

ORIGINAL

Case No. \_\_\_\_\_

# In the Supreme Court of Ohio

14-0481

ABBOTT LABORATORIES, ET AL., DEFENDANTS-APPELLANTS

v.

DAVID A. JELINEK, PLAINTIFF-APPELLEE

FILED

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CLERK OF COURT  
SUPREME COURT OF OHIO

ON APPEAL FROM THE COURT OF APPEALS, TENTH APPELLATE DISTRICT  
FRANKLIN COUNTY, OHIO, CASE NO. 11-APE-966

## MEMORANDUM IN SUPPORT OF JURISDICTION FOR DEFENDANTS-APPELLANTS ABBOTT LABORATORIES ET AL.

TUCKER ELLIS LLP  
*Irene C. Keyse-Walker (0013143)*  
925 Euclid Avenue, Suite 1150  
Cleveland, OH 44115  
(216) 592-5000

WINSTON & STRAWN LLP  
*James F. Hurst (pro hac vice pending)*  
*Derek J. Sarafa (pro hac vice pending)*  
*Samantha L. Maxfield (pro hac vice pending)*  
35 West Wacker Drive  
Chicago, IL 60601  
(312) 558-5600

VORYS, SATER, SEYMOUR  
AND PEASE LLP  
*Michael G. Long (0011079)*  
*Lisa Pierce Reisz (0059290)*  
52 East Gay Street, P.O. Box 1008  
Columbus, OH 43216-1008  
(614) 464-6400

WINSTON & STRAWN LLP  
*Steffen N. Johnson\* (pro hac vice pending)*  
1700 K Street, N.W.  
Washington, DC 20006  
(202) 282-5000

\*Counsel of Record

*Counsel for Defendants-Appellants Abbott Labs., Karl V. Insani, and Gregory A. Lindberg*

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**SUGGESTION OF DEATH BY COUNSEL FOR DEFENDANTS-APPELLANTS**

Pursuant to Ohio Civ. R. 25(E), counsel for Defendants-Appellants hereby suggest upon the record of this Court the death of Defendant-Appellant Karl V. Insani on March 14, 2014. Counsel learned of Mr. Insani's passing on March 20, 2014.

**INDEX TO PRIOR OPINIONS IN THIS CASE CONTAINED IN ADDENDUM**

Pursuant to Ohio Supreme Court Rule of Practice 7.02(D), the following opinions in this case are included in the addendum attached to this brief:

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## REASONS WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This appeal arises out of a split, partially reconsidered ruling that confirms the need for the Court's guidance on two issues of public and general interest: (1) What standard governs whether evidence is relevant to a showing that an employer's stated reason for an adverse employment action is "pretextual"?; and (2) When reviewing alleged errors in retrials ordered in prior appeals, are appellate courts bound by their own prior interpretations of their mandates?

*The pretext issue.* The Tenth District's 2-1 ruling (attached) overturns a unanimous (8-0) jury verdict rejecting Plaintiff Jelinek's age discrimination claim and orders a *fifth* trial in this 16-year-old case. The basis for that decision was a single trial court evidentiary ruling that certain testimony was inadmissible to show "pretext." But as Judge Dorrian explained in a thorough dissent (A4-11), when analyzed under the federal pretext standard set forth in *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078 (6th Cir. 1994), the evidence at issue is not even relevant. Under *Manzer*—which nine appellate districts have adopted—plaintiffs who dispute "the credibility of [an] employer's explanation" are "required to show ... (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *Id.* at 1084 (quoting *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993)).<sup>1</sup> Yet the majority ignored *Manzer*, and this Court has yet to decide whether it is binding. The Court should grant review and either confirm that all Ohio courts must apply *Manzer* or establish another clear pretext standard.

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<sup>1</sup> *Frantz v. Beechmont Pet Hosp.*, 117 Ohio App. 3d 351, 359 (1st Dist. 1996); *Hapner v. Tuesday Morning, Inc.*, 2d Dist. Montgomery, 2003-Ohio-781, ¶¶17, 18; *Miller v. Potash Corp. of Saskatchewan, Inc.*, 3d Dist. Allen, 2010-Ohio-4291, ¶25; *Horsley v. Burton*, 4th Dist. Scioto, 2010-Ohio-6315, ¶18; *Pitts-Baad v. Valvoline Instant Oil Change*, 5th Dist. Stark, 2012-Ohio-4811, ¶68; *Detzel v. Brush Wellman, Inc.*, 141 Ohio App. 3d 474, 483 (6th Dist. 2001); *Chandler v. Dunn Hardware, Inc.*, 168 Ohio App. 3d 496, 504-05 (8th Dist. 2006); *Wilson v. Rosemont Country Club*, 9th Dist. Summit, 2005-Ohio-6606, ¶14; *Hoffman v. CHSHO, Inc.*, 12th Dist. Clermont, 2005-Ohio-3909, ¶26.

Pretext issues arise in most employment discrimination cases filed in Ohio—thousands of cases annually.<sup>2</sup> And in applying Ohio employment discrimination law, this Court has directed Ohio courts to follow the *McDonnell-Douglas* framework and “federal case law interpreting Title VII.” *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm’n*, 61 Ohio St. 3d 607, 609-10 (1991). Apart from that, however, the Court has said only that a showing of pretext requires proof “that the [employer’s nondiscriminatory] reason was false, and that discrimination was the real reason” for the employer’s actions. *Williams v. Akron*, 107 Ohio St. 3d 203, 206 (2005). Indeed, in the context of jury instructions (rather than relevance), plaintiff’s own counsel has urged the Court to adopt the “standard in *Manzer*,” arguing that “*Williams* did not define the meaning of ‘false,’” and that “different Ohio District Court of Appeals us[e] different standards for defining pretext.” Jurisdictional Mem. 2, 5 in *Peters v. Rock-Tenn Co.*, No. 2011-1635 (filed Sept. 26, 2011). In short, the Court has provided no specific, concrete guidance as to what types of evidence will carry the plaintiff’s burden on pretext—leaving the lower courts at sea concerning when to grant (or deny) summary judgment, JNOV, or a new trial on pretext issues.

The need for guidance is on full display here. As part of a 225-person reduction in force in which most employees lost their jobs, Abbott offered Jelinek, a mid-level manager in Columbus, a sales job in Lake County, Indiana, at the same salary and benefits. It is undisputed that no jobs were available in Columbus, that it was Abbott’s policy to transfer employees within the same geographic region, and that the only open post in the region was the Lake County position. In addition, the first jury rejected Jelinek’s claim that his transfer to Lake County—which he said was “collapsed” and “not a desirable place”—was a “constructive discharge.” Over Judge Dorian’s strong dissent, however, the court below deemed it reversible error for the trial court in a

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<sup>2</sup> By comparison, from 2009 to 2010, the Ohio Civil Rights Commission received 4,121 charges of discrimination. OHIO CIVIL RIGHTS COMM’N, ANNUAL REPORT 2010 11 (2010).

later trial to exclude Jelinek's evidence that he had "no choice" but to quit when Abbott transferred him to Lake County—a territory he *still* claims is "collapsed" and "not a desirable place." Why? Because this evidence purportedly could "show that Abbott's explanation for sending Jelinek to an undesirable territory...was pretext to force him into retirement." A3.

The majority did not say, however, how evidence concerning Jelinek's view of the Lake County territory was probative of *Abbott's* state of mind, or to the *falsity* of Abbott's stated basis for acting. It is not. It may have shown that the policy had unfavorable effects on Jelinek. But as Judge Dorrian explained, under a straightforward application of *Manzer*, evidence regarding the "state of the Lake County Indiana territory is not probative as to the falsity of defendants' policy of transferring employees within their regions" (A8) or otherwise "relevant to the element of pretext" (A26). In short, Jelinek's dislike for Lake County has no logical connection to any "pretext" by Abbott—it relates only to *his* state of mind.

Review is needed to bring clarity to the Ohio courts' analysis of pretext issues, which arise in nearly every employment discrimination case that progresses beyond the pleading stage.

*The law of the case issue.* Although this Court has opined on the need for trial courts to respect the law of the case, it has yet to consider whether appellate courts must likewise comply with their own decisions in reviewing subsequent trial court proceedings. But trial courts should not be reversed for respecting the law of the case, and this Court's guidance is needed to ensure consistency of results—and to avoid endless litigation—at all levels of the Ohio judiciary.

The framework for the evidentiary ruling on "pretext" was set when Jelinek made a strategic decision to assert separate claims for constructive discharge and age discrimination. That strategy gave him two bites at the apple with the jury. But it also meant that the adverse verdict on constructive discharge—affirmed by the Tenth District—removed that claim from the case.

Jelinek's counsel could not accept this. He proceeded to cause two mistrials—one by encouraging the jury to search the Internet about Abbott and prior proceedings, and one by violating an express order not to refer to the “constructive discharge” theory rejected by the first jury. Faced with a lawyer who was exceedingly difficult to control, Judge Schneider entered an order drawing a bright line as to relevant evidence: The fourth trial would “exclude[] a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim.” A60-61.

That ruling was based on a logical reading of the Tenth District's earlier mandate, gave effect to the prior jury verdict, and was later upheld by the Tenth District when Jelinek sought mandamus review. A37. Both a magistrate judge of that court and a three-judge panel confirmed that Jelinek had adopted a trial strategy—reflected in jury interrogatories, trial court judgments, Jelinek's appellate briefs, and the appellate decision itself—that treated constructive discharge as a separate claim. A37-55. Moreover, that decision was affirmed by this Court, resolving liability and excluding associated damages and allegations from the retrial. A35.

In light of this history and the overall “atmosphere of the trial” (A77-78 (quotation omitted))—the fourth in this case—it is hard to imagine how the trial judge could have done *anything but* exclude Jelinek's testimony that his new territory was “collapsed” or “unviable.” The first jury rejected precisely those allegations. Yet the majority below did not even acknowledge the appellate court's 2010 mandamus ruling—affirmed by this Court—that the trial court acted “in accordance with this court's mandate” in “exclud[ing] a retrial of the constructive-discharge claim, *including facts or allegations that relate to that claim.*” A53-54, A52 (emphasis added). Instead, calling it reversible error to exclude evidence of the territory's condition—offered to show that Jelinek's transfer was “pretext to force him into retirement” (A3)—the majority effectively penalized the trial court for abiding by the appellate court's own earlier mandate.

The split ruling below thus directly undermines the law of the case, which “is necessary to ensure consistency of results in a case” and “to avoid endless litigation by settling the issues.” *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984). Both appellate courts and trial courts must respect that doctrine. This Court’s guidance is needed to make that clear, especially after *State v. Forrest*, which held that “a three-judge panel of appellate judges—instead of the full court—may ... determine whether an intradistrict conflict exists.” 136 Ohio St. 3d 134, 134 (2013).

This case presents an ideal vehicle for resolving the uncertainty in Ohio law. The issues are sharply presented in four appellate decisions, as well as this Court’s affirmance of the Tenth District’s decision on mandamus, interpreting its prior mandate. By granting review, providing a clear pretext standard, and setting definitive guidelines for respecting the law of the case, this Court can bring this case to an end and prevent similarly protracted litigation—and the attendant waste of both judicial and private resources—in the future. *State v. Lester*, 130 Ohio St. 3d 303, 306 (2011) (granting review where prior law had “created confusion and generated litigation”). It should not take five trials and sixteen years to resolve a single age discrimination suit.

#### STATEMENT OF FACTS AND OF THE CASE

This case arises from events in 1997, when Abbott transferred and demoted Jelinek as part of a business-wide reduction-in-force affecting 225 employees. Most employees lost their jobs. But all seven Primary Care District Managers (“PCDM”) within Abbott’s Ross Products Division—Jelinek’s job—were offered other jobs at the same salary and benefits. Jelinek has never argued that eliminating his job was discriminatory, and he was offered a sales position in Lake County, Indiana. Yet three months after accepting that offer—and just four days after starting the job—Jelinek, then 55 years old, quit and sued for age discrimination.

Jelinek first sued in 1998, and the case comes to the Court after sixteen years of litigation. Thus, to aid in understanding the context of the evidentiary ruling at issue, we briefly review the

case's tortured history, which includes four trials—two of which ended in mistrials caused by Jelinek's counsel's misconduct—four Tenth District appeals, and one other trip to this Court.

**A. The first trial and the ensuing appeal**

After a summary judgment ruling for Abbott and appeal, the case was first tried in 2002. Jelinek raised three claims: age discrimination, constructive discharge, and promissory estoppel.

Although it found age discrimination, the jury rejected Jelinek's constructive discharge and promissory estoppel claims. The constructive discharge claim focused on the character of Lake County, which he claimed was a poor sales territory. A special interrogatory relating to constructive discharge asked the jury: "If you found for Plaintiff on his claim of age discrimination with respect to his transfer to Lake County, Indiana, did Plaintiff prove by a preponderance of the evidence that the transfer resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign?" The jury answered "No." A46-47.

The trial court later granted JNOV to Abbott on the age discrimination claim, alternatively granting a new trial if JNOV was reversed on appeal. Jelinek appealed, but did not challenge the constructive discharge verdict. He asserted only "that the trial court erred in excluding evidence relating to his claim of constructive discharge." A81. In 2005, in *Jelinek II*, the appellate court "overrule[d] [that] assignment of error." A83. The court treated age discrimination and constructive discharge as distinct claims. It noted that Jelinek "failed to prove that he had been constructively discharged," but ordered retrial on the "age discrimination claim" only. A82, A80. Thus, the constructive discharge claim did not survive.

**B. The second and third trials, each of which ended as a mistrial due to Jelinek's counsel's misconduct**

The case then returned to trial court, but the second trial—and then the third trial—ended in mistrials caused by Jelinek's counsel. In the 2007 trial, counsel flagrantly violated two orders.

One order bifurcated liability from testimony on punitives or Abbott's net worth. The other barred references "to the outcome of the first trial," and the court specifically voiced concern that the jury not end up "Googling" the case. Jelinek's counsel joked that maybe someone would "blurt it out," causing the court to state: "[I]f that happens we will be trying this case again."

It happened. During voir dire, counsel asked: "How many people on the panel ... use Google regularly?" He also said that if the jury "wanted to look up information on a company ... , you can do that." Counsel later referred to the "history" of the "ten-year old case," and said "[p]rior proceedings ... said we can't ask you for" any "losses ... involving wages."

These actions were calculated—the first "hit" that came up in a Google search for "Jelinek v. Abbott" was an article entitled, "Big win for long-time employee in age bias suit," describing the prior \$26 million verdict. And interviews revealed that three jurors did exactly as Jelinek's counsel suggested: They Googled the case, learned about the earlier verdict and the excluded evidence, and discussed what they learned with other jurors.

Judge Bessey granted a mistrial, finding counsel's actions "in direct contravention" of his ruling: "you used the term 'Google,'" which was "specifically discussed." He later noted: "when you just blatantly throw it out as you blatantly did the last time through, when you started talking to the jury about going on the Internet ... I have to wonder about your motivation. ... I don't accept your explanation that you didn't know it was there. ... I just flat out don't accept it."

A third trial, in 2008, likewise ended as a mistrial due to Jelinek's counsel's infractions. Most notably, he violated an order "preclud[ing] [him] from referencing" any "constructive discharge." Despite repeated warnings, counsel told the jury: "[Jelinek's] retirement pay would actually go down because of the territory assignment. So what did he do? *He said, this is a constructive discharge*, and he sent the company a letter, and he quit." (Emphasis added.) Counsel

also raised prohibited back pay issues. As the court noted: “You have a habit of just going ahead and doing whatever you want to do.” “[T]his is why we had the mistrial the last time. And it—you seem to be repeating it again.” The judge soon declared a second mistrial.

**C. Judge Bessey’s recusal**

The same misconduct led the judge to recuse himself, stating: The “unprofessional conduct of Plaintiff’s counsel makes it impossible for me to maintain an appropriate degree of professional impartiality.” Counsel made “misstatements of law” and “fact,” “totally emasculated” the “rights of the parties,” and “blatantly” blurted out prohibited information. Judge Bessey “seriously considered recording Mr. Kelm’s conduct and turning it over to the disciplinary counsel.”

**D. The reassignment to Judge Schneider and the mandamus action over whether Jelinek could present evidence related to his constructive discharge claim**

The case was reassigned to Judge Schneider, who likewise barred retrying the constructive discharge claim and issued an order defining the proper scope of the evidence in the fourth trial. As he stated, *Jelinek II* “distinguished between the jury’s finding that plaintiff was discriminated against” and “[its] finding that plaintiff did not show that working conditions were so intolerable so as to constitute constructive discharge,” treating them as “separate” and allowing only the former to proceed. A59. The court thus “exclude[d] a retrial” of “the constructive discharge claim, *including facts or allegations that relate to that claim.*” A60-61 (emphasis added).

Jelinek then sought mandamus. But a Tenth District Magistrate rejected his request (A44-55) and the court affirmed, both adopting the Magistrate’s findings as its own (A43) and issuing its own opinion (A37-43). Jelinek never “challenge[d] the trial court’s treatment of his constructive theory as a separate claim,” the court held, and *Jelinek II* “did not order the retrial of ... constructive discharge.” A40, A38. Nor could Jelinek recast his constructive discharge as “[an] element[] of his ... age discrimination claim” (A38-39), as the trial court acted “in accord-

ance with this court's mandate" in "exclud[ing] a retrial of the constructive-discharge claim, *including facts or allegations that relate to that claim.*" A53-54, A52 (emphasis added).

Jelinek appealed to this Court, which rejected his theories yet again. "The court of appeals is in the best position to interpret its own mandate," the Court explained, and it "expressly determined that its prior mandate ... did not order retrial of Jelinek's constructive-discharge theory." A34. The case thus returned to the trial court for a fourth trial.

**E. The fourth trial and the overwhelming evidence supporting the verdict**

In 2011, after hearing seven days of evidence and testimony from ten witnesses, the jury unanimously (8-0) rejected Jelinek's claims. Overwhelming evidence supported the verdict.

In 1997, Karl Insani—head of Abbott's Ross Products Division, and a man of roughly Jelinek's age—was directed to cut 225 jobs from the division. One of his easiest decisions was cutting the PCDM positions, an extra layer of management. Those jobs had only recently been created, and had not added sales. So Insani asked his regional managers to recommend new jobs for the PCDMs within their regions. Six of the seven PCDMs, ranging in age from 29 to 55, were offered lower-level jobs, and one was offered a lateral move—all within their regions.

The only opportunity in Jelinek's region was a sales position in Lake County, Indiana. Insani offered Jelinek that job—with the same salary and benefits—and Jelinek accepted it. But as he admitted, he did not want to leave his long-time home in Columbus. So he immediately went on medical leave and then took vacation, ultimately showing up for his job months later. He then spent just four days in the job—mostly spent taking photos of dilapidated buildings—before deciding the territory was a "sham." He resigned in February 1998, saying he was "constructively terminated," and later sued Abbott for age discrimination. But as Jelinek admitted at trial, Abbott had no choice but to relocate him, as it "didn't have available jobs in Columbus."

At trial, Jelinek tried to compare himself to Steve Schlies, a PCDM who was laterally

transferred to an open district manager job in Memphis, a city in Schlies' region. Jelinek was not even *considered* for that job, let alone qualified for it. It is undisputed that his name never surfaced as a candidate. Insani relied on recommendations from his regional managers, and Schlies' regional manager, Barb Groth, recommended him. Schlies was a top-rated PCDM, and the "logical choice for that district," because "he was familiar with the Memphis market." Groth did not even know Jelinek, who was in a different region and had a different supervisor.

Even if Jelinek *had* been considered for the Memphis job, however, he would never have been chosen. The job involved managing sales representatives who sold highly technical devices for invasive medical procedures. But unlike Schlies, Jelinek had never sold such devices—his career had been devoted to selling over-the-counter nutritional supplements. As Jelinek admitted, the Memphis job involved "a whole variety of things [he] had never done"—tasks that required "a lot of extra training and expertise." And unlike Schlies, Jelinek had no customer contacts in Memphis, and he had a "history of difficulties in management positions." A10. Indeed, as he testified, those he earlier managed revolted and effectively "ended up firing [him]."

Not surprisingly, the jury unanimously rejected Jelinek's age discrimination claim.

**F. The original divided panel decision in the latest appeal**

Jelinek appealed, raising a host of issues. The court rejected all but two. Most notably, it rejected his view that the "constructive discharge [issue] should have been presented to the jury." A22. That issue was "fully litigated" in "an earlier appeal and [mandamus] action," and "the trial court acted in accordance with the law of the case and this court's mandate." A22-23.

Over Judge Dorrian's dissent, however, the court ordered a *fifth* trial based on two evidentiary rulings. First, it held that the trial court erred in barring Jelinek's testimony that he quit because his new territory was "collapsed" and "was not a desirable place to live." A19. While inadmissible to show constructive discharge, this testimony was admissible to show some unde-

defined type of “pretext” by Abbott. *Id.* The majority did not say how such “pretext” evidence reflected Abbott’s state of mind. Nor did it mention the court’s own prior holding that the trial court acted “in accordance with this court’s mandate” in “exclud[ing] a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim.” A53-54, A52.

Second, the majority held that the trial court wrongly excluded the testimony of Phil Pini, a former employee, regarding a 1999 conversation with Insani about an alleged memo (never shown to exist) supposedly stating that employees over age 50 should take early retirement.

Judge Dorrian dissented. Jelinek’s “state of the territory” evidence is not “relevant to the element of pretext,” she observed, and “resolution of this [issue] depends on the resolution of the [constructive discharge issue].” A26. As to the Pini testimony, Judge Dorrian explained that “in the appeal of the first trial, this court found that the trial court did not err in excluding the same testimony.” A27.

**G. The panel’s partial grant of reconsideration and denial of en banc review**

Abbott sought reconsideration or reconsideration en banc, and Judge Brown reversed her vote on the Pini testimony. “[I]t was obvious error not to follow the law of the case,” she wrote, as the appellate court’s 2005 decision “conclude[d] that the trial court did not abuse its discretion in excluding this testimony.” A2-3 (citation omitted).

Yet the majority stood by its view that the trial court’s exclusion of the Lake County evidence required a fifth trial. A3. Even though no “constructive discharge claim” was “before the jury,” such evidence was deemed “relevant ... to show that Abbott’s explanation for sending Jelinek to an undesirable territory ... was pretext to force him into retirement.” *Id.* (emphasis added). The majority again ignored the court’s prior ruling—affirmed by this Court—that the trial court acted “in accordance with this court’s mandate” in “exclud[ing] a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim.” A53-54, A52.

Nor did the majority say how testimony concerning the Lake County territory showed the *falsity* of Abbott's "policy of reassigning [people] within the region." A3.

Judge Dorrian issued a careful dissent. She first recounted the case's history, including the "mistrials" and the court's own mandamus ruling "exclud[ing] a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim." A5. Then, applying the Sixth Circuit's *Manzer* decision, Judge Dorrian explained that pretext evidence must show "that [Abbott's] reason for the transfer ... (1) had no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was an insufficient basis for [that] action." A7. As she explained, the condition of the Lake County territory was "not probative" under these factors, and excluding the evidence was not "an abuse of discretion." A8, A9-10.

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1.** In employment discrimination cases, evidence is not relevant to a showing of pretext unless it tends to show that: (1) the employer's stated reason for taking an adverse employment action had no basis in fact; (2) the proffered reason did not actually motivate the employer's actions; or (3) the proffered reason was insufficient to motivate the employer's actions.

Over a powerful dissent, the majority below deemed it an abuse of discretion to exclude Jelinek's testimony that he quit because his new sales territory was "collapsed, economically unviable," and "not a desirable place to live." A18, A19. This testimony was exactly what Jelinek argued in pressing the constructive discharge claim that the first jury rejected. But even though no "constructive discharge claim" remained in the case, the majority held that such evidence was "relevant ... to show that Abbott's explanation for sending Jelinek to an undesirable territory ... was *pretext to force him into retirement.*" A3 (emphasis added). That was error.

It is undisputed that Abbott had a policy of transferring employees within their regions, and that the only available job in Jelinek's region was in Lake County. But neither the original ruling below nor the reconsidered opinion explains how evidence about the quality of the Lake

County territory shows the *falsity* of Abbott's transfer policy or sheds light on its state of mind. Allowing Jelinek to use this evidence as proof that his transfer was "pretext to force him into retirement" resurrects the very claim that the first jury rejected. And the fact that the court below divided over the relevance of this evidence confirms that it was not improper to exclude it.

As Judge Dorrian recognized, the majority failed to "fully consider the definition of pretext." A6. She would have applied the Sixth Circuit's *Manzer* decision—the rule applied in at least nine Ohio districts (*supra* n.1)—under which Jelinek had to show "that [Abbott's] reason for the transfer ... (1) had no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was an insufficient basis for [that] action." A7. And as she explained, "[e]vidence regarding the Lake County Indiana territory" and Jelinek's reasons for not wanting to work there are "irrelevant to demonstrating the falsity of defendants' reason." A9. As a matter of basic logic, that conclusion is unassailable. Jelinek may have preferred better options. But as he admitted, Abbott "didn't have available jobs in Columbus."

Nor does the record support any other theory of "pretext." As Judge Dorrian explained—and the majority did not dispute—the record does not support a finding that Jelinek was comparable to Steve Schlies, the only PCDM who received a lateral transfer. "[T]o be similarly situated," an employee "must be similar in all ... relevant respects"—he must have "the same supervisor" and "engage[] in the same conduct without differentiating ... circumstances." A10 (quotations and emphasis omitted). But "a different supervisor ... recommend[ed] [Schlies'] transfer," and she did not even know Jelinek. A10-11. Moreover, "Schlies ... did not share [Jelinek's] history of difficulties in management positions," and Jelinek lacked Schlies' "qualifications." A11. Thus, "Schlies is not similarly situated to [Jelinek]" (*id.*), and the notion that Abbott acted "pretextually" in offering Jelinek a sales job in Lake County at the same salary as his last job—

preventing him from losing his job altogether—does not even make sense.

This Court should grant review, reverse, and clarify what makes a viable pretext theory. The ruling below both ignored the Sixth Circuit’s pretext rule—which most Ohio courts apply—and failed to explain how the barred evidence revealed Abbott’s state of mind. That was error.

**Proposition of Law No. 2.** The key purposes of the doctrine of law of the case—ensuring consistency of results in a case and avoiding endless litigation by settling the issues—apply equally to trial and appellate courts. To carry out those purposes, appellate courts must adhere to their own law of the case, and that of this Court—including prior affirmances of final judgments on specific claims, prior opinions and mandates, and prior interpretations of those opinions and mandates.

The law-of-the-case doctrine is vital to ensuring consistency and finality in Ohio cases. Trial courts depend on it in carrying out appellate mandates, and parties rely on it to define the issues to be tried. Yet the ruling below effectively gave Jelinek license to press a claim and present evidence that the Ohio courts—at every level—have rejected *numerous* times.

In the first trial, Jelinek claimed he had “no choice” but to quit when transferred to Lake County—a territory he deemed “collapsed.” Yet the jury said “No” when asked: “[D]id Plaintiff prove ... that the transfer resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign?” Jelinek’s appeal of that issue was limited to evidentiary issues—not the underlying finding of no liability—and his appeal was rejected.

Jelinek’s counsel nevertheless insisted on pressing the barred claim—causing two mistrials and directly violating orders not to mention “constructive discharge” to the jury. When Judge Schneider took over, he ruled that the appellate court’s 2005 mandate “exclude[d] a retrial of the constructive discharge claim, including facts or allegations that relate to that claim.” Undeterred, Jelinek sought mandamus, asking the court below and later this Court to let him press the theory. Both courts declined, and in terms that left no doubt as to the narrow scope of remand.

As the appellate court held, Jelinek had no right to retry the constructive discharge issue

—either as an “independent claim” or by saying his transfer “satisfies one of the elements” of his “age discrimination claim.” A38-39. Further, the trial court complied with “this court’s mandate” in “exclud[ing] a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim.” A53-54, A52 (emphasis added). This Court affirmed. A34-35.

Not surprisingly, Judge Schneider was vigilant in the fourth trial—barring Jelinek from testifying that he quit because his new territory was “collapsed” and “unviable.” Faced with a lawyer with a penchant for disobeying orders—including orders not to refer to any “constructive discharge”—the court sought to keep counsel from “do[ing] indirectly what [a] court order prohibit[ed] him from doing.” *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St. 3d 254, 258 (1996).

Even apart from the pretext issue, preventing a party from “cavalierly ignor[ing]” court orders cannot possibly be an “abuse of discretion.” *Id.* at 256. “The term discretion itself involves the idea of ... a determination ... between competing considerations.” *Id.* Yet without even *discussing* the text of the order reviewed on mandamus—which barred all “facts or allegations” relating to “constructive discharge”—the majority below ordered a *fifth trial* based on the trial court’s exclusion of Jelinek’s evidence as to the state of the Lake County territory.

That error calls out for review. The law-of-the-case doctrine “is necessary to ensure consistency of results in a case,” and “to avoid endless litigation by settling the issues.” *Nolan*, 11 Ohio St. 3d at 3. This Court’s enforcement of that doctrine is all the more critical after *Forrest*, which held that “a three-judge panel of appellate judges—instead of the full court—may ... determine whether an intradistrict conflict exists.” 136 Ohio St. 3d at 134. The court below up-ended the doctrine—ignoring both this Court’s and its own mandamus decisions affirming the trial court’s order barring “facts or allegations that relate to [the constructive discharge] claim.”

## CONCLUSION

The Court should accept jurisdiction, reverse, and bring this 16-year-old case to an end.

Respectfully submitted.

*James F. Hurst / by Doreen Holaday  
Per authority 03/28/2014*

TUCKER ELLIS LLP

*Irene C. Keyse-Walker (0013143)  
925 Euclid Avenue, Suite 1150  
Cleveland, OH 44115  
(216) 592-5000*

VORYS, SATER, SEYMOUR  
AND PEASE LLP

*Michael G. Long (0011079)  
Lisa Pierce Reisz (0059290)  
52 East Gay Street, P.O. Box 1008  
Columbus, OH 43216-1008  
(614) 464-6400*

WINSTON & STRAWN LLP

*James F. Hurst (pro hac vice pending)  
Derek J. Sarafa (pro hac vice pending)  
35 West Wacker Drive  
Chicago, IL 60601  
(312) 558-5600*

WINSTON & STRAWN LLP

*Steffen N. Johnson\* (pro hac vice pending)  
1700 K Street, N.W.  
Washington, DC 20006  
(202) 282-5000*

*\*Counsel of Record*

*Counsel for Defendants-Appellees Abbott Laboratories, Karl V. Insani, and Gregory A. Lindberg*

MARCH 28, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing brief was served upon Russell A. Kelm, 37 West Broad Street, Suite 860, Columbus, Ohio 43215, counsel for appellant Jelinek, by U.S. Mail, postage prepaid, this 28th day of March, 2014.

*Lisa Pierce Reisz* /s/ *by Palmer Holman*  
Lisa Pierce Reisz 0060013

*Counsel for  
Defendants/Appellees  
Abbott Laboratories, Gregory A.  
Lindberg, and Karl V. Insani*

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

David A. Jelinek, :  
 :  
 Plaintiff-Appellant, : No. 11AP-996  
 : (C.P.C. No. 99CVH-09-7505)  
 v. :  
 : (REGULAR CALENDAR)  
 Abbott Laboratories et al., :  
 :  
 Defendants-Appellees. :

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MEMORANDUM DECISION

Rendered on February 11, 2014

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*Law Offices of Russell A. Kelm, Russell A. Kelm, Joanne W. Detrick, and Lynn R. Taylor, for appellant.*

*Winston & Strawn LLP, James F. Hurst, Derek J. Sarafa, Samantha L. Maxfield, and Steffen N. Johnson; Tucker Ellis LLP, and Irene C. Keyse-Walker, Vorys, Sater, Seymour and Pease LLP, Michael G. Long, and Lisa Pierce Reisz, for appellees.*

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ON APPLICATION FOR RECONSIDERATION/  
EN BANC CONSIDERATION

BROWN, J.

{¶ 1} Defendant-appellee, Abbott Laboratories ("Abbott"), has asked this court to reconsider our decision in *Jelinek v. Abbott Laboratories*, 10th Dist. No. 11AP-996, 2013-Ohio-1675 reversing the judgment of the trial court and remanding the case for a new trial. Abbott also requests consideration en banc. For the reasons that follow, we grant the application for reconsideration but only with respect to one issue. We deny the request for en banc consideration.

{¶ 2} Applications for reconsideration are governed by App.R. 26(A)(1). The test that is generally applied to an application for reconsideration is whether the application calls attention to an obvious error in the decision or raises an issue that the court did not properly consider in the first instance. *Fleisher v. Ford Motor Co.*, 10th Dist. No. 09AP-139, 2009-Ohio-4847, ¶ 2. App.R. 26(A) was not designed for use in instances where a party simply disagrees with the conclusions and logic of the appellate court. Rather, it "provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996).

{¶ 3} App.R. 26(A)(2) provides for en banc consideration "[u]pon a determination that two or more decisions of the court on which they sit are in conflict." "[I]f the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, paragraph two of the syllabus. Appellate courts have discretion to determine whether an intradistrict conflict exists. *Id.*; *State v. Stewart*, 10th Dist. No. 11AP-787, 2013-Ohio-78, ¶ 10.

{¶ 4} The essence of Abbott's argument is that our resolution of two evidentiary issues conflicts with a prior decision of this court.

#### **I. Testimony About an Alleged Memorandum**

{¶ 5} First, Abbott disagrees with our decision to reverse the trial court's exclusion of testimony regarding an alleged memorandum indicating that employees over the age of 50 should take early retirement. Abbott argues that this decision was in conflict with our earlier decision that the trial court did not err in excluding certain testimony for lack of personal knowledge.

{¶ 6} In *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696 ¶ 59 (10th Dist.) ("*Jelinek II*"), this court stated:

Plaintiff asserts that it was error for the trial court to preclude testimony of Pini regarding an alleged Abbott memorandum indicating that employees over 50 years old with 20 years of service should be encouraged to take early retirement. The trial court determined that the testimony of Pini regarding the alleged memorandum was inadmissible under Evid.R. 602. We conclude that the trial court did not abuse its discretion in

excluding this testimony, and we therefore overrule plaintiff's fifth assignment of error.

{¶ 7} We grant reconsideration on this aspect of the case because this court's prior determination that the trial court did not abuse its discretion in excluding this testimony remains the law of the case. Because this court's prior determination that the trial court did not abuse its discretion in excluding this testimony "remains the law for [this] case as to all relevant legal questions in subsequent proceedings, both at trial and appellate levels," it was obvious error not to follow the law of the case. *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 934 (10th Dist.2000). Therefore, the trial court did not abuse its discretion in excluding this testimony.

## II. The Lake County Indiana Territory

{¶ 8} Second, Abbott argues that the trial court's decision to prohibit any discussion of the Lake County Indiana territory should have been upheld in light of our prior ruling that Jelinek could not pursue the issue of constructive discharge. This issue was thoroughly discussed and considered in our decision on the merits. *Jelinek*, 2013-Ohio-1675 at ¶ 18-22. A constructive discharge claim was not before the jury in the latest trial. The evidence was relevant and offered to show that Abbott's explanation for sending Jelinek to an undesirable territory in terms of sales and living conditions was pretext to force him into retirement, which was what ultimately happened. Abbott introduced evidence that Jelinek's transfer was non-discriminatory because it was in accordance with their policy of reassigning former primary care district managers within the region where they had previously operated. To show this reason is pretext for discrimination, Jelinek must show that the reason is false and that discrimination was the real reason. *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268. This evidence is relevant to pretext and we properly found this evidence should not have been excluded. The constructive discharge claim was not at issue in the most recent trial and any prior ruling of this court as to the admissibility or inadmissibility of this evidence as it pertained to the constructive discharge claim was not subject to the law of the case doctrine for the discrimination claim.

{¶ 9} There was no obvious error in our decision. Because the disputed evidentiary issues are strong circumstantial evidence central to the dispositive issue of age discrimination, a new trial is warranted.

{¶ 10} Therefore, Abbott's application for reconsideration is granted as to the issue of the alleged memorandum and denied as to the Lake County Indiana evidence. The request for en banc consideration is denied as an intradistrict conflict does not exist.

*Application for reconsideration granted;  
application for en banc consideration denied.*

TYACK, J., dissents.  
DORRIAN, J., concurs in part and dissents in part.

TYACK, J., dissenting.

{¶ 11} I would not reconsider any part of our previous decision. To that extent, I respectfully dissent.

DORRIAN, J., concurring in part and dissenting in part.

{¶ 12} I concur with the majority's decision to grant defendants' application for reconsideration as to the exclusion of testimony related to the alleged memorandum and concur with the majority's decision to deny defendants' motion for en banc consideration. However, consistent with my dissent in our April 25, 2013 decision ("original decision"),<sup>1</sup> I respectfully dissent from the majority's decision to deny defendants' application for reconsideration as to exclusion of the Lake County evidence.

### **I. Standard of Review for Application for Reconsideration**

{¶ 13} "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at

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<sup>1</sup> For purposes of clarification, I will refer to the panel decisions as follows: original majority (Tyack and Brown, JJ.); original dissent (Dorrian, J.); reconsideration majority on Lake County evidence (Brown and Tyack, JJ.); reconsideration dissent on Lake County evidence (Dorrian, J.); reconsideration majority on alleged memorandum (Brown and Dorrian, JJ.); reconsideration dissent on alleged memorandum (Tyack, J.); en banc majority (Tyack and Brown, JJ.); en banc concurrence (Dorrian, J.).

all or was not fully considered by the court when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus.

{¶ 14} I concur that this court committed obvious error in regard to Phil Pini's testimony regarding the alleged memorandum because the admission of such testimony conflicts with a prior decision of this court. Therefore, I would grant reconsideration as to this issue. Further, I would grant reconsideration as to the Lake County testimony as this court did not fully consider the definition of pretext in determining whether evidence of the conditions of the territory was relevant to pretext.

## II. Exclusion of Testimony Related to Alleged Memorandum

{¶ 15} I concur with the reconsideration majority on the alleged memorandum that reconsideration is proper regarding the exclusion of testimony related to the alleged memorandum. I further concur that our prior determination on the same in *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696 (10th Dist.) ("*Jelinek II*"), remains the law of the case.

## III. Exclusion of Lake County Evidence

{¶ 16} I respectfully dissent from the reconsideration majority on the Lake County evidence.

### A. Procedural History

{¶ 17} In *Jelinek II*, the jury held that plaintiff failed to prove his constructive discharge claim, finding "plaintiff failed to prove that his transfer to Lake County, Indiana, resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott." *Id.* at ¶ 54.

{¶ 18} Following two mistrials, prior to the commencement of the trial from which this appeal arises, the trial court issued a decision stating that "the scope of the new trial is confined to the age-discrimination claim and excludes a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim." (R. 531 at 5-6.) Plaintiff then commenced an original action in mandamus, procedendo, and prohibition in this court seeking to compel the trial court to include the constructive discharge claim in the new trial. *State ex rel. Jelinek v. Schneider*, 10th Dist. No. 08AP-957, 2010-Ohio-1220, ¶ 1 ("*Jelinek III*"). Noting that we rejected plaintiff's challenge to the trial court's resolution of his constructive discharge claim in *Jelinek II*, we denied plaintiff's request

for relief. *Jelinek III* at ¶ 14, 21. Upon appeal, the Supreme Court of Ohio affirmed our denial of plaintiff's request for extraordinary relief, finding the trial court did not "patently and unambiguously disregard the court of appeals' mandate in *Jelinek II*." *State ex rel. Jelinek v. Schneider*, 127 Ohio St.3d 332, 2010-Ohio-5986, ¶ 15-16.

{¶ 19} In the trial from which this appeal arises, the trial court denied admission of plaintiff's evidence concerning the quality of the Lake County, Indiana territory. In *Jelinek v. Abbott Laboratories*, 10th Dist. No. 11AP-996, 2013-Ohio-1675 ("*Jelinek IV*"), plaintiff asserted error contending the excluded evidence was relevant to pretext. *Id.* at ¶ 18. The original decision majority agreed and determined the evidence was "relevant to show that the offer of the territory was pretextual" and found the trial court abused its discretion by excluding it. *Id.* at ¶ 22. However, I would find that we did not fully consider the definition of pretext in determining whether the evidence at issue was relevant.

#### B. *Employment Discrimination Burden-Shifting Framework*

{¶ 20} "To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent" and may establish such intent through either direct or indirect methods of proof. *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766 (10th Dist.1998). "[A] plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that the employer more likely than not was motivated by discriminatory intent." *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 587 (1996). Alternatively, a plaintiff may indirectly prove a prima facie case of age discrimination by presenting evidence of the following: (1) the plaintiff is a member of the statutorily protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the position; and (4) the plaintiff was replaced by a substantially younger person or that a comparable, substantially younger person was treated more favorably. *Coryell v. Bank One Trust Co., N.A.*, 10th Dist. No. 07AP-766, 2008-Ohio-2698, ¶ 18, citing *Jelinek II* at ¶ 39. If a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse employment action. *Caldwell v. Ohio State Univ.*, 10th Dist. No. 01AP-997, 2002-Ohio-2393, ¶ 61.

{¶ 21} If an employer meets its burden of production, a plaintiff must prove by a preponderance of the evidence that the employer's reason was merely a pretext for unlawful discrimination. *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 148 (1983). " [A] reason cannot be proved to be "a pretext for discrimination" unless' " plaintiff demonstrates " 'both that the reason was false, and that discrimination was the real reason.' " (Emphasis sic.) *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 14, quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

{¶ 22} Here, plaintiff contends defendants subjected him to an adverse employment action by transferring him to the Lake County Indiana territory because of illegal discrimination on the basis of age. Defendants introduced evidence demonstrating that plaintiff's transfer was non-discriminatory because it was in accordance with their policy of reassigning former primary care district managers ("PCDM") within the region where the individual PCDMs previously operated.<sup>2</sup>

#### *C. Plaintiff's Evidence Is Not Relevant To Pretext*

{¶ 23} As provided in Evid.R. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The decision to admit or exclude evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion that materially prejudices a party. *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66 (1991).

{¶ 24} Here, plaintiff was trying to show that the reason offered by defendants for the transfer was a pretext. In this regard, evidence is relevant to establishing pretext if it tends to show that the defendant's reason for the transfer was less probable because the reason (1) had no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was an insufficient basis for the adverse employment action. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994), abrogated on other grounds by *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009), as recognized in *Geiger v. Tower Automotive*, 579 F.3d 614, 621 (6th Cir.2009).

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<sup>2</sup> Defendants' Application for Reconsideration at 23; (Tr. Sept. 19, 2011, 1251, 1253-54, 1256-57); DX 57.

{¶ 25} Both the first and third showings are direct attacks on the truthfulness of a defendant's proffered reason. *Manzer* at 1084. In the first showing, the plaintiff establishes pretext by providing evidence "that the proffered bases for the [adverse employment action] never happened, *i.e.*, that they are 'factually false.'" *Id.*, quoting *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir.1994). In the third showing, the plaintiff establishes pretext by presenting evidence that similarly situated employees not in the protected class were not subject to the adverse employment action or were treated more favorably. *Manzer* at 1084.

{¶ 26} Unlike the first and third showings, the second showing is an indirect attack on the credibility of a defendant's proffered reason. *Id.* Under this method, a plaintiff admits the factual basis underlying a defendant's legitimate non-discriminatory reason and further admits that such reason could actually motivate the adverse employment action. *Id.* To establish pretext, the plaintiff must present circumstantial evidence "tend[ing] to prove that an illegal motivation was *more* likely than that offered by the defendant." (Emphasis sic.) *Id.* "[T]he plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." *Id.*

{¶ 27} Plaintiff appears to contend that the quality of the Lake County Indiana territory is relevant to pretext under the first and third showings. Under the first showing, plaintiff states the condition of the Lake County Indiana territory is relevant to proving defendants' reason had no basis in fact because they "did not expect him to take [the territory]." (Appellant's Brief, 17.) Under the third showing, plaintiff asserts the condition of the Lake County, Indiana territory is relevant to demonstrate defendants' reason was an insufficient basis for the adverse employment action because plaintiff received "less favorable treatment than other younger PCDMs." (Appellant's Brief, 17.)

1. *Evidence Is Not Relevant To Proving That The Reason Was Factually False*

{¶ 28} The evidence regarding the dismal state of the Lake County Indiana territory is not probative as to the falsity of defendants' policy of transferring employees within their regions. To demonstrate pretext under the first showing, a plaintiff must "do more than dispute the facts on which the employer based its decision to take an adverse

employment action." *Smith v. Dept. of Pub. Safety*, 10th Dist. No. 12AP-1073, 2013-Ohio-4210, ¶ 78. Evidence regarding the conditions of the Lake County Indiana territory does not make less probable the fact that defendants followed a policy of recommending transfers of PCDMs to positions within their respective regions. Nor is it relevant to showing defendants' policy of transfers within respective regions is "irregular or idiosyncratic," "ambiguous," "unreasonable" or "not based on honest belief" in their legitimate non-discriminatory reason. *See Sybrandt v. Home Depot, U.S.A., Inc.*, 560 F.3d 553, 559 (6th Cir.2009); *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 399 (6th Cir.2008). Courts have considered the above criteria when reviewing the first showing, and I cannot say the trial court abused its discretion in determining that plaintiff did not succeed in demonstrating the evidence in question is relevant thereto.

{¶ 29} Accordingly, plaintiff's evidence regarding the Lake County Indiana territory is irrelevant to demonstrating the falsity of defendants' reason. *See Joostberns v. United Parcel Servs., Inc.*, 166 Fed.Appx. 783, 794-95 (6th Cir.2006); *Smith*, 2013-Ohio-4210 at ¶ 78-81.

2. *Evidence Is Not Relevant To Proving That The Reason Was An Insufficient Basis For The Transfer*

{¶ 30} Plaintiff contends evidence concerning the quality of the Lake County, Indiana territory demonstrates defendants' reason was insufficient to motivate the adverse employment action under the third prong of *Manzer* since (1) similarly situated, non-protected employees received (2) more favorable treatment. *Id.* at 1084. In support of this contention, plaintiff seeks to compare his transfer to defendants' treatment of Steven Schlies, a PCDM from another region who was transferred to Memphis.

{¶ 31} It is clear that the condition of the Lake County Indiana territory is not relevant to whether Schlies is similarly situated to plaintiff. Therefore, we must consider whether such evidence is relevant to whether Schlies' transfer to Memphis was more favorable treatment than plaintiff's transfer to Lake County pursuant to the policy transferring employees within their regions.

{¶ 32} The dismal state of the Lake County Indiana territory is not relevant to whether defendants applied their policy of transferring employees within their regions in

a manner more or less favorably to similarly situated, non-protected employees.<sup>3</sup> Specifically, plaintiff's evidence is not probative as to whether defendants applied their policy differently to Schlies.

{¶ 33} Nevertheless, assuming arguendo, the evidence regarding the condition of the Lake County Indiana territory was relevant to whether the transfer to Memphis was more favorable treatment than the transfer to Lake County, I cannot say that the exclusion of such evidence was an abuse of discretion because plaintiff did not establish that Schlies is similarly situated. Therefore, any possible error would be harmless.

{¶ 34} To demonstrate that a co-worker is similarly situated, "the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the *relevant* aspects.'" (Emphasis sic.) *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998), quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir.1994). Courts must determine the relevant factors based upon the particular circumstances of the case. *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 348 (6th Cir.2012); *Jackson v. FedEx Corporate Servs., Inc.*, 518 F.3d 388, 394 (6th Cir.2008). Ordinarily, to be similarly situated, the other employees "' must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Smith*, 2013-Ohio-4210, ¶ 82, quoting *Carson v. Patterson Cos.*, 423 Fed.Appx. 510, 513 (6th Cir.2011), quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992).

{¶ 35} Here, plaintiff failed to establish a similarly situated comparator. Defendants introduced evidence that a different supervisor, Barb Groth, managed Schlies and, as his regional manager, was responsible for recommending his transfer to the

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<sup>3</sup> Compare *Wigglesworth v. Mettler Toledo Internatl., Inc.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶ 24-25 (pretext not established "[a]bsent evidence that defendants ignored mandatory procedures or applied company policy differently to similarly-situated employees"); *Lamer v. Metaldyne Co. LLC*, 240 Fed.Appx. 22, 33 (6th Cir.2007) ("Evidence that the progressive-discipline policy asserted as a rationale for an employee's termination was not uniformly applied is evidence of pretext."); *Jones v. Potter*, 488 F.3d 397, 407 (6th Cir.2007) (employer's reason sufficient where other employees treated identically under policy); *Thomas v. Speedway Superamerica, LLC*, 1:04-CV-00147 (S.D. Ohio Mar. 31, 2006) (plaintiff unable to demonstrate employer's reason was insufficient where policy applied uniformly to other employees), *aff'd*, 506 F.3d 496 (6th Cir.2007).

Memphis position under defendants' policy.<sup>4</sup> Further, defendants introduced evidence supporting the conclusion that Schlies possessed different qualifications from plaintiff and did not share plaintiff's history of difficulties in management positions.<sup>5</sup> As a result, Schlies is not similarly situated to plaintiff in all relevant aspects, and evidence regarding the Lake County Indiana territory does not demonstrate defendants' reason was insufficient. *See Ercegovich* at 352.

{¶ 36} Because plaintiff's evidence regarding the conditions of the Lake County Indiana territory is not relevant to demonstrating defendants' reason was false and that discrimination is the real reason, I cannot say the trial court abused its discretion in excluding such testimony. *See Hicks* at 515; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

#### IV. Motion for En Banc Consideration

{¶ 37} Although I dissent from the reconsideration majority on the issue of Lake County evidence, I concur with the majority's denial of the motion for en banc consideration.

{¶ 38} App.R. 26(A)(2) states as follows:

Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

{¶ 39} I do not believe this case meets the criteria for en banc consideration. Our related prior decisions have held that: (1) such evidence was not relevant to a constructive discharge claim (*Jelinek II* at ¶ 55-56); and (2) "the mandate in *Jelinek II* did not order the retrial of relator's constructive discharge theory" (*Jelinek III* at ¶ 15, affirmed by the Supreme Court of Ohio in 127 Ohio St.3d 332). In the instant case, however, the original

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<sup>4</sup> (Tr. Sept. 20, 2011, 1523, 1530.)

<sup>5</sup> (Tr. Sept. 20, 2011, 1520-23, 1525, 1530-33.)

and reconsideration majority on this issue held that the evidence was relevant to pretext. These holdings do not conflict. Therefore, on this basis, I do not find an intradistrict conflict warranting en banc consideration. Furthermore, I reject defendants' argument that a conflict existed because, on this issue, the majority did not apply an abuse of discretion standard. Although I disagree that there was an abuse of discretion, the majority clearly recited the abuse of discretion standard of review at ¶ 11 of the original decision. There is no indication the majority applied anything other than this standard. Therefore, on this basis, I also do not find an intradistrict conflict warranting en banc consideration.

{¶ 40} Furthermore, with regard to testimony concerning the alleged Abbott memorandum, the relief sought in requesting en banc consideration has been achieved by the reconsideration majority on this issue. In granting reconsideration, a majority of the court has now found the trial court properly excluded the evidence concerning this issue.

{¶ 41} For these reasons, I concur with the majority's decision to deny the motion for en banc consideration.

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claims for relief of promissory estoppel, age discrimination, in violation of R.C. 4112.02(A) and 4112.99, retaliation, in violation of R.C. 4112.02(I) and 4112.99, violation of public policy, and willful and malicious destruction of records for purposes of impeding or impairing the current claims ("spoliation of evidence claim"). *Jelinek v. Abbott Laboratories*, 10th Dist. No. 01AP-217 (Sept. 13, 2001) ("*Jelinek I*"). Jelinek also asserted that he had been constructively discharged.

{¶ 3} By way of background, Jelinek was born on May 15, 1942. He had worked for Ross in various sales positions for over 30 years. In January 1997, Jelinek took a new position at Ross as a primary care district manager ("PCDM"). Ross employed seven or eight PCDMs throughout the country. Jelinek was based in Columbus, Ohio and was the oldest PCDM. Ross's sales representatives reported to their respective district managers, including Jelinek.

{¶ 4} In an effort to reduce costs, Ross determined that it would eliminate all PCDM positions. In early October 1997, Jelinek was informed of the elimination of his position and was offered a demotion, also known as a re-deployment to sales representative.. This involved a transfer, with no change in his salary and benefits, to a territory, which included Gary, Indiana, known as the Lake County, Indiana territory. In the alternative, Jelinek could choose to separate from his employment at Ross and take "pay continuation leave," in which he would be paid his then-current salary for approximately nine months (or until he secured other employment or retired). Upon accepting the pay continuation leave package, Jelinek would waive his right to bring any discrimination suit against Ross. Jelinek was informed that if he accepted the severance package he could continue to search for jobs within the Abbott organization.

{¶ 5} On October 28, 1997, Jelinek injured his back while moving cases of product and went on sick leave. Then, three days later, Jelinek accepted the Lake County, Indiana territory offer although he remained on sick leave. He retired from Abbott, effective April 1, 1998, after working only a few days at the Lake County territory. He was 55 years old at the time he retired.

{¶ 6} After dismissal of some claims, a motion for summary judgment, and a successful appeal from the grant of summary judgment, the matter proceeded to trial.

Jelinek prevailed on his claim of age discrimination, but by means of interrogatories, the jury rejected his claims for promissory estoppel and constructive discharge. The jury awarded Jelinek \$700,000 in compensatory damages for emotional distress suffered because of age discrimination. The jury also awarded \$25 million in punitive damages plus attorney fees against Abbott.

{¶ 7} The trial court then granted a motion for judgment notwithstanding the verdict ("JNOV") on the age-discrimination claim and, in the event that the JNOV were reversed on appeal, granted a new trial on the issue of age discrimination. Jelinek appealed, asserting that the trial court erred in excluding certain evidence related to the constructive discharge theory. This court found that a new trial on the issue of age discrimination was appropriate, but also that the jury found that Jelinek had failed to prove constructive discharge. *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696 (10th Dist.) ("*Jelinek II*").

{¶ 8} In attempting to retry the case, the court declared two mistrials, and the case was assigned to another judge. The constructive discharge theory was the subject of more litigation until 2010 when this court held that the mandate in *Jelinek II* would not be construed as requiring the new trial on remand to include a constructive discharge theory. *Jelinek v. Schneider*, 10th Dist. No. 08AP-957, 2010-Ohio-1220, ¶ 14.

{¶ 9} In 2011, the case proceeded to trial again on the age-discrimination claim. The trial court issued preliminary rulings on a number of motions in limine. The trial court restricted Jelinek to presenting evidence related to the sole remaining claim, age discrimination, and prohibited evidence regarding defunct claims including retaliation, breach of public policy, promissory estoppel, and constructive discharge. Jelinek was precluded from referring to the crime rate in Gary, Indiana, the quality of the Lake County territory, and any testimony referring to a memorandum allegedly saying that all employees over 50 years old with 20 years of service should take early retirement.

{¶ 10} The 2011 trial resulted in a verdict for appellees. Jelinek appealed, assigning the following as errors:

- I. The trial court erred in admitting evidence that was either irrelevant or even if relevant, exclusion was mandatory under Evid.R. 403(A) because the probative value was

substantially outweighed by the danger of unfair prejudice, of confusion of the issues, and/or of misleading the jury.

II. The trial court erred in excluding relevant evidence favorable to Jelinek, which would not have been unfairly prejudicial to defendants.

II. The trial court erred in allowing defendants to claim Jelinek was part of a reduction in force that occurred in 1997; in failing to compel defendants to produce requested discovery relating to the 1997 reduction in force; in excluding statistical evidence relating to the 1997 RIF; and in placing a higher burden on Jelinek because he was deemed to be included of the reduction in force.

IV. The trial court erred in limiting the scope of the retrial by excluding any evidence of Jelinek's constructive discharge.

V. The trial court erred in granting directed verdict for defendants on punitive damages because the court was not present for the testimony of two witnesses and excluded punitive damages without reviewing the testimony of those witnesses.

VI. The trial court erred in granting directed verdict in favor of Gregory Lindberg.

VII. The jury erred in ruling for the defendants on Jelinek's age discrimination claim.

VIII. The trial court abused its discretion in not assessing costs against defendants for all costs of the proceeding through the appeal of the first trial and remand.

{¶ 11} In his first assignment of error, Jelinek argues that the trial court abused its discretion in admitting evidence of his wealth. "It is well established that the decision to admit or exclude evidence is within the sound discretion of the trial court and that an appellate court will not disturb that decision absent an abuse of discretion. This is because the trial court is in a much better position than we are to evaluate the authenticity of evidence and assess the credibility and veracity of witnesses." (Citations omitted.) *America's Floor Source, L.L.C. v. Joshua Homes*, 191 Ohio App.3d 493, 2010-Ohio-6296,

¶ 27 (10th Dist.). (Citations omitted.) "Absent an abuse of discretion and material prejudice to appellant, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence \* \* \*. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable." (Citations omitted.) *Bruce v. Junghun*, 182 Ohio App.3d 341, 347-48, 2009-Ohio-2151, ¶ 19 (10th Dist.)

{¶ 12} In his opening statement, defense counsel referred to Jelinek's "beautiful home in a beautiful neighborhood." (Tr. Vol. II, 303.) The trial court sustained an objection. Defense counsel then referenced Jelinek's status in 1997 as a millionaire. (Tr. Vol. II, 305.) An objection was sustained as to the millionaire reference, but the trial court went on to state: "Obviously, evidence may well come in as to Mr. Jelinek's financial position in 1997, *which will be relevant*, and the jury can decide what it means at that time." (Emphasis added; Tr. Vol. II, 305.) In addition, Jelinek objected that Abbott was allowed, over objection, to display a picture of Jelinek's home, and inquire into the value of his 401K plan.

{¶ 13} During his case-in-chief, Jelinek addressed his finances. He testified that his house was paid off, and that prominent people such as the president of Ross Laboratories and Thad Matta, The Ohio State University men's basketball coach, lived in his neighborhood. Jelinek testified that he had Abbott stock worth over \$1 million, and when he was offered the PCDM job, he was a millionaire. He bought his wife "a little Mercedes" for Christmas because "she wanted a little toy." (Tr. Vol. II, 419.) Jelinek further testified that when his job was eliminated, he lost sleep and worried about paying his bills and about not having enough money in the bank.

{¶ 14} Ordinarily, in actions where only compensatory damages are sought, evidence is not admissible to show the wealth or poverty of the plaintiff or defendant. *Goodburn v. Gierhart*, 10th Dist. No. 84AP-43 (July 10, 1984). Here, however, Jelinek's financial situation was at issue because his claim for compensatory damages was based entirely on emotional stress caused by his financial concerns. Jelinek testified that he had sleepless nights, tossing and turning, worrying about how much money he had in

the bank, that he was very stressed about money, and he was concerned about making ends meet.

{¶ 15} In *America's Floor Source*, this court held that it was not an abuse of discretion to admit a photograph of the defendant's home after he had testified about his down-trodden personal finances. Even if the evidence would be irrelevant under ordinary circumstances, the photograph became relevant once the defendant put his own personal wealth—or purported lack thereof—at issue. *Id.* at ¶ 27.

{¶ 16} Jelinek argues that the value of his home and the size of his 401K account were irrelevant to his ability to pay his bills since he could not be expected to pay his bills by selling his house or liquidating his 401K. The argument addresses weight and credibility rather than admissibility. The evidence was probative of the alleged emotional distress. The trial court did not abuse its discretion in deciding the probative value of the evidence as to the issue of emotional distress outweighed any prejudice, particularly in light of Jelinek's own extensive testimony about his finances.

{¶ 17} Accordingly, it was not an abuse of discretion to admit evidence of Jelinek's wealth. The first assignment of error is overruled.

{¶ 18} In its second assignment of error, Jelinek contends that it was error to refuse him the opportunity to present evidence that the territory he was assigned was an undesirable territory in an undesirable area of the country, and that was why he did not want to move to Gary, Indiana. Jelinek argues that evidence about the quality of the territory was highly relevant to the issue of pretext and why his assignment to that territory was less preferential than what occurred with other, younger employees. He claims it was also highly prejudicial to exclude evidence that the territory had been collapsed before it was given to him, and that his demotion to a collapsed, economically unviable territory led to his emotional distress.

{¶ 19} Abbott was permitted to argue in closing that the reason Jelinek did not want to move away from Columbus was that he did not want to leave his comfortable house. Abbott was also allowed to argue that the decision maker, Karl Insani, thought that Jelinek would not take the Lake County, Indiana territory because he did not want to leave his beautiful house. Jelinek, however, was not permitted to argue that the reason he

did not want to take the Lake County territory was that it had been collapsed from 12 counties to 2 prior to it being offered to him, as well as the fact that the Gary, Indiana area was not a desirable place to live.

{¶ 20} Abbott argues that the evidence about the quality of the Lake County, Indiana territory was nothing more than an attempt to introduce constructive discharge evidence for a claim that was no longer part of the case. Abbott contends that the evidence that Jelinek sought to introduce at trial was previously offered solely on the constructive discharge claim to explain his claim of forced retirement. As such, Abbott concludes that the trial court did not err in excluding all references to the Lake County, Indiana territory.

{¶ 21} "It is fundamental that evidence that is admissible for one purpose may be inadmissible for another purpose." *State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 156 (1982) accord, *Barnett v. Sexten*, 10th Dist. No. 05AP-871, 2006-Ohio-2271, ¶ 14; see also Evid.R. 105.<sup>1</sup> In establishing pretext, "[i]f the plaintiff shows that that employer's explanation is not credible, the trier of fact may, but does not have to, draw the inference of intentional discrimination without any further evidence of discrimination." *Detzel v. Brush Wellman, Inc.*, 141 Ohio App.3d 474, 483 (6th Dist.2001), quoting *Brock v. Gen. Elec. Co.*, 125 Ohio App.3d 403, 408 (1st Dist.1998).

{¶ 22} Here, evidence of the quality of the territory offered to Jelinek was relevant to show that the offer of the territory was pretextual. Evidence that the territory was "collapsed" from twelve counties to two shortly before it was offered to Jelinek addresses both the issue of pretext, and the reason why Jelinek was reluctant to accept the territory. This pretext evidence was critical to Jelinek's ultimate burden of proof and therefore its exclusion was highly prejudicial. By taking the extreme position that any mention of the quality of the territory related only to constructive discharge, the trial court abused its discretion.

<sup>1</sup> Evid.R. 105 states: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Since the 2011 jury was not presented with a constructive discharge theory or claim, a limiting instruction as contemplated by Evid.R. 105 was not necessary.

{¶ 23} In addition, the trial court excluded testimony by Phil Pini, a Ross salesperson, who had a conversation with Insani, vice president of sales. The conversation occurred in August 1999, and concerned an alleged memorandum circulated in 1997, indicating that employees over 50 years old with 20 years of service should take early retirement. The memorandum was never produced, and Ross contends it did not exist.

{¶ 24} Ross contends that Insani's statement to Pini was hearsay. Jelinek argues that Insani's statement about the memorandum is not hearsay and therefore admissible as a statement of a party opponent under Evid.R. 801(D)(2). Ross further contends that Evid.R. 801(D)(2) is inapplicable because Insani was not an agent of Ross at the time he made the statement, having retired on May 7, 1999.

{¶ 25} Evid.R. 801(D)(2) defines an admission by a party opponent as not hearsay. Insani was a party opponent in the 2011 trial. The rule applies to Insani's statement because the statement was "offered against a party and is \* \* \* the party's own statement, in either an individual or a representative capacity." Evid.R. 801(D)(2)(a). Thus, the trial court erred in excluding Insani's statement.

{¶ 26} Error in the admission or exclusion of evidence is grounds for reversal only where substantial rights of the complaining party were affected or substantial justice appears not to have been done. *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶ 73. To determine whether a substantial right of the party has been affected, a reviewing court must decide whether the trier of fact probably would have reached the same conclusion had the error not occurred. *Id.* Here, the trial court's decision to exclude all evidence of the Lake County, Indiana territory greatly affected Jelinek's substantial rights. Insani's statement was highly probative of whether Abbott intentionally discriminated against older workers, and highly prejudicial to Abbott's defense. Since the alleged memorandum was never produced, the jury can decide how much weight, if any, to give to Insani's admission. It is only fair that the jury must appropriately reach its own conclusions and render its verdict after independently evaluating and weighing the evidence presented in this case. "When a new trial is granted, it must encompass all issues that come into doubt by the tainted verdict." *James*

*v. Murphy*, 106 Ohio App.3d 627, 633 (1st Dist.1995). Because this case must be remanded for a new trial, we shall address the remaining assignments of error that are not clearly moot in order to provide additional information to the trial court.

{¶ 27} The second assignment of error is sustained.

{¶ 28} In its third assignment of error, Jelinek argues that the trial court erred by allowing defendants to claim Jelinek was part of a 1997 reduction in force without compelling defendants to produce discovery related to the 1997 reduction in force. The trial court also excluded Jelinek's statistical evidence related to the reduction in force, but included a jury instruction that placed a heightened burden on Jelinek because he was part of a reduction in force.

{¶ 29} In *Karsnak v. Chess Fin. Corp.*, 8th Dist. No. 97312, 2012-Ohio-1359, ¶ 26, the court stated:

In RIF cases, the fourth prong of the prima facie test is modified to require the employee to offer additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled him out for impermissible reasons. *Ramacciato [v. Argo-Tech Corp.]*, 8th Dist. No. 84557, 2005-Ohio-506, ¶ 29. This prong "may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force." *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (C.A.10, 1988). "The purpose of the additional evidence requirement is to ensure, in reduction of force cases, that the plaintiff has presented evidence to show that there is a chance the reduction in force is not the reason for the termination." *Southworth [v. N. Trust Sec., Inc.]*, 195 Ohio App.3d 357, 2011-Ohio-3467, 960 N.E.2d 473, ¶ 25, quoting *Asmo v. Keane, Inc.*, 471 F.3d 588, 593 (6th Cir.2006).

{¶ 30} Here, the trial court instructed the jury, in relevant part, as follows:

Plaintiff alleges that he has presented evidence which would allow you the jury to find the defendants [sic] stated reason for the challenged employment decision is unworthy of belief, and therefore a pretext for discrimination.

Defendants' stated reason for the change in position was that the same was a business decision that took place in the context of a reduction in force. In the context of a reduction

in force, an age discrimination plaintiff carries a greater burden of supporting allegations of discrimination by coming forward with additional evidence, be it direct, circumstantial or statistical to establish that their age was the reason they were reassigned. As long as the defendants' employment decisions regarding plaintiff were not based on intentional age discrimination, the defendants are entitled to considerable discretion in making business decisions such as reassignment.

(Tr. Vol. VIII, 1787.)

{¶ 31} As can be seen, the trial court instructed the jury that Jelinek needed to come forward with additional evidence, but disallowed discovery and introduction of the evidence.

{¶ 32} If, when the case is retried, Abbott intends to argue that the elimination of Jelinek's position was part of an overall reduction in force in order to receive the heightened jury instruction, Jelinek should be allowed to rebut Abbott's claim by means of statistical evidence. Abbott argues that statistics are irrelevant since Jelinek did not assert a disparate impact claim, but statistics can be useful to prove discrimination in a disparate impact case, but such evidence is unlikely to be sufficient in itself. *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 423 (7th Cir.2000).

{¶ 33} "For statistics to be valid and helpful in a discrimination case, 'both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.' " *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (C.A.6, 1987). "Unless the statistics, standing alone or in comparison, are sufficient to lead the mind naturally to the conclusion sought, they have no probative value; they do not move the proof one way or another. "In short, their usefulness depends on all of the surrounding facts and circumstances." *Id.*

{¶ 34} Accordingly, the third assignment of error is overruled as moot. On remand, the trial court will decide whether to allow statistical evidence and whether to give the heightened jury instruction for RIF cases.

{¶ 35} In its fourth assignment of error, Jelinek argues that the issue of constructive discharge should have been presented to the jury. This issue has been fully

litigated and addressed by way of an earlier appeal and an original action. *Jelinek II* at ¶ 52; *Jelinek v. Schneider*, 2010-Ohio-1220, ¶ 16, 17. Therefore, regardless of whether constructive discharge is technically a distinct claim or only one of two alternative theories, the trial court acted in accordance with the law of the case and this court's mandate in excluding the issue of constructive discharge.

{¶ 36} The fourth assignment of error is overruled.

{¶ 37} In its fifth assignment of error, Jelinek argues that the trial court abused its discretion in granting a directed verdict on the issue of punitive damages. Jelinek contends that the trial court judge was absent for part of the trial when two witnesses' prior testimony was read to the jury, and that the unheard testimony supported a finding of conscious disregard sufficient to allow the issue of punitive damages to go to the jury.

{¶ 38} A motion for directed verdict is an issue of law that this court reviews under a de novo standard of review. *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90 (1987). The evidence is construed most strongly in favor of the party against whom the motion is made, and where reasonable minds could reach different conclusions, the motion must be denied. *Posin v. A.B.C. Motor Court Hotel*, 45 Ohio St.2d 271, 275 (1976). *Ridley v. Fed. Express Corp.*, 8th Dist. No. 82904, 2004-Ohio-2543. Punitive damages are awarded upon a showing of malice. Malice can consist of a spirit of ill will or hatred or conscious disregard of a plaintiff's rights. *Id.* at ¶ 86.

{¶ 39} Jelinek argues that the testimony of James Sipes and Charlie Fisher indicated a conscious disregard for Jelinek's right not to be discriminated against because of his age. Abbott contends that Jelinek mischaracterizes the evidence.

{¶ 40} The evidence for punitive damages was sparse. Jelinek characterizes the testimony of the two witnesses as showing that managers were either not trained in age discrimination or could not recall being trained in age discrimination.

{¶ 41} Our examination of the evidence reveals that Charlie Fisher, who at one time was Jelinek's regional manager, testified that he could not remember being trained in age discrimination. He testified that the only thing he could remember was "accepting differences," but he could not recall specifics. (Tr. Vol. VI, 1154.)

{¶ 42} James Sipes was the human resources manager responsible for implementing the re-deployment. He did not play a part in determining which employees would be selected for re-deployment. He did not personally compare the treatment of Jelinek with a younger employee who received favorable treatment from the re-deployment. However, he further stated that three people, at least one of them a lawyer, from "corporate" looked at the ages of the people whose jobs were being eliminated. Sipes testified that he received training about age discrimination through internet access to the company's policies. He stated that he was familiar with Abbott's EEOC policy and that age discrimination was prohibited. When asked whether he had sufficient training in age discrimination to recognize issues to bring to the attention of Abbott, he stated that he had experts in the corporate office that he could rely upon, and he knew enough to be able to administer the plan.

{¶ 43} The only other evidence of malice was Jelinek's testimony that Insani's secretary asked why Insani hated him.

{¶ 44} Construing this evidence in the light most favorable to Jelinek, he has failed to establish that he was entitled to an instruction on punitive damages. At best, the evidence shows that some managers did not receive formal instruction on age discrimination, but to infer that Abbott exhibited a conscious disregard for Jelinek's right to be free from age discrimination requires a leap of logic not supported by the evidence. The fifth assignment of error is overruled.

{¶ 45} In his sixth assignment of error, Jelinek disagrees with the trial court's decision to dismiss defendant Gregory Lindberg by means of a directed verdict. Jelinek admitted that the decision to abolish all the PCDM positions was not discriminatory. Rather, he argues that he was treated less favorably than younger PCDMs because he was asked to redeploy to the Lake County, Indiana area.

{¶ 46} Shortly before the reduction in force, Lindberg started as the vice-president of sales and medical nutrition in June of 1997. Lindberg was present at a meeting with Abbott Human Resources and a corporate attorney to discuss the decisions made regarding the reduction in force. The testimony at trial did not establish that Lindberg made personnel decisions in the re-deployment. Lindberg had been in his position for

four months and was not familiar with the people involved. Rather, Insani made the decision to send Jelinek to the Lake County, Indiana territory. Lindberg did state that he would have had the option and opportunity to review performance evaluations of the affected employees, but that he did not personally go through the available information to see whether the company was treating older people less favorably than younger people. Jelinek argues, without citation to any authority, that Lindberg had a duty to inquire on his own to make sure the decision to move Jelinek to Lake County, Indiana was not discriminatory.

{¶ 47} Given the evidence that Abbott, as a corporation, did review the PCDM positions, and Lindberg's unfamiliarity with the individuals involved, Lindberg's failure to review the re-deployments of the PCDMs personally is not sufficient to show a conscious disregard for Jelinek's rights such that he could be personally liable for the alleged discrimination.

{¶ 48} The sixth assignment of error is overruled.

{¶ 49} The seventh assignment of error is a manifest weight argument regarding the jury verdict in favor of Abbott. Because this case must be remanded for a new trial, the assignment of error is moot.

{¶ 50} In the eighth assignment of error, Jelinek argues that the trial court should have assessed costs against defendants for all the costs of the proceeding through the appeal of the first trial and remand.

{¶ 51} In *Jelinek II*, this court's judgment entry remanded the case for a new trial and assessed costs against defendants. Jelinek contends that this judgment entry was meant to assess all costs against defendants from the beginning of the case up to the judgment entry in *Jelinek II*.

{¶ 52} A trial court is authorized to award costs under Civ.R. 54(D), which provides that unless provided by a statute or by the Civil Rules, costs are to be awarded to the prevailing party unless the court decides otherwise. The assessment of costs is a matter within the discretion of the trial court, and, absent an abuse of discretion, the trial court's decision must be upheld. *Keaton v. Pike Community Hosp.*, 124 Ohio App.3d 153 (4th Dist.1997), citing *Vance v. Roedersheimer*, 64 Ohio St.3d 552 (1992).

{¶ 53} However, App.R. 24(B) defines costs as "an expense incurred in preparation of the record including the transcript of proceedings, fees allowed by law, and the fee for filing the appeal. It does not mean the expense of printing or copying a brief or an appendix." App.R. 24(A)(4) permits the court of appeals to order these costs as it sees fit if the judgment appealed is affirmed or reversed in part or is vacated. This court only assessed the costs associated with the appeal in *Jelinek II* against defendants. Because this case must be remanded for a new trial on the age discrimination claim, the remaining arguments in this assignment of error are rendered moot.

{¶ 54} The eighth assignment of error is overruled.

{¶ 55} Based on the foregoing, Jelinek's second assignment of error is sustained, and the case is remanded to the Franklin County Court of Common Pleas for further proceedings in accordance with law and consistent with this decision. Assignments of error one, three, four, five, six, and eight are overruled, and assignment of error seven is rendered moot.

*Judgment affirmed in part and  
reversed in part, cause remanded.*

BROWN, J., concurs.

DORRIAN, J., concurs in part and dissents in part.

DORRIAN, J., concurring in part; dissenting in part.

{¶ 56} I concur in part and respectfully dissent in part from the majority. I ultimately would affirm the trial court's decision.

{¶ 57} I concur with the majority that the trial court did not err in admitting evidence of Jelinek's wealth. I would overrule the first assignment of error.

{¶ 58} I dissent from the majority and would find that the trial court did not err in excluding evidence regarding (1) the dismal state of the Gary, Indiana territory, and (2) the conversation between Mr. Pini and Mr. Insani regarding an alleged report of Abbott's efforts to force retirements. As to the state of the territory, I disagree that such evidence is relevant to the element of pretext or to the claim of emotional distress. Therefore, I believe that the resolution of this portion of the second assignment of error depends on the resolution of the fourth assignment of error. Regarding the fourth assignment of error, I concur with the majority that the trial court did not err in limiting the scope of

retrial by not allowing the question of constructive discharge to be retried. Because I would overrule the fourth assignment of error, I would also overrule the second assignment of error as to the exclusion of evidence regarding the state of the territory.

{¶ 59} As to the conversation between Mr. Pini and Mr. Insani regarding the alleged report of Abbott's efforts to force retirements, I believe such testimony would be hearsay and is not excluded pursuant to Evid.R. 801(D)(2). Furthermore, in the appeal of the first trial, this court found that the trial court did not err in excluding the same testimony for lack of personal knowledge. *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696, ¶59 (10th Dist.). Therefore, I would also overrule the second assignment of error as to the exclusion of evidence regarding the conversation between Mr. Pini and Mr. Insani.

{¶ 60} Because it sustained the second assignment of error and finds that a new trial is necessary, the majority did not determine the third assignment of error as to whether the trial court erred in allowing Abbott to claim a reduction in force at trial. I, however, would find there was no error in this regard, as nothing in this court's remand orders from *Jelinek*, 2005-Ohio-5696, precluded Abbott from arguing a reduction in force theory at the new trial.

{¶ 61} The majority did determine the third assignment of error as to whether the trial court erred by failing to compel discovery of and excluding statistical evidence which *Jelinek* determined was relevant to the reduction in force. Here, the majority found error. I dissent from the majority on this finding. Regarding the motion to compel, *Jelinek* had ample opportunity to make such a motion prior to trial and did not do so until the eve of trial. In his brief, *Jelinek* admits that he had been requesting this same discovery since the beginning of the case. He also states that Abbott asserted the RIF theory at the retrial in April 2007. *Jelinek* does not satisfactorily explain why he waited almost four and one-half years to pursue a motion to compel discovery of this statistical information. The motion to compel was filed September 2, 2011, ten days before the trial started on September 12, 2011. *Jelinek* argues that such discovery did not become relevant until the court's ruling of August 24, 2011 to deny his motion in limine to exclude references to the 1997 RIF. *Jelinek* states that he filed the motion in limine in 2008. Given the scope of

discovery may have turned on the trial court's resolution of the motion in limine, Jelinek could have requested a trial court ruling on the motion in limine well in advance of trial. There is no indication that Jelinek did. Instead, the motion in limine apparently languished for three years. Furthermore, nothing prohibited Jelinek from pursuing discovery in anticipation of a possible adverse ruling on his motion in limine. Regarding the exclusion of statistical evidence he did have, Jelinek did not disclose its expert witness or expert report in advance of trial. Taking into consideration the procedural history of this case, the fact that the complaint was first filed in September 1999, and the fact that the motion to compel and request to present statistical evidence were made so late in the game, I cannot say that it was an abuse of discretion for the trial court to deny the motion to compel or exclude the statistical evidence. Therefore, I would overrule the third assignment of error.

{¶ 62} As noted above, I concur with the majority in overruling the fourth assignment of error.

{¶ 63} I concur with the majority that the trial court did not err in granting a directed verdict in favor of Abbott on the issue of punitive damages. I would overrule the fifth assignment of error.

{¶ 64} I concur with the majority that the trial court did not err in granting a directed verdict in favor of Gregory Lindberg. I would overrule the sixth assignment of error.

{¶ 65} Because it sustained the second assignment of error and found that a new trial is necessary, the majority found to be moot the seventh assignment of error and the question of whether the jury erred in ruling in favor of Abbott on Jelinek's age-discrimination claim. I would, however, overrule the seventh assignment of error, as I do not believe the jury erred in its determination.

{¶ 66} Finally, I concur with the majority that the trial court did not err in not assessing costs against Abbott for all costs of the proceeding through the appeal of the first trial and remand. I would overrule the eighth assignment of error.

{¶ 67} For these reasons, I would overrule all of appellant's assignments of error. I respectfully dissent from the majority's order to remand the case to the trial court for a new trial, and I would affirm the judgment of the trial court.

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[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Jelinek v. Schneider*, Slip Opinion No. 2010-Ohio-5986.]

NOTICE

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

**SLIP OPINION NO. 2010-OHIO-5986**

**THE STATE EX REL. JELINEK, APPELLANT, v. SCHNEIDER, JUDGE, ET AL.,  
APPELLEES.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Jelinek v. Schneider*,

**Slip Opinion No. 2010-Ohio-5986.]**

*Court of appeals' judgment denying petition for writs of mandamus, procedendo, and prohibition affirmed — Court of common pleas judge did not patently disregard the court of appeals' mandate on remand.*

(No. 2010-0824 — Submitted November 16, 2010 — Decided  
December 14, 2010.)

APPEAL from the Court of Appeals for Franklin County,  
No. 08AP-957, 2010-Ohio-1220.

.....  
**BROWN, C.J.**

{¶ 1} This is an appeal from a judgment entered by the court of appeals denying a petition for writs of mandamus, procedendo, and prohibition to compel appellees Franklin County Court of Common Pleas and Judge Charles A.

Schneider to carry out the court of appeals' mandate in a previous appeal by allowing appellant to allege constructive discharge in conducting a new trial on an age-discrimination claim. Because the common pleas court and Judge Schneider did not patently and unambiguously disregard the court of appeals' mandate, we affirm the judgment of the court of appeals denying the requested extraordinary relief.

#### Facts

{¶ 2} In September 1999, appellant, David A. Jelinek, filed a complaint in the Franklin County Court of Common Pleas against appellee Abbott Laboratories, Ross Products Division ("Abbott") and several current and former Abbott employees, including appellees Karl V. Insani and Gregory A. Lindberg. Jelinek alleged that "[a]fter 30 years in various sales capacities with Ross Laboratories and the Ross Products Division of Abbott Laboratories, [he] was retaliated against, demoted and constructively terminated by defendants on the basis of his age." Jelinek sought damages. After the common pleas court granted summary judgment in favor of the defendants on all of his claims, he appealed.

{¶ 3} In his assignments of error, Jelinek claimed that the trial court had erred in granting summary judgment on the claims of age discrimination, promissory estoppel, constructive discharge, retaliation, and wrongful discharge in violation of public policy. In September 2001, the Court of Appeals for Franklin County reversed the judgment of the trial court on the claims of age discrimination, promissory estoppel, and constructive discharge and remanded the cause to that court for further proceedings. *Jelinek v. Abbott Laboratories* (Sept. 13, 2001), Franklin App. No. 01AP-217, 2001 WL 1045534 ("*Jelinek I*"). The court of appeals affirmed the judgment of the trial court on the remaining claims. *Id.*

{¶ 4} On remand, the matter proceeded to a jury trial before Judge John P. Bessey, and the jury returned a verdict against Abbott, Insani, and Lindberg on

the age-discrimination claim, awarding Jelinek \$700,000 in compensatory damages for emotional distress, \$25,000,000 in punitive damages, and attorney fees. Although the jury found in favor of Jelinek on his age-discrimination claim based on his job transfer to Lake County, Indiana, the jury answered in an interrogatory that he did not prove by a preponderance of the evidence that “the transfer resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott.” Thus, the jury found in favor of the defendants on Jelinek’s claims for constructive discharge. The defendants also prevailed on Jelinek’s promissory-estoppel claim.

{¶ 5} On June 23, 2003, Judge Bessey entered a judgment notwithstanding the verdict (“JNOV”) in favor of the defendants and against Jelinek on his age-discrimination claim. In the alternative, the judge ordered that “defendants’ motion for new trial on plaintiff’s claim of age discrimination is hereby conditionally granted should the JNOV in favor of Abbott Laboratories, Karl V. Insani or Gregory A. Lindberg be vacated or reversed on appeal.” In the same judgment entry, Judge Bessey entered judgment in favor of the defendants on Jelinek’s promissory-estoppel and constructive-discharge claims.

{¶ 6} Jelinek appealed, and the defendants cross-appealed. Jelinek raised several assignments of error, including one relating to his constructive-discharge claim:

{¶ 7} “IV. The trial court erred in excluding certain evidence related to plaintiff’s constructive discharge claim which resulted in an adverse jury verdict on plaintiff’s constructive discharge claim.”

{¶ 8} In October 2005, the court of appeals reversed the judgment of the common pleas court insofar as the court granted the defendants’ motion for judgment notwithstanding the verdict on Jelinek’s age-discrimination claim, but it affirmed the portion of the judgment conditionally granting the defendants’

motion for a new trial on the age-discrimination claim. *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696, 843 N.E.2d 807 (“*Jelinek I*”). The court of appeals overruled Jelinek’s assignment of error regarding the constructive-discharge claim.

{¶ 9} Two retrials of Jelinek’s age-discrimination claim ended in mistrials, and Judge Bessey recused himself from the case in February 2008. Judge Schneider was then assigned to the case. In September 2008, Judge Schneider issued a decision stating that “the scope of the new trial is confined to the age-discrimination claim and excludes a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim.”

{¶ 10} The next month, Jelinek filed a complaint in the court of appeals for writs of mandamus and procedendo to compel the common pleas court and Judge Schneider to conduct a new trial on the issue or claim of constructive discharge in the context of his age-discrimination claim. Jelinek also sought a writ of prohibition to prevent the common pleas court and Judge Schneider from disregarding the court of appeals’ mandate in *Jelinek II* by excluding evidence of constructive discharge in the retrial of his age-discrimination claim. Appellees, Abbott, Insani, and Lindberg, intervened as additional respondents in the writ action. Following the submission of evidence and briefs, the court of appeals denied the writs.

{¶ 11} Jelinek appealed from that judgment, and the cause is now before the court as an appeal as of right.

#### Legal Analysis

{¶ 12} Extraordinary relief is appropriate to require a lower court to comply with and not proceed contrary to the mandate of a superior court. See *State ex rel. Non-Employees of Chateau Estates Resident Assn. v. Kessler*, 107 Ohio St.3d 197, 2005-Ohio-6182, 837 N.E.2d 778, ¶ 14 (mandamus and procedendo); *State ex rel. Danziger v. Yarbrough*, 114 Ohio St.3d 261, 2007-

Ohio-4009, 871 N.E.2d 593, ¶ 8 (prohibition). This precedent is supported by the law-of-the-case doctrine, which “is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.” *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 15. “The portion of the [law-of-the-case] doctrine generally applied in extraordinary-writ cases provides that ‘[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.’ ” *State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St.3d 391, 394, 678 N.E.2d 549, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 11 OBR 1, 462 N.E.2d 410, syllabus.

{¶ 13} Nevertheless, neither mandamus, procedendo, nor prohibition will issue if the party seeking extraordinary relief has an adequate remedy in the ordinary course of law. See *State ex rel. Mosier v. Fornof*, 126 Ohio St.3d 47, 2010-Ohio-2516, 930 N.E.2d 305, ¶ 2 (mandamus and prohibition); *State ex rel. Hazel v. Bender*, 125 Ohio St.3d 448, 2010-Ohio-2112, 928 N.E.2d 1092, ¶ 1 (procedendo). “In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party contesting that jurisdiction has an adequate remedy by appeal.” *State ex rel. Plant v. Cosgrove*, 119 Ohio St.3d 264, 2008-Ohio-3838, 893 N.E.2d 485, ¶ 5.

{¶ 14} The court of appeals is in the best position to interpret its own mandate in *Jelinek II* and determine whether Judge Schneider violated that mandate. See, e.g., *State ex rel. Pyle v. Bessey*, 112 Ohio St.3d 119, 2006-Ohio-6514, 858 N.E.2d 383, ¶ 12. The court of appeals expressly determined that its prior mandate in *Jelinek II* did not order retrial of Jelinek’s constructive-discharge theory and that Judge Schneider had “not acted in a manner inconsistent with this court’s mandate in *Jelinek II*.” *State ex rel. Jelinek v. Schneider*, 10th Dist. No.

08AP-957, 2010-Ohio-1220, ¶ 15 and 17. Moreover, “the use of extraordinary relief to enforce a judgment is not widespread, because of the availability of other means of enforcement, e.g., motion for contempt.” *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 14; *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, ¶ 16.

{¶ 15} The common pleas court and Judge Schneider did not patently and unambiguously disregard the court of appeals’ mandate in *Jelinek II*. Jelinek has adequate remedies in the ordinary course of law by appeal and by motion for contempt to challenge Judge Schneider’s rulings on remand. See *Dzina*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 14.

#### Conclusion

{¶ 16} Based on the foregoing, the court of appeals properly denied Jelinek’s request for extraordinary relief in mandamus, procedendo, and prohibition. Accordingly, we affirm the judgment of the court of appeals.<sup>1</sup>

Judgment affirmed.

LUNDBERG STRATTON, O’CONNOR, O’DONNELL, LANZINGER, and CUPP,  
JJ., concur.

PREIFER, J., concurs in judgment only.

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Law Offices of Russell A. Kelm, Russell A. Kelm, and Joanne W. Detrick,  
for appellant.

Ron O’Brien, Franklin County Prosecuting Attorney, and Patrick J.  
Piccininni, Assistant Prosecuting Attorney, for appellees Franklin County Court  
of Common Pleas and Judge Charles A. Schneider.

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1. We deny Jelinek’s request for oral argument. This case does not raise any complex factual or legal issues, and the parties’ briefs are sufficient for us to resolve the case. *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 41.

January Term, 2010

Winston & Strawn, L.L.P., James F. Hurst, Derek J. Sarafa, and Samantha L. Maxfield<sup>2</sup>; and Vorys, Sater, Seymour and Pease, L.L.P., Michael G. Long, and Lisa Pierce Reisz, for appellees Abbott Laboratories, Ross Products Division, Karl V. Insani, and Gregory A. Lindberg.

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2. The motion for admission pro hac vice of James F. Hurst, Derek J. Sarafa, and Samantha L. Maxfield by Lisa Pierce Reisz is granted.

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. David A. Jelinek, :

Relator, :

v. :

No. 08AP-957

Charles A. Schneider, Judge, Franklin  
County Common Pleas Court and  
Franklin County Common Pleas Court, :

(REGULAR CALENDAR)

Respondents. :

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DECISION

Rendered on March 25, 2010

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*Law Offices of Russell A. Kelm, Russell A. Kelm and Joanne W. Detrick, for relator.*

*Ron O'Brien, Prosecuting Attorney, and Patrick Piccininni, for respondents.*

*Winston & Strawn LLP, James F. Hurst, Derek J. Sarafa and Samantha L. Maxfield; Vorys, Sater, Seymour and Pease, LLP, Michael G. Long and Lisa Pierce Reisz, for intervening respondents Abbott Laboratories, Karl V. Insani, and Gregory A. Lindberg.*

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IN PROCEDENDO, PROHIBITION AND MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, David A. Jelinek, commenced this original action in mandamus, procedendo, and prohibition seeking an order compelling respondents, Franklin County

Court of Common Pleas and the Honorable Charles A. Schneider, to carry out the mandate of this court in *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696 ("*Jelinek II*") by conducting a new trial on relator's R.C. 4112.02(A) and 4112.99 age discrimination claim that includes relator's constructive discharge theory. Abbott Laboratories, Gregory A. Lindberg, and Karl V. Insani (collectively "Abbott") have intervened as respondents in this action.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that this court's mandate in *Jelinek II* did not order the trial court to re-try relator's constructive discharge theory. Essentially, the magistrate determined that because relator did not challenge the validity of the trial court's judgment on relator's constructive discharge theory in *Jelinek II*, this court's mandate in *Jelinek II* did not address that aspect of the trial court's judgment. Therefore, this court's mandate did not order the re-trial of that theory. Because relator failed to show that the trial court acted in a manner contrary to this court's mandate in *Jelinek II*, the magistrate has recommended that we deny relator relief in mandamus, procedendo, and prohibition.

{¶3} Relator has filed objections to the magistrate's decision. Although relator has asserted five separate objections, the objections are closely interrelated and, in part, redundant. Therefore, we will address them together.

{¶4} The heart of the issue presented here is the scope of this court's mandate in *Jelinek II*. Relator argues that constructive discharge is not an independent claim, but rather, an adverse employment action that satisfies one of the elements of his R.C.

4112.02(A) age discrimination claim. Therefore, relator argues that when *Jelinek II* ordered a new trial on relator's age discrimination claim, this court's mandate required the trial court to permit relator to prove age discrimination pursuant to a constructive discharge theory. Because the trial court refused to allow relator to prove age discrimination and damages based upon this theory, relator contends that the trial court acted contrary to this court's mandate in *Jelinek II*. According to relator, the trial court's disregard of the mandate in *Jelinek II* entitles relator to relief in mandamus, prohibition, and procedendo. We disagree.

{¶5} The trial court judgment at issue in *Jelinek II* states in relevant part:

It is further ORDERED, ADJUDGED and DECREED that judgment be and hereby is entered in favor of defendants Abbott Laboratories, Inc., Kari V. Insani and Gregory A. Lindberg (collectively "defendants") and against plaintiff David A. Jelinek on his constructive discharge claim.

It is further ORDERED, ADJUDGED and DECREED that judgment notwithstanding the verdict ("JNOV") be, and hereby is, entered in favor of defendants and against plaintiff David A. Jelinek on plaintiff's age discrimination claim.

{¶6} It is clear from these separate paragraphs in the judgment entry that the trial court treated relator's constructive discharge theory as a distinct claim, separate from his age discrimination claim. This separate treatment arose from the way the parties presented the case to the jury.

{¶7} Relator presented two distinct damage theories in connection with his age discrimination claim. These two theories are reflected in separate jury interrogatories. First, the jury was asked whether relator proved by a preponderance of the evidence that Abbott intentionally discriminated against relator because of his age when it transferred

relator to Lake County, Indiana. The jury answered "yes" in response to this interrogatory. (Jury interrogatory II(A)(4)).

{¶8} Then the jury was asked the following question:

If you found for Plaintiff on his claim of age discrimination with respect to his transfer to Lake County, Indiana, did Plaintiff prove by a preponderance of the evidence that the transfer resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott?

{¶9} The jury answered this interrogatory in the negative. (Jury Interrogatory II(C)(1)). Therefore, the jury expressly rejected relator's constructive discharge theory and refused to award any damages based upon this theory.

{¶10} Thereafter, the jury was also asked the following question:

If you find that Plaintiff suffered damages as a result of age discrimination, and was not compelled to resign as of March 31, 1998, how much do you find that plaintiff is entitled to recover for[.]

{¶11} The jury answered this interrogatory by awarding relator \$700,000 for "emotional distress." (Jury Interrogatory II(C)(2)). The jury's response to this interrogatory indicates that the jury rejected relator's constructive discharge theory but accepted relator's emotional distress theory. Because the jury expressly rejected relator's constructive discharge theory, but still found Abbott liable for age discrimination and awarded damages based on emotional distress, the trial court entered judgment on constructive discharge and age discrimination as if they were separate claims.

{¶12} Notably, in his appeal of the trial court's judgment, relator did not challenge the trial court's treatment of his constructive discharge theory as a separate claim. In fact,

in his fourth assignment of error in *Jelinek II*, relator referred to his constructive discharge theory as a separate and distinct claim:

IV. The trial court erred in excluding certain evidence related to Plaintiff's constructive discharge claim which resulted in an adverse jury verdict on Plaintiff's constructive discharge claim.

{¶13} Therefore, relator's assertion here that constructive discharge is not a distinct claim contradicts his own characterization of that theory of recovery. Moreover, even if relator is technically correct that constructive discharge is not a distinct claim, relator did not challenge the trial court's treatment of his constructive discharge theory as a distinct claim. In fact, relator encouraged this court in *Jelinek II* to treat his constructive discharge theory as a separate claim.

{¶14} We also note that relator's fourth assignment of error is the only assignment of error that expressly addressed his constructive discharge theory. This court overruled that assignment of error in *Jelinek II*. Although *Jelinek II* reversed the trial court's judgment on relator's age discrimination claim, it rejected relator's only challenge to the trial court's resolution of his constructive discharge theory. Therefore, we agree with the magistrate's determination that the mandate in *Jelinek II* did not order the retrial of relator's constructive discharge theory.

{¶15} We reach this conclusion regardless of whether constructive discharge is technically a distinct claim or only one of two alternative theories that relator asserted in attempting to recover damages for age discrimination. In either event, the way these issues were presented and argued on appeal indicates that the mandate in *Jelinek II* did not order the retrial of relator's constructive discharge theory.

{¶16} Given the scope of the mandate in *Jelinek II*, relator is not entitled to the relief he seeks. As noted by Abbott, relator is not entitled to a writ of procedendo because Judge Schneider has not refused to render judgment in the underlying proceeding nor has Judge Schneider delayed in proceeding to judgment. *State ex rel. CNG Fin. Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344, ¶20. Rather, relator seeks to prevent Judge Schneider from proceeding in a manner relator believes is contrary to this court's mandate in *Jelinek II*. Therefore, there is no basis for a writ of procedendo.

{¶17} Second, relator is not entitled to a writ of prohibition because Judge Schneider has not acted in a manner inconsistent with this court's mandate in *Jelinek II*. A writ of prohibition is an extraordinary writ granted to "restrain inferior courts and tribunals from exceeding their jurisdiction." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73, 1998-Ohio-275. Judge Schneider did not exceed his jurisdiction or act in a manner contrary to this court's mandate in *Jelinek II*.

{¶18} Lastly, relator is not entitled to mandamus relief because Judge Schneider is not under a clear legal duty to re-try relator's constructive discharge theory given the scope of this court's mandate in *Jelinek II*.

{¶19} For these reasons, we overrule relator's five objections.

{¶20} Respondents have also filed objections to the magistrate's decision. Respondents argue that relator is not entitled to relief in mandamus, prohibition, and procedendo for the additional reason that relator has an adequate remedy at law—the right to appeal Judge Schneider's interpretation of this court's mandate in *Jelinek II* following the re-trial of relator's age discrimination claim. Because we agree with the

magistrate's determination that relator is not entitled to relief in mandamus, prohibition, and procedendo for the reasons noted above, respondents' objections are moot.

{¶21} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus, prohibition, and procedendo.

*Relator's objections overruled;  
writs of mandamus, prohibition, and procedendo denied;  
and respondents' objections moot.*

FRENCH and CONNOR, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2009 SEP 25 PM 1:38  
CLERK OF COURTS

State of Ohio ex rel. David A. Jelinek, :  
Relator, :  
v. :  
Charles A. Schneider, Judge, Franklin :  
County Common Pleas Court and :  
Franklin County Common Pleas Court, :  
Respondents. :

No. 08AP-957

(REGULAR CALENDAR)

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MAGISTRATE'S DECISION

Rendered on September 25, 2009

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*Law Offices of Russell A. Kelm, Russell A. Kelm and Joanne W. Detrick, for relator.*

*Ron O'Brien, Prosecuting Attorney, and Patrick Piccininni, for respondents.*

*Winston & Strawn LLP, James F. Hurst, Derek J. Sarafa and Samantha L. Maxfield; Vorys, Sater, Seymour and Pease, LLP, Michael G. Long and Lisa Pierce Reisz, for intervening respondents Abbott Laboratories, Karl V. Insani, and Gregory A. Lindberg.*

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IN PROCEDENDO, PROHIBITION AND MANDAMUS

In this original action, relator, David A. Jelinek, requests the issuance of writs ordering respondents Franklin County Court of Common Pleas ("common pleas court") and the Honorable Charles A. Schneider ("Judge Schneider"), a judge of the common pleas court, to carry out the alleged mandate of this court in *Jelinek v. Abbott*

Laboratories, 164 Ohio App.3d 607, 2005-Ohio-5696 ("Jelinek II") by conducting a new trial on the issue or claim of constructive discharge as well as relator's age discrimination claim brought pursuant to R.C. 4112.02(A) and 4112.99.

Findings of Fact:

1. On September 10, 1999, relator refiled a complaint in the common pleas court against intervening respondents Abbott Laboratories, Karl V. Insani and Gregory A. Lindberg, who are among the named defendants in that action.

2. In his common pleas court complaint, relator, as plaintiff, brought five counts against defendants. Count one alleged promissory estoppel. Count three alleged retaliation in violation of R.C. 4112.02(I). Count four alleged violation of Ohio public policy. Count five alleged spoliation of evidence.

3. Count two of the common pleas court complaint presented an age discrimination claim alleged as follows:

The actions of defendants in demoting and constructively terminating plaintiff and not hiring him to existing sales positions constitute age discrimination in violation of R.C. 4112.02(A) and 4112.99. \* \* \*

4. Following the trial court's dismissal of the promissory estoppel claim and striking of the spoliation of evidence claim, defendants moved for summary judgment.

5. In a judgment entry journalized on February 12, 2001, the common pleas court granted summary judgment on all remaining claims.

6. Relator appealed to this court. In his assignments of error, relator challenged the trial court's grant of summary judgment as to "plaintiff's claim of age dis-

crimination," "plaintiff's claim of promissory estoppel" and "plaintiff's claim of constructive discharge."

7. On September 13, 2001, this court, in *Jelinek v. Abbott Laboratories* (Sept. 13, 2001), 10th Dist. No. 01AP-217 ("*Jelinek I*") affirmed in part and reversed in part the judgment of the trial court, and remanded the cause for further proceedings. This court's journal entry was journalized on September 13, 2001. In this court's opinion in *Jelinek I*, this court held that summary judgment was appropriate on relator's claim for retaliation and for violation of public policy. However, this court also held that summary judgment was not appropriate on the "age discrimination claim," the "constructive discharge claim" and the "promissory estoppel claim."

8. In April 2002, relator's action was tried to a jury in the common pleas court. On April 29, 2002, the jury rendered a verdict in favor of plaintiff for age discrimination, finding plaintiff entitled to recover compensatory damages from defendants in the amount of \$700,000, and punitive damages in the amount of 25 million dollars. The jury also rendered a verdict in favor of defendants on the promissory estoppel claim.

9. In a series of interrogatories, the jury held that individual defendants Insani and Lindberg participated in intentional discrimination against plaintiff by transferring him to Lake County, Indiana because of his age.

10. The jury responded "NO" to the following interrogatory:

## II. AGE DISCRIMINATION

### C. Damages On Plaintiff's Age Discrimination Claim.

1. If you found for Plaintiff on his claim of age discrimination with respect to his transfer to Lake County, Indiana, did Plaintiff prove by a preponderance of the evidence that the transfer resulted in working conditions that were so intoler-

able that a reasonable person would have been compelled to resign from his employment with Abbott?

(Emphases omitted.)

11. Thereafter, in June 2002, defendants moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, for a new trial. They also moved, in the alternative, for remittitur.

12. On May 20, 2003, the Honorable John P. Bessey, the common pleas judge presiding over relator's action, issued a 29-page written decision.

13. In his May 20, 2003 written decision, Judge Bessey determined that the court shall grant JNOV and, alternatively, a new trial. Judge Bessey conditionally granted remittitur as to compensatory and punitive damages.

14. On June 23, 2003, Judge Bessey filed a judgment entry, stating in part:

[I]t is hereby

ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of defendant Abbott Laboratories and against plaintiff David A. Jelinek on his promissory estoppel claim.

It is further ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of defendants Abbott Laboratories, Karl V. Insani and Gregory A. Lindberg (collectively "defendants") and against plaintiff David A. Jelinek on his constructive discharge claim.

It is further ORDERED, ADJUDGED AND DECREED that judgment notwithstanding the verdict ("JNOV") be, and hereby is, entered in favor of defendants and against plaintiff David A. Jelinek on plaintiff's age discrimination claim.

IN THE ALTERNATIVE, it is hereby ORDERED, ADJUDGED AND DECREED that defendants' motion for new trial on plaintiff's claim of age discrimination is hereby condi-

tionally granted should the JNOV in favor of Abbott Laboratories, Karl V. Insani or Gregory A. Lindberg be vacated or reversed on appeal.

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The judgment entered herein constitutes a final judgment, the Court finding that there is no just reason for delay.

(Emphases sic.)

15. Relator appealed to this court the judgment of the common pleas court.

16. On October 27, 2005, this court issued its 27-page opinion in *Jelinek II*. As noted in this court's opinion, relator asserted eight assignments of error.

Assignments of error one through four provide:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION BASED UPON THE "LAW OF THE CASE" DOCTRINE.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION.

III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR REMITTITUR.

IV. THE TRIAL COURT ERRED IN EXCLUDING CERTAIN EVIDENCE RELATED TO PLAINTIFF'S CONSTRUCTIVE DISCHARGE CLAIM WHICH RESULTED IN AN ADVERSE JURY VERDICT ON PLAINTIFF'S CONSTRUCTIVE DISCHARGE CLAIM.

17. In its opinion in *Jelinek II*, this court stated, in part:

¶140 At trial, plaintiff retained the ultimate burden of demonstrating that he was the victim of unlawful discrimination. See *U.S. Postal Serv. Bd. of Governors v. Aikens* (1983), 460

U.S. 711, 103 S.Ct. 1478. In this case, the jury determined that defendants intentionally discriminated against him because of his age based on his transfer to Lake County, Indiana.

\* \* \*

¶45 Based on this court's review of the record, we conclude that the trial court conditionally granted a new trial as to plaintiff's age discrimination claim on the basis that the verdict was not supported by the weight of the evidence. Essentially, the trial court found that the evidence at trial was not legally sufficient to support plaintiff's age discrimination claim, and even if it was legally sufficient to support the claim, it was not supported by the weight of the evidence.

\* \* \*

¶47 As revealed in the interrogatories, the jury found that defendants demonstrated that plaintiff was transferred to Lake County, Indiana, for reasons other than his age. However, the jury determined that plaintiff demonstrated that the reason(s) were false, and that plaintiff proved by a preponderance of the evidence that defendants intentionally discriminated against him because of his age based on his transfer to Lake County, Indiana.

¶48 As determined above, the evidence at trial was legally sufficient to support an age discrimination claim. However, after thoroughly reviewing the extensive record in this case, and considering the sound discretion provided to the trial court in determining whether to grant a motion for a new trial, we conclude that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim.

¶49 Considering the foregoing, we sustain plaintiff's first and second assignments of error on the basis that the trial court erred in granting the motion for JNOV. We need not, and do not, reach the issue that is raised by plaintiff's first assignment of error of whether the trial court erred in granting the JNOV based upon the "law of the case" doctrine. However, the trial court did not abuse its discretion in conditionally granting a new trial as to plaintiff's age discrimination claim. Therefore, to the extent defendant argues under his second assignment of error that the trial court erred in conditionally

granting a new trial on the issue of age discrimination, it is overruled.

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¶52 Under his fourth assignment of error, plaintiff contends that the trial court erred in excluding certain evidence relating to his claim of constructive discharge. Specifically, plaintiff argues that the trial court erroneously excluded from evidence a 1998 article from a newspaper which declared Gary, Indiana, as the most dangerous city in the United States for crime. Plaintiff also argues that the trial court erred in not permitting plaintiff's counsel to question witnesses regarding the desirability of working in Gary, Indiana, and by excluding from evidence photographs that plaintiff took of Gary, Indiana.

\*\*\*

¶54 In this case, the jury held that plaintiff failed to prove that his transfer to Lake County, Indiana, resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott. Thus, the jury found that plaintiff had failed to prove that he had been constructively discharged.

Id. at ¶40-54.

18. On October 28, 2005, this court issued its judgment entry in *Jelinek II*.

The judgment entry states in its entirety:

For the reasons stated in the opinion of this court rendered herein on October 27, 2005, plaintiff's first and second assignments of error are sustained on the basis that the trial court erred in granting defendants' motion for judgment notwithstanding the verdict as to plaintiff's age discrimination claim, but his second assignment of error is overruled to the extent plaintiff argues that the trial court erred in conditionally granting defendants' motion for a new trial on the issue of plaintiff's age discrimination claim. Our determination that the trial court did not abuse its discretion in conditionally granting defendants' motion for a new trial as to plaintiff's age discrimination claim moots defendants' first, second, and third cross-assignments of error, as well as plaintiff's third, seventh, and eighth assignments of error. Plaintiff's fourth, fifth,

and sixth assignments of error are overruled. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this opinion. Costs are assessed against defendants.

19. The parties agree that pursuant to this court's October 28, 2005 judgment entry remanding this case to the trial court, Judge Bessey began a new trial that ended in a mistrial. Judge Bessey then reset the new trial for February 2008 and that trial also ended in a mistrial. After Judge Bessey recused himself, the case was reassigned to Judge Schneider.

20. On September 19, 2008, Judge Schneider filed a five-page decision dated September 16, 2008 and captioned "Decision on the Scope of the New Trial." In his decision, Judge Schneider quotes at length from this court's opinion in *Jelinek II*, including those portions of this court's *Jelinek II* opinion quoted above in paragraph 17 of this magistrate's decision.

In his decision, Judge Schneider wrote:

The Court of Appeals distinguished between the age-discrimination claim and the constructive-discharge claim and discussed those separately. As such, in its discussion, the appellate court distinguished between the jury's finding that plaintiff was discriminated against because of his age and the jury's finding that plaintiff did not show that working conditions were so intolerable so as to constitute constructive discharge. See *id.* at 623 & 625.

In discussing these two, separate matters, the Court of Appeals held "that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim." *Id.* at 623. Conversely, the Court of Appeals did not mention a new trial on the constructive-discharge claim or any "intertwining."

Contrary to plaintiff's argument, a discrimination claim is distinct from a constructive-discharge claim. See, e.g., Valentine v. Harris (Hamilton App., May 11, 1994), No. C-920977, 1994 Ohio App. LEXIS 1976, at \*9-10 ("Even if Valentine failed to present evidence demonstrating that she was constructively discharged from her employment with Kroger, she was still entitled to an award of damages on her discrimination claim, if she proved at trial that she was the subject of wrongful harassment and that the defendants intentionally discriminated against her."); Yates v. Avco Corp. (C.A. 6, 1987), 819 F.2d 630, 637 ("proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other 'aggravating factors' ").

As the appellate court held, the trial court's conditional granting of defendants' motion for a new trial was proper, and this conclusion does not require overturning the jury's finding that constructive discharge did not occur. As one court has held,

[w]hen the jury has clearly decided an issue in favor [of] the party opposing the motion, and the issue is unaffected by the particular defect the court finds with respect to a wholly separate issue, a retrial of all issues is not reasonably warranted. The issue or issues to be retried should be limited to those which were affected by the defect according to the court's findings.

Drehmer v. Fylak (Montgomery 2005), 163 Ohio App. 3d 248, 258[.]

Therefore, the scope of the new trial is confined to the age-discrimination claim and excludes a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim. \* \* \*

21. On October 17, 2008, Judge Schneider filed an entry stating in its entirety:

For the reasons set forth in this Court's Decision On The Scope of the New Trial filed herein on September 16, 2008, the scope of the new trial in this matter, scheduled to begin November 10, 2008, will be confined to Plaintiff's age-discrimination claim and will exclude a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim.

IT IS SO ORDERED.

(Emphasis sic.)

22. On October 29, 2008, relator, David A. Jelinek, filed this original action.

Conclusions of Law:

It is the magistrate's decision that this court deny relator's requests for writs of procedendo, prohibition and mandamus, as more fully explained below.

Under the doctrine of the law of the case, "[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna* (1995), 73 Ohio St.3d 180, 182, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, syllabus. The Ohio Constitution does not give a common pleas court jurisdiction to review a prior mandate of a court of appeals. *Id.*, citing *State ex rel. Potain, S.A. v. Mathews* (1979), 59 Ohio St.2d 29, 32. Accordingly, a writ of prohibition can issue to prevent a lower court from proceeding contrary to the mandate of a superior court. *Id.* Also, a writ of mandamus can issue to prevent a lower court from proceeding contrary to the mandate of a superior court. *Id.* A writ of procedendo can be appropriate when an inferior court has erroneously stayed the proceeding on a remand from a superior court. *Crandall*, at 184.

As earlier noted, Judge Schneider's October 17, 2008 entry announces that "the new trial in this matter \* \* \* will be confined to Plaintiff's age-discrimination claim and will exclude a retrial of the constructive-discharge claim." Relator contends here that Judge Schneider's entry, in effect, announces that he will not proceed in ac-

cordance with this court's mandate in *Jelinek II*. The magistrate disagrees with relator's contention.

It should be noted at the outset that this court's October 28, 2005 judgment entry setting forth this court's mandate in *Jelinek II* holds that "the trial court did not abuse its discretion in conditionally granting defendants' motion for a new trial as to plaintiff's age discrimination claim." This court remanded the cause to the trial court for "further proceedings in accordance with law and consistent with this opinion." This court's October 28, 2005 judgment entry does not directly address the question of whether the new trial as to the age discrimination claim shall include a retrial of the constructive discharge issue or claim.

However, this court, in *Jelinek II*, was never asked to determine whether the new trial as to the age discrimination claim shall include a retrial of the constructive discharge issue or claim. That determination, however, can be easily made by a review of Judge Bessey's June 23, 2003 judgment entry and the assignments of error that relator asserted in his appeal to this court in *Jelinek II*.

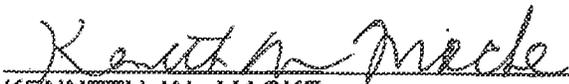
Again, Judge Bessey's June 23, 2003 judgment entry states in part:

It is further ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of defendants Abbott Laboratories, Karl V. Insani and Gregory A. Lindberg (collectively "defendants") and against plaintiff David A. Jelinek on his constructive discharge claim.

This court's October 28, 2005 judgment entry leaves undisturbed that portion of Judge Bessey's June 23, 2003 judgment entry, quoted above, that enters judgment in favor of defendants on relator's "constructive discharge claim" even though this court's October 28, 2005 judgment does not directly so state.

Given that Judge Bessey's entry of judgment in favor of defendants on the constructive discharge claim remains undisturbed by this court's judgment in *Jelinek II*, Judge Schneider cannot be in violation of this court's mandate in *Jelinek II* and, thus, relator's action here must fail.

Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for writs of procedendo, prohibition and mandamus.

  
KENNETH W. MACKE  
MAGISTRATE

#### NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

CLERK OF COURTS

DAVID A. JELINEK, et al.

Plaintiff,

v.

ABBOTT LABORATORIES,

Defendants.

Case No. 99CVH09-7505

Judge Schneider

DECISION ON THE SCOPE OF THE NEW TRIAL

Rendered this 16 day of September, 2008.

Schneider, J.

Plaintiff argues that the new trial includes both the age-discrimination claim and the issue of constructive discharge because "[t]he age discrimination claim is sufficiently intertwined with plaintiff's assertion that he was constructively discharged to require a new trial." Defendants argue that the Court of Appeals "treated age discrimination and constructive discharge as separate issues" and ordered a retrial on the age-discrimination claim only.

In this regard, the Tenth District Court of Appeals ordered a retrial only on the age-discrimination claim. The appellate court held as follows:

On September 13, 2001, this court issued an opinion reversing the trial court's judgment regarding plaintiff's claims of age discrimination, promissory estoppel, and constructive discharge. *Jelinek v. Abbott Laboratories* (Sept. 13, 2001), Franklin App. No. 01AP-217, 2001 Ohio App. LEXIS 4055 ("Jelinek I"). This court essentially determined that genuine issues of

material fact remained as to the claims for age discrimination, promissory estoppel, and constructive discharge.

After three weeks of trial, the jury deliberated and returned a verdict in favor of plaintiff and against defendant Ross and two individual defendants, Karl V. Insani and Gregory A. Lindberg, as to plaintiff's claim for age discrimination, awarding plaintiff \$ 700,000 in compensatory damages and \$ 25,000,000 in punitive damages, as well as attorney fees. The jury found in favor of defendants and against plaintiff on plaintiff's claims of promissory estoppel and constructive discharge.

[\*\*P27] On June 23, 2003, the trial court entered judgment in this case. The trial court entered judgment in favor of defendant Abbott and against plaintiff on his promissory estoppel claim, and entered judgment in favor of defendants Abbott, Mr. Insani, and Mr. Lindberg, and against plaintiff on his constructive discharge claim.

The trial court entered a JNOV in favor of defendants and against plaintiff on his age discrimination claim. In the alternative, the trial court conditionally granted defendants' motion for a new trial on plaintiff's claim of age discrimination should the JNOV in favor of defendants on this issue be vacated or reversed on appeal.

Plaintiff appeals and has asserted the following eight assignments of error:

I. The trial court erred in granting defendants' motion for judgment notwithstanding the verdict on plaintiff's claim of age discrimination based upon the "law of the case" doctrine.

II. The trial court erred in granting defendants' motion for judgment notwithstanding the verdict on plaintiff's claim of age discrimination.

IV. The trial court erred in excluding certain evidence related to plaintiff's constructive discharge claim which resulted in an adverse jury verdict on plaintiff's constructive discharge claim.

At trial, plaintiff retained the ultimate burden of demonstrating that he was the victim of unlawful discrimination. See *U.S. Postal Serv. Bd. of Governors v. Aikens* (1983), 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403. In this case, the jury determined that

defendants intentionally discriminated against him because of his age based on his transfer to Lake County, Indiana. . . .

. . . . Based on this court's review of the record, we conclude that the trial court conditionally granted a new trial as to plaintiff's age discrimination claim on the basis that the verdict was not supported by the weight of the evidence. Essentially, the trial court found that the evidence at trial was not legally sufficient to support plaintiff's age discrimination claim, and even if it was legally sufficient to support the claim, it was not supported by the weight of the evidence.

. . . . As revealed in the interrogatories, the jury found that defendants demonstrated that plaintiff was transferred to Lake County, Indiana, for reasons other than his age. However, the jury determined that plaintiff demonstrated that the reason(s) were false, and that plaintiff proved by a preponderance of the evidence that defendants intentionally discriminated against him because of his age based on his transfer to Lake County, Indiana.

As determined above, the evidence at trial was legally sufficient to support an age discrimination claim. However, after thoroughly reviewing the extensive record in this case, and considering the sound discretion provided to the trial court in determining whether to grant a motion for a new trial, we conclude that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim.

Considering the foregoing, we sustain plaintiff's first and second assignments of error on the basis that the trial court erred in granting the motion for JNOV. We need not, and do not, reach the issue that is raised by plaintiff's first assignment of error of whether the trial court erred in granting the JNOV based upon the "law of the case" doctrine. However, the trial court did not abuse its discretion in conditionally granting a new trial as to plaintiff's age discrimination claim. Therefore, to the extent defendant argues under his second assignment of error that the trial court erred in conditionally granting a new trial on the issue of age discrimination, it is overruled.

. . . . Under his fourth assignment of error, plaintiff contends that the trial court erred in excluding certain evidence relating to his claim of constructive

discharge. Specifically, plaintiff argues that the trial court erroneously excluded from evidence a 1998 article from a newspaper which declared Gary, Indiana, as the most dangerous city in the United States for crime. Plaintiff also argues that the trial court erred in not permitting plaintiff's counsel to question witnesses regarding the desirability of working in Gary, Indiana, and by excluding from evidence photographs that plaintiff took of Gary, Indiana.

In this case, the jury held that plaintiff failed to prove that his transfer to Lake County, Indiana, resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott. Thus, the jury found that plaintiff had failed to prove that he had been constructively discharged. (emphasis added.)

Jelinek v. Abbott Labs. (Franklin 2005), 164 Ohio App. 3d 607, 611, 617-20, 622-25.

The Court of Appeals distinguished between the age-discrimination claim and the constructive-discharge claim and discussed those separately. As such, in its discussion, the appellate court distinguished between the jury's finding that plaintiff was discriminated against because of his age and the jury's finding that plaintiff did not show that working conditions were so intolerable so as to constitute constructive discharge. See id. at 623 & 625.

In discussing these two, separate matters, the Court of Appeals held "that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim." Id. at 623. Conversely, the Court of Appeals did not mention a new trial on the constructive-discharge claim or any "intertwining."

Contrary to plaintiff's argument, a discrimination claim is distinct from a constructive-discharge claim. See, e.g., Valentine v. Harris (Hamilton App., May 11, 1994), No. C-920977, 1994 Ohio App. LEXIS 1976, at \*9-10 ("Even if Valentine failed to present evidence demonstrating that she was constructively discharged from her employment with Kroger, she was still entitled to an award of damages on her discrimination claim, if she proved at trial that she was the subject of wrongful harassment and that the defendants intentionally discriminated against her."); Yates v. Avco Corp. (C.A. 6, 1987), 819 F.2d 630, 637 ("proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other 'aggravating factors'").

As the appellate court held, the trial court's conditional granting of defendants' motion for a new trial was proper, and this conclusion does not require overturning the jury's finding that constructive discharge did not occur. As one court has held,

[w]hen the jury has clearly decided an issue in favor of the party opposing the motion, and the issue is unaffected by the particular defect the court finds with respect to a wholly separate issue, a retrial of all issues is not reasonably warranted. The issue or issues to be retried should be limited to those which were affected by the defect according to the court's findings.

Drehmer v. Fylak (Montgomery 2005), 163 Ohio App. 3d 248, 258

Therefore, the scope of the new trial is confined to the age-discrimination claim and excludes a retrial of the

constructive-discharge claim, including facts or allegations that relate to that claim. Counsel for defendants shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse party pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.



CHARLES A. SCHNEIDER, JUDGE

Copies to:

Russell A. Kelm, Esq.  
Joanne Detrick, Esq.  
Cynthia L. Dawson, Esq.  
37 W. Broad Street, Suite 860  
Columbus, Ohio 43215  
Counsel for Plaintiff

Brian Garvine, Esq.  
266 North Fourth Street, Suite 100  
Columbus, Ohio 43215  
Counsel for Plaintiff

Lisa P. Reisz, Esq.  
Elizabeth T. Smith, Esq.  
Adam J. Hall, Esq.  
Michael G. Long, Esq.  
Vorys, Sater, Seymour & Pease  
52 East Gay Street  
Columbus, Ohio 43215  
Counsel for Defendants

Derek J. Sarafa, Esq.  
James F. Hurst, Esq.  
35 W. Wacker Drive  
Chicago, IL 60601  
Counsel for Defendant Isani

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COURT OF APPEALS  
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT  
OCT 27 PM 1:46

CLERK OF COURTS

David A. Jelinek,

Plaintiff-Appellant,  
(Cross-Appellee),

v.

Abbott Laboratories et al.,

Defendants-Appellees,  
(Cross-Appellants).

No. 03AP-614  
(C.P.C. No. 99CVH-09-7505)

(REGULAR CALENDAR)

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O P I N I O N

Rendered on October 27, 2005

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*Law Offices of Russell A. Kelm, Russell A. Kelm and Joanne W. Detrick, for plaintiff-appellant/cross-appellee.*

*Vorys, Sater, Seymour & Pease LLP, Michael G. Long and Lisa Pierce Reisz; Mayer, Brown, Rowe & Maw LLP, Andrew L. Frey and Sanford I. Weisburst, for defendants-appellees/cross-appellants.*

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APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} On September 10, 1999, plaintiff-appellant, David A. Jelinek, re-filed a complaint in the Franklin County Court of Common Pleas against Abbott Laboratories, Ross Products Division, Joy A. Amundson, Thomas M. McNally, William H. Stadtlander, Karl V. Insani, Gregory A. Lindberg, and James L. Sipes. The complaint set forth claims for relief of promissory estoppel, age discrimination in violation of R.C. 4112.02(A) and

4112.99, retaliation in violation of R.C. 4112.02(l) and 4112.99, violation of public policy, and spoliation of evidence.

{¶2} On July 31, 2000, the defendants filed a motion for summary judgment as to all claims. Plaintiff filed a memorandum in opposition to the motion, and the defendants filed a reply. On January 23, 2001, the trial court rendered a decision granting defendants' motion for summary judgment and entered judgment in favor of defendants on February 12, 2001. Plaintiff appealed from this entry to this court, contending that the trial court erred in granting defendants' motion for summary judgment as to the claims of age discrimination, promissory estoppel, constructive discharge, and retaliation and wrongful discharge in violation of public policy.

{¶3} On September 13, 2001, this court issued an opinion reversing the trial court's judgment regarding plaintiff's claims of age discrimination, promissory estoppel, and constructive discharge. *Jelinek v. Abbott Laboratories* (Sept. 13, 2001), Franklin App. No. 01AP-217 ("*Jelinek I*"). This court essentially determined that genuine issues of material fact remained as to the claims for age discrimination, promissory estoppel, and constructive discharge. Relating to the age discrimination claim, this court, in *Jelinek I*, stated as follows:

\*\*\* Ross eliminated all of the district manager positions as part of a larger business plan. [Plaintiff was a primary care district manager at the time the position was eliminated.] According to Mr. Lindberg's April 27, 1999 affidavit, Ross attempted to place the former district managers in their respective regions in order to save on relocation expenses. However, Mr. Lindberg stated that appellant and Mr. Schlies were offered positions that required them to transfer, and the Lake County, Indiana territory was the only open sales territory in appellant's region. Mr. Schlies had been the district manager in the Chicago territory and was offered a position in Memphis, Tennessee.

Construing the evidence most strongly in favor of appellant, we determine that there are genuine issues as to whether appellees' actions with regard to appellant's transfer were discriminatory. Appellant put forth evidence that of the eight district managers, he had the most years of service and was the oldest. Ross stated that it attempted to keep the former district managers in their respective regions. However, Mr. Schlies, who was not in the protected class, was moved from the Chicago area to Memphis, Tennessee. The Lake County, Indiana territory was geographically closer to Mr. Schlies's former territory than Memphis. There is no explanation in the record as to why Mr. Schlies was offered the comparable position in Memphis and not appellant, who had more seniority. For purposes of summary judgment and drawing all reasonable inferences in favor of appellant, appellant has shown genuine issues of fact as to his claim against appellees for age discrimination.

{¶4} In *Jelinek I*, this court affirmed the trial court's granting of defendants' motion for summary judgment as to plaintiff's claim of retaliation/wrongful discharge in violation of public policy. *Id.* The cause was accordingly remanded to the trial court to conduct further proceedings consistent with the opinion. Plaintiff filed an application for reconsideration, which this court denied. The Supreme Court of Ohio declined jurisdiction to hear the case. *Jelinek v. Abbott Laboratories* (2002), 94 Ohio St.3d 1431.

{¶5} Plaintiff's remaining claims were thereafter tried to a jury from April 8 to April 29, 2002. The following evidence was presented at trial.

{¶6} Plaintiff, born May 15, 1942, began his career at Ross, a division of Abbott Laboratories, in 1967 as a salesman, or a "territory manager," and over the next 30 years he was employed in various positions with Ross, including working as a district manager in Syracuse, New York, as a district manager in Atlanta, Georgia, and as a national sales manager. The geographic framework for sales for Ross operates under regions, districts, and territories. Regions comprise of districts and districts comprise of territories. Plaintiff

left Ross for about nine months in 1970, and then returned to work for Ross. Plaintiff held "quite a few" different positions at Ross, and when he changed positions, it was not necessarily a promotion. (Tr. 586.) For example, he had moved laterally, and had changed positions from a district manager to a sales representative. In 1987, plaintiff moved back to Columbus and was the national sales manager for a sports nutritional drink called "Exceed." In early 1997, plaintiff became a primary care district manager ("PCDM") in Columbus. He was one of seven PCDMs. At trial, primary care was characterized as "calling on physicians." (Tr. 1045.) Plaintiff testified regarding a five-year commitment for his PCDM position. During his employment with Ross, plaintiff consistently received good evaluations. Phil Pini, a former supervisor of plaintiff, described him as an "outstanding" employee who was "conscientious." (Tr. 1048.)

{¶7} Plaintiff testified that after he assumed the PCDM position, he received an announcement in the summer of 1997 regarding the collapsing of territories by the company. Plaintiff described the "collapsing" of a territory as the dissolving of a territory. Plaintiff further explained, "You eliminate the salesman's base in that territory. And then you take that territory and assign it to other salesmen around that territory. So, you continue to generate sales, but you don't have a person responsible just for that piece of geography by itself. It is shared by other people." (Tr. 152.) According to plaintiff's testimony, the Gary, Indiana territory (also known as the Lake County, Indiana territory), which was part of the Columbus region and was contained within the Indianapolis, Indiana district, had been collapsed. Plaintiff testified that Charlie Fisher, a regional manager, informed him that a large part of geography of the Gary, Indiana territory had been given to a salesman in South Bend, Indiana. According to plaintiff's testimony, the

A. Yes, needs, business needs, I guess you can call it, unless you have another term.

Q. When you talk about business needs, would you want to put your best salesman in the best territory or the worst territory?

A. That is really a judgment call.

Q. It is a tough question, isn't it?

A. Yes; it could go both ways. It depends on the personality of the salesperson, and the area that you are going to put him in.

Q. You certainly don't want to lose a good salesman by putting him in a rotten territory, do you?

A. Define "rotten," and I would say yes.

Q. A bad territory, or he is not going to make sales, or bonus and is going to be unhappy with his compensation.

A. You don't want to make him unhappy, no.

Q. By the same token, you would like to put your best salesman in a low performance territory and try to turn it around.

A. Yes.

Q. It is a balancing act.

A. Yes.

(Tr. 965-966.)

{¶12} Mr. Insani testified that he made the decision that plaintiff would be offered the position in Gary, Indiana. Mr. Insani testified that he told his regional managers and others that he did not expect plaintiff to take the Gary, Indiana territory. Greg Lindberg,

who took over the vice president of sales position from Mr. Insani,<sup>1</sup> also testified regarding the position that was made available to plaintiff. When he was asked who made the decision to give plaintiff the Gary, Indiana territory, Mr. Lindberg responded as follows:

Maybe if I could just review, basically, how we handled it from a regional manager's perspective. We basically asked each regional manager to be responsible for making sure their primary care district manager had a position. So, the first place to look would be within their own region.

Now, in this particular situation the only vacant territory in the Columbus region, which also was going to be eliminated, was the Gary, Indiana territory.

(Tr. 1727.) Mr. Lindberg testified that he played a role in the reduction in force and the redeployment of employees in 1997. Mr. Lindberg also testified that Charlie Fisher was the regional manager for plaintiff during this time. Regarding the extent that Mr. Fisher was involved in deciding where to place plaintiff, Mr. Lindberg testified as follows:

I am not sure that I would characterize it that [Mr. Fisher] was actively a part. [Mr. Fisher] knew that we were \* \* \* placing the primary care district managers within their region where they had vacancies.

That is something that we had communicated to the regional managers. It was kind of a forgone conclusion that if that was the only vacancy, then that is where the primary district manager would be redeployed to.

(Tr. 1729.)

{¶13} Plaintiff thought that his job was going to be eliminated in connection with an early October 1997 meeting. At the October 3, 1997 meeting involving plaintiff and his employer, plaintiff arrived with his lawyer. The meeting was cancelled because Mr. Lindberg said that he could not meet with plaintiff and his lawyer without an Abbott lawyer

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<sup>1</sup> Prior to assuming the vice president of sales position, Mr. Lindberg had reported to Mr. Insani as the

present. Mr. Lindberg testified that the plan for the meeting was to discuss plaintiff's relocation to the Gary, Indiana territory. According to Mr. Lindberg, the Gary, Indiana territory was the only vacant territory in the Columbus region. The meeting was not rescheduled. Plaintiff testified that he brought a lawyer to the meeting because he thought the issues discussed at the meeting were going to affect his employment with Abbott. He thought he was "going to be forced out of Ross." (Tr. 171, 287.) Plaintiff was 55 years old at the time.

{¶14} Counsel for Abbott sent a letter to counsel for plaintiff indicating that if plaintiff was unwilling to meet with his managers without his counsel present, then his managers would communicate with him in writing regarding the subject of the previously scheduled meeting. (Plaintiff's exhibit 8.) Plaintiff was also informed that his district job was being eliminated and that he had the option to go to Gary, Indiana, as a medical-nutritional representative, or to accept an outplacement program and receive 39 weeks of compensation.

{¶15} Plaintiff sought information about the Gary, Indiana territory upon learning about his employment option. Plaintiff testified that he could not obtain good sales information regarding the Gary, Indiana territory because it had been collapsed. Plaintiff was unable to determine the sales in Gary, Indiana, and "with a great deal of reluctance" agreed to work at Gary, Indiana. (Tr. 179.) Based on the information that he did receive, plaintiff determined that the territory "was not sales competitive." (Tr. 335.)

{¶16} Plaintiff reported to Gary, Indiana in mid-January 1998. According to plaintiff's testimony, the information he was given indicated that the Gary, Indiana territory

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financial director of field sales.

had a total sales of \$1,568,000 for a period of time, and that an average territory had \$4,000,000 in sales. Plaintiff indicated to the district manager, Mr. Hinchman, that he did not think that the territory was competitive. Plaintiff was concerned about his pay grade, and that his bonus earnings would be negatively affected, which would also affect his retirement annuity.

{¶17} According to plaintiff's testimony, Ross had a policy that salesmen were expected to live in the population mass of a territory, which was Gary, Indiana. Plaintiff observed that Gary, Indiana, was economically depressed. Plaintiff was surprised that the major catholic hospital was closed. Plaintiff described Gary, Indiana, as "unsavory" and "scary." (Tr. 193.) Plaintiff testified that he was concerned for his physical safety in Gary, Indiana, and that the city was "voted the most dangerous town in America two years in a row." (Tr. 470-471.) Plaintiff returned to Columbus and sent Ross a letter indicating that he felt that he was constructively dismissed. Regarding the Gary, Indiana territory, plaintiff testified as follows:

\*\*\* It was very obvious from the materials that were provided, and the fact that the original territory did not exist anymore, they basically were providing me with materials for two counties that had been part of a previous territory. That indeed there was no territory, no job. And the attitude of the district manager kind of completed the puzzle that, indeed, this was a sales ruse. They were trying to get me to resign. And so I felt I was constructively terminated.

(Tr. 336-337.) According to plaintiff's testimony, relocation expenses for plaintiff to move to Gary, Indiana, were never requested nor approved.

{¶18} On a written evaluation of plaintiff, dated August 26, 1994, the following statement was made: "In his long career with Ross, [plaintiff] has had many responsible positions and now is in the twilight of his career. He wants to retire from Ross with strong

self-esteem." (Plaintiff's exhibit 1.) A 1995 evaluation also states that plaintiff was "[i]n the twilight of his career." (Plaintiff's exhibit 2.) Plaintiff was 53 years old at the time of this evaluation. These evaluations were signed by plaintiff's district manager at the time, Mr. Pini, and his regional manager at the time, Tom Mack.

{¶19} Plaintiff testified that Steve Schlies, a former PCDM in Chicago, was assigned the Memphis territory when it was still attached to the Columbus region. According to plaintiff, Mr. Schlies was offered a district manager position in Memphis the day he was offered the Gary, Indiana position. Mr. Schlies accepted a "full-line" district manager position in Memphis. A "full-line" representative was described as a salesman that called on hospitals, nursing homes, distributors, home care companies, and physicians. It was plaintiff's understanding that in July 1997, the Columbus region "absorbed" Memphis, and then by January 1998, Memphis was back in the Chicago region upon the elimination of the Columbus region. At trial, Mr. Insani did not recall the Memphis area ever being in the Columbus region. Mr. Lindberg also testified that the Memphis district was never part of the Columbus region. According to Bill Stadlander, who had been the vice president and general manager of the adult nutritional business at Ross, the persons who made the decision to make Mr. Schlies a full-line district manager in Memphis were Mr. Insani, the national sales manager, and Barb Groth, the regional manager of the Chicago region.

{¶20} At some point in this process, plaintiff had to reduce his inventory of samples that were in his garage. Plaintiff injured his back carrying cases of samples upstairs at the Fulton County Home Health Agency in October 1997. Plaintiff testified that this had happened before, and therefore he had re-aggravated his back.

{¶21} Plaintiff also testified at trial regarding the emotional stress he was experiencing as a consequence of his employment situation. Plaintiff testified, "I felt my back injury was related to the emotional stress of this whole issue of whether I was going to be employed or not. Just not able to sleep at night. Just not sure where we were going to be. \* \* \* It was \* \* \* a lot of pressure, a lot of lost sleep." (Tr. 365-366.) According to plaintiff, "[I]t had a significant impact on me in my personal life." (Tr. 566.) Plaintiff made an appointment with a psychologist, went to the office, but decided that he "just didn't want to share my problems," and he did not see the psychologist. (Tr. 567-568.)

{¶22} Plaintiff's employment with Ross terminated on April 1, 1998. Plaintiff did not receive pay and benefit continuation.

{¶23} After three weeks of trial, the jury deliberated and returned a verdict in favor of plaintiff and against defendant Ross and two individual defendants, Karl V. Insani and Gregory A. Lindberg, as to plaintiff's claim for age discrimination, awarding plaintiff \$700,000 in compensatory damages and \$25,000,000 in punitive damages, as well as attorney fees. The jury found in favor of defendants and against plaintiff on plaintiff's claims of promissory estoppel and constructive discharge.

{¶24} On June 6, 2002, plaintiff moved for an award of prejudgment interest on the emotional distress portion of the jury verdict. On the same day, plaintiff applied to the trial court to set the amount of attorney fees in accordance with the jury verdict.

{¶25} On June 7, 2002, defendant Abbott filed a motion for the trial court to grant a judgment notwithstanding the verdict ("JNOV"), or to conditionally order a new trial, or to order remittitur as to the damages awarded by this jury. On the same day, defendants

Mr. Insani and Mr. Lindberg also filed a motion for the trial court to grant a JNOV, or to grant a new trial.

{¶26} On May 20, 2003, the trial court rendered its decision regarding defendants Mr. Insani and Mr. Lindberg's motion for a JNOV or for a new trial, and Abbott Laboratories' motions for JNOV and for a new trial, or in the alternative, for a remittitur. We note that, in its decision, at 18, the trial court determined that, regarding the compensatory damages, the jury verdict was not influenced by passion or prejudice. However, it did find that the compensatory damage award was "manifestly excessive to the extent that it clearly shows a misconception by the jury of its duties." It accordingly provided for a remittitur, which would reduce the award to \$100,000. Similarly, the trial court found that, regarding the punitive damages awarded, the verdict was not influenced by passion or prejudice. However, the court determined that the award was excessive and accordingly provided for a remittitur, which would reduce the award to \$4,000,000.

{¶27} On June 23, 2003, the trial court entered judgment in this case. The trial court entered judgment in favor of defendant Abbott and against plaintiff on his promissory estoppel claim, and entered judgment in favor of defendants Abbott, Mr. Insani, and Mr. Lindberg, and against plaintiff on his constructive discharge claim.

{¶28} The trial court entered a JNOV in favor of defendants and against plaintiff on his age discrimination claim. In the alternative, the trial court conditionally granted defendants' motion for a new trial on plaintiff's claim of age discrimination should the JNOV in favor of defendants on this issue be vacated or reversed on appeal.

{¶29} In the alternative, the trial court conditionally granted defendants' motion for remittitur on the amount of compensatory damages should both the JNOV in favor of

defendants and the decision granting a conditional new trial on his age discrimination claim be vacated or reversed on appeal. Defendants' motion for a new trial on the issue of the amount of compensatory damages was conditionally denied unless plaintiff rejects a remittitur of \$600,000.

{¶30} In the alternative, the trial court conditionally granted defendants' motion for remittitur on the amount of punitive damages should both the JNOV in favor of defendants and the decision granting defendants a conditional new trial on plaintiff's age discrimination claim be vacated or reversed on appeal. Defendants' motion for a new trial on the issue of the amount of the punitive damages award was conditionally denied unless plaintiff rejects a remittitur of \$21,000,000.

{¶31} In addition, the trial court entered judgment in favor of defendants and against plaintiff on his motion for an award of prejudgment interest. Lastly, the trial court entered judgment in favor of defendants and against plaintiff on plaintiff's application to set attorney fees.

{¶32} Plaintiff appeals and has asserted the following eight assignments of error:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION BASED UPON THE "LAW OF THE CASE" DOCTRINE.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION.

III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR REMITTITUR.

IV. THE TRIAL COURT ERRED IN EXCLUDING CERTAIN EVIDENCE RELATED TO PLAINTIFF'S CONSTRUCTIVE

DISCHARGE CLAIM WHICH RESULTED IN AN ADVERSE JURY VERDICT ON PLAINTIFF'S CONSTRUCTIVE DISCHARGE CLAIM.

V. THE TRIAL COURT ERRED IN EXCLUDING CERTAIN EVIDENCE ON THE BASIS OF HEARSAY.

VI. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A PRIOR VERDICT AGAINST TWO OF THE DEFENDANTS FOR AGE DISCRIMINATION.

VII. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES.

VIII. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST.

{¶33} Defendants Abbott, Mr. Insani, and Mr. Lindberg, cross-appeal from the trial court's judgment and have asserted the following three cross-assignments of error:

1. The Trial Court Erred in Concluding That the Jury's Verdict Was Not Influenced by Passion or Prejudice and Denying Defendants' Motion for a New Trial on This Ground.
2. The Remitted Punitive Damages of \$4,000,000 Remain Grossly and Unconstitutionally Excessive.
3. The Remitted Compensatory Damages of \$100,000 Remain Grossly Excessive.

{¶34} Because both involve the issue of whether the trial court erred in granting defendants' motion for JNOV, we will address plaintiff's first and second assignments of error together. In plaintiff's first assignment of error, he contends that the trial court erred in granting a JNOV as to his age discrimination claim, based on the "law of the case" doctrine. Under his second assignment of error, plaintiff argues that the trial court erred in granting a JNOV as to his age discrimination claim.

{¶35} "A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, tests the legal sufficiency of the evidence." *Wright v. Suzuki Motor Corp.*,

Meigs App. No. 03CA2, 2005-Ohio-3494, at ¶109, citing both *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, and *McKenney v. Hillside Dairy Corp.* (1996), 109 Ohio App.3d 164. Therefore, the trial court's granting of a motion for JNOV is reviewed de novo. *Luft v. Perry Cty. Lumber & Supply Co.*, Franklin App. No. 02AP-559, 2003-Ohio-2305, at ¶24.

{¶36} R.C. 4112.02(A) provides as follows:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the \* \* \* age \* \* \* of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

{¶37} R.C. 4112.99 provides that whoever violates Chapter 4112 is "subject to civil action for damages, injunctive relief, or any other appropriate relief."

{¶38} Defendants argue that although plaintiff may have established a prima facie age discrimination case, Abbott explained the difference in treatment between plaintiff and Mr. Schlies as being consistent with its "in-region reassignment policy." (Defendant's brief, at 14-15.)

{¶39} "In order to prevail in an employment discrimination case, the plaintiff must prove discriminatory intent." *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 583. Discrimination may be proven by direct or circumstantial evidence. *Temple v. Dayton*, Montgomery App. No. 20211, 2005-Ohio-57, at ¶85, citing *Bymes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125. In order to establish a prima facie case for age discrimination, the plaintiff must establish that: he is a member of a statutorily protected class; he was subject to adverse action; he was qualified for the

position; and he was replaced by a person of substantially younger age. *Coryell v. Bank One Trust Co.*, 101 Ohio St.3d 175, 180, 2004-Ohio-723. The employer may demonstrate a legitimate, nondiscriminatory reason for the adverse employment action. See *Mauzy*, supra, at 582. The plaintiff may demonstrate that the employer's reason was merely a pretext for unlawful discrimination. *Id.*

{¶40} At trial, plaintiff retained the ultimate burden of demonstrating that he was the victim of unlawful discrimination. See *U.S. Postal Serv. Bd. of Governors v. Aikens* (1983), 460 U.S. 711, 103 S.Ct. 1478. In this case, the jury determined that defendants intentionally discriminated against him because of his age based on his transfer to Lake County, Indiana. The facts at trial revealed that plaintiff was one of seven primary care district managers deployed throughout the country in 1997, until the PCDM position was eliminated. Ross sought to retain the individuals as employees even though the PCDM position was eliminated. In the process of redeployment, only two of the seven were offered positions requiring them to relocate: Steve Schlies and plaintiff. At the end of 1997, Mr. Schlies was 36 years old, and plaintiff was 55 years old, with approximately 30 years of experience at Ross. Plaintiff, who had been working in Columbus, Ohio, was offered a territory manager position in the Gary, Indiana territory. This was a demotion in the hierarchy of the sales structure at Ross. Mr. Schlies, who had been located in Milwaukee, Wisconsin, was offered a lateral position as district manager in Memphis, Tennessee.

{¶41} Defendants presented evidence to support the idea that the decision to offer plaintiff the Gary, Indiana position was based on legitimate, nondiscriminatory reasons. In fact, the jury found that "Defendants demonstrate[d] that the action they took in

transferring Plaintiff to Lake County, Indiana was for reasons other than Plaintiff's age." (Jury Interrogatory II.A.2.) However, the jury further found that plaintiff "demonstrate[d] that the reason(s) for transferring Plaintiff to Lake County, Indiana were false." (Jury Interrogatory II.A.3.)

{¶42} Upon our review of the record, we conclude that there was legally sufficient evidence presented at trial for the jury to conclude that Abbott discriminated against plaintiff on the basis of age, and that Mr. Insani and Mr. Lindberg participated in the discrimination. Therefore, we conclude that the trial court erred in granting defendants' motion for JNOV.

{¶43} As stated above, the trial court conditionally granted a new trial should its granting of JNOV be reversed on appeal. Significantly, in this appeal, plaintiff has not separately assigned as error the trial court's conditional granting of a new trial as to the issue of plaintiff's age discrimination claim, but he does argue that the motion for a new trial should have been denied. We note that Civ.R. 50(C) provides that if the motion for JNOV provided for in Civ.R. 50(B) is granted, then the court shall rule on the motion for a new trial. Thus, the trial court's decision regarding a new trial was a necessary determination given its granting of the JNOV. Therefore, we find it necessary to address the issue of whether the trial court erred in conditionally granting a new trial.

{¶44} Although this court's review of the trial court's granting of JNOV is de novo, our review of its granting of a new trial is limited to determining whether the trial court abused its discretion. "It is well-settled law that the decision on a motion for a new trial pursuant to Civ.R. 59 is within the discretion of the trial court. The trial court's decision will be disturbed only upon a showing that such decision was unreasonable,

unconscionable or arbitrary." *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 312. Furthermore, in *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, the Supreme Court of Ohio stated:

The abuse of discretion standard requires a reviewing court to "view the evidence favorably to the trial court's action rather than to the original jury's verdict." \* \* \* This deference to a trial court's grant of a new trial stems in part from the recognition that the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the "surrounding circumstances and atmosphere of the trial."

Id. at 448, quoting *Rohde v. Farmer* (1970), 23 Ohio St.2d 82.

{¶45} Although it is not entirely clear upon what grounds the trial court granted the new trial, the trial court, in its May 20, 2003 decision, set forth one of the bases for granting a new trial pursuant to Civ.R. 59(A). Citing Civ.R. 59(A)(6) and *Rhode*, supra, at 93, the trial court noted that it had the authority to grant a new trial if it concluded that the verdict was contrary to the weight of the evidence. Civ.R. 59(A) provides, in pertinent part, as follows:

A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

\* \* \*

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case[.]

Additionally, defendant Abbott's June 7, 2002 motion argued that a new trial should be granted on the grounds that the judgment is not sustained by the weight of the evidence, pursuant to Civ.R. 59(A)(6). Based on this court's review of the record, we conclude that the trial court conditionally granted a new trial as to plaintiff's age discrimination claim on the basis that the verdict was not supported by the weight of the evidence. Essentially,

the trial court found that the evidence at trial was not legally sufficient to support plaintiff's age discrimination claim, and even if it was legally sufficient to support the claim, it was not supported by the weight of the evidence.

{¶46} We note that the Supreme Court of Ohio, in *Antal v. Olde World Products, Inc.* (1984), 9 Ohio St.3d 144, at the syllabus, stated as follows:

When granting a motion for a new trial based on the contention that the verdict is not sustained by the weight of the evidence, the trial court must articulate the reasons for so doing in order to allow a reviewing court to determine whether the trial court abused its discretion in ordering a new trial.

However, in this appeal, plaintiff has not argued that the trial court failed to articulate the reasons for granting the motion for a new trial.

{¶47} At trial, evidence was presented that indicated the existence of an in-region reassignment policy, which explained the disparate treatment in this case. Specifically, there was testimony that the preference was to reassign employees within the same region and district, for a variety of reasons. Additionally, testimony indicated that the Gary, Indiana, position was the only position available within plaintiff's region, and therefore plaintiff's reassignment was consistent with this policy. As revealed in the interrogatories, the jury found that defendants demonstrated that plaintiff was transferred to Lake County, Indiana, for reasons other than his age. However, the jury determined that plaintiff demonstrated that the reason(s) were false, and that plaintiff proved by a preponderance of the evidence that defendants intentionally discriminated against him because of his age based on his transfer to Lake County, Indiana.

{¶48} As determined above, the evidence at trial was legally sufficient to support an age discrimination claim. However, after thoroughly reviewing the extensive record in

this case, and considering the sound discretion provided to the trial court in determining whether to grant a motion for a new trial, we conclude that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim.

{¶49} Considering the foregoing, we sustain plaintiff's first and second assignments of error on the basis that the trial court erred in granting the motion for JNOV. We need not, and do not, reach the issue that is raised by plaintiff's first assignment of error of whether the trial court erred in granting the JNOV based upon the "law of the case" doctrine. However, the trial court did not abuse its discretion in conditionally granting a new trial as to plaintiff's age discrimination claim. Therefore, to the extent defendant argues under his second assignment of error that the trial court erred in conditionally granting a new trial on the issue of age discrimination, it is overruled.

{¶50} By his third assignment of error, plaintiff asserts that the trial court erred in granting defendants' motion for remittitur. Plaintiff's seventh assignment of error alleges that the trial court erred in denying his motion for attorneys' fees. In his eighth assignment of error, plaintiff alleges that the trial court erred in denying his motion for prejudgment interest. Defendants, in their first cross-assignment of error, assert that the trial court erred in not granting a new trial on the ground that the jury's verdict was influenced by passion or prejudice. In their second cross-assignment of error, defendants argue that the remitted punitive damages award of \$4,000,000 remains unconstitutionally excessive. In their third cross-assignment of error, defendants contend that the remitted compensatory damages award of \$100,000 is grossly excessive. Having determined that the trial court did not abuse its discretion in conditionally granting a new trial as to plaintiff's age discrimination claim, we find that these assignments of error are moot.

{¶51} Plaintiff's fourth, fifth, and sixth assignments of error relate to the trial court's exclusion of certain evidence at trial. Regarding these assignments of error, we preliminarily note that "[a] trial court has broad discretion in the admission and exclusion of evidence. Unless the trial court has clearly abused its discretion, an appellate court should not interfere in its determination." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 25; see, also, *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶52} Under his fourth assignment of error, plaintiff contends that the trial court erred in excluding certain evidence relating to his claim of constructive discharge. Specifically, plaintiff argues that the trial court erroneously excluded from evidence a 1998 article from a newspaper which declared Gary, Indiana, as the most dangerous city in the United States for crime. Plaintiff also argues that the trial court erred in not permitting plaintiff's counsel to question witnesses regarding the desirability of working in Gary, Indiana, and by excluding from evidence photographs that plaintiff took of Gary, Indiana.

{¶53} "The test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy*, supra, at paragraph four of the syllabus. Regarding the evidence necessary to prove constructive discharge, the Supreme Court of Ohio has stated, in *Mauzy*, as follows:

\*\*\* [T]here is no sound reason to compel an employee to struggle with the inevitable simply to attain the "discharge"

label. No single factor is determinative. Instead, a myriad of factors are considered, including reductions in sales territory, poor performance evaluations, criticism in front of co-employees, inquiries about retirement intentions, and expressions of a preference for employees outside the protected group. Nor does the inquiry change solely because an option to transfer is thrown into the mix, lateral though it may be. A transfer accompanied by measurable compensation at a comparable level does not necessarily preclude a finding of constructive discharge. Our review is not so narrowly circumscribed by the quality and attributes of the transfer option itself. \* \* \*

Id. at 589.

{¶54} In this case, the jury held that plaintiff failed to prove that his transfer to Lake County, Indiana, resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott. Thus, the jury found that plaintiff had failed to prove that he had been constructively discharged.

{¶55} Plaintiff argues that the newspaper article was not being offered for the truth of the matter asserted, i.e. that Gary, Indiana was the most dangerous city in the United States for crime in 1998. Plaintiff argues that he was "offering the article as further evidence that he was 'transferred' to a place he believed to be a very undesirable place to live or work and was, in fact, constructively discharged." (Plaintiff's merit brief, at 44.) Plaintiff adds, "The article was simply a piece of information plaintiff relied upon in consideration of his constructive discharge." Id. To the extent the article was offered to prove the truth of the matter asserted, it was inadmissible hearsay. Moreover, to the extent the article was being offered for the reasons stated by plaintiff, it was arguably irrelevant with respect to his constructive discharge claim, as it went to plaintiff's subjective opinion regarding Gary, Indiana. Plaintiff's subjective belief regarding Gary,

Indiana was not relevant to the issue of whether he was constructively discharged. See *Cline v. Electronic Data Systems Corp.* (Sept. 18, 2000), Washington App. No. 99CA14 (noting that an objective standard is applied in the constructive discharge inquiry).

{¶56} Plaintiff argues that the trial court erred in not permitting plaintiff's counsel to question witnesses regarding the desirability of working in Gary, Indiana. The trial court sustained objections to this testimony on the basis that the opinions of the witnesses regarding the city of Gary, Indiana, were not relevant to the inquiry in this case. The trial court did not abuse its discretion in this regard, and we therefore find plaintiff's argument on this matter to be without merit.

{¶57} Plaintiff also asserts that the trial court erred in excluding photographs that plaintiff had taken of Gary, Indiana. In his merit brief, plaintiff does not assert why it was error for the trial court to not allow the admission of the photographs. In his reply brief, plaintiff contends that the photographs were relevant to the inquiry as to what a reasonable person would have felt under the circumstances. Plaintiff's argument to the contrary, the trial court did not abuse its discretion in excluding from evidence the photographs that plaintiff took of Gary, Indiana.

{¶58} Based on the foregoing, we overrule plaintiff's fourth assignment of error.

{¶59} In his fifth assignment of error, plaintiff argues that the trial court erred in excluding certain evidence on the basis of hearsay. Plaintiff asserts that it was error for the trial court to preclude testimony of Mr. Pini regarding an alleged Abbott memorandum indicating that employees over 50 years old with 20 years of service should be encouraged to take early retirement. The trial court determined that testimony of Mr. Pini regarding the alleged memorandum was inadmissible under Evid.R. 602. We conclude

that the trial court did not abuse its discretion in excluding this testimony, and we therefore overrule plaintiff's fifth assignment of error.

{¶60} Plaintiff alleges in his sixth assignment of error that the trial court erred in excluding evidence of a prior verdict against two of the named defendants for age discrimination. In his brief, plaintiff asserts that the trial court erroneously did not permit the discussion of the "*Fitch*" case at trial. Plaintiff argues that evidence of a prior verdict against two of the defendants was admissible under Evid.R. 404(B), which states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶61} Although it is not entirely clear from the record, plaintiff apparently is referring to the Franklin County Court of Common Pleas case of *Fitch v. Abbott Laboratories*, case No. 94CVHO8-5867. The record before this court contains a copy of an agreed order in the *Fitch* case. The order, which was signed by the trial court judge and dated November 3, 1997, vacated an earlier judgment entry and states that "all claims that were or could have been asserted by [Fitch] herein are hereby dismissed with prejudice." (Emphasis sic.)

{¶62} Plaintiff's arguments to the contrary, the trial court did not abuse its discretion in excluding evidence regarding the prior case. Thus, plaintiff's sixth assignment of error is overruled.

{¶63} For the foregoing reasons, plaintiff's first and second assignments of error are sustained on the basis that the trial court erred in granting defendants' motion for JNOV as to plaintiff's age discrimination claim, but his second assignment of error is

overruled to the extent plaintiff argues that the trial court erred in conditionally granting defendants' motion for a new trial on the issue of plaintiff's age discrimination claim. Our determination that the trial court did not abuse its discretion in conditionally granting defendants' motion for a new trial as to plaintiff's age discrimination claim moots defendants' first, second, and third cross-assignments of error, as well as plaintiff's third, seventh, and eighth assignments of error. Plaintiff's fourth, fifth, and sixth assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this opinion.

*Judgment affirmed in part, reversed  
in part, and cause remanded.*

FRENCH J., concurs.

McCORMAC, J., dissents.

McCORMAC, J., retired of the Tenth Appellate District,  
assigned to active duty under authority of Section 6(C), Article  
IV, Ohio Constitution.

McCORMAC, J., dissenting.

{¶64} I agree with the majority that the trial court erred in granting judgment notwithstanding the verdict on plaintiff's claim of age discrimination. I respectfully disagree with the majority's ruling that the trial court did not abuse its discretion in granting a conditional new trial.

{¶65} My analysis of the evidence leads me to the conclusion that the jury correctly found that the defendant's reason for the adverse employment action was a pretext for unlawful discrimination. The jury's finding was not against the manifest weight of the evidence, but fully in accordance with it. Defendant's reason is not well supported

by the record, in contrast to plaintiff's evidentiary history of excellent service to defendant and remarks by defendant's personnel which strongly indicated that he was assigned to a poor territory and inferior position because of his age and for no other legitimate reason.

{¶66} My conclusion is fortified by the fact that the trial court failed to articulate reasons for its ruling to enable us to determine whether the trial court abused its discretion in ordering a new trial. See *Antal v. Olde World Products, Inc.* (1984), 9 Ohio St.3d 144,

{¶67} Demonstrative of the inability of our court to fully review the trial court's conditional order is the majority's analysis which primarily consists of the statement that "after thoroughly reviewing the extensive record in this case, and considering the sound discretion provided to the trial court in determining whether to grant a motion for a new trial, we conclude that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim." (See ¶48.) That analysis stands, through no fault of the majority, in stark contrast to the otherwise excellent analysis.

{¶68} The assignments of error regarding the remittitur should not be determined to be moot.

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