

IN THE SUPREME COURT OF OHIO

CARLOS SIVIT, <i>et al.</i> ,)	Case No. 2016-0810
)	
Appellees / Cross-Appellants)	
)	On Appeal from Cuyahoga County
and)	Court of Appeals, Eight Appellate District
)	
DAVID S. GRUHIN and)	Court of Appeals Case Nos.:
SYDNEY SIGLER GRUHIN,)	CA-15-103340 and CA-15-103498
)	
Appellants)	
)	
vs.)	
)	
VILLAGE GREEN OF)	
BEACHWOOD, L.P., <i>et al.</i> ,)	
)	
Appellees / Cross-Appellees)	

**APPELLEES/CROSS-APPELLANTS' COMBINED MEMORANDUM BOTH IN
RESPONSE TO APPELLANTS/CROSS-APPELLEES' MEMORANDUM AND IN
SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL**

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MEMORANDUM IN RESPONSE TO APPELLANTS/CROSS-APPELLEES'
MEMORANDUM IN SUPPORT OF JURISDICTION

I. Statement of Appellees' Position as to Whether the Case is of Public or Great General Interest.

Appellees / Cross-Appellants Carlos Sivit, Sonya Pace, Luciana Armaganijan, Jason Edwards, Renee Edwards, Hallie Gelb, Prathibha Marathe, Mohammad Marwali, Selvy Pangkey, Mitchell Rosenberg, and Natalie Rudd (collectively, the "Sivit Plaintiffs") respectfully request that this Honorable Court decline jurisdiction over the appeal filed by Appellants / Cross-Appellees David Gruhin and Sydney Gruhin (collectively "the Gruhins"). After their arguments were soundly rejected by both lower courts, the Gruhins now ask this Court to accept jurisdiction and ultimately determine that the trial court abused its discretion when it found the equal share distribution of punitive damages, under the circumstances of this particular case, to be "**fair, reasonable and equitable.**" (Gruhin Appendix pgs. 14-19) (emphasis added). That judgment is consistent with applicable law and premised on the factual circumstances of this particular case. The decision was clearly within the discretion of the trial court and was unanimously affirmed by the court of appeals. (Gruhin Appendix pgs. 23-63). The Gruhins' appeal is therefore not one of public or great general interest.

Much of the relevant procedural and factual history has been accurately set forth in the various appellate decisions previously issued in this case, both by the court of appeals and this Court. See, *Sivit v. Village Green of Beachwood, L.P.*, 143 Ohio St.3d 168, 2015-Ohio-1193 (Gruhin Appendix 5-12); *Sivit v. Village Green of Beachwood, L.P.*, 2013-Ohio-103; *Sivit v. Village Green of Beachwood, L.P.*, 2016-Ohio-2940 (Gruhin Appendix 23-63). Pertinent to this most recent appeal, the Gruhins take issue with the August 31, 2015 Order of the trial court, which directed that the lump sum punitive damages award be allocated in equal shares to the 10

plaintiff groups. (Gruhin Appendix 23-63). Although the Gruhins have, throughout these appellate proceedings, focused their efforts on ad-hominem attacks directed at counsel for the Sivit Plaintiffs (and the trial judge), the appellees in this limited issue appeal are the Sivit Plaintiffs, not their counsel.

The factual history relevant to this appeal is quite limited. Given the Sivit Plaintiffs' faith that this Court will ignore the Gruhins' attempts to invoke undue passion or prejudice and disregard the 'red herrings' which litter the majority of the pages in their Memorandum, the intent of the Sivit Plaintiffs is to more succinctly identify and discuss the issues pertinent to this Court's determination of whether its review is warranted.

The relevant facts are as follows. The Gruhins lived in one of the apartment units affected by the fire. They joined with the other 9 groups of Sivit Plaintiffs to bring claims against the landlords of the apartment complex. During both pre-trial proceedings and at trial, the compensatory damages submitted were done so in 10 separate groups:

- 1) Carlos Sivit (Unit #304)
- 2) David and Sydney Gruhin (Unit #203)
- 3) Sonya Pace (Unit #303)
- 4) Jason and Renee Edwards (Unit #310)
- 5) Natalie Rudd (Unit #110)
- 6) Prathibha Marathe (Unit #210)
- 7) Hallie Gelb (Unit #106)
- 8) Mohammed Marwali / Selvey Pangkey (Unit #111)
- 9) Luciana Armanijigan (Unit #305)
- 10) Mitchell Rosenberg (Unit #104)

The jury's verdict awarded compensatory damages to each of the groups in the full amount requested. (Gruhin Appendix pgs. 1-4).

Unlike the particularized claims for compensatory damages, the plaintiff groups jointly requested punitive damages. After deliberation, the jury awarded punitive damages in one lump-sum of \$2,000,000. (Gruhin Appendix pgs. 1-4). While the Gruhins claim that it was not until

more than two years after the verdict that they were aware of the allocation method for punitive damages, the court of appeals carefully reviewed the record and correctly found that their argument “strains credulity.” *Sivit*, supra, 2016-Ohio-2940, ¶44 (Gruhin Appendix pgs. 23-63).

Following this Court’s decision in April 2015, the Gruhins claimed they were each entitled to a 1/13th share of the punitive damages which would have resulted in an increase of their collective share to \$236,547.06. Their theory then ‘evolved’ to seek an allocation which would allow them to collect both two-times their compensatory damages award (\$111,233 x 2 = \$222,466), plus potentially a pro-rata share of the punitive damages which would be left over after each plaintiff is allocated a share equal to two times their own compensatory damages. This pro-rata share, if awarded, would presumptively increase the Gruhins’ award from \$222,466 to \$286,406.79.¹

None of the other plaintiffs elected to join in the Gruhins’ untimely efforts to alter the allocation method. Notably, the Appellees herein include those plaintiffs who could potentially benefit (financially, at least) from the two-times plus pro-rata share method (Pace and Sivit) or from a 1/13th division (the Edwards and Marwali/Pangkey). The common pleas judge – who presided over the trial and therefore had the opportunity to actually meet these individuals and evaluate their testimony – determined the equal share allocation to be appropriate and just based on the facts presented, the applicable law, and equity. The trial court ultimately issued a decision on remand which was within its discretion. (Gruhin Appendix 14-19). That decision was unanimously affirmed by the court of appeals. (Gruhin Appendix 23-63).

¹ The excess funds which the Gruhins insisted should be divided on a pro-rata basis are the funds at issue in the *Sivit* Plaintiffs’ cross-appeal (i.e. the excess punitive damages which would result from including the insurance subrogation compensatory damages in the two-times calculation).

The Ohio Revised Code does not dictate how lump sum punitive damage awards are to be allocated. Absent perhaps a jury verdict directing a particular allocation, the decision has traditionally been within the province and discretion of the trial court according to the Ohio jurisprudence. To be clear, no plaintiff is ever entitled to punitive damages, let alone a specific amount of punitive damages as the Gruhins claim here. Consistent with this Court's precedent, the trial court *could have* ordered that the entire award be directed to charity. The Gruhins were fully compensated for their losses, including attorney fees and costs incurred in seeking such relief. They have no claim as a matter of right to any of the punitive damages. Thus, the Gruhins' appeal does not present a case of public or great general interest for which this Court should expend its limited and valuable resources.

II. Responses to Propositions of Law

a. Response to Proposition of Law No. 1

The Gruhins' first proposition of law is a blatant 'red herring' designed to invoke passion or prejudice which this Court can and should disregard. This is not a malpractice action or a disciplinary counsel investigation. The rights the Gruhins seek to prejudice are those held by the other victims of the subject fire – their fellow tenants and co-plaintiffs – who are the Appellees herein.

Notwithstanding the above, the trial court's decision is premised on much more than its finding that the co-plaintiffs had reached an agreement on the method of allocation. The decision is grounded in reason, fairness, and equity, as specifically stated in the August 31, 2015 Order and the appellate decision which unanimously affirmed the same. (Gruhin Appendix pgs. 14-19 and 23-63). Given the trial court's wide discretion on the issue of allocation of punitive

damages, and the societal interests involved, any ‘agreement’ on the allocation method would be non-binding on the trial court anyways.

b. Response to Proposition of Law No. 2

This Court has previously determined that **“Ohio’s courts have a central role to play in the distribution of punitive damages.”** *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121 at ¶188 (emphasis added). The notion of any ‘bright-line division’ has been repeatedly rejected. *Id.* Instead, the distribution should be determined on a **case-by-case basis**. *Id.* Here, the trial judge carefully considered the circumstances of this case and determined that an equal share distribution was **fair, reasonable and equitable**. In so ruling, the trial court properly exercised its discretion.

The unequivocal purpose of punitive damages is not to compensate the plaintiff, but to punish and deter the defendant’s conduct. *Dardinger* at ¶178, citing *Moskovitz v. Mt. Sinai Medical Center* (1994), 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331. "Punitive damages are damages beyond and above the amount which the plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff." *Washington Gas-Light Co. v. Lansden* (1899), 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543. Punitive damages are therefore awarded because of the defendant’s behavior, not the plaintiff’s loss. *Dardinger*, citing *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546. The focus is thus not on any one individual plaintiff as punitive damage claims are not an independent tort. Instead, the award is supposed to be tailored to the defendant’s wealth and wrongdoing. The damage or harm caused is relevant only to assessing the defendant’s wrongdoing.

Punitive damages are never awarded to benefit the injured party or as a matter of right. Even in single plaintiff cases, punitive damages are individual awards in function only. Their purpose is to protect society by “encouraging suit by a plaintiff as a ‘private attorney general’ on issues of public importance.” *Myer v. Preferred Credit, Inc.* (Harrison Cty. C.P. March 27, 2001), 117 Ohio Misc.2d 8. **“At the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.”** *Dardinger* at ¶187 (emphasis added). For that reason, punitive damages are fundamentally collective in nature.

Indeed, the narrow right to seek punitive damages exists only because of public policy as expressed through state statutes and the common law. Consequently, in the situation of a multiple plaintiff case in which a joint claim for punitive damages is pursued, the plaintiffs’ claims to the award are presumptively common and equal because the award is not any individual plaintiff’s, but society’s.

Consistent with the presentation of damages to the jury at trial, the May 2012 Final Judgment Entry allotted the various plaintiffs into 10 separate groups, the Gruhins representing one of those groups. (Gruhin Appendix pgs. 1-4). At trial, each group, including the Gruhins, presented a joint itemization for their respective property damage claims. The jury thereafter awarded compensatory damages separately to each of the seven plaintiff groups (Pace, the Gruhins, Sivit, the Edwards, Rudd, Marathe, and Gelb) who presented their itemizations at trial. For various reasons the trial court became familiar with during the course of these lengthy proceedings, three more plaintiff groups (Marwali/Pangkey, Armanijigan, and Rosenberg) reached pre-trial stipulations on the issue of compensatory damages.

Available for the trial court's consideration was the undisputed fact that the punitive damages were sought jointly by all of the plaintiff groups. The jury's verdict awarded punitive damages in one lump-sum. The trial court's May 2012 Final Judgment entered that verdict as being "in favor of the 10 claimant groups of Sivit Plaintiffs... and against Defendant Village Green of Beachwood, LP, the sum of \$2,000,000.00." (Gruhin Appendix pgs. 1-4). The only logical and reasonable reading of that paragraph in light of the jury's verdict and the proceedings leading to that verdict is a division of the punitive damages awarded in 10 equal shares.

Furthermore, several other important considerations independently or collectively support the trial court's decision:

First, to the extent the various plaintiff groups suffered differing degrees of compensable harm that difference is accounted for in the varying amounts of compensatory damages. No matter how the trial court decided to allocate the punitive damages, the Gruhins have already been fully compensated for their loss.

Second, in a case such as this which involved total destruction of an apartment building via fire, what losses are compensable and what losses are not compensable is an appropriate factor to consider. Several of the plaintiffs lost family heirlooms, photographs/videos of children and other relatives, and other items of immense sentimental value for which no amount of compensation is adequate and, worse yet, for which the law does not allow relief in the form of compensatory damages. A plaintiff should not receive a windfall share of punitive damages simply because his/her personal property has a higher compensable value.

Third, even if their loss had a higher monetary value, compensable or not, the Gruhins' wealth and ownership of 'nicer things' in no way *entitles* them to a larger share of the punitive damages award. In fact, financial vulnerability is "one of the main guideposts in determining an

appropriate amount of punitive damages”, the absence of vulnerability (i.e. relative wealth) of the plaintiff is admissible and can be considered as a relevant factor by the trier-of-fact when considering an appropriate award of punitive damages. *Caruso v. Leneghan* (App. 8 Dist.), 2014-Ohio-1824.

Fourth, every plaintiff was a victim of the same malicious and reprehensible conduct which justified the award of punitive damages. Each family was placed at the risk of loss of life and was displaced from their domicile due to the damage done by the subject fire. Most notably, Mr. Rosenberg, a 90 year old widower and cancer survivor, had endured living under the abominable conditions presented by this building for 12 years (as compared to the 19 months the Gruhins had resided there). Mr. Rosenberg was a victim of the same reprehensible conduct and is entitled to more than the meager \$3.00 in total damages the Gruhins insist he should receive.

Fifth, all plaintiffs, including the Gruhins, entered into the same contingent fee contract with their attorneys. This contract authorized the attorneys to “institute legal proceedings... and prosecute the same to final determination, and to do and perform all other acts which, in the judgment of the attorneys, are necessary and proper to enforce and protect the rights of the client.” The trial court consistently noted that the attorneys in this case represented their clients admirably and to the best of their abilities. Several tactical decisions were made pursuant to the judgment of the attorneys during the course of these lengthy and difficult proceedings to maximize the ability to (1) obtain a plaintiff’s verdict, (2) elicit an award for the full amount of compensatory damages requested (despite evidence of those damages being destroyed by the fire), and (3) convince the jury to award punitive damages in a case involving only property damage and no bodily injury. Solely within the discretion of counsel, particularly in light of no

specific directives from the clients, was the decision on how to present the case for punitive damages and how to ask the jury to consider the award of punitive damages.

While the trial court was free to consider a number of relevant factors, the Opinion and Order it ultimately issued relied mainly on (1) its familiarity with the parties and the procedural history of the litigation, (2) the lack of any authority mandating a pro-rata share distribution, (3) the understood method of allocation as evidenced by the affidavits submitted,² and (4) other equitable considerations, specifically including the indisputable and unfathomable effect a pro-rata share distribution would have on the distribution to certain plaintiffs. The trial court's final judgment was the result of careful consideration and deliberation. The decision was **fair, reasonable and equitable**. No good faith argument for an abuse of discretion is presented.

In furtherance of their argument, the Gruhins also raise R.C. 2315.21 and assert that the operation of that statute mandates that they receive a windfall share of punitive damages. However, the clear purpose of the statutory cap on punitive damages contained in R.C. 2315.21 is to limit the punishment imposed on the defendant based on the actual harm caused by the defendant's conduct, not the ability of any given plaintiff to recover a specific amount of punitive damages. This Court's prior ruling in this case applying R.C. 2315.21, as confirmed by the trial court, focused on the total harm caused by the conduct at issue as established at trial, not just the harm done to those plaintiffs who sought punitive damages. The punitive damages were therefore reduced to **“twice the amount of compensatory damages that were awarded in the trial court's judgment entry.”** Sivit, supra, 2015-Ohio-1193 at ¶8. Following remand, the

² To be clear, while the Sivit Plaintiffs have never suggested that any agreement or understanding among the plaintiffs is dispositive of the question presented, it may be an appropriate factor to consider. The Gruhins, for their part, apparently suggest that the operation of the statute would nullify any such agreement or understanding.

Gruhins agreed that this amount included the stipulated damages of the insurance subrogation plaintiffs who did not seek punitive damages.

Section 2315.21 is silent on the issue of distribution of a punitive damage award. The purposes of that statute were achieved when the trial court executed this Court's mandate. Absent valid legislative directive, the decision on how a punitive damage award is to be distributed remains within the discretion of the trial court to be determined on a case-by-case basis without any bright-line rules. *Dardinger*.

Not mentioned by the Gruhins is that, should their argument prevail that each individual plaintiff is statutorily limited to two-times their actual compensatory damages, a further conundrum would be presented in how the trial court would allocate the division of punitive damages amongst David and Sydney Gruhin. The Gruhins were jointly awarded \$111,233 in compensatory damages. If the Gruhins suggested interpretation of the statute is correct and David and Sydney are each to be considered "a plaintiff", then how would their individual entitlement to a share of the punitive damages be determined?

Of course, there is no such concern because the use of "a plaintiff" is not in the operable paragraph of the statute – specifically, subsection (D)(2)(a). The requirement of R.C. 2315.21(D)(2)(a) was similarly satisfied when the total punitive damages were reduced to twice the total amount of compensatory damages awarded to "the plaintiff(s) from that defendant (VGOB)." See R.C. 1.43(A) ("[t]he singular includes the plural, and the plural includes the singular"). Section 2315.21 has no further application to any issues in this case as its goals of protecting the defendant have been achieved. **Any distribution/allocation of the punitive damages is of no concern to the defendant and remains solely within the province of the trial court.**

III. Conclusion

For all of the foregoing reasons, the Sivit Plaintiffs (Appellees herein) respectfully request that this Honorable Court decline jurisdiction over the Gruhins' discretionary appeal.

MEMORANDUM IN SUPPORT OF OF JURISDICTION FOR THE CROSS-APPEAL

I. Statement of Cross-Appellants' Position as to Whether the Case is of Public or Great General Interest.

The trial court decision which was reversed by the court of appeals simply executed the previous mandate of this Court and was rendered consistent with the law of the case doctrine. In 2013, this Court agreed to review three propositions of law suggested by co-defendants Village Green of Beachwood ("VGOB") (cross-appellee herein) and Forest City Residential Management, Inc. ("FCRM"). One of those propositions of law concerned the application of the punitive damages cap set forth in R.C. 2315.21. This Court issued its decision on April 2, 2015 which, in relevant part, unambiguously decided the issue relative to R.C. 2315.21 as follows:

{¶ 6} R.C. 2315.21(D)(2)(a) states that "in a tort action," a "court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff." **The compensatory-damages award by the jury totaled \$582,146. The judgment entry of the trial court also included stipulated compensatory damages of \$186,631.95, which were contingent on a finding of liability. The punitive damages awarded totaled \$2,000,000. The \$2,000,000 award for punitive damages is more than twice the total compensatory damages.** Accordingly, it is clear that the award of punitive damages is contrary to the mandate of R.C. 2315.21(D)(2).

* * * * *

{¶ 8} Remittitur of punitive damages is required. Accordingly, we must consider the four criteria that arise from this court's decision in *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 166 N.E. 186 (1929), paragraph three of the syllabus. See *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121, ¶ 184. First,

the punitive damages must have been assessed by a jury; they were. Second, the verdict must not have been influenced by passion or prejudice; Village Green does not argue that the jury was unduly influenced by passion or prejudice. Third, the punitive damages must be excessive; they are in excess of the statutory limit. Fourth, the plaintiff must agree to the reduction; we consider the chance that Sivit will refuse remittitur remote given the clear mandate of the statute. **We order reduction of the amount of punitive damages to twice the amount of compensatory damages that were awarded in the trial court's judgment entry, which we deem an appropriate amount to deter the conduct at issue in this case.**

* * * * *

{¶ 12} In summary, we affirm the court of appeals with respect to all issues related to the verdict except the award of punitive damages. We agree with Village Green that the amount of punitive damages allowed exceeds the limit prescribed by R.C. 2315.21(D)(2)(a). Therefore, **we hold that punitive damages in the amount of two times the award of compensatory damages is the appropriate amount** and remand to the trial court to set the amount of damages.

Sivit, supra, 2015-Ohio-1193 (Gruhin Appendix pgs. 5-12) (emphasis added). Following issuance of that decision, VGOB submitted a motion for reconsideration, which was denied. Significantly relevant here, VGOB's motion for reconsideration did not take issue with this Court's directive to reduce the punitive damages to "twice the amount of compensatory damages that were awarded in the trial court's judgment entry[.]"

Upon remand, the trial court correctly applied this Court's decision and ordered the punitive damages reduced to 'two times the award of compensatory damages.' Specifically, the trial court ordered a reduction of punitive damages to 'twice the amount of compensatory damages that were awarded in the trial court's judgment entry' as this Court had clearly directed.

In doing so, the trial court stated:

It is a rock bed principle of our system of jurisprudence that trial courts are subordinate to superior courts. In this instance, **this Court has been ordered to re-access punitive damages at twice the compensatory damages in the original journal entry** — an award which has been

affirmed by the entire Eighth District Court of Appeals and a unanimous Supreme Court.* * * A trial court must obey the mandates of superior courts. **If the defendant perceived any ambiguity in the mandate, the time and place to raise the current theory was at the Supreme Court in the motion for reconsideration, not here and not now.**

Because the *total* amount of compensatory damages awarded in the final judgment entry was \$768,777.95, the trial court ordered a reduction of punitive damages from the \$2,000,000 set by the jury to \$1,537,555.90. In reversing the decision of the trial court, the court of appeals ignored the previous decision of this Court and the law of the case doctrine to which the trial court had properly adhered.

Furthermore, the court of appeals also misinterpreted and misapplied several sections of the Ohio Revised Code, most notably R.C. 2315.21. Even if the law of the case doctrine had not already established the amount by which the punitive damages were to be reduced, nothing in the R.C. Ch. 2315 instructs the courts, in determining the total harm caused by the defendants, to ignore that harm which was incurred by plaintiffs (as established by the jury or stipulation) who did not request punitive damages. To the extent the law of the case doctrine does not apply, this cross-appeal then raises the question of how to properly ‘cap’ punitive damages consistent with R.C. 2315.21, which is a matter of public or great general interest.

II. Propositions of Law

- a. Proposition of Law No. 1: A Trial Court’s Mere Act of Executing the Mandate of a Superior Court does not Constitute a Final and Appealable Order required by R.C. 2505.02 to give rise to Appellate Jurisdiction.

Consistent with the interests of judicial economy and the prevention of piecemeal litigation, it is highly doubtful that VGOB ever presented the court of appeals with a final appealable order as required by R.C. 2505.02. The trial court's Order reducing the punitive damages was merely an order carrying out the decision of this Court and was therefore not a

final appealable order within the contemplation of R.C. 2505.02. Once the reduction in punitive damages was made consistent with this Court's judgment, VGOB's interest in the trial court proceedings ceased as it had no standing in the dispute amongst the plaintiffs relative to the allocation of those punitive damages.

In the absence of a final appealable order, an appeal must be summarily dismissed for lack of appellate jurisdiction. See *In re Estate of Hollingsworth* (App. 12 Dist. 1989), 58 Ohio App. 3d 14. **Such a dismissal is warranted when the appeal is “nothing more than appellant's obstinate refusal to accept the ruling of [a superior court] and to delay execution of [its] mandate.”** *Id.*, citing 1 Whiteside, Ohio Appellate Practice (1988) 87, Section T 23.08.

This Court's prior decision was clear. The trial court was instructed to reduce the punitive damages to 'twice the amount of compensatory damages that were awarded in the trial court's judgment entry.' Unambiguously and consistent with the plain language of its decision, this Court considered all of the compensatory damages, **including** the stipulated damages, in its contemplation of 'the total compensatory damages.' The 'amount of compensatory damages that were awarded in the trial court's judgment entry,' or in other words the 'the total compensatory damages,' was **\$768,777.95**.

Consequently, proper application of this Court's mandate resulted in a reduction of the punitive damages award to \$1,537,555.90 (i.e. 2x \$768,777.95), not the lower amount later suggested by VGOB and imposed by the court of appeals. To avoid that clear directive, but without citing to any specific language in the decision, VGOB repeatedly alleged on remand that this Court was either confused or not fully informed of the pertinent facts.

Notably, the appeal to this Court was pending for nearly two years between the time it was accepted for review (June 2013) and the date of ultimate decision (April 2015). Moreover, this Court considered the arguments submitted for more than one year between the time of oral argument (March 2014) and the final decision (April 2015), and then denied a motion for reconsideration filed by VGOB and FCRM. Clearly, carefully deliberation was had on all of the arguments submitted and an opinion was meticulously crafted on the issues presented, the central issue of course involving the statutory caps on punitive damages. At its disposal, this Court had the entire record on appeal, **including** but certainly not limited to **the trial court's May 2012 Final Judgment Entry** and the unanimous decision of this Court affirming all aspects of that Final Judgment Entry.

Belying the allegation that this Court was somehow confused, the very first page of VGOB's Merit Brief filed with this Court on August 6, 2013 described the plaintiffs as **"either tenants or subrogated insurers of tenants in the building"** and further states that "[t]he individual plaintiffs also sought punitive damages." (Emphasis added). Page 4 of the same Merit Brief clearly states that the jury "awarded compensatory damages to the **individual tenants** totaling \$597,326." (Emphasis added). Moreover, footnote 4 of the Merit Brief provides:

The jury verdicts actually totaled \$582,326 (Tr. 2213). The trial court then awarded \$15,000 in stipulated damages to two additional plaintiffs. In addition, the trial judge awarded \$171,631 to the subrogated insurance companies. (See Final Judgment Entry of May 11, 2012; App. 43).

(Emphasis added).³

³ In actuality, the stipulated damages were awarded to three of the 10 Sivit Plaintiff groups, not "two additional plaintiffs." Specifically, those stipulations were agreed to for the following Sivit

This Court may also reference page 9 of the Merit Brief wherein VGOB, when directly addressing the statutory cap on punitive damages, specifically noted that the total compensatory damages awarded to the Sivit Plaintiffs was \$597,326 and, in an accompanying footnote, clarify that this amount included the \$15,000 awarded to the additional Sivit Plaintiffs by stipulation. Also, on page 26, VGOB again reiterated that the total compensatory damages awarded to the Sivit Plaintiffs was \$597,326.

Additionally, filed along with Defendants' Merit Brief was an Appendix (or Supplement). Included in that Appendix/Supplement (at App. 42-44) was the May 2012 Final Judgment Entry, which clearly provides for the specific amount of compensatory damages awarded by the jury "in favor of Plaintiffs Carlos Sivit, et al. ('the Sivit Plaintiffs')", the specific amounts awarded to certain additional "Sivit Plaintiffs" pursuant to pre-trial stipulations on the issue of compensatory damages, the specific amounts for compensatory damages awarded to the "insurance subrogation plaintiffs", and the punitive damages awarded specifically to the Sivit Plaintiffs. For its part, this Court observed in its decision that, following the 2007 fire, lawsuits were filed by **both** the tenants and "[s]everal subrogated insurers{.}" *Sivit*, supra, 2015-Ohio-1193 at ¶3.

Based on the above, there can be no doubt that this Court was indisputably aware that \$171,631.95 of the stipulated damages explicitly set forth in the trial court's Final Judgment Entry had been awarded to the insurance subrogation plaintiffs who were not awarded punitive damages. This Court was also indisputably aware that the "total compensatory damages" awarded in the trial court's Final Judgment Entry included those stipulated damages.

Plaintiffs: (1) Marwali/Pangkey (husband/wife); (2) Armanijigan; and (3) Rosenberg. (See Appendix-1).

A motion for reconsideration is the proper vehicle for which any perceived ambiguity or confusion in the decision can be addressed. However, in the motion it submitted following the April 2015 decision, VGOB did not raise any issue with the above directives and instead elected to simply reargue the question of whether it was liable at all for punitive damages. As observed by the trial court, the opportunity to address any concerns with this Court's directive was available with the timely filing of a motion in this Court, not following remand and certainly not through yet *another* round of appeals.

In an attempt to avoid these rather simple conclusions, VGOB directed the court of appeals to this Court's decision in *Nolan v. Nolan* (1984), 11 Ohio St.3d 1. *Nolan*, however, is both inapplicable and clearly distinguishable. The *Nolan* Court was presented with the question of whether the trial court impermissibly exceeded the scope of its authority upon remand. This question, the Court determined, required consideration of the law of the case doctrine, which the Court defined as providing that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Id.* at 3. Particularly applicable here, the *Nolan* Court also noted that "the rule 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." *Id.* at 3.

Specifically relevant to this case, the *Nolan* Court found that the doctrine strips the trial court of any "authority to extend or vary the mandate given." *Id.* at 4. While the *Nolan* Appellee argued that the trial court did indeed "conform itself to the appellate court's mandate", the Court disagreed despite the prior appellate court's usage of "general language in reversing and remanding the matter to the trial court." *Id.* at 4. In fact, the *Nolan* Court went so far as to say

that the court of appeals, by affirming the trial court's order on remand, also violated the law of the case doctrine by not adhering to its prior decision. *Id.* at 4.

The Sivit Plaintiffs raised and preserved this argument in the court of appeals. Given the clear directive of this Court and VGOB's failure to address any perceived faults in that decision while the case was still pending with this Court, this case should be summarily reversed with instructions to reinstitute the trial court's July 2015 Orders regarding the proper reduction in the punitive damages award to \$1,537,555.90 (plus interest).

- b. Proposition of Law No. 2: The statutory 'cap' on punitive damage awards imposed by R.C. 2315.21 is a protection for the defendant, not a limitation placed on any single plaintiff's ability to recover punitive damages.

VGOB's position relative to R.C. 2315.21, as adopted by the court of appeals, lacks merit because it fails to consider both the purpose of punitive damages and certain basic tenets of statutory construction. For instance, it fails to properly apply R.C. 1.43(A), which instructs that "[t]he singular includes the plural, and the plural includes the singular." Therefore, the relevant statutory language is properly read, in the context of this case, as "[t]he court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to **the plaintiffs** from **that defendant**[" R.C. 2315.21(D)(2)(a) (emphasis added). Clearly, while the phrase "the plaintiff" is subject to alternation between the singular and the plural, "that defendant" is not. The reason is simple. Punitive damage awards focus on the defendant and, moreover, the limitation imposed by the General Assembly is a protection for the defendant which does not restrict the ability of any single plaintiff to recover punitive damages. **The focus is therefore properly placed on the damage done by the defendant, not the damage sustained by a single plaintiff.**

Furthermore, no language in sections (B)(2) or (3) of Section 2315.21 limits their application to the awards given to those plaintiffs who actually make a claim for punitive damages. The only limitation on those sections is that they apply to “a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory and punitive or exemplary damages.” (Emphasis added). Certainly, as was seen here, there are cases, arising from the same incident, in which some plaintiffs ask for punitive damages and others do not. The directives imposed by sections (B)(2) and (B)(3) (the former of which is applicable here given that the case was tried to a jury) are to ensure a proper measure is taken of the “total compensatory damages recoverable by the plaintiff[s] from each defendant.” R.C. 2315.21(B)(2) (emphasis added). Again, the **focus** is on each defendant, not on the plaintiff or plaintiffs.

To that end, this Court has consistently noted with approval the general jurisprudence on the purpose of punitive damages:

[P]unitive damages “are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 350 * * *. **“The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.”** *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651.

Arbino v. Johnson & Johnson (2007, 116 Ohio St.3d 468, ¶97.

The **focus** of the [punitive damages] award **should be the defendant**, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant.

Dardinger v. Anthem Blue Cross & Blue Shield (2002), 98 Ohio St.3d 77, 102.

Punitive damages are awarded **as punishment for causing compensable harm** and as a deterrent against similar action in the future.

Bishop v. Grdina (1985), 20 Ohio St.3d 26, 28, *superseded by rule on other grounds*.

Plainly, what this Court did in the prior appeal was examine the compensable damage caused by VGOB, as determined both by the jury and through VGOB's own pre-trial stipulations, and reduced the punitive damages to twice the compensatory damages recoverable by the plaintiffs (i.e. all plaintiffs) from "that defendant" (VGOB). This Court further determined that such an amount was sufficient to carry out the purpose of punitive damages, which is not to compensate any given plaintiff, but rather to punish the defendant and deter similar conduct in the future.

Presented with a somewhat similar issue, the Tenth Appellate District determined that the "two times" calculation applied to the amount of compensatory damages awarded by the jury *prior* to application of the 'statutory cap' on non-economic damages set forth in R.C. 2315.18, which limits recovery of non-economic damages to three-times the amount of economic damages awarded. *Faieta v. World Harvest Church* (App. 10 Dist.), 2008-Ohio-6959. Specifically, the court of appeals affirmed the trial court's conclusion that "R.C. 2315.21(D)(2)(a)'s statutory cap, limiting judgments for punitive damages to 'two times the amount of the compensatory damages awarded to the plaintiff from that defendant,' should be calculated based upon the total, uncapped compensatory damages the jury awarded against defendants." *Id.* at ¶87. Therefore, although the application of R.C. 2315.18 limited the plaintiff's recovery of compensatory damages to \$250,000, the court of appeals approved of the trial court's use of the actual, uncapped jury award of \$600,000 in compensatory damages for calculation of the caps on punitive damages. In doing so, the court jealously safeguarded the plaintiff's right a jury trial and only altered the jury's will to the extent absolutely required by statute.

The *Faieta* court also correctly reasoned that it was not within its authority to insert words into or delete words from the statute. Here, VGOB essentially asked the lower courts, and

the court of appeals agreed, to add to and delete from R.C. 2315.21(D)(2)(a) as follows: “[t]he court shall not enter judgment for punitive or exemplary damages [*for each individual plaintiff who was awarded punitive damages*] in excess of two times the amount of the compensatory damages awarded to the [*each individual*] plaintiff [*who was awarded punitive damages*] from that defendant[.]” However, if the General Assembly desired to include such language, it would have done so. The statute, under any reading, simply is not susceptible to the interpretation adopted by the court of appeals.

III. Conclusion

For all of the foregoing reasons, the Sivit Plaintiffs (cross-appellants herein) respectfully request that this Court accept jurisdiction over their appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11, service of the foregoing is made this 15th day of July, 2016,

upon the following parties, by email and facsimile:

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