

ORIGINAL

Supreme Court No. 2011-1097
(Related to Supreme Court Case No. 2011-1120)

IN THE SUPREME COURT OF OHIO

Ronald Luri,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
Plaintiff-Appellee,	:	
	:	Eighth Appellate District
	:	Court of Appeals
v.	:	Case No. 10-094908
	:	
Republic Services, Inc., et al.,	:	
	:	
Defendants-Appellants.	:	

FILED
MAR 16 2012
CLERK OF COURT SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION FOR SUMMARY REVERSAL AND FOR REMAND FOR NEW TRIAL CONSISTENT WITH THIS COURT'S HOLDING IN *HAVEL V. VILLA ST. JOSEPH*, 2012-OHIO-552

I

INTRODUCTION

This is a wrongful termination case brought under R.C. 4112. Prior to trial, Republic¹ twice moved Judge Bridget McCafferty to bifurcate the trial pursuant to the mandatory bifurcation provision in R.C. 2315.21(B). Judge McCafferty refused to do so. As a result of that decision, Plaintiff-Appellee Ronald Luri was able to elicit evidence regarding Republic's wealth during the trial and made it the centerpiece of his closing argument—all before the jury had decided liability and compensatory damages. The jury awarded a stunning \$3.5 million in compensatory damages and \$43 million in punitive damages to a single, discharged employee who suffered no physical harm.

¹ Defined terms in the accompanying motion are also used herein.

Republic appealed, and the Eighth District Court of Appeals held that Judge McCafferty was not required to apply the mandatory bifurcation in R.C. 2315.21(B) because it was unconstitutional. The Eighth District then certified its decision to be in conflict with the Tenth District Court of Appeals. This Court recognized that conflict and “held” the issue for *Havel v. Villa St. Joseph*, Supreme Court Case No. 2010-2148. On February 15, 2012, this Court decided *Havel* and upheld the constitutionality of the mandatory bifurcation provision in R.C. 2315.21(B). As explained below, that decision requires summary reversal and a remand for a new trial consistent with *Havel*.

II

BACKGROUND

There are two related appeals pending before this Court arising out of the Eighth District Court of Appeals’ decision in this case—both of which were partially or entirely “held” for *Havel*. First, in Supreme Court Case No. 2011-1097—which is this certified conflict—the Court accepted Republic’s Notice of a Certified Conflict, which presented precisely the same conflict as in *Havel* concerning the mandatory bifurcation provision in R.C. 2315.21(B). The Court therefore “held” that certified conflict for *Havel*. (Order 10/5/2011, *Ronald Luri v. Republic Services, Inc. et al.*, Ohio Supreme Court Case No. 2011-1097).

Second, in Supreme Case No. 2011-1120—which is a discretionary appeal—the Court accepted jurisdiction over (i) Ronald Luri’s single proposition of law relating to the punitive damage cap in R.C. 2315.21(D), and (ii) Proposition of Law No. 1 in Republic’s Cross-Appeal, which raised the same bifurcation issue as the certified conflict in Case No. 2011-1097 and which, therefore, was also “held” for *Havel*. (Order 10/5/2011, *Ronald Luri v. Republic Services, Inc. et al.*, Ohio Supreme Court Case No. 2011-1120). The only issue in either case that was not

held for *Havel* is Luri's single proposition of law regarding the punitive damages cap in R.C. 2315.21(D), which the Parties have briefed.

On February 15, 2012, this Court issued its decision in *Havel* and upheld the constitutionality of R.C. 2315.21(B). *Havel v. Villa St. Joseph*, 2012-Ohio-552, syllabus. The Court has not yet rendered a ruling in this case or in the related discretionary appeal based on *Havel*. On March 5, 2012, an oral argument was scheduled in the discretionary appeal on Luri's single proposition of law regarding the punitive damages cap for April 25, 2012. *Havel*, however, has rendered that issue moot, and both appeals are now ripe for decision.

Unlike many "partial holds"—where the held issue is independent of the other issues pending before the Court—the held issue in this case is *dispositive*. In this case, the Eighth District concluded that the trial court did not err in refusing to apply the mandatory bifurcation provision in R.C. 2315.21(B) on the basis that it was unconstitutional. (5/19/2011, 8th Dist. Journal Entry and Opinion, at 4-5). Under the syllabus set forth in *Havel*, the Court of Appeals was incorrect in reaching that conclusion. The only way to remedy that error is a new trial, which renders moot the remaining proposition of law pending before this Court concerning the application of punitive damages cap.

Therefore, for these reasons and those set forth below, Republic respectfully requests that the Court summarily reverse the Court of Appeals' decision and remand the cause to the trial court for a new trial consistent with its decision in *Havel*.

III

ANALYSIS

R.C.2315.21(B) provides: “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.***” (Emphasis added). As the Court of Appeals recognized in this case, Republic “twice moved [the trial court] to bifurcate the trial pursuant to the Ohio Tort Reform Statutory provisions in R.C. 2315.21 et seq. . . .” (5/19/2011 8th Dist. Journal Entry and Opinion, at 2). The first time was on May 28, 2008, when Republic argued to the trial court that “Ohio Rev. Code 2315.21(B) ***requires*** the bifurcation of punitive damages evidence[.]” (5/28/08 Defs.’ Mot. to Bifurcate, at 1 (emphasis added)). Republic was clear in the memorandum in support of its motion that bifurcation under this provision was “***mandatory.***” (5/28/08 Memo. in Support of Mot. to Bifurcate, at 3). Two weeks after its Motion to Bifurcate was denied, Republic *again* requested a bifurcated trial pursuant to RC. 2315.21(B), stating that “O.R.C. 2315.21(B) ***requires*** bifurcation” (6/16/08 Defs’ Trial Brief, at 26 (emphasis added)).

Despite these two motions and the mandatory language of the R.C. 2315.21(B), Judge McCafferty refused to apply the mandatory bifurcation provision. (6/3/2008 Judgment Entry). Having ruled that the trial would proceed unbifurcated in violation of the R.C. 2315.21(B), Judge McCafferty permitted Luri’s counsel to elicit testimony and make argument regarding Republic’s wealth in the context of determining liability and compensatory damages. The jury then returned a verdict against Republic for \$3.5 million in compensatory damages and approximately \$43 million in punitive damages.

In view of *Havel*, Judge McCafferty's error in refusing to bifurcate the trial could not be plainer. This Court in *Havel* concluded that "R.C. 2315.21(B) does more than set forth the procedure for the bifurcation of tort actions: it makes bifurcation mandatory." *Havel v. Villa St. Joseph*, Slip Opinion No. 2012-Ohio-552, ¶ 25. The Court held:

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

Id. at syllabus. Thus, it was clear error for Judge McCafferty to have denied Republic's motion to bifurcate the trial pursuant to R.C. 2315.21(B). The only way to remedy that error is to order a new trial.

Sprinkled throughout his appellate papers, Luri has made various efforts to distinguish this case from *Havel*. Both the Court of Appeals and this Court have already rejected those arguments. The Court of Appeals did so when it certified the conflict, and this Court did so when it recognized that a conflict exists and when it held this case for *Havel*. In reaching those conclusions, both the Court of Appeals and this Court concluded that the issue in this case is the same issue as in *Havel*. It follows that the result here must be same as in *Havel*.²

Nor can Luri argue that the error was harmless. Indeed, he has never done so prior to the appeal to this Court. That is not surprising. It is not credible to argue that the trial court's refusal

² Luri has also pointed out at various times that neither party challenged the constitutionality of R.C. 2315.21(B)(2), (8/22/2011 Luri Memorandum Opposing Jurisdiction of Cross Appeal, at 2), but he never explains why—even if true—it would matter. Certainly a party is not required to defend the constitutionality of a statute every time it wishes to rely on it; statutes are presumed constitutional. *Boles v. Knab*, 129 Ohio St. 3d 222, 2011 Ohio 2859, 951 N.E.2d 389, ¶ 3 (Ohio 2011). Luri first raised the constitutionality of the statute shortly before the oral argument at the Court of Appeals, and the Court of Appeals held R.C. 2315.21(B)(2) to be unconstitutional, which it confirmed in its certification of the conflict. (6/7/2011 8th Dist. Journal Entry).

to bifurcate was harmless—the prejudice to Republic is self-evident from the shocking amount of the award alone. Indeed, after Judge McCafferty denied Republic’s motion to bifurcate, Luri implemented a strategy to improperly appeal to the jury’s passion and prejudice by commingling compensatory evidence and evidence of Republic’s wealth. The seeds for this strategy were sown during Luri’s examination of defendant Krall:

LURI’S COUNSEL: As a regional vice president of Republic Services, which is a publicly traded corporation, Republic Service is a very large corporation, is it not?

MR. KRALL: Small corporation, three billion dollars.

LURI’S COUNSEL: Three billion dollars is a small corporation?

MR. KRALL: Fairly small.

LURI’S COUNSEL: \$330 million dollars in net profit last year?

MR. KRALL: Yes.

(Tr. 365).

This is precisely what the mandatory bifurcation provision in R.C. 2315.21(B) was designed to prevent: the contamination of the jury’s consideration of liability issues with inflammatory evidence of wealth at the compensatory damages stage. Luri, however, has repeatedly stated that Krall “blurted” out the revenue of the company, suggesting that it was not the intent of Luri’s counsel to elicit it. (8/22/2011 Luri Memorandum Opposing Jurisdiction of Cross Appeal, at 4). A simple review of the quote above shows that Luri’s counsel sought to elicit that answer from Krall and then followed it up by asking a leading question about the net profit for the previous year (\$330 million), which Mr. Krall had not previously mentioned.

Moreover, Luri’s counsel then made the evidence of wealth the cornerstone of his closing argument. The very first words of his closing argument were: “Ron Luri stood up against a *three*

billion dollar a year company and opposed discrimination, and they fired him for it.” (Tr. 1569) (emphasis added)). This improper appeal to passion and prejudice continued throughout the closing argument, as counsel stated *seven times* that Republic was a “*three-billion dollar*” corporation. (Tr. 1569, 1582, 1587-1589, 1607, 1611, 1742-1743). Indeed, Luri told the jury that Republic had net income of \$330 million in 2007, constituting “*almost one million net a day,*” as well as \$76.1 million in the first quarter of 2008, and that the jury should assess punitive damages in multiples of 1% of Republic’s net income. (Tr. 1608 (emphasis added)). Luri asked the jury: “[D]oes a company that makes *three billion dollars a year* terminate a general manager who is exceeding financial performance because he wasn’t getting together every single week at an hour staff meeting?” (Tr. 1587-1588 (emphasis added)).

To further compound the prejudice, the trial court then sent voluminous documentary evidence regarding Republic’s wealth into the jury deliberation room. The documentary evidence regarding Republic’s wealth that the trial court sent back to the jury deliberation room included:

- Exhibit 41: Affidavit of defendant Ronald Krall regarding his assets and salary; affidavit of defendant James Bowen regarding his assets and salary
- Exhibit 42: 10-Q for Republic Services, Inc. for first quarter of 2008
- Exhibit 43: E-mail correspondence between counsel regarding the financial health of the individual and corporate defendants
- Exhibit 78: Financial information of defendant James Bowen, including amended affidavit, tax returns, and other financial documents (approximately 100 pages)
- Exhibit 79: Financial information of Ronald Krall, including affidavit, tax returns, and other financial documents

In flagrant violation of the mandatory bifurcation provision in R.C. 2315.21(B), the jury was given all of this evidence while it was in the process of deciding liability and compensatory damages.

Luri has at various times suggested that Republic's trial counsel should have objected to Luri's use of wealth evidence at trial. Judge McCafferty, however, *had already denied the motion to bifurcate*. As a result, any further objection would have been superfluous because this evidence was relevant to punitive damages, and Judge McCafferty had already concluded that evidence relating to punitive damages would be heard at the same time as evidence relating to liability and compensatory damages.

In sum, the trial court's refusal to bifurcate was enormously prejudicial to Republic.

The closest Luri comes to arguing that Judge McCafferty's error was harmless is his statement that, even if the trial court had bifurcated the trial, "the jury necessarily had to hear about the fabrication of evidence as part of liability." (2/8/2012 Luri Reply Br. Sup. Ct. No. 2011-1120, at 5). Luri misses the point. Republic has never argued that evidence of *wrongdoing* would have been inadmissible during the liability phase of a bifurcated trial. It has argued that, as mandated by Ohio law, evidence of *wealth* would have been inadmissible during the liability phase of a bifurcated trial. See *Hudock v. Youngstown M. R. Co.*, 164 Ohio St. 493, 498-499 (Ohio 1956) ("[D]amage actions in which compensatory damages only are recoverable, evidence is not admissible, directly or indirectly, to show the wealth or financial standing of either the plaintiff or the defendant."); *Sayavich v. Creatore*, 2009 Ohio 5270, ¶ 80 (7th Dist.) ("[E]vidence of a defendant's net worth is only relevant as to punitive damages.").

Similarly, Luri's argument that application of the *punitive damage* caps "cured" the prejudice in this case, (2/8/2012 Luri Reply Br. Sup. Ct. No. 2011-1120, at 5-6), misses the point. Bifurcation serves to protect the integrity of *compensatory* awards—not *punitive* awards. It does so by ensuring that evidence of wealth is not introduced until after an award on liability and

compensatory damages is rendered by the jury. A *punitive cap* cannot “cure” a contaminated *liability and compensatory* phase of a trial.

Finally, Luri has at times pointed out that Republic did not immediately appeal the trial court’s refusal to bifurcate under R.C. 2315.21(B), but never explains why that matters. Even if Republic could have immediately appealed the decision under R.C. 2505.02, it had the option to wait to appeal until after the final judgment. Appellate Rule 4(B)(5) expressly permitted Republic to wait to appeal “within thirty days of entry of the judgment or order appealed *or the judgment or order that disposes of the remaining claims.*”³ (Emphasis added). It is undisputed that Luri appealed the bifurcation ruling within 30 days of the order that disposed of the remaining claims.

Consequently, none of Luri’s arguments change the fact that *Havel* is dispositive of the issues in this case and requires a new trial.

³ As this Court has held, “[f]or App.R. 4(B)(5) to apply, an order must meet two requirements: (1) it must be a final order that does not dispose of all claims for all parties, and (2) it must not be entered under Civ.R. 54(B).” *In re H.F.*, 120 Ohio St. 3d 499, 2008 Ohio 6810, 900 N.E.2d 607, ¶ 12. Here, App.R. 4(B)(5) applies because the order denying bifurcation (1) was a final order that did not dispose of all claims for all parties, and (2) it was not entered under Civ.R. 54(B). The Staff Note to the July 1, 1992 Amendment to App.R 4 establishes that this is exactly the type of situation for which the rule was adopted. “Division (B)(5) is intended to give to a party who has the right to appeal a partial final judgment or order under *section 2505.02* of the Revised Code the option to appeal the judgment or order at the time it is entered *or when the final judgment disposing of all claims as to all parties is entered.*” Staff Note (July 1, 1992 amendment) (emphasis added); *see also Grabill v. Worthington Indus.*, 91 Ohio App. 3d 469, 473 (10th Dist. 1993).

IV

CONCLUSION

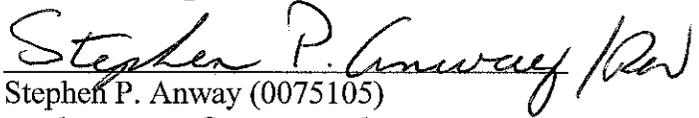
For the foregoing reasons, Republic respectfully requests that the Court summarily reverse the Court of Appeals' decision and remand the cause to the trial court for a new trial consistent with its decision in *Havel*.

Respectfully submitted,



Robin G. Weaver (0020673)

robin.weaver@squiresanders.com



Stephen P. Anway (0075105)

stephen.anway@squiresanders.com

SQUIRE SANDERS (US) LLP

Trevor G. Covey (0085323)

trevor.covey@squiresanders.com

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 16th day of March 2012

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 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*