

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

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE No. 10-094908

RONALD LURI,
Appellant/Cross-Appellee,

v.

REPUBLIC SERVICES, INC., et al.,
Appellees/Cross-Appellants.

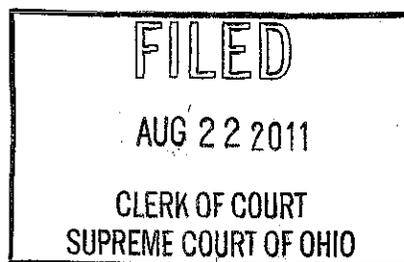
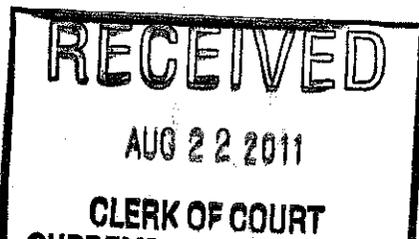
APPELLANT/CROSS-APPELLEE'S MEMORANDUM OPPOSING JURISDICTION OF CROSS-APPEAL

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Cross-Appellee Ronald Luri (“Luri”) opposes the request of Cross-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”) (jointly “Republic Defendants”), Ronald Krall (“Krall”), and James Bowen (“Bowen”) (collectively “Defendants”) that this Court accept jurisdiction of their cross-appeal.

I. INTRODUCTION

As explained in Luri’s Memorandum in Support of Jurisdiction (“Supp. Mem.”), the Eighth District Court of Appeals reduced the punitive damage awards against the three corporate defendants¹ by over 83% (from a total of \$43 million to \$7 million), terminating a three-year appeal process. Defendants now ask this Court to “hold” this case and grant an automatic new trial should this Court conclude that a statute that had no effect on the outcome of this case, and that neither party in this appeal has *ever* challenged, is constitutional. In addition, Defendants seek advisory opinions on “tort reform” jury instructions and interrogatories they never requested, and “more” due process than Ohio’s punitive damage cap affords, or that accords with the adjudicated facts.

In essence, the Eighth District Court of Appeals determined that the two-to-one ratio of compensatory to punitive damages in Ohio’s damages cap statute satisfies the due process standard of *Barnes v. Univ. Hosp. of Cleveland* (2008), 119 Ohio St.3d 173 in a case where the reprehensibility of the Republic Defendants’ conduct “weighs heavily in

¹ The individual defendants, Krall and Bowen, did not and do not challenge the amount of the punitive damage awards against them.

favor of a large punitive damage award[.]” *Luri II*² at A-18. The panel disagreed, however, on how to calculate the two-to-one ratio. The dissent would have applied it to each of the three Republic entities found to have engaged in malicious conduct (awarding \$7 million against each), while the majority concluded that the three awards should be consolidated into a single \$7 million punitive damage award, thereby effectively reducing each of the three awards to about \$2.3 million – an amount that is *below* the one-to-one ratio advocated by the Republic Defendants in their cross-appeal.

Ron Luri is willing to accept the “consolidated” award in lieu of further delay, and no issue presented by Defendants justifies further delay. But if this Court accepts the “conflict” question certified by the Eighth District, or any portion of Defendants’ cross-appeal, it should also review the majority’s erroneous “consolidation” of three punitive damage awards.

II. THE CROSS-APPEAL DOES NOT PRESENT AN ISSUE OF GREAT OR GENERAL PUBLIC INTEREST

With one exception, all of Defendants’ propositions of law are based on a case they did not try. No party ever challenged the constitutionality of Ohio’s bifurcation statute and it was not until after the jury returned its verdict that Defendants alleged that tort reform damage caps apply to employment actions under R.C. Chapter 4112. Indeed, just a month before the trial of this action, Defendants’ experienced, employment law trial counsel filed a brief in the United States Court of Appeals for the Sixth Circuit

² *Luri v. Republic Services, Inc.* (May 19, 2011), 8th Dist. No. 94908, attached to Luri’s Memorandum in Support of Jurisdiction at A-2 – A-24.

(*Morgan v. New York Life Ins. Co.* (C.A.6, 2009), 559 F.3d 425, cited at p. 15 of Defts.’ Combined Mem.) arguing that Ohio’s punitive damage cap does not apply to employment actions under Chapter 4112. No great or general interest resides in this Court providing advisory opinions on a case created post-verdict. Further, the one exception – whether the punitive damage awards now totaling \$7 million exceed due process – provides no issue of great or general public interest.

1. Republic’s first Proposition of Law, which asserts that Ohio’s bifurcation statute “is constitutional” and “does not violate Section 5(B), Article IV,” is not supported by the record. Here, neither party has asserted that the statute is *unconstitutional*. Rather, Defendants’ motion to bifurcate urged that R.C. 2315.21(B) should be read “in conjunction with” Civ.R. 42(B) and Luri did not disagree. Here, Defendants did not (like the defendants in *Havel v. Villa St. Joseph*, Sup.Ct. No. 2010-5251) file a pretrial, interlocutory appeal claiming that the trial court’s denial of bifurcation was tantamount to an order finding the statute to be unconstitutional. Instead, Defendants proceeded to an eight-day jury trial and raised “tort reform” only after the jury returned a large verdict. And here, Defendants told the court of appeals in *Luri P* that the constitutionality of the bifurcation statute was not, and could not be, part of the appeal. Such argument alone estops Defendants from now arguing the constitutionality of Ohio’s bifurcation statute before this Court.

³ *Luri v. Republic Services, Inc.* (Oct. 23, 2009), 8th Dist. No. 92152, attached to Luri’s Memorandum in Support of Jurisdiction at A-25 – A-39.

In addition, while Defendants claim that bifurcation is “mandatory,” they have not, and do not now, indicate how the trial court could have implemented Defendants’ request to separately try liability for compensatory damages and liability for punitive damages when the same fabricated and altered documents were offered by Defendants in an unsuccessful attempt to prove no retaliation and by Luri to prove pretext and malice.

Finally, Defendants offer no reasonable basis for an “automatic” reversal of a two-week jury trial based on the denial of one of a multitude of pretrial motions presented to the trial court in the weeks immediately preceding trial. Any prejudice the Defendants could conceivably have suffered when Vice President Krall blurted out the company’s net worth during trial (the alleged effect of the trial court failing to grant the motion to bifurcate) was fully remedied when the court of appeals remitted 83% of the punitive damage award. “No error * * * in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial * * * unless refusal to take such action *appears to the court* inconsistent with substantial justice.” Ohio Civ.R. 61 (emphasis added). Defendants’ claim that Luri “waived” Ohio’s firmly entrenched harmless error doctrine is meritless. The harmless error doctrine is a constraint imposed upon reviewing courts; not a claim or affirmative defense. It is Defendants’ burden to prove that any alleged error was prejudicial; not Luri’s burden to argue that an *alleged* error is “harmless.”

2. The alleged “errors” in Defendants’ Propositions of Law II, III, and V are both waived and invited. Defendants’ claim that the trial court should have divined what

they did not – that tort reform statutes apply to statutory discrimination claims – and unilaterally reject the employment law instructions and interrogatories submitted by the parties, is baseless. Notwithstanding the Defendants’ protestations to the contrary, no case has applied tort reform damage caps to employment claims under Chapter 4112. But whether or not those statutes apply, it is hornbook law that parties “may expressly or impliedly waive statutory provisions intended for their own benefit * * *.” 85 O.Jur.3d, Statutes, §319. The trial court was thus under no obligation to thwart any trial strategy Defendants may have had to rely on federal employment doctrines and defenses in lieu of “tort reform” statutes.

Nor does the “plain error” doctrine apply. As the Eighth District pointed out, Defendants’ actions constituted more than simple omission; their affirmative actions “invited” the error of which they now complain. See *Luri II* at A-12 – A-14. As this Court held in *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121 (citation omitted):

While invocation of the plain error doctrine is often justified in order to promote public confidence in the judicial process, “[it is doubtful that] the public’s confidence in the jury system is undermined by requiring parties to live with the results of errors that they invited, even if the errors go to ‘crucial matters.’”

3. Finally, the Republic Defendants’ claim in Proposition of Law IV that due process requires a further reduction of their consolidated corporate punitive damage award is wholly inconsistent with their argument, accepted by the Eighth District, that Ohio’s punitive damage “cap” applies. The Republic entities are thus precluded from arguing in this case that they did not have “fair notice” of a 2:1 ratio for punitive

damages. Indeed, the Court of Appeals' "consolidation" of the awards provided an award *lower* than a "1:1" ratio against each Republic entity. Having expressly requested individual punitive damage awards from the jury, the Republic Defendants cannot now complain about a punitive damage award that is less than a 1:1 ratio for each entity.

Moreover, a "*Barnes*" analysis is necessarily case-specific, precluding the "bright line" rule advocated by the Republic Defendants. The case upon which they rely – *Morgan v. New York Life Ins. Co.*, supra (Combined Mem., p. 15) – illustrates the flaw in their argument. The court in *Morgan* affirmed a \$6 million punitive damage award (for a total damage award of \$12 million), based on age discrimination that was "minor" and not "so reprehensible as to justify a high punitive damages award" (559 F.3d at 442). The majority in this case, in contracts, affirmed a \$7 million punitive damage award (for a total damage award of \$10.5 million) after concluding that the Republic entities' misconduct, including fabricated and altered evidence, "demonstrated reprehensible conduct * * * that weighs heavily in favor of a large punitive damage award" (*Luri II* at A-18). If anything, the *Barnes* factors and *Morgan* support a *higher* punitive damage award than the \$7 million allowed by the majority in *Luri II*.

III. COUNTERSTATEMENT OF THE CASE AND FACTS

As they did in the court of appeals, Defendants present as "facts" only the evidence *rejected* by the jury.

The three corporate entities and two individuals who orchestrated Ron Luri's unlawful termination are: (1) Luri's direct employer, Ohio Hauling, LLC; (2) Luri's

direct supervisor (Bowen) and the corporate entity that employed him, Republic Ohio; and (3) Bowen's direct supervisor (Krall) and the entity that employed him, Republic.

Ron Luri is a career waste management industry employee who was hired by Ohio Hauling in 1998 to be the General Manager for their three Cleveland Division facilities. From 1998 to 2007, Luri received only positive performance reviews; the three Cleveland Division facilities were steadily improving under his management and on track for their best year ever in 2007.⁴ In the summer of 2006, Bowen prepared an "action plan" identifying so-called "Leaders of Tomorrow," as well as employees who need to be "retrain[ed]" or "replace[d]." That plan had the "buy-in and approval" of corporate officers (including Krall) and was implemented by targeting older workers for termination. Consistent with that plan, in November 2006, Bowen told Luri to fire his three oldest workers, including Frank Pascuzzi. Luri knew his three oldest employees had "no performance problems" and was concerned that firing them would be age discrimination. He thus refused Bowen's directive and reported it, along with his response, to another General Manager.

After Luri refused Bowen's directive, "all of a sudden" there were "problems" with his "communication skills" and "management style." Bowen told Luri that he was not having enough meetings with his employees and created a "Ron Luri file" to collect

⁴ The "rankings" in Exhs. S, T, and U referenced by Defendants (Combined Mem., p. 7), were Krall's *internal* documents, purportedly kept to create a "succession plan."

documents on these “problems.” Krall helped to create a paper trail by commissioning a survey to identify “employee issues” at Luri’s Cleveland Division.

Over the next several months, Bowen “counseled” Luri, and created a paper trail of “directives.” From mid-February to mid-April 2007, Luri followed Bowen’s numerous “directives” and “action plans” to the best of his ability. On April 12, 2007, after nine weeks of silence, Bowen sent Krall an e-mail message seeking permission to terminate Ron Luri’s employment. According to Krall, the real purpose of the e-mail was to “copy Craig Nichols” in Human Resources, “to make sure we’re not missing anything here.” The e-mail omitted Luri’s February 6, 2007 performance evaluation that reported Luri had met and exceeded expectations, and contained several false statements.

After Human Resources consented to the termination, Luri was summoned to the office where Bowen terminated him, with Krall present. Bowen blurted out the real reason for the termination during the meeting: “He said, ‘plus you didn’t fire Frank Pascuzzi.’” Craig Nichols from Human Resources confirmed that Luri was terminated after he “wouldn’t follow” a staffing “directive” from Bowen. Soon after his termination, Luri interviewed with Waste Management, which was looking for someone in the Cleveland area. But Defendants prevented Luri from being hired by refusing to waive the restrictions in Luri’s covenant not-to-compete.

After this lawsuit was filed, Bowen altered and backdated a document to make it appear that Luri had a “negative perception” within the company prior to his refusal to fire his three oldest employees. Defendants then produced the altered document in

discovery. Defendants further directed employees to fabricate documentation of non-existent events, all of which was revealed at trial. Notwithstanding a jury verdict, post-trial “*Barnes*” findings from the trial court and an appellate decision finding the three corporate entities guilty of reprehensible conduct that “weighs heavily in favor of a large punitive damage award” (*Luri II*, A-18), Defendants continue to deny any responsibility for their retaliatory and malicious termination of Ron Luri.

IV. ARGUMENT

A. No “Constitutional” Issue Arises From a Denial of a Pretrial Motion to Bifurcate that Was Neither Erroneous Nor Prejudicial.

Defendants’ first Proposition of law attempts to rewrite the record of this case based upon decisions issued well after trial, and in completely different procedural contexts.

The Motion to Bifurcate filed by Defendants was filed “pursuant to Rule 42(B) of the Ohio Rules of Civil Procedure and Section 2315.21(B)(1) of the Ohio Revised Code” and argued, in relevant part, that “Rule 42(B) and the policy embodied in the Ohio statutory scheme of tort reform, read in conjunction, provide both the means and justification for granting the requested bifurcation of the punitive damages issue.” The motion requested that the first phase of trial be limited to “liability and compensatory damages,” while the second phase consider all aspects of punitive damages – i.e., both malice and the amount of punitive damages. The Eighth District succinctly explained why the motion was unworkable (*Luri II* at A-9):

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.

Republic does not offer this Court any basis for finding that the Court "had to" do the impossible – bifurcate inextricably entwined evidence. Further, following the trial court's denial, Republic did not appeal; it proceeded to trial. And when Defendant Krall "introduced" evidence of the corporate net worth "without prompt from Luri" (*Luri II* at A-9), Republic's counsel did not object.

During the two weeks following the trial court's entry of judgment on the jury verdict, Defendants mined the record for an argument that would relieve them of the consequences of their unlawful and reprehensible misconduct. They then filed post-trial motions showcasing the Motion to Bifurcate as support for a new claim that tort reform statutes apply to employment actions under R.C. Chapter 4112. Neither post-trial nor on appeal did either party argue that the constitutionality of R.C. 2315.21(B)(1) was in issue; it was only after the Eighth District cited *Havel*, supra – a decision that issued more than two years after the trial of this matter and after *Luri II* was fully briefed – in its decision that Republic latched onto a "constitutional" argument. Defendants' continual re-writing of the record provides no basis for any finding of error, much less an "automatic" retrial.

B. Parties to a Lawsuit "Must Decide Their Issues, Incorporate Them into Their Strategy, and Be Responsible for the Results[.]" *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77.

In Propositions of Law II, III, and V, Defendants assume that the application of all Ohio tort reform statutes to employment actions under Chapter 4112 is well established,

and then ask for an inconsistent rule – that defendants seeking the application of “caps” or special jury instructions need not request them (a court has a “mandatory” obligation to give them) while a plaintiff seeking prejudgment interest *does* have the obligation to present “tort reform” interrogatories. These arguments fail for several reasons.

First, it is not well-established that all tort reform statutes apply to statutory actions, including actions under Chapter 4112.⁵ Further, Ohio federal district courts have split on the question of whether the bifurcation statute is substantive rather than procedural for choice-of-law purposes. Compare *Tuttle v. Sears, Roebuck & Co.* (N.D. Ohio 2009), No. 1:08-cv-333, 2009 WL 2916894 and *Geiger v. Pfizer, Inc.* (S.D. Ohio 2009), No. 2:06-cv-636, 2009 WL 1026479. In fact, as pointed out by the Eighth District, the same federal court that applied Ohio’s bifurcation statute in lieu of Fed.Civ.R. 42(b), also held that the punitive damage caps in R.C. 2315.21 *do not apply* to a statutory claim. See *Luri II*, A-10, citing *Kramer Consulting, Inc. v. McCarthy* (Mar. 8, 2006), S.D. Ohio No. C2-02-116, 2006 WL 581244. As *Kramer* notes, “the Ohio Supreme Court observes the principle that because the Ohio General Assembly knows how to apply a limit to the amount of punitive damages available under a statutory claim, if the statute does not explicitly specify such a limit, one should not be applied.” *Id.*,

⁵ *Ridley v. Federal Express*, 8th Dist. No. 82904, 2004-Ohio-2543, as well as the numerous federal cases Defendants cite as purporting to apply “tort reform” punitive damages to employment actions, merely apply the “clear and convincing” burden of proof in R.C. 2315.21, which is also part of Ohio common law. Republic cites no case applying tort reform “caps” in employment actions.

2006 WL 581244, at *8. No “caps” appear in the remedies available under R.C. 4114.02 and R.C. 4112.99.

Second, even if tort reform caps are applicable, that does not prevent parties from choosing to pursue a strategy that relies on employment defenses rather than tort reform.⁶ This Court has long held that the parties to an action “must decide their issues, incorporate them into their strategy, and be responsible for the results[.]” *Dardinger*, 98 Ohio St.3d at 93, ¶148. This Court has repeatedly held that parties are bound by the consequences of their litigation strategy, and prohibits a party in litigation to “intentionally or unintentionally * * * induce or mislead a court into the commission of an error,” and then seek reversal on those very grounds. *Lester v. Leuck* (1943), 142 Ohio St. 91. As this Court held in *Goldfuss v. Davidson*, 79 Ohio St.3d at 121, “the idea that parties must bear the cost of their own mistakes at trial is essential supposition of our adversarial system of justice.” That doctrine applies equally to “tort reform” interrogatories. *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶¶80-85. Here, Defendants “collaborated with the court and Luri in crafting the jury instructions given”; proposed common law compensatory damage instructions; and “submitted interrogatories and agreed upon the final versions submitted to the jury” that “did not separate past and future economic damages nor economic and noneconomic

⁶ Here, for example, Defendants’ trial strategy included an attempt to limit Luri’s damages by pleading a failure to mitigate damages and “after-acquired evidence” – a federal doctrine that allows employers to assert a later discovered justification for an unlawful termination to limit (but not eliminate) damages.

damages.” *Luri II* at A-12, A-14. Defendants’ Memorandum in Support of Jurisdiction of their cross-appeal does not even address this long line of Ohio law that would be gutted under the propositions of law they suggest.

Third, the lack of merit in these Propositions of Law is evident in their inconsistency. In their fifth Proposition of Law, Defendants assert that since Luri “was * * * the party seeking prejudgment interest[.]” it was Luri’s “burden to request that the jury identify which portions of the compensatory award were appropriate for prejudgment interest.” Combined Mem., p. 16. But in Propositions of Law II and III, Defendants state that the party seeking a damage cap on compensatory awards, which necessarily requires the allocation of economic and noneconomic damages, *does not* have a burden to request such interrogatories and, to the contrary, the court must unilaterally give such interrogatories even though the parties agree to interrogatories without separate damages.

C. **The Outer-Most Due Process Limit on Punitive Damages Must Be Decided Based Upon the Facts and Record Presented.**

Finally, the Republic Defendants ask this Court to establish a 1:1 ratio of punitive to compensatory damages as the outer-most limit of due process, based upon a characterization of its conduct in this case that is belied by the evidence, the trial court’s findings, and the de novo review of the Eighth District.

Having successfully argued that the “2:1” ratio of Ohio’s punitive damage cap applies, the Republic Defendants are estopped from arguing that they did not have “fair notice” (*Barnes v. Univ. Hosps. of Cleveland* (2008), 119 Ohio St.3d 173, ¶132) that they

could be subject to a punitive damage award that is twice the compensatory award. Moreover, at trial the Republic Defendants insisted that the jury return *individual* awards against them. Since those individual awards are now *less* than the \$3.5 million compensatory award, and thus less than the “1:1” ratio they advocate, the Republic Defendants’ “due process” claim rings hollow.

The remainder of the argument simply disagrees with the conclusion of the jury and courts below that the proven misconduct “weighs heavily in favor of a large punitive damage award” (*Luri II*, A-18). As the Eighth District explains:

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, [Defendants] refused to waive the non-compete clause in his employment contract, which further hampered Luri’s ability to support himself and his family. * * * 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 [Defendants’] 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.

Id. at A-19 – A-20. Defendants’ refusal to acknowledge those findings is indicative of the continuing course of conduct that caused the jury to determine that a sizable punitive damage award was necessary for deterrence.

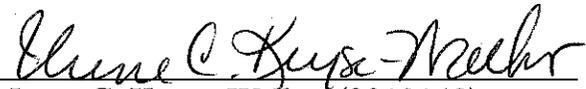
V. CONCLUSION

The five Propositions of Law in Defendants' cross-appeal are not supported by the record, are based on waived and invited error, and contain inconsistent arguments that ignore findings below. This Court should decline jurisdiction.

Respectfully submitted,

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I hereby certify that a copy of the foregoing has been served this 19th day of August, 2011, by U.S. Mail, postage prepaid, upon the following:

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