C. 2505.02(B)(6) and this Court's decision in *Flynn v. Fairview Village Retirement Community, Ltd.*, 2012-Ohio-2582, as the basis for asserting the existence of a final, appealable order in this case.

The Eighth District Court of Appeals affirmed the Trial Court Order based solely on its interpretation of R.C. 2315.21 as specifically applied to Americare Kidney's counterclaims, without challenging the statute's constitutionality or any conflict with Civ. R. 42.

Furthermore, Appellants did not invoke this Court's jurisdiction due to any "substantial constitutional question" this Court must resolve. Instead, in their memorandum in support of jurisdiction, Appellants argued that this appeal presents a question of "public or great general interest" (it does not) as contemplated under S.Ct.Prac.R. 7.02(C)(2). Appellants' Jurisdictional Brief at p. 3-5.

III. LAW AND ARGUMENT

A. An order must satisfy R.C. 2505.02 to constitute a final, appealable order.

Article IV, Section 3(B)(2) of the Ohio Constitution establishes that courts of appeals "shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or *final orders* of the courts of record inferior to the court of appeals within the district." *Flynn v. Fairview Vill. Ret. Cmty., Ltd.*, 2012-Ohio-2582, ¶ 5, citing *State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.,* 2011-Ohio-5456, ¶ 14. Ohio Revised Code Section "2505.03(A) limits the appellate jurisdiction of courts of appeals to the review of final orders, judgments, or decrees." *Bates* at ¶ 44. "An order must satisfy the criteria of R.C. 2505.02 to constitute a final, appealable order." *Flynn v. Fairview Vill. Ret. Cmty., Ltd.*, 2012-Ohio-2582, ¶ 5, citing *Gehm v. Timberline Post & Frame*, 2007-Ohio-607, ¶ 15.

R.C. 2505.02(B)(1)-(9) provides nine express circumstances under which an order is considered final and appealable.

Ordinarily, an order denying a motion for a bifurcated trial is not considered a final order under R.C. 2505.02. *See e.g., King v. Am. Std. Ins. Co. of Ohio*, 2006-Ohio-5774, ¶ 19 (6th Dist.) (finding that an "order [which denied a motion to bifurcate] is not final and appealable."), citing *Korodi v. Minot*, 1988 WL 88828 (10th Dist. Aug. 23, 1988); *Goettl v. Edelstein*, 1985 WL 4494 (5th Dist. Dec. 5, 1985).

However, in the aftermath of Ohio's enactment of S.B. 80 (which included the tort reform bifurcation statute at issue here), Ohio courts needed to address (i) whether the tort reform bifurcation statute unconstitutionally conflicted with the

Ohio Civ. R. 42 and (ii) at what point appellate courts had a final appealable order to decide that specific question. In 2012, this Court addressed both of those questions.

First, in *Havel v. Villa St. Joseph*, this Court held that R.C. 2315.21(B) did not unconstitutionally clash with Civ. R. 42(B)'s bifurcation procedures. 2012-Ohio-552, ¶ 35.

Second, this Court addressed the appealability question, in *Flynn v. Fairview Vill. Ret. Cmty., Ltd.*, 2012-Ohio-2582. Prior to the *Havel* decision, Ohio appellate courts had issued conflicting decisions about whether an order denying a bifurcation motion under R.C. 2315.21 was a final appealable order. *Cf. Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 2009-Ohio-6481, ¶¶ 6-13 (10th Dist.) (finding jurisdiction to review a bifurcation order pursuant to R.C. 2315.21, while acknowledging that "[i]t is well-established that a trial court's bifurcation determination under Civ. R. 42(B) is not a final, appealable order."); *Finley v. First Realty Prop. Mgt., Ltd.*, 2007-Ohio-2888, ¶ 12 (9th Dist.) (finding that "the trial court's order denying appellant's motion to bifurcate is not a final, appealable order[.]").

This court resolved the question in *Flynn*. The court of appeals had *sua sponte* dismissed an appeal of the denial of an R.C. 2315.21 motion to bifurcate, finding no final appealable order under pre-*Havel* precedent. This Court's *Flynn* decision found a final appealable order under R.C. 2505.02(B)(6), since the appellate court—without the benefit of the *Havel* decision, which had not been announced at the time—had "implicitly determined that the S.B. 80 amendment to the statutory provision is unconstitutional, i.e., that Civ. R. 42(B) prevails over the conflicting statutory

provision." *Flynn* at ¶ 7. This Court reversed and remanded to the court of appeals for the application of *Havel* decision. *Id*.

Notably, *Flynn* did not hold, as a general proposition, that trial court denials of bifurcation motions are final appealable orders. *Flynn* addressed unique circumstances in the aftermath of Ohio's enactment of tort reform. And since *Havel* conclusively found the tort reform bifurcation statute constitutional, the context and rationale in *Flynn* (an "implicit" finding of unconstitutionality of R.C. 2315.21(B)) should not recur. However, some Ohio courts (and candidly, the litigants here) appear reflexively to see *Flynn* as grounds to treat the denial of a R.C. 2315.02(B) motion as a final appealable order.[1] But that analysis is flawed and unnecessary since *Havel* conclusively decided the constitutionality of the tort reform bifurcation statute. And the analysis is especially inapplicable here. Where a lower court ruling decides the *applicability* of R.C. 2315.21(B) to a case while accepting the statute's constitutionality, that ruling does not expressly or implicitly challenge the statute's constitutionality, *Flynn* is inapplicable, and no final appealable order exists under R.C. 2505.02(B)(6).

B. The Trial Court Order is not a final order under R.C. 2505.02.

No other grounds exist to assert that the Trial Court Order comprises a final appealable order under R.C. 2505.02.

[1] *See e.g., Nationwide Mut. Fire Ins. Co. v. Jones*, 2016-Ohio-513, ¶ 12 (4th Dist.) ("An order denying a motion to bifurcate under R.C. 2315.21(B)(1) is a final, appealable order because it implicitly determines the statute's constitutionality.").

The Trial Court Order does not "determine the action and prevent[] a judgment" under R.C. 2505.02(B)(1). This Court has determined that "[f]or an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *See Natl. City Com. Cap. Corp. v. AAAA at Your Serv., Inc.*, 2007-Ohio-2942, ¶ 7. The Trial Court Order does not resolve the merits of any claim or any distinct branch of the case and therefore cannot be a final order under R.C. 2505.02(B)(1).

The Trial Court Order was not made in a "special proceeding" or "upon a summary application in an action after judgment" under R.C. 2505.02(B)(2). The statute defines a "special proceeding" as "an action or proceeding that is specially created by statute or that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). This Court has held that orders—like the Trial Court Order here—that "are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02." *Polikoff v. Adam*, 67 Ohio St. 3d 100, 107 (1993).

The Trial Court Order did not vacate or set aside a judgment or grant a new trial under R.C. 2505.02(B)(3).

The Trial Court Order did not grant or deny a provisional remedy and prevent a judgment in the action under R.C. 2505.02(B)(4). The statute defines a "provisional remedy" as a "proceeding ancillary to an action[.]" R.C. 2505.02(A)(3). The

prototypical provisional remedy is a preliminary injunction, but the statutory definition provides a list of additional examples (e.g., attachment, discovery of a privileged matter, suppression of evidence), none of which apply here.

This appeal does not concern a class action, appropriation proceeding, or motion for expedited relief, so R.C. 2505.02(B)(5), (7) and (9) are inapplicable.

The Trial Court Order determines the application of R.C. 2315.21 to Americare Kidney's counterclaims for breach of fiduciary duty and unfair competition by malicious litigation in this case, but that decision does not act to "restrain[] or restrict[] enforcement" of the statute under R.C. 2505.02(B)(8). This provision is not intended to declare final all orders determining the application of a statute to a particular case. The Trial Court Order contains a routine interpretation of a statute, which does not rise to the level of "restraining or restricting" the enforcement of the statute as used in this section.

According to the docketing statement filed with the Eighth District appellate court, Appellants assert that R.C. 2505.02(B)(6) applies to their appeal. However, unlike *Flynn,* Americare Kidney has not—at any point in either court below—challenged the constitutionality of S.B. 80 or the bifurcation statute. This case does not involve a constitutional challenge to R.C. 2315.21(B), implicitly or explicitly; nor does it involve a conflict between the statute and Civ. R. 42(B). Instead, Americare Kidney argued (and the lower courts properly agreed) that the bifurcation statute simply *does not apply to Americare Kidney's claims in this case.* Specifically, Americare Kidney has consistently argued that the apparent ambiguities R.C.

2315.21 necessitate and anticipate that trial courts will exercise discretion on a case-by-case basis to determine whether the claims at issue are subject to the bifurcation mandate. The Trial Court Order resolved the question of R.C. 2315.21's application but made no determination as to whether the bifurcation requirement is constitutional. The Trial Court Order, therefore, is not a final, appealable order under R.C. 2505.02(B)(6).

C. The Trial Court order lacks the requisite Civ. R. 54(B) language.

The trial court did not include in the Trial Court Order any reference to Civ. R. 54(B) or the requisite language to confirm it is final and immediately appealable. "As this court has held in the past, the phrase 'no just reason for delay' is not a mystical incantation which transforms a nonfinal order into a final appealable order. *** Such language can, however, through Civ. R. 54(B), transform a final order into a final appealable order." *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St. 3d 352, 354 (1993). The lack of Civ. R. 54(B) language further evidences the Trial Court Order was not a final order within the meaning of R.C. 2505.02.

IV. CONCLUSION

For the foregoing reasons, Americare Kidney submits that the Trial Court Order is not a final, appealable order and requests dismissal of this appeal for lack of jurisdiction.

Respectfully submitted,

Date: December 29, 2025

/s/ John F. Hill

John F. Hill (39675)
John.Hill@lewisbrisbois.com
Meleah M. Skillern (96077)
Meleah.Skillern@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
1 Gojo Plaza, Suite 310
Akron, Ohio 44311
Telephone: 330.272.0000
Facsimile: 330.272.0019

Attorneys for Appellee Americare Kidney Institute, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2025, I electronically filed the foregoing **Appellee's Supplemental Brief** with the Clerk of Courts and served by email to counsel for Appellants Wassim El-Hitti, M.D. and Saurabh Bansal, M.D. pursuant to S.Ct.Prac.R. 3.11(C)(1) as follows:

Christopher B. Congeni (0078160)
Christopher R. Green(0096845)
Marissa R. Borschke (0100369)
Amundsen Davis LLC
500 S Front Street, Suite 1200
Columbus, OH 43215
Telephone: 614-229-4563
ccongeni@amundsendavislaw.com
cgreen@amundsendavislaw.com
mborschke@amundsendavislaw.com

Counsel for Appellants Wassim El-Hitti, M.D. and Saurabh Bansal, M.D.

/s/ John F. Hill
John F. Hill
Attorney for Appellee Americare Kidney Institute, LLC