

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

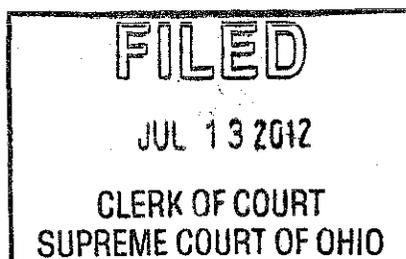
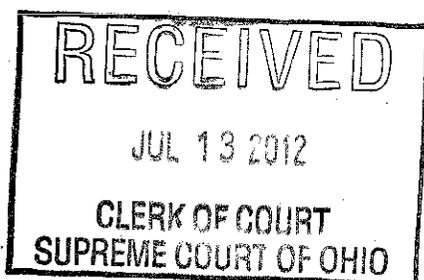
RONALD LURI,
Appellee,

v.

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

APPELLEE'S MOTION FOR RECONSIDERATION, CLARIFICATION

Appellee Ronald Luri, by and through counsel, and pursuant to S.Ct.Prac.R. 11.2, respectfully requests reconsideration and clarification of this Court's decision issued July 3, 2011 (Slip Opinion No. 2012-Ohio-2914, attached to Luri's Memorandum in Support), to specify that the matter is remanded to the Court of Appeals for Cuyahoga County for the application of this Court's decision in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235,



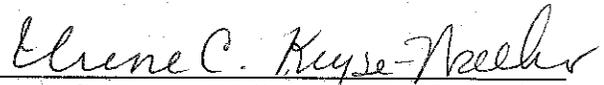
2012-Ohio-552, and consideration of arguments that were not considered or were rendered moot by the panel's conclusion that the bifurcation statute is unconstitutional.

Unlike *Havel*, and unlike the other appeals "held" for *Havel* (*Myers v. Brown*, Case No. 2011-0529; *Fleenor v. Karr*, Case No. 2012-0020; *Plaughter v. Oniala*, Case No. 2011-0779), this case involves issues and assigned errors that are not affected by the constitutionality of Ohio's bifurcation statute (R.C. 2315.21(B)(1)). That is so because unlike the defendant in *Havel*, unlike the defendants in *Myers*, *Fleenor*, and *Karr*, and unlike the defendant in *Flynn v. Fairview Village Retirement Community, Ltd*, ___ Ohio St.3d ___, 2012-Ohio-2582, the Defendants in this case did not immediately appeal the trial court's pre-trial denial of their motion to bifurcate, choosing instead to wait until after an adverse jury verdict to appeal. Unlike the reversals and remands in those other cases, the application of *Havel* to the issues and assigned errors in this case therefore requires consideration of other Eighth District precedent addressing the issue in the same procedural status as this case, as well as waiver, invited error, harmless error and other arguments raised by Luri and rendered moot by the appellate panel's conclusion that the bifurcation statute was unconstitutional.

Luri files this motion because when his counsel contacted counsel for Defendants about the possibility of expedited supplemental appellate briefing on the effect of *Havel* on Defendants' first assignment of error, Defendants' counsel declined, indicating that this Court's July 3, 2012 decision unambiguously grants Defendants a new trial. Clarification is therefore necessary to prevent confusion and additional delay in an appeal

that has already lasted more than four years, as explained more fully in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Appellee Luri seeks reconsideration and clarification of the Slip Opinion attached hereto. In the context of the proceedings below, this Court's "remand[]" for the application of *Havel v. Villa St. Joseph*" necessarily remands the case to the Cuyahoga County Court of Appeals for consideration of issues and arguments rendered moot by that court's application of the now-reversed *Havel* decision. Specifically adding that additional language, however, will prevent additional, unnecessary delay in the final resolution of this appeal.

I. PERTINENT PROCEEDINGS

This appeal arises out of a July 2008 judgment on a jury verdict finding in favor of Appellee Ron Luri ("Luri") and awarding compensatory and punitive damages after he was discharged in retaliation for objecting to age discrimination.

Appellants Republic Services, Inc., et al. ("Defendants") assigned six errors in their appeal to the Eighth District Court of Appeals, the first of which argued that on June 3, 2008, the trial court erroneously denied Defendants' hybrid pretrial motion to bifurcate filed pursuant to Civ.R. 42(B) and R.C. 2315.21(B)(1). (*See Br. of Appellants (6/14/10), p. 1.*)

Luri's Opposing Brief did not challenge the constitutionality of R.C. 2315.21(B)(1); it pointed out that the denial of a motion in which Defendants ask for bifurcation under the civil rule considered "in conjunction" with the "policy" of R.C. 2315.21(B) is not erroneous and, even if erroneous, doctrines of waiver, invited error and harmless error apply to prevent reversal. (*See Appellee's Br. (7/16/10), pp. 13, 15-18,*

19-23.) After briefing was complete, the Eighth District issued its decision in *Havel v. Villa St. Joseph*, Cuyahoga App. No. 94677, 2010-Ohio-5251, which held that R.C. 2315.21(B)(1) is unconstitutional. Thereafter, the Court of Appeals issued a decision in this case that included *Havel* and its reasoning as bases for rejecting Defendants' first assignment of error.

At Defendants' urging, the appellate panel agreed to certify the same "conflict" question as certified in *Havel*. This Court accepted the conflict (Case No. 2011-1097) and "held" the certified conflict appeal, briefing stayed. This Court also accepted: (1) Luri's discretionary appeal on the proper calculation of punitive damage limits under R.C. 2315.21(D)(2)(a), which was briefed and argued on the merits; and (2) that portion of Defendants' discretionary cross-appeal addressing the constitutionality of R.C. 2315.21(B)(1), which was held, briefing stayed, for the issuance of *Havel*. The discretionary appeal and cross-appeal were docketed as Case No. 2011-1120.

Luri's discretionary appeal was orally argued in April and thereafter, on July 3, 2012, this Court issued its per curiam opinion in the two appeals as follows:

The certified question in case number 2011-1097 is answered in the negative, and the cross-appellants' first proposition of law in case number 2011-1120 is sustained. Appellant's discretionary appeal in case number 2011-1120 is moot. The judgment of the court of appeals is reversed, and the case is remanded for application of *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

See Slip Opinion No. 2012-Ohio-2914, attached. When Luri's counsel contacted Defendants' counsel regarding further proceedings in the Eighth District, defense counsel

indicated that the above decision “mandates a new trial” and “invite[d]” Luri to file a motion for reconsideration or clarification “[i]f you feel there is an ambiguity in the Supreme Court’s decision * * *.”

II. RECONSIDERATION/CLARIFICATION

The plain meaning of “reversed, and * * * remanded for application of *Havel*” is that the Eighth District Court of Appeals must now consider Defendants’ first assignment of error in the context of a constitutional statute. Neither party addressed the constitutionality of the statute in their appellate briefs. Rather, the issues presented included whether a trial court errs when it denies a motion to bifurcate that includes an explicit request that the court exercise its discretion under Civ.R. 42(B); whether error, if any, were invited, waived, or both; and whether Defendants were prejudiced by any alleged error. While the appellate court suggested that the harmless error doctrine applies (*see* App. Op., ¶ 12), a remand is necessary for its resolution of that and other issues within the context of a constitutional statute. *See, e.g., State v. Morris*, Slip Opinion No. 2012-Ohio-2407, ¶ 23 (reversing and remanding to the court of appeals with instructions to apply the correct standard of review to appellant’s assignment of error).

Defendants’ assumption that the opinion “mandates a new trial” echoes a motion they filed in this Court seeking an automatic new trial. (*See* Appellees/Cross-Appellants’ Motion for Summary Reversal, etc. (3/16/12).) That motion, however, was denied *sub silentio* by this Court’s entry of its July 3, 2012 decision. And for good reason. As Luri pointed out in his brief opposing the motion, parties who wish to enforce a substantive

right must utilize procedural opportunities to do so. *See Marks v. Swartz*, 174 Ohio App.3d 450, ¶ 20, fn. 3 (11th Dist. 2007) (“[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.”). It would be poor policy indeed to conclude that parties could forego an available appeal, voluntarily proceed to an unbifurcated trial, and wait to see the jury verdict before deciding whether to demand an “automatic” new trial based on the pretrial ruling. *See 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 suit to run its course * * * and then, if dissatisfied with the result, seek to enforce the right to arbitration on appeal from the final judgment).

In addition to waiver, the Eighth District Court of Appeals must consider, at a minimum:

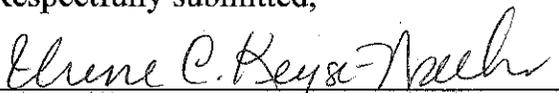
- The effect of *Havel* on *Barnes v. Univ. Hosps. of Cleveland*, Cuyahoga App. Nos. 87247, 87285, 87710, 87903, and 87946, 2006-Ohio-6266, *aff'd in part and rev'd in part on other grounds*, 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, which formed an independent basis for the Eighth District’s rejection of Defendants’ first assignment of error;
- Whether the trial court’s denial of bifurcation under the motion and circumstances presented, even if error, was “harmless” error in light of subsequent proceedings leading up to the judgment on the jury verdict affirmed as modified; and
- Whether Defendants invited error by filing a motion to bifurcate under Civ.R. 42(B) as well as R.C. 2315.21(B) and arguing the Court “should” bifurcate when the discretionary rule is considered “in conjunction” with the “policy” of the statute.

Given Defendants' stated intent to argue that this Court's per curiam opinion grants a new trial, clarification is necessary to prevent further delay in the resolution of this four-year-old appeal. Judgment on the jury verdict in favor of Ron Luri was entered in July 2008. An entire year was lost when Defendants filed a premature notice of appeal based on similarly unfounded interpretations of a court order. *See Luri v. Republic Services, Inc.*, 8th Dist. No. 92152, 2009-Ohio-5691, ¶ 3 ("appellants prematurely filed their notice of appeal, thereby depriving the trial court of its stated intention to issue a final judgment entry * * *."). Defendants successfully deferred dismissal of the premature appeal by vigorously opposing Luri's motion to dismiss or remand with arguments the court later described as "disingenuous at best" and "clearly belied by the record." *Id.*, ¶¶ 20, 25. Defendants' announced intent to treat this Court's July 3, 2012 decision as a grant of a new trial threatens similar delay. Luri respectfully suggests that if this Court had decided to resolve merits issues beyond the scope of the narrow issue presented in these appeals, it would have said so. But Luri also recognizes that he will not have an opportunity to file a Reply to whatever Defendants file in opposition to this motion that they "invited." Luri therefore respectfully and urgently asks for a clarification of the opinion that clearly specifies that the remand is to the Cuyahoga County Court of Appeals, and that the application of *Havel* includes the appellate panel's consideration of arguments that were not considered or were rendered moot by the panel's conclusion that the bifurcation statute was unconstitutional.

III. CONCLUSION

For reasons more fully stated above, Appellee Ron Luri respectfully requests reconsideration and clarification of the attached decision, and substitution of the following sentence for the last sentence: "The judgment of the court of appeals is reversed, and the case is remanded to the Cuyahoga County Court of Appeals for application of *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270 to appellants' first assignment of error, and to address arguments and issues either not considered or rendered moot by the determination that R.C. 2315.21(B) is unconstitutional," and that the Judgment Entries in Case Nos. 2011-1120 and 2011-1097 be conformed accordingly. Alternatively, Luri requests that the opinion recite the specific issues to be considered upon remand. *See, e.g., Dougherty v. Torrence*, 10 Ohio St.3d 139, 140 (1984) (reversing the appellate court's statutory interpretation and remanding for consideration of two specific issues that could affect the outcome of the assigned error).

Respectfully submitted,


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[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Luri v. Republic Servs., Inc.*, Slip Opinion No. 2012-Ohio-2914.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2012-OHIO-2914

**LURI, APPELLEE AND APPELLANT-CROSS-APPELLEE, v. REPUBLIC SERVICES,
INC. ET AL., APPELLANTS AND APPELLEES-CROSS-APPELLANTS.**

**[Until this opinion appears in the Ohio Official Reports advance sheets,
it may be cited as *Luri v. Republic Servs., Inc.*,
Slip Opinion No. 2012-Ohio-2914.]**

*Court of appeals' judgment reversed and cause remanded for application of
Havel v. Villa St. Joseph.*

(Nos. 2011-1097 and 2011-1120—Submitted June 19, 2012—Decided
July 3, 2012.)

APPEAL and CROSS-APPEAL from and CERTIFIED by the Court of Appeals for
Cuyahoga County, No. 94908, 193 Ohio App.3d 682, 2011-Ohio-2389.

Per Curiam.

{¶ 1} The certified question in case No. 2011-1097 is answered in the negative, and the cross-appellants' first proposition of law in case No. 2011-1120 is sustained. Appellant's discretionary appeal in case No. 2011-1120 is moot. The judgment of the court of appeals is reversed, and the cause is remanded for

SUPREME COURT OF OHIO

application of *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL,
LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

Tucker, Ellis & West, L.L.P., Irene C. Keyse-Walker, and Benjamin C. Sassé, for appellee in case No. 2011-1097 and for appellant and cross-appellee in case No. 2011-1120.

Squire, Sanders & Dempsey, L.L.P, Robin G. Weaver, Stephen P. Anway, and Trevor G. Covey, for appellants in case No. 2011-1097 and for appellees and cross-appellants in case No. 2011-1120.
