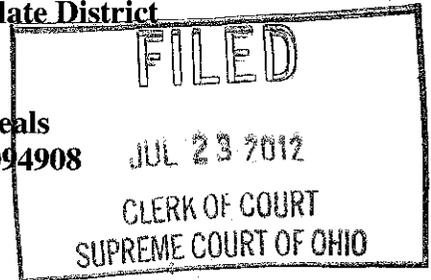


ORIGINAL

IN THE SUPREME COURT OF OHIO

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



APPELLANTS' OPPOSITION TO APPELLEE'S MOTION FOR
RECONSIDERATION/CLARIFICATION

I

INTRODUCTION

This Court's opinion of July 3, 2012 is clear and unambiguous. No reconsideration or clarification is needed.

In its July 3, 2012 opinion, this Court (*i*) reversed the holding of the Eighth District Court of Appeals that the mandatory bifurcation provision in R.C. 2315.21(B) was unconstitutional and therefore that a new trial was not required, (*ii*) remanded for application of *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, which requires the trial court to bifurcate the trial into a compensatory phase and punitive phase, and (*iii*) disposed of all other issues in the appeal as "moot." This ruling, as mandated by this Court's decision in *Havel*, was correct. In the face of that clear and unambiguous ruling, Appellee Ronald Luri asks the Court to "reconsider" and "clarify" its order by remanding the case to the Court of Appeals for *another* round of briefing, *another* hearing, and *another* Court of Appeals' decision.

Luri's request for reconsideration and clarification is without merit and should be denied. The points that Luri seeks to re-argue to the Court of Appeals are the very same points that he *already* made to the Court of Appeals in his opposition to Republic's¹ motion to certify a conflict and that he *already* made to this Court in a 20-page brief dated March 23, 2012 (Exhibit A hereto). The Parties then debated those arguments at the oral argument before the Court on April 25, 2012. Having those arguments before it, this Court reversed the Court of Appeals and remanded for application of *Havel*.

There is no ambiguity in this Court's opinion of July 3, 2012. The application of *Havel* mandates a new trial in this case because of the error by Judge Bridget McCafferty in refusing to apply the statutory mandate on bifurcation. Republic has been waiting for more than four years for a fair trial in this case—*i.e.*, a *bifurcated* trial in which Luri is not permitted to make Republic's wealth the centerpiece of his case on compensatory liability and damages, nor concomitantly permitted to appeal to passion or prejudice on determining those issues. This Court's opinion of July 3, 2012 clearly establishes that Republic is entitled to such a trial.

Accordingly, Luri's motion for "reconsideration/clarification" should be denied.

II

ARGUMENT

In his motion for "reconsideration/clarification," Luri asks the Court to remand this case to the Court of Appeals so that he can recycle four familiar arguments:

- Republic did not request bifurcation under R.C. 2315.21(B) (Luri Memo. in Supp. of Mot. for Reconsideration, pp. 1, 4);

¹ Appellants are Republic Services, Inc., Republic Services of Ohio Hauling LLC, Republic Services of Ohio I, LLC, James Bowen, and Ronald Krall ("Republic").

- R.C. 2315.21(B)(1) gives the trial court discretion to refuse to bifurcate under *Barnes v. Univ. Hosps. of Cleveland*, 2006 Ohio 6266 (Ohio Ct. App., Cuyahoga County Nov. 30, 2006) (Luri Memo. in Supp. of Mot. for Reconsideration, p. 4);
- Republic did not timely appeal the bifurcation issue and thereby waived it (Luri Memo. in Supp. of Mot. for Reconsideration , pp. 3, 4); and
- The trial court’s refusal to bifurcate the trial was harmless error (Luri Memo. in Supp. of Mot. for Reconsideration, pp. 1, 3, 4); and

As demonstrated in Table 1, Luri has already made these very arguments to the Court of Appeals:

Table 1

Luri’s Argument	Where Luri Argued it to the Eighth District Court of Appeals
Republic did not properly request bifurcation under R.C. 2315.21(B).	<ul style="list-style-type: none"> • Luri’s Appellee Brief, pp. 12, 13, 15, 18, 19, 20, 21, 22 (Exhibit B hereto). • Luri’s Opposition to Republic’s Motion to Certify a Conflict, p. 3 (Exhibit C hereto).
R.C. 2315.21(B)(1) gives the trial court discretion to refuse to bifurcate under <i>Barnes</i> .	<ul style="list-style-type: none"> • Luri’s Appellee Brief, pp. 12, 19, 20, 21 (Exhibit B hereto). • Luri’s Opposition to Republic’s Motion to Certify a Conflict, pp. 2, 3, 4 (Exhibit C).
Republic did not timely or properly appeal the denial of bifurcation and therefore waived it.	<ul style="list-style-type: none"> • Luri’s Appellee Brief, pp. 16, 17, 18, 19, 20, 21, 22 (Exhibit B hereto). • Luri’s Opposition to Republic’s Motion to Certify a Conflict, pp. 3, 4 (Exhibit C hereto).
Denial of bifurcation was harmless.	<ul style="list-style-type: none"> • Luri’s Appellee Brief, pp. 20-21 (arguing that compensatory and punitive issues were intertwined and therefore, even if bifurcation had been granted, it would not have functionally mattered) (Exhibit B hereto).

The Court of Appeals rejected these arguments. With regard to the first argument, the Court of Appeals determined that Republic *did* properly request bifurcation under R.C. 2315.21(B). In fact, the Court of Appeals held that Republic requested bifurcation under R.C. 2315.21(B) *twice*, concluding that “Appellants *twice* moved to bifurcate the trial pursuant to the Ohio Tort Reform Statutory provisions in R.C. 2315 et seq., as well as Civ.R. 42(B).” (Court of Appeals Decision of May 19, 2011, p. 2 (emphasis added)).

The Court of Appeals also impliedly rejected Luri’s second argument that R.C. 2315.21(B)(1) gives the trial court discretion to refuse to bifurcate under *Barnes*. For there to be a constitutional issue at all, there must be a *conflict* between R.C. 2315.21(B) (making bifurcation mandatory) and Civil Rule 42(B) (making bifurcation discretionary). If, as Luri now argues, R.C. 2315.21(B) leaves discretion to the trial court under *Barnes*, then there would have been no conflict between the statute and the civil rule—and thus no constitutional issue. By concluding otherwise, the Court of Appeals necessarily decided that bifurcation under R.C. 2315.21(B) was mandatory—a conclusion with which this Court later agreed in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, at ¶ 25 (“R.C. 2315.21(B) does more than set forth the procedure for the bifurcation of tort actions: it makes bifurcation mandatory.”).

The Court of Appeals likewise rejected Luri’s third and fourth arguments. In support of those arguments, Luri argued to the Court of Appeals—as he now attempts to do to this Court²—that the conflict should not be certified because, “[u]nlike *Havel* . . . , this appeal does not arise from an interlocutory determination of the constitutionality of R.C. 2315.21(B), and this Court’s judgment is not dependent upon any finding of any statute to be unconstitutional (or constitutional).” (Luri Opposition to Republic’s Motion to Certify, p. 1 (Exhibit C hereto)). The

² Luri Memo. in Supp. of Mot. for Reconsideration, p. 2 (“[T]his case involves issues and assigned errors that are not affected by the constitutionality of Ohio’s bifurcation statute.”).

Court of Appeals rejected that argument by certifying the conflict, thus agreeing with Republic that its decision not to grant Republic a new trial hinged on the constitutionality of the bifurcation provision rather than other issues or assigned errors.

Having had these arguments rejected by the Court of Appeals, Luri then raised them with this Court. Table 2 shows where he did so.

Table 2

Luri's Argument	Where Luri Argued it to the Supreme Court of Ohio
Republic did not properly request bifurcation under R.C. 2315.21(B).	<ul style="list-style-type: none"> • Hearing, 13:45-16:45; 39:50-41:20 • Opposition to Republic's Motion for Summary Reversal, pp. 4, 5, 6, 7, 11, 12, 14, 16 (Exhibit A hereto). • Opposition to Republic's Discretionary Appeal, pp. 3, 9, 10 (Exhibit D hereto).
R.C. 2315.21(B)(1) gives the trial court discretion to refuse to bifurcate under <i>Barnes</i> .	<ul style="list-style-type: none"> • Opposition to Republic's Motion for Summary Reversal, pp. 2, 3, 4, 5, 6, 7, 8, 11, 12, 14 (Exhibit A hereto). • Opposition to Republic's Discretionary Appeal, pp. 9, 10 (Exhibit D hereto).
Republic did not timely or properly appeal the denial of bifurcation and therefore waived it.	<ul style="list-style-type: none"> • Opposition to Republic's Motion for Summary Reversal, pp. 12, 13, 14, 15, 16, 17 (Exhibit A hereto). • Opposition to Republic's Discretionary appeal, pp. 10, 12 (Exhibit D hereto).
Denial of bifurcation was harmless.	<ul style="list-style-type: none"> • Hearing, 13:45-16:45; 39:50-41:20 • Opposition to Republic's Motion for Summary Reversal, pp. 2, 3, 4, 5, 6, 7, 8, 12, 18, 19, 20 (Exhibit A hereto). • Opposition to Republic's Discretionary Appeal, pp. 4, 9, 10 (Exhibit D hereto).

Having heard these arguments at the Court of Appeals, Republic anticipated them in its motion for summary reversal filed with this Court on March 16, 2012 (Exhibit E hereto). That document answered every argument that Luri would later make in his opposition brief. The issues were then raised and discussed at the oral argument on April 25, 2012. With those arguments before it, this Court issued its decision on July 3, 2012, reversing the holding of the Court of Appeals that a new trial in this case is not required because the mandatory bifurcation provision in R.C. 2315.21(B) is unconstitutional, remanding for application of *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, and disposing of Luri's appeal as "moot."

Following the issuance of the Court's July 3, 2012 opinion, Luri's counsel stated in correspondence to Republic's counsel that she believed a remand to the Court of Appeals for further briefing and another oral argument was necessary. (Exhibit F hereto). Republic's counsel responded by explaining that he saw no ambiguity in the Court's opinion. (*Id.*) Nevertheless, Republic's counsel invited Luri's counsel to seek reconsideration or clarification if she believed the Court's opinion was ambiguous. (*Id.*) Republic's counsel was clear, however, that he saw no ambiguity in the Court's opinion and, therefore, that neither reconsideration nor clarification was necessary. (*Id.*)

This Court's opinion of July 3, 2012 necessarily decided Luri's arguments. It rejected the first and third arguments because, to remand for application of *Havel*, the Court had to have first concluded that Republic requested bifurcation under R.C. 2315.21(B) and timely appealed it. This Court also rejected Luri's second argument because, as explained above, this Court held in *Havel* that bifurcation under R.C. 2315.21(B) is mandatory—and not discretionary, as the Eighth District had held in *Barnes*. Finally, this Court's holding in *Havel*—that "R.C. 2315.21(B)

creates, defines, and regulates a substantive, enforceable right”—disposed of any harmless error analysis. *Havel*, syllabus, ¶¶ 5, 36.

Both R.C. 2309.59 and Civil Rule 61 provide that an error can only be harmless if it did not affect a “substantial right.” R.C. 2505.02 defines “substantial right” as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure *entitles a person to enforce or protect.*” R.C. 2505.02 (emphasis added). In *Havel*, this Court held that “R.C. 2315.21(B) creates, defines, and regulates *a substantive, enforceable right*”—the right to mandatory bifurcation. *Havel*, syllabus, ¶¶ 5, 36. This Court thus determined in *Havel* that the right to mandatory bifurcation is a substantial right.

Where, as here, a substantial right has been denied, it is reversible error. Indeed, in support of its holding in *Havel*, this Court cited *Cleveland Produce Co. v. Dennert* for the proposition that, where a statute confers “‘a substantial right’ upon the requesting party and its provisions were ‘mandatory,’ *the failure of a court to [follow the statute] constituted reversible error.*” *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, ¶ 26 (emphasis added). *Dennert* went on to explain that, where there is a substantial right that was denied, reversal is required “unless it can be determined by this court *without weighing the evidence* that plaintiff in error has not been prejudiced. Any other view of this section would render its provisions a dead letter.”³ *Cleveland Produce Co. v. Dennert*, 104 Ohio St. 149, 155 (Ohio 1922) (emphasis added). Thus, although courts often weigh evidence to determine whether an error was harmless or prejudicial, they do not do so where, as here, a substantial right has been violated.

Simply put, there is nothing left for the Court of Appeals to consider.

³ None of the harmless error cases cited by Luri say otherwise. Some do not deal with substantial rights at all, others involve waiver rather than harmless error, and many address the very different issue of sufficiency of the evidence—where weighing of evidence *is* necessary.

Nor was the compensatory and punitive evidence so intermingled that bifurcation was impossible. The evidence of Republic's wealth—which became Luri's centerpiece for his closing argument—*had absolutely nothing to do with Republic's compensatory liability or damages*. Wealth evidence is only relevant to punitive damages. Republic has repeatedly explained this point, and Luri has never disagreed.⁴

Republic is entitled to a new trial in which evidence of its wealth is excluded from the compensatory phase of the trial. R.C. 2315.21(B) plainly states that “[t]he initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to *whether the plaintiff is entitled to recover compensatory damages . . .*” R.C. 2315.21(B) (emphasis added). It is undisputed that evidence of wealth is not relevant to compensatory issues in this case. Therefore, R.C. 2315.21(B) prohibits the introduction of wealth evidence in the compensatory phase of a new trial.

The *only* way to remedy the error committed by Judge McCafferty is a completely new trial, as her error tainted the entire trial. The purpose of the bifurcation statute is to protect the integrity of the compensatory phase of a trial, both liability and damages. Thus, a new trial on all phases of the case is mandated.

⁴ Luri has argued that evidence of *wrongdoing* would have been admissible during both the compensatory and punitive phases of the trial. (Motion for Reconsideration, at 4; Opposition to Republic's Motion for Summary Reversal, at 3-5). That, however, is not the issue. The issue is whether the trial court should have excluded evidence of *wealth* from the compensatory phase of the trial. By denying Republic's two motions to bifurcate the trial, the trial court improperly allowed evidence of wealth—which is only relevant to punitive damages—to be introduced while the jury was considering compensatory liability and damages.

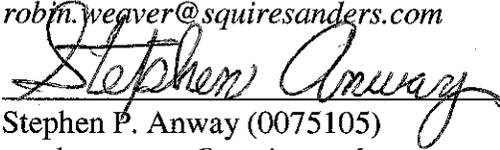
III

CONCLUSION

For the foregoing reasons, Republic respectfully requests that this Court deny Luri's motion for reconsideration and clarification.



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CERTIFICATE OF SERVICE

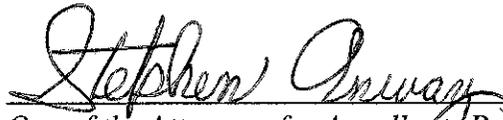
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EXHIBIT A

No. 2011-1120
(Related to 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 RONALD LURI'S MEMORANDUM OPPOSING APPELLEES/CROSS-APPELLANTS' MOTION FOR SUMMARY REVERSAL AND FOR REMAND FOR NEW TRIAL

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I. INTRODUCTION

Plaintiff-Appellant/Cross-Appellee Ronald Luri (“Luri”) opposes the motion filed by Defendants-Appellees/Cross-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, 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. 2011-1097 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.*)

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.

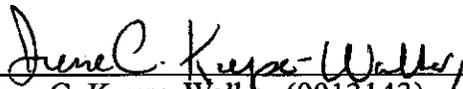
Defendants do not (and cannot) point to any evidence of *misconduct* that was erroneously introduced at trial. As explained above, the same evidence of fabrication that supported the awards of punitive damages also was relevant to liability. Because the same evidence of misconduct would have been introduced 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-Appellees/Cross-Appellants is not well-taken and should be denied.

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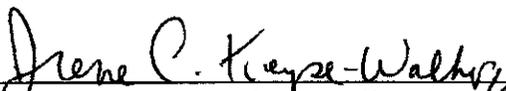
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EXHIBIT B

No. 10-094908

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

RONALD LURI,
Plaintiff-Appellee,

v.

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

APPEAL FROM THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO
CASE No. CV 07 633043

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ASSIGNMENTS OF ERROR

1. The trial court erred by failing to apply the Ohio tort reform provision in R.C. 2315.21(B)(1), which requires mandatory bifurcation of a trial upon the motion of a party. (6/03/08 Journal Entry.)
2. The trial court erred by failing to apply the Ohio tort reform provision in R.C. 2315.18(C), which requires the trial court to instruct the jury not to consider evidence of wealth or wrongdoing in awarding non-economic compensatory damages. (Tr. 1764-1768.)
3. The trial court erred by failing to apply the Ohio tort reform provision in R.C. 2315.18(D), which requires the trial court to submit a jury interrogatory specifying the amount of noneconomic compensatory damages, and by failing to apply the Ohio tort reform provision in R.C. 2315.18(B)(2), which requires the trial court to use that interrogatory to apply the \$350,000 cap on noneconomic compensatory damages. (Tr. 1775.)
4. The trial court erred by failing to apply the Ohio tort reform provision in R.C. 2315.21(D)(2)(a), which requires the trial court to apply a cap on punitive damages equal to twice the amount of compensatory damages. (9/18/08 Journal Entry.)
5. The trial court erred by failing to reduce the punitive damages award under the U.S. Constitution. (9/18/08 Journal Entry.)
6. The trial court erred by awarding prejudgment interest on front-pay damages. (9/25/08 Journal Entry.)

COUNTERSTATEMENT OF THE ISSUES

1. (Assignments of Error 1, 2, 3, 4, 6) When defendants to an action filed under R.C. Chapter 4112 pursue a litigation strategy that challenges damages based on employment law principles, and are dissatisfied with the outcome of their litigation choices, do doctrines of waiver and invited error preclude them from seeking a new trial on the grounds that the trial court should have sua sponte applied "tort reform"?
2. (Assignment of Error 1) When a retaliation action is tried under R.C. 4112.02(I) and 4112.99, and the employer seeks to prove business justification through fabricated and altered documents, does a trial court properly deny a motion seeking to bifurcate liability for compensatory and punitive damages?
3. (Assignments of Error 2, 3) When defendants fail to request "tort reform" jury instructions and interrogatories, the trial court utilizes a compensatory damage instruction substantially the same as that offered by defendants, and defendants expressly agree to a damage interrogatory that does not break out non-economic damages, does invited error pretermitt any allegation of "plain error" in the omission of "tort reform" instructions and interrogatories?
4. (Assignment of Error 4) Does a trial court properly deny defendants' motion to "remit" a punitive damage award under R.C. 2315.21 when that statute directs how a judgment is to be entered on a jury verdict in a tort action and the defendants do not assert that R.C. 2315.21 applies until after judgment has been entered on the jury verdict?
5. (Assignment of Error 5) Does evidence of continuing, repeated, particularly egregious misconduct that is hard to detect support a jury's determination that a substantial punitive damage award is necessary to punish and deter future misconduct?
6. (Assignment of Error 6) Does a trial court properly award prejudgment interest on an entire compensatory award when "[t]he agreed upon jury interrogatories did not separate past and future damages" (R. 199)?

I. INTRODUCTION

This is the second appeal from a judgment on jury verdicts awarding compensatory damages to Plaintiff-Appellee Ron Luri and assessing punitive damages against the three corporate and two individual Defendants who retaliated against him.

The evidence at trial proved that after Luri opposed a corporate plan to engage in unlawful age discrimination, Defendants concocted a false paper trail to disguise their retaliatory termination, used the threat of lawsuits to prevent Luri from accepting a similar position with another company, and attempted to deceive the court and jury with fabricated documents and hopelessly conflicting testimony. Then, after filing a premature notice of appeal (No. 92152) to *prevent* the trial court from supplementing its judgment entry with its “*Barnes*”¹ findings, Defendants filed an Appellants’ Brief (“Br. I”) that included a claim that the trial court’s “failure” to undertake a *Barnes* analysis constituted reversible error. (See JE (11/16/09), App. No. 92152, attached as Exh. A, p. 2.) This Court dismissed the appeal after full briefing. *Id.*

After the trial judge supplemented her journal entry, Defendants filed a new Notice of Appeal and, educated by the prior briefing, filed a second Appellants’ Brief (“Br. II”) with new arguments and assignments of error. Defendants abandoned their challenge to the sufficiency of the evidence on liability. (See Assignment of Error (“Assmt. Error”) 1, Br. I, attached as Exh. B), but continue to deny all wrongdoing and disparage the victim of their misconduct. (See Br. II, p. 6, alleging that Ron Luri was a “disgruntled” former employee who was “properly discharged” and who filed suit “based on a created history of retaliatory discharge.”) Similarly, Defendants added a challenge to a jury instruction *they submitted* and an interrogatory *they*

¹ *Barnes v. Univ. Hosps. of Cleveland* (2008), 119 Ohio St.3d 173 (“*Barnes*”) adopting the “guideposts” of *BMW v. N. Am., Inc. v. Gore* (1996), 517 U.S. 559 (“*Gore*”) for analyzing constitutional challenges to punitive damage awards.

approved (Assmts. 2, 3) but continue to blame the trial judge for their own litigation strategy. (See Br. II, pp. 4, 12: “In the face of * * * five mandatory [tort reform] statutes, the trial court – without explanation – did not apply any of them”; the trial court “refused to apply the tort reform statutes at every turn.”)

The record clearly demonstrates that Defendants never even remotely argued that “[a] claim under R.C. 4112 has been ruled a ‘tort’ action under R.C. 2315 by every court that has considered the issue” (Br. II, p. 11) until two weeks *after* the trial court entered judgment on the jury’s verdicts. Even then, counsel’s assertions that the trial court must apply “tort reform” caps rang hollow; at the same time they were seeking post-judgment tort reform “caps” from Judge McCafferty, defense counsel were filing briefs in a Sixth Circuit employment appeal stating that “Ohio’s tort damage caps, and related punitive damage restrictions * * * do not apply to discrimination cases * * *.” (R. 183, Pl.’s Br. Opp. Mot. for New Trial, etc. (8/29/08), Exh. 2.) Judge McCafferty properly applied the substantive and procedural employment law that the parties’ pled and presented.

In short, after terminating Ron Luri for opposing age discrimination, after preventing him from accepting equivalent employment elsewhere, and after altering and back-dating documents to hide their unlawful acts, Defendants proceeded to manipulate the appellate process and force Luri to defend against two different appeals in which they seek relief from the consequences of their own trial strategy. The jury awards are amply supported by the evidence and should be affirmed in their entirety.

II. COUNTERSTATEMENT OF THE CASE

A. The Parties.

The three corporate entities and two individuals who orchestrated Ron Luri's unlawful termination are: 1) Luri's direct employer, Republic Services of Ohio Hauling, LLC ("Ohio Hauling"); 2) Luri's direct supervisor, Area President James Bowen, and the corporate entity that employed Bowen, Republic Services of Ohio I, LLC ("Ohio I"); and 3) Bowen's direct supervisor, Regional Vice President Ron Krall, and the entity that employed him, Republic Services, Inc. ("Republic") (collectively, "Defendants").

B. Discovery and Trial Uncover Defendants' Extensive Efforts to Conceal Their Unlawful Retaliation.

Luri's Complaint alleged that Defendants violated R.C. 4112.02(I) when they terminated him in April 2007 in retaliation for opposing a November 2006 directive from Bowen to fire his three oldest employees. (R. 1, Pl.'s Compl., ¶¶29-32, 41, 43-49.) During discovery, motion practice, and trial, Defendants relied on a paper trail created between November 2006 and April 2007 to assert a fictional, "he didn't conduct enough meetings" basis for terminating one of their top performing managers.

After Luri filed this action (August 17, 2007), Defendants added to and altered the concocted paper trail, including: 1) an October 2006 document (created shortly before Luri opposed age discrimination) that was modified to include an alleged "negative perception" Luri "ha[d] within the company" and backdated to September 2006 (Exh. 35); 2) a set of handwritten notes that were created and backdated to describe a purported incident where a variety of employees indicated their ignorance that Luri was their General Manager (Exh. 39); and 3) a memorandum created and backdated to describe an alleged conversation around the time of Luri's termination supporting Defendants' (now abandoned) falsification-of-expense-reports

justification for the termination (Exh. 34). Defendants then produced the modified and fabricated documents in discovery and relied on them during deposition testimony as supporting performance-based reasons for the termination.

About a month before the June 23, 2008 trial, Luri agreed not to oppose a motion for bifurcation filed by Defendants, if Defendants would produce overdue financial information for Defendants Krall and Bowen. (R. 53, Pl.'s Mot. to Compel (6/5/08), at 2.) The trial court denied the motion and Luri withdrew his agreement because Defendants failed to comply with their side of the bargain. (Id.; R. 52, JE (6/03/08).) The Thursday before the Monday start of trial, Defendants moved for leave to add an affirmative defense based on purported "after acquired evidence" and filed their Amended Answer the next day. (R. 99, Mot. (6/19/08); R. 108, Am. Ans. (6/20/08).)

C. Defendants File Post-Trial Motions Seeking to Avoid the Consequences of Their Litigation Choices.

The trial did not go well for Defendants, whose witnesses were caught time and again in fatally inconsistent stories regarding the concocted documentation of reasons for Luri's termination. After eight days of trial presenting 16 witnesses, the jury received thorough and extensive instructions and interrogatories (none of which were assigned as error in Defendants' first appeal). On July 3, 2008, the jury entered a \$3.5 million joint and several compensatory award against all Defendants and separate punitive damage awards against Republic (\$21.5 million), Ohio I (\$10.75 million), Ohio Hauling (\$10.75 million), Ronald Krall (\$83,394), and James Bowen (\$25,205). (R. 183, Pl.'s Brief Opp. Mot. for New Trial, etc. (8/29/08), Exh. 1, pp. 10, 12, 13, attached hereto as Exh. C.) The trial court entered judgment on the jury's verdict five days later. (R. 154, JE (7/08/08).)

Defendants did not request any “tort reform” jury charge and expressly agreed to interrogatories and verdict forms that did not ask the jury to break out the compensatory damage award into economic and non-economic damages. (Tr. at 1561, 1692, 1712.) Nor did Defendants request application of any damage “caps” before the trial court entered judgments on the jury verdicts. Defendants nevertheless filed a post-judgment Motion for New Trial or, in the Alternative, Remittitur (R. 155) challenging undifferentiated components of the compensatory award and seeking the application of “caps” on the punitive damage awards, among other claims. Luri filed motions seeking prejudgment interest (“PJI”) and attorney fees, which the trial court granted, awarding PJI on the full amount of compensatory damages because “[t]he agreed upon jury interrogatories did not separate past and future damages.” (R. 199, JE (9/25/08).)

D. Defendants File a Premature Appeal.

After the trial court announced its decision to supplement its denial of Defendants’ post-judgment motions with *Barnes* findings, Defendants requested and were granted a two-week extension to submit proposed findings. (Exh. A, pp. 3-5.) But instead of submitting proposed findings, Defendants filed a premature notice of appeal; opposed Luri’s proposed supplemental journal entry on the grounds that the appeal divested the trial court of all jurisdiction; and argued on appeal that the trial court’s denial of post-judgment motions “was made in error because the trial court did not include the *Barnes* analysis that Defendants prevented.” (Id., p. 6.) The premature appeal was dismissed days before a scheduled oral argument.

III. COUNTERSTATEMENT OF THE FACTS

Defendants’ Statement of Facts both ignores and mischaracterizes the evidence heard by the jury. See, e.g., Br. II, p. 9 (emphasis in original) (“In point of fact, Bowen never directed Luri to fire *anyone*”) and compare Tr. at 624 (Bowen told Luri, in the presence of Krall, that in

addition to his purported failure to hold meetings, Luri was being terminated because “you didn’t fire Frank Pascuzzi”); Br II, p. 10 (Luri “never reported this ‘discrimination’ to anyone”) and compare Tr. at 574-78, 740 (in addition to Bowen, Luri expressed his concerns to General Manager Gutwein); Br. II, p. 7 (Luri was a “poor” performer and one of the “worst” General Managers) and compare Tr. at 566-69, 591, 637, 745-46, 749, 889-93, Exhs. 3, 17 (from 1998 to 2007, Luri received only positive performance reviews; the three Cleveland Division facilities were steadily improving under Luri’s management and on track for their best year ever in 2007 when Luri was terminated).²

A. **A Career Waste Management Industry Employee With a Record of Strong Performance Opposes Age Discrimination.**

Luri is a career waste management industry employee who has worked as a General Manager in the Cleveland area since at least 1991. (Tr. at 557-60.) He was hired by Ohio Hauling in 1998 to be General Manager for their three Cleveland Division facilities. (Id. at 561, 565-66.) In August 2006, Regional Vice President Krall promoted Bowen to the position of Area President and urged Bowen to “take a step back, * * * take a look at what’s in place, who is doing what and why.” (Id. at 396-97, 1267.) With the assistance of Area Controller Mike Herman, Bowen then prepared an “action plan” identifying so-called “Leaders of Tomorrow,” as well as employees who needed to be “retrain[ed]” or “replace[d].” (Id. at 386, 400-03, 774-75; Exh. 69.) That plan had the “buy-in and approval” of corporate officers (including Krall), and was implemented by targeting older workers for termination. (Tr. at 386-97, 573-74, 741-43, 872-73, 887-88, 1228, 1267.)

² The “rankings” in Exhs. S, T, and U referenced by Defendants were Krall’s *internal* documents, purportedly kept to create a “succession plan.” (Tr. at 1244.)

In November 2006, Bowen told Luri to fire his three oldest workers: (1) Division Controller Frank Pascuzzi (age 61); (2) Industrial Supervisor George Fiser (about 60); and (3) Safety Manager Louis Darienzo (mid-50s). (Tr. at 404, 408-10, 573-77, 1112; Exh. 63.) At the same time, Bowen told Akron/Canton Division General Manager Pete Gutwein to eliminate positions held by four of his oldest workers. (Tr. at 577-78, 741-45, 1488.) Luri refused Bowen's directive and reported it – and his response – to Gutwein. (Tr. at 574-78, 740.) Luri knew his three oldest employees “had no performance problems” and was concerned that firing them would be age discrimination. (Id. at 408-10, 573-74, 576-77, 1112; Exh. 63.) Luri specifically told Bowen that, “firing Frank [Pascuzzi] for no reason, looking at his performance appraisal and suddenly coming up [with] a reason for firing him and then replacing him with a younger employee would put the company in a bad position or possible lawsuit.” (Id. at 575.)

B. And Is Subjected to Retaliatory “Counseling” and Termination.

After Luri refused Bowen's directive, “all of a sudden” there were “problems” with his “communication skills” and “management style.” (Tr. at 570-72, 579.) Bowen told Luri on December 22, 2006 that he was not having enough meetings with his employees. (Id. at 444.) Bowen created a “Ron Luri file” to collect documents on these “problems.” (Id. at 444, 579.) Krall helped to create a paper trail by commissioning a survey to identify “employee issues” at Luri's Cleveland Division. (Id. at 572-73, 579, 1217-18, 1221.)

On January 2, 2007, Bowen sent Luri an e-mail, attaching a document labeled “Improvement Directives” purporting to “recap” the December 22nd meeting. (Tr. at 580; Exh. 12.) In fact, the memorandum contained an “action plan” never mentioned during that meeting and several statements that were simply false, including claims that: (1) in discussions about Luri's performance, one employee called Luri a “ghost” and “two of three had never heard of

Ron Luri”; and (2) that sales results were “well under expectations” and operating results were “inconsistent” (Exh. 12, pp. 2-3). Compare Tr. at 436, 456, 587-88, 1124, Exh. 17. When Bowen forwarded this memorandum to Krall, Krall approved and commented that the memorandum was a “good start.” (Tr. at 359-62; Exh. 72.)

On February 6, 2007, Bowen gave Luri a written evaluation for 2006, stating “I’m sure you’re going to have some comments to make.” (Tr. at 600.) Bowen’s ratings for 2006 confirmed Luri’s financial performance *exceeded* requirements and his overall performance *met* requirements; Luri wrote two pages of comments addressing Bowen’s ratings in productivity/operations, market development, and other issues. (Id. at 598; Exh. 17.) Bowen discarded the second page of Luri’s comments, added additional typed comments, and attached his “action plan” from the false “Improvement Directives” memorandum before filing it away. (Tr. at 598-600; Exh. 17.)

On February 7, 2007, Bowen forwarded Luri yet another memorandum, purporting to “recap” a non-existent “discussion” from the day before and adding several additional “action” items. (Tr. at 602-05; Exh. 18.) The memorandum also falsely stated that Bowen and Luri had “collectively” decided to “flip flop” the positions of Pascuzzi and the much younger Martha Morales, and instructed Luri to make sure that Pascuzzi “voluntarily” asked to be “reassigned” “as soon as possible.” (Id.) Luri construed Bowen’s fictionalized “recap” as a suggestion to create a pretext for Pascuzzi’s termination. (Tr. at 608-09.) Instead, Luri worked with Pascuzzi so that he could keep working with no change in pay. (Id. at 608-09, 614-17, 657-58; Exh. 20.)

Meanwhile, on February 13, 2007, Luri responded to Bowen’s February 7th memorandum and confirmed his intent to follow Bowen’s numerous “directives” and “action plans.” (Tr. at 611-14; Exh. 19.) Luri’s memorandum was ignored. (Tr. at 614, 1463-64.)

From February 13, 2007 to April 11, 2007, Luri followed Bowen's numerous "directives" and "action plans" to the best of his ability; no one criticized his performance. (Tr. at 611-14, 1465-67.) Bowen did nothing to follow up or check on Luri's progress. (Id.)

On April 12, 2007, after nine weeks of silence, Bowen sent Krall an e-mail message seeking permission to terminate Ron Luri's employment. (Tr. at 451-53; Exh. 22.) The message was a mere formality; Bowen had already spoken with Krall "prior to that." (Tr. at 1231.) Krall confirmed the real purpose of the e-mail was to "copy Craig Nichols" in Human Resources, "to make sure that we're not missing anything here." (Id. at 451-53, 1231; Exh. 22.)

The April 12, 2007 e-mail purported to attach: (1) the January 2, 2007 "Improvement Directives" memorandum and Luri's response; (2) an e-mail message allegedly sent by Bowen to Krall on February 1st; and (3) Bowen's February 7, 2007 memorandum and Luri's response. Notably absent was Luri's February 6, 2007 performance evaluation noting that he met and exceeded expectations. (Exh. 22.) Bowen's April 12, 2007 e-mail contained several new false statements, including: (1) an allegation that Luri had "rehired" employees who failed the Company Drug and Alcohol policy; and (2) a charge that Luri had falsified expense accounts. (Exh. 22.) Compare Tr. at 459-62, 997-1000 (Luri did not violate company policy); Tr. at 473, 726, 1636-59 (Bowen had no evidence to support his charges relating to expense reports).

After Human Resources consented to the termination, Bowen showed up unannounced and told Luri he was "not doing anything I told you to do." (Tr. at 620.) When Luri attempted to show Bowen his file with his meeting agendas, Bowen brushed them aside, stating "oh, you're just doing that to cover your ass," suspended Luri pending "further investigation," and told him to leave the premises. (Id. at 620-21, 1469.) Later that day (a Monday), Luri wrote an e-mail to Republic COO Michael Cordesman, reporting his suspension and anticipated termination, and

expressed his desire to “talk to” Cordesman “personally” about the situation. (Tr. at 621; Exh. 25.) Luri did not want to put the company’s discrimination against older workers and retaliation against him in writing because he was still an executive, still thought the situation could be worked out, and did not want to harm the company. (Tr. at 622-23.) Cordesman sent Luri an e-mail indicating that he would be back in the office that Thursday and would “review the situation” then. (Id.)

Cordesman, however, did not call after “review[ing] the situation.” Instead, Bowen called Luri Thursday afternoon and told Luri to report to the office the following day. (Tr. at 623.) When Luri reported to work on Friday, Bowen and Krall told Luri that he was terminated. (Id. at 624.) Critically, Bowen admitted (in Krall’s presence) that the termination was not about holding meetings; it was because he did not terminate Pascuzzi. (Id. (“He said, ‘Plus you didn’t fire Frank Pascuzzi.’”)) Craig Nichols (Human Resources) confirmed Luri was terminated because he “wouldn’t follow” a staffing “directive” from Bowen. (Id. at 730.) Soon after his termination, Luri interviewed with Rob Smith of Waste Management, who was looking for someone in the Cleveland area. (Tr. at 625.) But Defendants prevented Luri from being hired by refusing to waive the restrictions in Luri’s covenant not-to-compete. (Id. at 475-76, 625-26, 704; Exh. 64.)

IV. STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

Defendants argue that because “the Ohio tort reform statutes” form the basis for their first four assignments of error, a “de novo” standard of review applies. (Br. II, p. 11.) That is incorrect. The proper standard of review is dependent upon the trial court action challenged on appeal. The standard of review for a trial court’s denial of a motion to bifurcate (Assmt. Error 1) is abuse of discretion. *Barnes v. Univ. Hosps. of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710,

87903, 87946, 2006-Ohio-6266 (hereinafter "*Barnes App. Op.*"), ¶160. There is no standard of review for Appellants' unreviewable Assignments of Error 2 and 3 because there was no request for any trial court action – Defendants challenge the compensatory jury charge and interrogatory for the first time in this appeal.

Assignments of Error 4 and 5 challenge the denial of Defendants' post-judgment request for a remittitur of the punitive damage awards based on: (1) tort reform damage caps; or (2) federal Due Process. The standard of review for a denial of remittitur is abuse of discretion (*Wightman v. Consol. Rail Corp.* (1999), 86 Ohio St.3d 431); a de novo standard applies to a trial court's constitutional analysis of punitive damage awards (*Barnes*, 119 Ohio St.3d at 182, ¶137). Finally, a court's award of prejudgment interest (Assignment of Error 6) is reviewed for abuse of discretion. *Wagner v. Midwestern Indem. Co.* (1998), 83 Ohio St.3d 287.

Defendants' second appeal – like their first – is without merit. Assigned "errors" 1-4 and 6 were not only waived, but invited. "Every trial has many potential lives" and "[p]arties 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, 93, ¶¶122, 148. Of the five tort reform statutes that Defendants claim the trial court "refused to apply," only one, R.C. 2315.21(B)(1) (bifurcation), was included in any filing or request for court action prior to the court's entry of judgment on the jury verdicts; Defendants abandoned that statute two weeks after their Motion to Bifurcate was denied, when they renewed their bifurcation request solely under Civ.R. 42(B). (R. 72, Defs.' Trial Br. (6/16/08), pp. 26-28.) Defendants' proposed jury instructions (R. 81 (6/16/08) did not include any request for a damage instruction incorporating language in R.C. 2315.18(C), and the charge given was substantially the same as the charge Defendants proposed. Defendants expressly agreed to jury interrogatories and verdict forms

providing for joint and several liability for undifferentiated compensatory damages and separate punitive damages against the five Defendants. It was not until Defendants' trial strategy backfired that they sought to change their damage limitation strategy to "tort reform."

Defendants' punitive damage challenge (Assignments of Error 4, 5) is based on an aggregation of the separate awards. This contradicts Defendants' own insistence at trial that the "single employer" doctrine cannot affect punitive damages, which must be considered separately as to each Defendant. Under Defendants' own "tort reform" theory, each of the three corporations had fair notice that its managers' malicious conduct could result in a punitive damage award of \$7 million (twice compensatory damages of \$3.5 million). But the application of the guideposts in *Barnes* amply support the 6-to-1 ratio of the award against Republic and the 3-to-1 ratios awarded against Ohio I and Ohio Hauling. Retaliating against employees who refuse to carry out orders constituting unlawful age discrimination shows a total disregard for the rights of the affected employee, the policy supporting discrimination statutes and the statutes themselves. When dogged discovery reveals a top-down corporate culture of unlawful discrimination enforced by intimidation and coordinated efforts to conceal retaliation through falsified evidence, only a substantial punitive damage award will deter future repetitions of misconduct that is both reprehensible and hard to detect. The largely ignored facts of *this case* fully justify the jury verdicts accepted by the trial court.

V. ARGUMENT

For ease of analysis, this brief will first summarize the waiver and invited error doctrines applicable to Assignments of Error 1, 2, 3, 4, and 5.

A. Parties Are Bound By the Consequences of Their Litigation Strategy.

Defendants' first four assignments assert "error" on the grounds that because a half-dozen employment discrimination cases in state and federal courts from 2003 to the present have applied, upon request, some part of past or current "tort reform" (but not damage caps³), Judge McCafferty should have divined (even though Defendants did not) that employment discrimination actions arising under R.C. Chapter 4112 are subject to five "mandatory" tort reform statutes. These allegations of "errors," as well as Assignment 6 (PJI) constitute nothing more than an attempt by Defendants to avoid the consequences of their own litigation strategy. Ohio courts have repeatedly held that waiver and invited error preclude such claims.

Defendants further argue that such "error" caused "prejudice" because R.C. 2315.18 and R.C. 2315.21 were designed to "prevent * * * precisely" the types of awards returned by the jury in this case. (Br. II, pp. 2, 4.) But the trial judge did "precisely" what judges are supposed to do – she tried the case based on the issues formed by the pleadings and the law presented by the parties, who "must decide their issues, incorporate them into their strategy, and be responsible for the results[.]" *Dardinger*, 98 Ohio St.3d at 93, ¶ 148. See, also, *Gallagher v. Cleveland Browns Football Co.* (1996), 74 Ohio St.3d 427, 436 (a "fundamental" rule of our adversarial system places "specific responsibilities on parties involved in litigation to shape the course of the trial"). Any prejudice Defendants suffered was the result of their own litigation choices.

1. Parties to litigation can waive statutory benefits and challenges to jurisdiction.

Even if the legislature intended for "tort reform" statutes to benefit employers who violate R.C. Chapter 4112 (see *infra*, pp. 26-27 for contrary view), parties to litigation are free to

³ Defendants' listing of cases applying "punitive damage provisions" (Br. II, p. 11) refer to cases applying the codified common law standards of "clear and convincing evidence" and "ratification" (both of which were applied in this case (Tr. 1767)) – *not* "caps."

waive statutory provisions intended for their benefit. See 85 O.Jur.3d, Statutes, §319; *City of Cleveland v. Fulton* (2008), 178 Ohio App.3d 451, 455, ¶¶18-20 (appellant “waived” statutory right to a hearing); *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 141 (plaintiff “waived” statutory treble damages); *Kassicieh v. Mascotti*, 10th Dist. Nos. 05AP-684, 06AP-1224, 2007-Ohio-5079, ¶18 (appellant “waived” claim that different statute applied to claims); *Creager v. Crooks*, 6th Dist. No. F-78-6, 1979 WL 207042, at *3 (trial judge was not obligated to apply statute that appellants did not bring to the attention of the court). Judge McCafferty did not “err” simply because Defendants elected to assert and pursue non-tort reform damage defenses; it is easily understandable why employers may prefer defenses tailored for discrimination in the workplace to “tort” instructions and interrogatories that require separate awards of non-economic compensatory damages. The law does not preclude such litigation choices.

Defendants’ argument that tort reform damage caps are “jurisdictional in nature” and therefore “cannot be waived” (Br. II, p. 22, 24) is incorrect. See *Barnes*, 119 Ohio St.3d at 179, ¶27 (a party asserting that a non-elected retired judge has “no jurisdiction” to conduct trial “has a duty to object in the trial court and timely preserve the error for appeal”). *Barnes* affirmed this Court’s conclusion that defendants cannot challenge a judge’s jurisdiction simply because “they did not receive their desired outcome.” *Barnes* App. Op., 2006-Ohio-6266, ¶60. Similarly, Defendants cannot challenge Judge McCafferty’s “jurisdiction” to enter judgment on uncapped damage awards simply because they did not receive their desired outcome.

2. **Invited error cannot be the basis for an appellate reversal.**

A party in litigation may not “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. Thus, *no* error – including “unwaivable” or “plain” error – can

be the basis of appellate relief when it was “invited” by the appellant. See *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 313 (“While arguably appellants are correct that objection to the admission of parol testimony cannot be waived * * * appellants ‘invited’ the alleged error”); *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.’”

As *Goldfuss* notes, “the idea that parties must bear the cost of their own mistakes at trial is a central presupposition of our adversarial system of justice.” *Id.* Accord *State v. Doss*, 8th Dist. No. 84433, 2005-Ohio-775, ¶9 (invited error “involves the exercise of trial strategy”). Thus, the doctrine precludes a claim on appeal that an arbitrator exceeded his limited authority when “[a] review of the record demonstrates that the parties treated this matter as a class grievance” (*City of Fostoria v. Ohio Patrolmen’s Benevolent Assoc.* (2005), 106 Ohio St.3d 194, 196-197, ¶16), and a claim that the trial court “contravened statutes governing execution proceedings against property” when both parties participated in the hybrid procedure (*Preferred Properties, Inc. v. Tillimon*, 6th Dist. No. L-05-1085, 2005-Ohio-5875, ¶¶14-15). Nor can a party wait until his “strategy backfired and the jury found against him” to allege that the prevailing party’s claim is not cognizable (*Blair v. McDonagh* (2008), 177 Ohio App.3d 262, 276, ¶¶38-39).

The invited error doctrine applies to jury instructions, verdict forms and jury interrogatories “assembled and approved by both parties at a conference with the trial court.” *Siuda v. Howard*, 1st Dist. Nos. C-656, C-687, 2002-Ohio-2292. Ohio and other jurisdictions have recognized that the doctrine applies to “tort reform” interrogatories (*Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶¶80-85, rejecting “plain error”

argument); and “caps” (*In re Estate of Salerno* (Conn. App. 1993), 630 A.2d 1386, 1390, “fee cap” statute could be waived since “[s]tatutes relating to litigation * * * confer[] a private right that may be waived”); to claims that a damage award is unconstitutionally excessive (*United States v. Rogan* (C.A.7, 2008), 517 F.3d 449, 454 (upholding \$64 million award where the appellant “himself has made the record unsuitable to resolution of his constitutional argument”); and to civil rights actions (*Williams v. Boles* (C.A.7, 1988), 841 F.2d 181, 184, refusing to consider “error” in §1983 jury charge similar to appellant’s own proposed instruction).

In this case, Defendants’ trial strategy was 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. (See R. 108, Am. Ans. (6/20/08), pp. 6, 8; R. 40, Defs.’ MSJ (4/28/08), pp. 32-33, citing *McKennon v. Nashville Banner Publishing Company* (1995), 513 U.S. 352.) A review of Defendants’ Answer, Amended Answer, Motion for Summary Judgment, Trial Brief, Proposed Jury Instructions, Proposed Jury Interrogatories and Verdict Forms, Amended Proposed Jury Instructions, and Second Amended Proposed Jury Instructions,⁴ reveals no reliance on “torts,” “tort reform,” or “mandatory” tort reform statutes. The *only* invocation of *any* “tort reform” statute is Defendants’ *partial* reliance on R.C. 2315.21(B)(1) in their Motion to Bifurcate filed a month before trial. (R. 50, Defs.’ Mot. to Bifurcate (5/28/08).) That motion, however, does not allege that Luri’s employment discrimination claims constitute a “tort,” does not refer to the definitional section of R.C. 2315.21, and does not assert any intent to invoke the whole panoply of “tort reform.” Further, when Defendants renewed their bifurcation motion three weeks later, they relied *solely* on Civ.R. 42. (R. 72, Defs.’ Tr. Br. (6/16/08), pp. 26-28.)

⁴ R. 22, R. 40, R. 72, R. 80, R. 81, R. 108, R. 128, and R. 147.

Far from arguing that “tort reform” required the *aggregation* of punitive damage awards (Br. II, pp. 24-30), Defendants *objected* when the trial judge pointed out that the proposed punitive damage interrogatory would have the jury return a *single* punitive damage award against Defendants, insisting that “we need each Defendant that’s named as a Defendant in this case to be separated out” (Tr., pp. 1559-60). The next day, Defendants confirmed their agreement with the jury interrogatories and verdict forms that included separate punitive damage awards for the five Defendants (Tr. at 1712):

THE COURT: We’re on the record outside of the presence of the jury, and the parties have agreed on changes to the interrogatories and the verdict forms, and there aren’t any objections; is that correct?

MR. HABER: The interrogatories and verdict forms, that is my understanding, Your Honor, correct.

MR. POSNER: Correct, Your Honor, to the interrogatories and the verdict forms.

The “agreed upon” interrogatories (R. 199, JE (9/25/08)) did not separate past and future damages or economic and non-economic damages. (See Exh. C.) Defendants waived and invited the error asserted in Assignments 1, 2, 3, 4, and 6.

B. The Trial Court Properly Denied Bifurcation (Assmt. Error 1).

The trial court had and properly exercised discretion when it denied Defendants’ motion to bifurcate and post-judgment assertion that the absence of “tort reform” bifurcation mandated a new trial. See *Barnes* App. Op., 2006-Ohio-6266, ¶34:

Although [appellant] argues that R.C. 2315.21(B) mandates that compensatory and punitive damages be bifurcated upon request, the trial court may exercise its discretion when ruling upon such a motion.

Barnes is the governing rule of this District, and is consistent with courts’ inherent authority to exercise “those powers that ‘are necessary to the orderly and efficient exercise of jurisdiction’”

(*City of Norwood v. Horney* (2006), 110 Ohio St.3d 353, 387, ¶¶117, 118) and duty to “exercise reasonable control” over the mode and order of presenting evidence (Ohio Evid.R. 611(A)).

Further, contrary to Defendants’ claim that they instructed the trial court “in no uncertain terms” that she *must* grant bifurcation (Br. II, p. 12), Defendants’ filings were wholly consistent with *Barnes*’ holding that courts retain the discretion to bifurcate accorded by Civ.R. 42(B). Defendants’ Motion to Bifurcate 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 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.” (R. 50, at 1 (emphasis added).) Further, when Defendants included a second request for bifurcation in a Trial Brief filed two weeks later, they based their request *solely* on Civ.R. 42(B). (See R. 72, Defs.’ Tr. Br., pp. 26-28).⁵

Defendants not only omit their own invocation of Civ.R. 42(B) (which makes bifurcation discretionary), but claim “error” on the grounds that the trial court refused a bifurcation in which liability for compensatory *and* punitive damages would be tried first, with only the *amount* of punitive damages (based on additional net worth evidence) to be tried in the second phase. (Br. II, pp. 12-15.) But that is *not* what Defendants requested. Defendants requested that the first phase be limited to “liability and compensatory damages” and that the second phase consider all aspects – *liability for and amount of* – punitive damages. (R. 50, at 1; R. 72 at 26-28.) Such bifurcation was unworkable because, as in *Barnes*: “The issues surrounding compensatory damages and punitive damages in this case were closely intertwined.” *Barnes* App. Op, ¶135.

⁵ R.C. 2315.21(B) appears only in footnote, noting that “[i]n addition” to Civ.R. 42(B), R.C. 2315.21(B) “requires bifurcation * * * in a tort action.” (R. 72, p. 26.)

Specifically, Defendants claimed that they terminated Ron Luri based on “documented” performance issues. Luri, however, proved at trial that the “documentation” was fabricated after the fact, including a September 26, 2006 memo (Exh. 35) that was altered and back-dated after this litigation was filed to make it appear that it was drafted before Luri objected to age discrimination. The “mandatory” statute that Defendants argue Judge McCafferty was “required” to apply includes the proscription that a trial judge “shall not permit” evidence in the first phase of the bifurcated trial that relates “solely” to a party’s *liability* for punitive damages. R.C. 2315.21(B)(1)(a). Under that “mandate,” could Luri’s counsel cross-examine Bowen to demonstrate that the “documented” justification for termination was a fake? Would *either* party thereafter be entitled to an automatic retrial because the exposed fabrication related “solely” to liability for punitive damages? The impracticability of Defendants’ requested bifurcation supports the discretion that this Court’s *Barnes* decision accords trial judges, and the correct exercise of that discretion in this case.

Defendants’ reliance on *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481 (Br. II, p. 13), is equally flawed. The *Hanners* majority concluded that R.C. 2315.21(B) was a “substantive” law “packaged in procedural wrapping” and the trial court therefore erred when it denied the motion to bifurcate; the dissent concluded that two Ohio Supreme Court decisions describing R.C. 2315.21(B)(1) as “procedural” were “powerfully persuasive,” such that the trial court retained discretion. *Id.* at ¶¶30-31.⁶ The most significant holding of *Hanners* is its unanimous conclusion that a trial court’s denial of a motion

⁶ Defendants also cite two federal cases from Ohio’s southern district that construe the bifurcation statute to be substantive rather than procedural for choice of law purposes. (Br. II, pp. 12-13.) Ohio’s northern district holds just the opposite. See *Tuttle v. Sears, Roebuck & Co.* (N.D. Ohio 2009), No. 1:08-cv-333, 2009 WL 2916894; *Columbia Gas Trans. Corp. v. First Congressional Church* (N.D. Ohio 2008), No. 1:07-cv-661, 2008 WL 118066.

to bifurcate is immediately appealable. *Id.*, ¶¶13, 32. Although they now claim that this single pretrial ruling allowed Luri to “implement[] a strategy designed to appeal to the jury’s passion and prejudice” (Br. II, p. 15), Defendants elected not to appeal the order. Instead, they renewed their request *solely* under Civ.R. 42(B) two weeks later. (R. 72 at 26-28.) It was only when Defendants “did not receive their desired outcome” (*Barnes App. Op.*, ¶60) that they resurrected their pretrial motion, redefined it as a “tort reform” measure, mischaracterized it as seeking bifurcation of “net worth” evidence, and alleged that its denial required a new trial.

Defendants’ hyperbolic argument that Luri “implemented a strategy” to taint the proceedings after the trial court denied bifurcation (Br. II, pp. 15-17) simply attempts to distract attention from their own trial choices.⁷ First, while Luri did initially agree to bifurcation in exchange for overdue discovery, Defendants failed to mention that Luri *withdrew* his agreement when Defendants refused to carry out their side of the bargain. (R. 53, Pl.’s Mot. to Compel (6/5/08), at 2.) Second, Luri did not “solicit evidence of Republic’s net worth” (Br. II, p. 15) during Defendant Krall’s cross-examination. It was Krall who spontaneously injected his company’s net worth into evidence during questioning on his management experience. See Tr. at 361-63:

Q. Have you ever been trained with respect to how to progressively discipline or support a termination?

A. No, not to my knowledge.

⁷ None of the cases Defendants cite at pp. 13-15 to support their claim of “taint” grant a new trial based on a trial court’s failure to bifurcate. In four (*Book, City of Cleveland, Adams, Draper*) only *compensatory* damages were at issue. Three (*Farmy, Koukatis, Washington*) held that a punitive damages claim should not have gone to the jury. In the eighth case (*Campden*), the court agreed that the judge had given an erroneous punitive damage instruction over defendant’s objection.

Q. Let me back up a little bit. As a regional vice president of Republic Services, which is a publicly traded corporation, Republic Service is a very large corporation, is it now?

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 cannot now claim "foul" because Plaintiff presented closing argument on the very evidence Defendants introduced. See *Hinkle v. Cleveland Clinic Found.* (2004), 159 Ohio App.3d 351, ¶¶47-49 (appellant waived any error based on collateral source evidence he first introduced). Third, there was nothing improper about closing argument that repeats Krall's own description of Republic as a "small corporation, three billion dollars" – as Defendants themselves recognized by *never objecting*. Just as Defendants must live with their own trial strategy, they must also live with the volunteered testimony of their own officers.

C. Defendants Invited Any Error in the Compensatory Damage Instruction and Jury Interrogatory. (Assmts. Error 2 and 3)

Defendants' Assignments of Error 2 and 3 assert for the first time, two years after trial, that the trial court "erred"⁸ in failing to give a "tort reform" jury instruction and interrogatory on

⁸ Defendants cite to Tr. 1764-1768 and 1775 as "the place in the record where" the error set forth in Assmts. 2 and 3 "is indicated." (App.R. 16(A)(3).) Those transcript pages simply contain the trial court reading the instruction and interrogatory to the jury.

compensatory damages. Defendants' own proposed compensatory damage instruction and interrogatories (R. 81, Instr. No. 21; R. 80, 'Rog 10) contained neither, and Defendants expressly agreed that "there aren't any objections" to "the interrogatories and verdict forms." (Tr. at 1712.) For all of the reasons set forth supra, pp. 14-19, Defendants' claims are baseless. See, also, *Srail v. RJF Intl. Corp.* (1998), 126 Ohio App.3d 689, 702, where this Court affirmed a compensatory damage judgment in an age discrimination case; defendant "never requested interrogatories" that would have differentiated the economic and non-economic elements of the award and the court would not "join in a guessing game" as to the amount of non-economic damages awarded.

Further, unlike *S.H.Y., Inc. v. Garman*, 3d Dist. No. 14-04-04, 2004-Ohio-7040 (Br. II, pp. 20-21), where the trial court permitted punitive damages in a breach of contract case upon a finding "by the greater weight of the evidence that the defendant acted with fraud" (*id.*, ¶45), the punitive damage charge in this case (Tr. at 1767-69) contained the proper burden and description of malice. Therefore, even if the error had not been invited, "plain error" would not apply. See *Goldfuss*, 79 Ohio St.3d at 120-123 ("plain error" doctrine did not require reversal based on charge that allowed recovery under negligence principles rather than willful or wanton misconduct). Similarly, unlike the series of cases cited on page 23 (Br. II), this is not a case in which the jury was instructed to apportion fault to non-parties (*Calmes, Pever*) or where the trial court failed to provide an interrogatory on the contributory fault defense *pled by the defendant* (*Lockwood, Cook*).

Finally, Defendants' complaints at pages 19-20 (Br. II) again seek a new trial based on their own ill-conceived trial strategy. To wit:

- Defendants complain that the trial court did not prevent what R.C. 2315.18(C) “forbids,” but they never proposed instructions or interrogatories incorporating R.C. 2315.18(C);
- Defendants complain that five exhibits representing net worth evidence for each of the five Defendants should not have been considered by the jury, but it was Defendants who insisted that the jury render five separate punitive damage awards; and
- Defendants complain that the jury should not have been allowed to see the evidence demonstrating the fabrication and alteration of documents, but it was Defendants who offered the concocted paper trail to support Luri’s termination.

None justify reversal; all are waived.

D. The Trial Court Properly Denied Defendants’ Post-Judgment Request for “Remittitur” of the Punitive Damage Awards Through the Application of “Caps.” (Assmt. Error 4)

Another hindsight change in Defendants’ litigation strategy was their “remittitur” argument that the trial court “must” retroactively apply the tort reform punitive damage cap in R.C. 2315.21(D)(2)(a) to the judgment it entered on July 8, 2008. (R. 155, Defs.’ Mot. (7/22/08), pp. 18-22.) Defendants reassert that untimely claim here. (Br. II, pp. 23-30.) Even if preserved and applicable (and it is neither), Defendants’ discourse on how the cap might apply to multiple defendants is purely hypothetical; the trial court never ruled on the issue.

1. Defendants waived and invited any error relating to separate, uncapped punitive damage awards.

Defendants had to know the very real possibility of a substantial punitive damage award well before the trial began; Bowen conceded during his deposition that after this case was filed, he altered and back-dated a document produced in discovery. (See R.38, Pl.’s Mot. (4/18/08).) Yet as late as June 19, 2008, when Defendants filed their Amended Answer, the only punitive damage limitation pled was that “[a]ny” award of punitive damages “would be unconstitutional and violate due process.” (R. 99, p. 7.)

At trial, Defendants challenged Luri's punitive damages based on a federal employment doctrine, not R.C. 2315.21 (Tr. 1523-24, 1526-27), and did not object when Luri's counsel suggested in closing argument that the jury award "one percent" of \$330 million "for every piece of evidence that you found to have been fabricated in this case, manipulated in this case" and "for each witness that sat in that chair and tried to mislead you" (Tr. at 1606). Nor did Defendants argue R.C. 2315.21 to the court. Instead, they argued that the "single employer" doctrine requiring joint and several liability for compensatory damages "cannot be applicable" to punitive damages, and that punitive damages must be considered separately for each Defendant. (Tr. at 1559-60, 1714.) The jury considered the evidence and arguments and returned the separate punitive damage awards requested by Defendants on July 3; judgment was entered on those awards on July 8. (R. 154 (JE).)

As Defendants note (Br. II, p. 24), R.C. 2315.21(D)(2)(a) plainly states that a court "shall not enter judgment" that exceeds the caps set forth therein. A party seeking to invoke the benefits of the statute must therefore necessarily do so *before* judgment is entered. Defendants first invoked R.C. 2315.21(D)(2)(a) 14 days *after* judgment was entered. For the reasons set forth *supra*, p. 16, Defendants can and did waive any argument in this case that tort reform caps in 2315.21(D)(2) apply to malicious violations of R.C. 4112.02(I).

In fact, Defendants had good reason not to plead or otherwise invoke R.C. 2315.21(D)(2) in an action under R.C. Chapter 4112. "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." *Kramer Consulting, Inc. v. McCarthy* (Mar. 8, 2006), S.D. Ohio No. C2-02-116, 2006 WL 581244, at *8 (citations omitted) (declining to apply R.C. 2315.21 to a

statutory claim). Defendants point to no provision in R.C. Chapter 4122 that limits the punitive damages available under R.C. 4112.99 to punish and deter employers who retaliate against employees with actual malice. Because the statute creating the right contains its own remedy, it is not subject to limiting provisions in other statutes, such as R.C. 2315.21. If the General Assembly had intended to “cap” the punitive damages for the cause of action it created in R.C. Chapter 4112, it knew how to do so.

2. **Defendants’ premature calculations are incorrect.**

Finally, Defendants accuse Luri of “attempt[ing] to obfuscate” how caps *would be* calculated (if timely sought in a tort action) by “[i]n effect * * * seek[ing] multiple punitive damage verdicts” (Br. II, pp. 24, 25). It is not Luri who is trying to “obfuscate” what occurred during the trial of this matter. It was *Defendants* who insisted on multiple punitive damage verdicts; Defendants’ dismay at the consequences of their litigation strategy provides no basis for “aggregating” the individual awards.

If the caps statute applied and had been timely invoked, *if* there were any “caps” calculation for this Court to review, and *if* that calculation declined to aggregate the punitive awards, Defendants’ claim that any such calculation would be incorrect is misplaced. The facts of this case do not fall within any legislative concern about “multiple awards of * * * punitive damages * * * that have no rational connection to the wrongful actions * * * of the tortfeasor.” (See Br. II, p. 26, quoting S.B. 80 §4(b)(ii).) As explained more fully *infra*, pp. 34-37, *each* corporate Defendant retaliated against Luri, concocted false documents, and presented untruthful testimony. The separate punitive damages are thus wholly consistent with the proper “focus” of punitive damages – “what it will take to bring about the twin aims of punishment and deterrence *as to that defendant*. *Dardinger*, 98 Ohio St.3d at 102 (emphasis added).

Defendants repeatedly quote the *first* phrase of R.C. 2315.21(D)(2)(a) (“two times the amount of the compensatory damages awarded to the plaintiff * * *”) (Br. II, pp. 25-27) while omitting the last phrase: “* * * from that defendant, as determined pursuant to division (B)(2) or (3) of this section.” The statutory cross-references require determinations of compensatory damages “recoverable * * * from each defendant” (R.C. 2315.21(B)(2), (3)), which is sufficiently broad to account for joint and several compensatory awards while maintaining the appropriate focus of punitive damages on “that defendant.” Accord (emphasis added) R.C. 2315.21(C) (punitive damages are available only when “[t]he actions or omissions of *that defendant* demonstrate malice * * *); R.C. 2315.21(D)(1) (the trier of fact “shall determine the liability of *any defendant*” for punitive damages).⁹ And contrary to Defendants’ argument at page 25, the clear statutory language capping *each defendant’s* punitive damage awards is consistent with *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468. See ¶86: “The statute [R.C. 2315.21(D)(2)(a)] limits punitive damages in tort actions to a maximum of two times the total amount of compensatory damages awarded to a plaintiff *per defendant*.”¹⁰

E. The Punitive Damage Awards Are Constitutional. (Assmt. Error 5)

The touchstone of the Due Process analysis required under the United States Constitution is whether a defendant “receive[s] fair notice not only of the conduct that will subject him to

⁹ The authorities from other jurisdictions that Defendants invoke at pages 26-27 are inapposite; each construe a statute with materially different language, and merely illustrate that the General Assembly would have drafted R.C. 2315.21 differently had it wished to limit punitive damage awards to a single aggregate amount.

¹⁰ Defendants’ reliance on the definition of “employer” in R.C. 2315.21(A)(4) to support their “aggregation” claim (Br. II, pp. 28-29) is equally misplaced. That definition uses the conjunctive “or,” not “and.” See *id.* (an employer “includes * * * a parent, subsidiary, affiliate, division, *or* department of the employer”). The statutory definition merely specifies the myriad of corporate forms an employer may take; there is no textual support for aggregating punitive damage awards against distinct corporate entities that independently commit malicious acts.

punishment, but also of the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 574. By arguing that “tort reform” caps clearly apply to actions under R.C. Chapter 4112, Republic, Ohio I, and Ohio Hauling necessarily concede that they each had fair notice of punishment in an amount equal to at least \$7 million (two times the \$3.5 million compensatory damages). But, as Judge McCafferty appropriately recognized, the egregious misconduct uncovered in *this* action – including lying under oath and falsification of evidence – amply supports a finding that the ratio of compensatory to punitive damages as to each Defendant “is not so significant as to overturn the finding of the jury.” (R. 226, JE (3/31/10).)

The guideposts that aid a court in determining whether a particular award deprives violates Due Process, “should neither be treated as an analytical straitjacket nor deployed in the expectation that they will ‘draw a bright line marking the limits of a constitutionally acceptable punitive damages award.” *Zimmerman v. Direct Fed. Credit Union* (C.A.1, 2001), 262 F.3d 70, 81. Here, Judge McCafferty – after sitting through an eight-day trial and watching Defendants’ witnesses get caught time and again in fatally inconsistent stories – correctly determined that each of the five separate punitive damage awards comported with all three guideposts (R. 226, JE (3/3/10).)

1. **The evidence of highly reprehensible conduct by each Defendant supports their respective awards.**

After the dismissal of Defendants’ premature appeal, Judge McCafferty memorialized her analysis of the “reprehensibility of each of the defendant’s conduct” and explained that the *Barnes* factors supported each of the punitive damage awards. (R. 226, JE (3/3/10).) Predictably, Defendants are now dismissive of the *Barnes* findings that they worked so hard to avoid – see Br. II, pp. 32 and 33 – and continue to argue that none of the five reprehensibility factors are present here; i.e., (1) “the harm arose from a transaction in the economic realm”; (2)

“there is no evidence that Republic was indifferent to Luri’s health or safety”; (3) Luri was not financially vulnerable; (4) “[t]here was no evidence that Republic retaliated against any other employee for engaging in protected conduct”; and (5) “there was no evidence that the alterations to the memorandum [Exh. 35] harmed Luri at all.” (Br. II, pp. 32-33.) This crabbed interpretation of reprehensibility – the most important of the three guideposts – is contrary to employment case law, Judge McCafferty’s findings and the substantial evidence of record.

Because this case involves a violation of R.C. 4112.02(I), each of the five reprehensibility factors must be construed in the context of intentional retaliation engaged in to deter protected activity. Courts have recognized that the first factor (whether the harm arose from “a transaction in the economic realm” or a physical trauma) presents a false choice in employment cases – the harm inflicted by intentional discrimination or retaliation is “far more than wounded pride and hurt feelings,” *Zimmerman*, 262 F.3d at 82, and constitutes “a serious affront to personal liberty.” *Zhang v. Am. Gem Seafoods, Inc.* (C.A.9, 2003), 339 F.3d 1020, 1043.¹¹ Similarly, consideration of whether a plaintiff is financially vulnerable (the third factor) cannot be determined solely on the basis of the salary an employee received *before* he was unlawfully terminated.¹² Judge McCafferty’s finding that Luri was financially vulnerable is

¹¹ See, also, *Romano v. U-Haul Internatl.* (C.A.1, 2000), 233 F.3d 655, 673 (conduct demonstrating a “blatant disregard of federally and state-mandated anti-discrimination laws” and an “attempt[] to conceal this violation” is “more reprehensible than would appear in a case involving economic harms only”); *Merrick v. Paul Revere Life Ins. Co.* (D.Nev.2008), 594 F.Supp.2d 1168, 1188 (“Defendants’ lack of repentance, refusal to acknowledge responsibility, attempts to hide their misconduct from discovery, and presentation of false and misleading evidence to the jury all suggest a need for greater punishment and deterrence and add to the sense that Defendants’ conduct is highly reprehensible.”).

¹² The third reprehensibility factor focuses on whether the plaintiff is financially vulnerable, not (as suggested in Br. II, p. 32) whether the plaintiff is “targeted” *because of* financial vulnerability. See *Gore*, 517 U.S. at 576 (infliction of economic injury “when the target is financially vulnerable, can warrant a substantial penalty”) (emphasis added). Accord *Barnes*,

amply supported by Defendants' refusal to waive his covenant not to compete, and their unsupported allegations of falsified expense reports – which unquestionably impacted his ability to resume his career. See, e.g., *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life* (C.A.9, 2005), 422 F.3d 949, 958-59 (“financially vulnerable” includes physician whose livelihoods were threatened by misconduct of defendants). Moreover, Luri’s projected 2007 salary of \$179,000 is a far cry from the high-level salaries that preclude a finding of financial vulnerability. See Tr. at 1031-32; cf. *Morgan v. New York Life Ins. Co.* (C.A.6, 2009), 559 F.3d 425, 429, 443 (stating that “it would not be accurate to describe [the plaintiff] as financially vulnerable” when he “earned between \$500,000 and \$1,000,000 per year”).

The fourth factor – whether the conduct involved repeated actions or was an isolated incident – must also be analyzed within its evidentiary context. Courts have recognized that “a substantial award of punitive damages” is appropriate against an employer who knew that its “scurrilous course of conduct was unlawful” and “persisted in it.” *Zimmerman*, 262 F.3d at 82. See, also, *Goldsmith v. Bagby Elevator Co., Inc.* (C.A.11, 2008), 513 F.3d 1261, 1283 (evidence of a “pattern” of retaliatory and discriminatory conduct further justified substantial punitive damage award). As Judge McCafferty correctly recognized, Defendants’ misconduct “evolved over a period of time” (R. 226, JE (3/3/10)) – from a “Leaders of Tomorrow” program targeting older employees, to instructions given to General Manager Gutwein to eliminate the positions of four older employees in his division, to pressure put on Pascuzzi to sign a new memorandum indicating it was solely his idea to be demoted and then lie under oath at trial about the circumstances surrounding his “voluntary” demotion, to “counseling” that Defendants subjected

119 Ohio St.3d at 181, ¶33 (describing the relevant inquiry as whether “the target had financial vulnerability”).

Luri to in retaliation for his efforts to oppose age discrimination, to requests to employees to create memoranda that include self-serving statements such as “there was no discussion of termination,” and similar activities. Judge McCafferty appropriately concluded that this evolving course of conduct “was composed of repeated actions.” (R. 226, JE (3/3/10).)

Finally, as Judge McCafferty recognized (see *id.*), the record is replete with evidence of the fifth factor – “intentional malice, trickery, and deceit.” Retaliation accomplished through a “concocted” reorganization plan, *Bogle v. McClure* (C.A.11, 2003), 332 F.3d 1347, 1361, or a “cover up in flagrant violation of Title VII,” *Lampley v. Onyx Acceptance Corp.* (C.A.7, 2003), 340 F.3d 478, 486, is the very type of reprehensible conduct that *does* warrant a large punitive damages award. That is what *each* corporate defendant did here.

Republic, and its Regional Vice President Krall, demonstrated a “top down” corporate culture of intimidation and retaliation. Krall knew it was against the law to discriminate on the basis of age and retaliate against those who opposed that discrimination. (Tr. at 363-64.) Nevertheless, he provided “buy-in and approval” for an action plan that targeted older workers for termination and helped to create a pretext for Luri’s termination by initiating a spurious “survey” of Cleveland Division employees. (*Id.* at 362, 370-71, 376, 383-86, 397, 573-74, 741-43, 872-73, 887-88, 1217-18, 1221, 1228; Exh. 72.) There was also evidence that Krall participated in the decision to terminate Luri for opposing age discrimination: Krall spoke with Bowen about terminating Luri prior to Bowen’s April 12, 2007 e-mail; Krall testified that the real purpose of that e-mail was to copy Nichols “to make sure *we’re* not missing anything here” (emphasis added); Krall had Luri’s termination meeting moved to accommodate his schedule; and Krall was present when Bowen told Luri he was being fired because he “didn’t fire Frank Pascuzzi,” and cut-off Luri when he attempted to challenge his termination. (*Id.* at 624, 1231-

33.) Nichols confirmed that Luri was fired because he refused Bowen's staffing "directive." (Id. at 730.) Republic's reprehensibility is also evident in its interference with Luri's attempt to secure a comparable position with another company. (Id. at 625-26; Exh. 64.)

Ohio I, through Area President Bowen, concocted a false paper trail to cover up the retaliatory motive for Luri's termination. (Tr. at 370-71, 436, 456, 459-60, 462-63, 473, 580-85, 598-600, 608-09, 997-99, 726, 1124, 1217; Exhs. 1, 14, 17, 22.) Bowen also confirmed, in front of both Krall and Luri, that Luri was being terminated because he refused to fire Frank Pascuzzi. (Tr. at 624.) Bowen then tried to conceal his reprehensible conduct by: (1) backdating an October 2006 memo, after supplementing it, to make it appear that Luri had performance issues *before* he opposed age discrimination; (2) creating and backdating a handwritten set of notes describing a non-existent visit to the Cleveland Division; (3) telling Marino in September 2007 to create a memorandum to support a false allegation that Luri falsified expense reports; and (4) directing Area Controller Herman to create notes purporting to memorialize a non-existent meeting between Bowen, Herman, and Pascuzzi in January 2007. (Tr. at 414-21, 438-47, 493-94, 550, 779-88, 1351, 1384, 1470, 1484; Exhs. 15, 34, 35, 37, 39.) And when his reprehensible conduct was exposed at trial, Bowen made up new stories, testifying to a conversation with Luri on September 26, 2006 that never happened (Tr. at 423-28), asserting that Jonathan Sheets was not telling the truth when he testified that Luri attended sales meetings (id. at 423-28, 1460-61, 1478-79, 1495-96), and proclaiming he had "no idea" why Herman wrote "at no time was termination discussed for any employee" in notes Bowen told Herman to create (id. at 1484). (After Herman confirmed he could not reconcile his purported January 2007 notes with Bowen's February 7, 2007 memorandum, Bowen adopted the new date, and claimed his notes were in error (id. at 793, 1480-81).)

Ohio Hauling was an active participant in the plans aimed at discriminating against older workers, and – through its agent General Manager Marino and others – created, altered, and supplemented evidence after litigation was filed in an attempt to deceive the Court and jury. Marino created and then supplemented (to make “more specific”) a document that was used to support the unfounded claim that Luri had falsified expense reports. (Tr. at 443-47, 978, 979; Exh. 34A.) At trial, Marino attempted to support another baseless claim – that Luri violated company policy by permitting Marino to rehire a driver with a positive drug test – by providing false testimony that contradicted his prior deposition (Tr. at 997-1002), and falsely testified that employees considered him to be the “acting general manager,” that Luri only attended one sales meeting, and that he was responsible for hiring and firing, union negotiations and attended all sales meetings. (Id. at 930-36, 963.) Additionally, Ohio Hauling acted maliciously in pressuring Pascuzzi to contradict his prior deposition testimony. (Id. at 1109-14.)

The lying under oath and falsification of evidence detailed above is precisely the kind of misconduct that requires “punishment at the highest levels constitutionally permissible.” *Merrick*, 594 F.Supp.2d at 1189. And the fact that Defendants to this day attempt to minimize the extent of their efforts to mislead the court and jury, and continue to argue that Luri could not have been harmed by “a single instance of poor judgment by one individual” after he was terminated (Br. II, p. 34), simply confirms that the jury correctly determined that a substantial punitive damage award would be required to deter future misconduct.

2. **The single-digit ratios satisfy Due Process.**

(a) **“Ratios” are calculated separately for each Defendant.**

Defendants’ proportionality arguments (Br. II, pp. 34-38) rehash their misguided effort to aggregate the individual punitive damage awards separately entered against each of them. For

the reasons explained above, Defendants' aggregation approach wrongly conflates the separate issues of liability for compensatory damages (which can be joint and several)¹³ and liability for punitive damages (which cannot), and ignores the manner in which this case was tried, including the fact that *Defendants*: (1) requested the independent findings of actual malice and separate punitive damage awards entered in this case, and (2) took the position at trial (correctly) that single employer status is irrelevant to the issue of punitive damages.

But there is a more fundamental problem with Defendants' aggregation argument; their respective rights under the Due Process Clause are personal, not collective. See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 417 ("The Due Process Clause * * * prohibits the imposition of grossly excessive or arbitrary punishments *on a tortfeasor*"). Accordingly, a proportionality review must be conducted in a manner which assures that the "precise award * * * [is] based upon the facts and circumstances *of the defendant's conduct* and the harm to the plaintiff." *Id.* at 425 (emphasis added). This constitutional focus on the individual conduct of a particular tortfeasor precludes aggregation of punitive damage awards in a "ratio" analysis. *Planned Parenthood*, 422 F.3d at 960-62; see, also, *Merrick*, 594 F.Supp.2d at 1190 (same); *Fastenal Co. v. Crawford* (E.D.Ky.2009), 609 F.Supp.2d 650, 660 n.3 (finding *Planned Parenthood* persuasive). As *Planned Parenthood* explains, the aggregation of punitive damage awards "fails to allow for the possibility that the reprehensibility of individual defendants can * * * differ," "runs counter to the court's task of determining whether any or all of the

¹³ The single employer doctrine is a form of joint and several liability. *Armbruster v. Quinn* (C.A.6, 1983), 711 F.2d 1332, 1337 (explaining that the single employer doctrine makes "the affiliated corporation * * * jointly responsible for the acts of the immediate employer"), abrogated on other grounds by *Arbaugh v. Y&H Corp.* (2006), 546 U.S. 500.

defendants had their due process rights violated,” and impermissibly “shifts the focus away from a particular defendant’s conduct to the defendants’ conduct *en grosse*.”¹⁴ Id. at 960.

The punitive damage awards challenged here results in the following ratios:

- Republic – \$21.5 million/\$3.5 million is a ratio of approximately 6:1;
- Ohio I – \$10.75 million/\$3.5 million is a ratio of 3:1;
- Ohio Hauling – \$10.75 million/\$3.5 million is a ratio of 3:1;

(See R. 226, JE (3/3/10).) Judge McCafferty correctly concluded that all of these ratios fall comfortably within the range of “single digit” multipliers that “are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution.” *State Farm*, 538 U.S. at 425. And they are well below the ratios in *retaliation* cases. See, e.g., *Vandevender v. Sheetz, Inc.* (W.Va.1997), 490 S.E.2d 678, 691, 693 (while punitive damage award for unlawful termination would be remitted to reflect a 5:1 ratio, the punitive damage award for retaliation would not be remitted, notwithstanding a 15:1 ratio, where evidence on retaliation claim “suggests a mean-spirited intent to punish” the plaintiff).¹⁵

¹⁴ To the extent that the unpublished trial court opinion in *Farm Bureau Life Ins. Co. v. Am. Natl. Ins. Co.* (D.Utah Feb. 11, 2009), No. 2:03CV646, 2009 WL 361267, relied on by Defendants holds otherwise, it should not be followed. *Farm Bureau* contains no analysis of the appropriate method for calculating the ratio of compensatory to punitive damages in a multiple defendant scenario; it merely proclaims that the award is excessive under the facts of that case and remits the total punitive damage award to an amount equal to the total compensatory award.

¹⁵ Accord *Lopez v. Aramark Uniform & Career Apparel, Inc.* (N.D.Ohio 2006), 426 F.Supp.2d 914, 971 (ratios of 7:1 and 6:1 for plaintiffs subjected to sexual harassment and retaliation “were within a single-digit ratio” and “a far cry from proportions that raise any judicial eyebrows”); *Goldsmith*, supra, 513 F.3d at 1283-1284 (upholding 9.1:1 ratio for retaliation where “there was a substantial need for deterrence”); *Jeffries v. Wal-Mart Stores, Inc.* (C.A.6, 2001), 15 Fed.Appx. 252, 266 (approving 50:1 ratio in suit for race discrimination and retaliation and noting that a high ratio may be justified “in cases in which the injury is hard to detect where the monetary value of non-economic harm might have been difficult to determine”).

(b) Ratios in excess of 1:1 are constitutional when, as here, the misconduct is egregious and hard to detect.

Defendants' argument that a ratio of 1:1 generally is the constitutional maximum,¹⁶ as well as their reliance on ratios contained in other cases involving what they consider to be "substantial" compensatory damages, misconstrues the nature of the proportionality guidepost. "[A] reviewing court should search for comparisons solely to determine whether a particular defendant was given fair notice as to its potential liability *for particular misconduct*, not to determine an acceptable range into which an award might fall." *Zimmerman*, 262 F.3d at 83; see, also, *Action Marine, Inc. v. Continental Carbon, Inc.* (C.A.11, 2007), 481 F.3d 1302, 1319-20 (declining "Continental's invitation to compare its actions with those of other defendants in dissimilar contexts" and upholding \$17.5 million punitive damage award where defendant "continued its course of action and inaction undeterred by both the prospect and reality of litigation" and demonstrated a "willingness to elude accountability"); *Hargarter v. Provident Life & Accident Ins. Co.* (C.A.9, 2004), 373 F.3d 998, 1014 ("State Farm's 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be.").

Here, the proper focus is on whether Defendants had fair notice of the penalty for retaliation, concealment, lying under oath and falsification of evidence – not on what other courts did in other cases where those elements were not present. Lying under oath and manufacturing evidence to conceal misconduct alone supports ratios of more than 8:1, even when the compensatory damages are "substantial." See *Merrick*, 594 F.Supp.2d at 1190 (upholding ratio

¹⁶ Defendants' reliance on *Exxon Shipping Co. v. Baker* (2008), ___ U.S. ___, 128 S.Ct. 2605, is misplaced. That case involved maritime law, not a constitutionally-based due process analysis, and the defendant immediately accepted responsibility for the spill and promptly initiated extensive clean-up actions. In fact, *Exxon* confirms that a 1:1 ratio would *not* be appropriate in cases like this involving "malicious conduct" and misconduct that produces "low odds of detection." *Id.* at 2633.

of \$24,000,000/\$2,932,751, or 8.18:1). For similar reasons, the other two primary authorities Defendants rely on as comparators are inapposite.

In *Morgan v. New York Life Ins. Co.* (C.A.6, 2009), 559 F.3d 425, the court reviewed a compensatory award of \$6 million and a punitive damage award of \$10 million following an employer's termination of an older executive based on age. The Court ordered a remittitur to a total award of \$12 million based on an assumption that the harm was "merely economic,"¹⁷ and misconduct that was "minor," and "not so reprehensible as to justify a high punitive damage award." There was no record of lying under oath and manufacturing evidence to conceal misconduct. Likewise, the malpractice insurer in *Jurinko v. Medical Protective Co.* (C.A.3, 2008), 305 Fed.Appx. 13 – which was found to have acted in bad faith by failing to offer its policy limits in a settlement – engaged in conduct described by the Third Circuit as "egregious, but not likely 'particularly' egregious." (Br. II, p. 35, quoting *Jurinko*.) In this case, in contrast, there is substantial evidence of "particularly" egregious conduct engaged in by each of the Defendants in an attempt to cover up their unlawful retaliation.

(c) Comparable civil penalties.

Defendants' claim (Br. II, p. 38) that the "comparable civil penalties" guidepost requires an inquiry into the "highest amount of punitive damages upheld on appeal * * * in a retaliatory discharge case," is equally flawed. *Dardinger* examined punitive damage awards in other cases only after concluding that there was no relevant statute to reference. 98 Ohio St.3d at 101. Here, however, Defendants' own "tort reform" theory confirms that an award of at least \$7 million per corporate Defendant complies with Due Process. Accord *Safeshred, Inc. v. Martinez*

¹⁷ The Court's assumption (559 F.3d at 441) is questionable. Compare *Zimmerman*, 262 F.3d at 82; *Zhang*, 339 F.3d at 12043; and *Romano*, 288 F.3d at 673.

(Tex.Ct.App.2010), __ S.W.3d __, 2010 WL 1633025, at *11 (“Numerous federal courts have held that ‘a punitive damages award that comports with a statutory cap provides strong evidence that a defendant’s due process rights have not been violated’”), quoting *Romano v. U-Haul Internatl.* (C.A.1, 2000), 233 F.3d 655, 673.

Courts that have thoughtfully analyzed *Gore* and its progeny remain mindful of the principle that “[a] punitive damages award must remain of sufficient size to achieve the twin purposes of punishment and deterrence.” *Modern Mgmt. Co. v. Wilson* (D.C. 2010), __ A.2d __, 2010 WL 2194436, at *15, quoting *Saunders v. Branch Banking & Trust Co. of Va.* (C.A.4, 2008), 526 F.3d 142, 154. In this case, Defendants’ “attempted use of ratios exemplifies why the determination of punitive damages is not a mathematical process.” *Wightman*, 86 Ohio St.3d at 438. As Krall blurted out on cross-examination, Republic is a “\$3 billion” corporation. (Tr. at 362.) And Defendants’ litigation strategy reflected a corporate attitude that clearly failed to recognize “that a civilized society governed by rules of law” cannot tolerate “the act of altering and destroying records to avoid liability.” *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651. The jury correctly determined that substantial punitive damage awards would be required to deter future misconduct.

F. The PJI Award is Correct. (Assmt. Error 6)

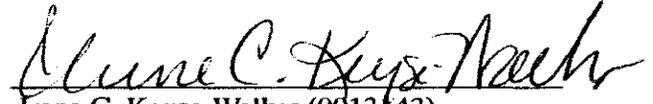
Defendants’ argument that PJI was not awardable absent a determination of “future damages” (Br. II, p. 39) ignores that the error, if any, was invited. The “agreed upon” jury interrogatories “did not separate past and future damages” (R. 199, JE (9/28/08)). Because Defendants’ own trial strategy precludes the identification of any particular amount of PJI awarded for “future damages,” they cannot show that the trial court abused its discretion in awarding PJI as to the entire amount. See *Srail*, 126 Ohio App.3d at 702; cf. *Julian v. Creekside*

Health Ctr., 7th Dist. No. 03MA21, 2004-Ohio-3197, at ¶¶107-17 (affirming PJI where undifferentiated damage award included future losses).

VI. CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,



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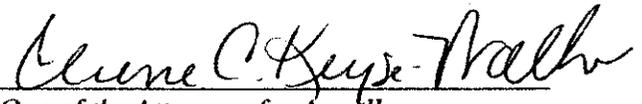
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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 6th day of July, 2010, by U.S. Mail, postage prepaid, upon the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92152

RONALD LURI

PLAINTIFF-APPELLEE

vs.

REPUBLIC SERVICES, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
DISMISSED**

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

BEFORE: Kilbane, P.J., Stewart, J., and Boyle, J.

RELEASED: October 23, 2009

JOURNALIZED:

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ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

OCT 23 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY G. Furst DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

Appellants, Republic Services, Inc. ("Republic"), Republic Services of Ohio Hauling, LLC ("Ohio Hauling"), Republic Services of Ohio I, LLC ("Ohio I"), Jim Bowen ("Bowen"), and Ron Krall ("Krall") (collectively known as "appellants"), appeal the July 3, 2008 jury verdict in favor of Ronald Luri ("appellee"), with respect to his retaliation claim stemming from his unlawful termination under R.C. 4112.02(I). The jury awarded Luri 3.5 million dollars in compensatory damages and approximately 43 million dollars in punitive damages.

Appellants argue that the trial court erred by denying their motion for judgment notwithstanding the verdict and their motion for new trial. Appellants claim that the trial court erred in failing to reduce allegedly excessive compensatory and punitive damages awards. Finally, appellants argue that the trial court erred in awarding excessive attorneys' fees and in granting prejudgment interest. Appellants' six assignments of error focus solely on the trial court's rulings on posttrial motions.

Because appellants prematurely filed their notice of appeal, thereby depriving the trial court of its stated intention to issue a final judgment entry supplementing its reasons for denying appellants' motion for new trial or in the alternative for remittitur, we dismiss the instant appeal for lack of a final appealable order under R.C. 2505.02 and Civ.R. 54.

Procedural History

On August 17, 2007, Luri filed the instant lawsuit alleging that he was retaliatorily discharged under R.C. 4112.02(I) after refusing to terminate his three oldest employees. In his complaint, Luri also alleged that appellants discriminated against him because of his age in violation of both R.C. 4112.14(A) and Ohio public policy.

On June 24, 2008, a jury trial commenced on Luri's retaliation claim. At trial, Luri proved that after he refused to fire the three targeted employees on the basis of their age, his supervisors retaliated against him for engaging in protected activity under Ohio's Civil Rights statute, R.C. 4112, et seq., that such retaliation eventually led to his unlawful termination, and that his supervisors attempted to justify their nefarious activity by fabricating evidence and backdating documents in order to create a sham "paper trail" justifying Luri's unlawful termination.

On July 3, 2008, a jury found in favor of Luri.

On July 8, 2008, the trial court entered judgment in Luri's favor.

On July 22, 2008, appellants filed a motion for judgment notwithstanding the verdict, and a motion for new trial or in the alternative for remittitur, alleging that the punitive damage awards against them violated their right to due process.

On September 17, 2008, the trial court faxed an entry to all counsel denying appellants' motion for new trial or in the alternative for remittitur.

On September 18, 2008, the trial court journalized its entry denying the motion for new trial or in the alternative for remittitur without opinion.

On September 19, 2008, the trial court convened a hearing on pending posttrial motions. During this hearing, appellee's counsel, as the prevailing party in accordance with Civ.R. 52 and Loc.R. 19, provided the trial court with a proposed supplemental journal entry to accompany its earlier ruling, augmenting the court's September 18, 2008 entry denying the motion for new trial or in the alternative for remittitur, to include an analysis of the due process "guideposts" elucidated in *BMW of N. Am. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, based upon the Ohio Supreme Court's recent pronouncements in *Barnes v. Univ. Hosps. of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142. (Tr. 1849.)

In *Barnes*, the Ohio Supreme Court held, inter alia, that trial courts are required to analyze a jury's punitive damage award under *BMW of N. Am.* when it stated:

"This discretionary appeal was accepted on the issues of whether * the trial court is required to analyze the jury's punitive damage award under *BMW of N. Am.*, * * *. We answer yes * * *." *Barnes* at 174.**

Appellants' counsel professed that they never received the court's facsimile denying their motions, yet the court produced a copy of its confirmation sheet faxing the entry to appellants' counsel. During the hearing, appellants' counsel inquired of the court regarding its denial of appellants' motion for new trial or in the alternative for remittitur:

"[Counsel for appellants]:

But I take it Your Honor did not consider the *Barnes* case in making that determination?

The Court:

Well, no. You're speculating what I did consider and I think what counsel's asking the Court to do is provide a little bit more edification pursuant to the *Barnes* case. I considered every case that was cited within that.

*** * ***

So I basically just ruled on the motions, but I think it is always helpful if the prevailing party wants to submit a more detailed entry for the trial court to look at. That way, I can look through it and see which the Court agrees with and maybe that would provide you the edification you seek.

*** * ***

I read them all and I took them all into consideration and I wanted to have them ruled on before today's hearing so that you would know that.

*** * ***

So rather than have you come back in a couple of years, should you be appealing this case, and provide edification

on a case that's not as fresh in my mind, would I mind looking at this? I don't have any issue with that.

[Counsel for appellants]:

Thank you, your honor. Thank you." (Tr. 1852-1853.)

At the conclusion of the hearing, pursuant to appellants' request, the trial court granted appellants a two-week extension or until October 3, 2008, within which to provide an alternative proposed supplemental entry or an opportunity to respond to appellee's proposed supplemental entry.

On September 22, 2008, the trial court memorialized the hearing in the following journal entry, which states in pertinent part:

"Hearing held September 19, 2008 on P1 Ronald Luri's Application for Attorney's Fees and Motion to Tax Costs pursuant to Rule 54 and P1 Ronald Luri's Motion for Prejudgment Interest. On a previous date, court ruled upon defendants' motion for new trial or in the alternative for remittitur [sic]. Plaintiff, the prevailing party, pursuant to Ohio Rule of Civil Procedure 52, and Local Rule 19, submitted proposed findings to the Court. *Defendants' counsel requested until October 3, 2008, to submit proposed findings, without objection.* Request granted. Upon receipt of said findings, Court shall incorporate a set of findings into the record as set forth in the above referenced procedural rules * * * 9/22/08 notice issued." (Emphasis added.)

On September 25, 2008, the trial court journalized an entry granting appellee's motion for attorneys' fees, motion for prejudgment interest, and motion to tax costs without opinion.

On October 1, 2008, instead of presenting the trial court with a supplemental journal entry containing its own proposed findings, appellants filed their notice of appeal. In their brief, appellants argue, inter alia, that the trial court's September 22, 2008 entry was made in error because the trial court did not expressly conduct the *Barnes* analysis in the record, despite the fact that appellants were fully apprised of the trial court's intent to do so based upon their involvement at the posttrial motion hearing.

On October 2, 2008, appellants filed an "opposition" to appellee's proposed supplemental journal entry in common pleas court, arguing, inter alia, that their appeal divested the trial court of jurisdiction from placing its findings in the record. This argument contains incorrect statements of fact, given appellants' prior agreement at the September 19, 2008 hearing that they would submit their own proposed entry to the court by October 3, 2008, pursuant to Civ.R. 52 and Loc.R. 19, so the court could finalize ruling on all posttrial motions. The trial court's subsequent journal entry states explicitly that it will conclude its ruling on posttrial motions when it states:

"Defendants' counsel requested until October 3, 2008, to submit proposed findings, without objection. Request granted. Upon receipt of said findings, Court shall incorporate a set of findings into the record." See, 9/22/09 journal entry, supra.

On November 5, 2008, appellee filed a motion to dismiss, or in the alternative for limited remand. Appellee argues that the trial court's September 22, 2008 posttrial order expressly states the trial court's intent to finalize ruling on appellant's motion for new trial or in the alternative for remittitur. We agree.

On November 18, 2008, appellants filed a brief in opposition to appellee's motion to dismiss the instant appeal in this court. Appellants refer to the trial court's September 19, 2008 hearing and the trial court's September 22, 2008 journal entry, arguing that "[a]mong the trial court's errors was its failure to heed the Ohio Supreme Court's recent decision in *Barnes* [supra], which requires trial courts to explain their reasoning for upholding punitive damages in the face of constitutional challenges." Based upon the above-cited exchange between the court and appellants' counsel in which the trial court stated that it considered *Barnes*, the trial court's subsequent entry stating its intention to provide a written *Barnes* analysis at the parties' joint request, and finally, the trial court's acquiescence to appellants' request for a two-week extension to provide the court with its own proposed supplemental entry for the court's consideration in the final judgment entry, we find this argument to be disingenuous at best.

Analysis

When an order contemplates further action, and the judge does not certify any part of the order as final under Civ.R. 54(B), it is not final under R.C.

2505.02. See *Nwabara v. Willacy*, Cuyahoga App. Nos. 79416 and 79717, 2002-Ohio-1279, at 4, citing *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 534, 706 N.E.2d 825, 831.

A review of the record indicates that appellants deprived the trial court of the opportunity to issue a final order by prematurely filing the instant appeal. The trial court's September 22, 2008 journal entry granted appellants' request to supplement the trial court's findings regarding its previous entry denying the motion for new trial or for remittitur by October 3, 2008. Instead of doing so, appellants prematurely filed their notice of appeal on October 1, 2008, arguing solely that the trial court erred in ruling on posttrial motions, despite the fact that appellants were engaged with the trial court in clarifying, and ruling on, those same motions.

In their brief in opposition to appellee's motion to dismiss, appellants argue they were concerned about the losing their 30 days within which to file an appeal under App.R. 4(A), because under App.R. 4(B)(2),¹ the trial court's September 25, 2008 order on the posttrial motions for attorneys' fees, prejudgment interest, and the motion to tax costs decided "all remaining post-trial motions." Inexplicably, appellants argue that no party requested findings

¹App.R. 4(B)(2), provides: "In a civil case * * *, if a party files a timely motion for * * * a new trial under Civ.R. 59(B), * * * the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered."

of fact and conclusions of law under Civ.R. 52, and as a consequence, the tolling provision within App.R. 4(B)(2) is inapplicable. We find this argument unavailing, given appellants' own request for an extension to provide a supplemental journal entry on the September 22, 2008 orders, which were clearly not yet final based upon the record cited above.

Under App.R. 4(A), a party has 30 days to appeal a final judgment. In a civil case, however, when certain postjudgment motions are filed, the time for filing a notice of appeal does not begin to run until the order disposing of all postjudgment motions is entered. App.R. 4(B)(2). One type of postjudgment motion that tolls the time for appeal is a motion for findings of fact and conclusions of law under Civ.R. 52. The parties invoked Loc.R. 19 and Civ.R. 52 on the record. Both rules allow the prevailing party in a civil action to request findings of fact and conclusions of law. As the trial court and appellee's counsel stated at the September 19, 2008 hearing:

"The Court:

"I was actually going to say that the prevailing party would have the ability to present the Court with a more detailed entry and that's what you're doing here today?"

[Counsel for appellee]:

I believe that's right your Honor, yes. Yes, your honor. It's our -

The Court:

You're citing Rule 19 for some reason I thought it was another Rule of Civil Procedure in our court. Is that maybe -

[Counsel for appellee]:

Local rule 19.

The Court:

Oh. Local rule. (Tr. 1850).

*** * ***

The Court:

I was going to ask you, in my mind it's somewhere in the 50s, maybe 52, I think, that says that * * *. (Tr. 1855.)

*** * ***

[Counsel for appellee]:

Your Honor, pursuant to that rule [Civ.R. 52], it's my understanding that the Defendants have an opportunity to submit their own journal entry to you as well or comment on ours. So perhaps we could set a time frame for you to do so before you provide us that edification.

The Court:

How much time would you like, Counsels?

[Counsel for appellants]:

Your Honor, two weeks, please.

The Court:

Okay. No problem. I'll hold it. (Tr. 1856-1857.)

Based upon the statements of appellants' counsel at tr. 1855-1857, their arguments about the propriety of App.R. 4(B)(2) are misplaced, and clearly belied by the record.

The September 22, 2008 order obviously contemplates further action; it is not final under R.C. 2505.02. The trial judge did not include any language certifying any part of the order as final under Civ.R. 54(B) and was deprived of including such findings in the record when appellants brought the instant appeal. The parties were in the midst of arguing posttrial motions when appellants sought an extension to provide a proposed supplemental entry clarifying one of those motions. Instead of so doing, appellants prematurely filed the instant appeal. We therefore dismiss the appeal for lack of a final appealable order. Appellee's motion to dismiss is granted.

Appeal dismissed.

It is ordered that appellee recover from appellants costs herein taxed.

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

Mary Eileen Kilbane

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR

No. 08-092152

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

RONALD LURI,

Plaintiff-Appellee,

v.

REPUBLIC SERVICES, INC., REPUBLIC SERVICES OF OHIO HAULING, LLC,
REPUBLIC SERVICES OF OHIO I, LLC, JIM BOWEN, and RON KRALL,

Defendants-Appellants.

Appeal From The Court Of Common Pleas Of Cuyahoga County
Case No. CV 07 633043, McCafferty, J.

APPELLANTS' OPENING BRIEF

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Counsel for Defendants-Appellants

*Republic Services, Inc., Republic Services Of Ohio Hauling, LLC,
Republic Services Of Ohio I, LLC, Jim Bowen, and Ron Krall*

ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

1. The trial court erred in denying the appellants' motion for judgment notwithstanding the verdict. (9/18/08 Journal Entry.)
2. The trial court erred in failing to bifurcate the trial between liability for compensatory damages and liability for punitive damages. (6/03/08 Journal Entry.)
3. The trial court erred in failing to reduce the excessive compensatory-damages award. (9/18/08 Journal Entry.)
4. The trial court erred in failing to reduce the excessive punitive-damages award. (9/18/08 Journal Entry.)
5. The trial court erred in doubling the attorney-fee award. (9/25/08 Journal Entry.)
6. The trial court erred in awarding prejudgment interest. (9/25/08 Journal Entry.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. To prevail on his claim under R.C. 4112.02(I), plaintiff Ronald Luri had to prove that he would not have been terminated but for the defendants' retaliation. Luri was warned that he would be fired if he did not perform his managerial duties, and he committed to performing those duties, but he concededly failed to do so. Did the trial court err in denying the defendants' motion for judgment notwithstanding the verdict? (Assignment Of Error No. 1.)
2. Only conduct causing injury can give rise to punitive damages under R.C. 2315.21. Luri sought punitive damages based upon conduct that did not cause injury and otherwise failed to prove actual malice by clear and convincing evidence. Did the trial court err in denying the defendants' motion for judgment notwithstanding the verdict as to punitive damages? (Assignment Of Error No. 1.)
3. R.C. 2315.21 prohibits an award of punitive damages against an individual exceeding twice the individual's net worth when the tort was committed. Luri failed to introduce evidence of the net worth of defendants Ronald Krall and Jim Bowen. Did the trial court err in denying their motion for judgment notwithstanding the verdict as to punitive damages? (Assignment Of Error No. 1.)
4. R.C. 2315.21 requires the trial court to bifurcate the trial of liability and compensatory damages from the trial of punitive damages upon the motion of any party, and any judgment rendered without doing so is void. The defendants moved to bifurcate – and Luri agreed – but the trial court refused to do so. As a result, prejudicial information concerning Republic Services, Inc.'s \$3 billion net

- worth infected the jury's determination of liability and compensatory damages. Are the defendants entitled to a new trial? (Assignment Of Error No. 2.)
5. The evidence at trial could not support a compensatory-damages verdict exceeding \$940,000, yet the jury awarded \$3.5 million in compensatory damages. Did the trial court err in not reducing this amount? (Assignment Of Error No. 3.)
 6. When a compensatory-damages award is substantial, due process limits a punitive-damages award to the amount of compensatory damages, if not less. And under Ohio law, a trial court lacks jurisdiction to enter a judgment for punitive damages in excess of two times compensatory damages. The jury awarded \$43 million in punitive damages, nearly 46 times the maximum supportable compensatory-damages award. Did the trial court err in failing to analyze and reduce the punitive-damages verdicts? (Assignment Of Error No. 4.)
 7. Attorneys' fees in the amount of the lodestar are presumed to be reasonable. Luri's counsel asked for additional attorneys' fees based upon considerations that are already factored into the lodestar. Did the trial court err in awarding attorneys' fees that were double the lodestar? (Assignment Of Error No. 5.)
 8. A trial court may not award prejudgment interest on future damages. Luri did not ask the jury to distinguish between past and future damages. Did the trial court err in awarding prejudgment interest on the entire compensatory-damages award? (Assignment Of Error No. 6.)

STATEMENT OF THE CASE

On August 17, 2007, appellee Ronald Luri filed a complaint against defendant Republic Services, Inc. and two of its subsidiaries, Republic Services of Ohio, LLC, Republic Services of Ohio Hauling, LLC, and two of his superiors, Ronald Krall and Jim Bowen (collectively, "Republic"), alleging retaliatory discharge in violation of R.C. 4112.02(I).¹ (Complaint.) On May 28, 2008, Republic moved to bifurcate the trial under the mandatory bifurcation provision of R.C. 2315.21(B)(1) and also under Civ.R. 42(B), and Luri agreed. (5/28/08 Defendants' Motion to Bifurcate Trial; 5/29/08 Plaintiff's Response to Defendants' Motion to Bifurcate Trial.²) But the trial

¹ Luri's other claims were dismissed prior to trial.

² Record excerpts and unreported cases are reproduced in separate appendices.

CERTIFICATE OF SERVICE

I certify that on February 20, 2009, a copy of the Appellants' Opening Brief was served by regular U.S. mail upon the following parties:

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Attorneys for Appellee
Ronald Luri



One of the attorneys for Appellants

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MAY TERM, A.D., 2008

TO-WIT: JULY 3, 2008

RONALD LURI)
)
Plaintiff)
)
vs.)
)
REPUBLIC SERVICES, *et al.*)
)
Defendants)

CIVIL ACTION
CASE NO. CV-633043

VERDICT
(FOR PLAINTIFF)

Compensatory Damages

We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, do find for plaintiff RONALD LURI in the sum of \$ 3,500,000.00 and against the Defendant(s), as compensatory damages on plaintiff's retaliation claim, as decided in Interrogatory #3.

1.
FOREMAN/FOREWOMAN

2.

3.

4.

5.

6.

7.

8.

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MAY TERM, A.D., 2008

TO-WIT: JULY 3, 2008

RONALD LURI)
)
) Plaintiff)
)
) vs.)
)
) REPUBLIC SERVICES, *et al.*)
)
) Defendants)

CIVIL ACTION
CASE NO. CV-633043

VERDICT
(FOR PLAINTIFF)

Punitive Damages

We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, having found for plaintiff RONALD LURI and against defendant REPUBLIC SERVICES, INC., and having awarded plaintiff compensatory damages on his retaliation claim, further find that defendant REPUBLIC SERVICES, INC. is liable to plaintiff for punitive damages and award to plaintiff the additional sum of \$ 21,500,000.00, as decided in Interrogatory #6(a).

1.
FOREMAN/FOREWOMAN
3.
5.
7.

2.
4.
6.
8. _____

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

MAY TERM, A.D., 2008
IO-WIT: JULY 3, 2008

RONALD LURI)
)
Plaintiff)
)
vs.)
)
REPUBLIC SERVICES, *et al.*)
)
Defendants)

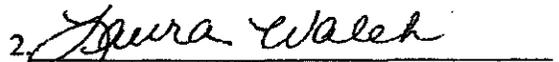
CIVIL ACTION
CASE NO. CV-633043

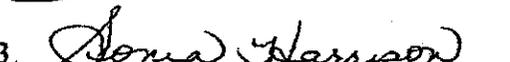
VERDICT
(FOR PLAINTIFF)

Punitive Damages

We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, having found for plaintiff RONALD LURI and against defendant REPUBLIC SERVICES OF OHIO I, LLC, and having awarded plaintiff compensatory damages on his retaliation claim, further find that defendant REPUBLIC SERVICES OF OHIO I, LLC is liable to plaintiff for punitive damages, and award to plaintiff the additional sum of \$ 10,750,000.00, as decided in Interrogatory #6(b).

1. 
FOREMAN/FOREWOMAN

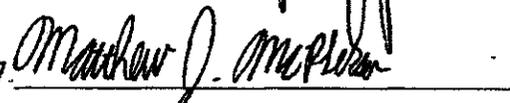
2. 

3. 

4. 

5. 

6. 

7. 

8. _____

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MAY TERM, A.D., 2008

TO-WIT: JULY 3, 2008

RONALD LURI)
)
) Plaintiff)
)
) vs.)
)
) REPUBLIC SERVICES, *et al.*)
)
) Defendants)

CIVIL ACTION

CASE NO. CV-633043

VERDICT

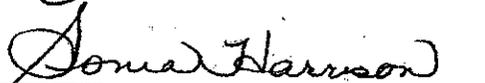
(FOR PLAINTIFF)

Punitive Damages

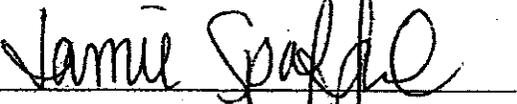
We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, having found for plaintiff RONALD LURI and against defendant REPUBLIC SERVICES OF OHIO HAULING, LLC, and having awarded plaintiff compensatory damages on his retaliation claim, further find that defendant REPUBLIC SERVICES OF OHIO HAULING, LLC is liable to plaintiff for punitive damages, and award to plaintiff the additional sum of \$ 10,750,000.00, as decided in Interrogatory #6(c).

1. 
FOREMAN/FOREWOMAN

2. 

3. 

4. 

5. 

6. 

7. 

8. _____

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MAY TERM, A D , 2008
TO-WIT: JULY 3, 2008

RONALD LURI)
)
Plaintiff)
)
vs.)
)
REPUBLIC SERVICES, *et al.*)
)
Defendants)

CIVIL ACTION
CASE NO. CV-633043

VERDICT

(FOR PLAINTIFF)

Punitive Damages

We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, having found for plaintiff RONALD LURI and against defendant JAMES BOWEN, and having awarded plaintiff compensatory damages on his retaliation claim, further find that defendant JAMES BOWEN is liable to plaintiff for punitive damages, and award to plaintiff the additional sum of \$ 25,205.00, as decided in Interrogatory #6(d).

1.
FOREMAN/FOREWOMAN

2.

3.

4.

5.

6.

7.

8. _____

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MAY TERM, A.D., 2008
TO-WIT: JULY 3, 2008

RONALD LURI)
)
) Plaintiff)
)
) vs.)
)
) REPUBLIC SERVICES, *et al.*)
)
) Defendants)

CIVIL ACTION
CASE NO. CV-633043

VERDICT
(FOR PLAINTIFF)

Punitive Damages

We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, having found for plaintiff RONALD LURI and against defendant RON KRALL, and having awarded plaintiff compensatory damages on his retaliation claim, further find that defendant RON KRALL is liable to plaintiff for punitive damages, and award to plaintiff the additional sum of \$ 83,394.00, as decided in Interrogatory #6(e).

1.
FOREMAN/FOREWOMAN

2.

3.

4.

5.

6.

7.

8. _____

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MAY TERM, A.D., 2008
TO-WIT: JULY 3, 2008

RONALD LURI)
)
) Plaintiff)
)
) vs.)
)
) REPUBLIC SERVICES, *et al.*)
)
) Defendants)

CIVIL ACTION
CASE NO. CV-633043

VERDICT
(ATTORNEYS' FEES)

Attorneys' Fees

We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, having found by clear and convincing evidence that plaintiff RONALD LURI is entitled to punitive damages against defendant REPUBLIC SERVICES, INC. and/or REPUBLIC SERVICES OF OHIO I, LLC and/or REPUBLIC SERVICES OF OHIO HAULING, LLC and/or JAMES BOWEN and/or RONALD KRALL on plaintiff's retaliation claim, further find that:

- (a) Republic Services, Inc.
- (b) Republic Services of Ohio I, LLC
- (c) Republic Services of Ohio Hauling, LLC
- (d) James Bowen
- (e) Ron Krall

(*) ARE/IS liable for payment of plaintiff's attorneys' fees, as decided in Interrogatory #7.

(*) INSERT IN INK: "ARE / IS" or "ARE / IS NOT"

1. [Signature]
FOREMAN/FOREWOMAN
3. [Signature]
5. [Signature]
7. [Signature]

2. [Signature]
4. [Signature]
6. [Signature]
8. _____

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MAY TERM, A.D., 2008
TO-WIT: JULY 3, 2008

RONALD LURI)
)
Plaintiff)
)
vs.)
)
REPUBLIC SERVICES, INC., et al.)
)
Defendants)

CASE NO. CV-07-633043

INTERROGATORIES TO THE JURY

1. Do you find that plaintiff has proven by a preponderance of the evidence that defendant(s) unlawfully retaliated against him?

CHECK ONE: YES NO

Each juror who agrees in the above answer sign his/her name.

1. [Signature]
FOREMAN/FOREWOMAN
2. [Signature]
3. [Signature]
4. [Signature]
5. [Signature]
6. [Signature]
7. [Signature]

2. [Signature]
3. [Signature]
4. [Signature]
5. [Signature]
6. [Signature]
7. [Signature]
8. [Signature]

(A minimum of six jurors must concur with the answer to this Interrogatory)

If the answer of six or more jurors to Interrogatory #1 is "YES,"
• *move to Interrogatory #2.*

If the answer of six or more jurors to Interrogatory #1 is "NO,"
• *do not answer the remaining Interrogatories;*
• *sign the General Verdict in favor of defendants; and*
• *report to the Court that you have completed your deliberations.*

If six jurors cannot agree on an answer to Interrogatory #1, report this to the Court.

2. Which defendants do you find by a preponderance of the evidence have unlawfully retaliated against the plaintiff?

CHECK ALL THAT APPLY:

- Republic Services, Inc.
- Republic Services of Ohio I, LLC
- Republic Services of Ohio Hauling, LLC
- Jim Bowen
- Ronald Krall

1. *[Signature]*
FOREMAN/FOREWOMAN
3. *[Signature]*
5. *[Signature]*
7. *[Signature]*

2. *[Signature]*
4. *[Signature]*
6. *[Signature]*
8. *[Signature]*

(A minimum of six jurors must concur with the answer to this Interrogatory.)

Please proceed to Interrogatory #3.

*If six jurors cannot agree on an answer to Interrogatory #2,
report this to the Court.*

3. If your answer to Interrogatory #1 is "YES," state the amount of compensatory damages to be awarded to the plaintiff on his retaliation claim.

STATE YOUR ANSWER IN FIGURES IN INK:

\$ 3,500,000.00

Each juror who agrees in the above answer sign his/her name.

1. <u></u> FOREMAN/FOREWOMAN	2. <u>Jura Week</u>
3. <u>Donna Harrison</u>	4. <u>Genore A. Dyer</u>
5. <u>Francis P. Pober</u>	6. <u></u>
7. <u>Jamie Spafford</u>	8. <u>Matthew J. McHone</u>

(A minimum of six jurors must concur with the answer to this Interrogatory)

Then sign the General Verdict form relating to Compensatory Damages in favor of plaintiff and proceed to Interrogatory #4.

If six jurors cannot agree on an answer to Interrogatory #3, report this to the Court.

4. If your answer to Interrogatory #1 is "YES" and you have awarded compensatory damages to plaintiff on his retaliation claim in Interrogatory #3, do you find by clear and convincing evidence that any of the defendant(s) acted with actual malice toward the plaintiff?

ONLY THOSE JURORS ANSWERING "YES" TO INTERROGATORY #1 AND AWARDING DAMAGES IN INTERROGATORY #3 MAY ANSWER THIS QUESTION.

CHECK ONE: YES NO

Each juror who agrees in the above answer sign his/her name.

- | | |
|---------------------------------|--------------------------------|
| 1. <u></u>
FOREMAN/FOREWOMAN | 2. <u>Jaura Ubeck</u> |
| 3. <u>Dona Harrison</u> | 4. <u>Senore A. Rogers</u> |
| 5. <u>Francis B. Sobier</u> | 6. <u></u> |
| 7. <u>Jamie Spafford</u> | 8. <u>Matthew J. McPherson</u> |

(A minimum of six jurors must concur with the answer to this Interrogatory.)

If the answer of six or more jurors to Interrogatory #4 is "YES,"
• *proceed to Interrogatory #5.*

If the answer of six or more jurors to Interrogatory #4 is "NO"
• *do not answer Interrogatory #5;*
• *sign the General Verdicts in favor of each and all defendants with respect to Punitive Damages;*
• *then conclude your deliberations.*

If six jurors cannot agree on an answer to Interrogatory #4, report this to the Court.

5. If your answer to Interrogatory #4 is "YES," which defendants do you find by clear and convincing evidence acted with actual malice as defined by this Court's instructions?

CHECK ALL THAT APPLY:

- (a) Republic Services, Inc.
- (b) Republic Services of Ohio I, LLC
- (c) Republic Services of Ohio Hauling, LLC
- (d) Jim Bowen
- (e) Ronald Krall

1. [Signature]
FOREMAN/FOREWOMAN
3. Sonia Harrison
5. Franco B. Robter
7. James Spaffel

2. [Signature]
4. [Signature]
6. [Signature]
8. Matthew J. Thompson

(A minimum of six jurors must concur with the answer to this Interrogatory)

If your answer to Interrogatory #5(a) does not award punitive damages to plaintiff, fill out verdict form in favor of defendant Republic Services, Inc against plaintiff.

If your answer to Interrogatory #5(b) does not award punitive damages to plaintiff, fill out verdict form in favor of defendant Republic Services of Ohio I, LLC against plaintiff.

If your answer to Interrogatory #5(c) does not award punitive damages to plaintiff, fill out verdict form in favor of defendant Republic Services of Ohio Hauling, LLC against plaintiff.

If your answer to Interrogatory #5(d) does not award punitive damages to plaintiff, fill out verdict form in favor of defendant James Bowen against plaintiff.

If your answer to Interrogatory #5(e) does not award punitive damages to plaintiff, fill out verdict form in favor of defendant Ron Krall against plaintiff.

If your answer to Interrogatory #5(a), 5(b), 5(c), 5(d) and/or 5(e) is yes, please proceed to Interrogatory #6.

If six jurors cannot agree on an answer to Interrogatory #5, report this to the Court.

If your answer to Interrogatory #6(d) includes an amount of damages to award plaintiff, against defendant James Bowen, sign verdict for m for punitive damages, against defendant James Bowen and for plaintiff.

If your answer to Interrogatory #6(e) includes an amount of damages to award plaintiff, against defendant Ron Krall, sign verdict for m for punitive damages, against defendant Ron Krall and for plaintiff.

(A minimum of six jurors must concur with the answer to this Interrogatory.)

Please proceed to Interrogatory #7.

*If six jurors cannot agree on an answer to Interrogatory #6,
report this to the Court.*

6. If your answer to Interrogatory #4 is "YES," and you have checked "YES" for a particular Defendant in Interrogatory #5, what amount of punitive damages, if any, do you award to the plaintiff and against that particular defendant(s)?

FILL IN AMOUNTS ONLY FOR THOSE DEFENDANTS FOR WHICH BOXES ARE CHECKED IN INTERROGATORY #5.

- (a) \$ 21,500,000.00 against Republic Services, Inc.
- (b) \$ 10,750,000.00 against Republic Services of Ohio I, LLC
- (c) \$ 10,750,000.00 against Republic Services of Ohio Hauling, LLC
- (d) \$ 25,205.00 against Jim Bowen
- (e) \$ 83,394.00 against Ronald Krall
- (f) \$ 43,108,599.00 Total [add the above (a) - (e)]

1. [Signature]
FOREMAN/FOREWOMAN

2. [Signature]

3. [Signature]

4. [Signature]

5. [Signature]

6. [Signature]

7. [Signature]

8. _____

If your answer to Interrogatory #6(a) includes an amount of damages to award plaintiff, against defendant Republic Services, Inc., sign verdict form for punitive damages, against defendant Republic Services, Inc and for plaintiff.

If your answer to Interrogatory #6(b) includes an amount of damages to award plaintiff, against defendant Republic Services of Ohio I, LLC, sign verdict form for punitive damages, against defendant Republic Services of Ohio I, LLC and for plaintiff.

If your answer to Interrogatory #6(c) includes an amount of damages to award plaintiff, against defendant Republic Services of Ohio Hauling, LLC, sign verdict form for punitive damages, against defendant Republic Services of Ohio Hauling, LLC and for plaintiff.

ONLY THOSE JURORS ANSWERING "YES" IN INTERROGATORY #5 AND AWARDING DAMAGES IN INTERROGATORY #6 SHALL RESPOND TO THIS INTERROGATORY.

7. If your answer to Interrogatory #5 was "YES" and Interrogatory #6 awarded punitive damages to plaintiff against that particular defendant, do you find that that particular defendant should be liable for attorneys' fees to plaintiff?

- | | |
|--|--|
| (a) Republic Services, Inc. | CHECK ONE: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO |
| (b) Republic Services of Ohio I, LLC | CHECK ONE: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO |
| (c) Republic Services of Ohio Hauling, LLC | CHECK ONE: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO |
| (d) James Bowen | CHECK ONE: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO |
| (e) Ron Krall | CHECK ONE: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO |

Each juror who agrees in the above answer sign his/her name.

1. <u></u> FOREMAN/FOREWOMAN	2. <u></u>
3. <u></u>	4. <u></u>
5. <u></u>	6. <u></u>
7. <u></u>	8. _____

(A minimum of six jurors must concur with the answer to this Interrogatory.)

Sign verdict form for attorneys' fees to comport with your answer "YES" or "NO"

*If six jurors cannot agree on an answer to Interrogatory #7,
report this to the Court.*

Please conclude your deliberation and enter a verdict in favor of the plaintiff consistent with your responses to these Interrogatories.

Not Reported in F.Supp.2d, 2008 WL 118066 (N.D. Ohio)
(Cite as: 2008 WL 118066 (N.D. Ohio))

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Ohio.
COLUMBIA GAS TRANSMISSION CORP,
Plaintiff,
v.
FIRST CONGREGATIONAL CHURCH, Defend-
ant.
No. 1:07-cv-661.

Jan. 10, 2008.

Amy M. Smith, Steptoe & Johnson, Clarksburg,
WV, James C. Wright, Melanie Morgan Norris,
Steptoe & Johnson, Wheeling, WV, for Plaintiff.

Bradley D. Barbin, Mark R. Meterko, Maguire &
Schneider, Columbus, OH, John Allen Holmes,
Weldon, Huston & Keyser, Mansfield, OH, for De-
fendants.

ORDER AND OPINION

JAMES S. GWIN, United States District Judge:

*1 On January 8, 2007, the Plaintiff Columbia Gas Transmission Corp. moved to bifurcate the trial's liability and compensatory damage phase from the phase regarding punitive damages. [Doc. 79]. For the reasons stated below, the Court **DENIES** the motion.

This is an action for a declaratory judgment and injunction concerning the width of the right-of-ways regarding certain easements for gas pipelines. The Defendant has counterclaimed for a declaratory judgment, an injunction, and an action of trespass. The Defendant has alleged the Plaintiff's trespass was malicious and in conscious disregard of the Defendant's rights, entitling it to punitive damages. [Doc. 34].

Under Ohio law, a court should bifurcate these phases upon motion of a party, though it has some discretion to deny a motion for reasons of judicial economy.. O.R.C. § 2315.21; *see also Barnes v. Univ. Hosps. of Cleveland*, 2006 WL 3446244, 2006 Ohio App. LEXIS 6251, (Nov. 30, 2006) (finding no abuse of discretion where trial court denied such bifurcation based on a finding that the issues surrounding both types of damages were closely intertwined and bifurcation would result in duplicate testimony and wasted time).

The Court finds this Ohio rule to be procedural, and therefore it does not apply in federal court. Rule 42 of the Federal Rules of Civil Procedure governs this type of a claim for bifurcation of claims or issues. "It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law." *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 n. 7, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).

Under Rule 42, this Court has discretion to bifurcate if it finds it "in furtherance of convenience or to avoid prejudice" or when "conducive to expedition and economy." Fed. R. Civ. Pro. 42(b). In this case, the Court finds that would be conducive to judicial economy to try the entire case as one.

For the reasons stated above, the Court **DENIES** the motion for bifurcation.

IT IS SO ORDERED.

N.D. Ohio, 2008.

Columbia Gas Transmission Corp. v. First Congregational Church
Not Reported in F.Supp.2d, 2008 WL 118066 (N.D. Ohio)

END OF DOCUMENT

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 (Cite as: 2009 WL 361267 (D.Utah))

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Only the Westlaw citation is currently available.

United States District Court,
 D. Utah,
 Central Division.

FARM BUREAU LIFE INSURANCE COMPANY
 and Farm Bureau Mutual Insurance Company,
 Plaintiffs,

v.

AMERICAN NATIONAL INSURANCE COM-
 PANY, American National General Insurance Com-
 pany, American National Property & Casualty
 Company, Darrin Ivie and Kenneth Gallacher, De-
 fendants.

No. 2:03 CV 646(TC).

Feb. 11, 2009.

West KeySummary

Principal and Agent 308 ⇌ 194(I)

308 Principal and Agent

308III Rights and Liabilities as to Third Persons

308III(F) Actions

308k191 Trial

308k194 Instructions

308k194(1) k. In General. Most

Cited Cases

Recruiter was not entitled to a new trial on the ground that the court erred when it refused to instruct the jury about the difference between an independent contractor and an agent. The controlling issue was whether the recruiter had been acting as an agent of the insurance company when he recruited several of a competitor's insurance agents. The jury received four instructions on agency, which outlined what the jury should consider when deciding whether the recruiter was the company's agent. The court concluded that an additional instruction would have been confusing and not relevant. Further, strong testimony supported the finding that the recruiter acted as an agent of the company.

Stephen G. Morgan, Dennis R. James, Jonathan L. Hawkins, Joseph E. Minnock, Morgan Minnock Rice & James, Sara N. Becker, Kirton & McConkie, Salt Lake City, UT, for Plaintiffs.

ORDER AND MEMORANDUM DECISION

TENA CAMPBELL, Chief Judge.

*1 In this diversity action the Plaintiffs Farm Bureau Life Insurance Company and Farm Bureau Mutual Insurance Company (collectively "Farm Bureau") claimed that the Defendants American National Insurance Company, American National General Insurance Company, American National Property & Casualty Company (collectively "American General"), Kenneth Gallacher and Darrin Ivie had conspired to entice Farm Bureau agents and agent recruits to leave Farm Bureau and join American National. At the time of trial, six causes of actions remained against the Defendants: breach of duty of loyalty as an employee against Mr. Ivie; inducing the breach of loyalty against all Defendants except Mr. Ivie; breach of fiduciary duty against Mr. Ivie; inducing the breach of fiduciary duty against all Defendants except Mr. Ivie; tortious interference with prospective economic relations against all Defendants; civil conspiracy against all Defendants. Following a nine-day trial, a jury returned verdicts in favor of Farm Bureau against all Defendants on all causes of action. The jury awarded Farm Bureau \$3,606,214 in compensatory damages and \$62,727,000 in punitive damages.

Defendants have filed motions challenging the jury's verdicts. They seek alternative remedies: judgment as a matter of law in their favor, a new trial or remittitur. For the reasons explained below, the court denies the motions for judgment as a matter of law and the motions for a new trial but does grant the motions for remittitur.

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DISCUSSION^{FNI}

FNI. Because the parties describe much of the factual background of this case in their pleadings, the court will relate facts only when necessary to explain its order.

I. Defendants' Motions for Judgment as a Matter of Law and Motions for a New Trial

"Judgment as a matter of law is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Mason v. Okla. Tpk. Auth.*, 115 F.3d 1442, 1450 (10th Cir.1997). A court must view the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1522 (10th Cir.1997). A court will not weigh the evidence or the credibility of the witnesses and will not substitute its judgment for that of the jury. *Brown v. McGraw-Edison, Co.*, 736 F.2d 609, 613 (10th Cir.1984). Moreover, a court will grant a motion for a new trial only if the verdict is "clearly, decidedly, or overwhelmingly against the weight of the evidence." *Champion Home Builders v. Shumate*, 388 F.2d 806, 808 (10th Cir.1967) (quoting *Locke v. Atchison, Topeka & Santa Fe Ry. Co.*, 309 F.2d 811, 816 (10th Cir.1962)). Defendants raise a number of arguments in support of their contentions. The court now considers each of Defendants' arguments.

a. Alleged Juror Misconduct

Defendants argue that they are entitled to a new trial because Juror Number 8 failed to disclose during voir dire that his deceased grandfather had worked for an organization of farmers in Ohio called Farm Bureau. According to Defendants, this deprived them of an impartial jury in violation of their due process rights.

*2 During voir dire, the court asked the potential

jurors whether they had "any connections with" the insurance companies involved, which the court told potential jurors it would collectively refer to as Farm Bureau and American National. (Mem. Supp. ANPAC ANGIC Mot. J. Matter Law or New Trial or Remittitur, Ex. D; Trial Tr., 55, July 28, 2008, Docket No. 504.) None of the jury panel, including Juror Number 8, answered in the affirmative and the court continued with questioning. Later, the court stressed to the potential jurors that, if selected to serve on the jury, they would "be dealing with insurance companies and insurance agencies and insurance agents." (*Id.* at 61.) The court asked the potential jurors whether any of them felt that they "could not be impartial in such a case." (*Id.* at 61-62.) Juror Number 8 remained silent. (*Id.*) Finally, the court asked whether any of the potential jurors had "family, close family or close friends, who have worked for insurance companies." (*Id.* at 62.) Again, Juror Number 8 said nothing. (*Id.*)

Immediately after trial, counsel for American National starting contacting members of the jury, including Juror Number 8. During his conversation with an attorney for American National, Juror Number 8 revealed the information about his grandfather and told the attorney that Cy Winters, Farm Bureau's corporate representative, reminded Juror 8 to some extent of his grandfather.

Defendants now maintain that Juror Number 8 failed to honestly answer questions during voir dire and had he disclosed the information about his grandfather, Defendants would have had a valid basis to challenge for cause. Farm Bureau disputes Defendants' conclusions and submitted an affidavit from Juror Number 8. (Pls.' Mem. Opp'n Defs.' Mot. New Trial or J. Matter Law, Ex. 1, Aff. Juror 8, Docket No. 603.) In his affidavit, Juror Number 8 explained that although he knew that his deceased grandfather had worked for an organization in Ohio called Farm Bureau, Juror Number 8 remained silent during voir dire because he did not believe that his grandfather had worked for the same company that was a party in the trial and he did not believe

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that his grandfather worked in insurance. Juror Number 8's grandfather had died twenty-seven years earlier and Juror Number 8 "did not have a close relationship with him." (*Id.* 7.) Juror Number 8 had never discussed his grandfather's work with him and did not know what his grandfather thought about his employer. After trial, Juror Number 8 learned that his suspicions were correct and that his grandfather had worked in oil distribution. Juror Number 8 stated that his grandfather's employment with a company called Farm Bureau did not influence in any way his ability to be fair and impartial.

The court is convinced that Juror Number 8 honestly responded to the voir dire questions when he remained silent, even if perhaps, in hindsight, it might have been more prudent had he disclosed the information about his grandfather. His grandfather did not, in fact, work in or have a connection with the insurance business. And Juror Number 8's understanding of his grandfather's work is entirely consistent with the complicated structure of the Farm Bureau entities. American Farm Bureau Federation is a national organization, which includes many individual state organizations that do not necessarily have any connection to each other. These state organizations provide services directly to farmers, and only some of them are in the insurance business. Notably, Ohio's state organization is one of the state organizations that is not in insurance. Because Juror Number 8 believed that his grandfather was involved in oil distribution, not insurance, it is understandable why he concluded that he could remain silent.^{FN2}

FN2. American National also contends that Juror Number 8 is biased because Mr. Winters, who testified on behalf of Farm Bureau at trial, bore a resemblance to the grandfather of Juror Number 8. This argument has no conceivable legitimate connection to Juror Number 8's silent responses during voir dire. Consequently, this argument cannot be viewed as anything but a challenge to the validity of the

verdict. Rule 606(b) bars consideration of such evidence, and as discussed in detail later, the evidence of alleged bias is not admissible.

*3 To preserve the sanctity of verdicts, Rule 606(b) of the Federal Rules of Evidence bars any inquiry into the deliberative process of a jury or a juror's own mental process. The rule reads in relevant part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as ... to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

Fed.R.Evid. 606(b). The rule "applies not just to juror testimony offered at a conventional evidentiary hearing but also extends to any other proceeding, on or off the record, in which the validity of a verdict becomes an issue." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence 2d* § 6074, 479-80 (2007).

The court views Defendants' arguments as an impermissible challenge to the validity of the verdict. The Tenth Circuit's recent decision in *United States v. Benally*, 546 F.3d 1230 (10th Cir.2008), is instructive.^{FN3} Kerry Benally, a Native American, was charged with having forcibly assaulted a federal officer. During voir dire, the trial court asked the jury panel whether the fact that Mr. Benally was a Native American could influence any panel member's consideration of the case and whether any of them had had a negative experience with Native Americans. No juror answered in the affirmative to any of the questions. Mr. Benally was convicted of the charge and, immediately after trial, one of the jurors, K.C., told defense counsel that during the jury deliberations, the jury foreperson had told the other members of the jury that he used to live by an Indian reservation and that when Native Americans were drunk, they were violent. Another member of the jury agreed with the foreperson.

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K.C. also told defense counsel of another discussion in the jury room when jurors talked about "a need to send a message back to the reservation." *Id.* at 1232. During this conversation, another juror said he had family members in law enforcement and had "heard stories from them about what happens when people mess with police officers and get away with it." *Id.*

FN3. Even though this is a diversity action, federal law controls the court's analysis. See *Wilson v. Vermont Castings*, 977 F.Supp. 691 (M.D.Pa.1997), *aff'd* 170 F.3d 391 (3d Cir.1999) (applying federal law in analysis of Rule 606(b) issue in diversity action).

The juror, K.C., signed an affidavit describing these events, and Mr. Benally filed it in support of a motion to vacate the verdict and receive a new trial. Mr. Bennally took the position that the jurors had not been honest during voir dire (the same argument Defendants raise here) and had improperly considered information that was not in evidence. The trial court agreed with Mr. Bennally and granted a new trial.

On appeal, the Tenth Circuit, after a thorough examination of Rule 606(b), concluded that the juror K.C.'s affidavit was inadmissible. The court pointed out that the Rule bars a juror from testifying about matters that occur during jury deliberations and, therefore, K.C.'s affidavit was also inadmissible. The court rejected Mr. Bennally's argument that the affidavit testimony was not covered by the Rule because, according to Mr. Bennally, the testimony was offered to show that a juror had failed to answer honestly during voir dire and was not being offered in connection with an "inquiry into the validity of a verdict or indictment." Fed.R.Evid. 606(b). The court stated: "We cannot accept this argument. Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict and for a new trial.

That is a challenge to the validity of the verdict." *Benally*, 546 F.3d at 1235.

*4 In cases such as this where a party challenges the jury's verdict on the basis of a juror's alleged untruthfulness, the U.S. Supreme Court has fashioned a two-part test. First, the party must show that the juror failed to honestly answer a material question on voir dire and second, show that a correct answer would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 845, 849 (1989). A party cannot satisfy the first part of the test if a juror gives a "mistaken though honest response to a question..." *Id.* at 849-50. The Court noted that to hold otherwise "is to insist on something closer to perfection that our judicial system can be expected to give." Here, Juror Number 8's answers were honest (and might even have been correct).

Accordingly, the court finds that Defendants' motions based on their claims of juror misconduct are without merit.^{FN4}

FN4. Because the affidavit of Juror Number 8 adequately describes the reasons for his silence during voir dire and because the court is completely persuaded that it would reach the same conclusion even if Juror Number 8 testified at an evidentiary hearing, the court denies Defendants' request for such a hearing.

b. Causation

Defendants contend that the evidence was not sufficient to establish that they caused the agents and agent recruits to leave Farm Bureau and join American National. The court disagrees.

In its opposition memorandum, Farm Bureau described in some detail the evidence which showed that Mr. Ivie and Mr. Gallacher, acting as American National's agents, began in 2001 to take steps to cause the agents to leave Farm Bureau. (See Pls.' Mem. Opp'n Defs.' Mot. New Trial or J. Matter

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Law, 11-19, Docket No. 603.) This evidence included a number of emails that clearly outlined Mr. Ivie's and Mr. Gallacher's intentions and actions. (*Id.*) In short, there was more than sufficient evidence to justify the jury's conclusion that Mr. Gallacher, Mr. Ivie and American National caused the agents and agent recruits to leave Farm Bureau.

c. Independent Contractor

Defendants argue that the court erred when it refused to instruct the jury about the difference between an independent contractor and an agent. Defendants argue that because the court's failure was allegedly prejudicial, they are owed a new trial. For the same reasons that the court refused to give the requested instruction, the court now denies their motions based on this contention.

The controlling issue was whether Mr. Gallacher had been acting as an agent when he recruited the Farm Bureau agents. The court gave the jury four instructions on agency, which outlined what the jury should consider when deciding whether Mr. Gallacher was American National's agent. (Jury Instructions Nos. 15-18, Docket No. 499.) The court concluded that an additional instruction regarding the difference between an independent contractor and an agent would be confusing and not relevant.

Moreover, the evidence was clear that Mr. Gallacher was, in fact, acting as American National's agent when he recruited the Farm Bureau agents. For example, Gregory Ostergren testified about Mr. Gallacher's role in recruiting agents for American National.^{FN5} (Trial Tr. vol. 9, 5-45, Aug. 6, 2008, Docket No. 566.) During the relevant time period, Mr. Gallacher was a regional director for all three of the Defendant insurance companies. (*Id.* 23.) Mr. Ostergren indicated that the only way that American National recruited agents was through its regional directors, like Mr. Gallacher. (*Id.* 22.) When regional directors recruit agents, he explained, "they are standing in place of American National...." (*Id.*) Furthermore, Mr. Ostergren admitted that when Mr.

Gallacher was recruiting Mr. Ivie and the Farm Bureau agents he was acting on behalf of American National. (*Id.*)

FN5. Mr. Ostergren described his positions with American National: "I head up the Multiple Line Division at American National. My titles include Executive Vice President of American National Insurance Company, Chairman and President and CEO of American National Property and Casualty Insurance Company and Chairman of Farm Family Insurance Companies." (Trial Tr. vol. 9, 5, Aug. 6, 2008, Docket No. 566.) He later testified that he was also "Chairman, President and CEO" of American National General Insurance Company. (*Id.* 20.)

d. Fiduciary Duty

*5 As Defendants did in their motions for partial summary judgment before trial, they argue that they are entitled to judgment as a matter of law on the fiduciary duty claims. Defendants argue that the court gave an erroneous instruction concerning Farm Bureau's argument that Mr. Ivie had breached a fiduciary duty owed to Farm Bureau. (Mem. Supp. Defs.' Mot. J. Matter Law or Mot. New Trial, 29-31, Docket No. 585.) Moreover, Defendants contend that because there was no evidence that Mr. Ivie used confidential information to compete against Farm Bureau after he resigned, Mr. Ivie should not be liable for a breach of fiduciary duty.

In the order denying Defendants partial summary judgment, the court gave a detailed discussion of its reasons supporting the conclusion that Utah courts would, if faced with the fiduciary duty issue, recognize a cause of action against Mr. Ivie. (Order & Mem. Decision Den. Mot. Partial Summ. J. 12-16, Docket No. 306.) For essentially the same reasons, the court now holds that the jury instruction it gave on fiduciary duty was correct and that the evidence was sufficient to find that Mr. Ivie breached that

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duty. (See Jury Instruction No. 21, Docket No. 499.)

Finally, the court is not persuaded by Defendants' argument that their case was prejudiced by the court's failure to instruct the jury that mere preparations to compete do not violate the duty of loyalty. In its instruction on the duty of loyalty, the court told the jury that Farm Bureau had to prove "[t]hat the breach [of the duty of loyalty] directly caused damages to the Plaintiff." (Jury Instruction No. 19, Docket No. 499.) The instruction made clear that a Defendant could be liable only if the actions were carried out and it resulted in harm to Farm Bureau.

e. Inducement

The jury found Defendants liable on Farm Bureau's claims that the Defendants had induced Mr. Ivie to breach both his duty of loyalty and his fiduciary duty. For a particular Defendant to be liable for inducing Mr. Ivie to breach his duty of loyalty, the court instructed the jury that it had to find that Mr. Ivie had breached his duty of loyalty and that the particular Defendant had "intentionally induced Mr. Ivie to breach or violate his duty." (Jury Instruction No. 20, Docket No. 499.) The court gave a similar instruction on the elements necessary for the jury to find that Defendants had induced Mr. Ivie to breach his fiduciary duty. (Jury Instruction No. 22, Docket 499.) For both instructions, the court told the jury that the phrase "intentionally induced" meant that the particular Defendant knew Mr. Ivie owed Farm Bureau the duty, knew that Mr. Ivie was acting in violation of the duty, "and that the Defendant intentionally gave substantial assistance or substantial encouragement to Mr. Ivie to act as he did." (Jury Instructions Nos. 20 & 22, Docket No. 499.)

Defendants raise three arguments in connection with the claims of inducement. First, they contend that because Utah courts have not recognized the tort of inducing a breach of fiduciary duty or a breach of the duty of loyalty, the court erred in allowing the jury to consider these claims. Defend-

ants raised the same argument in their motions for partial summary judgment, and the court rejected it. (Order & Mem. Decision Den. Mot. Partial Summ. J. 15-16, Docket No. 306.) For essentially the same reasons, the court again concludes that Defendants' argument is not persuasive.

*6 Second, the Defendants maintain that the court erred in including the language "substantial assistance or substantial encouragement" in Jury Instructions 20 and 22. Defendants object to the inclusion of both phrases. They contend that, rather than permit a jury to find inducement liability when there is only encouragement, the "better-reasoned approach is to allow inducement liability only when there is participation." (Defs.' Mem. Supp. Mot. J. Matter of Law or Mot. New Trial, 28, Docket No. 585.) Although Defendants acknowledge that the court's instruction followed the Restatement (Second) of Torts, they maintain that the instruction was improper without evidence of intent to do harm or, at least, negligence. (*Id.* at 26.)

The challenged instructions provide that in order for the jury to find a particular Defendant liable for having induced Mr. Ivie to breach a duty owed to Farm Bureau, the evidence must show that "the particular Defendant intentionally induced Mr. Ivie to breach or violate his duty." (Jury Instructions Nos. 20 & 22, Docket No. 498.) Moreover, as discussed in this order in the context of Defendants' challenge to the sufficiency of evidence that they caused the agents to leave, the court concludes that sufficient evidence exists that Mr. Gallacher, while acting as American National's agent, participated in the plan to lure the agents away from Farm Bureau. Farm Bureau recounted much of this evidence in its memorandum. (See Pls.' Mem. Opp'n Defs.' Mot. New Trial or J. Matter Law, 11-19, Docket 603.)

Finally, Defendants argue that Farm Bureau's attorney admitted in his opening statement that American National did nothing illegal by recruiting Mr. Ivie. Consequently, according to Defendants, the court should grant judgment as a matter of law because of Farm Bureau's "judicial admission."

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(Def's.' Mem. Supp. Mot. J. Matter Law or Mot. New Trial, 34-35, Docket No. 585.) But Defendants' characterization of counsel's statements is incorrect. As Farm Bureau points out, its attorney was, in fact, comparing what Defendants could do legally to what Defendants actually did, which Farm Bureau contended was illegal.

f. Compensatory Damages

The jury awarded Farm Bureau \$3,606,214 in compensatory damages. This amount is consistent with the opinion of Farm Bureau's damage expert, Rick Hoffman, who testified that, in his opinion, Farm Bureau had suffered damages of \$3,793,876.

Defendants advance several arguments in support of their contention that the damage award cannot stand. First, they contend that Mr. Hoffman based his lost profit calculations for the three agent recruits on speculative evidence. Second, they argue that Mr. Hoffman's calculations failed to take into account that Farm Bureau had, within six years, replaced all six of the agents who left Farm Bureau to join American National. Third, Defendants maintain that Farm Bureau was not entitled to damages because one of the six agents, Don Wells, was fired by Farm Bureau before he joined American National. Defendants' final argument is that because one of the agents (Layne Bartruff) ended his contract with Farm Bureau because he was ill, Farm Bureau should not receive damages for his departure.

*7 The court first notes that the jury did not award Farm Bureau the entire amount Mr. Hoffman had testified represented the damages suffered by Farm Bureau. As a consequence, Defendants do not appear to acknowledge that the jury might well have taken into account the various arguments Defendants now raise when making its award. In any event, as discussed below, the court is satisfied that the record supports the jury's compensatory damage award.

Although American National is correct that the

three agent recruits had not yet signed contracts with Farm Bureau, Farm Bureau presented sufficient evidence that the three recruits would have become Farm Bureau agents but for the actions of the Defendants. (Pls.' Mem. Opp'n Defs.' Mot. New Trial or J. Matter Law, 33-36, Docket No. 603.) And regarding Defendants' argument that Farm Bureau had replaced the six lost agents within two years and therefore was not entitled to damages beyond that time, the jury heard evidence that because Farm Bureau wanted to expand its operations in the St. George area, the new agent hires did not replace those who had left. As Cyrus Winters, a vice-president of Farm Bureau, explained, "We would love to have those six agents and three prospective agent candidates back. And, so, to the extent that we were replacing them, we were recruiting for new agents at that time. And I would say that in a perfect world we would still have those people plus the people we have recruited since then." (Trial Tr. vol. 5, 15, Aug. 1, 2008, Docket No. 522.)

Mr. Hoffman described why he did not adjust his calculations to reflect Farm Bureau's replacement of the agents: "And if you think of the way I think of it is you are aiming for ten agents and you have five but are trying to get to ten, want to have ten in your office and somebody takes two, let's say, and then you hire three more, you haven't replaced those two." (*Id.* 89.) In sum, a reasonable juror could conclude that Farm Bureau continued to suffer a loss despite having hired a number of agents after the six agents and three agent recruits left.

Defendants further argue that because Farm Bureau fired one of the agents, Don Wells, shortly before the other agents left, Farm Bureau should not receive any damages attributable to Mr. Wells' departure. However, as Farm Bureau points out, Mr. Wells was fired because of his contacts with American National. (Pls.' Mem. Opp'n Defs.' Mot. New Trial or J. Matter Law, 33-35, Docket No. 603.) The jury heard evidence of Mr. Wells' preparations to join American National before he left Farm Bur-

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eau. (*Id.*) Moreover, despite the fact that Mr. Wells was not, at the time he left Farm Bureau, particularly successful as an agent, Mr. Winters, a Farm Bureau vice-president, testified that Farm Bureau believed that Mr. Wells' performance could be improved and that Farm Bureau "would have liked to retain him." (Trial Tr. vol. 5, 75, Aug. 1, 2008, Docket No. 522.) This evidence was sufficient to support a conclusion that Defendants caused Farm Bureau to suffer a loss when Mr. Wells left.

*8 Finally, Farm Bureau pointed to evidence from which the jury also could have concluded that both Layne Bartruff and his wife Brooke Bartruff left Farm Bureau to join American National. (Pls.' Mem. Opp'n Defs.' Mot. New Trial or J. Matter Law. 35-36, Docket No. 603.) Consequently, Defendants' arguments to the contrary are without merit.

g. *Punitive Damages*

Defendants essentially argue that the evidence presented to the jury did not justify an award of punitive damages. (Defendants also maintain that the amount of punitive damages exceeded the limits set by both Federal and Utah law. The court will discuss this argument in the part of the order dealing with remittitur.)

After the return of the jury's verdict in favor of Farm Bureau against all Defendants, the jury heard the testimony of Mr. Ivie, Mr. Gallacher and Mr. Hoffman, the damages expert. In closing arguments, the attorney for Farm Bureau told the jury that his client was seeking a total of \$30,000,000 in punitive damages. The jury then retired to deliberate. After deliberating, the jury found Mr. Ivie liable for \$322,000; Mr. Gallacher for \$2,400,000; American National Insurance Company for \$37,000,000; American National Property and Casualty Company for \$15,000,000; and American National General Insurance Company for \$7,500,000. Although, as discussed below, the court concludes that these amounts are excessive, the evidence was

more than sufficient to justify an award of punitive damages against each of the Defendants.

Because Farm Bureau gave a fairly extensive description in its opposition memorandum of the evidence concerning Defendants' actions, the court will not go into detail concerning the evidence upon which the jury could base its decision to award punitive damages. (*See* Pls.' Mem. Opp'n Defs.' Mot. New Trial or J. Matter Law, 10-20, 41-45, Docket No. 603.) But the court notes that throughout the trial, the jury saw numerous documents made at the time of the events which supported Farm Bureau's contention that Mr. Gallacher and Mr. Ivie had worked together to lure Farm Bureau's agents and potential agents away from Farm Bureau to work for American National. These documents frequently contradicted the testimony of Mr. Ivie and Mr. Gallacher, which certainly could have lead the jury to believe that Mr. Ivie and Mr. Gallacher were not telling the truth on the stand. The jury might also have been offended by the attempts of Mr. Ivie and Mr. Gallacher to explain the stark differences between their testimony and the documents. For example, Mr. Gallacher claimed that statements he made in written documents were just expressions of his philosophy that if he acted as if events were definitely going to occur, such as the Farm Bureau agents leaving Farm Bureau and joining American National, the events would occur. Finally, because Mr. Gallacher was acting as an agent of American General, the evidence supported an award of punitive damages against American General.

*9 American National Property & Casualty Company and American National General Insurance Company also argue that because no evidence was presented of their specific financial worth, an award of punitive damages against them cannot stand. But this argument is contrary to Utah Supreme Court's holding in *Hall v. Wal-Mart Stores*, 959 P.2d 109 (Utah 1998), in which the court explained that "a directed verdict or j.n.o.v. should not be granted solely on the basis that the plaintiff has not introduced evidence of the defendant's relative wealth."

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Id. at 113. The court in *Hall* also noted that "evidence of relative wealth is still quite important where the excessiveness of a punitive damages award is at issue." *Id.*

II. Defendants' Motions for Remittitur

The jury awarded a total of \$62,722,000 in punitive damages. When this amount is compared to the \$3,606,214 of compensatory damages awarded, the ratio is approximately 17 to 1. Defendants contend that this ratio demonstrates the punitive damage award is excessive under both Utah and federal law.

^{FN6} Farm Bureau responds that this calculation is not the correct way to compare punitive damages to the compensatory damages and when the correct method is used, that is, comparing the compensatory damage award to each Defendant's individual punitive damage award, the ratios are within the acceptable boundaries of both federal and state law.

FN6. One telling indication that the punitive damages award was unreasonable is that even though Farm Bureau's attorney told the jury in closing argument that an appropriate award would be around \$30,000,000, the jury gave double that amount.

To guide courts in evaluating whether a punitive damage award is excessive, the Utah Supreme Court put forward seven factors to consider: the relative wealth of the defendant; the nature of the alleged misconduct; the facts and circumstances surrounding such conduct; the effect of the conduct on the lives of plaintiffs and others; the probability of future recurrences of the misconduct; the relationship of the parties; and the amount of actual damages awarded. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 808 (Utah 1991).

Under federal law, a court looks at three factors in considering the appropriateness of a punitive damage award: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between

the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.^{FN7} *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). According to the Utah Supreme Court, the guideposts in Utah law "substantially reflect the [United States] Supreme Court's directives...." *Campbell v. State Farm Mut. Auto. Ins.*, 98 P.3d 409, 414 (Utah 2004) (citing *Smith v. Fairfax Realty*, 82 P.3d 1064, 1072 (Utah 2003)). After consideration of these factors, the court agrees with Defendants that the punitive damages award is excessive.

FN7. The parties agree that this final factor does not apply in this case.

a. *Reprehensibility of Conduct*

The U.S. Supreme Court noted that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. The Court set forth five guideposts for measuring the reprehensibility of a defendant's conduct: (1) whether the harm was physical or economic; (2) whether the conduct showed an indifference or reckless disregard towards the health or safety of others; (3) whether the victim was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm resulted from intentional malice, trickery, deceit or simply accident. *Id.* at 576-77. Examination of these guideposts leads to the conclusion that Defendants' conduct was not remarkably reprehensible.

*10 First, there is no question that the harm Farm Bureau suffered was economic, not physical. Second, although Defendants acted with indifference and reckless disregard for the contractual and property rights of Farm Bureau, no one's health and safety were at risk. Third, Farm Bureau was not fin-

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ancially vulnerable. However, the fourth and fifth guideposts do apply because Defendants took repeated actions as part of a fairly lengthy and complicated scheme to lure the agents away from Farm Bureau, and Defendants' actions showed a certain amount of deceit.

b. Disparity Between Actual Harm and Punitive Damages Award

The jury found that \$3,606,214 reflected the amount of Farm Bureau's actual harm. The punitive damage award was \$62,722,000. The difference in the two amounts is extreme no matter which ratio the court would find reasonable.

c. The Crookston Factors

Because the first three of the Utah Supreme Court's *Crookston* factors (the nature of the alleged misconduct; the facts and circumstances surrounding such conduct; and the amount of actual damages awarded) are parallel to the federal *Gore* factors applied in the analysis above, those factors need not be independently evaluated here. Accordingly, the court now turns to the remaining four *Crookston* factors.

i. The Relative Wealth of the Defendants

While the evidence showed that American National Insurance Company has a substantial net worth, Farm Bureau presented no evidence of the net worth of the other two corporate Defendants. Mr. Gallacher's net worth is less than half a million dollars and Mr. Ivie has a negative net worth.

ii. The Effect of the Conduct on the Lives of Farm Bureau and Others

Although Defendants' actions caused Farm Bureau to lose agents, in light of the fact that Farm Bureau carried on its business, apparently successfully, the impact of Defendants' actions on Farm Bureau was not "devastating." See *Smith v. Fairfax*, 82 P.3d

1064, 1074, (Utah 2003) (despite fact that defendant's misconduct caused plaintiffs to lose partnership interests in real estate venture, court said that impact was not "devastating.").

iii. The Probability of Future Recurrences of the Misconduct

Nothing in the record indicates that Defendants will engage in this type of conduct again.

iv. The Relationship of the Parties

Mr. Ivie owed Farm Bureau a duty of loyalty and a fiduciary duty. The other Defendants knew of the duties owed by Mr. Ivie, yet, as the jury found, they induced Mr. Ivie to violate those duties. Still, no special relationship existed between the other Defendants and Farm Bureau.

After considering the relevant evidence and the law, the court concludes that an award equal to the amount of compensatory damages is in line with both the state and federal guideposts. Most significant to the court's conclusion is the large amount of compensatory damages awarded by the jury. The U.S. Supreme Court noted that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). Moreover, as discussed above, the Defendants' actions were not sufficiently reprehensible to justify a larger punitive damages award.

*11 For the above-stated reasons, the court reduces the punitive damages award against each individual Defendant based on the same proportion awarded by the jury in its verdicts (e.g., the initial \$15,000,000 in punitive damages assessed against American National Property and Casualty Company

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was 23.92% of the overall \$62,722,000 punitive damages award, so now American National Property and Casualty Company is assessed 23.92% of the new overall punitive damages award). Specifically, the punitive damage awards are reduced to the following amounts: American National General Insurance owes \$431,214.01 (11.96%); American National Property & Casualty owes \$862,428.02 (23.92 %); American National Insurance Company owes \$2,156,070.04 (59.78%); Darrin Ivie owes \$18,513.45 (0.51%); and Kenneth Gallacher owes \$137,988.48 (3.83%).

ORDER

For the foregoing reasons, the court ORDERS as follows:

1. Defendant American National Property & Casualty's and American National General Insurance Company's Motion for Remittitur or Alternative Motion for New Trial (Dkt # 541) is GRANTED IN PART AND DENIED IN PART.
2. Defendant American National Property & Casualty's and American National General Insurance Company's Combined Motions (i) for Judgment as a Matter of Law, (ii) For New Trial, and (iii) For a Remittitur (Dkt # 542) is GRANTED IN PART AND DENIED IN PART.
3. Defendants American National Insurance Company's, Kenneth Gallacher's, and Darrin Ivie's Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial (Dkt # 557 and Dkt # 558) is DENIED.
4. The jury's punitive damages award is reduced as follows: American National General Insurance owes \$431,214.01 (11.96%); American National Property & Casualty owes \$862,428.02 (23.92 %); American National Insurance Company owes \$2,156,070.04 (59.78%); Darrin Ivie owes \$18,513.45 (0.51%); and Kenneth Gallacher owes \$137,988.48 (3.83%).

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio, Eastern Division.
KRAMER CONSULTING, INC. Plaintiff,
v.
Kevin MCCARTHY, et al. Defendant.
No. C2-02-116.

March 8, 2006.

Theodore Richard Saker, Columbus, OH, for
Plaintiff.

Thomas Robert McGrath, McGrath & Breitfeller,
Columbus, OH, for Defendant.

OPINION AND ORDER

MARBLEY, J.

I. INTRODUCTION

*1 This matter is before the Court pursuant to the following motions brought by Defendant, Kevin McCarthy ("McCarthy"): (1) Motion for New Trial and Remittitur; and (2) Motion to Strike Post-Judgment Notice of Filing of Plaintiff's Trial Counsel's Time and Billing Statement.

II. STATEMENT OF FACTS ^{FN1}

FN1. The Statement of Facts is adopted, in part, the Court's findings on Summary Judgment and from those found at trial.

1. Background

Plaintiff, Kramer Consulting, Inc. ("KCI" or the "Company") is a computer consulting firm based in

Dublin, Ohio that developed and markets a computer software product known as "AUTO-CODE0." In May 2000, Plaintiff entered into a business agreement with Defendant, Kevin McCarthy ("McCarthy"), and his company, Xcel Computers ("Xcel"), which had maintained a business relationship with KCI for several years prior to the Parties' transaction.

On May 5, 2000, KCI sold McCarthy 430 shares of its stock (a 43% stake in KCI) for \$107,500 and the Parties signed a stock purchase agreement (the "PA") and an employment agreement (the "EA"), which set forth the terms of McCarthy's employment by KCI. Instead of paying cash for these shares, McCarthy gave KCI a \$3,999 down payment and a cognovit promissory note in the amount of \$107,500. The PA called for McCarthy to pay KCI forty-eight monthly payments of \$2,574.22.

As per the Parties' agreement, McCarthy became a director and the chief financial officer ("CFO") of KCI. Accordingly, McCarthy assumed the bookkeeping and sales management duties for KCI, as well as other duties marketing the AUTO-CODE0 product. Nonetheless, the relationship between KCI and McCarthy deteriorated shortly after it began. As ordered by McCarthy, Xcel began to bill KCI thirty-five dollars per hour for the services performed by Xcel employees who McCarthy hired to perform a number of different tasks for KCI, including bookkeeping. According to Plaintiff, as of March 2001, McCarthy had written checks to Xcel for approximately \$22,930.38.

KCI did not completely object to these charges, but certain KCI officials believed that the Company could not afford to pay for the outside services. Even so, in his capacity as a KCI director and officer, McCarthy *always* paid Xcel's bills ahead of KCI's other operating expenses, and certain bills for KCI's utilities, insurance, payroll taxes, and other business expenses consistently went unpaid.

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Accordingly, the relationship between KCI and McCarthy worsened, and, in 2001, McCarthy and a financially strained KCI severed their employment relationship. Although McCarthy retained his stock in KCI, Company officials informed him that they no longer wanted his services.

Between May 2000 and January 2001, McCarthy made only four payments toward his cognovit promissory note, in addition to his initial \$3,000 payment. In July 2000, McCarthy paid \$3,000, in October 2000, he made two payments of \$8,000 and \$4,000, and in January 2001, he paid \$2,600. In total, this adds up to \$20,600 in payments, none of which were timely. Because McCarthy has made *no* further payments on the Note since January 2001, as of that date, he still owed KCI \$86,900 before interest. *Id.* (emphasis added).

2. Procedural History

*2 Looking to recover the money McCarthy had agreed to pay the Company under the Note, KCI filed its first lawsuit against McCarthy in the Common Pleas Court of Franklin County, Ohio, on December 14, 2001 (the "Cognovit Note Case"). In that case, KCI claimed that McCarthy was in default on the Note and that KCI was entitled to judgment for the balance due thereon. The Common Pleas Court entered judgment against McCarthy on December 20, 2001. McCarthy subsequently removed the case to federal court. Shortly thereafter, on September 6, 2002, this Court granted McCarthy's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) finding that he had a valid defense to KCI's default argument because the Note would not become due until June 1, 2004.

KCI filed a second lawsuit in the Franklin County Common Pleas Court on December 14, 2001 (the "Fraud Case"). In that case, KCI sought damages against McCarthy based upon claims of fraud, conversion, embezzlement, and breach of fiduciary duty. McCarthy also removed the Fraud Case to

this Court. In McCarthy's answer, he asserted a counterclaim against KCI, alleging that pursuant to the EA, KCI was required to repurchase his 430 shares of stock.

On September 26, 2003, Plaintiff's Motion for Summary Judgment in the Cognovit Note Case was denied, and Defendant's Motion for Summary Judgment on Plaintiff's claims in the Fraud Case was granted with respect to Plaintiff's fraud, conversion, and embezzlement claims, but denied with respect to Plaintiff's breach of fiduciary duty claim. Further, Defendant's Motion for Summary Judgment on McCarthy's Counterclaim in the Fraud Case was granted, and Plaintiff's Motion to Strike Defendant's Reply Memorandum in the Fraud Case was denied.

KCI then filed a second Motion for Summary Judgment in the Cognovit Note Case in which it petitioned this Court to grant judgment in its favor because, by that point, McCarthy was in default under the Note, which had become due and payable on June 1, 2004. After hearing Oral Arguments on the matter, on January 25, 2005, the Court granted Plaintiff's Motion for Summary Judgment with respect to Defendant's default status under the Note, but denied it with respect to Plaintiff's request for a judgment in the amount of \$114,342.22, as of July 1, 2004.

Shortly thereafter, the Court ordered the Parties to value Defendant's stock in accordance with Section 10 of the EA, and ordered Defendant to pay Plaintiff the positive difference, if any, in the value of Defendant's stock and the outstanding balance on the Note, in addition to interest as provided in the Note itself. Moreover, the Court ordered Defendant to relinquish its stock certificate to Plaintiff for a credit against the Note if the amount he owed Plaintiff under the Note exceeded the value of his shares of stock. As such, the Parties obtained a valuation of Plaintiff's shares of KCI stock, and the Court ordered that Defendant pay Plaintiff \$127,416.67, with interest at seven percent from June 1, 2005 onward.

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*3 After the Court ruled on the Parties' cross-motions for summary judgment in 2003, the only issue left for trial was KCI's claim against McCarthy alleging that he breached his fiduciary duties as a KCI director and officer. The fiduciary duty claim was tried before a jury from May 16 through May 18, 2005. On May 18, 2005, the jury awarded Plaintiff compensatory damages of \$49,000 and punitive damages of \$150,000. Additionally, the jury concluded that Plaintiff should be awarded attorney's fees to be determined by the Court. *See* Gen. Verdict Forms 1-3.

At the conclusion of the trial, the Court set out a briefing schedule calling for Plaintiff's memorandum and supporting evidence for attorney's fees to be filed on or about June 7, 2005. Accordingly, Plaintiff's Counsel, Theodore R. Saker, Jr. ("Saker"), timely submitted his Post-Judgment Notice of Filing of Plaintiff's Trial Counsel's Time and Billing Statement (the "Notice") to the Court requesting \$22,940.73 in attorney's fees. *See* Pl.'s Notice.

Defendant filed both the Motion for New Trial and Remittitur and the Motion to Strike Plaintiff's Notice of Filing of Plaintiff's Trial Counsel's Time and Billing Statement that are currently at issue. In his Motion for New Trial and Remittitur, Defendant claims that the jury verdict "provide[s] Plaintiff with] excessive damages, influenced by bias, passion, and/or prejudice," and that Plaintiff has been afforded an unlawful "double recovery of compensatory damages from the Defendant." *See* Def.'s Motion for New Trial at 1. Further, Defendant moves that if the Court chooses to deny his motion for a new trial on the issue damages, the Court should, in the alternative, amend the verdict by granting him a remittitur of \$23,148 in compensatory damages to prevent Defendant's double recovery and grant a new trial on the issue of punitive damages. *Id.* Finally, Defendant moves that if the Court denies his motion for a new trial *in toto*, the Court should amend its previous judgment by granting a remittitur of both compensatory damages and punitive

damages. On October 15, 2005, while the foregoing motions were pending before this Court, Defendant filed Chapter 7 Bankruptcy in the Northern District of Indiana Bankruptcy Court (South Bend Division). On October 21, 2005, he filed a Notice of Bankruptcy in this case.

III. Standard of Review

Rule 59 allows parties to move for a court to alter or amend a previously issued judgment. *See* FED. RULE CIV. PRO. 59.^{FN2} Determining whether a new trial is appropriate is within the discretion of the trial court under Rule 59 of the Federal Rules of Civil Procedure. *See Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 637 (6th Cir.2000).

FN2. Rule 59(a) states:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

See FED. RULE CIV. PRO. 59(a).

Generally, courts are permitted to grant a new trial if a previous judgment "is against the weight of the evidence, if the damages award is excessive, or if the trial was influenced by prejudice or bias, or [was] otherwise unfair to the moving party." *See*

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Conte, 215 F.3d at 637. Moreover, a trial court has the discretion to "order a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). The excessiveness of a verdict is primarily a "matter ... for the trial court which has the benefit of hearing the testimony and of observing the demeanor of the witnesses." *Id.* (citing *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir.1986)).

*4 Though a "jury's verdict should be accepted if it is one that could reasonably have been reached," the Supreme Court has explained that, "[w]here [a] verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages." See *Conte*, 215 F.3d at 637; *Dimick v. Shiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

IV. ANALYSIS

A. Whether the Court Should Grant Defendant a New Trial on the Issue of Damages Under Rule 59(a)

In this case, Defendant argues that the evidence adduced at trial does not support the jury's verdict of \$49,000 compensatory damages, \$150,000 punitive damages, and a Court-determined amount of attorney's fees. According to Defendant, the evidence at trial "only support[s] a recovery of a maximum of \$25,930.38 based on the four checks [McCarthy wrote to Xcel plus] \$3,000 in late fees." Therefore, because the jury arrived at \$49,000 in damages, which is close to the \$49,078.38 figure provided by Plaintiff's counsel in his closing argument, the Defendant opines, that the verdict was against the weight of the evidence. Accordingly, Defendant as-

serts that, under Rule 59(a), the Court should grant the Parties a new trial *solely* on the issue of damages. See *Gasperini*, 518 U.S. at 433 (the trial court has the discretion to order a new trial without qualification).

The Plaintiff's counsel, however, disagrees, and, at trial, he expressly laid out for the jury, the arithmetic he used to arrive at the approximately \$49,000 of compensatory damages he requested for the Plaintiff. His explanation follows:

The jury had before it Joint Exhibits 1 through 3, the four checks Defendant wrote to Xcel, that totaled \$22,930.88. The jury had Exhibit P-10, the stock purchase agreement to consider, and was able to calculate the amount Defendant should have paid to Plaintiff from the terms thereof....Defendant promised to make payments on the stock purchase not once but twice (Exhibits J-12 and J-16) and testified that he did not do that. Defendant presented no evidence that he made any effort to pay Plaintiff for the purchase of the stock that resulted in any real gain to the company as contemplated by the [N]ote (Exhibit P-9), the stock purchase agreement (Exhibit P-10) and the employment agreement (Exhibit J-10). The lack of the [\$2,574.22] monthly payments, coupled with Defendant's pillaging of Plaintiff's funds, quite effectively hamstringed Plaintiff from obtaining the benefit of the bargain. The jury was able to refer to Exhibit P-10 and, from the provisions thereof, multiply the amount of the monthly stock purchase payment, \$2574.22, by nine (the number of months Defendant served as CFO), to arrive at the product, \$23,168. At that point, it became a matter of simple addition [the jury added the \$23,168 in delinquent Note payments to the \$22,930.88 in checks written to Xcel to arrive at \$49,078.38].

*5 Pl.'s Memo Contra at 3.

A trial court is within its discretion in remitting a verdict, and/or granting a new trial on the issue of damages only when, after reviewing all evidence in

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the light most favorable to the awardee, it is convinced that the verdict is clearly excessive, resulted from passion, bias or prejudice, or is so excessive or inadequate as to shock the conscience of the Court. *See Jones v. Wittenberg Univ.*, 534 F.2d 1204, 1212 (6th Cir.1976). If there is *any credible evidence* to support a verdict, it should not be set aside. *See Wertham Bag Co. v. Agnew*, 202 F.2d 119 (6th Cir.1953). A trial court may not substitute its judgment or credibility determinations for those of the jury, and it abuses its discretion in ordering either a remittitur or a new trial when the amount of the verdict turns upon conflicting evidence. *See Farber v. Massillon Bd. of Ed.*, 917 F.2d 1391, 1395. Considering the detailed explanation by Plaintiff's counsel laid out above, the Court is persuaded that the Jury based its verdict upon substantial evidence. Hence, the Court cannot overturn the jury's verdict as being "shocking to the conscience." *Id.*

Nevertheless, though the Court will not grant Defendant's motion for a new trial based upon his argument that the verdict was against the weight of the evidence, the Court is persuaded by Defendant's argument that \$23,148 of the Jury's compensatory damages award amounts to an unlawful "double recovery" for Plaintiff.^{FN3} *Id.* at 8.

FN3. According to Defendant, if the Plaintiff were to recover for the four checks and the supposedly deprived \$23,148 in cash flow, he would be compensated twice. *See* Motion for New Trial at 8.

According to Defendant, Plaintiff is not entitled to bring an action to recover on the Note^{FN4} and to claim damages for breach of fiduciary duty on the Note for "depriving Kramer Consulting of cash flow necessary to sustain the company, which resulted in the company's demise." *See id.* Defendant asserts, that, if the Court allowed Plaintiff to pursue both methods of recovery, the Plaintiff would receive the benefit of the \$20,600 that Defendant paid out over the course of his employment as well as

recover the \$23,148 which Plaintiff alleged amounted to "deprived cash flow." *Id.*

FN4. As noted in the Statement of Facts, the Court granted Plaintiff Summary Judgment in its Cognovit Note action, awarding KCI \$127,416.67 on the Note.

The law abhors duplicative recoveries, and a plaintiff who is injured by a defendant's misconduct is, for the most part, entitled to be made whole, not enriched. *See Bender v. City of New York*, 78 F.3d 787 (2d Cir.1996); *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1332 (10th Cir.1997) (double recovery is precluded when alternative theories seeking the same relief are pled and tried together). Accordingly, a plaintiff who alleges separate causes of action is not permitted to recover more than the amount of damage actually suffered; there cannot be double recovery for the same loss, even though different theories of liability are alleged in the complaint. *See Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490 (2d Cir.1995) (a plaintiff is not entitled to a separate compensatory damage award under each legal theory when he relies on alternate theories of liability; instead, he is entitled to one compensatory damage award if liability is found on any or all of the theories).

*6 Though the Court agrees with Plaintiff's assessment that the \$23,148 figure can be viewed as "deprived cash flow" resulting from Defendant's breach of fiduciary duty,^{FN5} the Court is persuaded that Plaintiff has already recovered that \$23,148 when the Court ordered Defendant to pay off the Note on Plaintiff's Motion for Summary Judgment.^{FN6} As KCI already recovered for its loss in its Cognovit Note Case, it is unfair for the Company to recover the same funds again by way of a different claim. As such, the only damages that the Plaintiff should recover based on a breach of fiduciary duty claim are the \$22,930.38, arising from four checks McCarthy paid to Xcel out of KCI's account plus the \$3,000 it owed in late fees. Hence, the Court agrees with Defendant's contention that, should the Court allow Plaintiff \$49,000 compens-

atory damages verdict to stand, it would lead to a palpably unjust result. As such, conditioned on the Plaintiff's agreement, the Court GRANTS Defendant a remittitur of the \$23,148 compensatory damages that he was required to pay the Plaintiff on the Note. Accordingly, Defendant owes Plaintiff \$25,952 in compensatory damages. Should, however, the Plaintiff refuse to remit, the Court will GRANT Defendant's Motion for a new trial on the issue of damages.

FN5. Defendant argues that the \$23,168 Plaintiff owed on the Note is derived from a breach of contract, not a breach of fiduciary duty, and that, therefore, Plaintiff may not recover the funds on its breach of fiduciary duty claim. Nonetheless, Plaintiff counters that the funds actually amount to a deprivation of cash flow arising from Defendant's breach of fiduciary duty. According to Plaintiff, Defendant's positions as both KCI CFO and as a Company director endowed him with statutory duties independent of his contractual liability to refrain from the self-dealing he engaged in, as well as the duty to make timely payments on the Note so that KCI had the funds to pursue the marketing plans that the Company had initially hired him to perform. Nonetheless, Defendant clearly breached these fiduciary duties when he paid Xcel with \$22,930.88 from KCI's account and when he failed to pay off the \$23,168 he owed on the Note. Together, these funds amount to \$49,078.38 in deprived cash flow for KCI. The Court is persuaded by Plaintiff's logic, and considers the \$23,168 to be recoverable under Plaintiff's breach of fiduciary duty claim.

FN6. See *supra* Part II.B. According to the Court's decision granting Plaintiff Summary Judgment on its Cognovit Note Case, Defendant owes Plaintiff \$127,416.67 with interest at 7% from June 1, 2005 onward.

B. Whether the Court Should Grant a New Trial or a Remittitur on the Issue of Punitive Damages

Defendant's arguments do not end with the issue of compensatory damages. Defendant also argues that: (1) he is entitled to a new trial on the issue of punitive damages; and (2) if the Court decides he is not entitled to a new trial, it should at the very least award him a remittitur of punitive damages. See Def.'s Motion for New Trial at 11; OHIO REV.CODE ANN. § 2315.21(D)(2)(b) ("tort reform III").

1. Whether the Court should grant a New Trial on the Issue of Punitive Damages

Section 2315.21(D)(2)(b) of the Ohio Code, which was amended on April 7, 2005, states: "[i]f the defendant is a[n] ... individual, the Court shall not enter judgment for punitive or exemplary damages in excess ... of two times the compensatory damages awarded to the plaintiff from the defendant...." See OHIO REV.CODE ANN. § 2315.21(D)(2)(b). Defendant contends that, applying the statute remedially, he is entitled to a remittitur of punitive damages, which amount to approximately three times the amount of compensatory damages. See Def.'s Motion for New Trial at 12. Plaintiff, however, counters that "tort reform III" does "not apply to the case at bar" because "the claim that survived summary judgment was a *statutory* claim for breach of fiduciary duty pursuant to Ohio Revised Code § 1701.59, not a "tort action" within the meaning of § 2315.21." See Pl.'s Memo Contra at 12. According to Plaintiff, § 1701.59 contains its own remedies provision, and the plain language of the statute makes clear that the legislature had not intended to bar a civil remedy under the statute. As such, the Court must consider the following issues: (1) whether § 2315.21 applies retroactively; and (2) if so, whether § 2315.21 applies in the context of a claim that an officer or director has breached his fiduciary duty to his company.

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a. Whether § 2315.21 Applies Retroactively

*7 In arguing that the amended version of § 2315.21 should apply retroactively to this case, Defendant relies on *French v. Dwigins*, in which the Ohio Supreme Court held that "[i]n the case of procedural or remedial legislation, the legislation will be applied to all proceedings occurring after the effective date regardless of the point of accrual." See 9 Ohio St.3d 32, 458 N.E.2d 827 (Ohio 1984). In *French*, the plaintiff asked court to apply a law that was amended after she had filed her initial wrongful death suit. *Id.* at 828. The law, as amended, would increase the amount of plaintiff's recovery, and the court found that such a ruling was acceptable because the statute changed only the *scope* of recovery, without affecting the *substance* of the defendant's liability. *Id.* (emphasis added).

Defendant concedes that *French* has been questioned by some Ohio state courts, but argues that it should apply to this case because the Ohio Supreme Court has "not overruled it." See Def.'s Motion for New Trial at 12. Nevertheless, the Defendant selectively overlooks *Erie Cty. Drug Task Force v. Essian*, in which the Ohio appellate court noted, "[w]e are aware of a line of cases which seems to exempt procedural and remedial statutes from this presumption. *French v. Dwigins*, 458 N.E.2d at 827; *Kilbreath v. Rudy*, 16 Ohio St.2d 70, 242 N.E.2d 658 (Ohio 1968). Our view is that *Van Fossen and Warren Cty. Bd. of Commrs.* implicitly overruled these cases." See 82 Ohio App.3d 27, 610 N.E.2d 1181, 1183 n. 2 (Ohio App.1992). See *Van Fossen v. Babcock & Wilcox*, 36 Ohio St.3d 100, 522 N.E.2d 489 (Ohio 1988) (holding that in order for the court to determine if the legislature's attempt is consistent with the Constitution, Ohio statutes are presumed to be applied *prospectively only* and finding that the presumption can be overcome only where the legislature specifically states that the statute is to apply to pending cases) (emphasis added); see *Warren Cty. Bd. of Commrs. v. Lebanon*, 43 Ohio St.3d 188, 540 N.E.2d 242, 244-245 (Ohio 1989) (same). In this case, the General Assembly

did not specifically make § 2315.21 applicable to pending cases; thus the amendment is not to be applied to them. Accordingly, § 2315.21 does not apply to negate Plaintiff's \$150,000 punitive damages award.

b. Whether § 2315.21 Applies in the Context of a Breach of Fiduciary Duty Claim

In addition to contesting whether § 2315.21 applies retroactively, the parties also debate whether the "tort reform III" statute is applicable to cases brought under § 1701.59, for breach of fiduciary duty. Defendant argues that though breach of fiduciary duty has been codified by Ohio statutory law, it still has roots in common law, and, therefore, is still considered a tort. See Def.'s Reply at 6. Nonetheless, according to Plaintiff, because § 1701.59 contains its own remedies, absent a clear indication from the Ohio General Assembly that such claims fall within the purview of "Tort Reform III," such remedies do not fall within the limitations contained in § 2315.21. See Pl.'s Memo Contra at 12.

*8 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. 60 Ohio St.3d 135, 573 N.E.2d 1056 (Ohio 1991) ("Had the General Assembly meant to limit the availability of the civil action remedy to those instances in R.C. Chapter 4112 where it was already provided, it would have identified the section to which R.C. 4112.99 applied ... Instead its language applies to any form of discrimination addressed by R.C. Chapter 4112."); see also, *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (Ohio 1990) ("Had the General Assembly intended to bar a civil remedy to workpersons situated similarly to appellant, it certainly knew how to do so," so, as it did not, no such bar applies); *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 677 N.E.2d 308 (Ohio 1997) ("the mere existence of statutory remedies for viol-

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ations of R.C. § 4113.52 does not operate as a bar to alternative common-law remedies for wrongful discharge in violation of the public policy embodied in the Whistleblower Statute"); *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 704 N.E.2d 1217 (Ohio 1990) (despite a lack of specific statutory language, R.C. § 4112.99 authorizes awards of punitive damages in employment discrimination actions).

In *Rice*, the Ohio Supreme Court establishes a paradigm for construing Ohio statutes. See 704 N.E.2d at 1219. The court explains,

[i]n construing a statute, a court's paramount concern is the legislative intent in enacting the statute. To this end, we must first look to the statutory language and the "purpose to be accomplished." In assessing the language employed by the General Assembly, the court must take words at their usual, normal, or customary meaning. Most important, it is the court's duty to "give effect to the words used [and to refrain from] insert[ing] words not used.

Id. (internal citations omitted). Applying this analysis to R.C. § 2315.21, the definition of "tort action" does not apply to the § 1701.59 claim the parties tried before a jury. In that statute, the legislature stated:

[a] director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation.

See OHIO REV.CODE § 1701.59. Considering the above language, the Court finds that the Ohio legislature clearly did not intend to include a breach of fiduciary claim against corporate officers and directors within the purview of the "Tort Reform III" statute. As such, whether it is considered retroact-

ively or prospectively, R.C. § 2315.21 is inapplicable to Plaintiff's claim.

2. Proportional Remittitur

*9 Defendant also argues that should the Court decide that he is not entitled to a new trial on the issue, it should at the very least award him a remittitur of either \$70,861.22^{FN7} or \$98,296^{FN8} in punitive damages.

FN7. The Defendant asserts that, if the Court "[d]etermines that § 2315.21 as amended *does not* apply to this case, the Court must nevertheless grant remittitur of punitive damages in the amount of \$70,861.22." See Def.'s Motion for New Trial at 13. Defendant explains that the compensatory damages the Court should remit amount to \$23,148, which equals approximately 47.24% of the \$49,000 compensatory verdict. See *id.* Therefore, the Court should also grant Defendant a remittitur of 47.24% of \$150,000 which equals \$70,861.22.

FN8. Defendant asserts that granting the Defendant a \$23,148 compensatory damage award would result in \$51,704 in punitive damages that can be awarded by Ohio law. See Def.'s Motion for New Trial at 12 (finding that \$49,000-\$23,148 = \$25,852 (x 2) = \$51,704 and 150,000-\$51,705 = \$98,296).

Unlike with compensatory damages, the jury is given wide discretion to determine whether punitive damages are justified and in assessing the amount of such damages based upon its collective judgment as to the punitive and deterrent effect that such an award would have. See *Smith v. Wade*, 461 U.S. 30, 50-51, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (noting the common law distinction between the mandatory nature of compensatory damages upon a finding of liability and the discretionary nature of

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punitive damages based upon the jury's "moral judgment"); *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (Ohio 1994) (under common law, initial discretion to determine whether to award punitive damages and the amount thereof resides with the jury).

At trial, this Court properly instructed the jury on these standards and the jury awarded Plaintiff \$150,000 in punitive damages. Though Defendant argues that the jury's award of punitive damages for Plaintiff must be proportionally reduced in line with the compensatory damages,^{FN9} Defendant fails to put forth any legal precedent in support of its argument. Further, because the jury had the prerogative, although not the obligation, to award appropriate punitive damages for Defendant's malicious breach of his fiduciary duty, the Court will not now, *sua sponte*, overturn the jury's decision. Therefore, the Court DENIES Defendant's motion for a remittitur of punitive damages.

FN9. *See supra* notes 7 & 8.

B. Motion to Strike

After ruling on Defendant's Motion for a New Trial and/or Remittitur, this Court now considers the merits of Defendant's Motion to Strike the Notice submitted by Plaintiff in support of its request for attorney's fees.

Rule 12(f) permits the court to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. CIV. R. PROC. 12(f).^{FN10} It cannot be gainsaid that, "because of the practical difficulty of deciding cases without a factual record it is well-established that the action of striking a pleading should be sparingly used by the courts. It is a drastic remedy to be resorted to only when required for the purposes of justice."^{FN11} *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir.1953) (citations omitted). Though many courts disfavor motions to strike for fear that they serve only to

delay, they can also expedite cases by removing "unnecessary clutter." *See Heller Fin., Inc. v. Midway Powder Co., Inc.*, 883 F.2d 1286, 1293 (7th Cir.1989).

FN10. Rule 12(f) states:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

FED. RULE CIV. PRO. 12(f).

FN11. Courts interpret "the interests of justice" to include concerns such as ensuring speedy trials, trying related litigation together, and having a judge who is familiar with the applicable law try the case." *See Heller Fin., Inc. v. Midway Powder Co., Inc.*, 883 F.2d 1286, 1293 (7th Cir.1989).

Defendant rests his Motion to Strike the Notice on the following grounds: (1) the question of attorney's fees is moot if the Court decides to award Plaintiff punitive damages, as those would be adequate both to compensate for fees and to fulfill the deterrent and punitive purposes of punitive damages; (2) the Notice and its attachments do not comport with either Local Rule 7.2(a)(1)^{FN12} or Federal Rule of Civil Procedure 54(d)(2)(A);^{FN13} and (3) the time and billing statement attached to the Notice is not evidence and does not meet the requirements for a motion under Local Rule 7.2(e).^{FN14} The Court will consider the merits of each of Defendant's above arguments.^{FN15}

FN12. Rule 7.2(a)(1), "Supporting Memor-

andum and Certificate of Service," states:

[a]ll Motions and applications tendered for filing shall be accompanied by a memorandum in support thereof which shall be a brief statement of the grounds, with citation of authorities relied upon. Except in the case of a motion or application permitted by law to be submitted *ex parte*, a certificate of service ... shall accompany all such papers.

See S.D. OHIO LOC. RULEE 7.2.(a)(1).

FN13. Rule 54(d)(2)(A) provides, "[c]laims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." See FED. R. CIV. PRO. 54(d)(2)(A).

FN14. Rule 7.2(e), "Evidence Supporting Motions-Deadlines," states, in relevant part:

When proof of facts not already of record is necessary to support or oppose a motion, all evidence then available shall be discussed in, and submitted no later than, the primary memorandum relying on such evidence. Evidence used to support a reply memorandum shall be limited to that needed to rebut the positions argued in memoranda in opposition....

FN15. In its Motion to Strike, Defendant also argued that a determination of the award of attorney's fees is not yet ripe for adjudication and should be deferred until the Court rules on Defendant's pending post-trial motions for a new trial and/or remittitur. See Def.'s Motion to Strike at 1. Nonetheless, because this Court considered Defendant's Motion for a New Trial and/or

Remittitur *before* considering the Motion to strike, the issue of attorney's fees is now ripe for review.

a. Whether Attorney's Fees are Justified

*10 Defendant first contends that the jury was not justified in granting Plaintiff attorney's fees. He asserts that, should the Court decide to award Plaintiff punitive damages, those damages alone would be sufficient both to compensate Plaintiff for attorney's fees and to fulfill the deterrent purposes of punitives. See *Digital Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657, 590 N.E.2d 737, 743 (Ohio 1992) ("... if the court concludes that the punitive damages are sufficient to fulfill [deterrent purposes] without the imposition of attorney fees, the court may decline to award such fees, even if a jury has determined that such fees should be awarded").

In support of his argument, Defendant primarily relies upon *Toole v. Cooke*, an Ohio case in which a trial court denied a plaintiff's request for attorney's fees. See 1999 Ohio App. LEXIS 2040 (Ohio App. May 6, 1999). In *Toole*, the plaintiff computed her request for \$250,000 in attorney's fees based upon her contingency fee agreement with counsel. *Id.* Nevertheless, the trial court denied her request, finding that the amount of fees requested was more than half the amount of the plaintiff's total award and that the award of punitive damages alone was sufficient to compensate both plaintiff and her attorney. *Id.*

This Court is persuaded, however, that the case at bar is easily distinguished from *Toole*. See 1999 Ohio App. LEXIS 2040. In this case, the amount of fees and expenses requested for attorney's fees amounts to \$22,940.73, which is roughly ten percent of the jury's award, and, therefore, not unreasonable to the extent of the fees requested by plaintiff in *Toole*. Furthermore, the fee award does accomplish the goals of punitive damages, which is to require McCarthy to bear the costs of bringing

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him to justice. As such, the Court finds that Defendant has not rebutted the presumption that the jury's decision to award Plaintiff attorney's fees was reasonable in light of Defendant's actions.

b. Whether the "Notice" Meets the Requirements of Local Rule 7.2 (a)(1) or Federal Rule of Civil Procedure 54(d)(2)(a)

Next, Defendant contends that because Plaintiff failed to attach a supporting memorandum to the Notice, it must be stricken. See Def.'s Motion to Strike at 3. Under Local Rule 7.2(a)(1) and Federal Rule of Civil Procedure 54(d)(2)(A), a party's claim for attorneys' fees "shall be made by motion," for which the party must provide the supporting materials according to the schedule set forth by the Court. See S.D. OHIO CIV. R. 7.2(a)(1); FED. R. CIV. PRO. 54(d)(2)(A). Essentially, Defendant contends that by filing an unsupported billing statement, Plaintiff's attorney has unfairly prevented Defendant from reviewing and responding to Plaintiffs' arguments and evidence.

In making its assertions, Defendant primarily relies upon *Logan Farms v. HBH, Inc.*, which the Court finds to be distinguishable from the case sub judice. See 282 F.Supp.2d 776, 796 (S.D. Ohio 2003). In *Logan Farms*, the plaintiff filed a motion for a "change of forum" without a supporting memorandum, and the Court denied the motion for failure to support it properly with argument or citation to case law. *Id.* In contrast to Plaintiffs in *Logan Farm*, the jury here has *already* ruled that the plaintiff should recover attorney's fees. *Id.* (emphasis added); see Gen. Verdict Form 3. Hence, whether Plaintiff should have the opportunity to receive attorney's fees is not in dispute, and Plaintiff need only to present evidence supporting its request for attorney's fees-the Notice. It would be a waste of the Court's time to consider Plaintiff's argument in support of attorney's fees when the jury has already decided to award Plaintiff those fees. Here, where the request for attorney's fees was appropriate, the Jury's decision stands.

b. Whether the Plaintiffs' Time and Billing Statements Fail to Meet Requirements of "Evidence" Under Local Rule 7.2.(e)

*11 According to Local Rule 7.2.(e), "[e]vidence shall be presented, in support of or in opposition to any Motion, using affidavits, declarations pursuant to 28 U.S.C. § 1746, deposition excerpts, admissions, verified interrogatory answers, and other documentary exhibits." See S.D. OHIO CIV. R. 7.2(e). Defendant asserts that because Plaintiff has provided no affidavit confirming the accuracy and reasonableness of the attorney's fees attached to the Notice, and has provided no other admissible evidence to which Defendant may respond, the "Notice" does not meet the requirements, and the Court should strike it from the record. See Def.'s Motion to Strike at 6-8.

Plaintiff, however, counters that Rule 7.2(e) is simply inapplicable to Plaintiffs' notice because it is not to be considered a "Motion" under the rules. See Pl.'s Memo Contra at 7. Further, Plaintiff asserts that Jury Interrogatory No. 3 states that if the jury found Defendant liable for attorney's fees, the Court would establish the amount, and there are no provisions in either the Rules of Civil Procedure or the Local Rules that prescribe what form the Notice had to be filed. *Id.*

The United States Supreme Court has prescribed the "lodestar" method for calculating reasonable attorney's fees, which requires a multiplication of the "number of hours reasonably expended on the litigation times a reasonable hourly rate." See *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (quoting *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). The lodestar is strongly presumed to yield a "reasonable" fee. See *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). "Reasonable fees" are to be calculated according to the prevailing market rates in the relevant community, taking into consideration the experience, skill, and reputation of the attorney. See *Blum*, 465 U.S. at 895. "To inform and assist the

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court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence-in addition to the attorney's own affidavits-that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 896 n. 11.

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In this case, the Plaintiff filed a Notice that apprised the Court of the hours of work performed, and the amount of money spent; however, the Notice did not include an affidavit explaining in detail those costs. As such, the Court agrees with Defendant that Plaintiff's Notice fails to provide enough evidence to inform and assist the Court in exercising its discretion to award just and reasonable attorney's fees. *See Blum*, 465 U.S. at 895-96. Therefore, the Court GRANTS Defendant's Motion to Strike the Notice, and orders Plaintiffs to re-file an amended Notice which includes a detailed affidavit supporting Plaintiffs' requested attorney's fees.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for New Trial is DENIED, conditioned upon the Plaintiff's agreement with the Court's decision to GRANT Defendant a remittitur of \$23,148 in compensatory damages. The Defendant's Motion for a New Trial and/or Remittitur on the issue of punitive damages is DENIED. Defendant's Motion to Strike Plaintiff's Notice of Filing of Plaintiff's Trial Counsel's Time and Billing Statement is GRANTED and Plaintiff must file an amended Notice with a memorandum in support thereof by close of business on Wednesday, March 15, 2006. Defendant will then have until Wednesday March 22, 2006 to respond to Plaintiff's amended Notice.

*12 IT IS SO ORDERED.

S.D. Ohio, 2006.

Kramer Consulting, Inc. v. McCarthy

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 (Cite as: 2009 WL 2916894 (N.D. Ohio))

C

Only the Westlaw citation is currently available.

United States District Court,
 N.D. Ohio,
 Eastern Division.
 Barry and Kathy TUTTLE, Plaintiffs,

v.

SEARS, ROEBUCK AND CO., et al., Defendants.
 No. 1:08 CV 333.

Sept. 4, 2009.

David R. Grant, Jeffrey H. Friedman, Friedman,
 Domiano & Smith, Cleveland, OH, for Plaintiffs.

Steven G. Janik, Audrey K. Bentz, Janik, Cleve-
 land, OH, for Defendants.

MEMORANDUM OPINION

DAVID D. DOWD, JR., District Judge.

*1 Pending before the Court is defendants' motion to bifurcate plaintiffs' claim for punitive damages. On June 19, 2009, defendants moved to bifurcate (ECF 48), and plaintiffs opposed on July 2, 2009. ECF 51. Defendants replied on July 9, 2009. ECF 54. For the following reasons, the Court declines to exercise its discretion as granted under F.R.Civ.P. 42(b), and defendants' motion to bifurcate plaintiffs' claims for punitive damages is DENIED.

I. BACKGROUND^{FN1}

FN1. The following facts, taken from plaintiffs' amended complaint (ECF 15), are assumed to be true for the purposes of this decision.

According to the amended complaint (ECF 15), plaintiff Barry Tuttle ("Mr. Tuttle") purchased a

Craftsman Table Saw ("the Saw") from defendants' store in Mansfield, Ohio on February 11, 2006. On that date, plaintiffs allege that defendants, by and through their employees, agents, or representatives, informed Mr. Tuttle that the Saw was fully assembled, and that he would only have to attach the legs in order to use it. However, when Mr. Tuttle opened the Saw at his home, he discovered that it required more assembly than simply attaching the legs. Mr. Tuttle then assembled the Saw.

According to plaintiffs, Mr. Tuttle was operating the Saw on February 14, 2006 in accordance with defendants' instructions and warnings. Plaintiffs allege that during this operation, Mr. Tuttle attempted to cut a piece of wood, which suddenly became jammed. Plaintiffs further allege that this caused the blade guard on the Saw to "lift up," exposing the Saw's blade. The blade then came in contact with Mr. Tuttle's left hand, injuring his thumb and three of his fingers. ECF 15.

II. LAW & ANALYSIS

A. Standard of Review for Bifurcation

Under the Federal Rules of Civil Procedure, a court *may* order a separate trial for one or more separate issues for convenience, to avoid prejudice, or to expedite and economize. Rule 42(b) Fed.R.Civ.P. (emphasis added). The language of Rule 42(b) "places the decision to bifurcate within the discretion of the district court." *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 556 (6th Cir.1996).

B. Choice of Law

Defendants argue that bifurcation of punitive damages is required under Ohio Revised Code § 2315.21(B)(1), which provides that claims for punitive damages *shall* be bifurcated upon motion by

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either party "[i]n a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and for punitive damages." However, defendants' reliance on Ohio law is misplaced.

When a court sits in diversity, as it does in this case, the court must apply substantive state law and procedural federal law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Thus, while the Court must apply state law to the substantive issues raised in this case, it is not similarly bound by state law regarding procedural issues. See *Tarrants v. Owens-Corning Fibreglass Corp.*, 225 F.3d 659 (6th Cir.2000), *Butler v. Yamaha Motor Co, Ltd.*, 1993 EL 95513 (E.D.Pa.) (court applying state products liability law in diversity action not required to apply state procedural law).

*2 Although plaintiffs impliedly contend that bifurcation is not a matter of procedure (ECF 54, at 3-4), ample precedent holds that bifurcation should be governed by federal law in diversity cases. *Hamm v. American Home Products Corporation*, 888 F.Supp. 1037, 1038 (E.D.Cal.1995), citing *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir.1990) (applying Rule 42(b) instead of New York common law requiring that evidence of defendant's wealth be admitted only after jury has otherwise determined that punitive damages are appropriate); *Rosales v. Honda Motor Co., Ltd.*, 726 F.2d 259, 261 (5th Cir.1984) (applying Rule 42(b) instead of Texas law requiring that liability and damages be tried in a single proceeding); *Moss v. Associated Transport, Inc.*, 344 F.2d 23, 25 (6th Cir.1965) (applying Rule 42(b) instead of Tennessee law requiring that liability and damages be tried in a single proceeding).

Under the Rules Enabling Act, 22 U.S.C.A. § 2072, Rule 42(b) was adopted to govern "practice and procedure" of district courts in diversity cases. Therefore, the Court retains its discretion over the issue of bifurcation as granted under Rule 42(b), and the mandatory language of O.R.C § 2315.2

does not apply. See *Hamm*, 888 F.Supp. 1037 (court retained discretion granted by Rule 42(b) in diversity action despite state statute mandating bifurcation).

C. Bifurcation is Unwarranted

As discussed *supra*, a court may bifurcate claims for convenience, to avoid prejudice, or to expedite and economize. The party moving for bifurcation "bears the burden of demonstrating that concerns of judicial economy and prejudice weigh in favor of granting the motion." *Rothstein v. Steinberg*, WL 5716138 (N.D. Ohio 2008), citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, 2388 (2d ed.2006).

1. Defendant's prejudice and jury confusion arguments are unfounded.

In their reply, defendants argue that bifurcation is necessary because they will be "inherently prejudiced" if the claims are tried together. ECF 54 at 1. More specifically, defendants contend that they will be forced to argue simultaneously that (1) no liability exists, and (2) if liability exists, defendant's actions do not rise to the level of malice necessary to support an award of punitive damages. *Id.* Defendants similarly argue that jury confusion will result if the claims are tried together, as the jury will be forced to apply two separate standards, including a "clear and convincing evidence" standard for plaintiffs' punitive damages claims, and a "preponderance of the evidence" standard for plaintiffs' remaining claims. *Id.* at 2.

In *Rothstein*, the defendant made virtually the same arguments in support of his motion to bifurcate claims for punitive and compensatory damages. As the *Rothstein* court noted, however, the defendant would not be prejudiced merely by being forced to advance alternative arguments, as "parties are forced into alternative stances all the time." *Rothstein*, at *2. Thus, the court reasoned, the defendant's prejudice argument "must be an argument that

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a jury would be confused by [the presentation of] alternative arguments," rendering it a mere "variation on his jury confusion argument[.]" *Id.* The court then classified the defendant's jury confusion arguments as unfounded, as juries "are called upon regularly to confront alternative arguments by defendants," and "frequently apply varying standards of proof to different claims." *Id.* Moreover, the court noted that any potential for jury confusion could be avoided through special instructions or cautionary warnings. *Id.*

2. *Defendants' judicial economy arguments are unfounded and wholly conclusory.*

*3 Defendants further contend that bifurcation of plaintiffs' compensatory and punitive damage claims will promote judicial economy, as a finding of liability is required before punitive damages may be determined. ECF 54 at 2. Thus, defendants reason, postponement of punitive damage proceedings will preserve judicial resources, presumably by eliminating the need for further litigation in the event that defendants are found not to be liable.

However, the Court finds this argument to be unfounded, as the facts and evidence related to plaintiffs' claims for punitive and compensatory damages are closely intertwined that many of the same issues, evidence, and witness would be involved in both proceedings if the claims were severed. Under such circumstances, bifurcation of claims is not warranted, as it would hamper judicial economy, rather than promoting it as defendants contend. *Schegel v. Li Chen Song*, WL 4113959 (N.D. Ohio 2008).

III. CONCLUSION

For the foregoing reasons, the Court declines to exercise its discretion as granted under F.R.Civ.P. 42(b), and defendants' motion to bifurcate plaintiffs' claims for punitive damages is DENIED.

The trial in this case will begin on the date certain

of October 13, 2009 at 9:00 a.m.

IT IS SO ORDERED.

N.D. Ohio, 2009.

Tuttle v. Sears, Roebuck and Co.

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EXHIBIT C

No. 10-094908

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

RONALD LURI,
Plaintiff-Appellee,

v.

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

APPEAL FROM THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO
CASE NO. CV 07 633043

**BRIEF OF APPELLEE RONALD LURI
OPPOSING CERTIFICATION FOR CONFLICT**

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Appellants Republic Services, Inc., et al. (“Republic”) seek certification of the following question, based on a purported conflict:

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

As Republic notes, that exact question is currently pending in the Ohio Supreme Court, due to conflicting judgments in *Havel v. Villa St. Joseph*, Cuyahoga App. No. 94677, 2010-Ohio-5251 (“*Havel*”) (holding that R.C. 2315.21(B) is unconstitutional) and *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, Franklin App. No. 09AP-361, 2009-Ohio-6481 (“*Hanners*”) (holding that R.C. 2315.21(B) is constitutional). Unlike *Havel* and *Hanners*, this appeal does not arise from an interlocutory determination of the constitutionality of R.C. 2315.21(B), and this Court’s judgment is not dependent upon any finding of any statute to be unconstitutional (or constitutional). Republic’s motion to certify a conflict therefore should be denied.

I. **ONLY CONFLICTING “JUDGMENTS” ARE PROPERLY CERTIFIED UNDER APP.R. 25**

Appellate Rule 25 implements Section 3(B)(4), Article IV of the Ohio Constitution, which provides that when a court of appeals concludes that its “judgment” conflicts with a “judgment” upon the same question by another district court of appeals, the conflict is to be resolved by the Ohio Supreme Court. The requirement that both decisions pronounce upon “the same question” means that an actual conflict must exist on a rule of law. *Whitelock v. Gilbane Building Co.* (1993), 66 Ohio St.3d 594, syllabus at para. 1. The requirement that the “judgments” of two districts be in conflict means that the rule of law must be dispositive in both decisions. *Pincelli v. Ohio Bridge Corp.* (1966), 5 Ohio St.2d 41, 44 (“Questions certified should have actually arisen and should be necessarily involved in the court’s ruling or decision”);

State v. Hankerson (1989), 52 Ohio App.3d 73, syllabus by the Court at para. 2 (emphasis in original) (“For a court of appeals to certify a case as being in conflict with another case, it is not enough that the *reasoning* expressed in the opinions of the two courts of appeals be inconsistent; the *judgments* of the two must be in conflict”); *Sprung v. E.I. DuPont de Nemours & Co.* (1939), 30 Ohio Law Abs. 278, 34 N.E.2d 41 (“The conflict to which the constitution relates is upon some matter which is so material to the judgment that it is determinative thereof”).

This Court was not asked to determine the constitutionality of a statute and the judgment this Court issued May 19, 2011 does not determine the constitutionality of a statute; it affirms judgment on the jury verdict and remands for the application of punitive damage “caps” to the corporate punitive damage award. Because that judgment does not conflict with the judgment in *Hanners*, Republic’s motion to certify should be denied.

II. THIS COURT’S JUDGMENT DOES NOT CONFLICT WITH THE JUDGMENT IN *HANNERS*

This Court’s May 19, 2011 decision reviewed a final judgment on a jury verdict, including the merged order denying Republic’s pretrial motion to bifurcate. This case was in the same procedural posture as *Barnes v. University Hosps. of Cleveland*, Cuyahoga App. Nos. 87247, 87285, 87710, 87903, and 87946, 2006-Ohio-6266, affirmed in part and reversed in part on other grounds (2008), 119 Ohio St.3d 173 (“*Barnes*”), and this Court followed *Barnes* by construing R.C. 2315.21(B) and Civ. R. 42(B) so as to maintain trial court discretion in bifurcation decisions. While this Court’s reasoning may differ from the reasoning in *Hanners*, there is no conflict between judgments to support certification under Appellate Rule 25.

The decisions in *Hanners* and *Havel* were the product of interlocutory appeals; the appellants in both cases argued that the appealed orders were “final” under R.C. 2505.02(B)(6) because they determined the constitutionality of a tort reform statute. To confirm appellate

jurisdiction, the *Hanners* and *Havel* courts had to first determine whether the appellants had correctly characterized the orders. Both courts agreed that the appealed orders determined the constitutionality of R.C. 2315.21(B) and were therefore final orders. The two courts reached opposite conclusions on whether the trial court had correctly found R.C. 2315.21(B) to be unconstitutional, giving rise to conflicting judgments certifiable under Appellate Rule 25.

Unlike the appellants in *Hanners* and *Havel*, Republic: (1) argued prior to trial that R.C. 2315.16 and Civ. R. 42(B) can and should be read “in conjunction” (Def. Mot. to Bifurcate (R. 50), p. 1; Def. Trial Brief (R. 72), pp. 26-28); (2) did not characterize the order denying bifurcation as a “final” order under R.C. 2505.02(B)(6); and (3) did not claim on appeal that the trial court had erroneously determined R.C. 2315.21(B) to be unconstitutional. Instead, following an unfavorable jury verdict, Republic alleged that the trial court erred “by failing to apply” the statute or, alternatively, that “the trial court abused its discretion by denying the motion to bifurcate.” (Br. of Appts., pp. 12, 13 (fn.5), 16). Consistent with Republic’s pretrial motion practice and appeal, as well as its own prior decision in *Barnes*, this Court interpreted and applied R.C. 2315.21 and Civ. R. 42(B) in conjunction -- i.e., “the rule will control for procedural matters, and the statute will control for matters of substantive law.” (App. Op., ¶8, quoting *Erwin v. Bryan* (2010), 125 Ohio St.3d 519, ¶28.) Thus, while Republic urged this Court to apply R.C. 2315.21(B) in a manner that “removes the discretion” of the trial court (Appellants’ Brief, pp. 12-13), this Court properly interpreted Civ.R. 42(B) and R.C. 2315.21(B) in a manner that maintained trial court discretion in procedural matters that are necessary to the orderly and efficient exercise of jurisdiction.

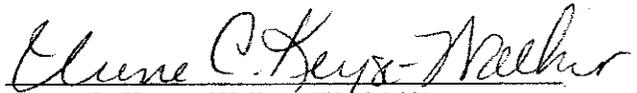
The May 19, 2011 decision goes on to note that this Court’s rejection of Republic’s interpretation of R.C. 2315.21(B) is “further buttressed” by its reasoning in *Havel* that the statute

is unconstitutional when interpreted as usurping all trial court discretion. (App. Op., ¶9.) But that paragraph is not determinative of this Court's judgment. At most, it cites to the *reasoning* in a different case as additional support for the *judgment* in this case. Because judgments, not reasoning, must conflict before a certifiable conflict exists under Appellate Rule 25 (*Hankerson*, 52 Ohio App.3d 73), and because this Court did not review a trial court's determination of the constitutionality of R.C. 2315.21(B), and did not determine the constitutionality of R.C. 2315.21(B), its judgment creates no conflict certifiable under Appellate Rule 25 and Republic's motion should be denied.

III. CONCLUSION

The judgment of this Court is not in conflict with the judgment of the Tenth District Court of Appeals in *Hanners*. Republic's motion to certify a conflict therefore should be denied.

Respectfully submitted,



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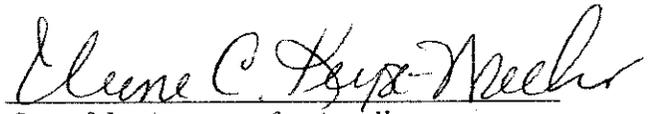
CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 31st day of May, 2011, by U.S. Mail,

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EXHIBIT D

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.

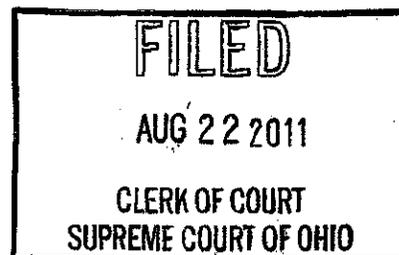
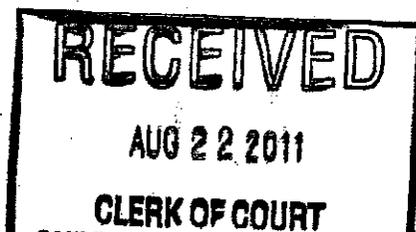
APPELLANT/CROSS-APPELLEE'S MEMORANDUM OPPOSING JURISDICTION OF CROSS-APPEAL

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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 IP* 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 Defs.’ 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.

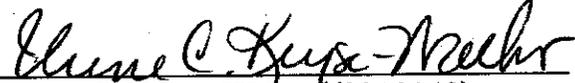
V. CONCLUSION

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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CERTIFICATE OF SERVICE

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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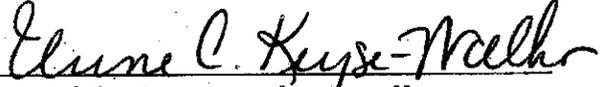

*One of the Attorneys for Appellant
Ronald Luri*

EXHIBIT E

ORIGINAL

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

IN THE SUPREME COURT OF OHIO

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

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

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-Appellant/Cross-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

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

FILED
MAR 16 2012
CLERK OF COURT
SUPREME COURT OF OHIO

\$3.5 million in compensatory damages and \$43 million in punitive damages to a single, discharged employee who suffered no physical harm.

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. This Court accepted the case on two issues: the threshold issue of the constitutionality of the mandatory bifurcation issue, which it “held” for *Havel v. Villa St. Joseph*, Supreme Court Case No. 2010-2148, and a secondary issue concerning the punitive damages cap in R.C. 2315.21(D), for which it ordered briefing and has now scheduled an oral argument. 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, mandates a remand for a new trial consistent with *Havel*, and moots the unrelated issue concerning the punitive damages cap and thus the scheduled oral argument.

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, 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 this 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 certified conflict based on *Havel*. On March 5, 2012, an oral argument was scheduled 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, remand the cause to the trial court

for a new trial consistent with its decision in *Havel*, and, concomitantly, cancel the oral argument scheduled for April 25, 2012.

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

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).

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 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

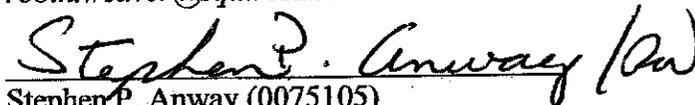
CONCLUSION

For the foregoing reasons, Republic respectfully requests that the Court summarily reverse the Court of Appeals' decision, remand the cause to the trial court for a new trial consistent with its decision in *Havel*, and, concomitantly, cancel the oral argument scheduled for April 25, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular U.S. Mail this 16th day of March 2012

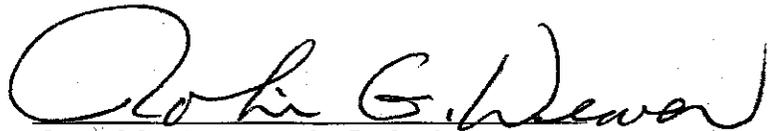
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Krall*

EXHIBIT F

Weaver, Robin G.

From: Weaver, Robin G.
Sent: Tuesday, July 10, 2012 7:21 PM
To: 'Keyse-Walker, Irene'
Subject: RE: Luri v. Republic

Irene,

After returning to the office, I have considered your suggestion outlined in your July 3rd email. I do not see any ambiguity in the Supreme Court's July 3rd decision; the application of *Havel* mandates a new trial in *Luri* because of the error by the trial court in refusing to apply the statutory mandate on bifurcation. If you feel there is ambiguity in the Supreme Court's decision, we invite you to file with the Supreme Court of Ohio a motion for clarification or reconsideration. We, however, do not see any ambiguity.

Thanks,

Robin

From: Keyse-Walker, Irene [<mailto:Irene.Keyse-Walker@TuckerEllis.com>]
Sent: Tuesday, July 03, 2012 5:14 PM
To: Weaver, Robin G.
Subject: Luri v. Republic

Robin,

Per your request, this will summarize my suggestion in our telephone conversation this same date. As a result of Supreme Court remand of this matter, the Eighth District panel must now consider its resolution of Republic's First Assignment of Error (Paragraphs 7-9 of the decision) in the context of a "constitutional," as opposed to an "unconstitutional" bifurcation statute. I suggested that we consider submitting a joint proposal to the Eighth District on how to proceed in carrying out the Ohio Supreme Court's remand "for the application of *Havel v. Villa St. Joseph . . .*"

The proper application of the Ohio Supreme Court decision in *Havel* is not an issue that has been briefed for the appellate panel, so guidance from the parties would seem appropriate. But it is a limited issue. My suggestion is that the joint motion propose that the parties each file a brief representing their view of the correct application of *Havel* and that we request oral argument to address any questions the Court might have. While we could file a motion on our own, I think the Court would appreciate having the parties in agreement over the best way to proceed. Let me know what you think. Thanks. -IK-W

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