Supreme Court of Ohio Clerk of Court - Filed August 05, 2016 - Case No. 2016-0810

IN THE SUPREME COURT OF OHIO

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

MEMORANDUM OF APPELLEE/CROSS-APPELLEE VILLAGE GREEN OF BEACHWOOD, L.P. IN OPPOSITION TO MOTION OF CROSS-APPELLANTS CARLOS SIVIT, ET AL., FOR JURISDICTION

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TABLE OF CONTENTS

I. EXPLANATION OF WHY CROSS-APPELLANTS' CROSS-APPEAL DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST` 1

II. RESPONSE TO CROSS-APPELLANTS' PROPOSITION OF LAW NO. 1 8

III. RESPONSE TO CROSS-APPELLANTS' PROPOSITION OF LAW NO. 2 11

CONCLUSION 14

CERTIFICATE OF SERVICE 15

I. WHY CROSS-APPELLANTS' CROSS-APPEAL DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

According to their Memorandum in Support of Jurisdiction, the only matter of public or great general interest being raised by plaintiffs/cross-appellants Carlos Sivit, et al., is "how to properly 'cap' punitive damages consistent with R.C. 2315.21." (Cross-Appellants' Memorandum, p. 13). That "cap" is set forth in division (D)(2)(a) of R.C. 2315.21, and reads as follows:

> (a) The [trial] 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** from the defendant, as determined pursuant to division (B)(2) or (3) of this section. (emphasis added)

Cross-appellants are no more specific in describing their purported issue of public or great general interest ("how to properly cap punitive damages consistent with R.C. 2315.21") until they get to the end of their Memorandum, where they assert (at page 18) that the above-quoted statutory language (stating that the allowable amount of punitive damages shall not exceed "two times the amount of the compensatory damages awarded to the plaintiff") should be interpreted so as to require that a trial court include in that computation the amounts of compensatory damages awarded to "**all** plaintiffs" who were part of the proceeding because of consolidation or joinder, even though some of those plaintiffs were not involved in the punitive damages phase of the case and, hence, were not plaintiffs who made "a claim for **both** compensatory damages and punitive or exemplary damages" as required by divisions (B)(2) and (B)(3) of the statute. This argument, however, has no merit whatsoever. Indeed, the Court of Appeals for the Eighth District held, in May 12, 2016, that cross-appellants' approach was contrary to the very language of the statute and ignored the General Assembly's purpose in enacting it.

The Court of Appeals began its analysis by pointing out that, in divisions (B)(2) and (B)(3) of R.C. 2315.21 (which divisions are specifically referred to in division (D)(2)(a) quoted above), the General Assembly had prescribed the procedures that are to be followed by a trial court when calculating the "cap" on punitive damages in order to avoid any uncertainty as to "the amount of compensatory damages awarded to the plaintiff", i.e., the amount that is to be multiplied by two in order to determine the allowable amount of punitive damages. Thus, division (B)(2) states that **in a jury trial** "in which a plaintiff makes a claim for **both compensatory damages and punitive or exemplary damages,"** the "amount of compensatory damages" is to be determined by having a jury answer "an interrogatory that **specifies the total compensatory damages recoverable by the plaintiff** from each defendant." (See Court of Appeals Judgment, ¶ 26). (Division (B)(3) states that, in a **bench trial,** the **court** "shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.")

Hence, in the instant case the jury's answers to interrogatories "specified" the amounts of compensatory damages to be awarded to seven of the "groups" of individual plaintiffs (each "group" being a single person or a husband and wife) who were seeking both compensatory and punitive damages, as follows:

Carlos Sivit	$ 107,430.00
David and Sydney Gruhin	111,233.00
Sonya Pace	214,873.00
Jason and Renee Edwards	47,484.00
Hallie Gelb	27,256.00
Natalie Rudd	38,850.00
Prathibha Marathe	35,020.00

In addition, the parties stipulated that compensatory damages in the following amounts should be awarded to three other such "groups" of individual plaintiffs should the jury find liability:

Mohammed Marweli/Selvey Pangkey	$ 12,000.00
Luciana Armanijian	3,000.00
Mitchell Rosenberg	1.00

Thus, the total of the compensatory damages awarded to all of the individual plaintiffs amounted to **$597,147**. Then, in the second phase of the bifurcated trial, the jury awarded punitive damages to those plaintiffs, as a group, in the amount of $2,000,000.

Subsequently, on April, 2, 2015, this Court held that the Common Pleas Court had erred when it concluded, in May 2012, that R.C. 2315.21(D)(2)(a) was not applicable to this case. This Court therefore remanded the case "to the trial court to set the amount of [punitive] damages" in accordance with that statute. See *Sivit v. Village Green of Beachwood, L.P.,* 143 Ohio St.3d 168, 2015-Ohio-1193 ¶ 12.

After the remand, defendant Village Green of Beachwood (which would be paying the punitive damages ultimately set by the trial court) and **nine** of the ten "groups" of individual plaintiffs who would be receiving such damages (i.e., the cross-appellants herein, represented by the Diemert law firm) submitted opposing briefs as to how the allowable amount of punitive damages should be calculated. After an oral hearing, the Common Pleas Court adopted the method of calculation urged by the cross appellants, which was to take the **total** of the compensatory damages that had been previously awarded to the ten individual plaintiff "groups" ($597,147) and then add to that amount the amount of compensatory damages that had been awarded to **four subrogated insurance companies** ($171,630.95) whose separate lawsuits had been **consolidated for trial** with the action filed by the individual plaintiffs. The Common Pleas Court did this even though those insurance company plaintiffs never made a claim for punitive damages, were never parties to the punitive damage proceeding and, hence, were never awarded punitive damages. The Common Pleas Court then took the resulting total

($768,777.95), multiplied it by two, and concluded that the **allowable amount of punitive damages** under R.C. 2315.21(D)(2)(a) was $1,537,333.96. (See Common Pleas Court Order of July 10, 2015).

Six weeks later, on August 31, 2015 -- and again at the urging of the cross-appellants represented by the Diemert law firm, but over the objection of plaintiffs David and Sydney Gruhin, represented by new counsel -- the Common Pleas Court divided that total **equally** among all ten groups of individual plaintiffs and "awarded each of the ten plaintiffs punitive damages in the amount of $153,755.59". (See Common Pleas Court Order and Opinion of August 31, 2015).

Those August 31 punitive damage awards by the Common Pleas Court were in direct violation of R.C. 2315.21(D)(2)(a). For one thing, they resulted in seven of the "groups" of individual plaintiffs – i.e., all except Sivit, the Gruhins and Pace -- being awarded punitive damages in amounts that were more than twice the amounts of their compensatory damages. In fact, as shown by the chart below, those punitive damage awards ranged from 3.2 times to more than 153,000 times the compensatory damages awarded to those particular plaintiffs:

Plaintiff	**Compensatory Damages**	**Punitive Damages**
C. Sivit	$ 107,430.00	$ 153,755.59
D. and S. Gruhin	111,233.00	153,755.59
S. Pace	214,873.00	153,755.59
J. and R. Edwards	47,484.00	153,755.59
H. Gelb	27,256.00	153,755.59
N. Rudd	38,850.00	153,755.59
P. Marathe	35,020.00	153,755.59
M. Marweli/S. Pangkey	12,000.00	153,755.59
L. Armanijian	3,000.00	153,755.59
M. Rosenberg	1.00	153,755.59
TOTALS	**$ 597,147.00**	**$ 1,537,555.90**

Similarly, if one looked only at the **total** of the ten punitive damage awards made by the Common Pleas Court (to wit, $1,537,555.90), that total substantially exceeded two times the total amount of compensatory damages awarded to those individual plaintiffs (i.e., $597,147). In other words, given the total amount of compensatory damages awarded to those individual plaintiffs ($597,147), the total amount of punitive damages should not have exceeded $1,194,294 had the Common Pleas Court complied with R.C. 2315.21(D)(2)(a).

Hence, on May 12, 2016, the Court of Appeals held that the approach taken by the Common Pleas Court -- namely, including in its calculation of the allowable amount of punitive damage the compensatory damages that had been awarded to four plaintiffs who were in no way involved in the punitive damage phase of the case, to wit, the four subrogated insurance company plaintiffs -- was directly contrary to the language of the statute. The Court of Appeals concluded that, under established "principles of statutory construction," the trial court, when computing the "cap" on punitive damages,

> could **only consider** the total compensatory damages awarded to the individual plaintiffs; **it could not also consider the amount of compensatory damages awarded to other plaintiffs,** i.e., the insurer plaintiffs, who were **not** seeking punitive damages, who were **not** involved in the punitive damages proceeding, and as to whom **no determination** of entitlement to punitive damages was made by the jury.

(Court of Appeals Judgment, ¶29; emphasis added)

Accordingly, the Court of Appeals held that "'set[ting] the amount of [punitive] damages,' in accordance with R.C. 2315.21(D(2)(a), required the trial court to award a total of $1,194,294 in punitive damages, not $1,537,555.90 in punitive damages, as the trial court did here." (*Id.*, ¶40.) The trial court's award of $1,537,55.90 "thus exceeds the limit prescribed by R.C. 2315.21(D)(2)(a) and is contrary to the mandate previously issued in this case by the Ohio Supreme Court." (*Id.*, ¶24.)

In support of this conclusion, the Court of Appeals pointed out that, under R.C. 2315.21(D)(2)(a), "the cap on punitive damages is computed by multiplying the amount of the compensatory damages awarded to *the plaintiff* times two", and the phrase "the plaintiff" "refers back *** to (1) the 'plaintiff' identified in R.C. 2315.21(B)(2) (jury trials) or (3) (bench trials)," namely, "*a plaintiff* [who] makes a claim for **both** compensatory damages and punitive or exemplary damages." (*Id.*, ¶ 30). Conversely, under the approach urged by cross-appellants, a trial court would have to interpret the words "the plaintiff" as including "persons **other than** 'plaintiff[s] [who] make[ ] a claim for both compensatory damages and punitive or exemplary damages'" and as "encompassing all plaintiffs in the case who are awarded compensatory damages, regardless of whether they have made a claim for punitive damages." Such an approach, concluded the Court of Appeals, would be "contrary to the plain meaning of the statute." (*Id.,* ¶ 32).

The Court of Appeals further pointed out that its interpretation of the statute was supported by the fact that "it is only where a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, that R.C. 2315.21 requires the jury, if a verdict is returned for the plaintiff, to answer an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant [see division (B)(2)]." There is "no such requirement in R.C. 2315.21 with respect to a plaintiff who does not make a claim for punitive damages." (*Id.*, ¶ 33.) The "reason for this distinction," concluded the Court of Appeals, is that "where a plaintiff makes a claim for both compensatory and punitive damages, there must be a basis upon which the court can calculate the cap on punitive damages set forth in R.C. 2315.21(D)(2)(a); where there is no claim for punitive damages, no such calculation is required." (*Ibid.*)

The Court of Appeals also held that the approach taken by cross-appellants (and by the Common Pleas Court) was **contrary to the legislative purpose** underlying the statute. "Given the purpose of the cap on punitive damages," stated the Court of Appeals, "we do not believe the legislature intended that the amount of punitive damage a trial court may award a plaintiff under R.C. 2315.21(D)(2)(a) should vary depending upon the number of other plaintiffs (or the amount of compensatory damages awarded to other plaintiffs) whose claims are tried with the plaintiff's claims but who do not themselves seek punitive damages (or as to whom no determination is made that they are entitled to punitive damages)." (*Id.,* ¶ 36)

In short, what cross-appellants were (and still are) attempting to do in this case was to improperly **expand** the statutory cap on punitive damages beyond the clear intent of the General Assembly. That legislative intent was to **"limit the amount of punitive damages** that can be awarded against a defendant to 'mak[e] the civil justice system more predictable. *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 10)." (Court of Appeals' Judgment, ¶ 35).

Finally, the Court of Appeals pointed out that by including the insurance companies' compensatory damages in the calculation of the proper amount of punitive damages to be awarded to the individual plaintiffs, the cross-appellants were seeking to take advantage of a procedural anomaly:

> [T]he only reason an issue exists in this case as to whether the punitive damages cap should be based on the compensatory damages awarded to the individual plaintiffs or the total compensatory damages awarded to all plaintiffs (including the insurer plaintiffs who did not assert claims for punitive damages), is because the action filed by the individual plaintiffs was **consolidated, for purposes of judicial economy**, with the actions filed by the insurer plaintiffs who did not assert claims for punitive damages.

(Id., ¶36) In other words, if the insurance companies' **separate lawsuits** had **not** been consolidated with the lawsuit filed by the ten "groups" of individual plaintiffs, there would have been "no basis upon which the individual plaintiffs could claim that they were entitled, under R.C. 2315.21(D)(2)(a), to punitive damages in excess of two times **their own awards of compensatory damages."** (*Ibid.*)

It should therefore be manifest that the issue that cross-appellants seek to raise in their cross-appeal is **not** one of public or great general interest. To the contrary, it is an issue that has no merit whatever.

II. RESPONSE TO CROSS-APPELLANTS' PROPOSITION OF LAW NO. 1

Cross-appellants do not claim that their first Proposition of Law -- that a trial court's "act of executing the mandate of a superior court does not constitute a final and appealable order" -- constitutes an issue of public or great general interest. Rather, the thrust of this portion of cross-appellants' Memorandum is that the Court of Appeals should have summarily dismissed defendant Village Green's appeal because "it is highly doubtful" that Village Green "ever presented the court of appeals with a final appealable order as required by R.C. 2505.02" (Cross-Appellants' Memorandum, p. 13). In cross-appellants' view, "the trial court's Order reducing the punitive damages [from $2,000,000 to $1,537,555.90] 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." (*Id.*, pp. 13-14). Significantly, cross-appellants say nothing about the Common Pleas Court's August 31, 2015 Order, wherein the Court "awarded $153,755.59 to each of the ten [groups of] plaintiffs."

Thus, what cross-appellants are contending in their first Proposition of Law is that an order of a trial court that simply "executes" the mandate of an appellate court cannot be

appealed by any of the parties to that order, even though such order was contrary to law or did not correctly execute the mandate.

The fallaciousness of such a proposition is particularly striking in cases, such as this one, where there was strong disagreement between the parties over what the trial court should do in order to properly "execute" the remand order and the trial court had to interpret the language of a critical statute in order to resolve that disagreement. Thus, in this case the Common Pleas Court, after being directed by the Court to set the amount of punitive damages, had to adjudicate a dispute between the individual plaintiffs (cross-appellants herein) and defendant Village Green of Beachwood over **how** the allowable amount of such damages should be calculated under R.C. 2315.21(D)(2)(a). Following the receipt of several briefs from the opposing parties and conducting an oral hearing, the Common Pleas Court, on July 10, 2015, issued an order (described at pp. 3-4 above) which held that the **total** allowable amount of punitive damages should be determined by taking the total amount of compensatory damages awarded to the individual plaintiffs ($597,147), adding to that amount the amount of compensatory damages that had been awarded to four insurance company plaintiffs ($171,630.95), and then multiplying the resulting total ($768,777.95) by two. In that manner, the Common Pleas Court concluded that the total amount of punitive damages to be awarded to the individual plaintiffs (as a single group) should be $1,537,555.90.

The Common Pleas Court then had to adjudicate a related dispute between (a) the nine plaintiff "groups" still represented by the Diemert law firm and (b) plaintiffs David and Sydney Gruhin (now represented by new counsel) as to how the total punitive damages should be divided up amongst all ten separate plaintiff "groups" (i.e., whether equally – as argued by the

Diemert firm – or based on the amount of each group's own compensatory damages, as claimed by the Gruhins).

On August 31, 2015, following the receipt of still more briefs and holding yet another oral hearing, the Common Pleas Court issued a **final** Order and Opinion that divided the $1,537,555.90 **equally** among the ten "groups" of individual plaintiffs and specifically "awarded **each** of the ten plaintiffs punitive damages in the amount of $153,755.59" (see page 4 above).

Defendant Village Green and the Gruhin plaintiffs then filed separate notices of appeal, with Village Green appealing from both the July 10 and August 31 Orders (on the ground that each of those orders violated R.C. 2315.21(D)(2)(a)) and the Gruhin plaintiffs appealing from the August 31 Order. To now hold (as the cross-appellants urge this Court to do) that defendant Village Green had no right to appeal the July 10 and August 31 orders because the Common Pleas Court was simply "executing a mandate" therefore makes no sense at all. The Common Pleas Court proceeded to adjudicate several contested issues of law and statutory interpretation and Village Green clearly had a right to appeal those rulings.

Cross-appellants also suggest that the issue of whether the calculation of allowable punitive damages under R.C. 2315.21(D)(2)(a) should include the compensatory damages awarded to four insurance companies who had had no involvement in the punitive damages proceeding had already been decided by this Court back on April 2,2015; therefore, the Court of Appeals should not have reversed the Common Pleas Court's orders based on that method of calculation. Cross-appellants' suggestion is erroneous. In its April, 2, 2015 decision, this Court **never discussed** how the statutory language should be interpreted when a trial court determines the amount of the punitive damages "cap." Rather, this Court's discussion of R.C. 2315.21(D)(2)(a) was limited to the **narrow issue** of whether this particular case was "a tort

action" within the meaning of the statute and therefore **subject to** that statute. See 143 Ohio St.3d 168, ¶ 5.[1] After deciding that narrow issue, this Court remanded the case "to the trial court to set the amount of damages" in accordance with the statute. (*Id.*, ¶ 14). This, the Common Pleas Court did not do correctly. As pointed out by the Court of Appeals, "properly 'set[ting] the amount of [punitive] damages,' in accordance with R.C. 2315.21(D)(2)(a), required the trial court to award a total of $1,194,294 in punitive damages, not $1,537,555.90 in punitive damages, as the trial court did here." (Court of Appeals Judgment, ¶ 40). The Court of Appeals therefore concluded that "applying R.C. 2315.21(D)(2)(a) **as written**, i.e., limiting the punitive damages award to two times the total compensatory damages awarded to the individual plaintiffs, **would [not] violate the mandate of the Ohio Supreme Court."** (*Ibid.*).

III. RESPONSE TO CROSS-APPELLANTS' PROPOSITION OF LAW NO. 2

Cross-appellants' second Proposition of Law -- that the statutory "cap" on punitive damages imposed by R.C. 2315.21 "is a protection for the defendant, not a limitation placed on any single plaintiff's ability to recover damages" -- is difficult to comprehend, since the Court of Appeals did not hold otherwise. To the contrary, the Court of Appeals expressly stated that "the **purpose of the cap** on punitive damages * * * is to **limit** the amount of punitive damages that can be awarded against a defendant so as to 'mak[e] the civil justice system more predictable.' *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 102." (See Court of Appeals Judgment, ¶ 35).[2] The reason that the Court of Appeals made that statement was to point out **the fallaciousness of cross-appellants' argument** that, in

[1] Indeed, because of the narrowness of that issue, none of the briefs filed in this Court by either of the parties made any mention of the fact that no claim for punitive damage was ever made by any of the insurance company plaintiffs or that those particular plaintiffs had no involvement in the bifurcated punitive damage proceeding.

[2] As stated by Chief Justice Moyer in the *Arbino* case, the "reforms codified in R.C. 2315.21 were an attempt to limit the subjective process of punitive damages calculations, something the General Assembly believed was contributing to the uncertainty" of the justice system.

interpreting R.C. 2315.21(D)(2)(a), courts should focus on "the purpose for which punitive damages **are awarded,**" namely, "to punish and deter certain conduct." (*Ibid.*) That argument by cross-appellants, stated the Court of Appeals, ignores **the purpose of R.C. 2315.21(D)(2)(a)** which is to impose a **legislative cap** on punitive damages. That purpose is quite different than the purpose of punitive damages itself.

Nevertheless, cross-appellants repeat this argument in their current Memorandum, where they assert that the Court of Appeals' holding as to how the punitive damages cap is to be calculated under R.C. 2315.21(D)(2)(a) "lacks merit because it fails to consider * * * the **purpose of punitive damages,**" which purpose is to "punish and deter misconduct by a defendant." (Cross-Appellants' Memorandum, pp. 18-19). What cross-appellants therefore want this Court to do is **expand the statutory "cap."** That can be done, say cross-appellants, by holding that the words "twice the amount of compensatory damages," as used in the statute, mean twice the amount of compensatory damages awarded to "**all plaintiffs**" in a consolidated action, even though some of those plaintiffs never received (or even sought) punitive damages -- like, for example, the insurance company plaintiffs in the instant case. This argument by cross-appellants is, of course, totally misguided, since, as pointed out above, it ignores **the purpose of R.C. 2315.21(D)(2)(a)**, which is to **limit the amount of punitive damages.**

In addition to asking this Court to ignore the legislative purpose of R.C. 2315.21(D)(2)(a), cross-appellants also ask this Court to rewrite the statutory language. As noted above, division (D)(2)(a) of R.C. 2315.21 states that a trial court shall not enter judgment for punitive damages "in excess of two times the amount of the compensatory damages awarded to **the plaintiff** from [the] defendant, as determined pursuant to division (B)(2) or (3) of this section." Cross-appellants, however, improperly add an "s" to the word "plaintiff" and state that

"the relevant statutory language is properly read 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[]." (See Cross-Appellants' Memorandum, p. 18). Cross-appellants attempt to justify this revision of the statute by stating that, under Ohio rules of statutory construction, "[t]he singular includes the plural." (*Ibid.*) However, as pointed out by the Court of Appeals, that rule

> does not apply where there is "clear language in [the statute] to the contrary, or evidence which adequately demonstrates that such a construction is out of context with the remaining language of that statute or its related provisions." *Wingate v. Hordge,* 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979).

(Court of Appeals Judgment, ¶ 31).

Cross-appellants conclude their Memorandum by citing the decision of the Tenth District Court of Appeals in *Faieta v. World Harvest Church,* 2008-Ohio-6959 (10th Dist.). That decision, however, has no bearing whatever on this case. In *Faieta*, a jury awarded three plaintiffs (a minor and his parents) $764,235 in compensatory damages, $600,000 of which was specified to be "non-economic," plus $5 million in punitive damages. Since, however, **R.C. 2315.18** imposes a $250,000 cap on **non-economic damages,** the trial judge reduced the **total** compensatory damages awarded to the plaintiffs to $414,235. Therefore, when it came time to calculate the cap on **punitive damages** in that case, the trial court had to decide whether the "amount of compensatory damages" referred to in R.C. 2315.21(D)(2)(a) should include the full amount of non-economic damages awarded by the jury ($600,000) or only the amount allowed by R.C. 2315.18 ($250,000). The trial court concluded (and the Court of Appeals agreed) that the full amount of non-economic damages should be included in the punitive damage calculation, reasoning that the words "amount of compensatory damages awarded to the plaintiff," as used in R.C. 2315.21(D)(2)(a), referred to "the uncapped, total compensatory damages the jury

awarded." (2008-Ohio-6959, ¶ 90). Contrary, however to what cross-appellants imply in their Memorandum, nothing in the *Faieta* case suggests that the words "amount of compensatory damages awarded to plaintiffs," as used in R.C. 2315.21(D)(2)(a), should be construed to include the amount of compensatory damages awarded to plaintiffs other than the plaintiffs who were awarded punitive damages. In fact, all three of the plaintiffs in *Faieta* were awarded **both** punitive and compensatory damages.

CONCLUSION

For all of the reasons set forth above, cross-appellants' request for jurisdiction should be denied.

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11, service of the foregoing was made this 5th day of August, 2016, upon the following parties, by email:

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