

No. 2011-1120
(Relating to Pending Notice of Certified
Conflict, Supreme Court Case No. 2011-1097)

IN THE SUPREME COURT OF OHIO

RONALD LURI,)
) On Appeal from the
Appellant/Cross-Appellee,) Ohio Court of Appeals,
) Eighth Appellate District
v.)
) Court of Appeals
REPUBLIC SERVICES, INC. et al.,) Case No. 10-094908
)
Appellees/Cross-Appellants.)

**APPELLEES/CROSS-APPELLANTS' COMBINED MEMORANDUM BOTH
IN RESPONSE TO APPELLANT/CROSS-APPELLEE'S MEMORANDUM
AND IN SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL**

IRENE C. KEYSE-WALKER (0013143)
ikeyse-walker@tuckerellis.com
BENJAMIN C. SASSE (0072856)
bsasse@tuckerellis.com
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414
(216) 592-5000
(216) 592-5009 fax

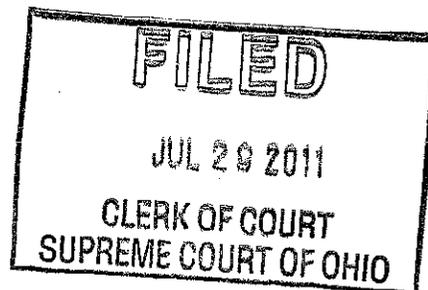
Attorneys for Appellee Ronald Luri

SHANNON J. POLK (0072891)
spolk@haberpolk.com
RICHARD C. HABER (0046788)
rhaber@haberpolk.com
Haber Polk LLP
737 Bolivar Road Suite 4400
Cleveland, OH 44115-1414
(216) 241-0700
(216) 241-0739 fax

ROBIN G. WEAVER* (0020673)
robin.weaver@ssd.com
STEPHEN P. ANWAY (0075105)
stephen.anway@ssd.com
Squire, Sanders & Dempsey (US) LLP
4900 Key Tower
127 Public Square Cleveland, OH 44114
(216) 479-8500
(216) 479-8780 fax

*Counsel of Record

*Attorneys for Defendants-Appellants Republic
Services, Inc., Republic Services of Ohio
Hauling LLC, Republic Services of Ohio I,
LLC, James Bowen, and Ronald Krall*



SHELLEY STRONCZER (0066531)
shelley.stronczer@piercelegal.com
Pierce Stronczer Law LLC
6900 S. Edgerton Road, Suite 108
Cleveland, OH 44141-3193
(440) 262-3630

Additional Counsel for Appellee Ronald Luri

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INTRODUCTION

Appellees/Cross-Appellants Republic Services, Inc., Republic Services of Ohio I, LLC, Republic Services of Ohio Hauling, LLC, Ronald Krall, and James Bowen (“Republic”) hereby submit this combined memorandum (i) in response to Appellant/Cross-Appellee Ronald Luri’s (“Luri”) Memorandum in Support of Jurisdiction and (ii) in Support of Jurisdiction for Republic’s Cross-Appeal, which it noticed to this Court on June 30, 2011.¹

Republic respectfully requests that the Court accept its propositions of law set forth below and decline jurisdiction over Luri’s single, fact-intensive proposition of law. Republic’s first proposition of law—concerning the constitutionality of the mandatory bifurcation of a trial under R.C. 2315.21(B)—has already been accepted by this Court in *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010-2148, which is currently pending before this Court as a certified conflict. In this case, the Eighth District also certified a conflict with regard to that issue, which Republic noticed to this Court on June 28, 2011 and which has been designated as Ohio Supreme Court Case No. 2011-1097.

Therefore, Republic requests that this Court (i) determine that a conflict exists on the mandatory bifurcation issue, as certified by the Eighth District, in Case No. 2011-1097, (ii) accept Republic’s propositions of law, but then (iii) “hold” both this case and the certified conflict case (Case No. 2011-1097) for its decision in *Havel*. The “hold” is appropriate because, if the Court in *Havel* were to uphold the constitutionality of the mandatory bifurcation statute in

¹ Republic attempted to file its own Notice of Appeal and Memorandum on June 30, 2011. The Clerk’s Office, however, had received Luri’s appeal documents earlier that day. The Clerk’s Office therefore (i) accepted Republic’s Notice of Appeal and stated that it would treat it as a Notice of Cross-Appeal (as it is now designated on the docket) and (ii) invited Republic to submit a combined memorandum both in response to Appellant/cross-appellee’s memorandum and in support of jurisdiction for the cross-appeal in accordance with Supreme Court Rule of Practice 3.4.

R.C. 2315.21(B), a new trial would be required and the rest of the propositions of law raised in this appeal become moot.²

**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND
MATTERS OF PUBLIC AND GREAT GENERAL INTEREST**

This appeal involves the constitutionality and the uniform applicability of certain key provisions of the Ohio tort reform statute, Am. Sub. SB No. 80, which are applicable to tort litigation statewide. In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, 2007 Ohio LEXIS 3354, this Court upheld the constitutionality of the noneconomic damages cap in R.C. 2315.18. Yet in this case, the Eighth District Court of Appeals declared the bifurcation provision of that statute, R.C. 2315.21(B), unconstitutional.

That decision conflicts with the Tenth District's decision in *Hanners v. Ho Wah Genting Wire and Cable*, Franklin App. No. 09AP361, 2009-Ohio-6481, which upheld the constitutionality of the mandatory bifurcation statute. On June 7, 2011, the Eighth District Court of Appeals in this case certified that its decision conflicts with that in *Hanners*. Republic notified this Court of the certified conflict on June 28, 2011, which is designated as Ohio Supreme Court Case No. 2011-1097. Having done so, Republic is deemed the Appellant in that case under Supreme Court Practice Rule 4.1 and, should that case be consolidated with this one, Republic is the Appellant with regard to that issue.

This Court has already accepted a certified conflict on this very issue in *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010-2148. This Court concluded that the decision in ~~*Havel*, Cuyahoga App. No. 94677, 2010-Ohio-5251, which declared R.C. 2315.21(B)~~ unconstitutional, conflicts with the Tenth District's decision in *Hanners*. The certified conflict at issue in *Havel*—which is the identical question certified by the Tenth District in this case—is

² The *Havel* appeal is scheduled for oral argument on September 20, 2011.

pending before this Court and scheduled for oral argument on September 20, 2011. See *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010-2148.³

The issue of the constitutionality of the mandatory bifurcation statute is dispositive in this case. If this Court agrees with *Hanners* and upholds the constitutionality of the bifurcation statute, a new trial would be mandatory in this case. Luri has waived any harmless error argument because he failed to raise it in his Court of Appeals brief in this appeal or at oral argument. He is now precluded from raising it here. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 494 (2009) (“It is well settled that [a] party who fails to raise an argument in the court below waives his or her right to raise it here.”); *City of Elyria v. Lorain County Budget Comm’n*, 128 Ohio St.3d 485, 491 (2011) (“[T]he omission of an argument from a party’s brief may be deemed to waive that argument.”).

Simply put, if the statute is constitutional, Republic is entitled to a new trial. Accordingly, Republic requests that the Court (i) determine that a conflict exists on the mandatory bifurcation issue in Case No. 2011-1097, (ii) accept Republic’s propositions of law below, but then (iii) “hold” both this case and the certified conflict case for its decision in *Havel*.

³ Despite not raising it as a proposition of law, Luri raises the possibility that the tort reform statutes do not apply to R.C. 4112 discrimination claims. Luri, however, does not take a position on the issue or ask the Court to accept jurisdiction over it—and for good reason. The tort reform statutes apply to “tort actions,” which are broadly defined as “civil action[s] for damages for injury or loss to person or property.” RC. 2315.18(A)(7); R.C. 2315.21(A)(1). It is inconceivable that a discrimination claim is not a “civil action for damages for injury or loss to person or property.” And, indeed, seven courts in Ohio have held that R.C. 4112 actions are “tort actions” for purposes of R.C. 2315. *Luri v. Republic Services, Inc.*, 8th App. Dist., Case No. 94908 (May 19, 2011), pp. 7-8; *Ridley v. Fed. Express*, 8th Dist. No. 82904, 2004-Ohio-2543, at ¶ 89; *Geiger v. Pfizer, Inc.* (S.D. Ohio Apr. 15, 2009), No. 2:06-CV-636, 2009 WL 1026479, at *1; *McIntyre v. Advance Auto Parts* (N.D. Ohio Jan. 10, 2007), No. 1:04 CV 1857, 2007 WL 120645, at *81-84; *McCombs v. Meyer, Inc.* (C.A.6, 2005), 395 F.3d 346, 355-356; *Waddell v. Roxane Laboratories, Inc.*, 10th Dist. No. 03AP-558, 2004-Ohio-2499, at ¶ 44; *Waters v. Allied Machine & Engineering Corp.*, 5th Dist. Nos. 02APO40032, 02APO40034, 2003-Ohio-2293, at ¶ 113. No court has held otherwise.

If the Court upholds the bifurcation statute in *Havel*, the other propositions of law set forth below become moot.

The Eighth District's decision in this case also raises two important issues regarding the consistent applicability of certain key provisions in the tort reform statutes, *i.e.*, whether a trial court may evade the General Assembly's mandatory tort reform statutes by conditioning their application on a party's express and specific request that each individual provision apply.

The first statutory provision is R.C. 2315.18(C), which mandates that a trial court "*shall*" instruct the jury that it cannot consider alleged wrongdoing or evidence of the defendant's wealth or financial resources when awarding noneconomic damages. In this case, the trial court failed to give such an instruction. The Eighth District nonetheless affirmed the trial court because Republic's trial counsel did not specifically request the mandatory jury instruction. Contrary to that holding, R.C. 2315.18(C) does not condition the applicability of the statute on a party's request, but rather, places the mandate directly on the trial court. This provision stands in contrast to the mandatory bifurcation statute, which is triggered "upon the motion of any party."

The second statutory provision is R.C. 2315.18(D), which provides that "the jury in a jury trial *shall* return a general verdict accompanied by answers to interrogatories, that *shall* specify . . . [t]he portion of the total compensatory damages that represents damages for noneconomic loss." (Emphasis added). This Court has already framed this provision in mandatory terms. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 27 ("[T]he jury (in a jury trial) *will* return a general verdict accompanied by answers to interrogatories. R.C. 2315.18(D)." (emphasis added)). This interrogatory is necessary to apply R.C. 2315.18(B)(2), which caps the amount of noneconomic damages at \$350,000. Here, the

trial court's failure to issue the mandatory interrogatory under R.C. 2315.18(D) prevented it from applying the mandatory cap of \$350,000 on noneconomic damages under R.C. 2315.18(B)(2).

Finally, the trial court failed to apply the limitation imposed by the Due Process Clause on punitive damages. The result is a \$7 million punitive award—*double* the compensatory award—for a single discharged employee who suffered no physical harm. The U.S. Supreme Court has repeatedly held that, except in the most egregious cases, the outmost due process limit is a punitive to compensatory ratio of no more than 1:1.

STATEMENT OF THE CASE

Appellee Ronald Luri (“Luri”) filed the instant lawsuit on August 17, 2007, against Appellees/cross-appellants Republic Services, Inc., two of its subsidiaries, Republic Services of Ohio I, LLC and Republic Services of Ohio Hauling, LLC, Ronald Krall and James Bowen (“Republic”). (Compl.). Luri alleged he was retaliatorily discharged under R.C. 4112.02(I) after refusing to discharge three employees who were older than 40. (*Id.*).

Republic filed a motion to bifurcate the trial pursuant to the mandatory bifurcation provision in R.C. 2315.21(B)(1) a month before trial. (5/28/08 Defs.’ Mot. to Bifurcate). Luri in fact agreed to bifurcate the trial. (5/29/08 Pl.’s Response to Defs.’ Mot. to Bifurcate). Nonetheless, the trial court, without explanation, denied the unopposed motion. (6/03/08 Journal Entry).

At the conclusion of the trial, the jury returned a \$3.5 million verdict in compensatory damages jointly and severally against all five defendants. It further awarded approximately ~~\$43 million in punitive damages:~~ \$21.5 million against Republic Services, Inc.; \$10.75 million against Republic Services of Ohio I, LLC; \$10.75 million against Republic Services of Ohio Hauling, LLC; \$83,394 against Krall; and \$25,205 against Bowen. (7/3/2008 Journal Entry).

This verdict was the largest employment verdict in the history of Ohio jurisprudence.

Following the verdict, Republic moved for a new trial and, alternatively, for remittitur of the punitive damages award under both the U.S. Constitution and the Ohio tort reform statutes, the latter of which imposes a cap on punitive damages of twice the amount of the compensatory damages. The trial court denied these motions again without explanation. (09/18/08 Journal Entry). On the other hand, the trial court did grant Luri's motions for prejudgment interest on the entire compensatory award (even though it included front-pay damages) and for attorneys' fees, doubling the amount calculated by the lodestar methodology. (09/25/08 Journal Entry).

Following the trial court's post-trial rulings and the dismissal of a prematurely filed appeal, Republic retained new counsel who prosecuted an appeal to the Eighth District Court of Appeals. The Eighth District issued its decision on May 19, 2011, ruling that the bifurcation statute, R.C. 2315.21(B), was unconstitutional, but that R.C. 2315.21(D)(2)(a) limited the punitive award to two times the compensatory damages, or \$7 million. Accordingly, the court of appeals ordered that the punitive damages awarded be reduced from \$43.1 million to \$7 million.⁴ The four other assignments of error asserted by Republic were overruled.

STATEMENT OF FACTS

Luri joined Republic Services of Ohio Hauling, LLC in 1998 and thereafter became the General Manager of the Cleveland Division. (Tr. 563). Eight years later, in August 2006, he applied for the position of Area President. (Tr. 573-574). Another Republic employee, defendant James Bowen, also applied for the position. Bowen was the top performer among general managers in Republic's Eastern Region in 2005 and 2006. (Tr. 1179, 1182; Exs. T, U).

⁴ ~~The Eighth District~~ correctly held that R.C. 2315.21(D)(2)(a) caps the punitive damage award at two times the compensatory award. Thus, it reversed and remanded on the basis that the punitive damage award in this case of \$43 million must be capped at two times the compensatory award of \$3.5 million, or \$7 million. (Judgment Order, Eighth District Ct. App., No. 94908, May 19, 2011, at 13-14). The Eighth District, however, failed to order reduction of this capped amount to no more than a 1:1 ratio in compliance with the Due Process Clause, which Republic now appeals.

By contrast, Luri was consistently ranked among the worst general managers in the region. In 2003, Luri was ranked 13 out of 13; in 2004, he was ranked 12 out of 13; in 2005, he was ranked 12 out of 13; and in 2006, he was ranked 10 out of 11. (Tr. 1174-1175, 1180-1183; Exs. R, S, T, U). Luri's poor rankings in 2003, 2004, 2005, and 2006 were the result of his repeated refusal to follow company rules and fulfill his obligations as manager. After reviewing the records of Bowen and Luri, Ron Krall, Region Vice President, selected Bowen to be the new Area President. (Tr. 573-574).

In his new position of Area President, Bowen became Luri's supervisor. After Bowen's promotion, Luri's work performance continued to be unsatisfactory. Bowen met with Luri several times to discuss ways to improve his performance. (Tr. 582-583; Ex. 12). Following a meeting held on December 22, 2006, Bowen sent an "Action Plan" to Luri, providing specific direction on each of the problems that management had identified. (Ex. 12). Luri responded to the Action Plan on January 3, admitting that he failed to conduct required staff meetings and committing to immediately "implement[] the Action Plan" and to keep Bowen apprised of his progress. (Ex. 14).

Luri, however, failed to follow the Action Plan and his failure had the expected negative impact on the Cleveland Division. Luri understood that, if he did not adhere to the Action Plan, it could result in him being discharged. (Tr. 691). Bowen explained to Luri that he had failed to meet the Action Plan objectives, and Luri acknowledged his failures. (Tr. 698, 1454). On April 23, 2007, Bowen met with Luri and informed him that he was suspended pending termination. (Tr. 615).

In the face of this record, on August 17, 2007, almost four months after his position had been terminated, Luri decided to try and shift the responsibility for his shortcomings from

himself to Republic and filed a complaint alleging his discharge was the result of retaliation. According to Luri, Bowen directed him in the fall of 2006 to fire three employees. Luri now alleges that, because these individuals were over 40 years old, he was concerned about discrimination and possible lawsuits. Luri further claims Republic terminated his employment because he refused to fire these three individuals.

After Luri filed suit, Bowen regrettably added additional material to a memorandum he had previously written. The added information concerned Luri's negative perception within Republic and his failure to hold meetings. While this additional information was not new, it was not written contemporaneously.

The objective facts tell a very different story from that portrayed in Luri's Complaint. In point of fact, Bowen never directed Luri to fire *anyone*. It is undisputed that, at the time of trial, all three of the individuals were still employed by Republic: the first was the operations supervisor for the residential line of business (Tr. 1463); the second was doing the exact same job he did when Luri was general manager (Tr. 1463); and the third was asked to stay on and assist the company following his announcement to retire (Tr. 1100-1101). Thus, Luri himself admitted at trial that he was only asked to change the positions of the employees-some without any change in compensation. (Republic Br. at 9-10.)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: R.C. 2315.21(B), as amended by S.B. 80, effective April 7, 2005, is constitutional because it creates a substantive right and, therefore, does not violate Section 5(B), Article IV of the Ohio Constitution.

A split of authority exists in Ohio regarding the constitutionality of the mandatory bifurcation provision in R.C. 2315.21(B). Consequently, this court should accept this appeal to resolve the conflicting opinions. The statutory provision in question requires a trial court to

bifurcate a trial upon a party's request: "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.*" R.C. 2315.21(B)(1) (emphasis added).

Courts in Ohio have consistently held that bifurcation is mandatory under this provision. See *Maxey v. State Farm Fire & Casualty Co.* (S.D. Ohio 2008), 569 F. Supp.2d 720, 724 (granting defendants' motion to bifurcate because it was "mandated by R.C. § 2315.21(B)(1)"); *Wharton v. Preslin* (S.D. Ohio June 26, 2009), No. 2:07-cv-1258, 2009 WL 2170659, at *1 ("The Ohio Tort Reform Act provides that tort actions that involve a claim for punitive damages shall be bifurcated. . . . Accordingly, the trial in this matter will proceed in two separate stages."); *Geiger v. Pfizer, Inc.* (S.D. Ohio 2009), No. 2:06-CV-636, 2009 WL 1026479, at *1 (holding that bifurcation under R.C. 2315.21(B)(1) was mandatory in the context of a R.C. 4112 claim); *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481, at ¶ 22 (concluding that "R.C. 2315.21(B) removes the discretion granted by Civ.R. 42(B) [to bifurcate a trial]").

The Eighth District, however, choose to depart from this weight of authority. Instead, it held that the mandatory bifurcation provision violates the Modern Courts Amendment of 1968, Section 5(B), Article IV of the Ohio Constitution. That provision grants the Supreme Court of Ohio the 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." At the same time, the Ohio Constitution authorizes the General Assembly to promulgate substantive rights. Therefore, where a statute conflicts with a rule, the statute will prevail if it affords a substantive right, and the rule will prevail if the statute merely regulates procedure. Reasoning that the mandatory

bifurcation statute merely protected procedural rights, the Eighth District held the statute to be unconstitutional.

On June 7, 2011, the Eighth District certified that its decision conflicts with that of the Tenth District in *Hanners*, which was noticed to this Court on June 28, 2011 and which has been designated as Ohio Supreme Court Case No. 2011-1097. The Tenth District in *Hanners* concluded that R.C. 2315.21(B)(1) confers clear substantive rights on tort defendants. The Tenth District observed that R.C. 2315.21(B)(1) is a substantive rule “packaged in procedural wrapping.” *Id.* at 30. Accordingly, the Tenth District held that bifurcation under R.C. 2315.21(B)(1) protects substantive rights and is thus constitutional under the Modern Courts Amendment provision of the Ohio Constitution.

As explained above, this issue is currently pending before this Court in *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010 2148. Republic therefore respectfully requests that this Court “hold” this case and the certified conflict case (Case No. 2011-1097) for this Court’s decision in *Havel*. If the Court upholds the constitutionality of the mandatory bifurcation statute in R.C. 2315.21(B) in *Havel*, then a new trial would be required in this case and the rest of the propositions of law raised in this appeal—discussed below—would become moot.

Proposition of Law No. II: R.C. 2315.18(C) of the Ohio tort reform statute mandates that the trial court instruct the jury not to consider evidence of wealth, wrongdoing, or other evidence offered for purposes of punishment when determining noneconomic damages, even if not requested by a party.

This Court should also accept this appeal to decide whether another tort reform provision, R.C. 2315.18(C), places a mandatory responsibility on the trial court to instruct the jury that it cannot consider alleged wrong doing or evidence of the Defendants’ wealth or financial resources when awarding noneconomic damages, even if not requested by any party. More

specifically, that provision provides that “[i]n determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact shall not consider any of the following:

- (1) Evidence of a defendant’s alleged wrongdoing, misconduct, or guilt;
- (2) Evidence of the defendant’s wealth or financial resources;
- (3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.”

Id. (emphasis added). Unlike the mandatory bifurcation provision, which is only triggered “upon the motion of any party”, this provision requires the trial court to give such an instruction regardless of whether a party requests it.

The General Assembly explained that R.C. 2315.18(C) was critical to reining in increasingly out-of-control jury awards in Ohio. In uncodified Section 6 of S.B. 80, the General Assembly explained that “[w]hile pain and suffering awards are inherently subjective, it is believed that this inflation of noneconomic damages is partially *due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.*” S.B. 80 § 6(d) (emphasis added). The General Assembly further explained that “[i]nflated damage awards create an improper resolution of civil justice claims. *The increased and improper cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.*” *Id.* § 6(e). Based on these findings, the General Assembly concluded that “courts should provide juries *with clear instructions about the purpose of pain and suffering damages.* Courts should instruct juries that evidence of misconduct is not to be considered in deciding compensation for noneconomic damages for those types of injuries.” *Id.* § 6(f). (Emphasis added)

In this case, the trial court—despite having been put on notice that the tort reform provisions apply—refused to give the clear limiting instruction in R.C. 2315.18(C) about the

purpose of noneconomic damages. Republic was severely prejudiced by that failure. The trial court's failure to provide the instruction allowed Luri to tell the jury that it should consider both punitive and compensatory damages to "send a message" to Republic. During closing argument, Luri told the jury: "*There is compensatory damages, there is punitive damages and then there is attorneys' fees. . . . They are entirely up to you to decide what kind of message you want to send*" (Tr. 1599 (emphasis added)). R.C. 2315.18(C) *explicitly forbids* using noneconomic compensatory damages to "send a message"—to a defendant or anyone else.

The General Assembly promulgated R.C. 2315.18(C) to guard against *precisely* these types of inflammatory statements, which the General Assembly concluded caused excessive jury awards influenced by passion and prejudice. This Court should accept this issue to determine whether R.C. 2315.18(C) requires such an instruction regardless of whether a party requests it.

Proposition of Law No. III: R.C. 2315.18(D) of the Ohio tort reform statute mandates that the trial court submit a jury interrogatory specifying the amount of noneconomic damages, and R.C. 2315.18(B)(2) mandates that the trial court use the answer to that interrogatory to apply the \$350,000 cap on noneconomic compensatory damages, even if not requested by a party.

Like the mandatory jury instruction in R.C. 2315.18(C) (and unlike the mandatory bifurcation provision in R.C. 2315.21(B)), R.C. 2315.18(D) and 2315.18(B)(2) are not triggered on the motion of a party. Rather, these statutory provisions compose a mandatory duty on the trial court to submit the noneconomic interrogatory to the jury, even if not requested by any party.

R.C. 2315.18(D) provides that "the jury in a jury trial *shall* return a general verdict accompanied by answers to interrogatories, that *shall* specify . . . [t]he portion of the total compensatory damages that represents damages for noneconomic loss." *Id.* (emphasis added). R.C. 2315.18(B)(2) in turn provides that "*the amount of compensatory damages that represents damages for noneconomic loss . . . shall not exceed . . . three hundred fifty thousand*

dollars” *Id.* (emphasis added). Failure to submit such an interrogatory to the jury makes it absolutely impossible for the trial court to perform its obligation under R.C. 2315.18(B)(2).

This Court has already interpreted both of these provisions in mandatory terms. In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, this Court held that “the jury (in a jury trial) *will* return a general verdict accompanied by answers to interrogatories. R.C. 2315.18(D),” and that “[f]or noneconomic damages, the court *must* limit recovery to . . . \$ 350,000. . . .” *Id.* ¶ 27 (emphasis added). In this case, however, the trial court refused to apply these mandatory provisions and the Eighth District affirmed the trial court’s decision because Republic’s trial counsel did not expressly and specifically request that they be applied.

The requirement to use the interrogatory in applying the cap on noneconomic damages is jurisdictional in nature and, therefore, cannot be waived. R.C. 2315.18(F)(1) (“A court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in this section.” (emphasis added)). The fact that the required interrogatory was not requested cannot *expand* the jurisdictional limitations that the Ohio General Assembly has placed on the courts of common pleas.

This Court should accept this appeal to determine whether it is incumbent on the trial court to apply these two statutory provisions, even if not requested by a party.

Proposition of Law No. IV: The outermost due process limit on punitive damages is a 1:1 ratio of punitive damages to compensatory damages where there is no physical harm, no reckless disregard for health or safety, and no repeat conduct.

Even if this Court were not to order a new trial based on the foregoing propositions of law, it should accept this appeal to decide the circumstances under which a punitive damages award in Ohio can exceed a ratio of 1:1. Although the Eighth District correctly reversed the trial court by capping the punitive damage award at \$7 million under R.C. 2315.21(D)(2)(a) (two

times the compensatory award), it incorrectly held that the 2:1 ratio of punitive to compensatory damages is consistent with the due process limit.

“A line of cases announced by the U.S. Supreme Court, starting with [*BMW of N. Am., Inc. v. Gore*] [(1996), 517 U.S. 559],” guides the review of punitive awards for excessiveness under the Due Process Clause. *Barnes v. Univ. Hosp. of Cleveland* (2008), 119 Ohio St.3d 173, at ¶ 32. Under *BMW*, “[a]n award of punitive damages violates due process when it can be categorized as ‘grossly excessive’ in relation to the state’s legitimate interests in punishing unlawful conduct and deterring its repetition.” *Id.* at ¶ 31, quoting *BMW*, 517 U.S. at 568. The constitutionality of an award of punitive damages is reviewed *de novo*. *Cooper Indus. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 435.

This Court has “instructed courts reviewing punitive damages to consider three guideposts,” *id.* at 418: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. 517 U.S. at 557-576. The most important of these is the degree of reprehensibility. *Barnes*, 119 Ohio St.3d 173, at ¶ 33, quoting *BMW*, 517 U.S. at 575.

The U.S. Supreme Court has identified five factors for evaluating reprehensibility: (1) whether “the harm caused was physical as opposed to economic”; (2) whether “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others”; (3) whether “the target of the conduct had financial vulnerability”; (4) whether “the conduct involved repeated actions or was an isolated incident”; and (5) whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *State Farm*, 538 U.S. at 419. Only the last of these factors is even arguably present, and that factor alone cannot sustain the constitutionality of the punitive damages awarded here. “[F]ew awards exceeding a single-digit

ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm*, 538 U.S. at 425. Furthermore, “[w]hen compensatory damages are substantial, . . . a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee.” *Id.* (emphasis added).

Since *State Farm*, courts have found that a ratio of 1:1 marks the outer limit of the due process guarantee when the compensatory damages are substantial. In *Morgan v. New York Life Ins. Co.* (C.A.6, 2009) 559 F.3d 425, which involved a claim of age discrimination raised by a senior manager under Ohio law, the Sixth Circuit recently held that a \$10 million punitive award that was 1.67 times the compensatory award was unconstitutionally excessive despite the evidence of “repeated misconduct” by the defendant. 559 F.3d at 442. It ordered remittitur of the punitive damages to an amount no greater than the compensatory damages. *Id.* at 442-43. The outcome should be no different here.

Similarly, the Third Circuit held that a punitive award that was approximately three times the \$2 million compensatory award was excessive. *Jurinko v. Med. Protective Co.* (C.A.3, 2008), 305 Fed. Appx. 13, 30. Characterizing the defendant’s conduct as “egregious, but not likely ‘particularly’ egregious,” *id.* at 28, the court reduced the ratio to 1:1. *Id.* at 30. As the court observed in *Jurinko*, many “[o]ther courts have used a 1:1 ratio as a benchmark where compensatory damages are substantial.” *Id.* at 28. To ensure “consistent results in cases with similar facts,” *Exxon*, 128 S.Ct. at 2625, the total punitive damages awarded here should be reduced to an amount no greater than the compensatory damages.⁵

⁵ Indeed, a 1:1 ratio has often been deemed the constitutional maximum even when the defendant’s conduct was judged to be highly reprehensible. *See, e.g., Williams v. ConAgra Poultry Co.* (C.A. 8, 2004), 378 F.3d 790 (reducing punitive award from \$6 million to \$600,000 despite evidence that supervisors “swore at” and “berated” plaintiff, “regularly used racially demeaning language,” and employed “a double standard for evaluating and disciplining white

In this case, however, the Eighth District held that an award of punitive damages which exceeded the 1:1 ratio was appropriate even though most of the indicia of reprehensible conduct are absent: there was *no* physical harm, *no* reckless disregard for health or safety, and *no* repeat conduct. As shown above, under similar facts, courts have held that a punitive award equal to (or less than) the compensatory award is the constitutional maximum. Hence, this Court should accept this case to decide the circumstances under which a punitive damages award in Ohio can exceed a 1:1 ratio.

Proposition of Law No. V: A party seeking prejudgment interest in a jury trial must request a jury interrogatory specifying the amount of damages to which prejudgment interest could apply.

Finally, this Court should accept this appeal to decide an important issue relating to prejudgment interest. It is well-settled that prejudgment interest can only apply to those damages that accrued prior to judgment and, therefore, cannot apply to front-pay damages. *Allgood v. Smith* (Apr. 20, 2000), 2000 Ohio App. LEXIS 1744, at *18-19; R.C. 1343.03(C)(2); R.C. 2323.56(A)(2). The trial court, however, awarded prejudgment interest on the entire \$3.5 million compensatory award, which included future damages. The Eighth District affirmed the trial court's decision, holding that Republic's trial counsel did not request an interrogatory separating past and future damages and, therefore, Luri was entitled to prejudgment interest on the entire compensatory award.

Luri was, however, the party seeking prejudgment interest. It was his burden to request that the jury identify which portions of the compensatory award were appropriate for prejudgment interest. *Nelson Jewellery Arts Co. v. Fein Designs Co., LLC*, 9th Dist. No. 23655,

and black employees"); *Boerner v. Brown & Williamson Tobacco Co.* (C.A.8, 2005), 394 F.3d 594, 603 (holding that "a ratio of approximately 1:1 would comport with the requirements of due process" where defendant had sold defective tobacco products for many years, affirmatively misled consumers about their dangers, and caused the decedent plaintiffs to suffer a slow, lingering death).

2007-Ohio-7042, at ¶¶ 51-52 (“A party is not entitled to prejudgment interest when ‘the record is devoid of any evidence as to how to calculate the prejudgment interest and on what amount.’”).

* * *

As demonstrated, this case involves matters of public and great general interest, including a conflict between the Ohio Appellate Districts on a constitutional question. Republic, therefore, respectfully requests that this Honorable Court accept jurisdiction over the foregoing propositions of law but then “hold” this case and the certified conflict case (Case No. 2011-1097) for *Havel*.

**LURI’S SINGLE PROPOSITION OF LAW DOES NOT INVOLVE
A MATTER OF PUBLIC OR GREAT GENERAL INTEREST**

In his Memorandum in Support of Jurisdiction, Luri raises a single, fact-intensive issue regarding the cap on punitive damages in R.C. 2315.21 that has rarely arisen before and is unlikely to arise with any frequency again. The issue arises only if (i) the plaintiff has sued multiple defendants from the same corporate family under a “single-employer” theory, (ii) those defendants are held jointly and severally liable for compensatory damages, (iii) the defendants request that any punitive damages be separately assessed against each defendant, and (iv) there are punitive damages awarded against multiple defendants in excess of twice the amount of the compensatory damages. It is only if all four of these unique factual circumstances happen to converge in a single case that this issue would be relevant. Even in the rare case where all four of these facts converge, the statute already provides a clear answer to the issue. Accordingly, this Court should decline jurisdiction over this proposition of law.

A. The Base Amount for the Punitive Damages Cap is the “Compensatory Damages Awarded to the Plaintiff.” R.C. 2315.21(D)(2)(a)

Under these unique facts, the question is whether the cap on punitive damages in R.C. 2315.18—which sets the cap as two times the compensatory damages—should be based on *the compensatory damages awarded to the plaintiff* (\$3.5 million in this case) or *an aggregate multiple of compensatory damages for which each defendant is jointly and severally liable* (here, \$17.5 million--\$3.5 million multiplied by five, for which each defendant is jointly and severally liable). The statute provides a clear answer to this question.

R.C. 2315,21(D)(2)(a) specifies that “[t]he court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages *awarded to the plaintiff* from that defendant. . . .” (Emphasis added.) Thus, in cases where there is no joint and several liability, the compensatory damages “*awarded to the plaintiff*” is equal to the sum of what each defendant owes, and the “that defendant” language instructs the court to establish the cap based on each defendant's compensatory liability. But where, as here, defendants are jointly and severally liable, the compensatory damages “awarded to the plaintiff” are different than the aggregate multiple sum of what each defendant owes.

In this case, for example, each defendant is jointly and severally liable for \$3.5 million, but Luri can receive the \$3.5 million *only once*. Put another way, the fact that Luri can choose to collect the \$3.5 million compensatory award from any one of the five defendants does not mean he can collect \$3.5 million from each of them. If it did, then the compensatory amount “*awarded to the plaintiff*” would be \$17.5 million (\$3.5 million times the five defendants), which is, of course, absurd. The statute makes clear that the cap is calculated *solely as a function of the amount of compensatory damages*. In other words, the General Assembly established a nexus between the punitive damages award and the harm caused.

Luri, however, seeks to obfuscate this straightforward issue by arguing that the cap should apply separately to each of the three corporate Republic entities, thus effectively tripling the \$7 million cap to \$21 million. In effect, Luri seeks multiple punitive damage verdicts against the same employer. To do so, Luri ignores the “awarded to the plaintiff” language in R.C. 2315.21(D)(2)(a) and wrenches out of context the phrase “that defendant.” This argument also runs counter to the Ohio General Assembly’s uncodified “statement of findings and intent” relating to tort reform, which states that R.C. 2315.21(D)(2)(a) is a cap on the amount “*awarded to the plaintiff*” with no reference to “that defendant.” S.B. 80 § 4(b) (“In prohibiting a court from entering judgment for punitive or exemplary damages in excess of the two times the amount of compensatory damages *awarded to the plaintiff*” (emphasis added)).

Consistent with the General Assembly’s “statement of findings and intent,” this Court has already held that R.C. 2315.21(D)(2)(a) imposes a cap on the compensatory damages *received by the plaintiff*. *Arbino*, 2007-Ohio-6948, at ¶ 103 (“Setting the limitation at double the amount of compensatory damages *received by the plaintiff* ensures that the defendant may still be punished.” (emphasis added)). The only other published decision in Ohio to have ever addressed this issue reached the same conclusion. *Doepker v. Willo Security, Inc.*, 5th Dist. No. 2007-CA-00 184, 2008-Ohio-2008, at ¶¶ 13, 59 (applying the cap to the amount received by plaintiff where defendants were jointly and severally liable).

The fact that no other published Ohio decision has addressed this issue convincingly shows that this is not a matter of public or great general interest.

B. ~~Luri’s Case Was Based on the “Single Employer Doctrine.”~~

Making this issue even more fact-intensive and inappropriate for this Court’s review, the Eighth District based its interpretation of R.C. 2315.21(D)(2)(a) on the fact that Luri pled the

“single employer doctrine” and thus a single defendant theory. Luri acknowledges this in his Memorandum in Support of Jurisdiction, stating that “it appears that the majority decision in this case adopted defendants' argument that because the three corporate defendants were jointly and severally liable for compensatory damages under the ‘single employer doctrine,’ the three separate punitive damage awards entered against them must be treated as one for purposes of applying the punitive damages cap in R.C. 2315.21(D).” (Luri Mem. in Supp. of Jurisdiction, pp. 10-11).

The Eighth District’s decision was born of good reason. During trial, Luri’s counsel argued to the jury: “[Y]ou have heard plenty of testimony about Republic Services, Inc., Republic Services of Ohio 1, and Republic Services of Ohio Hauling. As Mr. Bowen explained, *they’re all the same corporate entity. They just share a bunch of functions and operate together.*” (Tr. 1606 (emphasis added).) Moreover, in requesting a jury instruction on the single employer doctrine, Luri stated to the trial court: “In this case, the evidence is that the . . . ‘employer’ of Mr. Luri was Republic Services of Ohio Hauling, LLC. *However, the operations of the company and the parent corporations are so interrelated. . . [and] the doctrine of single employer applies.*” (Tr. 1546-1547 (emphasis added).) As Luri explained, “[t]he single employer doctrine permits the Plaintiff to establish that *the parent company and its subsidiaries are a quote, ‘single employer,’ unquote, for purposes of discrimination laws.*” (Tr. 1703 (emphasis added).)

The trial court agreed to give the single employer instruction. (Tr. 1708 (“I am going to give the single employer instruction.”)). Indeed, there is only one corporate decision at issue in this case. It was merely a happenstance of corporate structure that the individuals who are parties in this case (Luri, Bowen, and Krall) were employed by three different affiliates within

the same corporate family. That happenstance is hardly justification for applying a \$21 million statutory cap rather than a \$7 million statutory cap.

In sum, the Eighth District correctly held that the punitive damages cap should only be applied once—to the \$3.5 million “awarded to the plaintiff. . . .” R.C. 2315.21(D)(2)(a). Luri cannot point to a single case that has held otherwise—or, in fact, any case that has addressed this issue *at all*. His inability to do so bespeaks how uncontroversial the issue is and thus demonstrates that it is not an issue of “public or great general interest.”⁶

CONCLUSION

Based on the reasons enumerated in this memorandum, Republic respectfully requests that this Honorable Court accept its propositions of law, which raise a constitutional issue and matters of public or great general interest, and decline jurisdiction over Luri’s single, fact-intensive proposition of law. Republic further requests that the Court “hold” this case for *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010-2148. If the Court upholds the constitutionality of the mandatory bifurcation statute in R.C. 2315.21(B) in the *Havel* decision, Republic would be entitled to a new trial and the rest of the propositions of law raised in this appeal become moot.

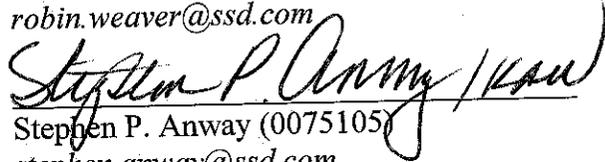
⁶ Despite not having raised it as a proposition of law, Luri suggests that Republic was required to request the punitive damages cap before the trial court entered its judgment on the verdict (and thus before it knew that there was a punitive damages award at all). Luri does not formally ask this Court to accept jurisdiction over this issue because he well appreciates that it is without merit. Civil Rule 59(B) specifies that a party has 14 days after judgment is entered to move for a new trial. ~~It is common practice to file motions for a new trial with an alternative motion for remittitur, as was done in this case.~~ See *Shepard*, 8th Dist. No. 92711, 2010-Ohio-1853, at ¶ 3. Luri’s theory would turn that long-standing practice on its head, forcing parties to move for the damages caps before they move for a new trial. Luri provides no reason or authority for such a nonsensical change. In any event, Republic filed the motion before the trial court had decided prejudgment interest or attorneys fees and was thus still exercising jurisdiction over the case. It is therefore clear that no prejudice resulted from the timing of Republic’s motion.

Respectfully submitted,



Robin G. Weaver (0020673)

robin.weaver@ssd.com



Stephen P. Anway (0075105)

stephen.anway@ssd.com

SQUIRE, SANDERS & DEMPSEY (US) LLP

4900 Key Tower

127 Public Square Cleveland, OH 44114

(216) 479-8500

(216) 479-8780 fax

Attorneys for Defendants-Appellants Republic Services, Inc., Republic Services of Ohio Hauling, LLC, Republic Services of Ohio I, LLC, James Bowen, and Ronald Krall

CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular U.S. Mail this 21 day of July 2011 upon:

Irene C. Keyse-Walker
TUCKER ELLIS & WEST LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414

Shannon J. Polk
Richard C. Haber
HABER POLK LLP
737 Bolivar Road Suite 4400
Cleveland, OH 44115-1414

Shelley Stronczer
Pierce Stronczer Law LLC
6900 S. Edgerton Road, Suite 108
Cleveland, OH 44141-3193

Attorneys for Appellee Ronald Luri



One of the Attorneys for Defendants-Appellants
Republic Services, Inc., Republic Services of Ohio
Hauling, LLC, Republic Services of Ohio I, LLC,
James Bowen, and Ronald Krall



51806804

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



RONALD LURI
Plaintiff

REPUBLIC SERVICES INC. ET AL
Defendant

Case No: CV-07-633043

Judge: BRIDGET M MCCAFFERTY

JOURNAL ENTRY

DEFENDANT(S) REPUBLIC SERVICES INC(D1), JIM BOWEN(D6) AND RON KRALL(D7) MOTION TO BIFURCATE,
FILED 5/28/08 IS DENIED. ALL DATES REMAIN SET.

Judge Signature

Date

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By

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Page 1 of 1

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

RONALD LURI

Appellee

COA NO.
94908

LOWER COURT NO.
CP CV-633043

COMMON PLEAS COURT

-vs-

REPUBLIC SERVICES INC., ET AL.

Appellant

MOTION NO. 444855

Date 06/07/11

Journal Entry

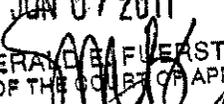
MOTION BY APPELLANTS TO CERTIFY CONFLICT IS GRANTED. THIS COURT'S JUDGMENT IN LURI V. REPUBLIC SERVS., INC., CUYAHOGA APP. NO. 94908, 2011-OHIO-2389, IS IN CONFLICT WITH THE FOLLOWING DECISION FROM THE TENTH DISTRICT COURT OF APPEALS OF OHIO: HANNERS V. HO WAH GENTING WIRE & CABLE SDN BHD, FRANKLIN APP. NO. 09AP-361, 2009-OHIO-6481.

THIS COURT HEREBY CERTIFIES THE FOLLOWING QUESTION TO THE OHIO SUPREME COURT PURSUANT TO APP.R. 25(A) AND ARTICLE IV, SECTION 3(B)(4) OF THE OHIO CONSTITUTION FOR RESOLUTION OF THE FOLLOWING ISSUE:

"WHETHER R.C.2315.21(B), AS AMENDED BY S.B.80, EFFECTIVE APRIL 7TH, 2005, IS UNCONSTITUTIONAL, IN VIOLATION OF SECTION 5 (B), ARTICLE IV OF THE OHIO CONSTITUTION, BECAUSE IT IS A PROCEDURAL LAW THAT CONFLICTS WITH CIV.R.42(B)."

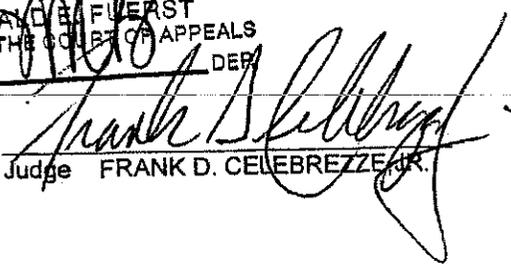
THIS ISSUE IS PENDING BEFORE THE SUPREME COURT OF OHIO ON THE CERTIFICATION OF A CONFLICT BY THE COURT OF APPEALS FOR CUYAHOGA COUNTY IN SUPREME COURT CASE NO.2010-2148, HAVEL V. VILLA ST. JOSEPH.

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JUN 07 2011
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP

Adm. Judge, MARY EILEEN KILBANE, Concurs

Judge SEAN C. GALLAGHER, Concurs


Judge FRANK D. CELEBREZZE JR.

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ALL PARTIES.-COSTS TAXED

MAY 19 2011

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94908

RONALD LURI

PLAINTIFF-APPELLEE

vs.

REPUBLIC SERVICES, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-633043

BEFORE: Celebrezze, J., Kilbane, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 19, 2011

ATTORNEYS FOR APPELLANTS

Stephen P. Anway
Robin G. Weaver
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Shannon J. Polk
Richard C. Haber
Haber Polk Kabat, L.L.P.
737 Bolivar Road
Suite 4400
Cleveland, Ohio 44115

Irene C. Keyse-Walker
Benjamin C. Sasse
Tucker Ellis & West, L.L.P.
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1475

Michelle Pierce Stronczer
Pierce Stronczer Law, L.L.C.
6900 South Edgerton Road
Suite 108
Cleveland, Ohio 44141-3193

**FILED AND JOURNALIZED
PER APP.R. 22(C)**

MAY 19 2011

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.**

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ALL PARTIES--COSTS TAXED**

FRANK D. CELEBREZZE, JR., J.:

Appellants, Republic Services, Inc. ("Republic"), Republic Services of Ohio I, L.L.C. ("Republic Ohio"), Republic Services of Ohio Hauling, L.L.C. ("Ohio Hauling"), James Bowen, and Ronald Krall, appeal from an adverse judgment and the largest retaliatory discharge jury award in Ohio history — over \$46 million. We affirm the jury's verdict, but remand for imposition of statutory punitive damage limits.

Ronald Luri was employed as the general manager in charge of the Cleveland division of Ohio Hauling. His direct supervisor, Bowen, was employed by Republic Ohio. Luri also reported to Bowen's supervisor, Krall, who was employed by Republic.

According to Luri, sometime in November 2006, Bowen approached him with an action plan that called for, among other things, the termination of three employees. Luri testified that Bowen instructed him to fire Frank Pascuzzi, George Fiser, and Louis Darienzo, Luri's three oldest employees. Luri testified that he informed Bowen that Pascuzzi had strong performance evaluations, and terminating him without reason could result in a discrimination lawsuit. He also informed Bowen that Pascuzzi had a medical condition that could result in a disability discrimination suit. Luri testified that he refused to fire the three individuals.

Thereafter, Luri's performance evaluations were worse than in previous years, and Bowen instituted "Improvements Directives" for Luri to complete, including conducting weekly meetings and providing more information to Bowen. Appellants claim these directives were not accomplished and, as a result, Luri was terminated on April 27, 2007.

Luri then filed suit on August 17, 2007, alleging claims of retaliatory discharge under R.C. 4112.02(I). After receiving notice of the litigation as a named party, it appears from the evidence presented at trial that Bowen altered at least one piece of evidence to justify Luri's termination. Luri claims as many as three pieces of evidence were altered or fabricated and submitted to him during discovery.

Appellants twice moved to bifurcate the trial pursuant to the Ohio Tort Reform Statutory provisions in R.C. 2315 et seq., as well as Civ.R. 42(B). The court denied these motions, and trial commenced on June 24, 2008. This lengthy trial concluded with a jury verdict finding against all defendants and awarding Luri \$3.5 million in compensatory damages, jointly and severally against all defendants, and \$43,108,599 in punitive damages.¹ Appellants moved for remittitur, a new trial, and for judgment notwithstanding the verdict. These

¹ The jury awarded punitive damages as follows: \$21,500,000 against Republic, \$10,750,000 against Republic Ohio, \$10,750,000 against Ohio Hauling, \$83,394 against Krall, and \$25,205 against Bowen.

motions were all denied. Luri sought an award for attorney fees and for prejudgment interest on the compensatory damages from the date of his termination. The trial court awarded Luri over one million dollars in attorney fees and prejudgment interest on the entire compensatory damages award.

Law and Analysis

Bifurcation

Appellants first argue that the trial court “erred by failing to apply R.C. 2315.21(B)(1), which requires mandatory bifurcation.” Appellants assert that bifurcation is mandatory upon motion.² This court disagrees.

In *Barnes v. Univ. Hosps. of Cleveland*, Cuyahoga App. Nos. 87247, 87285, 87710, 87903, and 87946, 2006-Ohio-6266, ¶34, affirmed in part and reversed in part on other grounds 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, we held that a court retains discretion to determine whether bifurcation is appropriate even in the face of R.C. 2315.21(B) and its mandatory language. Generally, a court’s jurisdiction is set by the legislature, but as the Ohio Supreme Court noted, “the Modern Courts Amendment of 1968, Section 5(B), Article IV, Ohio Constitution, empowers this court to create rules of practice and

² R.C. 2315.21(B)(1) states, “[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 * * *.”

procedure for the courts of this state. As we explained in *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, Section 5(B), Article IV 'expressly states that rules created in this manner "shall not abridge, enlarge, or modify any substantive right.'" Id. at ¶17. "Thus, if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law.' Id." *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶28. Since bifurcation is a procedural matter, the trial court retains discretion in determining if such an action is warranted.

This determination is further buttressed by this court's decision in *Havel v. Villa St. Joseph*, Cuyahoga App. No. 94677, 2010-Ohio-5251³ where we held that R.C. 2315.21(B)(1) is an unconstitutional usurpation of the judiciary's ability to control procedural matters because it conflicts with Civ.R. 42(B).⁴ Id. at ¶9. The Fifth District has agreed with this determination. *Myers v. Brown*, Stark App. No. 2010-CA-00238, 2011-Ohio-892; *Plaugher v. Oniala*, Stark App. No. 2010 CA 00204, 2011-Ohio-1207, ¶19-20. However, the Tenth District, in

³ This issue is currently before the Ohio Supreme Court to resolve a conflict between districts. See *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010-2148.

⁴ This rule states, "[t]he 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 * * *."

Hanners v. Ho Wah Genting Wire & Cable SDN BHD, Franklin App. No. 09AP-361, 2009-Ohio-6481, ¶30, held that R.C. 2315.21 is substantive law in a procedural package. This interpretation deprives courts of the power granted under the constitution of this state. "If then courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison* (U.S. Dist. Col. 1803), 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60.

Appellants also argue that their motion was unopposed and, therefore, should have been granted whether based on R.C. 2315.21 or Civ.R. 42(B). However, under the above cases, the trial court retains discretion to decide the issue. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

The *Barnes* court found that "[t]he issues surrounding compensatory damages and punitive damages in this case were closely intertwined. [Appellant's] request to bifurcate would have resulted in two lengthy proceedings where essentially the same testimony given by the same witnesses would be presented. Knowing that bifurcation would require a tremendous amount of

duplicate testimony, the presiding judge determined it was unwarranted.” Id. at ¶35.

Here, the malice evidence required for punitive damages was also the evidence used to rebut appellants’ arguments that Luri was terminated for cause. The manufacture of evidence was intertwined in arguments relating to both compensatory and punitive damages. Appellants also argue that the trial court should not have allowed testimony about the financial position of appellants, but it was Krall, while on cross-examination, who introduced this line of questioning without prompt from Luri. Therefore, the trial court did not abuse its discretion in denying appellants’ bifurcation motion.

Application of Other Ohio Tort Reform Provisions

In their second and third assignments of error, appellants argue that the trial court committed plain error when it failed to apply various provisions of R.C. 2315. First, appellants claim the trial court failed to instruct the jury pursuant to R.C. 2315.18(C).⁵ However, appellants never requested such an instruction and specifically agreed to their propriety before submission to the jury.⁶

⁵ Appellants’ statement of this error reads, “[t]he trial court erred in failing to submit an instruction regarding noneconomic damages, as required by R.C. 2315.18(C).”

⁶ Appellate counsel for appellants would like it known that they were not trial counsel.

We must first determine if these provisions apply to an action based on R.C. 4112. In analyzing whether the punitive damages caps within R.C. 2315.21 applied to a claim of a breach of fiduciary duty under R.C. 1751.09, Ohio's Southern District Court determined that they do not apply based on the language in R.C. 1751.09 and the intent of the legislature. *Kramer Consulting, Inc. v. McCarthy* (Mar. 8, 2006), S.D. Ohio No. C2-02-116. While the same reasoning would appear to apply to claims under R.C. 4112, the same court later held that "an action brought under Ohio Rev. Code 4112 is a 'tort action' as it is 'a civil action for damages for injury or loss to person or property.'" *Geiger v. Pfizer, Inc.* (Apr. 10, 2009), S.D. Ohio No. 2:06-CV-636, quoting *Ridley v. Fed. Express*, Cuyahoga App. No. 82904, 2004-Ohio-2543, ¶89, citing former R.C. 2315.21(A)(1). This finding would include such actions within the umbra of Ohio's Tort Reform provisions.

The Ohio Supreme Court has also noted the types of actions to which R.C. 2315.18 does not apply and found them to include "tort actions in the Court of Claims or against political subdivisions under R.C. Chapter 2744, * * * actions for wrongful death, medical or dental malpractice, or breach of contract. R.C. 2315.18(A)(7) and (H)(1) through (3)." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, fn. 3. Absent from this list are actions based on statutory remedies including, among others, discrimination

suits. When coupled with the holdings above, R.C. 2315 et seq. applies to retaliatory discharge actions brought under R.C. 4112, and the trial court was required to apply its provisions if appropriately asked.

R.C. 2315.18(C) provides that, “[i]n determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact shall not consider any of the following:

“(1) Evidence of a defendant’s alleged wrongdoing, misconduct, or guilt;

“(2) Evidence of the defendant’s wealth or financial resources;

“(3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.”

Because appellants never requested instructions based on R.C. 2315.18, we review this assigned error under a plain error analysis. “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, at the syllabus. Therefore, to constitute plain error, the error must be “obvious and prejudicial error, neither objected to nor affirmatively waived,” and, “if permitted, would have a material

adverse effect on the character and public confidence in judicial proceedings.”
Hinkle v. Cleveland Clinic Found., 159 Ohio App.3d 351, 2004-Ohio-6853, 823
N.E.2d 945, ¶78.

Here, appellants collaborated with the court and Luri in crafting the jury instructions given. Several courts of appeals have held that an agreed upon jury instruction that forms the basis for error on appeal is invited error. See *State v. Briscoe*, Cuyahoga App. No. 89979, 2008-Ohio-6276, ¶33 (holding that objection to an agreed jury instruction on appeal constituted invited error, which was not grounds for reversal); *Merkl v. Seibert*, Hamilton App. Nos. C-080973 and C-081033, 2009-Ohio-5473, ¶48, (“Not only did Merkl fail to object to the court’s instruction, but she collaborated with the court and defense counsel on its wording and specifically agreed to the instruction as given. Merkl cannot take advantage of an error that she invited or induced the court to make.”).

Appellants did not submit such a limiting instruction or even mention R.C. 2315 when proposing jury instructions. Appellants’ initial proposed jury instructions for compensatory damages stated, in part, “you will decide by the greater weight of the evidence an amount of money that will reasonably compensate [Luri] for the actual damage proximately caused by the conduct of [appellants]. In deciding this amount, if any, you will consider the nature, character, seriousness, and duration of any emotional pain, suffering or

inconvenience [Luri] may have experienced.” The amended proposed instructions are substantially the same. Appellants never raised this issue before the trial court when it could have been addressed, and their oversight should not result in reversal. See *Friedland v. Djukic*, Cuyahoga App. Nos. 94319 and 94470, 2010-Ohio-5777, ¶40.

Similarly, appellants’ issue with the failure of the court to provide a jury interrogatory detailing findings on noneconomic damages was invited.⁷ The invited error doctrine equally applies here where the jury instructions, verdict forms, and jury interrogatories were approved by appellants, without even suggesting the now complained of error. See *Siuda v. Howard*, Hamilton App. Nos. C-000656 and C-000687, 2002-Ohio-2292.

R.C. 2315.18(D) states that “[i]f a trial is conducted in a tort action to recover damages for injury or loss to person or property and a plaintiff prevails in that action, * * * the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following: (1) The total compensatory damages recoverable by the plaintiff; (2) [t]he portion of the total compensatory damages that represents damages for economic loss;

⁷ Appellants’ assigned error states “[t]he trial court erred by failing to provide the interrogatory required by R.C. 2315.18(D) and by failing to apply the cap on noneconomic compensatory damages in R.C. 2315.18(B)(2).”

(3) [t]he portion of the total compensatory damages that represents damages for noneconomic loss.”

In *Faieta v. World Harvest Church*, Franklin App. No. 08AP-527, 2008-Ohio-6959, ¶84-85, the Tenth District noted that “defendants not only failed to object to the jury interrogatories and verdict forms, they invited the alleged error. Defendants drafted verdict forms and interrogatories and submitted them to the trial court. Like those actually submitted to the jury, defendants’ drafts asked the jury to determine the amount of damages awarded to ‘plaintiffs’ collectively, not individually, and they did not ask the jury to apportion each type of damages between each defendant.”

In the present case, appellants submitted interrogatories and agreed upon the final versions submitted to the jury. Those interrogatories did not separate past and future economic damages nor economic and noneconomic damages. Appellants’ failure to raise the issue and their proffering of the relied upon interrogatories invited the error.

Appellants never sought the application of Ohio Tort Reform provisions during trial apart from bifurcation. It was only in post-verdict motions that appellants asked the trial court for their application. This error on appellants’ part should not serve as the basis for obtaining a new trial when it could have so easily been addressed and corrected if properly raised.

By failing to request an interrogatory distinguishing noneconomic damages, the trial court could not apply the damages limits set forth in R.C. 2315.18(B)(2),⁸ which appellants requested in their post-trial motions. This failure was precipitated by appellants' submission of interrogatories and jury instructions that did not provide for such details. Appellants failed to raise these issues at the proper time, and their nescience should not result in a new trial. Accordingly, these assignments of error are overruled.

Punitive Damage Caps

Appellants next argue that, when presented with a proper post-trial motion, the trial court "fail[ed] to apply the Ohio Tort Reform provision in R.C. 2315.21(D)(2)(a), which require[d] the trial court to apply a cap on punitive damages equal to twice the amount of compensatory damages."

R.C. 2315.21(D)(2)(a) provides that, "[i]n a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages. * * * Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary

⁸ "[T]he amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action."

damages in a tort action: (a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.”

Our holding above, that Ohio Tort Reform provisions apply to discrimination actions, means that, upon proper motion, the trial court was required to limit the award of punitive damages to two times the amount of compensatory damages. In this case, the trial court was not prevented from applying this provision by appellants’ failure to call it to the court’s attention when it had the ability to address such a request. This is because the trial court could apply the limit without engaging in the type of guessing game required in applying the compensatory damage provisions. See *Srail v. RJF Internatl. Corp.* (1998), 126 Ohio App.3d 689, 702, 711 N.E.2d 264. Therefore, the trial court erred in failing to limit the amount of punitive damages to seven million dollars.

Luri argues that the amount of punitive damages should be calculated for each defendant, meaning that each would be subject to punitive damages up to \$7 million. While there may be cases where Luri’s calculation would apply, that is not the case here, where Luri advanced a single-employer theory of liability to impute wrongdoing to multiple business entities in this case. Because Luri can collect at most \$3.5 million in compensatory damages, the trial court should

have limited the amount of punitive damages to \$7 million. Its failure to do so necessitates reversal and remand.

Due Process

In appellants' fifth assignment of error, they argue that the award of \$43 million in punitive damages violates their due process rights under the federal and state constitutions.⁹ While our holding above limits this argument, it does not completely dispose of it.

In *BMW v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, the Supreme Court attempted to outline the permissible bounds of punitive damage awards under the Due Process Clause of the Constitution. It recognized that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." (Internal citations omitted.) *Id.* at 568.

⁹ This assigned error states "[t]he trial court erred by failing to reduce the punitive damages because they are violative of the U.S. Constitution and Ohio law."

The Court set forth three factors it used to analyze the punitive damages award before it: The reprehensibility of the conduct, the disparity between the harm or potential harm suffered and the amount of the award, and the difference between the award and the civil penalties authorized or imposed in comparable cases. *Id.* at 575. See, also, *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585. The Ohio Supreme Court has directed this court to apply the *Gore* factors to independently determine whether an award is excessive. *Barnes*, *supra*, at ¶40.

Appellants demonstrated reprehensible conduct in this case. After Luri refused to engage in what he thought was discriminatory conduct, Bowen devised a plan to terminate him, fabricated evidence, and submitted this evidence during discovery to justify his actions. Krall then used this fabricated evidence for the same justification. After terminating Luri from a job in a specialized, consolidated industry, appellants refused to waive the non-compete clause in his employment contract, which further hampered Luri's ability to support himself and his family. This conduct weighs heavily in favor of a large punitive damage award and is the most important factor in the *Gore* analysis. See *Gore* at 575. The trial court also found that this conduct demonstrated a pattern of repeated retaliatory and discriminatory conduct. Nothing in the record demonstrates to this court that this finding was incorrect. From an action

plan calling for the termination or demotion of some of appellants' oldest employees, to fabricating evidence in an attempt to justify Luri's termination, there is evidence in the record supporting a pattern of conduct justifying substantial punitive damages.

The harm suffered by Luri was also significant in this case. Appellants would have this court determine that a ratio of compensatory to punitive damages of one-to-one is appropriate in this case because the harm was economic and Luri was a well-paid executive who was not economically vulnerable. While Luri did earn a substantial salary, as the trial court noted, a "punitive damage award is more about a defendant's behavior than the plaintiff's loss." Citing *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546.

Here, comparable jury verdicts imposed where a pattern of persistent conduct was shown demonstrate that a two-to-one ratio is not beyond the bounds of due process. *Merrick v. Paul Revere Life Ins. Co.* (D.Nev. 2008), 594 F.Supp.2d 1168, 1190; *Burns v. Prudential Secs., Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550. This court has also upheld a five-to-one ratio in an employment discrimination case. *Griffin v. MDK Food Serv., Inc.*, 155 Ohio App.3d 698, 2004-Ohio-133, 803 N.E.2d 834, ¶49, 57.

In this case, the appellants' behavior speaks to an award of punitive damages in the full amount authorized by the legislature. On remand, the trial court should feel free to enter an amount of punitive damages up to the bounds imposed by R.C. 2315.21.

Pre-Judgment Interest

Appellants finally argue that the trial court erred in awarding pre-judgment interest on the full amount of compensatory damages when that amount included pay Luri would not have yet earned, or "future damages."¹⁰

R.C. 1343.03(C)(1) states, "[i]nterest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

This statute encourages the "settlement of meritorious claims, and the compensation of a successful party for losses suffered as the result of the failure

¹⁰ This assigned error states "[t]he trial court erred by awarding prejudgment interest on front-pay compensatory damages."

of an opposing party to exercise good faith in negotiating a settlement.” *Lovewell v. Physicians Ins. Co. of Ohio*, 79 Ohio St.3d 143, 147, 1997-Ohio-175, 679 N.E.2d y1119. “Therefore, an injured party in a tort action is, under appropriate circumstances, entitled to recover interest from the date the cause of action accrues.” *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, 797 N.E.2d 132, ¶7.

Appellants did not request that the jury parse the amount of compensatory damages into any categories. As with the application of provisions of Ohio’s Tort Reform statutes, appellants invited this error by submitting instructions and interrogatories that did not separate out future damages. Appellants’ error will not induce this court “to speculate concerning the specifics of the jury’s award.” *Srail* at 702. This assignment of error is overruled.

Conclusion

Appellants caused a great many of the supposed errors complained of in this case, which should not result in reversal. However, on proper motion, the trial court should have applied the damages caps set forth in R.C. 2315.21(D)(2)(a). Accordingly, this case must be remanded.

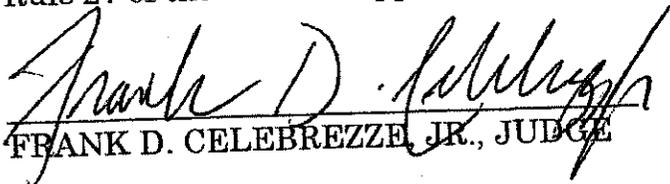
This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, J., CONCURS;
MARY EILEEN KILBANE, A.J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, A.J., DISSENTING IN PART:

I respectfully dissent from the majority's determination that the trial court should have limited the amount of punitive damages to \$7 million. I would conclude that plaintiff is entitled to \$7 million in punitive damages *from each defendant*, rather than \$7 million in total punitive damages.

R.C. 2315.21(D) sets forth certain limits on punitive damages and provides in relevant part as follows:

“(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.”

The defendants maintain that because the trial court determined that they were jointly and severally liable to Luri in the amount of \$3.5 million, this is the amount “awarded to the plaintiff.” Therefore, defendants claim that plaintiff’s recovery of punitive damages is limited to two times this amount or a total of \$7 million in punitive damages. This interpretation omits key terms of the statute, however, which calculates the punitive damages as “two times the amount of the compensatory damages awarded to the plaintiff *from that defendant*[,]” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. (“The statute limits punitive damages in tort actions to a maximum of two times the total amount of compensatory damages awarded to a plaintiff per defendant.”) The determination of joint and several liability does not alter this analysis, as plaintiff has been awarded compensatory damages “from that defendant.” There is no provision for limiting the awards where there are joint and several tortfeasors. I therefore dissent insofar as the

majority has limited plaintiff's recovery to punitive damages in this matter to \$7 million.

FILED

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CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Case No. 2010-2148

Sandra Havel

ENTRY

v.

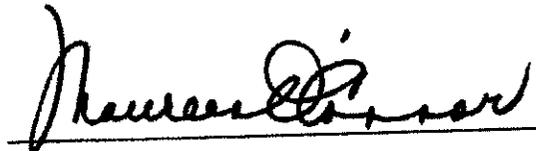
Villa St. Joseph et al.

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Cuyahoga County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated in the court of appeals' Journal Entry filed November 22, 2010, as follows:

"Whether R.C. 2315.21(B), as amended by S.B. 80, effective April 7, 2005, is unconstitutional, in violation of Section 5(B), Article IV of the Ohio Constitution, because it is a procedural law that conflicts with Civ.R. 42(B)."

It is ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 94677)



Maureen O'Connor
Chief Justice