

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ESTATE OF LEONA MAXIM)
by Christine Guest, Executor)
)
Plaintiff,)
)
vs.) **PLAINTIFF'S BRIEF REGARDING**
) **PUNITIVE DAMAGES BIFURCATION**
KINDRED NURSING & REHAB -)
STRATFORD, *et al.*)
)
Defendants.)
)
_____)

I. INTRODUCTION

This case stems from nursing home Kindred Stratford Commons violating one of its residents, Leona Maxim's, rights and safety by: (1) disregarding a physician's order requiring two people to assist in any care requiring repositioning in bed, leading to Leona being rolled out of bed and breaking her leg; and (2) failing to properly manage the physician-ordered leg brace leading to the development of open wounds and infections. Kindred rolled Leona out of bed on June 3, 2013, and she died on August 23, 2013. According to the Cuyahoga County Coroner, Leona died from the broken leg and complications related to the broken leg.

Leona Maxim's Estate, the Plaintiff in this case, brought claims for negligence, recklessness, violation of the Nursing Home Resident's Rights law violation (Revised Code section 3721.13), and wrongful death. The Estate seeks compensatory and punitive damages for a number of the claims.

Kindred moved the Court to bifurcate punitive-damage-only evidence to a second phase of trial under R.C. 2315.21. Plaintiff agrees Kindred has that right, and the trial

must be bifurcated. Plaintiff submits this brief to seek an order clarifying trial procedure. Specifically, the Court should issue an order that:

1. Plaintiff may introduce evidence bearing on the compensatory claims even where such evidence is also probative for punitive claims;
2. The punitive phase of trial will commence immediately after a Plaintiff's verdict on compensatory damages, with the same jury; and
3. The parties may question the jury in *voir dire* on issues related to punitive claims, including notice of a possible second phase of trial.

Ohio law is clear on these issues. The Court's order will streamline the trial and trial preparation. A proposed order is attached as **Exhibit A** and will be submitted in electronic format through the Clerk's electronic filing system for the Court's convenience.

II. **ARGUMENT**

A. **ONLY EVIDENCE RELATING SOLELY TO PUNITIVE DAMAGES IS EXCLUDED FROM THE FIRST PHASE OF TRIAL.**

The bifurcation statute explicitly provides that only evidence related ***solely*** to punitive damages—that is, evidence with no probative value towards claims permitting compensatory damages—can be excluded during the first phase of trial:

During [initial stage of the trial], 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. . . .

R.C. 2315.21(B)(1)(a) (emphasis added).

Ohio trial courts considering this issue have repeatedly found that “Plaintiff may introduce evidence at trial bearing on the compensatory claims in the compensatory phase of trial, even if such evidence also has probative value in the possible punitive

phase of trial,” because the “statute only excludes evidence during the compensatory phase going exclusively to punitive damages issues.” Howell v. The Eliza Jennings Home, et al., Cuyahoga County Case No. CV-14-824578, July 12, 215 Journal Entry (Judge Daniel Gaul) (**Exhibit B**) (emphasis added). As Judge Nancy Russo explained in a recent order, parties “may introduce evidence relative to the claims for compensatory damages, including such evidence that has probable value in the consideration of punitive damages” under R.C. 2315.21. Berry v. Brown, Cuyahoga County CP No. CV-16-861798, June 20, 2016 Journal Entry (Judge Nancy Margaret Russo) (**Exhibit C**).

Judge Michelle Miller in Jefferson County likewise refused to exclude evidence that goes to both compensatory and punitive damage issues:

While the Court reserves individual rulings challenging admissibility of specific evidence, it will not exclude evidence having probative value for the compensatory claims solely because it has probative value as to issues of punitive damages as well. The Defendant is not correct that “Plaintiff is not entitled to present any evidence that relates to the issue of punitive damages” in the first phase of trial. The statute only excludes evidence during the compensatory phase going *exclusively* to punitive damage issues.

The Estate of Pearl Dawson, et al., v. Trinity Health Systems West, et al., Jefferson County CP No. 16-CV-00074, March 3, 2016 Order on Bifurcation of Punitive Damages (Judge Michelle G. Miller) (**Exhibit D**).

Similarly, Clark County Common Pleas Judge Douglas M. Rastatter held evidence relating to punitive damages cannot be excluded if it has any bearing on compensatory damage issues, including “liability” or “control”:

During the compensatory damages phase of the trial, evidence will be subject to exclusion only if the evidence relates **solely** to Plaintiff's claim for punitive damages. Evidence that supports Plaintiff's claim for punitive damages may be admissible during the compensatory damages phase of the trial, if that evidence is relevant to the compensatory damages issues in this case, including, but not limited to, liability, control, compensatory damages, etc.

Thomas v. Ridgewood Nursing and Rehabilitation Center, et al., Clark County CP No. 11 CV 0153, July 13, 2012 Judgement Entry (Judge Douglas M. Rastatter), **Exhibit E** (emphasis original). See also Ott v. Canton Drop Forge, Inc., Stark County CP No. 2013-CV-02521, January 16, 2015 Judgment Entry (Judge Taryn L. Heath) (**Exhibit F**) (“bifurcation [under Havel and R.C. 2315.21(B)] only bifurcates evidence related solely to a punitive damage claim. . . .”).

In this case, Plaintiff claims the Kindred Defendants provided inadequate care by failing to follow a doctor's order regarding assistance levels leading to rolling Leona Maxim out of bed, leading to a broken leg. Plaintiff will also introduce evidence showing Kindred implemented an inadequate system to communicate and maintain such orders, failed to properly monitor care being provided, provided inadequate staffing resources to provide two-person assists to residents like Leona Maxim and manage her leg brace (leading to open wounds), and allowed the development and progression of the open wounds and infection leading to her death. Finally, Plaintiff will show this was not just negligent, but reckless, care, violating the nursing resident's rights law and state and federal regulations.

Any evidence that is relevant to the alleged negligence, recklessness, and code violations is admissible in the first phase, even if also relevant to show a conscious disregard for Leona Maxim's rights and safety with a great probability of causing

substantial harm (the definition of legal malice entitling a plaintiff to punitive damages). If one of the moving Defendant's employees was not just careless, but reckless, that is relevant for the negligence claim and for an award of punitive damages, and therefore is not excluded by the bifurcation statute in the first phase of trial. As a practical matter, the only evidence that would relate "solely" to claim for punitive damages likely would be evidence of Defendants' net worth.

Given the clear statutory language and weight of authority on the issue, the Court should only exclude evidence from the compensatory phase that has *no* probative value on any of the claims or compensatory damages.

B. THE PUNITIVE DAMAGES PHASE OF TRIAL SHOULD PROCEED WITH THE SAME JURY IMMEDIATELY FOLLOWING THE COMPENSATORY PHASE.

Under R.C. 2315.21, the same jury who hears and decides the claim for compensatory damages is to hear and decide the claim for punitive damages:

If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages . . . 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)(1)(b) (emphasis added).

Ohio trial courts in this and other counties have interpreted the clear language of the statute to require a single jury hear both phases of trial, one following the other. See e.g., Lawrence v. Fussner, Cuyahoga County CP Case No. CV-11-764382, Journal Entry (Judge McClelland) (**Exhibit G**) (" . . . R.C. 2315.21(B)(1) makes clear that the bifurcated trial shall be decided in stages by the same jury."); Howell v. The Eliza

Jennings Home, et al., Cuyahoga County CP No. CV-14-824578, July 12, 215 Journal Entry (Judge Daniel Gaul) (**Exhibit B**) (“Under R.C. 2315.21, the same jury who hears and decides the claim for compensatory damages is to hear and decide the claim for punitive damages.”); Glitch v. Hydro-Power, Inc., Belmont County CP Case No. 13CV23, July 20, 2015 Judgment Journal Entry (Judge Vavra) (**Exhibit H**) (“Only one jury will decide all claims. Moreover, those claims will proceed successively, provided that there is a Plaintiffs’ verdict resulting in compensatory damages.”) (citations omitted); The Estate of Pearl Dawson, et al., v. Trinity Health Systems West, et al., Jefferson County CP No. 16-CV-00074, March 3, 2016 Order on Bifurcation of Punitive Damages (Judge Michelle G. Miller) (**Exhibit D**) (“Under R.C. 2315.21, the same jury who hears and decides the claim for compensatory damages is to hear and decide the claim for punitive damages. R.C. 2315.21(B)(1)(b). The single trial will proceed through both phases (assuming a Plaintiffs verdict in the first phase) with the same jury.”).

C. PARTIES MUST BE PERMITTED TO VOIR DIRE ON PUNITIVE DAMAGES TO BE ENSURED A FAIR TRIAL, WITH ONLY JURORS VOTING FOR LIABILITY INVOLVED IN DELIBERATIONS.

Because the same jury will hear the compensatory and punitive phases, it follows that jury selection must include questioning on juror bias regarding punitive damages. Otherwise, jurors impermissibly biased for or against awarding punitive damages could be seated, violating one or the other party’s constitutional right to an impartial jury.

Ohio Courts have held that the statutory framework “requires the same jury to hear and decide both the compensatory damage phase and punitive damage phase,” and “permits the parties to conduct voir dire at the outset of trial on the issue of punitive damages.” Ott v. Canton Drop Forge, Inc., Stark County CP Case No.2013-CV-02521,

January 16, 2015 Judgment Entry (Judge Heath) (**Exhibit F**); see also McRoberts v. Michael A Kelly, DDS, Scioto County CP Case No. 12CIAOO7, July 11, 2013 Order (Judge Marshall) (**Exhibit I**) (“[T]he punitive damages trial will be tried before the same jury immediately following the trial of the compensatory damages case, provided there is a Plaintiffs’ verdict.”). As Judge Gaul explained, the “single trial will proceed through both phases (assuming a Plaintiff’s verdict on the compensatory claim) with the same jury,” therefore the “Parties **must be permitted to voir dire on issues related to biases and prejudices involving punitive damages.**” Howell v. Eliza Jennings, Cuyahoga County Case No. CV-14-824578, July 12, 2015 Journal Entry (Judge Daniel Gaul) (**Exhibit B**) (emphasis added).

Recently this issue arose in Belmont County, and Judge Vavra explained this is the only procedure that makes sense under the Ohio statute:

Defendants have cited no case law to support their position. The Court has found none, either, other than those cases cited by Plaintiffs. The Court draws the conclusion that this is a nonissue.

This is in line with the cases cited by Plaintiffs including especially *Ott v. Canton Drop Forge, Inc.*, Stark County Common Pleas Case No. 2013-CV-02521. Moreover, this Court can conceive of no other alternative. Accordingly, the parties will be permitted to conduct *voir dire* at the outset of the trial pertaining to the issue of punitive damages.

Glitch v. Hydro-Power, Inc., Belmont County CP Case No. 13CV23, July 20, 2015 Judgment Journal Entry (Judge Vavra) (**Exhibit H**); see also The Estate of Pearl Dawson, et al., v. Trinity Health Systems West, et al., Jefferson County CP No. 16-CV-00074, March 3, 2016 Order on Bifurcation of Punitive Damages (Judge Michelle G. Miller) (**Exhibit D**) (“The Parties must be permitted to *voir dire* on issues related to

biases and prejudices involving punitive damages in order to ensure their right to an unbiased jury.”).

Judge Nancy Russo ordered that not only must the parties be permitted to question the jury about punitive damages bias, the Court would advise the jurors of the possible second phase to prevent undue surprise: “The Court will instruct the jury that a separate proceeding, with the same jurors, will commence, if needed, to determine punitive damages. The attorneys are permitted to inquire, at initial *voir dire* and prior to selection of this jury, on matters that are relative to the ability of a juror to serve on a jury considering punitive damages.” Berry v. Brown, Cuyahoga County CP No. CV-16-861798, June 20, 2016 Journal Entry (Judge Nancy Margaret Russo) (**Exhibit C**).

This position is supported by extrajudicial cases decided under similar bifurcation statutes, which hold that parties must be allowed to conduct *voir dire* on punitive damages:

[A]lthough the trial is to be bifurcated, the parties are only presented with one opportunity to question potential jurors. Logically, where, as here, punitive damages are a relevant issue in the case, *voir dire* questions designed to ascertain bias or prejudice of potential jurors against the award of punitive damages are proper, even if the trial is bifurcated pursuant to § 510.263. To hold otherwise would prevent a party from exercising his right to ascertain any bias or prejudice of potential jurors against the award of punitive damages.

Ashcroft v. TAD Res. Int'l, 972 S.W.2d 502, 506 (Mo. Ct. App. 1998); see also Remel v. State Farm Fire & Cas. Co., 2009 WL 531862 (S.D. Miss. Mar. 2, 2009) (“[T]he only issue to be tried in phase one is the coverage claim. The subject(s) of any additional phases will be determined once the first phase is fully concluded. Of course, counsel for each party may make statements at the beginning of each phase that is held, **and each**

party will be allowed to address the prospect of punitive damages in voir dire.”)
(emphasis added).

Given the potential constitutional issues involved with denying a civil litigant an unbiased jury, the parties must be permitted to inquire as to possible juror bias regarding punitive damages.

III. CONCLUSION

Only evidence related exclusively to punitive damages is excluded from the initial, compensatory phase of the trial, and the Parties must *voir dire* on punitive issues to obtain an impartial jury. Plaintiff requests the Court issue an Order formalizing this procedure to streamline discovery and trial. A proposed order is attached and will be submitted in Word form for the Court’s convenience.

Respectfully Submitted,

s/ William B. Eadie

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CERTIFICATE OF SERVICE

The foregoing was electronically filed on August 4, 2016, and will be available for download through the Court's filing system by:

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One of Counsel for Plaintiff

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ESTATE OF LEONA MAXIM)	CASE NO. CV 15 845038
)	
Plaintiff,)	JUDGE SHIRLEY STRICKLAND SAFFOLD
)	
vs.)	
)	<u>ORDER GRANTING DEFENDANTS'</u>
KINDRED NURSING & REHAB - STRATFORD, <i>et al.</i>)	<u>MOTION TO BIFURCATE AND SETTING</u>
)	<u>TRIAL PROCEDURE FOR PUNITIVE</u>
Defendants.)	<u>DAMAGE BIFURCATION</u>
)	

This is a medical negligence, recklessness, nursing home bill of rights, and wrongful death case in which Plaintiff, the Estate of Leona Maxim, seeks punitive damages for many of its claims. The Kindred Defendants moved to the Court to bifurcate trial as to punitive damages-only evidence under R.C. 2315.21. Plaintiff does not oppose bifurcation, and requests that the Court set the procedure for trial relating to bifurcation.

The statute only excludes evidence during the compensatory phase going exclusively to punitive damages issues. R.C. 2315.21(B)(1)(a) (“During [initial stage of the trial], 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. . . .”) (emphasis added). While the Court reserves individual rulings challenging admissibility of specific evidence, it will not exclude evidence having probative value for the compensatory claims solely because it has probative value as to issues of punitive damages as well.

Defendants concede this point by stating “Plaintiff is not permitted to present evidence that relates **solely** to the issue of punitive damages until such time that a jury returns a verdict against a Defendant awarding compensatory damages.” (Defendants’ Motion at 3, emphasis added.)

Under R.C. 2315.21, the same jury who hears and decides the claim for compensatory damages is to hear and decide the claim for punitive damages. R.C. 2315.21(B)(1)(b) (“If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages . . . 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.”) (emphasis added); see also Lawrence v. Fussner, Cuyahoga County CP Case No. CV-11-764382 (Judge McClelland); Howell v. The Eliza Jennings Home, et al., Cuyahoga County CP No. CV-14-824578, July 12, 215 Journal Entry (Judge Daniel Gaul) (“Under R.C. 2315.21, the same jury who hears and decides the claim for compensatory damages is to hear and decide the claim for punitive damages.”).

The single trial will proceed through both phases (assuming a Plaintiff’s verdict on the compensatory claim) with the same jury. The Parties must be permitted to *voir dire* on issues related to biases and prejudices involving punitive damages in order to be ensured an unbiased jury, the Parties’ constitutional right. See, e.g. Howell v. Eliza Jennings, Cuyahoga County Case No. CV-14-824578, July 12, 2015 Journal Entry (Judge Daniel Gaul).

Having reviewed the Parties' filings on this issue, and for the reasons stated above, the Court Orders as follows:

1. Defendants' Motion to Bifurcate is GRANTED.
2. Plaintiff may introduce evidence bearing on the compensatory claims even where such evidence is also probative for punitive claims;
3. The punitive phase of trial will commence immediately after a Plaintiff's verdict on compensatory damages, with the same jury; and
4. The parties may question the jury in *voir dire* on issues related to punitive claims, including notice of a possible second phase of trial.

IT IS SO ORDERED.

JUDGE SHIRLEY STRICKLAND SAFFOLD

DATE

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL HOWELL,
Executor of the Estate of Mary McKinley

Plaintiff,

vs.

THE ELIZA JENNINGS HOME, *et al.*,

Defendants.

) CASE NO. CV 14 824578

)

) JUDGE DANIEL GAUL

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**ORDER GRANTING PLAINTIFF'S
MOTION FOR CLARIFICATION
ON PUNITIVE DAMAGES.**

This is a medical negligence and wrongful death case in which Plaintiff Estate of Mary McKinley seeks punitive damages. The Court previously granted Defendants' request to bifurcate trial in this matter under R.C. 2315.21(B)(1). Plaintiff moved the Court for an order clarifying the discovery and trial procedure as it relates to punitive damages.

The Court has never stayed the issue of punitive damages discovery, nor have any of the Parties requested such a stay. The bifurcation statute contemplates two phases of a single trial. R.C. 2315.21(B)(1) (“(a) The initial stage of *the trial* shall relate only to. . . .”; “(b) evidence may be presented in the second stage of *the trial*. . . .”) (emphasis added). Delaying trial between phases one and two for the purpose of conducting discovery is wasteful of parties', jurors', and Court's time and resources, particularly given that much of the discovery may be duplicative. Discovery as to all issues in the case should be ongoing for presentation at a single trial.

The statute only excludes evidence during the compensatory phase going exclusively to punitive damages issues. R.C. 2315.21(B)(1)(a) (“During [initial stage of

the trial], 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. . . .”) (emphasis added).

Under R.C. 2315.21, the same jury who hears and decides the claim for compensatory damages is to hear and decide the claim for punitive damages. R.C. 2315.21(B)(1)(b) (“If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages . . . 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.”) (emphasis added); see also *Lawrence v. Fussner*, Cuyahoga County CP Case No. CV-11-764382 (Judge McClelland).

The single trial will proceed through both phases (assuming a Plaintiff’s verdict on the compensatory claim) with the same jury. The Parties must be permitted to voir dire on issues related to biases and prejudices involving punitive damages.

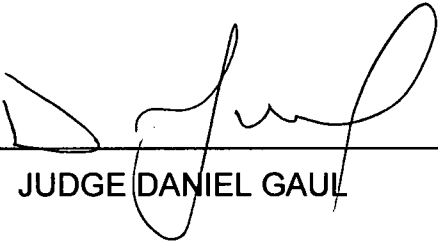
Having reviewed the Parties’ filings on this issue, and for the reasons stated above, the Court Orders as follows:

1. The Parties should proceed with discovery on all issues, including related solely to punitive damages.
2. Plaintiff may introduce evidence at trial bearing on the compensatory claims in the compensatory phase of trial, even if such evidence also has probative value in the possible punitive phase of trial, to the extent that such evidence is admissible at all.
3. The punitive phase of trial will commence immediately after a Plaintiff’s verdict on compensatory damages, if any, with the same jury.

4. The parties may question the jury in *voir dire* on issues related to punitive claims so all parties have the opportunity to have a fair trial decided by an unbiased jury.

IT IS SO ORDERED.

7/12/15
DATE


JUDGE DANIEL GAUL



94593669



**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

LORI BERRY
Plaintiff

Case No: CV-16-861798

Judge: NANCY MARGARET RUSSO

WALTER BROWN
Defendant

JOURNAL ENTRY

PLAINTIFFS MOTION FOR CLARIFICATION OF VOIR DIRE GUIDELINES FOR TRIAL IS GRANTED. THE COURT WILL INSTRUCT THE JURY THAT A SEPARATE PROCEEDING, WITH THE SAME JURORS, WILL COMMENCE, IF NEEDED, TO DETERMINE PUNITIVE DAMAGES. THE ATTORNEYS ARE PERMITTED TO INQUIRE, AT INITIAL VOIR DIRE AND PRIOR TO SELECTION OF THIS JURY, ON MATTERS THAT ARE RELATIVE TO THE ABILITY OF A JUROR TO SERVE ON A JURY CONSIDERING PUNITIVE DAMAGES; THE COURT FURTHER ORDERS THAT THE PARTIES MAY INTRODUCE EVIDENCE RELATIVE TO THE CLAIMS FOR COMPENSATORY DAMAGES, INCLUDING SUCH EVIDENCE THAT HAS PROBABLE VALUE IN THE CONSIDERATION OF PUNITIVE DAMAGES WITH INDIVIDUAL OBJECTIONS TO BE MADE ON SPECIFIC PIECES OF EVIDENCE, DURING TRIAL; THE PARTIES HAVE RECEIVED NON-EXPERT AND OTHER CASE MANAGEMENT DATES. THE PARTIES HAVE NOT RECEIVED A SEPARATE SCHEDULE FOR DISCOVERY ON PUNITIVE DAMAGES AND THEY ARE TO CONDUCT ALL DISCOVERY WITHIN THE TIMEFRAMES PREVIOUSLY SET BY THE PT/CMC ORDER.

Judge Signature

06/20/2016

06/20/2016

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NAILAH K. BYRD, CLERK

IN THE COURT OF COMMON PLEAS
JEFFERSON COUNTY, OHIO

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COMMON PLEAS COURT
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JOHN A. BOGGS
CLERK OF COURTS
JEFFERSON COUNTY OH

THE ESTATE OF PEARL DAWSON,

Plaintiff

vs.

TRINITY HEALTH SYSTEM WEST, *et al.*

Defendants

) CASE NO. 16-CV-000746
)
)
) JUDGE MICHELLE G. MILLER
)
)
)
) **ORDER ON BIFURCATION OF**
) **PUNITIVE DAMAGES.**
)
)
)

This is a negligence and wrongful death action in which the Plaintiff, the Estate of Pearl Dawson, alleges Pearl Dawson died as the result of infection and necrotizing fasciitis caused by pressure ulcers the Defendants either caused or failed to treat.

Defendant Sienna Skilled Nursing & Rehabilitation, Inc. moved this Court to bifurcate the trial as related to punitive damages under Ohio Revised Code 2315.21, the bifurcation statute. Plaintiff acknowledges the trial should be bifurcated, but requests the Court clarify that discovery will be ongoing on all issues, in preparation for a single trial with a single jury, and permit *voir dire* on punitive damage issues. The Court grants the requested bifurcation and adopts Plaintiff's proposed parameters as set forth below.

Discovery shall proceed on all issues, including punitive damages. There is no basis to stay discovery into punitive damages issues merely because the trial will be bifurcated. The bifurcation statute contemplates two phases of a single trial. R.C. 2315.21(B)(1)(a). Discovery as to all issues in the case should be ongoing for presentation at a single trial.

While the Court reserves individual rulings challenging admissibility of specific evidence, it will not exclude evidence having probative value for the compensatory claims solely because it has probative value as to issues of punitive damages as well.

The Defendant is not correct that "Plaintiff is not entitled to present any evidence that relates to the issue of punitive damages" in the first phase of trial. The statute only excludes evidence during the compensatory phase going *exclusively* to punitive damage issues.

Under R.C. 2315.21, the same jury who hears and decides the claim for compensatory damages is to hear and decide the claim for punitive damages. R.C. 2315.21(B)(1)(b). The single trial will proceed through both phases (assuming a Plaintiff's verdict in the first phase) with the same jury. The Parties must be permitted to *voir dire* on issues related to biases and prejudices involving punitive damages in order to ensure their right to an unbiased jury.

Having reviewed the Parties' filings on this issue, and for the reasons stated above, the Court Orders as follows:

1. The Parties should proceed with discovery on all issues, including related solely to punitive damages.
2. Plaintiff may introduce evidence at trial bearing on the compensatory claims in the compensatory phase of trial, even if such evidence also has probative value in the possible punitive phase of trial, to the extent that such evidence is admissible at all.
3. The punitive phase of trial will commence immediately after a Plaintiff's verdict on compensatory damages, if any, with the same jury.
4. The parties may question the jury in *voir dire* on issues related to punitive claims so all parties have the opportunity to have a fair trial decided by an unbiased jury.

IT IS SO ORDERED.

3-3-16

DATE



JUDGE MICHELLE G. MILLER

IN THE COURT OF COMMON PLEAS
CLARK COUNTY, OHIO

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FILED
ROBERT VINCENT, CLERK
COMMON PLEAS COURT
CLARK COUNTY, OHIO

PEGGY THOMAS, as the personal
representative of the Estate of KYLE A.
THOMAS (deceased),

CASE NO. 11 CV 0153
JUDGE DOUGLAS M. RASTATTER

Plaintiff,

vs.

JUDGMENT ENTRY.

RIDGEWOOD NURSING AND
REHABILITATION CENTER, et al.

Defendants.

This matter having come on for consideration on the Motion to Bifurcate Claims for Compensatory and Punitive Damages and for Stay of Discovery on Punitive Damages Claims filed by Defendants Ridgewood Nursing and Rehabilitation Center, Extendicare Health Services, Extendicare Health Services, Inc., and Extendicare Homes, Inc. ("Defendants"), the Court hereby finds Defendants' Motion well taken and hereby grants, in part, and denies, in part, Defendants' Motion. The jury trial of this case will be bifurcated as follows:

The jury trial of this case will be bifurcated into two phases: a compensatory damages phase and a punitive damages phase;

The jury will first decide the issue of compensatory damages. If Plaintiff is awarded compensatory damages, at the conclusion of the compensatory damages phase of the trial, then the punitive damages phase of the trial will begin immediately, with the same jury.

During the compensatory damages phase of the trial, evidence will be subject to exclusion only if the evidence relates solely to Plaintiff's claim for punitive damages. Evidence that supports Plaintiff's claim for punitive damages may be admissible during the compensatory damages phase of the trial, if that evidence is relevant to the compensatory damages issues in this case, including, but not limited to, liability, control, compensatory damages, etc.

Discovery will be permitted on all issues, including both punitive damage issues and compensatory damage issues, and shall proceed pursuant to the schedule established by the Court.

SO ORDERED.



The Honorable Judge Douglas M. Rastatter

7/13/12

Date

- (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. (Emphasis added).

OHIO REV. CODE § 2315.21(B)(1)(Anderson 2013). In *Havel v. Villa St. Joseph*, the Ohio

Supreme Court clearly held:

R.C. 2315.21(B) creates a substantive right to bifurcation in tort actions when claims for compensatory and punitive damages have been asserted. Thus, R.C. 2315.21(B) creates, defines, and regulates a substantive, enforceable right to separate stages of trial relating to the presentation of evidence for compensatory and punitive damages in tort actions and therefore takes precedence over Civ.R. 42(B) and does not violate the Ohio Constitution, Article IV, Section 5(B).

Havel v. Villa St. Joseph, 131 Ohio St. 3d 235, 245 (2012). Additionally, the Fifth

District Court of Appeals in *Reese v. Mechling*, reversed and remanded the trial court's

Judgment Entry denying the defendant's Motion to Bifurcate based on the Ohio

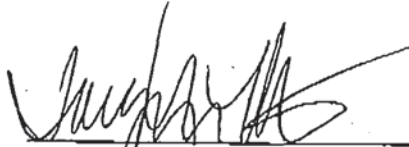
Supreme Court's decision in *Havel, supra*. See *Reese v. Mechling*, 2012-Ohio-2138

(Ohio 5th Dist. Ct. App., May 11, 2012).

Plaintiffs concede that pursuant to *Havel* and R.C. §2315.21(B), bifurcation is required when requested. However, Plaintiffs have requested this Court to issue an Order which makes clear that any bifurcation of Plaintiffs' punitive damages: 1) only bifurcates evidence related solely to a punitive damage claim; 2) requires the same jury to hear and decide both the compensatory damage phase and punitive damage phase; 3) permits the parties to conduct voir dire at the outset of trial on the issue of punitive damages; and 4) permits the parties to conduct discovery on the punitive damages claim prior to trial. In the present action, Defendant CDF has not opposed Plaintiffs aforementioned requests. Therefore, based upon a review of Ohio law as well as the

pleadings in the present action the Court hereby **GRANTS** Defendant's Motion and hereby Orders that the bifurcation: 1) only bifurcates evidence related solely to a punitive damage claim; 2) requires the same jury to hear and decide both the compensatory damage phase and punitive damage phase; 3) permits the parties to conduct voir dire at the outset of trial on the issue of punitive damages; and 4) permits the parties to conduct discovery on the punitive damages claim prior to trial.

IT IS SO ORDERED.



HON. TARYN L. HEATH

c: Atty. Frank G. Mazgaj/Atty. Emily Yoder- via facsimile (330) 670-7450
Atty. David R. Grant- via facsimile (216) 861-5322



72580349

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SHIRLEY LAWRENCE
Plaintiff

SARAH W FUSSNER
Defendant

Case No: CV-11-764382

Judge: ROBERT C MCCLELLAND

JOURNAL ENTRY

DEFENDANT'S MOTION TO RECONSIDER THIS COURT'S ORDER ON DEFENDANT'S PREVIOUS MOTION TO BIFURCATE CLAIMS FOR PUNITIVE DAMAGES AND STAY DISCOVERY ON THE BIFURCATED CLAIMS, IN LIGHT OF THE SUPREME COURT'S DECISION IN HAVEL, IS GRANTED. UPON RECONSIDERATION, THE MOTION TO BIFURCATE IS GRANTED. THE MOTION TO STAY DISCOVERY, HOWEVER, IS DENIED IN THAT R.C. 2315.21(B)(1) MAKES CLEAR THAT THE BIFURCATED TRIAL SHALL BE DECIDED IN STAGES BY THE SAME JURY. TO STAY DISCOVERY WOULD DELAY PROCEEDINGS AND GREATLY INCONVENIENCE THE JURY.

Judge Signature

02/23/2012

02/23/2012

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EXHIBIT
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STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS

FILED
COMMON PLEAS COURT
BELMONT CO., OHIO

DOCKET AND JOURNAL ENTRY

2015 JUL 20 1 13 04

ROBERT GLITCH, et al.

Plaintiffs

Case No. 13 CV 23

CHRISTINE MCGEE
CLERK OF COURT

vs.

Date of Entry: July 20, 2015

HYDRO-POWER, INC., et al.

Defendants

For the reasons set forth in the accompanying Judgment Journal Entry, one jury will decide both the compensatory and punitive damages phases of this case, which phases will be conducted in succession. The parties will be permitted to conduct *voir dire* pertaining to both phases at the outset of the trial.

The statement purportedly made to Plaintiff Robert Glitch by a first responder that he was lucky to be alive is inadmissible. However, the responders' statements about the observed conditions are admissible in their absence.

This matter remains scheduled for trial on Tuesday, September 8, 2015, at 8:30 a.m. This case is, therefore, referred to the Belmont County Mediation Department. Counsel are directed to cooperate to schedule mediation proceedings by immediately contacting the Mediator's Assistant, Micki Rushman, at 740-695-2121, extension 1043.

All subject to further order of the Court.

"Special Entry"


JOHN A. VAVRA – JUDGE

pc: William B. Eadie, Esq., Attorney for Plaintiffs
Daniel P. Taylor, Esq., Attorney for both Defendants
W. Gus Saines, Esq., Attorney for Defendant Hydro-Power, only
Harry W. White, Esq., Belmont County Mediator

JAV/hec

