[Cite as *Stewart v. Siciliano,* 2012-Ohio-6123.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

MARK L. STEWART,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2011-A-0042
- vs -	:	
JOHN A. SICILIANO,	:	
Defendant,	:	
PROGRESSIVE PREFERRED INSURANCE COMPANY,	:	
	:	
Defendant-Appellant.		

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009 CV 1335.

Judgment: Affirmed in part, reversed in part and remanded.

Ralph C. Buss and *David E. Koerner*, Law Offices of Ralph C. Buss, 168 East High Street, P.O. Box 704, Painesville, OH 44077 (For Plaintiff-Appellee).

Andrew H. Isakoff and *Kelly M. Jackson*, 625 Alpha Drive, Box 011B, Highland Heights, OH 44143 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Progressive Preferred Insurance Company ("Progressive") appeals from a judgment of the Ashtabula County Court of Common Pleas, which denied its motion to bifurcate proceedings in a case filed by Mark L. Stewart, who claimed Progressive breached its insurance contract with him and acted in bad faith regarding his

uninsured/underinsured motorist ("UM/UIM") claim. Progressive claims the trial court also erred in ordering the discovery of its claims file.

{¶2} We affirm the portion of the trial court's decision denying bifurcation of Mr. Stewart's breach of contract claim and the bad faith claim, although based on a different analysis. We reverse the trial court's decision to the extent that it failed to bifurcate the presentation of evidence relating to compensatory damages from evidence relating to punitive damages, as required by R.C. 2315.21(B). Regarding discovery of Progressive's claims file, we conclude the materials in the file relating to an insurer's alleged lack of good faith are not protected under the attorney-client privilege doctrine, but the trial court should have conducted an *in camera* review of the file to ensure that privileged information which does not itself show bad faith in the insurance company's handling of the claim remains protected.

Substantive Facts and Procedural History

{¶3} This case arose from a 2009 traffic accident, where John A. Siciliano's vehicle struck Mr. Stewart's motorcycle from behind. Mr. Stewart filed a complaint against Mr. Siciliano, alleging physical injuries and property damage. After Mr. Siciliano filed an answer, Mr. Stewart amended the compliant, adding his own insurance company, Progressive, as a defendant. He claimed Progressive breached his insurance contract regarding his UM/UIM motorist coverage.

{¶4} Progressive had made an offer to settle the UM/UIM claim but then withdrew its offer prompting Mr. Stewart to amend his complaint to add a bad faith claim for relief seeking punitive damages. He alleged Progressive acted in bad faith in withdrawing its settlement offer and refusing to pay his UM/UIM coverage. Progressive

maintained that it rescinded its offer after learning that Mr. Stewart, contrary to his representation to Progressive, had suffered prior injuries to the same parts of his body he claimed had been injured in this accident.

{¶5} Progressive moved to bifurcate the bad faith claim and claims for punitive damages from the remaining claims (i.e., the tort claim against the other driver and the breach of contract claim against Progressive), pursuant to R.C. 2315.21(B).

{¶6} In its decision, the trial court noted that several appellate courts have declared this bifurcation statute unconstitutional, citing *Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251, and *Myers v. Brown*, 5th Dist. No. 2010-CA-00238, 2011-Ohio-892. Concurring with these courts, the trial court declared the statute unconstitutional.

{¶7} The trial court then exercised its discretion as to bifurcation pursuant to Civ.R.42(B), and determined that Progressive failed to show that its defense of the breach of contract claim would be prejudiced if the bad faith and breach of contract claims were not tried separately. The trial court also determined that, on the other hand, Mr. Stewart had shown the two claims were necessarily intertwined to the extent he would be highly prejudiced if the proceedings were bifurcated. The court therefore denied Progressive's request to bifurcate. In addition, the court ordered Progressive to produce materials in the claims file for the period of July 5, 2009 through February 9, 2011, the day Progressive withdrew its UM/IUM settlement offer.

{¶8} Progressive now appeals from that judgment, assigning two errors for our review.

{¶9} "[1.] The trial court committed prejudicial error in denying defendant-appellant Progressive Preferred Insurance Company's Motion to Bifurcate and Stay."

{¶10} "[2.] The trial court committed prejudicial error when it declared, *sua sponte*, in its ruling on defendant-appellant Progressive's motion to bifurcate that plaintiff-appellee should be entitled to view the Progressive claim file, where no denial of coverage had occurred and the claim file had not been requested."

{¶11} Initially, we note that the denial of a motion to bifurcate pursuant to R.C. 2315.21(B) is a final appealable order. *See Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481.

Bad Faith Claim against an Insurer

{¶12} Ohio law imposes upon an insurer a duty to act in good faith in the handling and payment of the claims of its insured, and a breach of this duty gives rise to a cause of action in tort against the insurer. *Hoskins v. Aetna Life Ins. Co*., 6 Ohio St.3d 272 (1983). In the syllabus, the court in *Hoskins* held: "Based upon the relationship between an insurer and its insured, an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer." *See also Dombroski v. Wellpoint, Inc*., 119 Ohio St.3d 506, 2008-Ohio-4827, ¶8 (insurer bad faith is an actionable tort in this state).

{¶13} In *Zoppo v. Homestead Ins. Co*., 71 Ohio St.3d 552 (1994), the court set forth the standard for analyzing a bad faith claim against an insurer: "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Id*. at paragraph one of the syllabus.

{¶14} Regarding whether punitive damages can be recovered from a bad faith claim, the *Hoskins* court explained that "inasmuch as the breach of the duty to act in good faith is tortious in nature, punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay a claim of its insured upon adequate proof." *Hoskins* at 277. The court cautioned, however, that an insurance company's violation of its duty of good faith and fair dealing alone does not necessarily establish that the defendant insurance company acted with the requisite intent to injure the insured plaintiff entitling the latter to punitive or exemplary damages. *Id*. at 278, citing *Silberg v. California Life Ins. Co.*, 11 Cal.3d 452 (CA. 1974).

{¶15} Punitive damages may only be recovered against an insurer "who breaches his duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer." *Hoskins* at paragraph two of the syllabus, citing *Columbus Finance v. Howard*, 42 Ohio St.2d 178. *See also Ohio Natl. Life Assur. Corp. v. Satterfield,* 194 Ohio App.3d 405, 2011-Ohio-2116 (9th Dist.).

{¶16} Actual malice is defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Zoppo* at 558, quoting *Preston v. Murty*, 32 Ohio St.3d 334 (1987), syllabus.

{¶17} With that background in mind, we turn to the instant appeal. Progressive claims the bad faith claim and punitive damages claim should be bifurcated from other claims in this case, citing R.C. 2315.21(B)(1).

Bifurcation Statute

{¶18} R.C. 2315.21(B)(1), effective April 7, 2005, requires a trial court to bifurcate the compensatory and punitive damages phases of "a tort action." It states:

{¶19} "*In a tort action* that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

{¶20} "(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

{¶21} "(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."

{¶22} Under the statute, a plaintiff may proceed with the second stage of a bifurcated trial only when the jury determines in the initial phase that the plaintiff is entitled to recover compensatory damages. *Kleinholz v. Goettke*, 173 Ohio App.3d 80, 2007-Ohio-4880 (1st Dist.).

Constitutionality of R.C. 2315.21(B)(1)

{¶23} In this case, the trial court below refused to apply R.C. 2315.21(B), agreeing with several appellate courts that have declared it unconditional. The trial court did so on the ground that the statute conflicts with Civ.R. 42(B), which grants it the discretion to order a separate trial of any claims presented, if doing so promotes convenience and avoids prejudice. The rule provides the following:

{¶24} "The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury."

{¶25} Under Section 5(B), Article IV of the Ohio Constitution, the Modern Courts Amendment, the Supreme Court of Ohio has the exclusive authority to "prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. * * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *See*, *e.g.*, *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, ¶5. Where a conflict arises between a rule and a statute, the court's rule prevails on procedural matters, whereas the legislature's statute prevails on substantive matters. *See*, *e.g.*, *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶28.

{¶26} Therefore, the controversy regarding R.C. 2315.21(B) is whether the right to bifurcation under the statute is a substantive right; if it is a procedural matter only, then the statute conflicts with Civ.R. 42(B), and would be unconstitutional as it violates the doctrine of separation of powers. The issue of whether R.C. 2315.21(B) is

constitutional was certified as a conflict question and recently resolved by the Supreme Court of Ohio, in *Havel*, *supra*. The court held that that R.C. 2315.21(B) creates a substantive right to bifurcation in tort actions where both compensatory and punitive damages are sought, and therefore, it does not violate the separation of powers required by the Ohio Constitution. *Id*. at ¶5.

{¶27} In accordance with *Havel*, therefore, bifurcation of the presentation of evidence supporting compensatory damages from that supporting punitive damages is mandated. However, our analysis does not end here. R.C. 2315.21(B)(1) is premised on a "tort action." *Havel* presents a typical factual scenario for the application of the statute. There, the plaintiff sued a hospital for medical malpractice, wrongful death, and violation of Ohio's Nursing Home Bill of Rights, seeking compensatory and punitive damages.

The Statute's Applicability in Breach-of-Contract-and-Bad-Faith Cases

{¶28} Here, Mr. Stewart did not seek punitive damages against the other vehicle driver, Mr. Siciliano, and therefore, there is no bifurcation issue regarding that claim. Rather, Mr. Stewart asserted a breach-of-contract claim and then added a bad faith tort claim regarding Progressive's handling of his UM/UIM coverage. It is not apparent how the statute would apply in a hybrid case such as this one, which includes both a contract and a tort claim.

{¶29} R.C. 2315.21(A)(1) defines "tort action" as "a civil action for damages for injury or loss to person or property * * * but does not include a civil action for damages for a breach of contract or another agreement between persons."

{¶30} Mr. Stewart's bad faith claim for relief, although a tort claim, "arises as a consequence of a breach of a duty established by a particular contractual relationship." *Motorist Mut. Ins. Co. v. Said*, 63 Ohio St.3d 690, 694 (1992). Therefore, it would not be an unreasonable interpretation of the statute to conclude that *the entire case* is outside the contemplation of the R.C. 2315.21(B)(1).

{¶31} The federal court in *Maxey v. State Farm Fire & Cas. Co*., 569 F.Supp.2d 720, 724 (S.D.Ohio 2008), interpreted the statute differently. Although the federal case is not controlling, we find it persuasive.[1]

{¶32} In that case, the plaintiff's home was destroyed in a fire, but the insurance company denied the claim. The plaintiff sued the insurance company for breach of contract and bad faith, seeking compensatory damages for breach of contract and punitive damages for the bad faith claim. The insurance company moved the court to bifurcate the bad faith claim and the breach of contract claim. It also sought bifurcation of claims for compensatory damages and for punitive damages, citing R.C. 2315.21(B).

{¶33} Exercising its discretion in bifurcation, the district court denied the request to bifurcate the bad faith claim from breach of contract claim, on the ground that the potential prejudice to the plaintiff and judicial economy outweighed possible prejudice to the insurance company.

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1. Our research does not disclose state cases directly addressing the applicability of R.C. 2315.21 to a suit involving breach of contract and bad-faith claims against an insurance company. In *Mastellone v. Lightning Rod Mut. Ins. Co*., 175 Ohio App.3d 23, 2008-Ohio-311 (8th Dist.), the insurance company moved to bifurcate an insured's bad faith claim from the underlying breach of contract claim pursuant to R.C. 2315.21(B)(1), and the trial court granted it. The Eight District reversed, on the ground that the insured filed the complaint before the enactment of R.C. 2315.21(B)(1), which is not retroactive. The court therefore did not reach the issue of whether the bad faith claim should be bifurcated from the underlying breach of contract claim pursuant to the statute.

{¶34} Regarding the insurance company's request for bifurcation of the plaintiff's claim for compensatory damages from the claim for punitive damages, the insurance company argued R.C. 2315.21 makes it mandatory if requested by any party. The plaintiff, on the other hand, argued that R.C. 2315.21(B)(1) only applies to *tort actions*, and, because the case was based on the plaintiff's breach of contract claim, bifurcation was not mandatory. In response, the insurance company argued the plaintiff's claim for bad faith was a tort claim, and therefore, the court must grant bifurcation if requested. *Id*. at 724.

{¶35} The district court agreed with the insurance company. Because the plaintiff's claim for bad faith *was* a tort claim, it would be subject to R.C. 2315.21(B)(1). The court explained, "[t]he language is clear, '[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 original.) *Id*.

{¶36} Having read the statute carefully, we agree with the federal court's reading of the statute. As an insured's claim for bad faith sounds in tort, it would be subject to R.C. 2315.21(B); the insurer is entitled to bifurcate the presentation of evidence supporting compensatory damages from the presentation of evidence supporting an award of punitive damages when a bad faith claim is alleged. That is, presentation of evidence purporting to show "actual malice, fraud, or insult on the part of the insurer" must be bifurcated from the presentation of evidence regarding the recovery of compensatory damages for breach of contract and breach of the duty of good faith claims.

{¶37} Returning to the case at hand, the trial court here found R.C. 2315.21(B) unconstitutional and therefore exercised its discretion in bifurcation under Civ.R. 42(B). It found that (1) Progressive failed to make any specific showing as to how it would be prejudiced if the breach of contract claim is not bifurcated from the bad faith claim, (2) the breach of contract and the bad faith claim are necessarily intertwined to the extent that it would be highly prejudicial to Mr. Stewart if they were bifurcated, (3) the mere fact that the two claims will be tried together is insufficient to find that jury confusion would result, (4) the testimony of Mr. Stewart's counsel, which, if necessary, may disqualify counsel, would not be prejudicial to Progressive, and (5) the interest of judicial economy weighs against bifurcation of the two claims.

{¶38} Based on these reasons, the trial court denied Progressive's request to bifurcate the breach of contract and bad faith claims. We find no abuse of discretion in its ruling. Although Progressive's motion asked for the bifurcation of bad faith *as well as* punitive damages, the court's judgment made no mention of punitive damages.

{¶39} On the basis of the foregoing analysis, we conclude that R.C. 2315.21(B)(1), found to be constitutional by Supreme Court of Ohio, is applicable to this case to a limited extent. Although it does not require bifurcation of the breach of contract claim and the bad faith claim, it does require the bifurcation of the presentation of evidence of compensatory damages and that of punitive damages regarding the bad faith tort claim. We therefore affirm the portion of the trial court's decision denying bifurcation of the breach of contract claim and the bad faith claim, based on its well-articulated reasons and in exercise of its discretion.

{¶40} However, we reverse the trial court's decision to the extent that it failed to bifurcate the presentation of evidence regarding compensatory damages from evidence purported to prove punitive damages (i.e., evidence regarding "actual malice, fraud, or insult on the part of the insurer"), as such bifurcation is required by the statute. The first assignment of error is sustained in part and overruled in part.

Discovery of Progressive's Claims File

{¶41} Under the second assignment of error, Progressive contends that the trial court erred in ordering the production of materials in Progressive's claims file for the period of July 5, 2009 through February 9, 2011, the day Progressive withdrew its offer regarding his UM/UIM coverage.

{¶42} Initially, we note that, generally, discovery issues are interlocutory in nature and a trial court's judgment regarding these issues does not constitute a final appealable order. However, provisional remedies ordering discovery of alleged privileged material are final and appealable. *See Cobb v. Shipman*, 11th Dist. No. 2011-T-0049, 2012-Ohio-1676 (an order compelling the production of privileged documents to an opposing party constitutes a final appealable order). *See also Smalley v. Friedman, Domiano & Smith Co., LPA*, 8th Dist. No. 83636, 2004-Ohio-2351.

{¶43} Furthermore, a trial court's disposition of a discovery matter is normally reviewed under an abuse of discretion standard. *Simeone v. Girard City Bd. of Edn*., 171 Ohio App.3d 633, 2007-Ohio-1775, ¶21 (11th Dist.). However, if the discovery issue involves an alleged privilege, it is a question of law and will be reviewed *de novo*. *Ward v. Summa Health Sys*., 128 Ohio St.3d 212, 2010-Ohio-6275, ¶13.

{¶44} In insurance bad faith litigation, discovery of the insurer's claims file is now routine; however, there are limitations. Progressive contends that the attorney-client privilege exempts the materials from discovery. Generally, "[t]he attorney-client privilege exempts from the discovery process certain communications between attorneys and their clients. The privilege has long been recognized by the courts, and 'its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" (Citations omitted). *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209 (2001), fn. 2.

{¶45} However, the Supreme Court has recognized several exceptions to the attorney-client privilege. *See Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp*., 127 Ohio St.3d 161, 2010-Ohio-4469. Pertinent to the present case is the exception to the attorney-client privilege recognized in *Boone*, where the court extended the exception to attorney-client communications showing an insurance company's lack of good faith in denying coverage. The court deemed such communications to be unworthy of protection by the attorney-client privilege.

{¶46} The *Boone* court defined the scope of the exception in the bad faith context, holding that "[i]n an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage." *Boone* at syllabus.

{¶47} Here, Progressive withdrew its settlement offer tendered under the UM/UIM portion of the policy during a mediation on February 9, 2011, allegedly because

it learned Mr. Stewart had not disclosed information about prior injuries. Progressive's withdrawal of its settlement offer prompted Mr. Stewart to amend his complaint, claiming Progressive's withdrawal of the offer constituted bad faith.

{¶48} Progressive asserts the trial court improperly ordered discovery of the claims file, arguing that *Boone* only requires discovery after coverage is *denied*, and, in Mr. Stewart's case, Progressive *has not* denied outright the UM/UIM claim. Progressive claims a *denial* of coverage must occur to trigger its obligation to produce the privileged materials, and it maintains that there is no evidence in the record that Progressive actually denied the UM/IUM coverage.

{¶49} To bolster its claims that it has not denied the UM/UIM claim, Progressive points us to paragraph nine of its answer to Mr. Stewart's amended complaint. Our reading of that paragraph, however, indicates that there is no admission by Progressive that it is obligated to pay the claim. Rather, the paragraph states, in very general terms, that "Defendant Progressive admits that it owes Plaintiff Mark Stewart certain obligations pursuant to the terms of and conditions of the applicable laws, but Defendant Progressive is without knowledge sufficient to admit or deny the remainder as it [the bad faith claim] is vague and lack specificity."

{¶50} Progressive essentially argues that, although it withdrew its settlement offer under the UM/IUM portion of the policy, it has not outright *denied* such coverage, and therefore, its obligation of discovery under *Boone* has not been triggered.

{¶51} This is the identical argument made by the defendant insurance company in *Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 2006-Ohio-2630 (2d Dist.). In that case, the plaintiff similarly asserted that Preferred Mutual Insurance Company acted in

bad faith in its handling of his claim, and the trial court ordered Preferred Mutual to produce privileged materials in its claims file. On appeal, Preferred Mutual argued that *Boone* was distinguishable because *Boone* involved an action alleging the bad faith *denial* of insurance coverage, while Preferred Mutual never expressly *denied* plaintiff Unklesbay's UM/UIM claim. Preferred Mutual argued that, absent an outright denial of coverage, the privilege exception addressed in *Boone* did not apply and its claims file remained protected from discovery.

{¶52} The Second District was not persuaded. It reasoned that, while it was true that *Boone* involved a cause of action alleging bad faith in the *denial* of insurance coverage, an insurance company could exhibit bad faith in other ways as well. The Second District emphasized that in Ohio, "an insurer has a duty to act in good faith toward its insured in carrying out its responsibilities under the policy of insurance." *Id.* at ¶14, citing *Hoskins, supra,* at paragraph one of the syllabus. "Those responsibilities include the handling and payment of an insured's claim." *Id*. citing *Hoskins*. The Second District therefore concluded that, pursuant to *Boone*, "claims-file materials showing an insurer's lack of good faith in processing, evaluating, or refusing to pay a claim are unworthy of the protection afforded by the attorney-client or work-product privilege. This is true regardless of whether the insurer ever denied the claim outright." *Unklesbay* at ¶16.

{¶53} We find ourselves in agreement with the Second District. If discovery is only triggered by an express denial, as Progressive claims, the insurance company would have the ability to shield its file from discovery required by *Boone* while engaging

in a myriad of bad faith tactics, as long as it does not deny coverage outright. We decline to read *Boone* so narrowly.

Limitation on Discovery of Claims File

{¶54} That being said, and although the trial court properly ruled that Mr. Stewart is entitled to discover Progressive's file materials containing otherwise privileged communications, certain materials remain beyond the reach of discovery, and therefore the trial court should have conducted an *in camera* review before ordering discovery. *See Cobb, supra,* at ¶62.

{¶55} In *Unklesbay*, the trial court ordered the production of the claims file without first conducting an *in camera* review. The Second District reversed and remanded to the trial court for such a review. The Second District stated that the critical issue when evaluating the discoverability of otherwise privileged materials was whether "they may cast light on bad faith on the part of the insurer." *Id*. at ¶21, quoting *Garg v. State Auto. Mut. Ins. Co.*, 155 Ohio App.3d 258, 2003-Ohio-5960, ¶20 (2d Dist.) The Second District cautioned that the attorney-client communications that were "relevant to the insurance company's defense of [the] bad-faith claim but which did not themselves show any bad faith" in the insurance company's handling of the claim were not discoverable. *Id*. at ¶22.

{¶56} Upon remand, the trial court is to conduct an *in camera* review of the claims file, applying the principle set forth in *Unklesbay*, to ensure that privileged materials in the file not discoverable are properly protected. The second assignment of error is sustained in part.

{¶57} The judgment of the Ashtabula County Court of Common Pleas is affirmed in part and reversed in part regarding its decision denying bifurcation, as explained in the foregoing opinion. Its decision regarding the discovery is affirmed as modified. The matter is remanded to the trial court for further proceedings consistent with this opinion.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., concurs in part, and dissents in part, with a Concurring-Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in part, and dissents in part, with a Concurring-Dissenting Opinion.

{¶58} I concur in the judgment and opinion of this court with respect to the constitutionality of R.C. 2315.21(B)(1) and the discovery of defendant-appellant, Progressive Insurance Company's, claims file. I dissent from the majority's judgment with respect to the bifurcation of the breach of contract and bad faith claims.

{¶59} The issue of the constitutionality of R.C. 2315.21(B) is a final order by virtue of R.C. 2505.02(B)(6) ("[a]n order is a final order * * * when it is * * * [a]n order determining the constitutionality of any changes * * * made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code"). *Flynn v. Fairview Village Retirement Community, Ltd.*, 132 Ohio St.3d 199, 2012-Ohio-2582, 970 N.E.2d 927, ¶ 6.

{¶60} The issue of whether the trial court erred by denying Progressive's motion to bifurcate the breach of contract and bad faith claims is not a final order. *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481, ¶ 6 ("[i]t is well-established that a trial court's bifurcation determination under Civ.R. 42(B) is not a final, appealable order") (cases cited). Accordingly, I dissent from the majority's decision to address that part of the lower court's judgment.

{¶61} Finally, I note that the majority's discussion of the applicability of R.C. 2315.21(B)(1) to "a hybrid case such as this one, which includes both a contract and a tort claim," is not necessary. The statute mandates the bifurcation of the proceedings relating to compensatory damages from the proceedings relating to punitive or exemplary damages in tort actions. R.C. 2315.21(B)(1). However, "[p]unitive damages are not recoverable in an action for breach of contract." *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922), paragraph two of the syllabus. A "hybrid" case such as this presents no difficulty, since both the contract and tort claims may be addressed in the proceedings relating to compensatory damages, without hindering any further proceedings necessary to address claims for punitive damages.