ORIGINAL

No. 2011-1097
(Related to No. 2011-1120)

In the Supreme Court of Ohio

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

RONALD LURI,
Appellee,

v.

REPUBLIC SERVICES, INC., et al.,
Appellants.

APPELLEE RONALD LURI'S MEMORANDUM OPPOSING APPELLANTS' MOTION FOR SUMMARY REVERSAL AND FOR REMAND FOR NEW TRIAL

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I. INTRODUCTION

Plaintiff-Appellee Ronald Luri ("Luri") opposes the motion filed by Defendants-Appellants Republic Services, Inc., Republic Services of Ohio Hauling LLC, Republic Services of Ohio I, LLC James Bowen and Ronald Krall ("Defendants"), in which they seek a "summary" reversal and new trial, cancellation of the oral argument scheduled for April 25 in Marion, Ohio in Appeal No. 2011-1120, and dismissal of Luri's appeal as "moot."

This appeal exists because a jury returned a large punitive damage award against the three Republic entities. The award was large because the jury considered the malicious conduct of each Defendant individually, in accordance with Defendants' request, and the evidence included computer forensics and skillful cross-examinations that established each Defendant's malicious conduct in the fabrication of a "paper trail" — including alteration and back-dating of evidence after suit was filed — to cover up retaliation after Plaintiff Luri objected to age discrimination. That same evidence also established liability, because the altered and back-dated documents were the predicate for the purportedly "legitimate" reasons offered at trial for Luri's termination.

Defendants essentially conceded as much in the court below: They did not appeal the jury's finding of liability as to any Defendant. Yet Defendants now ask this Court to summarily excuse them from the consequences of their misconduct by ordering a new trial based on their unilateral pronouncement as to how the holding of *Havel v. Villa St. Joseph,* 2012-Ohio-552, applies to this case. That misguided request should be denied.

Defendants' efforts to characterize this case as a clone of *Havel* are unavailing. *Havel* holds only that R.C. 2315.21(B) is constitutional, and its effect on Defendants' appeal is limited accordingly. Defendants' request for an automatic new trial not only improperly assumes the existence of trial court error, contrary to the conclusions of the Eighth District, but also simply ignores fundamental doctrines of appellate review — invited error, waiver, and harmless error — that bind parties to their litigation strategies.

II. PERTINENT PROCEEDINGS

Defendants' attempt to force this case into the mold of *Havel* ignores the basis of the Eighth District's resolution of the first of Defendant's six Assignments of Error and grossly distorts the trial court proceedings that provided the context for that holding.

A. The Decision Below.

This appeal and related Appeal No. 2011-1120 arise out of Defendants' second appeal from the jury verdict entered against them in July 2008 ("*Luri II*").[1] In that appeal, Defendants asserted six assignments of error, one of which argued "that the trial court 'erred by failing to apply R.C. 2315.21(B)(1), which requires mandatory bifurcation.'" *Luri II*, ¶8. The Eighth District overruled the assignment, citing and following its precedent in *Barnes v. University Hospitals of Cleveland*, 2006-Ohio-6266,

[1] Defendants' first appeal was dismissed, after full briefing, because Defendants "deprived the trial court of the opportunity to issue a final order by prematurely filing the instant appeal." *Luri v. Republic Services, Inc.*, 8th Dist. No. 92152, ¶22, Appx. to Luri's Merit Brief at 37.

aff'd in part, rev'd in part on other grounds, 119 Ohio St.3d 173 (2008). *Id. Luri II* noted that its interpretation of the statute in *Barnes* was "further buttressed" by its conclusion in *Havel* (which issued after the completion of briefing in *Luri II,*) that the statute was unconstitutional. *Id.*, ¶9.

In *Barnes,* as here (and unlike *Havel*), the issue was whether judgment on a jury verdict must be vacated and a new trial ordered because a trial court denied a party's pretrial motion to bifurcate. The Eighth District rejected the argument that R.C. 2315.21(B) "mandates" any specific resolution of a party's motion to bifurcate, concluding that "the trial court may exercise its discretion when ruling upon such a motion." 2006-Ohio-6266, ¶34.

In *Luri II*, the Eighth District concluded that the trial court, like the trial court in *Barnes*, did not abuse the discretion it retained to determine the merits of the specific motion filed within the context of the facts and proceedings presented, because:

> 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.

Luri II, ¶12. The *Luri II* panel also rejected Defendants' argument that the trial court "erred" by "allowing" net worth evidence:

> 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 prompting from Luri.

Id.

B. Defendants' Motion to Bifurcate and Litigation Strategy Following the Denial of Their Motion

Contrary to their current characterization, Defendants' motion seeking bifurcation reflected the Eighth District's interpretation of R.C. 2315.21(B) in *Barnes*.

Defendants' motion invoked Civ. R. 42(B), which, they argued, supported bifurcation when considered "in conjunction" with the "policy embodied in" R.C. 2315.21(B)(1). (*See* R. 50, Defs.' Mot. to Bifurcate (5/28/08), at 1.) The supporting memorandum similarly concludes its introductory section by arguing that the court "should" bifurcate, because "[b]ifurcation of liability/compensatory damages serves all the ends rule 42(B) seeks to promote, and is the clear public policy of Ohio[.]" (*Id.*, Mem. Supp., at 2.) The bulk of the supporting memorandum is devoted to arguing the reasons the trial court "should" bifurcate the trial, without ever explaining how such bifurcation could be accomplished in a case where the defense to liability is premised on manufactured and altered documents. In their concluding paragraph, Defendants similarly state that "Plaintiff's requirement to demonstrate both the existence and entitlement to compensatory damages separate themselves neatly and fairly from a determination of punitive damages" without explaining how, and "request" bifurcation on

the grounds that it "is supported by Ohio law and because all parties and the efficient administration of justice will be served * * *." *Id.*, p.5.[2]

Defendants' current position that they filed a motion to bifurcate to "protect the integrity of compensatory awards" (Mem. in Supp. at 8), and that they have "never argued that evidence of *wrongdoing* would have been inadmissible during the liability phase of a bifurcated trial" (*id.*, emphasis in original), is equally unsupported by their motion. Defendants' motion invoked the "obvious danger" that permitting evidence on punitive damages during the liability phase of trial "implies that there is, in fact, conduct to punish." (R. 50, Defs.' Mot. to Bifurcate (5/28/08), at 4.) Defendants further insinuated that the "volume of evidence" could cause a juror to "consider evidence that can only be relevant to punitive damages (*i.e.*, any evidence beyond that pertaining to Defendants' allegedly tortious actions towards Plaintiff) *in determining liability*, thereby prejudicing Defendants." (*Id.*, emphasis supplied.) And Defendants characterized the potential of an erroneous finding of *liability* as the "exact danger that promoted the General Assembly to create O.R.C. §2315.21(B) in the first place." (*Id.*)

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[2] Defendants' understanding that bifurcation remained discretionary was also reflected in their efforts to solicit an agreement from Luri not to oppose the motion. *See* R. 53, Pls.' Mot. to Compel (6/5/08), at 2: "Counsel for Defendants represented that they would voluntarily produce information concerning the net worth of Mr. Krall and Mr. Bowen * * * as part of an agreement between Counsel for Defendant and Counsel for Plaintiff whereby Plaintiff would agree to bifurcate the proceedings if the Defendants would voluntarily produce the information." Luri withdrew his consent to bifurcation when Defendants reneged on their agreement to produce net worth evidence. *Id.*

Defendants' insistence that their argument has been limited to the exclusion of net worth evidence is puzzling. At best, a single footnote in the section of the motion discussing Rule 42(B) states, without elaboration, that because punitive damages do not have a compensatory purpose, "plaintiff's desire to introduce Defendants' finances is completely irrelevant in determining liability or the amount of compensatory damages." (*Id.*, at 4, fn.1). The context of the footnote is Defendants' argument that bifurcation would save "the court, the jury, and the parties the inherent time and expense" involved in introducing evidence relevant to the calculation of punitive damages. *Id.*

In short, Defendants requested bifurcation of "the punitive damages issue" in general — without explaining how the evidence could be bifurcated in that manner — as a matter of judicial economy and to prevent the introduction of evidence of Defendants' punishable conduct. In considering the motion, the trial court would have been well aware of the intertwined nature of liability for compensatory and punitive damages. About six weeks earlier, Luri filed for sanctions after computer forensics revealed that a key document produced by Defendants to dispute retaliation had been altered to make it appear that Luri had performance issues before he objected to age discrimination. (*See* R. 38, Pls.' Mot. for Sanctions (4/18/08).)

After the trial court denied their motion, and notwithstanding what they now assert as the denial of a substantial right to bifurcation, Defendants chose not to take an immediate appeal. Instead, they reiterated their "request" for bifurcation in a trial brief.

(*See* R. 72, Defs.' Trial Br. (6/16/08), at 26, "Trial Should Be Bifurcated into Compensatory and Punitive Damage Phases".) The second request was a cut and paste of the first, except that Defendants' eliminated their reliance on R.C. 2314.21(B). The trial brief argued that the efficiencies promoted by Civ. R. 42 "required" bifurcation, with a footnote that "[i]n addition," the statute requires bifurcation. (*Id.* at fn. 14.)

At trial, Defendants' conduct continued to conflict with any intent to bifurcate at all, much less to bifurcate only evidence of net worth. To the contrary it was Defendant Krall who injected net worth into evidence by a non-responsive answer to a question seeking to elicit his experience in the implementation of training programs for preventing workplace discrimination and retaliation.

> Q. Have you ever been trained with respect to how to progressively discipline or support a termination?
>
> A. No, not to my knowledge.
>
> Q. Let me back up a little bit. As a regional vice president of Republic Services, which is a publicly traded company, Republic Services is a very large corporation, is it not?
>
> A. Small corporation, $3 billion.
>
> Q. $3 billion is a small corporation?
>
> A. Fairly small.
>
> Q. $330 million in net profit last year?
>
> A. Yes.
>
> Q. You're the regional vice president of the east region; is that correct?

A. Yes.

Q. You report directly to whom?

A. The COO and president, Mike Cordesman.

Defendants neither objected nor asked the evidence be stricken.

Moreover, Defendants did not ask the trial court to instruct the jury, consistent with R.C. 2315.18(C), not to consider evidence of Defendants' misconduct, net worth or financial resources in determining compensatory damages for noneconomic loss. *See Luri II,* ¶21 ("Appellants did not submit such a limiting instruction or even mention R.C. Chapter 2315 when proposing jury instructions"). Nor did they request a jury interrogatory that would test the jury's noneconomic compensatory damage award. *Id.*, ¶23 (Appellants "invited" any error in the trial court's failure "to provide a jury interrogatory detailing findings on noneconomic damages").

Finally, the record belies Defendants' position that the net worth evidence caused "self-evident" prejudice based on "the shocking amount of the award alone." (Mem. in Supp. at 6.) The compensatory award Defendants now call "shocking" is amply supported by the testimony of Luri's damages expert that Defendants' unlawful retaliation caused him to suffer approximately $3 million in economic damages. (Tr. 1054.) *Compare Morgan v. New York Life Ins.*, 507 F.Supp.2d 808 (N.D.Ohio 2007) (rejecting challenge to portions of $6 million compensatory damage award for wrongful termination of managerial employee), *aff'd in part, rev'd in part on other grounds*, 559 F.3d 425 (6th Cir.2009).

Defendants' second appeal recognized as much. Indeed, Defendants did not assert in *Luri II* that the evidence was insufficient to support the jury's finding of liability or the compensatory damages award, or that the liability finding or compensatory damage awards were against the manifest weight of the evidence.

III. LAW AND ARGUMENT

The gist of the Republic entities' current motion is the following flawed syllogism: (1) in both their request for certification of a conflict and cross-appeal, attorneys for the Republic entities parroted the proposition of law certified in *Havel*; (2) this Court agreed to accept and "hold" that proposition of law at the same time it accepted Luri's appeal on an issue of first impression; and (3) *Havel* held that R.C. 2315.21(B) is not unconstitutional; therefore, *ipso facto*, (4) Luri's appeal is "secondary" and "moot" while the Republic entities are entitled to an automatic new trial.

The syllogism rests on the insupportable assumption that this Court's procedural order "holding" Defendants' appeal somehow irrevocably linked the *outcome* of Defendants' appeal to *Havel*, notwithstanding the completely different procedural status, issues and records in the two cases. Such unwarranted assumptions cannot avoid the conclusion that the undisputed record in this case results in affirmance of the jury verdict entered nearly four years ago.

A. What *Havel* Holds.

Havel resolves a conflict between two appellate districts on an issue of law. *See* Article IV, Section 3(B)(4) of the Ohio Constitution and S.Ct.Prac.R. 4.1. Such appeals

are limited to questions of law and are distinct from merit appeals. *See, e.g.*, S.Ct.Prac.R. 4.3 (when a certified conflict appeal is consolidated with a discretionary appeal, briefs "shall identify the issues that have been found by the Supreme Court to be in conflict and shall distinguish issues from any other issues being briefed in the consolidated appeal").

The question certified in *Havel* was whether R.C. 2315.21(B) is unconstitutional "'because it is a procedural law that conflicts with Civ.R. 42(B).'" *Havel* at ¶1. The recitation of relevant background facts indicates that after the plaintiff filed a medical malpractice action, two defendants moved to bifurcate pursuant to R.C. 2315.21(B); the trial court denied the motion; the defendants filed an immediate appeal; and the court of appeals affirmed on the ground that the statute was unconstitutional. *Id.*, ¶¶7-8.

This Court answered the certified question in the negative. This Court explained that R.C. 2315.21(B) "may" be a substantive law because "it contains mandatory language and restricts judicial or agency discretion." *Id.*, ¶26. Since the express language of R.C. 2315.21(B) did "not convey whether [it] is a substantive or procedural law," this Court analyzed the uncodified language of S.B. 80 to conclude that the General Assembly intended to create a substantive law. *Id.*, ¶¶27-34. That uncodified language distinguished noneconomic damages from punitive damages, finding that the potential for inflated noneconomic damages arising from jurors' "'improper consideration of evidence of wrongdoing in assessing pain and suffering" supported providing defendants "the right to request bifurcation of a trial to ensure that evidence of misconduct is not

inappropriately considered by the jury in its determination of liability and compensatory damages.'" ¶¶31-32, quoting S.B. 80, Section 3(A)(6)(a), (d) through (f), 150 Ohio Laws, Part V, at 8027, 8028 (emphasis omitted).

B. Issues Unaddressed by *Havel*

1. *Havel* Does Not Consider Whether a Particular Allegation that a Motion for Bifurcation Was Erroneously Denied or Whether Any Erroneous Denial Was Invited or Waived.

Defendants' unwarranted assumption that the outcome of their appeal is resolved by *Havel* fails to account for the fact that the question of law certified and answered in *Havel* does not, and cannot, predetermine the propriety of every court denial of any motion to bifurcate. A ruling on such motions must be considered in the context of the timeliness and asserted basis of the motion, what actions the court is asked to take, the purpose of statutory bifurcation, and the nature of the claims and evidence that will be presented at trial.

Here, barely a month before a scheduled jury trial on a retaliation claim, and while a motion was pending seeking sanctions for Defendants' alteration of evidence that was the linchpin of the "paper trail" Defendants intended to offer as their defense to liability, Defendants included among voluminous motions in limine a motion to bifurcate which invoked Civ.R. 42(B) in conjunction with "the policy embodied" in R.C. 2315.21(B). While seeking a bifurcation order that would limit evidence relating to liability for punitive damages to the second phase of trial, Defendants nowhere suggested how that

could be accomplished when the liability evidence for compensatory and punitive damages was inextricably entwined. Within the context of the motion presented, the purpose of the statute, and the record of this case, the trial court did not err.

In any event, the Republic entities are in no position to argue that they are entitled to an automatic new trial because the trial court did not divine a path to accomplish the bifurcation they requested. Neither *Havel* nor our adversary system of justice provides such automatic results.

This Court held in *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427 (1996), that the bare invocation of a right or defense may be insufficient to preserve it for appeal. Rather, "fundamental rules of our adversarial system place specific responsibilities on parties in litigation to shape the course of trial." *Id.* at 436 (also concluding that defendant's assertion of primary assumption of risk in an answer and post-trial motion were insufficient to preserve the issue for appeal); *accord Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, ¶¶120-150 (holding that a parent company waived argument that it lacked privity with insured, although asserted in its answer and raised in a directed verdict motion, where it "participated in and perpetuated" the impression that the two entities were "indistinguishable").

As this Court reiterated in *Dardinger*, parties are responsible for shaping the trial and preserving error and "cannot be permitted, either intentionally or unintentionally, to

induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which [they were] actively responsible." *Id.* at ¶125, quoting *State v. Kollar*, 93 Ohio St. 89, 91 (1915). Moreover, as *Gallagher* notes, waiver is "especially applicable" when the barely raised issue is of "extraordinary strength" — such as the complete defense of primary assumption of risk or, as the Defendants assert here, a statutory right that, regardless of context, mandates a new trial if denied. 74 Ohio St.3d at 436.

The fact that the issue may involve a "substantial" right created by statute does not change these fundamental rules, as the cases this Court cites in *Havel* demonstrate. *See, e.g., State v. Greer*, 39 Ohio St.3d 236 (1988) (discussed in ¶22 of *Havel*), holding that appellant waived alleged error affecting a "substantial" statutory right to peremptory challenges by exercising only five of the six peremptories granted. Similarly, courts have not hesitated to hold that, notwithstanding a strong legislative preference for arbitration, parties may waive their statutory right to demand a stay of litigation and referral to arbitration when, with knowledge of their statutory right, they act inconsistently with that right by participating in litigation. *See, e.g., Dispatch Printing Co. v. Recovery Ltd. Partnership*, 10th Dist. Nos. 10AP-353, 10AP-354, 10AP-355, 2011-Ohio-80, ¶14 (affirming trial court finding of waiver of statutory right to arbitration where appellant's "choice of proceeding with litigation" was their "obvious trial strategy").

Here, as explained above, just five weeks before trial, and after a motion was filed seeking sanctions for Defendants' alteration and back-dating of documents in discovery, Defendants filed a motion to bifurcate invoking the *discretionary* civil rule (Civ.R. 42(B)) and the "policy" of the statute. *See* R. 50, Defs.' Mot. to Bifurcate (5/28/08), p. 1 (emphasis added):

> It is respectfully submitted that Rule 42(B) and the *policy* embodied in the Ohio statutory scheme of tort reform, *read in conjunction*, provide both the means and the justification for granting the requested bifurcation of the punitive damages issue.

Not only is this language inconsistent with Defendants' later claim that the duty to bifurcate is absolute upon any party's unilateral demand, but Defendants felt the need to solicit Luri's agreement not to oppose the motion. (R. 53, Pl.'s Mot. to Compel (6/5/08), at 2 and Exh. 2, at 2.) And when Defendants reiterated their request for bifurcation in their trial brief they claimed entitlement to bifurcation only under the discretionary civil rule, relegating mandatory bifurcation to a footnote. (R. 72, Defs.' Trial Br. (6/16/08), at 26 fn. 14.)

Like the defendant in *Dardinger*, the Republic entities cannot intentionally or unintentionally mislead a court into error and then "procure a reversal of the judgment for an error for which [they were] actively responsible." 2002-Ohio-7113, at ¶125. And, as in *Gallagher* (74 Ohio St.3d at 436), waiver is "especially applicable" because Defendants now claim the motion had the "extraordinary strength" of entitling them to an

automatic retrial, regardless of the merits of the motion, the feasibility of bifurcation, or the events at trial.

Waiver is also more appropriate here because Defendants, who now claim that the result of an interlocutory appeal is "dispositive." did not seek to correct the trial court's alleged error through an immediate appeal from its denial of their motion. The Republic entities do not deny they could have appealed, but claim their decision not to appeal immediately cannot "matter" because they "had the option to wait to appeal until after the judgment." (Mem. in Supp. at 9.) But just as parties cannot procure reversal for an error they intentionally or unintentionally induce, they also cannot ignore procedural avenues for relief and gamble on a favorable verdict while holding an "automatic" reversal in their pocket. *See, e.g., Marks v. Swartz*, 174 Ohio App.3d 450 (2007).

The defendant in *Marks* moved to dismiss an action arising out of an attorney fee dispute on the grounds that the disciplinary rule mandating that such disputes be arbitrated deprived the court of subject matter jurisdiction. The trial court denied the motion to dismiss, giving rise to a statutory right of appeal if, as the defendant later argued, the motion to dismiss was the equivalent of a formal demand to stay pending arbitration. Instead, the defendant proceeded to trial. On appeal from a final judgment in favor of the plaintiff, the court of appeals held that by failing to file a formal motion to stay and proceeding to trial, defendant had both waived his right to mandatory arbitration and rendered the jurisdictional issue asserted in the motion to dismiss "moot." *Id.* at

¶¶19-20. Specifically, "[b]y failing to do everything procedurally to preserve his alleged rights, appellant effectively agreed to try the matter in a public civil forum, an action expressly contrary to the spirit and policy upon which appellant relies." *Id.*, fn. 3. *Accord Dispatch Printing, supra* at ¶¶14, 23 (finding waiver of a statutory right to demand a stay for arbitration where appellant's "choice of proceeding with litigation" resulted in the investment of considerable time and money in trial).

Here, the Republic entities filed a motion that was at best vague, at worst misleading, and proceeded to defend their conduct in an unbifurcated trial, while foregoing the admittedly available appeal which would have protected their right to a bifurcated trial. Moreover, they did not object to the introduction of the very net worth evidence they now claim to be prejudicial, did not ask for a statutory jury instruction cautioning jurors not to consider net worth in their consideration of noneconomic compensatory damages, and did not ask for a statutory jury interrogatory separating the compensatory damage award into economic and noneconomic damages.

Such conduct is contrary to the policy of the very statute Defendants now invoke and constitutes, at best, invited error and waiver. While Defendants now dismiss any suggestion that they could not ignore their "option" to appeal prior to trial, neither law nor policy supports a "right" to pursue a trial strategy that sets a trial court up for error by filing a vague and misleading motion, foregoing an interlocutory appeal, and demanding an "automatic" reversal following an adverse jury verdict. *See, e.g., Cotton v. Slone,* 4

F.3d 176, 180 (2d Cir.1993) (the purposes of the federal Arbitration Act "would be defeated if a party could reserve its right to appeal an interlocutory order denying arbitration, allow the substantive lawsuit to run its course * * * and then, if dissatisfied with the result, seek to enforce the right to arbitration on appeal from the final judgment"); *Ranchero Pescado, Inc. v. Northwestern Mut. Life Ins. Co.,* 680 P.2d 1235, 1242-43 (Ariz.App.1984) (although defendant "appeared to preserve its right to arbitrate," its decision not to pursue a permissive interlocutory appeal constituted "a tactical choice not to arbitrate. * * * Were we to rule otherwise * * * the party would simply take his chances at trial and, if not satisfied, thereafter appeal the order denying arbitration"); *Gemini Drilling & Found., LLC v. Natl. Fire Ins. Co. of Hartford,* 665 S.E.2d 505, 508-509 (N.C.App.2008) (public policy would not permit defendants a "second bite at the apple" by foregoing a permissive appeal from an interlocutory denial of arbitration and proceeding to trial).

Finally, Defendants claim they are entitled to an automatic retrial because they have "never argued that evidence of *wrongdoing* would have been inadmissible during the liability phase of a bifurcated trial," but only that "evidence of *wealth*" was inadmissible during the liability phase of a bifurcated trial. (Mem. in Supp., p. 8 (emphasis in original).) Yet nowhere does that limitation appear in their motion or trial brief. To the contrary, as explained above, Defendants argued that evidence of *misconduct* must be excluded. (R. 50, Defs.' Mot. to Bifurcate (5/28/08), p. 4.)

How simple it would have been had the Republic Defendants merely requested the bifurcation of net worth evidence. Had they done so, Luri may well have agreed, and Defendant Krall may not have injected net worth into evidence. The Defendants' current recognition of the insufficiencies of their own motion practice and trial strategies indisputably precludes the "automatic" reversal they now seek.

2. ***Havel* Does Not Address How the Harmless Error Doctrine Applies When a Motion for Bifurcation is Erroneously Denied.**

Even if there were error in the denial of the motion, and the error was neither invited nor waived, such conclusions do not, standing alone, entitle Defendants to a new trial. Defendants still must prove that any error was *prejudicial*, and *Havel* does not address the question of how the harmless error analysis applies when, as here, a party elects not to appeal the denial of a bifurcation motion until after an unfavorable verdict is rendered against it.

Harmless error has long been a fundamental principle of appellate review. Currently enshrined in Civ.R. 61, the principle that no error in any ruling or order is ground for granting a new trial "unless refusal to take such action appears to the court inconsistent with substantial justice" was codified in R.C. 2309.59 and, before that, in G.C. 11364. Importantly, this principle applies even where a statute imposes a mandatory duty on a trial court. *E.g., Smith v. Flesher*, 12 Ohio St.2d 107 (1967), paragraph one of the syllabus ("In order to support reversal of a judgment, the record

must show affirmatively not only that error intervened but that such error was to the prejudice of the party seeking such reversal."); *Bauer v. Cleveland Ry. Co.*, 141 Ohio St. 197, 202 (1943) (trial court's failure to issue separate findings of fact and conclusions of law upon request following a bench trial is not reversible error where "it appears from the record that the party making the request is not prejudiced by such refusal"); *Allstate Ins. Co. v. Dixon*, 118 Ohio App. 521, 524 (2d Dist.1962) (where "judgment is amply supported by the evidence," failure to render complete findings of fact and conclusions of law is not prejudicial error requiring reversal); *Nosik v. Scott*, 132 N.E.2d 230, 231 (8th Dist.1956) (same).

Smith addressed a trial court's failure to give a requested special jury instruction under a statute requiring that proper written instructions presented by a party "*shall* be given * * * by the court before the argument to the jury is commenced." 12 Ohio St.2d at 112 (emphasis supplied), quoting R.C. 2315.01(E). *Smith* reiterated the "elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that the error was prejudicial to him." *Id.* at 111. This Court explained that "[i]t might be error to deny a party the absolute right [to have instructions presented in writing given to the jury] but it does not necessarily follow that such error would be prejudicial so as to require a reversal[.]" *Id.* at 113.

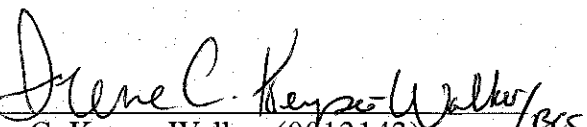
So it is here. Even assuming that R.C. 2315.21(B) imposes a mandatory duty to bifurcate the punitive damage phase of trial upon request in all cases, it does not follow that in all cases the failure to bifurcate is prejudicial and requires reversal. An analysis of any prejudice flowing from the erroneous denial of a motion to bifurcate must be based on the purposes for which the right to bifurcate was created. In *Havel*, this Court made clear that the purpose of bifurcation under the statute is "to ensure that *evidence of misconduct* is not inappropriately considered by the jury in its determination of liability and compensatory damages." 2012-Ohio-552, at ¶31 (emphasis supplied), quoting S.B. 80, Section 3(A)(6)(f), 150 Ohio Laws, Part V, at 8028.

Defendants do not (and cannot) point to any evidence of *misconduct* that was erroneously introduced at trial. As explained above, the same evidence of fabrication that supported the awards of punitive damages also was relevant to liability. Because the same evidence of misconduct would have been introduced at the liability phase of trial even if the trial were bifurcated, Defendants were not prejudiced by the trial court's alleged error in failing to bifurcate the proceedings. The fact that Defendants did not appeal either the jury's liability finding or the compensatory damage award in *Luri II* merely underscores that both were amply supported by the evidence presented at trial. Accordingly, any error in the trial court's failure to bifurcate is harmless and does not warrant summary reversal.

IV. CONCLUSION

For all of the reasons set forth above, the motion of Defendants-Appellants is not well-taken and should be denied.

Respectfully submitted,



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A copy of the foregoing has been served this 23rd day of March, 2012, by U.S. Mail, postage prepaid, upon the following:

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